[ORAL ARGUMENT SCHEDULED FOR FEBRUARY 16, 2012]

No. 11-5205

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PEPION COBELL, *et al*.,
Plaintiffs-Appellees,

KIMBERLY CRAVEN,
Objector-Appellant,

v.

KENNETH LEE SALAZAR, *et al*.,
Defendants-Appellees.

PLAINTIFFS' OPPOSITION TO OBJECTOR-APPELLANT'S SECOND MOTION FOR JUDICIAL NOTICE

Plaintiffs oppose Objector-Appellant Kimberly Craven's second motion for judicial notice. Craven asks the Court to take judicial notice of a brief filed by the United States in *Two Shields v. United States*, No. 11-531-L (Fed. Cl.), opposing class certification. (Mot. 2.) Craven contends that "as a matter of inexorable logic" this brief proves that the *Cobell* settlement is improper. (*Id*.) As with Craven's first motion for judicial notice, this second motion should be denied.

First, Craven again seeks judicial notice for an impermissible purpose. A court may take judicial notice of pleadings in a separate, pending lawsuit only to

show that those pleadings exist, but not for the truth of the factual allegations or for the correctness of legal arguments contained within them. *See Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388-89 (2d Cir. 1992); *Am. Mgmt. Sys., Inc. v. United States*, No. 01-7197, 2002 WL 31778773, at *1 (D.C. Cir. Dec. 4, 2002). Here, Craven's argument is not merely that the government opposed certification of a putative class in the *Two Shields* litigation—which by itself is judicially noticeable, but meaningless to this case—but also that *Two Shields* concerns the same facts as this case and that the government's legal arguments there are correct. (Mot. 2.) But it is not proper for this Court to judicially notice the factual allegations in *Two Shields*, nor can the Court take as correct the legal arguments advanced by the government there.

Second, contrary to Craven's argument (Mot. 2), the government's *Two Shields* pleading is not a "concession" that *Cobell*'s Trust Administration Class cannot be certified. Class certification in the *Two Shields* case is governed by Rule 23 of the Rules of the Court of Federal Claims, which is similar—but not identical—to Federal Rule of Civil Procedure 23. But Federal Rule 23 does not apply here. Craven ignores the Claims Resolution Act of 2010 ("CRA"), Pub. L. No. 111-291, 124 Stat. 3064, which expressly permits certification of the Trust Administration Class "[n]otwithstanding the requirements of the Federal Rules of Civil Procedure." CRA § 101(d)(2)(A). Thus, although Rule 23(a)(2)'s

commonality requirement is satisfied in *Cobell*, that requirement is irrelevant because the Trust Administration Class need not satisfy Rule 23(a)(2)—it need only satisfy the "minimal procedural due process" requirements for class certification established by the Supreme Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). The *Shutts* factors do not include a commonality requirement. *Id*.

Third, Craven mischaracterizes the government's Rule 23 argument in its *Two Shields* brief. That argument is based on Rule 23(b)(3)'s predominance requirement, not Rule 23(a)(2)'s commonality requirement. (Mot. Ex. 1 at 11-12.) To satisfy Rule 23(a)(2)'s commonality requirement, a class needs only one "common contention." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). By contrast, Rule 23(b)(3), under which the *Two Shields* plaintiffs seek class certification, permits certification only if "the court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members." R. Ct. Fed. Cl. 23(b)(3) (emphasis added).[1] The government's brief in *Two Shields* does not argue that the class lacks *any* common issues under Rule 23(a)(2), but instead that "[i]n this case, individual fact issues *predominate* over common fact issues." (Mot. Ex. 1 at 12) (emphasis added).

[1] The relevant language in Rule 23(b)(3) of the Rules of the Court of Federal Claims is identical to the language in Rule 23(b)(3) of the Federal Rules of Civil Procedure.

That is a predominance argument based on Rule 23(b)(3). In this appeal, Craven never argued that the Trust Administration Class does not satisfy Rule 23(b)(3)'s predominance requirement, and that argument is therefore waived. *See United States v. Reeves*, 586 F.3d 20, 26 (D.C. Cir. 2009).

Fourth, even if the government's brief were the proper subject of judicial notice (it is not), and even if Craven's characterization of that brief were correct (it is not), the Court should still deny this motion because the government's *Two Shields* brief is irrelevant. This Court will decide whether the district court properly certified the Trust Administration Class based on its own understanding of the applicable legal principles, irrespective of the government's positions in other cases. This is particularly true here because, even if Craven were correct that the government is taking inconsistent positions, Plaintiffs are not bound by—and cannot be prejudiced by—what the government says in an unrelated case before a different court.

CONCLUSION

For the reasons discussed above, the Court should deny Objector-Appellant Kimberly Craven's Second Motion for Judicial Notice.

Respectfully submitted,

/s/ Adam H. Charnes
Adam H. Charnes
David C. Smith
Richard D. Dietz
KILPATRICK TOWNSEND & STOCKTON LLP
1001 W. Fourth Street
Winston-Salem, North Carolina 27101
Telephone: (336) 607-7300

Dennis M. Gingold
THE LAW OFFICE OF DENNIS M. GINGOLD
607 14th Street, N.W., 9th Floor
Washington, D.C. 20005
Telephone: (202) 824-1448

Keith M. Harper
KILPATRICK TOWNSEND & STOCKTON LLP
607 14th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 508-5844

William E. Dorris
Elliott Levitas
KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309
Telephone: (404) 815-6500

DATED: December 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2011, I filed a copy of the foregoing PLAINTIFFS' OPPOSITION TO OBJECTOR-APPELLANT'S SECOND MOTION FOR JUDICIAL NOTICE with the clerk of court using the CM/ECF system and served a copy by first class mail on the following:

Theodore H. Frank
CENTER FOR CLASS ACTION FAIRNESS
1718 M Street NW, No. 236
Washington, D.C. 20036

Thomas M. Bondy
Michael S. Raab
UNITED STATES DEPARTMENT OF JUSTICE
Appellate Staff, Civil Division
950 Pennsylvania Ave., N.W.
Room 7535
Washington, D.C. 20530

Robert E. Kirschman, Jr.
John J. Siemietkowski
UNITED STATES DEPARTMENT OF JUSTICE
Commercial Litigation Branch, Civil Division
P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044

/s/ Richard D. Dietz
Richard D. Dietz
KILPATRICK TOWNSEND &
STOCKTON LLP
1001 W. Fourth Street
Winston-Salem, North Carolina 27101
Telephone: (336) 607-7300