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## I. INTRODUCTION

In its “Findings of Fact and Conclusions of Law” issued on January 30, 2008, this Court held that the accounting, which plaintiffs originally sought, is impossible as a matter of law and that “a remedy must be found.”<sup>1</sup> This memorandum provides this Court with an appropriate remedy that vindicates plaintiffs’ rights.

## II. BACKGROUND

The trustee’s repudiation of its accounting duty, a fiduciary duty that is crucial to every trust relationship, means that plaintiffs’ ability to achieve justice rests on the fairness of equitable restitution and disgorgement remedies fashioned by this Court. Fortunately, “all the inherent equitable powers of the District Court are available for the proper and complete exercise” of equitable jurisdiction because here no governing statute “by a necessary and inescapable inference[] restricts” this Court’s authority to protect and provide meaningful equitable relief to the plaintiff class. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

It is beyond dispute that defendants have an obligation to manage Individual Indian Trust resources for the benefit of the plaintiff class and to disburse promptly the proceeds or value of such resources to the appropriate beneficiary.<sup>2</sup> In that regard, just as it is “anomalous to conclude that the[] enactments [that establish the trust relationship] create a right to the value of

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<sup>1</sup> *Cobell v. Kempthorne* (“*Cobell XX*”), \_\_\_ F. Supp. 2d \_\_\_, 2008 WL 253035, at \*64 & n.21 (D.D.C. Jan. 30, 2008).

<sup>2</sup> Professor Langbein, the government’s testifying expert on trust law, explains that it is a “*simple truth that untoward delay in making distributions from a trust fund has long been understood to be a breach of trust ...*” Langbein, *What ERISA Means by “Equitable”: The Supreme Court’s Trial of Error in Russell, Mertens, and Great West*, 103 COLUM. L. REV. 1317, 1328 (2003) (“*Langbein*”) (emphasis added). See also RESTATEMENT (SECOND) OF TRUSTS, § 345 cmt. f (trustee liable for unreasonable delay in making distribution); *Ward v. Tinkham*, 32 N.W. 901, 902 (Mich. 1887) (trust administrator has no right to delay in administering the trust); *In re Jurgensmeier’s Estate*, 17 N.W.2d 155, 157 (Neb. 1945) (“It is the duty of an executor to administer the estate promptly and to distribute the property to those entitled thereto without unnecessary delay.”).

certain resources when the Secretary lives up to his duties, but no right to the value of resources if the Secretary's duties are not performed," *United States v. Mitchell* ("*Mitchell I*"), 463 U.S. 206, 227 (1983), it is equally anomalous to conclude that the trustee may profit and retain the benefits and advantages it has obtained from breaches of trust simply because it has caused the accounting to be impossible. Such a conclusion would condone an evasion of trust duties that cannot be reconciled with, and would repudiate, trust principles set forth in *Mitchell II* that explicitly confirm that implied remedies necessarily are available to individual Indian Trust beneficiaries to "deter federal officials from violating their trust duties." *Id.* at 227 (quoting *United States v. Mitchell* ("*Mitchell I*"), 445 U.S. 535, 550 (1980) (White, J., dissenting)). And, here, prospective relief has been ineffective. *Mitchell II*, 463 U.S. at 227 ("[P]rospective equitable remedies are totally inadequate.").

Plainly, the trustee is equally accountable in equity where, as here, it profits, it is enriched unjustly, and it benefits as much from advantages gained from its unlawful withholding and use of plaintiffs' trust funds to retire debt or to reduce its borrowings and debt service obligations as it would profit if it had acquired real property and other tangible assets using the same trust funds. Indeed, the term "profit," defined as "a benefit or advantage accruing from the management, use, or sale of property," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) ("WEBSTER'S"), necessarily includes the value to the trustee, not the beneficiaries, for its retirement of outstanding debt and related debt service obligations. By definition, the "value" to the trustee is "the amount" or "monetary worth" of the specific economic benefit that has been obtained in breach of trust,<sup>3</sup> a benefit that plaintiffs are entitled to recover and an enrichment that defendants must divest.

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<sup>3</sup> WEBSTER'S.

### III. NATURE OF AVAILABLE ALTERNATIVE REMEDIES

As defendants know well, remedies of equitable restitution and disgorgement versus damages are distinct in form, substance, and purpose. Damages are intended as compensation and require a showing of injury. Equitable restitution and disgorgement, in contrast, are not aimed at compensation. Indeed, the injury suffered by the class as a whole or by any member of the class is irrelevant to the calculation of equitable restitution and disgorgement.<sup>4</sup> Instead, in the context of fiduciary relationships and otherwise, the restitutionary award is measured by the extent to which the trustee has profited or benefited from its unjust enrichment, not by losses or injuries sustained by the plaintiff class as a whole or by any member of the class as a result of breaches of trust. *See, e.g., SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000) (The measure of disgorgement is the “amount by which the defendant was unjustly enriched . . . .”); *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987) (“[T]he primary purpose of disgorgement is not to compensate investors. Unlike damages, it is a method of forcing a defendant to give up the amount by which he was unjustly enriched.”) (quoting *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978) (Friendly, J.)).

Settled law in this Circuit and elsewhere requires that any limitation on the availability of equitable remedies must be explicit and that unless equitable restitution and disgorgement remedies expressly, or by necessary and unambiguous implication, are proscribed by statute, plaintiffs may elect such remedies to vindicate their rights. *See also SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (no express or necessarily implied bar; disgorgement proper notwithstanding the absence of explicit authorization in Securities

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<sup>4</sup> *See, e.g.,* 1 PALMER, LAW OF RESTITUTION, § 2.10 at 133 (“The general requirement [for restitution] does not mean that the gain to the defendant need be equated to the loss to the plaintiff, nor indeed that there need be any loss to the plaintiff except in the sense that a legally protected interest has been invaded.”).

Exchange Act); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (same in Federal Trade Commission Act); *United States v. Universal Mgmt. Servs.*, 191 F.3d 750, 760 (6th Cir. 1999) (same in Federal Food, Drug, and Cosmetic Act), *cert denied*, 530 U.S. 1274 (2000); *ICC v. B&T Transp. Co.*, 613 F.2d 1182, 1183, 1184-85 (1st Cir. 1980) (same in Motor Carrier Act of 1980); *CFTC v. British Am. Commodity Options Corp.*, 788 F.2d 92, 94 (2d Cir. 1986) (following *Hunt*), *cert. denied*, 479 U.S. 853 (1986); *CFTC v. American Metals Exch. Corp.*, 991 F.2d 71, 76 & n.9 (3d Cir. 1993) (same); *CFTC v. CO Petro Mktg. Group, Inc.*, 680 F.2d 573, 583-584 (9th Cir. 1982) (same). *See also Williams Elec. Games, Inc. v. Garrity*, 366 F.3d 569, 578 (7th Cir. 2004) (Posner, J.) (Victim “could seek (legal) damages from a jury and then, if it thought it could obtain a larger recovery by way of restitution, an order of restitution from the judge, since equitable remedies are determined by judges rather than juries . . . [and retain] the larger of the two.”). Most importantly, in these proceedings the Court of Appeals has confirmed that this Court has the authority to fashion equitable relief that vindicates plaintiffs’ rights, rights that now have been compromised irreparably by the trustee’s repudiation of its accounting duty and which cannot be vindicated without equitable restitution and disgorgement, as the accounting is impossible. *Cobell v. Norton (“Cobell VI”)*, 240 F.3d 1081, 1108 (D.C. Cir. 2001) (“[T]he court [is] justified in fashioning equitable relief that would ensure the vindication of plaintiffs’ rights.”).

#### **IV. PROCEDURAL BACKGROUND**

This Court in *Cobell v. Babbitt (“Cobell V”)*, 91 F. Supp. 2d 1 (D.D.C. 1999), declared, and the Court of Appeals in *Cobell VI* confirmed, that the government has an unconditional fiduciary duty to account to the plaintiff class, that the fiduciary duty has existed since the time

the government first exercised control over Individual Indian Trust lands,<sup>5</sup> that the accounting includes all funds (*e.g.*, all deposits, withdrawals, and accruals) as well as all other “items of the trust,” and that the accounting duty for which the government is in breach be discharged without further undue delay.<sup>6</sup> On January 30, 2008, this Court held that the failure of the trustee to adequately fund the declared accounting has exacerbated the government’s undue delay and has made the accounting impossible as a matter of law.<sup>7</sup>

The accounting sought by the plaintiff class on June 10, 1996, is a traditional equitable remedy that plaintiffs have been entitled to since the inception of the Trust, a remedy that has been “used against the errant fiduciary ... [and that typically] yield[ed] a restitutionary award of the defendant’s profits wrongfully obtained from the use of the plaintiff’s property.”<sup>8</sup> To the

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<sup>5</sup> *Mitchell II*, 463 U.S. at 225 (citing RESTATEMENT (SECOND) OF TRUSTS § 2, cmt. h (1959)) (“A fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).”).

<sup>6</sup> *See, e.g., Cobell VI*, 240 F.3d at 1087 (“The federal government retained control of lands . . . and thereby retained its fiduciary obligations. . . .”). *See also Mitchell II*, 463 U.S. at 216 (1983). Congress reaffirmed and first codified the accounting duty in 1899 (*see* 30 Stat. 495, 55<sup>th</sup> Cong., Sess. II, Ch. 545 at 1399 (1899) (“hereafter Indian agents shall account for all funds coming into their hands as custodians from any source whatever, and be responsible therefore under their official bonds.”)), repeatedly reaffirmed the duty to account throughout the 20<sup>th</sup> Century, and most recently reaffirmed that duty with enactment of the Indian Trust Management Reform Act of 1994, Pub. L. No. 103-412 (1994) (“Trust Reform Act”). On December 21, 1999, this Court held that “a century is, at best, a ‘long time’ for plaintiffs to wait,” for their accounting, *id.* at 47, and that defendants had “unreasonably delayed” in preparation of the “fundamental plans” that must be initiated if an accounting is ever to be performed. *Id.* On February 23, 2001, the Court of Appeals agreed, holding that “[e]ven assuming [] that the 1994 Act effectively reset the clock for a finding of unreasonable delay, [Interior’s] ‘reasonable time to discharge’ its fiduciary obligations ‘has expired.’” *Cobell VI*, 240 F.3d at 1095 (quoting *Cobell V*, 91 F. Supp. 2d at 48).

<sup>7</sup> *Cobell XX*, 2008 WL 253035, at \*64 & n. 21.

<sup>8</sup> *See, e.g., Eichengrun, Remediating the Remedy of Accounting*, 60 IND. L.J. 463 (1984-85) (“Eichengrun”). Eichengrun explains that an action in equity for an accounting has its origin in the 12<sup>th</sup> century as a discrete action against a fiduciary who had refused the request of a

extent the declared accounting would have quantified the value of collected funds withheld from plaintiffs by the trustee-delegates and their authorized representatives in breach of trust<sup>9</sup> and in violation of law,<sup>10</sup> and would have quantified the extent to which the government had profited, otherwise benefited, or gained improper advantage from such misuse of plaintiffs' trust funds,<sup>11</sup> the trust balances would have been restated to reflect the corrected values of the funds held in trust. Such specific relief does not implicate damages.<sup>12</sup>

Plaintiffs, sensitive to jurisdictional limitations of the district court, are not asking this Court to fashion a damages remedy to compensate the class as a whole or any Individual Indian

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beneficiary to account for income or for the use of the beneficiary's property. Typically, accounting actions resulted in restitutionary awards. Eichengrun at 464-68.

<sup>9</sup> In addition to the declared breach of trust for the failure to discharge fiduciary accounting duties (as well as subsidiary duties of the duty to account, including the duty to maintain adequate records, the duty to maintain adequate systems, and the duty to maintain adequate staffing) without which it is impossible to calculate with precision the damages sustained by plaintiffs, defendants are in breach of trust for their failure to disburse to the plaintiff class the value of the trust proceeds.

<sup>10</sup> See, e.g., *Defendants' Statement of Material Facts*, dated June 30, 1998, attached to *Defendants' Statement Pursuant to May 5, 1998 Order* [Dkt. No. 111], at 1 ("As defined by 25 CFR 115.1, "'individual Indian money account' means those accounts under the control of the Secretary of the Interior or his authorized representatives belonging to individuals.") (emphasis added).

<sup>11</sup> Richard L. Gregg, Commissioner of the Financial Management Service, testified repeatedly before this Court that the government benefits from IIM Trust funds that are commingled in the Treasury's General Account ("TGA") and withheld from the plaintiff class because Treasury treats such funds of the plaintiff class as government funds and the more such funds are "collected within the various accounts within the Treasury, the less Treasury has to borrow." See, e.g., Tr. 3315:10:19; 3390:20-3391:3; 3396:20-3397:4, Trial 1, Day 19, July 7, 1999 (Pliffs' Exh. 1).

<sup>12</sup> See, e.g., *Cobell V*, 91 F. Supp. 2d at 24-28. Professor Langbein endorses the RESTATEMENT OF TRUSTS' declarations, confirming that where, as here, a trustee is in breach of trust, "the law of trusts has long exhibited a three-part remedial system" .... [whereby the beneficiary at his or her option] may recover (1) for loss incurred, (2) for any profits that the trustee made in breach of trust, and (3) for any gains that would have accrued but for the breach of trust." *Langbein* at 1333-34 & n. 91 (citations omitted) (quoting 3 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 205, at 237 (4th ed. 1988)); see also RESTATEMENT (SECOND) OF TRUSTS § 205. Parenthetically, Langbein notes that "[t]he *Restatement of Trusts* [is] the most authoritative source of American trust law ...." *Langbein* at 1347.

Trust beneficiary for the harm that necessarily would have been disclosed had defendants cured their breaches of the fiduciary duty to account. Indeed, unlike the calculation of a typical restitutionary award, the loss sustained by plaintiffs cannot be measured here and compensatory damages cannot be quantified with sufficient precision without an accurate and complete accounting of all items of the trust.

However, twelve years of defendants' exercise in futility is enough and this Court wisely concluded that the accounting is "impossible" as a matter of law. *Cobell XX*, 2008 WL 253035, at \*64 & n.21. This Court's sound judgment and sensitivity to the severe adverse consequences of infinite undue delay is laudable and welcomed by the plaintiff class.<sup>13</sup> And, its importance is underscored by the observation of former Congressman Howard of New Jersey that the Supreme Court noted with approval in *Mitchell II*: "The failure of their governmental guardian to conserve the Indians' land and assets and the consequent loss of income or earning power, has been the principal cause of the present plight of the Indian." 463 U.S. at 221.

At this point in these proceedings defendants should recognize this action in equity is principally an Indian trust case, not a garden-variety action grounded in the Administrative Procedure Act ("APA"). See, e.g., *Cobell v. Norton* ("*Cobell XVIII*"), 455 F.3d 301, 304-05 (D.C. Cir. 2006), (reiterating that in this case "the narrower judicial powers appropriate under the

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<sup>13</sup> Defendants ten years ago – in 1997 and again in 1998 – (notwithstanding their subsequent, contrary representations to this Court and to the Court of Appeals) conceded that they could never discharge their duty to render an adequate accounting due to the loss and their systemic destruction of critical trust records. See *Defendants' Memorandum of Points and Authorities in Response to Plaintiffs' Motion for Class Certification* dated January 21, 1997 [Dkt. No. 24] ("*Defendants' Class Cert. Memo*") at 17 (recognizing the "patent futility" of attempting to perform an accounting for each IIM account as "critical records no longer exist"); see also *Defendants' Memorandum in Support of Defendants' Motion for Protective Order and for Rule 16 Pre-Trial Conference* dated February 2, 1998 [Dkt. No. 66] at 2 ("As a result of missing records, it is not feasible to perform a full accounting of the IIM accounts pursuant to Generally Accepted Accounting Principles for all IIM accounts.").

APA do not apply”), *cert. denied*, 127 S. Ct. 1875 (2007). The United States Constitution has conferred upon this Court broad equitable powers to provide plaintiffs whatever remedy under the law of trusts and the law of restitution is necessary to protect their interests, restore their funds, restore the trust *corpus*, correct inaccurate trust balances, and deter further breaches of trust. *See, e.g.*, III SCOTT ON TRUSTS § 199, at 203-04 (4th ed. 1988); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (“[T]he equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73).”). *See also* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, § 291, at 651-52 (5th ed. 1941) (“The Constitution of the United States recognizes equity as a part of the national jurisprudence inherited from England at the time of the Revolution, and the equitable jurisprudence as part of the judicial powers conferred upon the national tribunals.”). The Court of Appeals is in accord, concluding “that the district court has substantial ability to order that relief which is necessary to cure [defendant trustee-delegates’] legal transgressions.” *Cobell VI*, 240 F.3d at 1108.

The trustee’s repudiation of the declared accounting duty plainly justifies this Court’s conclusion that the accounting is impossible; however, it is important to note briefly the material adverse impact repudiation has on the plaintiff class. Specifically, repudiation compromises irreparably an unconditional fiduciary duty that is inherent in the nature of the trust relationship itself.<sup>14</sup> It thereby deprives class members of their right to know the nature and value of their trust assets and precisely how such assets have been, and are being, managed, including a

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<sup>14</sup> *See, e.g.*, *Cobell VI*, 240 F.3d at 1103 (“Not only does the 1994 Act plainly *reaffirm* the government’s preexisting duty to provide *an accounting to IIM trust beneficiaries*, but it is plain that such an obligation *inheres in the trust relationship itself*.”) (emphasis added).

complete and accurate inventory and legal description of all lands as well as all ownership interests therein, and each security or other investment instrument purchased with trust income,<sup>15</sup> and the amount and timing of all deposits, collections, withdrawals, and accruals.<sup>16</sup> Therefore, short of placing the Individual Indian Trust into receivership both to protect trust assets from further waste and ruin,<sup>17</sup> to ensure accountability,<sup>18</sup> and to protect the plaintiff class from further breaches of trust, in accordance with general principles established by the Supreme Court, it is also essential for this Court to order restored to the Trust all lands, other assets and interests that the government in breach of trust has taken or has used for its own benefit, and all fractionated *Youpee* interests that have escheated unconstitutionally to tribes<sup>19</sup> and to order defendants to

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<sup>15</sup> Treasury is responsible for keeping track of each Treasury security issued by the government. *See, e.g.*, (Pltffs' Exh. 2) (testimony of Don Hammond, Assistant Secretary of the Treasury, Financial Management Service at that time and current Member of the Board of Governors of the Federal Reserve System) at Tr. 57:12-22, May 13, 2003 AM ("Hammond Trial 1.5 Testimony") ("Our responsibility is to keep track of specific Treasury securities issued, the rate of interest they pay, and the payment of those interests credited.").

<sup>16</sup> *See* (Pltffs' Exh. 2) Hammond Trial 1.5 Testimony at Tr. 50:4-9, May 13, 2003 AM (Secretary Hammond defined the accounting as "a description of the activity, beginning with a beginning balance, and describing with a level of specificity agreed to or required that indicates what happened with those funds or that activity during the period of time measured.").

<sup>17</sup> The Secretary has a duty to ensure that trust property does not "fall into ruin." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003). However, the trustee's repudiation of the accounting duty not only makes the accounting impossible to discharge, it also makes it impossible for the trustee to protect the assets of the IIM Trust. It is simply impossible to protect trust assets and the value of the proceeds generated therefrom if the trustee does not know each specific asset that it has a duty to protect. Most importantly, this Court twice has held that it has the authority to place the IIM Trust into receivership if such action is necessary to protect the plaintiff class. *Cobell v. Norton* ("Cobell VII"), 226 F. Supp. 2d 1, 136 (D.D.C. 2002) ("[T]he appointment of a receiver over a trust is one option available to a court if it appears necessary to protect trust property.... [And] separation of powers concerns do not inhibit [district courts'] ability...."); *Cobell v. Norton* ("Cobell X"), 283 F. Supp. 2d 66, 127 (D.D.C. 2003) ("The court . . . does have authority to appoint a receiver to manage the IIM trust.").

<sup>18</sup> *See, e.g.*, (Pltffs' Exh. 2) Hammond Trial 1.5 Testimony at Tr. 92:18-93:14, May 13, 2003 AM (Secretary Hammond acknowledged the trustee-delegates must be held accountable to ensure that they are "adequately and accurately dealing with funds entrusted to them.").

<sup>19</sup> *See Babbitt v. Youpee*, 519 U.S. 234 (1997); *see also United States' Statement on Predecessors in Interest for Purposes of Document Production*, dated April 8, 1999, at 2 n. 3 (Pltffs' Exh. 258)

“disgorge gains received from the improper use of [trust property] or entitlements.” 1 DAN B. DOBBS, LAW OF REMEDIES § 4.3(5) at 610 (2d ed. 1993).<sup>20</sup> See *Porter*, 328 U.S. 395; *Mitchell II*, 463 U.S. 206; *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960); *First City Fin.*, 890 F.2d 1215; Fed. R. Civ. P. 54(c).

*Mitchell II* confirms that remedies typically available to other beneficiaries in breach of trust cases are also available to the Indian beneficiaries in these proceedings. See *Bryan v. Welch*, 74 F.2d 964, 970 (10th Cir. 1935) (“A court of equity has exclusive jurisdiction over trusts.”); *In re Lorax Corp.*, 307 B.R. 560, 565 n.11 (N.D. Tex. 2004) (“[I]t is well established that a trust is a creature of equity.”). Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) (Marshall, C.J.) (“[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”). As a leading treatise on trusts provides: “Equity is primarily responsible for the protection of rights arising under trusts and will provide the beneficiary with whatever remedy is necessary to protect him ....” G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 861 at 3-4 (Rev. 2d ed. 1995).

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in Trial 1.5) (“Based upon the information gathered by the Department of Interior in November 1998, the redistribution project will entail the modification of the [pre-*Youpee* estate] probate orders for approximately 64,955 fractionated interests and create 774,749 fractional interests....”). (Pltffs’ Exh. 3.)

<sup>20</sup> The term “gain,” defined as “an increase in or addition to what is of profit, advantage, or benefit,” plainly includes the benefits conferred on the government in connection with its use of plaintiffs’ trust funds to reduce the national debt and its debt servicing costs. WEBSTER’S. The right to recover specific relief in the form of a monetary award under section 702 applies to governmental obligations created by statute and informed by common law. *Aetna Casualty & Surety Co. v. United States*, 71 F.3d 475, 479 (2d Cir. 1995) (finding *Bowen* applied both to duties “prescribed by statute” as well as those “arising under some other rule of law”). See also *Cobell VI*, 240 F.3d at 1094 (holding the fact that “plaintiffs rely upon common law trust principles in pursuit of their claims is immaterial” on the issue of jurisdiction under § 702).

Since *Cobell VI* expressly confirmed the existence of a trust relationship, it “naturally follows” – as it did in *Mitchell II* – that the right of action and specific remedies that have been available to all trust beneficiaries for more than 700 years are the same ones that Individual Indian Trust beneficiaries have been entitled to at all times relevant to these proceedings. Here, plaintiffs’ predominant claim for twelve years has been the accounting, a specific remedy and a duty that this Court declared in December 1999, as well as other appropriate equitable relief incidental thereto, necessarily including restitution and disgorgement.<sup>21</sup> These specific remedies are available in equity to the aggrieved plaintiff class or their rights will never be vindicated.

#### **V. THIS COURT IS AUTHORIZED TO ORDER EQUITABLE RESTITUTION AND DISGORGEMENT**

Trusts are enforced in equity. BOGERT states: “Equity is primarily responsible for the protection of rights arising under trusts and will provide the beneficiary with whatever remedy is necessary to protect him....” § 861 at 3-4. *Accord* III SCOTT ON TRUSTS § 199, at 203-04 (4th ed. 1988) (“A court of equity, having jurisdiction over the administration of trusts, will give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests....”). *See also First Fiduciary Corp. v. Office of the Comm’r of Banks*, 684 N.E.2d 1, 2 n.2 (Mass. App. Ct. 1997) (“[T]here is a long history of equitable supervision of trusts and trustees by the courts, which, at the behest of beneficiaries, routinely compel trustees to perform duties, enjoin breaches of trust, compel redress of breaches of trust, remove faithless trustees, and appoint receivers to administer trust property.”). This Court has broad equitable powers to enforce the IIM trust. *See, e.g., Village of Brookfield v. Pentis*, 101 F.2d 516, 520-21 (7th Cir. 1939)

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<sup>21</sup> The fact that all remedies are not expressly identified in the complaint is of no matter, particularly where, as here, defendants have unduly delayed and wholly frustrated the accounting explicitly demanded by plaintiffs in their complaint and declared by this Court. *See, e.g., Fed. R. Civ. P. 54(c)* (“Except as to a party against whom a judgment is entered by default, *every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party’s pleadings.*”) (emphasis added).

“Courts of equity have *original inherent jurisdiction to decree and enforce trusts* and to do whatever is necessary to preserve them from destruction.” (emphasis added); *Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978) (“Traditional trust law provides for broad and flexible equitable remedies in cases involving breaches of fiduciary duty.”). This comports with the law of equity recognized beyond the trust context. As stated in *Franklin v. Gwinnett County Public Schools*, “if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief.” 503 U.S. 60, 69 (1992), *quoted in Cobell VI*, 240 F.3d at 1108.

Cases standing for the proposition that the district courts have broad equitable powers are legion and equity is routinely called upon to fashion remedies that protect trust beneficiaries’ interests. This Circuit is no exception. Thus, in *Crawford v. La Boucherie Bernard Ltd.*, the district court held that “[t]rust law contemplates the use of broad and flexible equitable remedies as means for dealing with breaches of fiduciary duty, and it *imposes the obligation upon the courts to use the remedy that is most advantageous to the participants and that will most closely effectuate the purposes of the trust.*” 815 F.2d 117, 120 (D.C. Cir. 1987) (emphasis added); *accord Beckett v. Air Line Pilots Ass’n*, 995 F.2d 280 (D.C. Cir. 1993).

More specifically, this Circuit has addressed the breadth of this Court’s equitable authority where, as here, a trustee cannot or will not account. In *Rainbolt v. Johnson*, 669 F.2d 767, 769 (D.C. Cir. 1981), neither this Court nor the Circuit flinched from “established principles of trust law” that mandate “if the ... trustee has not kept adequate accounts, the benefit of the doubt is to be given to the beneficiary.... [And,] *the District Court shall provide such additional relief for plaintiff-appellant as may be appropriate.*” (emphasis added) (citing BOGERT, § 962). *See also* 3 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 199.1 (4th ed.

1988) (“The court will ... compel the trustee to render a proper accounting to the court, and thereupon will give such relief, if any, as the beneficiaries may be entitled to receive.”).

Here, the trustee has repudiated its duty to account; therefore, it is critical for this Court to exercise its inherent equitable authority and fashion “such relief . . . as the beneficiaries may be entitled to receive.” SCOTT & FRATCHER, § 199.1. Indeed, defendants are in breach of trust and have frustrated the extraordinary efforts of this Court to enforce the trustee’s duty to account. Therefore, this Court is authorized to fashion “broad and flexible equitable remedies” to remedy such breaches of trust in a manner “most advantageous to” the plaintiff class. *Crawford*, 815 F.2d at 120. Such specific relief includes “whatever remedy is necessary to protect [the beneficiary],” BOGERT, § 861, particularly in light of the trustee’s repudiation of a duty that is fundamental to every discretionary trust.

## **VI. EQUITABLE RESTITUTION IS NOT DAMAGES**

Because the trustee and its defendant trustee-delegates at all times relevant to these proceedings, have been, and continue to be, in breach of trust, equitable restitution and disgorgement awards may be decreed. *See, e.g., Porter*, 328 U.S. at 402 (Restitution encompasses a decree “ordering the return of that which rightfully belongs to” the plaintiff.). What rightfully belongs to plaintiffs includes the value of the government’s unjust enrichment and all advantages or benefits obtained in connection with its breaches of trust.

As discussed above, such relief does not constitute damages notwithstanding that it necessarily involves a monetary award. *See, e.g., id.* at 402 (“Restitution, which lies within that equitable jurisdiction, is consistent with and differs greatly from ... damages ....”); *First City Fin.*, 890 F.2d at 1230 (“Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the [law].”). The Supreme Court has recognized that actions to disgorge improperly gained profits, *Tull v. United States*, 481 U.S.

412, 424 (1987), return funds rightfully belonging to another, *Curtis v. Loether*, 415 U.S. 189, 197 (1974), or to recover specific funds withheld, *Bowen v. Massachusetts*, 487 U.S. 879, 893-96 (1988), are equitable actions – even though the relief they seek is monetary – because they are restitutionary in nature. *See also Feltner v. Colombia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998) (noting that the Court has characterized “actions for monetary relief . . . as equitable, such as actions for disgorgement of improper profits”).

As this Circuit has made clear, “[a]n action in restitution can result in the defendant’s payment of money. . . . In such a case the payment of money from defendant to plaintiff represents a kind of specific relief rather than compensatory damages. Whatever restitution may encompass . . . we clearly may not collapse it into the broader notion of ‘compensation.’” *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 747 (D.C. Cir. 1995) (internal citations omitted). Indeed, restitution is the mirror image or direct opposite of damages; restitution is measured only by the amount defendants unjustly have enriched themselves in breach of the trust duties owed to the plaintiff class, not, as with damages, measured by the extent of plaintiffs’ loss.<sup>22</sup> *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 rptr’s note cmt. d (T.D. No. 4, 2005) (“The presumption underlying the remedy is that disinterested judgment is best secured *not* by requiring compensation for the harm that self-interest may cause,

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<sup>22</sup> To the extent that the restitutionary award includes monies not in the government’s possession, such funds likewise are *not* construed as money damages under section 702. *See, e.g., America’s Community Bankers v. FDIC*, 200 F.3d 822, 830 (D.C. Cir. 2000) (“[t]hat the [defendant] no longer possesses the precise funds collected is not determinative” when analyzing jurisdiction); *Aetna Casualty & Surety Co.*, 71 F.3d at 479 (holding the fact the government had mistakenly paid the subject funds to a third party did not convert the plaintiffs’ claim to one for recovery of damages); *Minor*, 228 F.3d at 355 (“that the government obviously cannot restore to [the plaintiff] the specific currency that was seized does not transform the motion into an action at law”).

but by eliminating the possibility of gain in any transaction where the interests of the fiduciary and beneficiary could potentially conflict.” (emphasis added)).

Deterrence is viewed by many authorities as critical under circumstances such as these, where defendants have an indisputable, continuing record of gross mismanagement of the IIM Trust.<sup>23</sup> As this Circuit explained, “[t]o make the [disgorgement] rule credible, . . . [such] awards must be made[.]” *United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1203 (D.C. Cir. 2005).<sup>24</sup> This Court, and this Circuit, as well as other courts of appeals, recognize that deterrence is crucial to effective relief. *See, e.g., Porter*, 328 U.S. at 400 (“Future compliance may be more definitely assured if one is compelled to restore one’s illegal gains[.]”); *First City Fin.*, 890 F.2d at 1230 (“Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the [law.]”); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (same) (quoting *First City Fin.*, 890 F.2d at 1230); *SEC*

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<sup>23</sup> *See, e.g., Cobell VI*, 240 F.3d at 1086 (“The trusts at issue here were created over one hundred years ago through an act of Congress, and have been mismanaged nearly as long.”).

<sup>24</sup> In assessing the propriety of equitable restitution and disgorgement in the context of civil RICO, Judge Williams noted that remedies more effective than equitable restitution and disgorgement usually are available to the district court to deter future violations by defendants who have a disturbing history of past wrongs, citing this Court’s authority to fashion “draconian contempt penalties for future violations, and impose transparency requirements so that future violations will be quickly and easily identified.” *Philip Morris*, 396 F.3d at 1203. However, here, deterrence through contempt proceedings, whether “draconian” or merely ordinary, is unavailable and the transparency referenced by Judge Williams has proven to be elusive. *See, e.g., Cobell v. Norton* (“*Cobell X*”), 283 F. Supp. 2d 66, 220 (D.D.C. 2003) (“inadequacy and misleading nature of the quarterly reports submitted by Interior”). Therefore, given unique limitations on this Court’s authority to enter injunctions against wayward trustee-delegates, *see, e.g., Cobell v. Norton* (“*Cobell XI*”), 310 F. Supp. 2d 77 (D.D.C. 2004); *Cobell v. Norton* (“*Cobell XIII*”), 392 F.3d 251 (D.C. Cir. 2004), unique limitations on this Court’s authority to enter contempt orders against obdurate trustee-delegates, *see Cobell v. Norton* (“*Cobell VII*”), 226 F. Supp. 2d 1 (D.D.C. 2002); *Cobell v. Norton* (“*Cobell VIII*”), 334 F.3d 1128 (D.C. Cir. 2003), and the fact that receivership is unlikely to be decreed to protect trust assets from further waste and ruin, equitable restitution and disgorgement are the only specific remedies available to this Court to deter future breaches of trust, misconduct that has continued unabated for 120 years.

*v. Manor Nursing Ctrs. Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972) (“The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits.”); *CFTC v. Hunt*, 591 F.2d 1211, 1223 (7th Cir. 1979) (“to allow a violator to retain the profits from his violations would frustrate the purposes of the regulatory scheme”); *CFTC v. CO Petro Mktg. Group, Inc.*, 680 F.2d 573, 584 (1982) (same).

In the absence of explicit limitations in governing statutes, to infer a limitation on this Court’s inherent equitable authority where, as here, “the interests at stake are not merely economic interests in an administrative scheme, but personal interests of life and health,”<sup>25</sup> would constitute an unprecedented miscarriage of justice.<sup>26</sup>

Restitution is the traditional or “typical” remedy that is available in equity, a remedy that plaintiffs have been entitled to since the Trust was established by statute and the government first exercised control over the plaintiffs’ trust assets. Such relief necessarily divests trustees of benefits and advantages acquired in breach of trust. As the RESTATEMENT (THIRD) OF RESTITUTION instructs, where a trustee “obtains a benefit” because of a “breach of fiduciary duty,” it is fully “accountable for the benefit so obtained to the person to whom the duty is owed.” *Id.* at § 43. Indeed, “any benefit acquired or retained in violation of a fiduciary duty must be given to the person to whom the duty is owed.” *Id.* The rationale underlying restitution is sound and irrefutable; it is unconscionable for trustees to retain the value of profits and advantages obtained and benefits conferred through their breaches of trust. *Id.* There is no

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<sup>25</sup> *Cobell VI*, 240 F.3d at 1097 (citation omitted).

<sup>26</sup> *See, e.g., Cobell VI*, 240 F. Supp. 2d at 1100 (“[T]he 1994 Act explicitly reaffirmed the Interior Secretary’s obligation to fulfill the ‘trust responsibilities of the United States.’ 25 U.S.C. § 1629(d).) From this express language, ‘we must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary.’”) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981)). *See also* 1 PALMER, LAW OF RESTITUTION, § 1.6 at 40 (“[I]t would be impermissible to allow the repudiating party to retain the benefit of the performance.”).

exception where, as here, the government is trustee; no governing statute limits such remedy, expressly or by necessary implication. And, defendants' wrongful retention of the value of such profits, advantages, or benefits constitutes classic unjust enrichment. *See* DOBBS, § 4.1(2), at 557 (“The fundamental substantive basis for restitution is that the defendant has been unjustly enriched by receiving something, *tangible or intangible*, that properly belongs to the plaintiff.” (emphasis added)).

## **VII. THE REMEDIES TRIAL AND CALCULATION OF BENEFITS CONFERRED**

In the most narrow interpretation of the nature and scope of equitable restitution (as distinguished from damages) as it exists today, the value of all funds collected and not disbursed to the beneficiaries is squarely within the scope of equitable restitution and disgorgement. Such funds belong to plaintiffs, not the government; their recovery is specific, not substitutionary. Further, the property rights in such funds are vested in the plaintiff class; they are not entitlements handed out by the government.

In this Circuit, disgorgement is not limited to the particular “actual assets” unjustly obtained by defendants. Rather, what matters is the value or “*amount*” by which defendants unjustly have enriched themselves. *Philip Morris*, 396 F.3d at 1202 (Williams, J., concurring) (quoting *Banner Fund Int'l*, 211 F.3d at 617 (emphasis in original)). That component of a restitutionary award – the amount of collected funds not disbursed to the beneficiaries – is part of the calculated benefit conferred on the wayward trustee in connection with its withholding or use of such funds in breach of trust. The total amount – the value of undisbursed collected funds plus the value of the corresponding advantages and benefits conferred – is reduced only by the

specific amount which defendants prove in accordance with standard rules of evidence has been paid to the correct trust beneficiaries.<sup>27</sup>

It is important to bear in mind that “[r]ules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task. . . . [Therefore, plaintiffs’] burden of persuasion [is met when] the disgorgement figure *reasonably approximates* the amount of unjust enrichment....” *First City Fin.*, 890 F.2d at 1231-32 (emphasis added). At that point, the burden would shift to the defendant trustee-delegates to “demonstrate that the disgorgement figure was not a reasonable approximation.” *Id.* at 1232. In equity, of course, “the risk of uncertainty [regarding the disgorgement amount] should fall on the wrongdoer....” *Id.*

Accordingly, in light of the impossibility of the accounting, among the procedures available for an expeditious and just resolution of this case is one that through equitable restitution and disgorgement awards to the plaintiff class the tangible and intangible benefits obtained by the trustee in breach of trust. Those benefits and advantages are measured, *inter alia*, by the value of reduced borrowings and debt servicing costs that were gained through the use and enjoyment of plaintiffs’ trust funds. Irrefutable government sourced data available to plaintiffs will be used in their case-in-chief. As stated more fully below, on June 9, 2008, plaintiffs will present their case-in-chief using data that reflect aggregate annual collections of the trustee-delegates throughout the history of the Trust.

To the extent such data does not exist – and it does not exist for many years prior to 1972 – plaintiffs would rely on data points that are available and would reasonably approximate the revenue collected in the intervening years. Because extant checks and related authorization

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<sup>27</sup> See, e.g., (Pltffs’ Exh. 2) Hammond Trial 1.5 Testimony, Tr. 91:91:4-9; 98:1-2 Day 19, May 13, 2003 (“Paid checks generally do not exist prior to 1992”).

documents have not been produced and cannot be examined for correctness, authenticity and disbursement to the class, plaintiffs, instead, will rely on the Treasury's CP&R database.

Because record evidence confirms serious systemic disbursement infirmities throughout the history of the Trust, plaintiffs reasonably approximate annual disbursement rates as derived from the CP&R database. The net result of the collections/disbursement analysis described above would be used to determine the benefit conferred on the government. This approach is discussed in greater detail below.

### **VIII. RESTITUTION AND RESTORATION OF THE TRUST CORPUS**

As this Court recognized in *Cobell XX*, the declared accounting “*necessarily requires a full disclosure and description of each item of property constituting the corpus of the trust at its inception.*” 2008 WL 253035, at \*61 (quoting *Cobell VI*, 240 F.3d at 1103) (emphasis added in *Cobell XX*). Because the accounting is impossible, it naturally follows that the plaintiff class is deprived of this critical information to its detriment. And that “does mean that a remedy must be found.” *Id.* at \*64. Plaintiffs do not ask this Court to assess damages as compensation for tens of millions of acres of land<sup>28</sup> and subsurface rights that have been held in trust and beneficially

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<sup>28</sup> The precise amount of trust land and subsurface rights transferred out of the IIM Trust and to whom such lands were transferred is unknown to plaintiffs. Nor do plaintiffs know how much land has been taken by the trustee for its own use, occupation, advantage, and benefit. No aggregate data is known to exist regarding subsurface rights. However, based upon data currently available to plaintiffs, upwards of 40,848,172 acres of land reportedly have been held in trust for the benefit of the plaintiff class, of which approximately 35,897,000 acres were held in trust in 1920. *See* (Pltffs' Exh. 4) 1935 Indian Land Tenure, Economic Status, and Population Trends at D125-0041; *Cobell XX*, 2008 WL 253035, at \*3, n. 2 (citing Francis Paul Prucha, 2 *The Great Father: The United States Government and American Indians* 865 (1984)). In 1990 and in 2002, approximately 11,000,000 acres of land were reported as held in trust for the benefit of the plaintiff class. *Cobell XX*, 2008 WL 253035, at \*3; *see also* (Pltffs' Exh. 5) Deposition Testimony of Bert Edwards, Executive Director of Interior's Office of Historical Accounting, dated December 18, 2002, Tr.277:9-11 (“Edwards Deposition”). Therefore, from 1887 to 2002, approximately 29,000,000 acres of land have been reported by the government as transferred out of trust. Parenthetically, Mr. Edwards indicated that 54 million acres of land have been held in trust; not the 41 million acres reported in Pltffs' Exh. 5. Edwards Deposition at Tr.277:8-11.

owned by the plaintiff class that the trustee has taken for its own use or has occupied (*e.g.*, leases, rights-of-way and easements), or that have been transferred out of the trust for its use or for the use and legal ownership, by sale or otherwise, to third parties, including without limitation non-Indians; Indian tribes, state, municipal or county governments; and corporations, whether such companies are oil and gas companies, timber companies, coal companies, utilities, railroads, or other entities.<sup>29</sup>

Instead, plaintiffs ask that this Court order defendants to set aside all trust land sales, other transfers of legal or beneficial ownership, and leases, easements, rights-of-way, and royalty agreements to itself and to third parties (excluding gift deeds and transfers by probate) for which defendants do not prove that fair market value, in fact, has been paid to the plaintiff class.<sup>30</sup> Further, plaintiffs ask that such lands be returned or restored to the trust and held exclusively for the benefit of the plaintiff class.<sup>31</sup> To the extent that conditions exist that may cause it to be unreasonable to set aside such transactions to third parties (excluding the trustee and its

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To date, plaintiffs have discovered no information regarding the amount or value of plaintiffs' aggregate subsurface rights that have been, and continue to be, held in trust, an important issue inasmuch lands have been transferred out of the trust and severed from the beneficial ownership interests in subsurface rights, rights that were expressly retained by the plaintiff class. Conversely, there are instances where subsurface rights have been transferred out of trust severed from surface rights that were expressly retained by the plaintiff class. With respect to subsurface rights held in, or transferred out of, trust, such rights include beneficial ownership interests in some of the most valuable oil and gas properties in this country. Yet, the government has produced no data regarding aggregate subsurface rights held in trust; that information is not reflected in (Pltffs' Exh. 4). 1935 Indian Land Tenure, Economic Status, and Population Trends at D125-0041.

<sup>29</sup> Defendants admit that they must account for all proceeds of land sales. Edwards Deposition, Tr.277:6-20. However, defendants' repudiation of the accounting duty makes that impossible, necessitating a decree of alternative equitable remedies to vindicate plaintiffs' rights in these proceedings.

<sup>30</sup> *See, e.g.*, 4 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER, & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS, § 24.10, at 1709 (5th ed. 2007) (successor edition to SCOTT ON TRUSTS).

<sup>31</sup> *See, e.g., id.* §§ 17.2, at 1077-79; 24.11.3, at 1715.

authorized representatives), plaintiffs ask that the value of the proceeds for such transactions that have been paid to, and at any time have been held by, the trustee be disgorged.<sup>32</sup> Further, to the extent that leases, rights-of-way, easements, and royalty agreements have been executed with third parties for which market value has not been paid to the plaintiff class, plaintiffs ask that this Court order defendants to set aside such leases and eject such third parties from plaintiffs' trust land. Further, to the extent that third parties are in trespass on plaintiffs' lands, plaintiffs ask that this Court order defendants to eject such trespassers forthwith.

Further, as to such lands taken, used, or otherwise occupied by the trustee for which fair market value has not been paid to the plaintiff class, plaintiffs ask that the value of all profits inuring to the benefit of the government during such use, putative beneficial ownership, and occupation be disgorged to the plaintiff class.<sup>33</sup> Finally, as to all such lands for which the trustee had not paid the plaintiff class market value, plaintiffs ask that this Court order the ejectment of the trustee and his authorized representatives from such trust lands that they occupy, use, or claim beneficial ownership in breach of trust.<sup>34</sup>

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<sup>32</sup> *See, e.g., id.* § 24.10, at 1707-08.

<sup>33</sup> *See, e.g., id.* § 17.2.1.1, at 1089-90.

<sup>34</sup> *See, e.g., id.* § 17.2.3, at 1107-09. Parenthetically, the same rules and principles apply to all property of the trust, real and personal. Accordingly, plaintiffs also ask that this Court order defendants to disgorge all securities they or their authorized representatives have purchased with plaintiffs' trust funds to the extent they cannot prove that such securities have been redeemed and the funds paid to the plaintiff class. *See, e.g., supra* note 15.

## **IX. QUANTIFICATION OF EQUITABLE RESTITUTION AND DISGORGEMENT OF THE BENEFITS CONFERRED**

### **A. The Burden of Proof Is Defendants' to Prove Each Transaction in the Trust.**

When “construing the trust duties” owed by defendants, this Court looks to trust law. *Cobell XVIII*, 455 F.3d at 304. Interior defendants are subject to “traditional fiduciary duties unless Congress has un-equivocally expressed an intent to the contrary.” *Id.* (quoting *Cobell VI*, 240 F.3d at 1098). Other than governing statutes, common law of trusts is the principal reference to “determine the precise contours of the government’s responsibilities.” *Id.* at 307.

Under trust law, the initial burden is on the plaintiff to show (1) the existence of a trust or analogous fiduciary relationship; and (2) the beneficiary’s entitlement to relief. *See* 1A C.J.S. ACCOUNTING § 44 (2007); *Kennedy v. Miller*, 582 N.E.2d 200, 205 (Ill. App. Ct. 1991). Plaintiffs satisfied this burden over eight years ago. *See generally Cobell V*, 91 F. Supp. 2d 1.

Where, as here, the *prima facie* showing has been made, the burden shifts to defendants “to prove the proper disposition of the property, and that the fiduciary has performed the trust in a proper manner.” 1A C.J.S. ACCOUNTING § 44 (2007). Meeting this burden requires that the trustee (1) prove that each and every transaction or expenditure entered into was justified; (2) “prove that its actions had conformed to every standard of duty;” and (3) “establish not only the fair dealing but the proper degree of prudence and care” in connection with each transaction. *See Bryan v. Security Trust Co.*, 176 S.W.2d 104, 109 (Ky. Ct. App. 1943).

Where the trustee fails to prove each transaction or identify each item of the trust, all doubts are resolved in favor of the beneficiaries and against the trustee. *See Rainbolt*, 669 F.2d at 769 (“If the . . . trustee has not kept adequate accounts, the benefit of the doubt is to be given to the beneficiary.”); *Kennedy*, 582 N.E.2d at 205 (“Any doubts created by errors or omissions in the accounting are resolved against the party producing it.”); *Bravo v. Sauter*, 727 So.2d 1103,

1107 (Fla. Dist. Ct. App. 1999) (The failure to make “a clear, distinct, and accurate” accounting requires that doubts be resolved against the trustee.). Consequently, if the trustee fails, or as here, repudiates the duty to “render a proper account,” the consequences of that failure fall fully on the trustee.

Accordingly, once a reasonable approximation of the amount that came in to the trust is established, it is the burden of defendants to prove each disbursement. In doing so, any doubt must be resolved in favor of plaintiffs. Pursuant to settled trust law principles, plaintiffs are entitled to recover the full amount collected by defendants as well as the benefit conferred and advantage gained through the unlawful withholding of such funds, less proven disbursements to the beneficiaries.<sup>35</sup>

However, plaintiffs recognize this Court’s concern that some beneficiaries may have received some trust funds, despite the defendants’ inability to prove such payments. Plaintiffs are further mindful of the Court of Appeals’ instructions that the parties work with this Court “to resolve this case expeditiously and fairly.” *Cobell v. Kempthorne* (“*Cobell XIX*”), 455 F.3d 317, 336 (D.C. Cir. 2006). Accordingly, notwithstanding defendants’ repudiation of their trust duties, plaintiffs are prepared to proceed to trial that will result in a reasonable approximation of that which they are owed.

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<sup>35</sup> In addition, as the Court of Appeals made clear, plaintiffs are entitled to “imputed yields for any period of delay in paying over income or principal.” *Cobell XIII*, 392 F.3d at 468.

**B. For Over 120 Years the Government Has Unlawfully Benefited From the Use of Plaintiffs' Trust Funds**

**1. Background**

It is important to understand how the government benefits from the use of plaintiffs' trust funds. On July 7, 1999, Richard L. Gregg, Commissioner of the Financial Management Service, a bureau within the Department of Treasury, testified before this Court.<sup>36</sup> His testimony bears directly upon the calculation of benefits conferred, and advantages gained by, the government.

Treasury records individual beneficiaries' co-mingled funds in a single account known as a "deposit fund account."

Q. What kind of an account is an IIM account?

A. It's referred to as a deposit fund account . . . .

Q. Sir, what is Treasury's role with respect to the IIM account?

A. It's essentially the same as the, you know, many other – maybe 1200 other accounts that we have, in terms of the summary accounting information.

(Pltffs' Exh. 1) (July 7, 1999 Trial) Tr. at 3310:8-24. As Commissioner Gregg testified: "we treat the IIM account like any other funds that come into Treasury, really without distinction."

*Id.* at Tr. 3397:3-4.<sup>37</sup>

This Court described the process as follows:

When Interior deposits funds for credit to the IIM trust account, the funds themselves go into Treasury's operating account at the Federal Reserve Bank of New York. Like the accounts in which money is deposited at the area or agency level, this account is referred to as Treasury's General Account or TGA.

*Cobell V*, 91 F. Supp. 2d at 12 (citation omitted). Specifically, "[t]he Treasury General Account at the Federal Reserve Bank is a cash account, but the various agency accounts maintained at Treasury do not actually hold funds. Instead, amounts are debited and credited to the various

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<sup>36</sup> For this Court's convenience, plaintiffs have attached the relevant portions of Commissioner Gregg's July 7, 1999 testimony before this Court as Exhibit 1.

<sup>37</sup> See also *id.* at Tr. 3311:17-20 (Individual Indian Trust funds are *not* "treated any differently than any other account [at Treasury].").

agency accounts *only as accounting entries.*” *Id.* at 12 (emphasis added). Generally, each particular agency is responsible for classifying, tracking, segregating and accounting for its own deposits into the TGA. *Id.* at 13 (citations omitted). Interior has the same responsibility for the deposit of Individual Indian Trust funds. As such, Interior and Treasury (and, every other federal agency) are required to identify the flow of funds via an Agency Location Code (“ALC”). The IIM Account has been designated the 4844 ALC. *Id.* at 11. This Court explained:

At the time of deposit, Interior does not tell Treasury to which agency account the deposit should be credited. Rather, Interior reports deposits to Treasury by Agency Location Code (ALC). An ALC is a code assigned by Treasury to an agency and is used by the agency to report financial transactions.

*Id.* at 11 (citations omitted). Importantly, the 4844 ALC “covers transactions made at a higher organizational” level and includes “more than just IIM trust transactions.” *Id.* Because “[e]ach agency is responsible for classifying its own deposits placed into the TGA and for reporting this information on a monthly basis to Treasury,” Treasury must “work cooperatively to ensure complete and accurate information with regard” to the Individual Indian Trust. *Id.*<sup>38</sup> In practice

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Q. So your information in this regard is almost totally dependent upon Interior. Is that correct?

A. Again, depending on the account, if they are reporting with an Interior ALC, they have the responsibility to have the detailed records to support that transaction, and they would be the only ones, certainly not Treasury, that would have the information to support what was contained in that specific transaction. We simply do not have the information.

Q. So the answer is you are totally dependent on Interior for this information. . . . is that correct?

A. They send us the summary information on these and as well as other Government agencies. So, to say that I’m dependent on them, they’re the ones that initiate the flow of funds into the account, as well as initiate the flow of funds out of the account and have the responsibility to have the detailed records to support that.

Q. So is it fair to say Treasury and Interior have to work cooperatively to ensure complete and accurate information with regard to these accounts? Is that a fair statement?

the cooperation required for the identification of Individual Indian Trust funds – both deposits and disbursements – has been ineffective. As a result, Individual Indian Trust transactions – both deposits and disbursements – pass through the TGA, but are indistinguishable (“treat[ed]. . . without distinction”) from the other transactions and activity of the federal government.

In fact, Interior and Treasury have never been able to reconcile the balances that stand to the credit of Individual Indian Trust beneficiaries – *i.e.*, the funds held by the Department of Treasury and the records of the Department of the Interior have never reconciled. As reported in the Special Trustee’s Strategic Plan in April 1997: “The cash account at the U.S. Treasury is not verifiable due in part to inadequate Bureau procedures and also because the U.S. Treasury is not able to provide the Bureau with accurate information regarding cumulative balances.”<sup>39</sup> Without

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A. That’s – which accounts are we talking about now?

Q. Any account which holds the Individual Indian Trust funds at the Department of the Treasury in order to –

A. That’s certainly a fair statement with regard to the IIM fund.

(Pltffs’ Exh. 1) (Gregg July 7, 1999 Trial Testimony) Tr. at 3412:10-3413:11.

<sup>39</sup> (Pltffs’ Exh. 6) (Special Trustee’s Strategic Plan) at Tab 8, p. 8 (emphasis added) (excerpts only, bulky exhibit). This is a recitation of the Fiscal Year 1995 *Report of Independent Public Accountants on Financial Statements* at 607: “(1) cash and overnight investments are maintained by a related U.S. Governmental Agency (U.S. Treasury) and cannot be independently confirmed, (2) cash balances reflected in the accompanying financial statement are materially greater than balances reported by the U.S. Treasury . . . .” (Pltffs’ Exh. 7). *See also generally*, (Pltffs’ Exh. 8) (October 28, 1991, U.S. DOI-BIA-Office of Trust Funds Management, *Trust Disbursements Project*) at 4 (emphasis added):

Unlike normal checking accounts utilized in the private sector, the *BIA’s checking account with Treasury does not allow for the following:*

Monthly statements showing the BIA which checks have cleared, which are still outstanding, and which checks are clearing for amounts not consistent with the amount reported by the BIA. Because of this, *BIA cannot “reconcile the account.”*

*See also id.* at 12 (“One of the main problems in the current disbursement process is the use of separate systems which currently are not integrated.”). Plaintiffs have provided a more detailed review of defendants’ historical out-of-balance condition and the consequences thereof, in their November 30, 2007 *Proposed Findings of Fact* [Dkt. No. 3454] at ¶¶ 435-445.

accurate information, trustee-delegates cannot possibly know the amount of plaintiffs' trust funds deposited into the TGA. Nor can they know the amount disbursed.

## 2. Benefit to the Government of Unlawfully Withheld Trust Funds.

The TGA maintains balances to meet short-term funding needs of the U.S. Government. Any Individual Indian Trust monies unlawfully withheld in the TGA benefit the government, not the plaintiff class:

Q. Who gets the *benefit* of the monies in the [Treasury General A]ccount?

A. Essentially, the federal government. It certainly isn't credited to any organization within the Treasury for use. What it means is that to the extent that there are funds that come into the Treasury's general account, those are considered in the borrowing decisions that are made by the Department and carried out by the Bureau of Public Debt. So it means that, at least at the margin, the more that's collected and within the various accounts within Treasury, the less Treasury has to borrow.

(Pltffs' Exh. 1) (July 7, 1999 Trial) at Tr. 3315:10-19 (emphasis added).<sup>40</sup> Accordingly, there is benefit conferred on the Government as a result of depositing the trust funds in the TGA and improperly withholding them from the plaintiff class – a reduction of the national debt and related debt service costs.

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<sup>40</sup> Q. Did you testify to what it means when funds are available to Treasury during your direct examination?

A. I believe I did, yes.

Q. What does it mean?

A. To me, it means it's within the general account, the Treasury's general account.

Q. So it's the Treasury's asset at that point?

A. Well, it's the Government's. It happens to reside within Treasury, yes.

Q. And I think you testified that when funds are available to Treasury, those funds do not earn interest; is that correct?

A. That's correct.

Q. And *is it because they don't earn interest because it's considered the Government's funds during that period of time?*

A. *It's really – yes. It's our – the funds that are in our Treasury general account that we use to pay off obligations that are due, and it helps, you know, to look at that to determine how much the borrowing has to be at any given time.*

*Id.* at 3396:4-24 (emphasis added)

**C. Defendants Have Improperly Withheld Billions of Dollars of Trust Funds from the Plaintiff Class.**

As plaintiffs calculate the benefit conferred on the government, it must be remembered that any imprecision is entirely attributable to the trustee's repudiation of the declared accounting duty. Plaintiffs do not have the information an accounting by the trustee-delegates would ordinarily provide.<sup>41</sup> Plaintiffs are also limited by the adequacy of the records created and maintained by trustee-delegates. Nevertheless, given this Court's broad equitable authority, it need only derive "a disgorgement figure that reasonably approximates the amount of unjust enrichment." *First Fin. Corp.*, 890 F.2d at 1231-32.

Plaintiffs are mindful of the Court's instruction to consider Interior's records. *Cobell XX*, 2008 WL 253035, at \*45. Accordingly, as demonstrated below, plaintiffs are relying on data sourced to Interior and Treasury for purposes of this restitution calculation.

**1. Trustee-Delegates Have Failed to Disburse Over \$3 Billion in Breach of Trust.**

**a. AR-171 Shows Over \$14.3 Billion Collected from 1909 to 2005 and \$3.6 Billion Remains Undistributed.**

AR-171 is a "detailed chart, color coded by source, reflecting throughput estimates between 1909 and 2005." *Cobell XX*, 2008 WL 253035, at \*46.<sup>42</sup> This chart has been prepared by defendants' experts and reflects "the government's most recent throughput calculations." *Cobell XX*, 2008 WL 253035, at \*46. Notably, as Mr. Cason testified, AR-171 does not include direct pay transactions or Individual Indian Trust revenue collected by compacting and

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<sup>41</sup> As noted by this Court, "the purpose of an accounting," at least in part, is to allow a beneficiary "to determine whether the duties of the trust have been faithfully carried out and whether her assets, funds, and transactions are correctly stated." Without a proper accounting that beneficiary "will be prejudiced from 'enforc[ing] [her] rights under the trust or [] prevent[ing] or redress[ing] a breach of trust.'" *Cobell XX*, 2008 WL 253035, at \*61 (quoting RESTATEMENT (THIRD) OF TRUSTS § 173).

<sup>42</sup> This Court has already made findings with respect to AR-171. *See generally id.* at \*46, *et seq.*, AR-171 is attached as Pltffs' Exh. 9.

contracting tribes. *Id.* Nevertheless, once the income categories are totaled, AR-171 estimates that approximately \$14.3 billion had been collected. *See Cobell XX*, 2008 WL 253035, at \*47 (identifying total income based on AR-171 can be achieved only after “critical calculations that are curiously missing from [AR-171] itself”). At the same time, the government reported that disbursements from the Trust totaled approximately \$10.7 billion, resulting in \$3.6 billion in nominal dollars remaining in the trust. *See Cobell XX*, 2008 WL 253035, at \*47. As this Court noted, “[t]hese figures are of course estimates, calculated according to unverified hypotheses, using data that are opaque. They provide only a starting point in assessing the size of the IIM trust fund that cannot be accounted for.” *Id.*

Certain calculations in AR-171 suffer from serious infirmities. First, defendants employed a NORC-supplied hypothesis suggesting that period-ending balances for the period from 1909 until 1972 approximate actual revenue. *Id.* at \*46. This “dubious” assumption was not “seriously posit[ed as a] . . . good prox[y] for collections or receipts.” *Id.* Therefore, defendants cannot provide reasonable estimates of revenue prior to 1972. *Id.* at \*46-48.

Second, and more importantly, defendants’ cannot provide an accurate estimate of disbursements. Their estimate constitutes little more than the recorded outflows from systems found – by this Court and the Court of Appeals – to be unreliable and inadequate. *See, e.g., Cobell XIX*, 455 F.3d at 325 (“To be sure, we have no doubt Interior’s trust account information has serious reliability problems.”). AR-171 indicates that the data is sourced from Interior’s Finance System (1972-1985); the Integrated Records Management System – IRMS (1986-1997) and the audited financial statements (1998-2005).<sup>43</sup> Plaintiffs discuss trustee-delegates’

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<sup>43</sup> *See* Pltffs’ Exh. 9 (AR-171). It should also be noted that defendants’ witness, Michelle Herman – FTI, the contractor who prepared AR-171, had little to testify about regarding disbursements:

historical problems with the disbursement of Individual Indian Trust funds, *infra* Part III.C.3. For purposes of AR-171, it is sufficient to note that defendants' method of calculating revenues prior to 1972 is "bizarre," as disbursement values are simply an outflow calculation from systems that are unreliable. *Cobell XX*, 2008 WL 253035, at \*46, n.12. As such, AR-171 requires significant supplementation, although it reflects residual, unrecorded trust balances of at least \$3.6 billion.

**b. DX-365 Indicates Over \$13.2 Billion was Collected and \$3 Billion Remains Undisbursed**

Defendants' exhibit DX-365 confirms that at least \$3 billion in trust revenue had been collected and held by defendants, but *never* credited to beneficiaries' IIM accounts.<sup>44</sup> *Cobell XX*, 2008 WL 253035, at \*48 (quoting Interior Assistant Deputy Secretary Abraham Haspel, "'if one is talking about collections, that tends to be a larger number than credits, and so if you're doing a division between the amount of collections or the amount of credits that are proven to be – which are proven coverage, then depending on what you use as the denominator changes the answer.'"). This is calculated by multiplying trust revenues of \$13.186 billion by Interior's estimate that only 77% of revenues were "credit[ed] into IIM Accounts."<sup>45</sup>

**c. AR-171 and DX-365 Are a Starting Point to Determine Collections and Disbursements**

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Q. "Disbursements." What does that reflect?

A. Disbursements made from the trust in that fiscal year.

Q. And what information is that based on? In the yellow code, what does that mean?

A. You can see that that information varies over time, but the yellow is from the finance system.

*See* October 15, 2007 (Day 3 PM) at Tr. 654:24-655:5. (Pltffs' Exh. 10) Ms. Herman neglected to inform the Court that her calculations required an "Adjustment" each year to match to published balances. Exhibit AA5 (AR-171) (see Column I for "Adjustment"). This "Adjustment" varied between \$25 million and minus \$63 million, an almost \$90 million variation between periods. *Id.*

<sup>44</sup> Attached hereto as (Pltffs' Exh. 11) (DX-365).

<sup>45</sup> DX-365-00001, (Pltffs' Exh. 11).

This Court expressed frustration about the lack of reliable throughput information adduced during the October trial. This is the inevitable result of over 100 years of document destruction and mismanagement of Individual Indian Trust assets. As this Court noted, there “are . . . heaps of records suggesting that the numbers informing these calculations [AR-171 and DX-365] are unreliable.” *Cobell XX*, 2008 WL 253035, at \*49. That being the case, the government should not be permitted to gain improper advantage from its breaches of trust. To the extent its records indicate shortfalls in the balances recorded to trust accounts, such records provide additional support – a reasonable approximation – to calculate benefits obtained by the trustee in connection with its breach of trust.

## **2. Trustee-Delegates’ Collection of Trust Revenue**

### **a. Collections Since 1972**

Plaintiffs use the information in AR-171 to calculate trust collections beginning in 1972, with a documented adjustment to account for defendants’ underreporting of Osage revenue that is addressed *infra* at Part IX.C.2.c. Using this approach, **Attachment A** reflects the calculation of the IIM Trust funds collected by the government.

Plaintiffs are using AR-171 in this calculation, despite its understatement of collected trust revenue. Pltffs’ Exh. 12 (AR-176, D000-000-HTA-WDC-000056-0007-0086 through ‘0087) (2006 IIM Trust Fund Revenue Estimate prepared by FTI). For example, AR-176 at ‘0086-‘0087 reflects that at least 60 of the 88 agencies reporting Individual Indian Trust revenue on the general ledger are missing data (as indicated by years with no income reported) between 1972 and 1986; most of the missing data is in the early 1970’s. The effect of the missing data is dramatic. As defendants locate additional data through the 1970’s, the reported revenues on the general ledger (*see id.* at ‘0088) increase from \$132.6 million in 1972 to \$419.1 million in 1978 to over \$600 million in 1982. Clearly, well over 50% of the data is missing from the general

ledger in the 1970's. This material missing data problem, of course, is not disclosed in AR-171. However, because AR-171's post 1972 data is the only revenue information available to plaintiffs, it is utilized despite its underreporting of trust income.

**b. Collections Prior to 1972**

For the period prior to 1972, plaintiffs' research has identified thirteen publicly-available government reports which record Individual Indian Trust revenues in a particular year. Once again, these reports underreport the recorded income.<sup>46</sup> Nevertheless, they constitute the only evidence of collected revenue deposited into the IIM Trust for these earlier time periods.

These reports – also referred to as data points – are available for the following years: 1909, 1910, 1911, 1915, 1916, 1917, 1918, 1919, 1920, 1923, 1926, 1955 and 1968.<sup>47</sup> A graphical representation of these data points is included as **Attachment B**. With respect to the intervening years for which plaintiffs have no revenue data, plaintiffs reasonably approximate revenue through use of a straight line interpolation to connect the data points.

This is a basic slope function.<sup>48</sup>

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<sup>46</sup> See, e.g., *Staff Report on Mineral Leasing on Indian Lands*, Federal Trade Commission Bureau of Competition (October 1975) at 94 (noting that defendants' Annual Reports were often inaccurate and gas leases had been underreported by 13.7%), attached as Pltffs' Exh. 13.

<sup>47</sup> Some of the public reports exceed 1,000 pages. Accordingly, plaintiffs collectively have entered excerpts of these reports as Pltffs' Exh. 14. Plaintiffs, of course, welcome the production of additional competent revenue data.

<sup>48</sup> Linear interpolation was used to estimate IIM Trust Revenue figures in years for which no government reported actual data were available. In a simple practical form, the linear interpolation function used in Attachment A can be expressed as follows:

$$R_Y = R_{Y-1} + (R_N - R_0) / P \dots\dots\dots \text{Where,}$$

$R_Y$  = Interpolated revenue result in a given year

$R_{Y-1}$  = Revenue in previous year

$Y_0$  = Year of the last actual data point before an interpolation period ("IP")

$Y_N$  = Year of the first actual data point after the IP

$$P = Y_N - Y_0$$

$R_0$  = Last actual data point before IP

$R_N$  = First actual data point after IP

$$R_Y = R_{Y-1} + (R_N - R_0) / P$$

**c. Osage “Headright” Revenues Are IIM Trust Funds**

It is settled law that the trustee’s fiduciary duty to account includes “all funds held in trust by the United States for the benefit of ... an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. § 162a).” Definitively within the scope of this case then are funds held by the United States pursuant to section 162a for the benefit of any individual Indian, irrespective of the account in which they are held, the particular system wherein they are recorded or whether the collected funds are pooled or are held individually. The trustee-delegates’ broken trust management system does not define the nature and scope of defendants’ trust duties; trust law does.

Osage headright funds are by definition “funds held in trust by the United States for the benefit of ... an individual Indian.” The Osage mineral estate is not owned by the Osage Tribe, but by individual trust beneficiaries who are entitled to a “headright” share in the proceeds derived from the mineral estate. To be sure, proceeds from the sale of Osage oil and gas initially are held in a single pooled trust account. However, the Osage mineral estate income is at all times the vested property interest of individual Osage headright owners, each of whom is a member of the plaintiff class. The statutory language is conclusive on this point. The governing provision is Section 4 of the Osage Allotment Act of 1906, Pub. L. 59-321, 34 Stat. 539, 544, which provides in pertinent part:

[T]he royalty received from oil, gas, coal, and other mineral leases upon the lands for which selection and division are herein provided, ... shall be placed in the Treasury of the United States to the *credit of the members* of the Osage Tribe of Indians ... and the same *shall be distributed to the individual members* ....

*Id.* (emphasis added). This language is dispositive: The funds are held in trust at Treasury solely for the benefit and to the “credit of [its] members,” not the tribe nor its government. *Id.* Further, the distribution mandate is equally clear and imperative – the collected

funds “*shall be* distributed to the individual members ....” *Id.* (emphasis added). Here, there is no ambiguity; *no* discretion has been granted to the trustee to distribute funds to anyone other than the individual headright owners. Indeed, it would be unlawful and a breach of trust for the government to distribute the trust funds to anyone other than to the rightful individual members – or “headright” holders. *See, e.g., Logan v. Andrus*, 457 F. Supp. 1318, 1321 n.2 (N.D. Okla. 1978). *See also* FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 407[1][d] (2005 Ed.) (“Cohen Handbook”) (noting that the “statutory scheme” mandates that most proceeds from trust lands are distributed to individual headright owners); *id.* (describing the Osage headright fund as a “restricted tenancy in common” for the persons identified in the 1906 tribal rolls). Accordingly, funds held in trust in the pooled Osage account for the benefit of individual Indians are within the scope of this case.

Nevertheless, AR-171 underreports the proceeds of individual Osage beneficiaries’ trust lands. AR-176<sup>49</sup> exposes the underreporting of individual Osage beneficiaries’ trust revenue that is reflected in AR-171.<sup>50</sup> What had been concealed is that defendants improperly excluded almost \$1 billion in individual Indian Osage revenue from the AR-171 schedule. The basis – factual, legal or otherwise – for such material omission is not evident in any of defendants’ exhibits. Plaintiffs assume, based upon calculations contained in AR-176,<sup>51</sup> the omission is not inadvertent. Rather, it is plain that defendants are treating individual Indian Osage trust funds held at Treasury and distributed through Interior’s Osage system (via US Treasury check) as individual Indian “trust” funds that are outside the scope of this case. No basis exists for this exclusion. Accordingly, plaintiffs corrected defendants’ estimate of individual Indian Osage

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<sup>49</sup> Pltffs’ Exh. 12, AR-176 (D000-000-HTA-WDC-000056-0007-0001 through ‘0123).

<sup>50</sup> *Id.* at 0047-0084. (Pltffs. Exh. 12)

<sup>51</sup> *See* AR-176, D000-000-HTA-WDC-000056-0007-0048 (calculating a percentage reduction to the total Osage revenues). (Pltffs’ Exh. 12)

revenues for all periods to reflect the true individual Indian Osage revenues in the restitution calculation. These calculations are also included in **Attachment A**.

As shown on **Attachment A**, the Individual Indian Trust revenues total **\$15.129 billion**. Plaintiffs discuss this nominal value and the application of disbursements in the following subsection.

### **3. Disbursements.**

#### **a. Defendants Cannot Establish Valid Disbursements.**

Every independent review, examination, internal audit, field visit, or third-party inspection has found serious, systemic weaknesses in the disbursement of trust funds to the plaintiff class.<sup>52</sup> As this Court has noted, there exists “considerable evidence – anecdotal and otherwise – of instances in which IIM beneficiaries did not receive funds to which they were apparently entitled.” *Cobell XX*, 2008 WL 253035, at \*49.

It is important to understand that from its inception, the IIM trust has not been a “pass-through” trust in which the proceeds of trust funds were disbursed to beneficiaries promptly and

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<sup>52</sup> This Court is familiar with the historical unreliability of Interior’s trust fund systems and processes. *See, e.g., Cobell XX*, 2008 WL 253035, at \*7 (“Royalty Distribution and Reporting System (RDRS) was unreliable”); *id.* at \*17 (“[The 1988 Andersen] audit documented internal control weaknesses attributable to inadequate training, lack of experienced supervisors, understaffing, and out-of-date accounting manuals, and concluded that the ‘accounting systems [were] unreliable.’”); *id.* (“The most recent independent audit–prepared by KPMG for the year ending on September 30, 2006–noted that OST relied upon unreliable BIA data and unresolved financial reporting from prior periods, that OST’s processing of trust data relies upon the accuracy of information from BIA, MMS, and other bureaus and offices, and that ‘current management is burdened with the ongoing impact of decades of accumulated discrepancies in the accounting records.’”) (citation omitted); *id.* at 34 (“Interior’s electronic land ownership records are inconsistently updated, inaccurate, and unreliable.”). Plaintiffs’ emphasis on the pervasive failures in Interior’s disbursement processes and systems is a subset of more generalized system “unreliability” problems and related breaches of trust noted by the Court of Appeals seven years ago in *Cobell VI*, 240 F.2d at 1106.

regularly.<sup>53</sup> Payments to beneficiaries were subject to the discretion of the BIA agency superintendent. Historically, superintendents exercised their discretion to minimize payments to class members.<sup>54</sup> Payments often were determined on the basis of the so-called “competency” of the Indian beneficiary as viewed by the Superintendent. Beneficiaries were placed on meager “allowances” as low as \$10 per month, despite substantial funds held by the trustee.<sup>55</sup> Often, even these meager distributions were discontinued, even for the purchase of necessities, if the local BIA superintendent determined that the beneficiary otherwise was capable of supporting himself.<sup>56</sup> Payments also were withheld from beneficiaries arbitrarily based on social concerns of the Superintendents.<sup>57</sup> Necessary funds due minors were routinely withheld from distribution although their parents or guardians were known to be competent to handle their affairs.<sup>58</sup> As a

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<sup>53</sup> See, e.g., *Annual Report of the Department of Interior for Fiscal Year Ended June 30, 1915* at 376-377 (“The monthly receipts under this particular class of funds (royalties from oil) are enormous in many instances, while the actual disbursements to the Indians are comparatively small, until reliable information is secured upon which it may be determined how and when disbursements may be made which will be of permanent benefit to the Indian.”). Attached as Pltffs’ Exh. 15.

<sup>54</sup> See, e.g., *Annual Report of the Department of Interior for Fiscal Year Ended June 30, 1905* at 30 (“The distribution of such large sums of money to a people for the most part inexperienced in the use of money could not, of course, fail to be accompanied by serious evils, and it has been my aim to devise a means to reduce it to a minimum”). Attached as Pltffs’ Exh. 16.

<sup>55</sup> *Id.* (noting heirs of deceased beneficiaries limited to \$10 per month in income despite trust deposits of \$620,603.80 from sale of land due to their “recklessness”).

<sup>56</sup> See *Annual Report of the Department of Interior for the Fiscal Year Ended June 30, 1909* at 67 (attached as Pltffs’ Exh. 17).

<sup>57</sup> By way of example, in fiscal year 1915, the government withheld payments from the Osage because alcohol “was within convenient reach of the Indians.” Pltffs’ Exh. 15 (*Annual Report of the Department of Interior for Fiscal Year Ended June 30, 1915*) at 9. See also Pltffs’ Exh. 18 (*Annual Report of the Department of Interior for Fiscal Year Ended June 30, 1917*) at 22 (withholding funds from the Five Civilized Tribes “because of prevailing conditions there;” Pltffs’ Exh. 19 (*Annual Report of the Department of Interior for Fiscal Year Ended June 30, 1918*) at 73 (withholding \$6 million from the Osage until they had “conquered and exterminated the bootleggers”).

<sup>58</sup> *Id.* See also Pltffs’ Exh. 18 at 43 (*Annual Report of the Department of Interior for Fiscal Year Ended June 30, 1917*) (it is “more important that the children’s money shall be kept intact for

consequence, in the limited instances in which trust transactions were recorded, collections typically far exceeded disbursements.<sup>59</sup>

Accordingly, as a matter of practice, not only were funds withheld from the plaintiff class, but trust funds that were “disbursed” often were disbursed in error, as confirmed by Interior’s own records.<sup>60</sup> Examples of trustee-delegates’ failure to properly disburse trust funds to beneficiaries are identified below:

- [1991] “A greater level of accounting information and data control are now required than the present system is capable of providing through current disbursement methods. Numerous and prolonged deficiencies in current processes of trust fund disbursements have been identified by OTFM and have been disclosed by independent auditors.”<sup>61</sup>

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them, so that they shall some day receive its full benefit, rather than permit parents to use this money for ordinary current expenses”).

<sup>59</sup>See, e.g., Pltffs’ Exh. 20 (*Annual Report of the Department of Interior for Fiscal Year Ended June 30, 1914*) at 245 (noting receipts on behalf of the Five Civilized Tribes of \$2,150,157.04 and disbursements of only \$325,212.29); Pltffs’ Exh. 21 (*Annual Report of the Department of Interior for Fiscal Year Ended June 30, 1904*) at 243 (records of Union agency indicated \$31,419.68 of individual Indian monies received and only \$5,280.35 disbursed); Pltffs’ Exh. 22 (*Annual Report for the Department of Interior for Fiscal Year Ended June 30, 1913*) at 281 (\$48,512,473.77 of total trust funds on hand and received, and \$8,434,327.41 disbursed).

<sup>60</sup> See *supra* at note 22.

<sup>61</sup> Pltffs’ Exh. 8 at 3 (October 28, 1991, U.S. DOI-BIA-Office of Trust Funds Management, *Trust Disbursements Project*). See also *id.* at 4:

Unlike normal checking accounts utilized in the private sector, the BIA’s checking account with Treasury does not allow for the following:

Monthly statements showing the BIA which checks have cleared, which are still outstanding, and which checks are clearing for amounts not consistent with the amount reported by the BIA. Because of this, BIA cannot ‘reconcile the account.’

See also *id.* at 12 (“One of the main problems in the current disbursement process is the use of separate systems which currently are not integrated.”).

- [1975] “Inadequate follow up of reports of fraudulent misuse of IIM funds.”<sup>62</sup>
- [1965] Lease rentals “had been distributed to individuals no longer entitled to the income.”<sup>63</sup>
- [1955] “Adequate means of identifying persons authorized to withdraw from individual Indian money accounts were usually not available.”<sup>64</sup>
- [1952] “Our audit disclosed many deficiencies in the accounts and procedures of the Indian Service Special Disbursing Agents (ISSDA’s) and their deputies. For example, control over individual Indian moneys was completely inadequate, the individual account ledger and supporting records of receipt and disbursement were generally in deplorable condition, certain accounts were apparently overdrawn. . . . Moreover, in many instances responsible Bureau officials at field locations showed little concern regarding the poor condition of the ISSDA records and the weaknesses and deficiencies in the procedures followed.”<sup>65</sup>
- [1940] “In some instances, the entry showed the receipt and disbursement and what the payment was for, but no reference as to who made the remittance, nor who received the payment.”<sup>66</sup>

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<sup>62</sup> Pltffs’ Exh. 23 at NORCMAP\_0024088, 1975 Goshute and Skull Valley Reservations Grazing Lease and Permit Meta-Analysis Summary.

<sup>63</sup> Pltffs’ Exh. 24 at NORCMAP\_00001423 1963 Phoenix Audit.

<sup>64</sup> Pltffs’ Exh. 25 at 15, Report of the GAO for 1955.

<sup>65</sup> Pltffs’ Exh. 26 at 19 (1952, Audit Report to the Congress of the United States, BIA-DOI for the Fiscal Years Ended June 30, 1952 and 1953). Page 20 of this report discloses incidents of Interior officials’ “embezzlements,” and notes that Interior has not investigated cash irregularities so no referral could be made to the Department of Justice for prosecution. *Id.* More specific criticisms of ISSDA’s disturbing “disbursement” processes and the failure to investigate “irregularities” are contained on pages 117-119 therein.

<sup>66</sup> Pltffs’ Exh. 27 at NORCMAP\_00003457, 1940 Fiscal Audit of IIM for Albuquerque, NM.

- [1935] Accounts are “so badly tangled up that it will take some very close study on the part of the clerk handling them to disentangle and distribute them as they should be.”<sup>67</sup>
- [1915] “The primary inducement to collusion, fraud, and subversion lies in the relation of ‘trusteeship’ . . . . The possession of the Indian estate, the power to contract for the Indian, *the power to dispose of his moneys and properties – on the one hand – and the ever present desire of the Indian’s white neighbor to make these moneys and properties his own – on the other hand – these are conditions that have operated continuously in the past to impair the Indian Services.*”<sup>68</sup>

These examples reflect dysfunctional and unreliable disbursement systems, practices and processes.

**b. Treasury’s CP&R Data.**

The ALC assigned to the Individual Indian Trust is 4844.<sup>69</sup> On November 4, 2003, Treasury Document Production Coordinator Charles Schwan provided Bert Edwards, Executive Director – Office of Historical Trust Accounting, a schedule of “all checks issued under symbol

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<sup>67</sup> Pltffs’ Exh. 28 at NORCMAP\_00003406, 1935 Interior Department Colville Area Report.

<sup>68</sup> Pltffs’ Exh. 29 at 69 (1915, *Joint Commission of the Congress of the United States, Investigate Indian Affairs Relative to Business and Accounting Methods Employed in the Administration of the Office of Indian Affairs*) (emphasis added). It is telling that the Joint Commission prefaces its report with an ominous observation: “[D]ue to the increasing value of his [Indian beneficiaries’] remaining estate, there is left an inducement to fraud, corruption, and institutional incompetence almost beyond the possibility of comprehension. . . . The Government itself owes many millions of dollars for Indian moneys which it has *converted to its own* use and it is of interest to note that it does not know and the officers do not know what is the present condition of the Indian funds in their keeping.” *Id.* at 2 (emphasis added).

<sup>69</sup> Defendants are in accord with this Court’s finding. As noted by Bert Edwards in a July 15, 2003 Memorandum for Files provided to DOI’s accounting contractors, “Symbol 4844 is Treasury FMS’ designator for the IIM Trust Fund. The sweep [produced as DX-272 in the October 2007 hearing, attached hereto as Pltffs’ Exh. 30 and discussed, *infra*] will cover all checks issued by OTFM (and its BIAS predecessor units) from roughly 1986 through December 31, 2002.” Pltffs’ Exh. 31 (D000-000-HTA-WDC-000003-0002-0094).

4844 that are stored in the Check Payment and Reconciliation (CP&R) system maintained by the Financial Management Service (FMS).”<sup>70</sup> This schedule was included as Exhibit B (revised) to a memorandum prepared by Schwan.<sup>71</sup> However, this schedule does not include the following checks: (1) checks that were not negotiated within 14 months; (2) checks where a claim had been filed by the issuing agency; (3) checks that were never issued; and (4) checks that Treasury declined to pay because the check had been altered.<sup>72</sup>

Accordingly, Exhibit B must be corrected to reflect the non-negotiated checks (or, checks that otherwise had been returned to the trustee-delegates). Plaintiffs have made this correction and a modified schedule is included as **Attachment C**. Therefore, a calculation of all revenues collected between 1988 and 2002, when compared to a calculation of all disbursements reputedly made to Individual Indian Trust beneficiaries between 1988 and 2002, indicates that – for present purposes to determine an appropriate value of restitutionary award – approximately 69.82% of all trust funds collected are assumed to have been distributed. Plaintiffs apply this distribution rate for prior periods because defendants have destroyed the trust records; and, even though the record evidence indicates that defendants’ distribution systems were materially weaker in the years prior to 1988. The total disbursements from the trust are **\$10.563 Billion**. *See generally Attachment C*.

**c. Automated Clearinghouse/Electronic Funds Transfer**

This calculation of disbursements does not include estimates of Automated Clearinghouse or Electronic Funds Transfer (ACH/EFT) transactions. Plaintiffs do not dispute

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<sup>70</sup> Pltffs’ Exh. 30 (produced in the October 2007 hearing as DX-272), DX-272-00031.

<sup>71</sup> *Id.*, DX-272-00034. Mr. Schwan subsequently revised Exhibit B (“Exhibit B (revised)”) on November 13, 2003 and transmitted the modified schedule to Bert Edwards via e-mail. *Id.* at ‘0047 (*see also* Exhibit B (revised) at ‘0048). Plaintiffs utilize the calculations included in Exhibit B (revised) for purposes of calculating equitable restitution amounts. *See Attachment C*.

<sup>72</sup> *Id.* at DX-272-00049 through ‘00050.

that some funds might have been distributed to class members via ACH/EFT. However, such electronic transactions are a demonstrably insignificant part of the total amount of disbursements. And, it is only since October 1997 that such transactions could even be recorded and quantified by defendants.<sup>73</sup> Indeed, in FY 1999, ACH/EFT transactions reportedly consisted of less than 8% of total outflows.<sup>74</sup> By other rough measures, ACH/EFT transactions between October 1997 and December 2000 are less than 1.2% of the total disbursement transactions (defined here to be checks + ACH/EFT transactions).<sup>75</sup> And the government's own principal expert, NORC, reports that *only* 669 electronic payments are recorded in the IRMS (IIM) system before October 1997.<sup>76</sup>

The Director of Interior's Office of Historical Trust Accounting, Bert Edwards, directed Treasury to query its CP&R database and report its results to Interior, recognizing the value in the application of aggregate CP&R data to the calculation of outflows from the Individual Indian

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<sup>73</sup> Pre-1997 legacy systems preclude any quantification of ACH/EFT transactions in aggregate, much less allow for any meaningful analysis as to the propriety of any particular outflow. As reported by NORC, no systematic report on Treasury's ACH/EFT system (referred to as PODSARS) can be obtained in the pre-1997 time period "without the trace number [to be provided by DOI] looking up these records in the PODSARS system is a difficult job for Treasury." Pltffs' Exh. 32 (September 30, 2003, NORC, *Electronic Payment Prototype for the Alaska Region*), D-000-000-HTA-WDC-000047-0002-0010.

<sup>74</sup> See Pltffs' Exh. 33, DX-238-00001. \$26.4 million (ACH/EFT) ÷ \$336.6 million (audited outflows) = 7.86%. Plaintiffs provide a more detailed review of this exhibit in their November 30, 2007 *Proposed Findings of Fact* [Dkt. No. 3454] at ¶¶ 631-633. It is notable that this exhibit, on its face, indicates that almost \$135 million in individual Indian beneficiaries' trust revenue was transferred or otherwise diverted to other Treasury accounts and agencies of the U.S. Government in fiscal year 1999. *Id.* at ¶632.

<sup>75</sup> NORC reports that 17,692 ACH/EFT transactions are identified as IIM-related between October 1997 and December 2000. Pltffs' Exh. 34 (December 10, 2003 NORC, *Drawing the Debit Sample for Alaska*), D000-000-HTA-WDC-000046-0003-0036. This must be compared to the total CP&R identified check counts for 1998, 1999 and 2000. See Pltffs' Exh. 30 (Exhibit B, November 4, 2003 Memo from Schwan to Edwards) (produced in the October 2007 hearing as DX-272), DX-272-00034 (sum of 1998-2000 CP&R check totals = 1,386,355 checks). 17,692 ÷ 1,386,355 = 1.28%.

<sup>76</sup> Pltffs' Exh. 32 (September 30, 2003, NORC, *Electronic Payment Prototype for the Alaska Region*), D-000-000-HTA-WDC-000047-0002-0009.

Trust.<sup>77</sup> And, while there is no doubt that ACH/EFT transactions are not included in the CP&R database, defendants should embrace the application and use of CP&R disbursement data at the aggregate level because it assumes that all such recorded disbursements (1) were proper, (2) made to the correct beneficiaries, (3) in the correct amounts, and (4) that defendants' historical disbursement problems were no worse than the disbursement problems reflected in more modern audit reports.

#### **d. Other Disbursement Considerations**

Finally, as defendants are quick to point out, but never estimate – much less, quantify with any precision – there are funds “returned to third parties”<sup>78</sup> that are recorded as passing through the Individual Indian Trust. Using aggregate CP&R data *overstates* the actual amount of funds disbursed to the plaintiff class. However, no meaningful examination of the validity of disbursements is possible given the trustee's repudiation of its accounting duty and the spoliation of essential trust records, hard copy and electronic. At best, an examination would provide inconclusive results. Indeed, the vast majority of checks have been destroyed prior to 1992.<sup>79</sup> To analyze the extant disbursement documentation (at least, since 1992) would likely take years and potentially cost tens of millions of dollars (perhaps hundreds of millions of dollars if defendants' profligate spending on other accounting activities is any guide).<sup>80</sup>

In any event, the results of such an investigation would surely undermine defendants' unsubstantiated claims that the vast majority of funds were properly disbursed to plaintiffs. On

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<sup>77</sup> See generally Pltffs' Exh. 31 (7/15/03 Edwards Memo to File), at D000-000-HTA-WDC-000003-0002-0094-0095.

<sup>78</sup> March 5, 2008 Hearing Tr. at 15:23-24 (defense counsel, Robert Kirschman).

<sup>79</sup> See, e.g., Pltffs' Exh. 1 (July 9, 1999) Trial 1 at Tr. 3336:4-20.

<sup>80</sup> Defendants undoubtedly would favor such a never-ending exercise: undertake an investigation that would take years and millions of taxpayer dollars to reach a conclusion that has no utility to this Court or plaintiffs so they can argue for yet another investigation that would take years, millions of taxpayer dollars, and reach no conclusion.

September 28, 2004, Susan Hinkins, defendants’ statistical expert (National Opinion Research Center), transmitted her findings to Bert Edwards after completing her examination of the CP&R system.<sup>81</sup> She noted, as an initial matter, that the “current accounting procedure mandates that two things be verified to reconcile negotiated check disbursements – evidence of proper disbursement and negotiation.”<sup>82</sup> As part of Ms. Hinkins’ investigation, she examined the 440 disbursement transactions sampled as part of the Litigation Support Accounting;<sup>83</sup> 27 were eliminated because they were “out-of-scope debits” and 7 checks could not be located, leaving 406 checks in the sample.<sup>84</sup> The following results were reported:<sup>85</sup>

Endorsed – Signature	225
Endorsed – Stamp	19
	<u>244</u>
Illegible	141
Other Endorsement	5
Not Endorsed	8
Unintelligible	8
	<u>162</u>
	<u><b>406</b></u>

There is only one conclusion that can be drawn from Ms. Hinkins’ investigation – almost 40% of all checks could not be identified as disbursed to Individual Indian Trust beneficiaries. It

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<sup>81</sup> Pltffs’ Exh. 35 (Hinkins memo to Edwards), D000-000-HTA-WDC-000045-0002-0001 through ‘0005.

<sup>82</sup> She continued:

On the first requirement, one needs to show that a check payment was made to a correct account holder in the appropriate amount by locating the corresponding check register or check carbon copy. For the second requirement, accountants need to verify that the check issued was indeed negotiated *by obtaining the actual check copies from the Department of Treasury.*

*Id.* at ‘0001 (emphasis added). Ms. Hinkins similarly affirms that “copies of [] checks issued before 1991 are no longer available.” *Id.* at ‘0002.

<sup>83</sup> *See generally id.* at ‘0002.

<sup>84</sup> *See generally id.* at ‘0003.

<sup>85</sup> *See generally id.* at ‘0005.

is noteworthy that defendants are fully aware, having sought a legal opinion from their trust expert, Hughes & Bentzen, PLLC, (hereafter referred to as “H&B”) of the “proof a trustee must offer to establish that disbursements were made to beneficiaries.”<sup>86</sup> As a foundational matter, H&B opined that in the event:

the trustee ‘claims that he made payments to creditors or beneficiaries, these disbursements are disputed, and the trustee has no written evidence to substantiate his position due to a faulty record system, the court will tend to disallow the item.’ If the trustee claims that he kept an account book but that he has lost it, it has been held that he must bear the burden of proving the payments which he alleges were shown by the book, and that doubts will be resolved against him.<sup>87</sup>

Accordingly, although the CP&R database is incomplete, it is the best available data. Therefore, plaintiffs have employed CP&R aggregate totals by year to establish reasonable approximations for purposes of this equitable restitution and disgorgement calculation.

#### **4. Calculation of the Savings to the Government**

To calculate the benefit to the government for its withholding of plaintiffs’ trust funds in breach of trust, plaintiffs have utilized the 10 Year Treasury Note rate. This is the government’s cost of borrowing and it reflects the savings to the government that corresponds to reduced national debt – *i.e.*, outstanding government securities since the inception of the trust. Because of the amount of funds wrongfully held by the government and the length of the time such funds have been withheld, the aggregate benefit acquired by the government in connection with its wrongful withholding of plaintiffs’ trust funds is \$58 billion as of December 31, 2007. These calculations are show in **Attachment A**.<sup>88</sup>

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<sup>86</sup> Pltffs’ Exh. 36 (February 27, 2003 Hughes and Bentzen, PLLC legal opinion regarding disbursements), D000-000-HTA-WDC-000064-0006-0003.

<sup>87</sup> *Id.* at ‘0003 (quoting BOGERT at § 962).

<sup>88</sup> To ensure that investment income is not double counted, plaintiffs have reduced the reported collections by the amount of interest credited to plaintiffs’ trust accounts by the government.

**X. THIS COURT HAS JURISDICTION TO FASHION EQUITABLE RELIEF THAT VINDICATES PLAINTIFFS' RIGHTS.**

As this Court recently noted in *Cobell XX*: “Three jurisdictional requirements must be satisfied before a federal court may entertain an action against an officer or agency of the United States.” 2008 WL 253035, at \*49. *See also United American, Inc. v. N.B.C.-U.S.A. Housing, Inc. Twenty Seven*, 400 F. Supp. 2d 59, 61 (D.D.C. 2005) (“In any suit in which the United States is a defendant, there must be a cause of action, subject matter jurisdiction, and a waiver of sovereign immunity.”) (quoting *Presidential Gardens Assocs. v. United States*, 175 F.3d 132, 139 (2d Cir. 1999). “The first [of these requirements] is subject matter jurisdiction. That requirement is undisputed, as plaintiffs’ claims arise under the laws of the United States.” *Id.* (citing 28 U.S.C. § 1331; *Cobell VI*, 240 F.3d at 1094). This Court also found in *Cobell XX* that the cause of action exists as there is final agency action, satisfying the jurisdictional prerequisite.<sup>89</sup> *Id.* at \*50-51.

With respect to the final requirement – whether there is a waiver of sovereign immunity, this Court explained:

It has long been settled that the Administrative Procedure Act waived the government’s immunity to this suit. 5 U.S.C. § 702; *see also Cobell I*, 30 F. Supp. 2d at 38-42; *Cobell V*, 91 F. Supp. 2d at 24-28; *Cobell VI*, 240 F.3d at 1094-94; *Cobell XVIII*, 455 F.3d at 304. Plaintiffs assert a legal wrong because of agency action or inaction (Interior’s breach of its

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<sup>89</sup> Plaintiffs continue to believe that this action is also properly brought as an action to enforce statutory trust duties as informed by common law. This Court in *Cobell XX* did not reach that issue. But we note that the government’s sovereign immunity is waived for non-APA claims as well. *See, e.g., Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (“The APA’s waiver of sovereign immunity applies to any suit whether under the APA or not.” (emphasis added)); *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984); *Assinboine & Sioux Tribes of the Fort Peck Indian Reservation v. The Board of Oil and Gas Conservation of the State of Montana*, 792 F.2d 782, 793 (9th Cir. 1986) (“[A]bolition of sovereign immunity in § 702 is not limited to suits ‘under the Administrative Procedure Act’; the abolition applies to every ‘action in a court of the United States seeking relief other than money damages . . . .’ No words of § 702 and no words of the legislative history provides any restriction to suits ‘under’ the APA.”)

fiduciary duty to account), and their claim is for relief other than money damages. (The dispute about the nature of the relief plaintiffs seek has not been resolved. The agency contends that plaintiffs would not be entitled to any sort of monetary relief since their action relies on the waiver sovereign immunity in 5 U.S.C. § 702. Plaintiffs insist that the recovery of one's own unaccounted for trust funds is not money damages but equitable disgorgement, relying on *Bowen v. Massachusetts*, 487 U.S. 879, 897 (1988). These arguments have been considered in past *Cobell* decisions, *see, e.g., Cobell V*, 91 F. Supp. 2d at 28 n.20, and will surely be addressed again. For jurisdictional purposes, it is enough to note that the government has waived sovereign immunity at least insofar as the relief sought by plaintiffs is not money damages.)

*Id.* at \*49.

Defendants, thus, continue to argue that there has been no waiver of sovereign immunity, contending that plaintiffs' recovery of monetary relief would constitute "money damages" for purposes of Section 702 of the APA. 5 U.S.C. § 702 (1976). Defendants' argument is not supported by the law.

**A. The Sovereign Immunity of the United States Is Waived For The Specific Relief Sought By Plaintiffs.**

It is axiomatic that the United States may not be sued without its consent. *See Minnesota v. United States*, 305 U.S. 382, 388 (1939). Accordingly, a plaintiff must point to an applicable waiver of the government's immunity from suit to bring an action against it. Here, section 702 provides that waiver. *See Schnapper v. Foley*, 667 F.2d 102, 108 (D.C. Cir. 1981). It provides, in pertinent part:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States....

5 U.S.C. § 702 (1976).

As the D.C. Circuit explained in *Schnapper*, Section 702 was amended in 1976 to dramatically expand the waiver of federal immunity from suit: "The legislative history of this

provision could not be more lucid. It states that this language was intended ‘to eliminate the defense of sovereign immunity *with respect to any action in a court of the United States seeking relief other than money damages* and based on the assertion of unlawful official action by a Federal officer ....’ S. Rep. No. 996, 94th Cong., 2d Sess. at 2 (1976).” *Id.* at 107 (emphasis added). Indeed, in amending Section 702, the Senate was unequivocal with respect to the purpose and desired effect of the enactment: “[T]he time [has] now come to eliminate the sovereign immunity defense *in all equitable actions for specific relief* against a Federal agency or officer acting in an official capacity....” S. Rep. No. 966, 94th Cong., 2d Sess., at 7-8 (emphasis added).

In light of clear language of Section 702 and the congressional intent, the sole question for this Court with respect to sovereign immunity is whether equitable restitution and disgorgement is “relief other than money damages.” An analysis of the relevant caselaw demonstrates conclusively that the plaintiff class’ request for relief is not “money damages” and, accordingly, the immunity of the United States is waived by Section 702.

The analysis of whether certain relief is “money damages” as used in Section 702 naturally begins with the Supreme Court’s seminal decision in *Bowen*, 487 U.S. at 897. *Bowen* clarified that “[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as ‘money damages.’” *Id.* at 893. The Court explained further that courts have “long recognized the distinction between an action at law for damages – which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation – and an equitable action for specific relief – which may include an order providing for ... ‘the recovery of specific . . . monies.’” *Id.* (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)). Put another way, damages are

“compensatory” and “substitutionary” – “monetary compensation for an injury” sustained. And it is, as *Bowen* makes perfectly plain, fundamentally different from “specific relief,” in which the remedies plaintiff seeks “are not substitute remedies at all, but attempt to give the plaintiff *the very thing to which he was entitled.*” *Id.* at 895 (quoting D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 135 (1973)) (emphasis added). *See also Cobell v. Norton*, 260 F. Supp. 2d 98, 107 (D.D.C. 2003) (citing *Bowen* and noting the distinction between an action for “money damages” and an action in equity for recovery of “specific monies”).

Here, plaintiffs seek the “very thing to which [they are] entitled” including: (1) prompt payment of all withheld trust funds to the plaintiff class; and (2) payment of any profit that the trustee obtained through its breaches of trust, which, pursuant to settled law, the beneficiaries have a right to recover. As beneficiaries of a statutorily-created trust that is informed by common law, there can be no question, that plaintiffs have a legal entitlement to these “things.” Through the June 9 proceeding, plaintiffs seek to recover these things, using a classic instrument of specific relief – equitable restitution and disgorgement.

Defendants contend that because plaintiffs seek a monetary recovery, they must be seeking money damages, despite *Bowen* and the weight of the authority to the contrary. It is settled law that “[r]estitution, which lies within [the federal court’s] equitable jurisdiction, is consistent with and differs greatly from ... damages.” *Porter*, 328 U.S. at 402. The leading treatise on remedies (relied on repeatedly by the Supreme Court in *Bowen* and elsewhere) states it more emphatically still: “[R]estitution is not damages; restitution is a restoration required to prevent unjust enrichment.” 1 DOBBS § 4.1(2), at 557 (emphases in original). *See also, e.g., United States v. Minor*, 228 F.3d 352, 355 (4th Cir. 2000) (action to recover value of currency improperly forfeited was not money damages because plaintiff sought “restitution of the very

thing to which he claim[ed] an entitlement, not damages in substitution for a loss”) (citation omitted); *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 797 (Fed. Cir. 1993) (Action seeking return of money unlawfully withheld from airlines involved money to which they were legally entitled; therefore, the order that the funds “be paid over to their rightful owner [was] in no way an order for the payment of ‘money damages’”).

As this Circuit made unmistakably clear in *Crocker*, 49 F.3d at 747, where, as here, a plaintiff seeks through restitution a payment of money “because that sum of money was itself the thing unjustly taken[,] .... the payment of money from defendant to plaintiff represents a kind of specific relief rather than compensatory damages.” The Court further clarified: “Whatever restitution encompasses, ... we clearly may not collapse it into the broader notion of ‘compensation.’” (citation omitted). *Id. See also First City Fin.*, 890 F.2d at 1230 (“Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating [the law.]”); *Aetna Casualty & Surety Co.*, 71 F.3d at 478-79 (action by surety company to recover payments made by government to debtor in violation of its subrogation rights was not barred by section 702 where plaintiff sought to compel a legal obligation and not recovery of damages); *See also* 1 DOBBS, § 4.3(5) at 610 (It is appropriate to order equitable restitution for defendants’ breaches of trust and order defendants to “disgorge gains received from the improper use of [trust property] or entitlements.”).

To the extent that defendants no longer hold the same funds they initially had collected – the action to recover the value of the collected funds is not an action for damages. The D.C. Circuit’s decision in *America’s Community Bankers*, 200 F.3d 822 is instructive on this point. There, a trade association of banks and savings and loans (“Banks”) brought suit under the APA to obtain a refund of improper assessments by the government against its members. *Id.* at 829.

The defendant agency, the FDIC, contended that Section 702's immunity waiver did not apply because the FDIC no longer held the same funds that were alleged to have been impermissibly collected. Any refund would necessarily be satisfied from a different set of funds and, hence, according to the government, the relief plaintiffs sought is not specific relief, but money damages. *Id.* The D.C. Circuit flatly rejected this argument. Noting that *Bowen* and its progeny “focus on the nature of the relief sought” and “not on whether the agency still has the precise funds paid,” the Court held that the plaintiffs’ “claim[] entitlement” to these funds pursuant to legal obligations and, thus, “the claim represents specific relief within the scope of 5 U.S.C. § 702, not consequential damages compensating for an injury.” *Id.* at 829-30; *see also Aetna Casualty & Surety Co.*, 71 F.3d at 479 (holding the fact the government had mistakenly paid the subject funds to a third party did not convert the plaintiffs’ claim to one for recovery of damages);<sup>90</sup> *Minor*, 228 F.3d at 355 (that the government could not restore to the plaintiff the specific currency that was seized does not transform the action into one at law for damages). *Cf. Alabama v. Bowsher*, 734 F. Supp. 525, 533, n.10 (D.D.C. 1990), *aff’d sub nom. Arizona v. Bowsher*, 935 F.2d 332 (D.C. Cir.), *cert. denied*, 502 U.S. 981 (1991) (where states sought to recover trust funds held by Treasury, the states were “seeking specific monies within the unclaimed monies accounts which they claim they are entitled to under their state law” and therefore it was not an action for money damages).

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<sup>90</sup> *Aetna Casualty* is important for a separate reason. In *Bowen*, the legal obligation that entitled the plaintiff to certain funds was established by statute. *Aetna Casualty*, 71 F.3d at 479. In *Aetna Casualty*, the government argued that only legal entitlements created by statute (as opposed to legal obligations otherwise created) could lead to monetary relief that was specific relief in nature. The *Aetna Casualty* court held that *Bowen* applied both to duties “prescribed by statute” as well as those “arising under some other rule of law.” Here, too, plaintiffs’ rights are grounded in statute and the relief sought is limited to that which the plaintiffs have a right to recover.

Section 702 waives sovereign immunity for suits other than money damages. This includes specific relief for the trust funds held by the United States and the benefits the government has unjustly obtained in breach of trust. Accordingly, the waiver of immunity in Section 702 applies and this Court may order restitution and disgorgement.

**XI. THE EQUITABLE REMEDIES OF DISGORGEMENT AND RESTITUTION ARE AVAILABLE TO PLAINTIFF CLASS UNDER THIS COURT'S RULE 23(B)(1)(A) AND (B)(2) CERTIFICATION**

**A. Monetary relief is available in a class action certified under Rule 23(b)(1) and (b)(2).**

This Court certified this class of present and former IIM beneficiaries under Rule 23(b)(1)(A) and (b)(2) on February 4, 1997, finding that the “prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendants,” Order of February 7, 1997, at 3 [Dkt. No. 27] (quoting Fed. R. Civ. P. 23(b)(1)(A)), and that “defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole.” *Id.* (quoting Fed. R. Civ. P. 23(b)(2)). At the March 5, 2008 status conference, defendants contended that this case should not proceed to a remedies phase as a certification under Rule 23(b)(1) or (2) precludes recovery of “an award of money.” March 5, 2008 Hrg. Tr. at 12:8-13:4. Defendants are incorrect.

A class action certification under Rule 23(b)(1)(A) or (b)(2), seeking principally injunctive or declaratory relief, does not prevent this Court from granting monetary relief to class members as well. *Eubanks v. Billington*, 110 F.3d 87, 92 (D.C. Cir. 1997). *See also* ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS*, § 4:14 p. 73 (4th ed. 2002) (“NEWBERG”). Monetary relief is permissible on a classwide basis in actions under Rule

23(b)(1) or (2) where the “awards are either (1) equitable in nature or (2) secondary or ancillary to the general scheme of injunctive or declaratory relief sought by the plaintiffs.” *Eubanks*, 110 F.3d at 92. Either is satisfactory; plaintiffs have met both.

**1. Plaintiffs seek equitable relief, not damages.**

While both Rules 23(b)(1) and (2) are silent as to the recovery of monetary relief in a class action certified under those sections, the Advisory Committee notes provide that (b)(2) “does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.” Advisory Comm. Note to Fed. R. Civ. P. 23(b)(2) (1966). *See also Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 (D.C. Cir. 2006); *Garcia v. Veneman*, 211 F.R.D. 15, 22 (D.D.C. 2002). However, once again, “money damages” are far different from equitable restitution. *See, e.g., Jefferson v. Ingersoll International, Inc.*, 195 F.3d 894, 899 (7th Cir. 1999) (distinguishing between “money damages” and “equitable monetary relief” in considering certification under 23(b)(2)). *See also Porter*, 328 U.S. at 402 (“Restitution, which lies within [the federal court’s] equitable jurisdiction, is consistent with and differs greatly from ... damages.”); 1 DOBBS, § 4.1(2), at 557 (“[R]estitution is not damages; restitution is a restoration required to prevent unjust enrichment.” (emphases in original)); *Crocker*, 49 F.3d at 747 (“[B]ecause that sum of money was itself the thing unjustly taken[,] .... the payment of money from defendant to plaintiff represents a kind of specific relief rather than compensatory damages. ... “Whatever restitution encompasses, ... we clearly may not collapse it into the broader notion of ‘compensation.’” (citation omitted)).

Plaintiffs are not seeking “money damages.” Equitable restitution and disgorgement are available without limitation to a class certified under Rule 23(b)(1) and (2). Accordingly, once it is determined that the plaintiff class is entitled to injunctive or declaratory relief in a 23(b)(2) class, “the full panoply of the court’s equitable powers is introduced.” *Newberg* at § 4:14 at 73.

Since inception, plaintiffs' principal requested remedies were declaratory or injunctive relief – trust reform and an accounting. On December 21, 1999 this Court granted that primary relief, declaring under the Declaratory Judgment Act, 28 U.S.C. § 2201, that defendants were in breach of the fiduciary duty to account and were required “to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs,” and ordering them, among other things, to “promptly come into compliance.” *Cobell V*, 91 F. Supp. 2d 1, 58 (D.D.C. 1999). The accounting declared would have led inevitably to some equitable monetary relief in the nature of a decree adjusting or restating accounts to reflect accurate trust balances. *Cobell I*, 30 F. Supp. 2d at 40. However, because defendants have repudiated their duty to account, plaintiffs are left with restitutionary remedies. As set forth above, plaintiffs' monetary award in restitution is equitable and not “money damages.” *See infra* at Part IV. Such relief is incidental to, and flows from, this Court's declaratory judgment that defendants are in breach of trust and in violation of their accounting duties. Defendants' repudiation of their trust duties does not shield them from accountability.

This Court's decision in *Coleman v. Pension Ben. Guar. Corp.*, 196 F.R.D. 193 (D.D.C. 2000) is instructive. There, former employees brought suit contending that the defendant had violated ERISA in amending its pension plan to suspend layoff benefits and diverting plan assets. Plaintiffs sought declaratory and injunctive relief, finding the plan amendment invalid, as well as various forms of monetary relief, including repayment to the plan of \$12.68 million. *Id.* at 199. The court found certification under Rule 23(b)(2) to be proper, including the request for monetary relief. As the Court described, the monetary relief sought derived solely from the requested declaratory judgment, and, in any event, the “claim for benefits [was] equitable in nature because it [sought] restitution, rather than damages, thus rendering it appropriate for

certification under Rule 23(b)(2).” *Id.* Other courts that have addressed this issue are in accord, when the monetary relief sought is restitution or disgorgement. *See, e.g., Lightfoot v. District of Columbia*, 246 F.R.D. 326, 343 (D.D.C. 2007) (certification under 23(b)(2) was proper where plaintiff requested “restitution rather than damages”); *Clarke v. Ford Motor Co.*, 220 F.R.D. 568, 580 (E.D. Wis. 2004), *vacated on other grounds*, 228 F.R.D. 631 (E.D. Wis. 2005) (where plaintiff claimed breach of fiduciary duty by plan representative and sought restitution of benefits improperly withheld and disgorgement of profits, monetary relief requested is equitable and certification under 23(b)(2) proper); *Broussard v. Foti*, 2001 WL 699525 (E.D. La. June 18, 2001) (monetary relief in the form of restitution of improper surcharges is equitable and certification under 23(b)(2) proper); *Allen v. Leis*, 204 F.R.D. 401, 409 (S.D. Ohio 2001) (holding an award of equitable restitution proper in a class 23(b)(2) certification). *See also Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 476-77 (E.D. Pa. 2007) (certifying a class under Rule 23(b)(2) where the class sought “disgorgement of profits”); *Richards v. FleetBoston Fin. Corp.*, 235 F.R.D. 165, 174 (D. Conn. 2006) (certifying a class under Rule 23(b)(2) where the class sought “an injunction requiring the payment of monies unlawfully withheld”); *Mulder v. PCS Health Systems, Inc.*, 216 F.R.D. 307, 319 (D.N.J. 2003) (certifying a class under Rule 23(b)(2) where the class sought “disgorgement of illegal profits”).

Plaintiffs, here, similarly seek equitable monetary relief, including restitution and disgorgement based on this Court’s declaratory judgment, holding that defendants are in breach of their fiduciary duties and the trustee’s repudiation of the declared accounting. Accordingly, the restitutionary award sought by plaintiffs is not “damages” and is proper under the February 4, 1997 class certification order.

**2. The equitable relief is secondary or incidental to the declaratory relief ordered by this Court.**

The relief plaintiffs seek is equitable in nature. Accordingly, this Rule 23(b)(2) class action can proceed and this Court can award restitution and order disgorgement. Plaintiffs need show no more. Nevertheless, here, plaintiffs also satisfy the alternative ground for sustaining a Rule 23(b)(2) class – namely that monetary relief sought is neither “exclusive[]” nor “predominant[].”

Plaintiffs brought this action to enforce fundamental trust duties owed to them by their trustee, the United States, including the duty to account. Further, plaintiffs ask for the correction of account balances in conformity with the accounting that has been declared. In addition, in light of the undisputed reality that the trust management system is broken, plaintiffs sought reformation of the trust, described by this Court as “fixing the system.”

Neither the Supreme Court nor this Circuit have determined when monetary relief is deemed to predominate in a class action requesting both declaratory or injunctive relief and a monetary award. *See Richards v. Delta Air Lines, Inc.*, 453 F.3d at 531 n.8; *Garcia*, 211 F.R.D. at 23. Other Circuits have adopted two very distinct approaches for analyzing such situations. *Compare Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001) (endorsing a flexible *ad hoc* balancing of the relative importance of the remedies sought);<sup>91</sup> *with Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (“monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory

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<sup>91</sup> This Court has suggested that this Circuit may be inclined to follow the Second Circuit’s *ad hoc* balancing approach. *Garcia*, 211 F.R.D. at 23; *Taylor v. D.C. Water & Sewer Auth.*, 205 F.R.D. 43, 50 (D.D.C. 2002).

relief”).<sup>92</sup> The monetary relief requested in this case does not predominate under either test and is clearly incidental to the declaratory judgment that has been repudiated by the trustee.

**a. Under the Second Circuit’s Ad Hoc Balancing Test Equitable Restitution May be Awarded and Disgorgement Ordered**

In *Robinson*, the Second Circuit examined the following factors to determine whether, in a case seeking both monetary and injunctive or declaratory relief, the monetary relief requested predominated such that it precluded a 23(b)(2) certification: Whether “(1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.” *Id.* at 164.

The court in *FleetBoston Financial* applied this ad hoc balancing approach in an action brought by an employee seeking class certification for all employees affected by an allegedly invalid amendment to the employer’s pension plan, which reduced the cash balances of the plan participants’ accounts.<sup>93</sup> 235 F.R.D. at 168. In addition to an injunction prohibiting enforcement of the amendment, plaintiffs sought equitable relief to determine plan participant losses and payment of other additional benefits. *Id.* at 174-75. In determining that certification under 23(b)(2) is proper, despite a request for an equitable monetary award, the Court found that reasonable plaintiffs would bring the suit “even in the absence of possible monetary recovery,” *id.* at 174 (quotations and citations omitted), as all of the potential class members would benefit

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<sup>92</sup> See also *Coleman v. General Motors Acceptance Corp.*, 296 F.3d 443, 447-50 (6th Cir. 2002); *Lemon v. Int’l Union of Operating Eng’rs, Local No. 139*, 216 F.3d 577, 580-81 (7th Cir. 2000); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001).

<sup>93</sup> While it applied the ad hoc balancing approach, the court in *FleetBoston Financial* offered support for the *Coleman* distinction between monetary relief and money damages that permits certification under 23(b)(2). Rejecting defendants’ argument that the plaintiffs’ only interest was monetary relief, the Court stated: “These objections do not prevent (b)(2) certification. For purposes of subsection (b)(2), an injunction requiring the payment of monies unlawfully withheld in the past may be considered injunctive relief.” *Id.* at 174 (citing *Walsh v. Northrop Grumman Corp.*, 162 F.R.D. 440, 448 (E.D.N.Y. 1995)).

from an injunction prohibiting the future application of the amendment that adversely affected their cash balances. *Id.* “[T]he injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.” *Id.* The class could not receive relief unless the court found the amendment invalid and ineffective. Thus, declaratory relief was necessary to show that the balances calculated under the amended plan were improper and to allow the court to order a suitable equitable monetary award. *Id.* at 174-175.

In applying the ad hoc balancing approach to this case, the monetary relief sought by the plaintiff class does not predominate. First, “even in the absence of possible monetary recovery, reasonable plaintiffs would bring th[is] suit to obtain the injunctive or declaratory relief sought.” *Robinson*, 267 F.3d at 164. Indeed, here the plaintiff class brought this action without knowing whether it was entitled to equitable monetary relief. *See* Complaint at p. 12, ¶ 24. (“The representative plaintiffs, and all other members of the class, thus do not know, and have no way of ascertaining, and unless the Court grants the relief here *sought* will in the future have no way of knowing or ascertaining, the true state of their accounts . . . .” (emphasis added)). Further, plaintiffs here sought and obtained all manners of injunctive relief – including enforcement of the trustee-delegates’ obligation to account through contempt, temporary restraining order, and preliminary injunction.<sup>94</sup>

It is self-evident that an accounting is relief for which beneficiaries commonly sue, independent of other claims. Furthermore, here, plaintiffs continue to seek reform of a broken

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<sup>94</sup> Below is a representative sample of declaratory judgments, temporary restraining orders and preliminary injunctions entered in this case none of which were sought or entered for purposes of monetary recovery. *See, e.g.*, Declaratory Judgment of Dec. 21, 1999 [Dkt. No. 412]; Temporary Restraining Order of Dec. 5, 2001 disconnecting dangerously insecure information technology systems [Dkt. No. 1036]; Consent Order admitting to the dangerous conditions of the information technology systems, Dec. 17, 2001 [Dkt. No. 1063]; Class Communication Order protecting beneficiaries from improper communications from trustee, Dec. 23, 2003, [Dkt. No. 1692]; Order Issuing Structural Injunction, Sept. 25, 2003 [Dkt. No. 2310].

trust management system – equally important and equally injunctive in nature. Finally, plaintiffs sought and this Court provided declaratory relief of significance in its own right. The magnitude of the declaratory relief ordered by this Court cannot be emphasized enough. This Court characterized the declaratory judgment as a “stunning victory . . . on behalf of the 300,000-plus Indian beneficiaries of the IIM trust” that would make reform of the IIM trust “a reality rather than a dream.” *Cobell V*, 91 F. Supp. 2d at 57. Under these circumstances, the plaintiff class undoubtedly satisfies the first prong of the ad hoc balancing test.

Applying the second prong, it is clear that the declaratory relief is “both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.” *Robinson*, 267 F.3d at 164. The plaintiff class has succeeded on the merits and declaratory relief was necessary, appropriate, and awarded. This Court determined that defendants “are currently in breach of statutory trust duties,” declared that “[t]he Indian Trust Fund Management Reform Act, 25 U.S.C. §§ 162a *et seq.* & 4011 *et seq.*, required defendants to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited,” and ordered defendants to “promptly come into compliance.” *See Cobell*, 91 F. Supp. 2d at 58. Such declaratory relief is an essential predicate to the equitable monetary relief plaintiffs seek, due to the trustee’s repudiation of its duty to account, rendering the accounting impossible as a matter of law.

The trustee-delegates’ history of failing to properly steward the IIM Trust also provides support for allowing the plaintiff class to obtain equitable monetary relief through this action under the ad hoc balancing approach. *See Robinson*, 267 F.3d at 164 (Courts must “assess whether (b)(2) certification is appropriate in light of the relative importance of the remedies

sought, given all of the facts and circumstances of the case.” (internal quotations and citations omitted)). A 1992 congressional report noted:

Scores of reports over the years by the Interior Department's inspector general, the U.S. General Accounting Office, the Office of Management and Budget, and others have documented significant, habitual problems in the [Bureau of Indian Affairs'] ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the trust funds.

*Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.R. No. 102-449 (1992). Notwithstanding plaintiffs' vigorous prosecution of this case and the heroic efforts of this Court, the trustee-delegates still do “not know the precise number of accounts that it is to administer and protect.” *Cobell VI*, 240 F.3d at 1089. The trustee-delegates also do “not know the proper balances for each IIM account, nor do [the trustee-delegates] have sufficient records to determine the value of IIM accounts.” *Id.* And, those questions may never be resolved because the trustee has repudiated its declared accounting duty. *See Cobell XX*, 2008 WL 253035, at \*1. Worse, without equitable restitution and disgorgement ordered or decreed, defendants will never be deterred in their gross mismanagement of the IIM Trust and a manifest injustice will result.

Moreover, that the potential equitable monetary relief may be significant is not a factor in determining the propriety of a 23(b)(2) certification. In other words, the predominance of the monetary relief versus the injunctive or declaratory relief is not determined by the restitutionary amount. Courts do not balance the declaratory and monetary relief and “somehow attempt to ascertain which is the heavier scale.” *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 451 (N.D. Cal. 1994). The value of declaratory relief ordered is “virtually immeasurable.” *Id.* *See also Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1186 (9th Cir. 2007) (“[T]he predominance test turns on the *primary goal* of the litigation – not the theoretical or possible size of the damage

award.” (emphasis in original)); *Beck v. Boeing Co.*, 203 F.R.D. 459, 466 (W.D. Wash. 2001), *rev’d in part on other grounds*, 2003 WL 683797 (9th Cir. 2003) (holding the predominance of one form of relief is not measured by the amount of monetary relief awarded).<sup>95</sup>

The declaratory relief sought (and obtained) is reasonably necessary and appropriate, and the equitable monetary relief sought by the plaintiff class does not, and cannot predominate under the standard enunciated in *Robinson*.

**b. Under the Fifth Circuit’s “Incidental” Test Equitable Restitution May be Awarded and Disgorgement Ordered**

The Fifth Circuit in *Allison*, 151 F.3d 402 set forth an alternative test to *Robinson*. In *Allison*, the court held that a damages claim “predominates” in class actions certified under 23(b)(2), “unless it is incidental to requested injunctive or declaratory relief.”<sup>96</sup> *Id.* at 415. *See also, e.g., General Motors Acceptance Corp.*, 296 F.3d at 447-50.

Likewise, the equitable monetary relief sought by plaintiffs in this action does not predominate under the Fifth Circuit’s approach. In *Allison*, the court defined incidental to “mean damages that flow directly to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief.” *Id.* (emphasis in original). The court explained that the “incidental” approach for determining predominance is designed to “balanc[e] competing interests underlying the class action device.” *Id.* Those interests are: (1) “protect[ing] the legitimate interests of potential class members who might wish to pursue their monetary claims

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<sup>95</sup> Of course, any equitable monetary award to which the plaintiff class is entitled is modest compared to the value of land and subsurface rights that are also in issue.

<sup>96</sup> Importantly, the *Allison* court recognized the distinction adopted in *Pension Ben. Guar. Corp.* between equitable restitution awards and money damages for Rule 23(b)(2) purposes. The *Allison* court made clear that the “incidental” test announced therein is consistent with Fifth Circuit precedent that permits courts to certify classes under (b)(2) where the monetary relief sought is equitable in nature. 151 F.3d at 415-16. (“[In *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974), w]e construed (b)(2) to permit monetary relief when it was an equitable remedy . . . . If the instant case involved only claims for equitable monetary relief, *Pettway* would control.”).

individually;” and (2) “preserv[ing] the legal system's interest in judicial economy.” *Id.* Equitable monetary relief is incidental under this approach when it flows “directly to the class *as a whole*” because no individual calculations of monetary relief are necessary (or any necessary calculations are objective). *Id.* See also *Garcia*, 211 F.R.D. at 23.

Although a differently-stated standard, plaintiffs in this action may still proceed in a Rule 23(b)(2) class under the analytical framework set forth in *Allison*. Here, plaintiffs seek equitable restitution and disgorgement from the breaching trustee. In this respect, *Cobell* is not dissimilar from *Mehling*, where the court applied the *Allison* “incidental” test when evaluating whether to approve a class action settlement<sup>97</sup> in an action brought by current and former employees and agents of an insurance company, alleging breach of fiduciary duty through improper investments and seeking an accounting and disgorgement of all illegal profits. 246 F.R.D. at 471, 477. Reciting the test announced in *Allison*, the court stated that even damages are incidental when they:

(1) flow directly from liability to the class as a whole on the claims forming the basis for the injunctive or declaratory relief; (2) are capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances; (3) should not require additional hearings to resolve the disparate merits of each individual's case, nor introduce new and substantial legal or factual issues entailing complex individualized determinations; and (4) will, by definition, be more in the nature of a group remedy.

*Id.* at 467. The court concluded that the disgorgement of profits was incidental to, and flowed directly from, the declaratory relief requested – all recoverable profits were amassed only if the insurance company breached its fiduciary duty. *Id.* at 476-77. The monetary relief was incidental because it “would be objectively calculable and could be distributed . . . without

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<sup>97</sup> Settlement classes must satisfy the Rule 23(a) requirements and the relevant 23(b) requirements. See, e.g., *Vista Healthplan, Inc. v. Warner Holdings Co. III*, 246 F.R.D. 349 (D.D.C. 2007); see also *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997).

holding additional hearings . . . .” *Id.* at 476. The class was certified under Rule 23(b)(2). *Id.* at 477. *See also Mulder*, 216 F.R.D. at 319 (where plaintiffs requested disgorgement of profits from fiduciary in addition to declaratory and injunctive relief affecting employee benefit plan, equitable monetary relief did not predominate as it flowed directly from the declaratory relief affecting class members as a whole).

Here, too, the equitable monetary relief is incidental to the injunctive and declaratory relief ordered. The equitable monetary relief “flow[s] directly . . . to the class as a whole on the claims forming the basis for the injunctive or declaratory relief.” *Mehling*, 246 F.R.D. at 476. Importantly, the declaratory relief in this case determined, among other things, that defendants are in breach of their fiduciary duty to account to the class as a whole. Necessarily, all equitable monetary relief requested is incidental to that finding and trustee’s repudiation of its declared duty to account.

Equitable monetary relief here is “capable of computation by means of objective standards and [is] not dependent in any significant way on the intangible, subjective differences of each class member's circumstances.” *Id.* The trustee will not discharge its declared accounting duties. Further, the IIM Trust is a commingled trust and, in the absence of a complete and accurate accounting, no member of the class can know the amount to which he is entitled. In fact, it is now impossible to evaluate with adequate precision subjective differences amongst class members’ circumstances. Therefore, any equitable monetary remedy must benefit the class as a whole. No individualized monetary remedies are possible, particularly, where, as here, the restitutionary award and disgorgement ordered is measured by the benefit obtained by the trustee and its delegates in connection with their breaches of trust. It is not measured in any way by “subjective differences” inasmuch as injury to the class as a whole or any individual

member is irrelevant. Hence, there will be no need for “additional hearings.” *Id.* Accordingly, the equitable relief “will, by definition, be more in the nature of a group remedy.” *Id.* See also *In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005) (Posner, J.) (Operational meaning of “incidental” in (b)(2) class certification is that the recovery computation is mechanical, with no need for individual calculation.). See also MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.221 (2004).<sup>98</sup>

In sum, the class as certified under (b)(2) may obtain the equitable monetary relief that it seeks. First, the relief sought by the plaintiff class is not money damages, but rather equitable monetary relief. See, e.g., *Pension Benefit Guar. Corp.*, 196 F.R.D. at 199. Second, the equitable monetary relief sought by plaintiffs in this class action does not predominate under either the Second or Fifth Circuit’s standards. See, e.g., *FleetBoston Financial*, 235 F.R.D. at 174; *Mehling*, 246 F.R.D. at 476-77. Finally, the fact that the requested equitable relief is significant does not mean that it predominates for purposes of certification. See, e.g., *Allison*, 151 F.3d at 412 (“[D]etermining whether one form of relief actually predominates in some quantifiable sense is a wasteful and impossible task that should be avoided.”). Indeed, it is impossible to compare in a quantifiable sense the value of deterrence that results from actually enforcing the trust duties owed to the plaintiff class, when for 120 years the trustee has grossly mismanaged the IIM Trust. Without equitable restitution and disgorgement, the trustee-

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<sup>98</sup> For purposes of class certification under (b)(2), this Circuit also requires that the equitable monetary relief sought not require the court to perform individualized determinations of relief. See *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997) (“That back pay is characterized as a form of ‘equitable relief’ in Title VII cases does not undercut the fact that variations in individual class members’ monetary claims may lead to divergences of interest that make unitary representation of a class problematic in the damages phase.”) (citations omitted). Unlike back-pay cases, here the monetary award would be measured solely by the value of defendants’ unjust enrichment, not the extent of injury to the plaintiff class. Therefore, the relief plaintiff seeks does not implicate “variations in individual class members’ monetary claims.” *Id.*

delegates will have no incentive to discharge their trust duties and the IIM Trust will be reduced to a legal fiction. Here, deterrence is crucial.

**B. Notice and Opt-out Rights.**

As the relief requested is solely equitable and benefits the class as a whole, individualized damage remedies are not viable. Therefore, notice and opt-out rights in this 23(b)(1) and (2) action are unnecessary. To the knowledge of plaintiffs, no class member has filed an individual damage claim in the 12 years of this litigation. Nevertheless, this action does not preclude any beneficiary from filing an individual damage claim in the U.S. Court of Federal Claims. *See Eubanks*, 110 F.3d at 52 (“Nothing prevented [class plaintiff seeking to opt out] from pursuing an individual lawsuit during the past seventeen years...”).

However, plaintiffs recognize that this Court has the flexibility to modify the class certification order and provide notice and opt-out rights. This Circuit has found that “the procedural flexibility suggested in [Rule 23] subsection (d)” is “broad enough to permit the court [flexibility] to facilitate a fair and efficient conduct of the litigation.” *See Eubanks*, 110 F.3d at 95, 96. And, this Court has, unequivocally retained such jurisdiction when it certified the class on February 4, 1997. *See Order Certifying Class Action*, at p. 3 [Dkt. No. 27]. This Circuit views the flexibility of 23(d) as broad enough to permit courts to provide notice to class members and permit opt out if deemed by this Court to be appropriate. *Eubanks*, 110 F.3d at 96. *See also Thomas v. Albright*, 139 F.3d 227, 234 (D.C. Cir. 1998). Should this Court make a determination that plaintiffs are entitled to a restitutionary award, in its discretion it may permit individual class members to opt out “on a selective basis” where they can establish their claims “are sufficiently unique or sufficiently distinct from the claims of the class as a whole.” *Eubanks*, 110 F.R.D. at 50. However, here, no relief is sought that is measured by harm to any

member of the class. Therefore, it is not possible to establish claims that are distinct among the plaintiff class.

## **XII. PRIOR DECISIONS IN THIS CASE SUPPORT AN AWARD OF EQUITABLE RESTITUTION**

Defendants suggested to this Court, at oral argument, that proceeding to a restitution/disgorgement trial was precluded by the “law of the case” concerning the “issue of a remedy.” March 5, 2008 Hrg. Tr. at 5:15-16. Their argument is premised on the belief that plaintiffs’ remedy is limited to an accounting, and if an accounting is impossible due to the trustee’s repudiation, no relief is available, as any “other relief” is “not this case.” *Id.* at 11:7-25. However, no decisions of this Court or the Court of Appeals preclude an appropriate restitutionary award and disgorgement order. To the contrary, those decisions make clear that any equitable remedy, including traditional restitution, is available to redress defendants’ egregious breach of trust and vindicate plaintiffs’ rights. Defendants’ argument that after twelve years of litigation there can be no remedy in this action for their wrongdoing is untenable, particularly where as, as here, the trustee unconscionably has repudiated its declared accounting duty.

As determined by this Court’s landmark decision in *Cobell XX*, a critical remedy requested in plaintiffs’ complaint, that of an accounting, is rendered impossible. *Cobell XX*, 2008 WL 253035, at \*1. However, this does not and cannot preclude the grant of other appropriate equitable relief. This Court is empowered under Federal Rule of Civil Procedure 54(c) “to grant the relief to which the prevailing party is entitled, regardless whether the party specifically requested the relief in its complaint.” *People for The Ethical Treatment of Animals v. Gittens*, 396 F.3d 416, 421 (D.C. Cir. 2005). *See generally* Fed. R. Civ. P. 54(c) (“every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if

the party has not demanded such relief in the party's pleadings"). The courts have interpreted this rule liberally, "leaving no question that it is the court's duty to grant whatever relief is appropriate in the case on the basis of the facts proved." *Robinson v. Lorillard Corp.*, 444 F.2d 791, 803 (4th Cir. 1971). See also *Dunkin Donuts of America, Inc. v. Minerva, Inc.*, 956 F.2d 1566, 1575 (11th Cir. 1992); 10C WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2664 at 146 (1983). This is particularly true where the principal relief requested has been held to be unavailable. See, e.g., *Reynolds v. Slaughter*, 541 F.2d 254, 255-56 (10th Cir. 1976) (where requested damage remedy was not available, restitution could be awarded even where not plead); *Matarese v. Moore-McCormack Lines, Inc.*, 158 F.2d 631, 633 (2nd Cir. 1946) (equitable relief proper where legal relief requested in complaint is not available).

There is nothing in the "law of the case" that limits the available equitable remedies. The law of the case doctrine holds that "the *same* issue presented in the *same* case in the *same* court should lead to the *same* result." *PNC Financial Services Group, Inc. v. Comm'r.*, 503 F.3d 119, 126 (D.C. Cir. 2007) (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1392 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997) (emphasis added). *Accord Cooksville Regional Medical Center v. Leavitt*, 2006 WL 2787831, at \*5 (D.D.C. Sept. 26, 2006). However, the prior decisions of this Court and the Court of Appeals only serve to reaffirm the ability to award appropriate equitable relief.

It was the Court of Appeals that held "if a right of action exists to enforce a federal right of action and Congress is silent on the question of remedies, a federal court may order *any appropriate relief*." *Cobell VI*, 240 F.3d at 1108 (quoting *Gwinnett County Public Schools*, 503 U.S. at 69 (emphasis in original)). Accordingly, it determined that this Court "has substantial ability to order that relief which is necessary to cure the [government's] legal transgressions."

*Id.* at 1108. Because there is no statutory restriction on the relief that may be ordered, it concluded this Court has the “full range” of its equitable powers, and “was justified in fashioning equitable relief that would ensure the vindication of plaintiffs’ rights.” *Id.* at 1108.<sup>99</sup> Less than two years ago, the Court of Appeals reaffirmed these principles, holding that, because defendants “have egregiously breached their fiduciary duties,” this Court “retains substantial latitude ... to fashion an equitable remedy.” *Cobell XVIII*, 455 F.3d at 305 (quoting *Cobell XII*, 391 F.3d at 257-58).<sup>100</sup>

Moreover, this Court repeatedly has recognized that this action in equity includes an equitable restitutionary component. In 1998, in considering defendants’ motion for judgment on the pleadings, Judge Lamberth wrote:

The defendants seek from the beginning to constrain the plaintiffs’ claims to the APA, but such a characterization simply does not compare with the facts alleged and the allegations set forth in the complaint. Therefore, *to the extent that the plaintiffs state a claim for equitable relief for breach of trust duties*, the defendants’ motion for judgment on the pleadings must be denied.

*Cobell I*, 30 F. Supp. 2d at 33 (emphasis added). Subsequently, Judge Lamberth recognized that plaintiffs’ statutory right to an accounting may “support some future monetary claim” – relief appropriately characterized as equitable in nature and *not* “money damages.” *Cobell V*, 91 F. Supp. 2d at 28. Therefore, while an accounting may yield a “restitutionary award,” “*restitution* is not damages; restitution is a restoration required to prevent unjust enrichment.” *Id.* at 28, n.20 (quoting DOBBS, § 4.1(2) at 557 (emphasis in original)).

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<sup>99</sup> Importantly, in response to plaintiffs’ argument before the Court of Appeals that any accounting is impossible and the district court should consider alternative equitable remedies, the Court of Appeals expressly reserved the right of this Court to address the impossibility of an accounting. *Cobell XVII*, 428 F.3d at 1077.

<sup>100</sup> This Court recognized its equitable authority in its January 30, 2008 decision. *Cobell XX*, 2008 WL 253035, at \*64.

Therefore, throughout the lengthy history of this case, this Court and the Court of Appeals have acknowledged the power of this Court to award plaintiffs appropriate equitable relief. There is nothing in the “law of the case” to suggest otherwise.

### **XIII. CONCLUSION**

Plaintiffs respectfully submit this Memorandum in Support of Equitable Restitution and Disgorgement.

Respectfully submitted,

/s/ Dennis M. Gingold  
DENNIS M. GINGOLD  
D.C. Bar No. 417748  
607 14th Street, N.W.  
9th Floor  
Washington, D.C. 20005  
(202) 824-14448

/s/ Keith Harper  
KEITH HARPER  
D.C. Bar No. 451956  
JUSTIN M. GUILDER  
D.C. Bar No. *Pending*  
Kilpatrick Stockton LLP  
607 14th Street, N.W.  
Washington, D.C. 20005  
(202) 508-5844

DAVID COVENTRY SMITH  
N.C. Bar No. 12558  
*Admitted Pro Hac Vice*  
Kilpatrick Stockton LLP  
1001 West Fourth Street  
Winston-Salem, NC 27101-2400  
(336) 607-7392

WILLIAM E. DORRIS  
Georgia Bar No. 225987  
*Admitted Pro Hac Vice*  
Kilpatrick Stockton LLP  
1100 Peachtree Street  
Suite 2800  
Atlanta, Georgia 30309  
(404) 815-6104

Attorneys for Plaintiffs

March 19, 2008

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' MEMORANDUM IN SUPPORT OF EQUITABLE RESTITUTION AND DISGORGEMENT was served on the following via U.S. Mail, pursuant to agreement, on this day, March 20, 2008.

Earl Old Person (*Pro se*)  
Blackfeet Tribe  
P.O. Box 850  
Browning, MT 59417  
406.338.7530 (fax)

/s/ Justin Guilder  
Justin Guilder