IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	
Plaintiffs,	No. 1:96CV01285 (Judge Robertson)
v.	
DIRK KEMPTHORNE, Secretary of the Interior, et al.,	
Defendants.	

DEFENDANTS' RULE 52(c) MOTION FOR JUDGMENT AGAINST PLAINTIFFS ON THEIR EQUITABLE RESTITUTION AND DISGORGEMENT CLAIM

Pursuant to Rule 52(c) of the Federal Rules of Civil Procedure, Defendants respectfully move this Court for judgment against Plaintiffs on their claim for equitable restitution and disgorgement because, as of the close of Plaintiffs' case-in-chief, they have not met their burden of establishing that (1) any money that was collected by Defendants and intended to be disbursed to individual Indian account holders, was not in fact so disbursed; and (2) the government reaped a measurable benefit from any demonstrably undisbursed Individual IIM account holder money.

BACKGROUND

Plaintiffs filed their Complaint on June 10, 1996, seeking an accounting under the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 (1994 Act). The Complaint does not contain a claim for equitable restitution or disgorgement. In an opinion issued on January 30, 2008, the Court decided that as a matter of law the accounting required under the 1994 Act, and demanded in Plaintiffs' Complaint, is

impossible. Cobell v. Kempthorne, 532 F. Supp. 2d 37, 102 (D.D.C. 2008) (Cobell XX).[1] On March 5, 2008, the Court directed Plaintiffs to file a paper setting forth, in detail, their claim for any alternative relief. March 5, 2008 Status Conference Tr. 40:3-6 ("The plaintiffs have two weeks from now to file what I will call a written claim for equitable disgorgement in reasonable detail setting forth what they think they're entitled to and on the basis of what evidence, broadly stated.").

On March 19, 2008, Plaintiffs filed their Memorandum in Support of Equitable Restitution and Disgorgement (Dkt. No. 3515). Defendants filed a response on April 9, 2008 (Dkt. No. 3519), setting forth the legal and factual reasons that Plaintiffs' equitable claim must fail. Plaintiffs filed a Reply on April 21, 2008 (Dkt. No. 3523). Plaintiffs did not seek to amend their Complaint to add their new claim.

On May 2, 2008, the Court issued a Pretrial Order (Dkt. No. 3526), describing Plaintiffs' new claim as one for restitution of (1) "funds that were received in the IIM trust, do not appear to have been disbursed to beneficiaries, and are not explained by the government's accounting efforts;" (2) "plus an amount that represents the benefit reaped by the government from the use of those funds." Pretrial Order at 1. Plaintiffs bear the burden of establishing the fact and the amount of any such benefit. See Pretrial Order at 1-2.

ARGUMENT

I. RULE 52 STANDARDS

Under the Federal Rules of Civil Procedure, the Court is authorized to enter judgment against Plaintiffs on their restitution claim at any time that it can appropriately make a

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[1] Defendants respectfully disagree with that decision.

dispositive finding of fact on the evidence. Because Plaintiffs have concluded their case-in-chief and they have not established their entitlement to restitution and disgorgement, the Court can properly enter judgment against Plaintiffs on this claim. Rule 52(c) provides:

> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Fed. R. Civ. P. 52(c).[2]

"The standards that govern judgment as a matter of law in a jury case have no bearing on a decision under Rule 52(c)." Advisory Committee Notes, 2007 Amendments, Fed. R. Civ. P. 52. Consequently, a district court ruling on a Rule 52(c) motion "'is not to make any special inferences in the plaintiff's favor . . . . Instead it is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies.'" Mitchell v. Baldrige, 759 F.2d 80, 82 n.1 (D.C. Cir. 1985) (quoting C. Wright & A. Miller, Federal Practice and Procedure § 2371, at 224-25 (1971)); see also Albright v. United States, 558 F. Supp. 260, 264 (D.D.C. 1982). "Since it is serving as the trier of fact, the court even may assess the credibility of the witnesses." 9C Wright & Miller, Federal Practice and Procedure: Civil 3d § 2573.1, at 262-64 (footnotes omitted).

In the context of litigation where the plaintiff must establish a prima facie case, such as a Title VII discrimination claim, if the plaintiff has not met its burden, "the defendant need not

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[2/] In 1991, Rule 52(c) replaced the practice under Rule 41(b), which formerly authorized a dismissal at the close of the plaintiff's case if the plaintiff had failed to carry an essential burden of proof. See Advisory Committee Notes, 1991 Amendment, Fed. R. Civ. P. 52. Consequently, "[t]he case law developed under Rule 41(b) between its promulgation in 1938 and the 1991 amendments to Rule 41(b) and Rule 52(c) is applicable under Rule 52(c)." 9C Wright & Miller, Federal Practice and Procedure: Civil 3d § 2573.1, at 253 (2008).

present a case; the suit can (and should) be terminated at that point." Mitchell, 759 F.2d at 84. Moreover, although ordinarily a trial will proceed to the defendants' presentation if a plaintiff has carried a threshold burden, judgment is proper if the facts to rebut the prima facie case "emerged during plaintiff's case, plaintiff had a full and fair opportunity to rebut the defendant's explanation, and plaintiff failed to do so persuasively." Id.

II. PLAINTIFFS HAVE NOT SUSTAINED THEIR EQUITABLE RESTITUTION CLAIM BY A PREPONDERANCE OF THE EVIDENCE

To succeed on their equitable restitution claim, Plaintiffs must establish, by a preponderance of the evidence, two things. First, they must show that some amount of money which entered the IIM System and was intended to be disbursed to Individual IIM Account beneficiaries, was never disbursed to an Individual IIM Account beneficiary.[3] Second, if they could establish that any such money exists, they must also establish that the United States received some benefit from the use of that money. As of the close of their case-in-chief, Plaintiffs have established neither of these facts.

A. No Evidence of Wrongfully Withheld Individual IIM Account Beneficiary Money

Plaintiffs' entire restitution claim rests on the mistaken premise that all money that went into the IIM System was required to be disbursed to Individual IIM Account beneficiaries. From this mistaken premise, they then conclude that all they need to establish is that the amount of money collected into the IIM System is greater than the amount disbursed to Individual IIM Account beneficiaries – and that the balance should go to Plaintiffs.

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[3] Both parties acknowledge that some funds are currently held by the United States for the benefit of Individual IIM Account beneficiaries, but have not yet been disbursed. This money is reflected in the current balance of the IIM trusts. Plaintiffs concede that they do not meet their burden by establishing the existence of this money.

The evidence adduced thus far demonstrates that not all money collected into the IIM System is required to go to Individual IIM Account beneficiaries. The IIM System comprises both Individual IIM Accounts and non-Individual Accounts. For example, at the October 2007 trial, Interior's Associate Deputy Secretary, James Cason, testified that Individual IIM Account beneficiaries are not entitled to all money collected into the IIM System, and provided the specific example of disappointed bidders' deposit money. See Cobell XX, 532 F. Supp. 2d at 85. Interior also presented testimony that tribes deposited money into the IIM System, for the benefit of their tribal members, with no intent that any of this money would be disbursed to Individual IIM Account beneficiaries. Id. at 84. Therefore, to succeed on the first prong of their restitution claim, Plaintiffs must do more than merely establish that more money was collected into the IIM System than was disbursed to Individual IIM Account beneficiaries.

In an aside during a recent status conference, the Court suggested that perhaps Plaintiffs would meet their burden by producing AR-171 and DX-365. See April 28, 2008 Status Conference Tr. 114:9-14. AR-171 is a chart included in the administrative record of the October 2007 trial that was intended to provide a rough estimate of aggregate throughput of money collected into the IIM System, in response to a request from the Court for such aggregate throughput data. It did not indicate the amounts that were specifically collected into the IIM System with the intent that they would be disbursed to Individual IIM Account beneficiaries.[4]

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[4] Moreover, the $3.6 billion difference in AR-171 between collections into the IIM System and disbursements out of the system, identified by the Court in its January 30, 2008 opinion, Cobell XX, 532 F. Supp. 2d at 84, is largely explained (1) by the absence – noted on the face of AR-171 – of any disbursement data estimates pre-1972, while collections estimates pre-1972 were included; and (2) an amount reflecting the current balance.

DX-365 was a chart prepared by Interior, and introduced as an exhibit at the October 2007 trial, that was intended to estimate the amount of total throughput that was to be covered by Interior's May 2007 Accounting Plan. In that Plan, Interior concluded that under the 1994 Act, it only needed to account for money deposited in Individual IIM Accounts. Because some money enters the IIM System and is never intended to go to an Individual IIM Account, DX-365 reflected a difference (the approximately $3 billion noted by the Court, Cobell XX, 532 F. Supp. 2d at 85-86) between the amount that went into the IIM System and the amount that went into Individual IIM Accounts. DX-365 did not demonstrate the amount of IIM System money that was appropriately posted to an Individual IIM Account, but rather provided aggregate throughput coverage estimates in response to the Court's request.

These exhibits could thus be used to establish the unremarkable proposition that not all money collected into the IIM System was disbursed to Individual IIM Account beneficiaries. But, as discussed, this is not enough to establish an entitlement to restitution. Plaintiffs cannot meet their burden of demonstrating the existence of wrongfully withheld Individual IIM Account beneficiary money simply by relying upon AR-171 and DX-365.

In any event, Plaintiffs did not simply produce AR-171 and DX-365, and then rest their case. Indeed, Plaintiffs have wholly ignored DX-375.[5] Instead, to calculate the difference between collections into the IIM System and disbursements to Individual IIM Account beneficiaries – which, again, is all that Plaintiffs apparently believe they need to show – Plaintiffs employ a three-part model. Professor Bradford Cornell introduced this model and explained its operation. Tr. 267-323 (Cornell). First, Plaintiffs purport to calculate a

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[5] Defendants similarly have no plans to rely upon DX-365 and it is, therefore, irrelevant to this hearing.

"disbursement rate," the percentage of money collected into the IIM System that they believe was disbursed to Individual IIM Account beneficiaries. They use collection data from AR-171 (enhanced by an inappropriate Osage factor, as discussed below) for money entering the IIM System for the period from 1988 through 2002, matched against Treasury's CP&R data (reflecting checks used to disburse money to Individual IIM Account beneficiaries) for the same time period. PX-41, Column E; PX-56. Plaintiffs calculate a disbursement rate of 69.82%. Tr. 271:4-272:11 (Cornell); PX-56.

Second, Plaintiffs purport to calculate the total amount of money collected into the IIM System. They use collection data from AR-171 (again enhanced by an inappropriate Osage factor) for money collected into the IIM System from 1972 through 2007. For the period from 1887 through 1971, they select thirteen data points in that range for which they use reported annual collection information, and then apply an unrealistic linear "interpolation" method (essentially just a straight line back in time from 1971 through their selected data points), to estimate the collections into the IIM System during that span. Tr. 281:1-19 (Cornell); PX-41, Column E; PX-55. Plaintiffs' total collections figure is $15.129 billion. PX-41, Column E.

Finally, Plaintiffs apply their disbursement rate to the annual collections total, and calculate that Interior only disbursed $10.563 billion to Individual IIM Account beneficiaries. PX-41, Column F. Thus, according to Plaintiffs' calculation, $4.566 billion entered the IIM System and was not disbursed to Individual IIM Account beneficiaries.

Plaintiffs' calculation of $4.566 billion does not satisfy their burden. Professor Cornell, the only witness that testified for Plaintiffs regarding this calculation, acknowledged that although he stands by the propriety of the methodology, he does not vouch for any of the data

input into the model. Tr. 323:7-9 (Cornell); 324:9-21. This was already observed by the Court during a colloquy with Plaintiffs' counsel:

> He's already said if the data are correct my methodology is correct; if not, it's not. He's not vouching for these numbers. I don't understand him to be vouching for this decision to use the seventy percent. That was your decision.

Tr. 375:3-7.

Again, Plaintiffs improperly assume that all money entering the IIM System was intended for Individual IIM Account beneficiaries. This is particularly inappropriate with regard to the money that the Court identified as the "tribal IIM" money. See 532 F. Supp. 2d at 84. On its face, AR-171 included over $1.5 billion for tribal IIM. AR-171 (Column E); see 532 F. Supp.2d at 84. Plaintiffs still include this amount, Tr. 352:13 (Cornell). even though this Court already recognized that it is not properly to be included in Individual IIM Accounts.

Plaintiffs' methodology is fatally flawed in numerous other ways. These defects prevent Plaintiffs from presenting a reasonable approximation of any money owed to the Individual IIM Account beneficiaries.

1. Omission of disbursement data. As the Court observed during Professor Cornell's testimony, while Plaintiffs use actual historical data for revenues for 1909, 1910, 1911, 1926, and 1955, they apply their imputed "disbursement" rate of 69.82 percent for those same years instead of using historical disbursement data available in the same reports containing the revenue data. Neither Professor Cornell, nor any other Plaintiff witness, reasonably explained why the revenue data in these reports is reliable, but the disbursement data is not. If Plaintiffs had used the actual disbursements data for those years, their methodology would have applied

an average disbursement rate that is substantially higher than 69.82 percent, which can have dramatic impacts on the total benefit claimed.[6]

Similarly, although Plaintiffs use the collection data from AR-171 for 1972 through 2007, they elect not to use the disbursement data in AR-171 for those same years. Again, neither Professor Cornell, nor any other Plaintiff witness, explained why the revenue data for these years in AR-171 is reliable, but the disbursement data is not.

2. Improper Osage revenue. Plaintiffs' analysis of Osage headright revenues is flawed because it wrongly includes payments in excess of $880 million (based upon Plaintiffs' own figures), that was never intended for an Individual IIM Account beneficiary.[7] In our pretrial brief, Defendants provided the Court with a full analysis of this issue. See Defendants' Response to Plaintiffs' Memorandum in Support of Equitable Restitution and Disgorgement, April 9, 2008 (Dkt. No. 3519), at 104-107. Headright revenues are first deposited into the Osage Tribe's account and a substantial portion is then paid directly to the owners of the headrights. The remainder is collected into the IIM System and deposited in Individual IIM Accounts for beneficiaries such as minors, other incompetent beneficiaries, and probate estates.

Plaintiffs have produced no evidence to the contrary. The testimony from Ms. Infield about the mistaken opinions of certain members of the Osage community, Tr. 169:21-170:1 (Infield), does not transmute the character of the Osage headright money into IIM. Professor

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6/ Indeed, using the reported disbursement data for 1926 alone lowers Plaintiffs' calculation by $734 million, according to Professor Cornell. Tr. 306:18 (Cornell).

7/ After compounding interest is applied to this erroneous $880 million, the impact on the bottom line of Plaintiffs' model is over $11 billion – 20 percent of Plaintiffs' total. Tr. 335:14-25 (Cornell).

Cornell testified that he simply used the modified Osage figure because he was instructed to do so by Plaintiffs' counsel. Tr. 315:12-16 (Cornell); Tr. 330:23-24 (Cornell); Tr. 333:21-334:1.

3. Incorrect application of disbursement rate. Even if Plaintiffs' 69.82 percent disbursement rate were accurate – which it is not – Plaintiffs apply this disbursement rate only to the revenues collected in an individual year. Plaintiffs fail to consider amounts in the IIM System at the beginning of the year. As a result, Plaintiffs treat revenues not disbursed in a current year as never disbursed. Tr. 340:21:341:1 (Cornell).[8]

4. Exclusion of electronic transfers. Plaintiffs' exclusion of Automated Clearinghouse and Electronic Funds Transfer transactions significantly understates disbursements made to Individual IIM account holders. Professor Cornell inaccurately assumed that these electronic transfers are included in the CP&R data, Tr. 349:10-12 (Cornell), but Plaintiffs have already conceded that they do not include these electronic transfers. See Memorandum in Support of Equitable Restitution and Disgorgement, at 40-42. The purported justification for this omission – because such transfers are assumed to be insignificant – is flawed. This claim is based on Plaintiffs' analysis of NORC's report entitled "Electronic Payment Prototype for the Alaska Region." AR-388 (Sept. 30, 2003). See Memorandum, at 40-42. Plaintiffs did not establish during their direct case that the average dollar amount associated with electronic transfers is equivalent to the average dollar amount associated with check disbursements.

5. Improper check disbursement rate. Plaintiffs assert erroneously that only about 94 percent of the revenues disbursed by checks to Individual IIM account holders actually

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[8] Without this improper application of the disbursement rate, Plaintiffs' bottom line would be reduced dramatically.

reached the beneficiaries. PX-56, Column G. In response to the Court's question, Professor Cornell explained that Plaintiffs arrive at this number by assuming that the percentage of checks paid is equal to the percentage of revenue disbursed. Tr. 310:13-311:10 (Cornell). Plaintiffs offer no evidence to support this assumption. In fact, the evidence produced at the October 2007 hearing demonstrates that nearly 100 percent of the revenue disbursed by check reached the beneficiaries for the years studied.

The evidence last October showed that Interior issued approximately $2.8 billion worth of IIM checks between January 1991 and December 2005, and that checks totaling only about $5.2 million were not cashed. DX-273; DX-275; 2007 Tr. 1300:15-1302:23 (Cymbor). This amount represents approximately 0.2 percent of the total dollar value of checks issued. In other words, 99.8 percent of the dollar value of issued checks were cashed.

Consistent with the above finding, Treasury's Check Study, DX-242, established that for a twelve-month period from September 1998 through August 1999, Interior issued $177 million in IIM checks. Of those IIM checks, less than one percent, with a value of approximately 0.2 percent of the total dollar value, were not cashed. DX-242 at 13, 16-17; 2007 Tr. 884:25-885:13 (Winter).

For checks issued from 1954 to 1989, when Treasury initiated "limited payability" of checks to one year from the date of issuance, DX-231 at 1, 18; 2007 Tr. 323:17-324:4 (Ramirez), Interior identified 38,554 uncashed checks to IIM beneficiaries with a face value of no more than $1.6 million. 2007 Tr. 357:10-12 (Ramirez). Plaintiffs estimate IIM revenue for 1954 through 1989 as over $8.5 billion. PX-41, Column E. Using the evidence produced at the October, 2007, trial and Plaintiffs' revenue estimate (an estimate the government disputes), the total amount of non-cashed checks represents less than 0.02 percent of IIM revenue.

Plaintiffs also assume wrongly that revenue from uncashed checks is turned over to and benefits the government, Tr. 311:20-21 (Cornell). It does not. Treasury recredits Interior for uncashed checks, 2007 Tr. 1294:16-1295:18, Tr. 1300:15-24 (Cymbor); 2007 Tr. 290:14-291:2 (Ramirez), and Interior in turn recredits the IIM accounts for those uncashed checks. 2007 Tr. 846:17-847:5 (Winter); 2007 Tr. 292:4-296:3 (Ramirez).

The evidence presented at the 2007 trial revealed a nearly 100 percent disbursement rate for revenue paid by check in the years studied. If Plaintiffs had used this number instead of the unjustified rate of approximately 94 percent, their calculation of the amount owed to them would be dramatically lower. Applied to Plaintiffs' $15.13 billion total revenue estimate for 1887 through 2007 (an amount Defendants dispute), the higher disbursement rate produces an additional $900 million in disbursements and reduces Plaintiffs' "Accumulated Benefit Conferred" by approximately $11.5 billion. PX-41 ("Total" row for columns F, G, J).

6. Improper inclusion of transfers to Tribal Trust. Plaintiffs have included transfers of funds from the IIM System to tribal trusts in their collections calculation. Such interfund transfers are manifestly not collections intended for the benefit of an Individual IIM Account beneficiary and must be excluded.

7. Unrealistic interpolation. Plaintiffs' "linear interpolation" analysis for calculation of collections into the IIM System from 1887 to 1972, is simplistic and disregards real-world occurrences that contra-indicate the approach. Plaintiffs have ignored events that impact the "straightness" of the line. As noted by the Court, in the 1970s (the period where Plaintiffs used recorded collections data) there was a huge spike in collections. See PX-55. Professor Cornell attributed this spike to the rise in oil prices. Tr. 301:15-18 (Cornell). To ignore the effects of other real-world occurrences (like the Great Depression) during the period where Plaintiffs

simply draw a straight line between their intermittent data points does not produce a reasonable approximation of revenues.

8. No discount for deceased IIM beneficiaries. As described in Cobell XX, for Individual IIM account holders who died before October 25, 1994, their right to an accounting under the 1994 Act never accrued and they are thus not proper class members in this litigation. 532 F. Supp. 2d at 98. According to the Court, the heirs of these deceased class members would have been entitled to an accounting of their deceased predecessor's Individual IIM Account to ensure that the heir's opening balance was correct.[9] Id. However, it does not follow that the heirs would be entitled to restitution of any amount not disbursed to their predecessor in interest who died before October 24, 1994, especially for those whose accounts were also closed well before October 24, 1994. In their revenue calculation, Plaintiffs provide no discount for amounts that may have been undisbursed to deceased Individual IIM account holders and for which no current account holder has any interest.

9. No discount for Judgment and Per Capita accounts. Unlike the accounting for land-based accounts, the accounting work on the Judgment and Per Capita accounts does not suffer from the problems described in Cobell XX, which led the Court to deem the overall accounting under the 1994 Act impossible to accomplish. See Tr. 144-45 (Ziler). Plaintiffs do not discount the amounts of money collected into the IIM System destined for Judgment and Per Capita accounts.[10] OHTA reported in the Twenty Second Quarterly Report (Aug. 1, 2005),

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[9] Defendants respectfully believe that this decision was in error.

[10] Similarly, Plaintiffs fail to discount the money collected into land-based accounts for which an accounting can be done under the Court's Cobell XX analysis.

AR-540 at 2-7, that the total throughput related to Judgment & Per Capita accounts, as of June 30, 2005, was $832,592,622.

10. No discount for prior settlements. Plaintiffs also fail to exclude any amount for prior settlements of claims against the United States by Individual IIM Account beneficiaries. The most obvious of these is the amount involved in the Mitchell litigation before the Supreme Court.

11. No discount for accounting efforts. The Court also required Plaintiffs to discount any amount of money "explained by the government's accounting efforts." Pretrial Order at 1.[11] The Court does not explain what is meant by the term "accounting efforts," but based on the evidence presented by Plaintiffs in their case-in-chief, they have treated this term as a nullity. Their calculation of a 69.82 percent disbursement rate is inconsistent with all of the evidence in the record of this case. Plaintiffs simply ignore the documented results of the Mass Cancellation project, the Settlement of Accounts Packages prepared by Treasury and GAO auditors from the late 1800s through 1950, see generally AR-344; AR-348; AR-436; AR-533; AR-626, and more recent audits of Interior, AR-374 - AR-378; DX-259 - DX-268, none of which support Plaintiffs' assertions that money was wrongfully diverted from the IIM accounts of individual Indians.

Plaintiffs also ignore the results of the Paragraph 19 work (with respect to the named Plaintiffs and their predecessors in interest), Cobell XX, 532 F. Supp. 2d at 50 (citing Tr.

[11/] In the 2007 Historical Accounting Plan, Interior did not plan on accounting for the money that went into the IIM System and was not posted to an Individual IIM Account because Interior interpreted the 1994 Act to require an accounting of money deposited in Individual IIM Accounts. No evidence was presented that, given enough time and money, Interior could not have accounted for all money in the IIM System, both in Individual IIM Accounts and non-Individual accounts.

62:12-21 (Cason)), and Litigation Support Accounting projects, id., 532 F. Supp. 2d at 60-62, which showed extremely low error rates – nothing even approaching the thirty percent error rate assumed by Plaintiffs. Plaintiffs also completely ignore the accounting work with respect to the Judgment and Per Capita accounts, which also found extremely low error rates, id., 532 F. Supp. 2d at 71, and the numerous other projects and tests conducted thus far by Interior, such as the "Data Completeness Validation Project," 532 F. Supp. 2d at 67-69, "Posting Test" and "Land-to-Dollars Test," 532 F. Supp. 2d at 69-70, and "Interest Recalculation Project," 532 F. Supp. 2d at 70-71.

Because of these defects, Plaintiffs have not met their burden of establishing a "reasonable approximation" of the amount to be disgorged. See, e.g., SEC v. First City Fin. Corp., 890 F.2d 1215, 1231-32 (D.C. Cir. 1989). Indeed, Professor Cornell repeatedly advised the Court that he does not vouch for the data used in his model and stands ready to input better data, and thus revise Plaintiffs' claimed restitution amount. See, e.g., Tr. 323:7-9 (Cornell); 324:9-21; 328:2-7; Tr 375:3-7. The "sensitivity" of Plaintiffs' model translates minor changes in data inputs into dramatic changes in the bottom line. One $12 million difference in 1926 translated into a $734 million change to the claimed total. Tr. 306:18 (Cornell).

Plaintiffs have merely presented the Court with a tentative approximation of an unreasonable approximation of an unwarranted unjust enrichment amount. Under Rule 52(c), judgment should be entered against Plaintiffs on their restitution and disgorgement claims.

B. No Evidence of Benefit Conferred on the United States

Because Plaintiffs have not established the existence of any improperly undisbursed Individual IIM Acccount beneficiary money, they have necessarily failed to establish any benefit conferred on the government from such money. However, even if one assumes that

Plaintiffs had sustained their prima facie case, they have not established that the United States received a benefit. In the May 2, 2008 Pretrial Order, the Court indicated that Plaintiffs bear the burden of establishing both the "fact and the amount" of any "benefit" to the government. May 2, 2008 Pretrial Order at 2.

Plaintiffs employ an invalid methodology as well as invalid data to calculate the purported benefit to the government. They apply the 10-year Treasury Bond rate annually to the amounts generated by their faulty calculation of undisbursed Individual IIM Account money discussed above and, after compounding, they produce a $58 billion estimate of benefit to the government, as of December 31, 2007. PX-41, Column J.

Plaintiffs' witnesses claim that this method reasonably approximates the avoided borrowing costs of the government because it enjoyed the use of the undisbursed IIM System money and, in theory, did not have to borrow as much money as it otherwise would have without the windfall from this money. Tr. 219:7-18 (Miller); Tr. 267:7-10 (Cornell). Plaintiffs did not, and cannot, identify where this $58 billion – or any other amount representing the alleged improper benefit reaped by the government – actually went or resides.

Plaintiffs' allegation of benefit conferred on the government also rests on a fundamentally mistaken premise. Plaintiffs assume that every dollar entering the IIM System and allegedly not disbursed to Individual IIM Account beneficiaries constitutes a dollar that the United States did not have to borrow. During their case-in-chief, Plaintiffs' witnesses were unable to support this proposition regarding the borrowing costs saved by the United States with any testimony from anyone with personal knowledge about United States borrowing practices. Although this notion may seem to reflect sound common sense, Tr. 252:12-254:2

(Miller), Plaintiffs provided no evidence that it reflects actual borrowing decisions made by the United States.

Plaintiffs have mistaken the difference between cash and fund accounting and the distinction between Treasury's General Account (TGA) and the IIM account 14X6039. Treasury does not treat funds within 14X6039 as government funds; they are not owned by the government, and no Plaintiff witness or exhibit establishes otherwise. 14X6039 constitutes a "deposit fund" and, as explained in OMB Circular A-11, a deposit fund

> is an account established to record amounts held temporarily by the Government until ownership is determined (for example, earnest money paid by bidders for mineral leases) or held by the Government as an agent for others (for example, State and local income taxes withheld from Federal employees' salaries and not yet paid to the State or local government).

DX-466 (OMB Circular A-11, Section 20.3, at 4 (2007)) (emphasis added). Section 20.12(b) of OMB Circular A-11 similarly explains:

> Section 20.12(b) Overview of funds types: . . . Agencies account for amounts that are not Government funds in deposit funds. The following table summarizes the characteristics of these funds. The text following the table discusses the types of funds in more depth.
>
> | Fund Type/Account Treasury Account Symbol | What is the purpose of the account |
> |---|---|
> | Deposit funds (6000-6999) | Record deposits and disbursements of monies not owned by the Government or not donated to the Government (amounts donated to the Government are deposited in a special or trust fund account). |

DX-466 (OMB Circular A-11, Section 20.12(b), at 36-37 (2007)) (emphasis added); see id. at 37 ("use deposit funds to account for monies that do not belong to the Government").

When Interior deposits funds for credit to the IIM account, the cash goes into the TGA, but that does not mean that the government fails to account for the funds separate and apart

from all other government funds. That is, the movement of cash between a financial institution designated to accept a government deposit and the TGA at the Federal Reserve is distinct from the government's fund accounting. No Plaintiffs' witness testified to the contrary.

During a transaction, the agency (here, Interior) making the deposit will also post the transaction to a fund account within Treasury's central accounting system, which in this case would increase the fund balance of 14X6039. The concentration of cash in the TGA at the Federal Reserve subsequent to a deposit does not affect the amount posted to the IIM fund balance, including the amount available for future authorized transactions. Thus, while every dollar that any government entity – including IIM fund managers – deposits to Treasury and disburses from Treasury through the TGA, that is simply not relevant to this case.

Thus, no Plaintiff witness was able to establish that any IIM funds have been unlawfully withheld in the TGA. The TGA is a cash management tool and its cash balances must be distinguished from amounts classified to a deposit fund, like the IIM fund, in a fund accounting system. If a collection amount is recorded to increase the funds credited to the IIM fund balance, it is not possible to have withheld monies in the TGA, regardless of the cash balance in the TGA on a given day or over time. The level of the transient operating cash in an account like the TGA has no effect on the fund accounting balance of the IIM fund, nor does it affect the earnings generated by the investable balance and credited to the fund. Conversely, benefit or harm to the IIM fund are simply not a function of the TGA cash balance. No Plaintiff witness or exhibit provides otherwise.

Finally, contrary to Plaintiffs' contention, the credits and debits to the TGA that relate to IIM activities have a neutral effect on the government's borrowing and national debt costs. The cash that comes into the TGA is offset by the cash that leaves the TGA to fund the IIM

investments and disbursements. As for 14X6039, the net of all collections and disbursements is recognized as a liability in the Treasury's central accounting system, because the funds do not belong to the federal government. Plaintiffs offered no proof to the contrary.

Professor Cornell acknowledges that money which is not available for the use of the government would not confer a benefit on the government. Tr. 354:22-24; 357:9-20 (Cornell). Because the IIM funds are not government funds, they are not available for use by the government and thus have no impact on borrowing decisions.

Moreover, even crediting Dr. Miller's testimony about the theoretical, common sense, benefit to the government from having to borrow less for amounts not disbursed to Individual IIM Account beneficiaries, without proof that those funds actually existed (and are not just based on a theoretical amount that has not been accounted for) Plaintiffs cannot prove an actual benefit to the government. To meet their burden, Plaintiffs must show that the government had actual use of IIM System money that was improperly withheld from an Individual IIM Account beneficiary. They have not done so.

Plaintiffs' methodology for calculating any benefit conferred on the government is also fatally flawed. These defects prevent Plaintiffs from establishing a reasonable approximation of any benefit reaped by the United States for any undisbursed IIM System money.

1. <u>IIM money held in commercial banks</u>. Plaintiffs' methodology does not discount IIM that was or is held in commercial banks. Plaintiffs have not provided evidence or testimony based upon personal knowledge that the government has the use of or derives any benefit from this money. Professor Cornell assumed for purposes of his model that the government has the use of this money, but he did not establish that it is true. Tr. 357:9-20

(Cornell).[12] And he acknowledges that if his assumption is wrong, then the government did not obtain any benefit from such money. Id.

2. Money invested on behalf of IIM beneficiaries. Similarly, the government receives no benefit from money it invests for IIM beneficiaries and that is subsequently paid to beneficiaries. Plaintiffs' methodology does not discount such money.

3. Disbursements to third parties. Similarly, the government did not use or benefit from any money that it may have disbursed improperly to a third party – or even to the wrong Individual IIM Account beneficiary. Plaintiffs' methodology would improperly calculate such money as a benefit conferred on the government.

4. Use of ten-year Treasury Bond rate. Although Dr. Miller and Professor Cornell opined that the use of the ten-year Treasury Bond rate is a reasonable approximation of the borrowing cost saved by the government, Tr. 222:1-2 (Miller); Tr. 264:13-18 (Cornell), Plaintiffs provided no testimony or evidence that this rate best reflects the actual borrowing practices of the United States. The United States sells securities at various rates, short and long term, depending upon borrowing needs. For example, Plaintiffs' witnesses did not explain why it would not be more appropriate to use a five-year rate, or some other rate reflecting a weighted blend of long and short-term rates.

5. Prohibited interest. Plaintiffs' methodology actually calculates prejudgment interest, compounded. In their pretrial brief, Defendants presented the case law describing why awarding any such interest against the United States is prohibited. See Defendants'

[12/] Mr. Miller also assumed the government derived a benefit because he thought the United States could call in such money, but had no personal knowledge. Tr. 228:14-229:8 (Miller).

Response to Plaintiffs' Memorandum in Support of Equitable Restitution and Disgorgement, at 114-1178. Defendants are prepared to supplement these citations, if desired by the Court.

For these reasons, Plaintiffs have not met their burden of demonstrating the fact and amount of any benefit reaped by the government from IIM. Therefore, even if Plaintiffs are deemed to have established the existence of improperly undisbursed Individual IIM Account beneficiary money, judgment should be entered against Plaintiffs on the $54 billion they claim for benefit conferred on the United States.

CONCLUSION

For these reasons, Defendants respectfully request that the Court grant Defendants' motion and enter judgment against Plaintiffs on their claim for restitution and disgorgement.

Dated: June 11, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 12, 2008 the foregoing *Defendants' Rule 52(c) Motion for Judgment Against Plaintiffs on Their Equitable Restitution and Disgorgement Claim* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96cv01285 (JR)
DIRK KEMPTHORNE, Secretary of the Interior, et al.,	)	
Defendants.	)	

ORDER

This matter comes before the Court *on Defendants' Rule 52(c) Motion for Judgment Against Plaintiffs on Their Equitable Restitution and Disgorgement Claim* (Dkt. No.). Upon consideration of Defendants' Motion, any Opposition by Plaintiffs, and the entire record of this case, it is hereby

ORDERED that the Motion is GRANTED;

and it is further

ORDERED that judgment is entered against Plaintiffs on their claim for equitable restitution.

SO ORDERED.

_____
Hon. James Robertson
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

Date:_____