IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al., on their own behalf and on behalf of all persons similarly situated,	)	
Plaintiffs,	)	
vs.	)	**Case No.96CV1285 (RCL)**
GALE NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

PLAINTIFFS' BRIEF IN COMPLIANCE WITH THE COURT'S ORDER OF FEBRUARY 23, 2005 SETTING FORTH THE EFFECT OF *COBELL XIII* ON THE PROVISIONS OF THE SEPTEMBER 25, 2003 INJUNCTION OTHER THAN THE HISTORICAL ACCOUNTING PROVISIONS

I. INTRODUCTION

On February 23, 2005, this Court re-issued the September 25, 2003 Structural Injunction as it related to the historical accounting. *Cobell v. Norton*, --- F. Supp.2d ---, 2005 WL 419293 (D.D.C. Feb 23, 2005) (hereafter "*Cobell XIV*"). In addition, this Court ordered that the parties file "within twenty (20) days of this date, briefs setting forth their respective positions concerning the effect of the *Cobell XIII* decision upon all provisions of this Court's September 25, 2003 Structural Injunction other than the historical accounting provisions of the September 25, 2003 Structural Injunction reissued herein." *Id.* at *8. This brief, in compliance with this Court's order, sets forth plaintiffs views on the non-historical accounting provisions on the September 25, 2003 Structural Injunction ("September 25th SI") and, further, plaintiffs' recommendations as to how this Court should proceed to move this case forward on the merits and reduce the harm that plaintiffs have suffered,[1] and continue to suffer, as a consequence of the malfeasance of the Interior trustee-

[1] *See, e.g., Cobell v. Norton,* 24 F.3d 1081, 1097 (D.C. Cir. 2001) ("*Cobell VI*") ("Given that many plaintiffs rely upon their IIM trust accounts for their financial well-being, the injury from delay could cause irreparable harm to plaintiffs' interests as IIM trust beneficiaries.").

delegates in their management and administration of the Individual Indian Trust ("Trust") and their bad faith in this litigation.

Preliminarily, plaintiffs set forth the framework for this case as articulated by the Court of Appeals and this Court in Section II and III. These sections make clear that this Court has numerous available options and broad authority to determine the best way to proceed. Among other things, this Court can declare the duties that govern this Trust. But, significantly, this Court's plenary authority is not constrained merely to declare duties and hope for compliance. The Court has substantial latitude to fashion an effective remedy for those critical already-declared duties that have been found to be breached. Specifically, plaintiffs discuss the availability of various equitable relief, including removal of the Interior trustee-delegates and disgorgement of plaintiffs' trust funds that have been unlawfully withheld, in Section IV of this brief. Such equitable remedies are plainly available, as the government itself has advocated vigorously in the *Philip Morris* case and are preferred because they are remedies that will ensure desperately needed protection for the plaintiff class and are far less intrusive. Plaintiffs respectfully request that this Court consider such remedies before all other remedial options in light of the continuing irreparable harm to the individual Indian trust beneficiaries.

As this Court recently recognized, "this case approaches its ninth year" and further delays come at a severe price to class members.[2] That is as true for unconscionably delayed failure to address on-going malfeasance, as it is for the unconscionably denied "historical accounting." Each day that the "dismal history of inaction and incompetence"[3] continues is another day that denies the plaintiff class its trust revenue and further underscores the indisputable and freely admitted fact that the century-delayed accounting remains an impossibility. This same inaction, incompetence, and

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[2]*Id.* at *7 ("Elderly class members' hopes of receiving an accounting in their lifetimes are diminishing year by year by year as the government fights--and re-fights--every legal battle. ... In this case the government has not only set the gold standard for mismanagement, it is on the verge of setting the gold standard for arrogance in litigation strategy and tactics.")

[3]*Cobell v. Norton*, 392 F.3d 461, 464 (D.C. Cir. Dec 10, 2004) (quotations and internal citations omitted) ("*Cobell XIII*").

bad faith means that these unfit trustee-delegates can never recreate the critical trust records they have destroyed and will never clean-up and restore the irreplaceable trust data they have corrupted.[4] Nor will they ever rehabilitate and reform their deeply troubled trust management systems to preserve whatever residual integrity remains in the existing trust records. What is indisputable from the trustee-delegates' deplorable record is that they will continue to breach the fiduciary duties owed to the *Cobell* class with impunity.

While this "hopelessly inept"[5] mismanagement and on-going breach of declared trust duties result in enormous financial harm, the impact has been, and continues to be, much worse. This case, in all its aspects, is about the real harm and injury inflicted on real people – more than 500,000 individual Indian trust beneficiaries – as a result of the relentless breaches of trust duties by the trustee-delegates. This Court and the Court of Appeals have already determined that the injury suffered by these people is "irreparable." Every day that passes results in more harm. That means that undue delay is truly a killer – people die every single day without getting their due. It is real suffering that this Court has spelled out as "personal interests of life and health." It is human beings living in inadequate shelter. It is elderly people doing without adequate medical attention. It is children going without adequate food, clothing, shelter, and education. Some people cannot get enough to eat because their trust checks have been withheld by the trustee-delegates in retaliation for asking this Court to enforce the fiduciary duties that they are owed and because the trust checks, when they are sent, are untimely and in the wrong amounts – pennies on the dollar. All of this and much more. The fact remains that these trustee-delegates will never render an accurate and complete accounting of the trust beneficiaries' money – at least $13 billion without interest. As this Court recently lamented:

The idea that Interior would either instruct or allow BIA to withhold trust payments,

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[4] *See, e.g., Cobell v. Norton,* 226 F.Supp. 2d 1, 11, (D.D.C. 2002) ("The Department of Interior's administration of the Individual Indian Money ("IIM") trust has served as the gold standard for mismanagement by the federal government for more than a century.").

[5] *Cobell XIII* at 463.

> and then to stonewall the Indians who dared ask why, is an obscenity that harkens back to the darkest days of United States-Indian relations. But this idea, no matter how profane and repugnant to the foundational principles of our government, is amply supported in the record by evidence that remains uncontested by any factual proffer from Interior. The Court is offended that the individuals responsible for these acts would cite the Court's Orders as justification; but the perniciousness and irresponsibility demonstrated by blaming the Court pales in comparison to the **utter depravity and moral turpitude** displayed by these individuals' willingness to withhold needed finances from people struggling to survive and support families on subsistence incomes.[6]

There is, however, a solution. This Court need not sit idly by as these trustee-delegates continue to allow the trust funds and non-financial assets to fall into waste and ruin. Courts sitting in equity have broad inherent authority to fashion appropriate redress for ongoing and willful violations of law and court orders and breaches of fiduciary duties. The Court of Appeals recent decisions – *Cobell v. Norton*, 391 F.3d 251 (D.C. Cir. Dec 3, 2004) ("*Cobell XII*") and *Cobell XIII* – confirm this understanding. Inherently, this Court possesses broad equitable authority and great discretion in determining which remedy is appropriate and which remedy will be most effective. As stated in the leading treatise, G. Bogert, The Law of Trusts and Trustees § 861 at 3-4 (Rev.2d ed.1995): "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 and recompense him for the loss, in so far as this can be done without injustice to the trustee or third parties."

This Court also has broad "case management authority" to determine how to proceed to protect the trust beneficiaries and remedy the suffering they have been forced to endure. In short, the recent Court of Appeals decisions make clear the expansive powers this Court possesses – both procedurally and substantively – to achieve reformation and rehabilitation of the trust and to remedy continuing malfeasance and willful breaches of trust.

While this Court does indeed have broad inherent equitable authority, that does not mean, of course, that any and all available remedies will be effective. Few options would in fact be meaningful. The redress put in place will undoubtedly have a dramatic effect on trust beneficiaries,

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[6] *Cobell v. Norton*, 2005 WL 281139 at *9 (D.D.C. Feb. 7, 2005).

depending on whether such relief, in fact, protects them from the on-going breaches and concomitant resulting irreparable and sustained injury they presently endure. It is vital that this Court put in place an effective remedy tailored to address the specific conditions here found. An effective remedy is one that, if properly implemented, will minimize the injury plaintiffs continue to suffer and would lead to a prompt resolution of this case on the merits. Until competent and honest trust management is employed, effective trust management systems are established and operating, and a complete and accurate accounting is rendered, these interim measures will for the first time in 118 years begin secure the rights of the plaintiff class.

In this brief, plaintiffs begin by setting forth governing legal principles that emerge from *Cobell XII* and *Cobell XIII*, along with those already established in *Cobell VI*. We then discuss the instructions that emerge from this Court's February 8, 2005 decision.[7] With this foundation set, we outline and discuss what we believe this Court should do to protect plaintiffs from the most serious consequences of trustee-delegates' on-going malfeasance and breaches of declared trust duties. In addition, as this Court is aware, plaintiffs have several pending motions and requests concerning the need for an IT security evidentiary hearing,[8] an E&Y trial date to confirm the futility of the declared accounting,[9] and, of course, the show cause motions that have been pending since October 19, 2001.[10]

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[7]*Cobell*, 2005 WL 310516.

[8]*See Plaintiffs' Renewed Request for Emergency Status Conference Regarding the Security of Electronic Trust Records*, filed January 4, 2005.

[9]*See Plaintiffs' Motion to Set Date Certain for Trial of Adequacy of Final "Accounting" for Named Plaintiffs,* filed December 30, 2004 (reply filed January 25, 2005).

[10]As plaintiffs have repeatedly advised this Court, unless and until the trustee-delegates and their counsel are held accountable for their violations of court orders, bad faith, and malfeasance, there will be no end to this litigation. The Court of Appeals ruling in *Phillip Morris* is instructive. *See e.g.*, *Philip Morris v. U.S.*, 396 F.3d 1190, 1203 (February 4, 2005) (*Williams concurring*):

> The equity court . . . has before it the history of the defendant, including his past wrongs. It can decree relief targeted to his plausible future behavior. It can define the conditions bearing directly on that behavior, it can, for example, **establish schedules of draconian contempt penalties for future violations**, and impose

II. PRINCIPLES ENUNCIATED IN *COBELL XII* AND *COBELL XIII* THAT PROVIDE THE BASIS FOR FURTHER PROCEEDINGS

Both *Cobell XII* and *Cobell XIII* dramatically impact the nature and scope of these proceedings. These decisions make clear the substantial latitude this Court has in fashioning effective equitable relief to protect the beneficiaries' property and declared rights and to enforce the trustee-delegates' compliance with identified fiduciary duties. Further, these decisions offer additional guidance on the rules of decision that govern this action in equity. Below, plaintiffs set forth their views on how this Court may elect to proceed regarding non-historical accounting components of the September 25th structural injunction, discussing, in this section, certain salient principles that emerge from these two appellate decisions.

A. This Court Has Full Authority to Declare the Fiduciary Duties that Govern the Trustee-Delegates' Management of the Trust

Since inception of this litigation, the trustee-delegates vigorously have disputed that traditional or conventional trust duties govern their management of the Trust. The recent Court of Appeals decisions resolve this issue against the trustee-delegates. In *Cobell VI*, of course, the Court of Appeals held that "[w]hile the government's obligations are rooted in and outlined by the relevant statutes and treaties ... traditional fiduciary duties" are applicable to and enforceable against the government "unless Congress has unequivocally expressed an intent to the contrary."[11] Furthermore, such duties are "defined in traditional equitable terms."[12]

Despite the clear holding of *Cobell VI*, the trustee-delegates have continued to argue in bad faith that traditional fiduciary duties do not apply unless they are expressly restated in statute. This position is at direct odds with *Cobell VI*. A central issue in *Cobell VI*, was whether the duty to account pre-dated the 1994 Act. No statute was identified prior to the 1994 Act that expressly

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transparency requirements so that future violations will be quickly and easily identified.

[11] *Cobell VI*, 240 F.3d at 1099.

[12] *Id.*

imposed a duty to account on the government. Nonetheless, the *Cobell VI* court held that the 1994 Act did not create, but rather "reaffirms the government's **preexisting** fiduciary duty to perform a complete historical accounting."[13] The Court explained that by its nature, trust instruments do not always expressly create each and every applicable fiduciary duty, but that "**many of the duties and powers are implied**" by the establishment of the trust relationship.[14] In other words, "[n]ot 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."[15]

In short, the Court of Appeals, four years ago, acknowledged that enforceable trust duties are "rooted" in statute or treaty, but emphatically held that they need not be restated expressly therein:

> It is no doubt true that 'the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations." ... This does not mean that the failure to specify the precise nature of the fiduciary obligation **or to enumerate the trustee's duties** absolves the government of its responsibilities.[16]

If the trustee-delegates had been principled (and they are not now, nor have they have ever been),

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[13]*Id.* at 1102. *See also id.* at 1099-1100 ("The Indian Trust Fund Management Reform Act reaffirmed and clarified preexisting duties; it did not create them.").

[14]*Id.* at 1099.

[15]*Id.* at 1103 (emphasis added). Parenthetically, to apply the same conventional trust standards to the trustee-delegates' management of non-financial assets as are applicable to the revenues generated from the sale or lease of such lands, the Court must find in accordance with standards set forth by the Supreme Court in *Mitchell II* and *White Mountain Apache* that the government, in fact, has exercised control over the trust lands at all times relevant to this litigation. Such control by statute **or** practice is a condition precedent to the existence of a "genuine trust" and the application of corresponding "conventional fiduciary duties." *See Cobell XIII* at 470; *see also Cobell XIII* at 471 ("The statutory mandate, ... appears in large part to codify Interior's prior practice, which involved the exercise of complete control over the IIM funds.").

Accordingly, plaintiffs respectfully request that this Court first make a finding that the trustee-delegates by statute and practice have exercised "elaborate control over . . . property belonging to Indians. *See United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("[A] fiduciary relationship necessarily arises when the Government assumes ... elaborate control over forests and property belonging to Indians.").

[16]*Cobell VI* at 1098-99 (emphasis added; citations omitted)

they would not continue to act against the best interests of individual Indian trust beneficiaries and would not "fight[s] – and re-fight[s] – every legal battle"[17] that they lose. And, *Cobell VI* would have conclusively settled this issue. But, cold reality is what plaintiffs must live with. This Court and the Court of Appeals have made clear that each enforceable fiduciary duty need not be expressly restated in statute and that each such duty may be implied by the trust relationship, where, as here, the trust relationship is statutorily based. Since the trustee-delegates refuse to accept the conclusions of *Cobell VI* and chose to re-fight this issue, the *Cobell XIII* court was forced to reiterate this point – again.

The *Cobell XIII* court relied on the Supreme Court's approach in *White Mountain Apache* to explain when a particular fiduciary duty governs and is enforceable. Importantly, nowhere in the "1960 Act" that is the subject of the *White Mountain Apache* litigation is there any express provision that states that the government owes a "duty to preserve and maintain trust assets." Nevertheless, the Supreme Court took a straight-forward common sense approach and held that such duty plainly applied. *Cobell XIII* adopted the *White Mountain Apache* approach – to "look to trust law to find ... a particular common law duty" and then determine that it is necessarily "implied" (*i.e.* not expressly stated) in the statutory scheme.[18] Perhaps with this additional clarity, the trustee-delegates will begin to understand the duties that they owe to plaintiffs. Perhaps, they will begin to accept governing law. Perhaps, they will begin to obey this Court's orders. Perhaps, they will not re-fight this issue again. Perhaps, pigs will fly. Unfortunately, the truth is that such expectations and hopes are entirely unrealistic.

More importantly still, the *Cobell XIII* Court held that it is proper for this Court to declare the fiduciary duties that govern the trustee-delegates' management of the Trust: "[T]he district court

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[17]*Cobell v. Norton,* __ F. Supp. 2d __, 2005 WESTLAW 419293, at *7 (D.D.C. February 23, 2005).

[18]*Id.* at 472.

may declare the government's legal obligations ... pursuant to the Declaratory Judgment Act ...."[19] Of course, this Court has identified at least sixteen common law duties that govern. *Cobell XIII* plainly states that this Court may enter an order pursuant to the Declaratory Judgment Act that restates the governing trust duties.[20] In many cases, the statutory basis – implied or express – of these specified duties has already been clearly identified by this Court or the Court of Appeals.[21] This Court may conclude that additional briefing may be necessary to further flesh out the "statutory basis" of other to-be-declared duties in question.[22]

In an ideal world, such a declaratory judgement would serve many useful purposes. The fact that this is not an ideal world does not mean that this Court should not issue such a declaratory judgment. Further clarity in this regard is vital. Such declaratory relief would clarify the governing standard of conduct and provide an appropriate and much-needed measuring stick for successor trustee-delegates to bring the government into compliance with its trust duties. Since the Court of Appeals has affirmed this Court's order requiring the trustee-delegates to produce their trust reform plan, if this plan is ever prepared competently and in good faith (another wholly unrealistic assumption), this Court's declaration of applicable trust duties would permit it to readily determine the nature and scope of the trustee-delegates' continuing malfeasance and unconscionable delays – which is precisely why no such adequate plan will ever be prepared and submitted to this Court. Moreover, such a declaration would eliminate any honest disputes between the parties as to whether an identified duty does or does not govern. Unfortunately, plaintiffs would be compelled forever to suffer real-world harm if this Court were to rely solely on such

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[19]*Id.* at 476.

[20]We note that the court of Appeals agrees with this Court that these duties govern this Trust. *See id.* at 465 ("we agree that Interior is subject to many of the common law trust duties identified by the court").

[21]*See, e.g., Cobell VI*, 240 F.3d at 1093 ("As trustee delegates these officials had a clear obligation to maintain trust records and furnish such records to beneficiaries upon request ....").

[22]*Cobell v. Norton,* 392 F.3d 461, 472 (D.C. Cir. Dec 10, 2004).

declarations as trustee-delegates' incentive to rehabilitate themselves and behave as principled fiduciaries.

B. The APA Does Not Control This Trust Case

Of course, one of the trustee-delegates' central arguments throughout this litigation has been (and continues to be) that this action in equity is not a trust case, but an action dictated by the standards, procedures and rules of the APA. This Court has rejected that notion repeatedly and, now, so too has the Court of Appeals in unmistakable terms. In *Cobell XII*, the Court vacated the injunction on narrow procedural grounds, stating that this Court should have held another evidentiary hearing prior to issuing the injunction.[23] But on the wider question of whether the decisional law for the *Cobell* case is trust law or administrative law, the appeals court, quoting its 2001 decision, held: "Contrary to the Secretary's view, '[w]hile the government's obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined in traditional equitable terms,' and **the narrower judicial powers appropriate under the APA do not apply**."[24] Importantly, the Court did not limit its language to issues of *Chevron* deference or mere procedures, but spoke instead in terms of the inapplicability of the APA's constraint on judicial authority. The Court further confirmed – as plaintiffs had urged and this Court had repeatedly held previously –

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[23] *Cobell v. Norton*, 391 F.3d 251, 256 (D.C. Cir. 2004). This injunction addressed the longstanding failure of the government to fix – in the Court of Appeals' words – "gross computer security failures." And contrary to some of Interior officials public comments, they have already conceded that their IT systems have been untrustworthy because they had no security for trust data housed therein, exposing such data to imminent and continuing risk of loss, destruction, and corruption by anyone in the world who had access to the Internet. Worse, there was no audit trail from which the trustee-delegates could detect, identify, trace, and quantify the impact of unlawful transactions. During the same timeframe that the Court ordered disconnection of certain IT systems from the internet, Interior reluctantly conceded that there were "significant deficiencies in the security of information technology systems protecting individual Indian trust data. Correcting these deficiencies merits Interior Defendants' immediate attention." Defendants' Proposed "Consent Order regarding Information Technology Security" at 4. A couple of months later, Norton testified before this Committee and confessed in unequivocal terms that the "Departmental information technology security measures associated with Indian trust data **lack integrity and are not adequate to protect trust data** ...." *Testimony of Gale A. Norton, Secretary of the Interior, before the Committee on Resources, U.S. House of representatives, February 6, 2002, on Native American Trust Issues and the Ongoing Challenges*, at 5 (emphasis added).

[24] *Id.* at 257 (emphasis added).

that the fact this is both a "trust case" and an "Indian case" are "salient considerations ignored by the Secretary that remove this case from the APA framework:

> The district court ... **retains substantial latitude**, much more so than in the typical agency case, **to fashion an equitable remedy** because the underlying lawsuit is **both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties**. *Id.* at 1099, 1109. The Secretary's suggestion that the appropriate role for the district court was confined to retaining jurisdiction and ordering periodic progress reports, as in *In re United Mine Workers of America International Union*, 190 F.3d 545, 556 (D.C. Cir.1999), ignores these salient considerations.[25]

Cobell XIII is in accord. There, the Court took pains to distinguish this action in equity from the normal agency case where both *Lujan v. National Wildlife Federation,* 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), and *Norton v. Southern Utah Wilderness Alliance,* --- U.S. ----, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004) mandated that the APA fully control. Here, by contrast, the "availability of common law trust precepts to flesh out the statutory mandates"[26] trumps ordinary administrative law precepts.[27] Thus, when determining applicable standards and appropriate relief, the court looked to rules of decision governed by trust law, not administrative law.[28] The court added that while availability of trust law provided the rule of decision, it did not "fully neutralize the limits placed by the APA."[29] In that regard, the only identified limitation is that "wholesale improvements" could not be ordered – at this time.[30] Rather, the court could find specific breaches of trust and then order "specific relief" for the identified breaches, hoping that the trustee-delegates

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[25]*Id.* at 257-58 (emphasis added).

[26]*Cobell v. Norton,* 392 F.3d 461, 473 (D.C. Cir. Dec 10, 2004)

[27]*Id.*

[28] For example, the Court discusses circumstances when court's may intervene to ensure that a trustee fulfills duties and relies not on the APA or *SUWA* or *Lujan,* but a trust law treatise, Bogert & Bogert, Law of Trusts and Trustees and the a trust law case, *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 111, (1989). *See Cobell XIII* at 473.

[29]*Cobell v. Norton,* 392 F.3d at 473.

[30]That may not always be the case: " To the extent Interior's malfeasance is demonstrated to be prolonged and ongoing, more intrusive relief may be appropriate ...." *Id.* at 477-78.

would bring themselves into compliance with their trust duties. In this light, the court's only substantive complaint of this Court's September 25 SI was that certain aspects of the injunction had constituted an order "to obey the law in managing the trusts"[31] that was not permissible at that juncture.

After *Cobell XII* and *Cobell XIII*, as this Court has recognized,[32] the applicable decisional law and analytical framework for this case is not administrative law, but trust law, with certain minor modifications.

C. This Court Has Substantial Latitude in Fashioning Effective Equitable Relief

Related to the appellate court's decision regarding the nature of this case, is the substantial guidance that has been provided regarding effective equitable remedies that this Court may fashion to ameliorate breaches of declared trust duties. Since this briefing centers on effective remedies that this Court may fashion to protect trust beneficiaries, this issue is worthy of separate consideration.

What is clear is that once a trust duty is declared and a breach is found, this Court may order the "specific relief" required to remedy the breach.[33] Moreover, this Court, as a court of equity, has "broad equitable powers in ordering specific relief."[34] As noted in *Cobell VI*,

> courts are presumed to possess the full range of remedial powers--legal as well as equitable--unless Congress has expressly restricted their exercise." *Crocker v. Piedmont Aviation, Inc*., 49 F.3d 735, 749 (D.C.Cir.1995). This means that the district court has **substantial ability to order that relief which is necessary to**

[31] *Id.* at 475.

[32] Recently, as an example of the government's commitment to "fight[] and re-fight[],"this Court pointed to this very issue as an example of the trustee-delegates' steadfast refusal to accept settled issues: "[T]he defendants continue to contend today that this is a simple record-review Administrative Procedures Act case--a proposition that has been squarely rejected by this Court on more than one occasion, as well as by three different Court of Appeals panels in *Cobell VI, Cobell XII,* and *Cobell XIII*." *Cobell,* 2005 WESTLAW 419293, at *7.

[33] *Cobell XIII* at 477.

[34] *Cobell VI* at 1108.

cure the appellants' legal transgressions ....[35]

Cobell XII reiterates this very point, holding that the district court "retains substantial latitude ... to fashion an equitable remedy" and that the APA's "narrow judicial powers" do not apply. [36] Finally, in *Cobell XIII*, the Court endorsed a racheting-up approach, holding that where "Interior's malfeasance is demonstrated to be prolonged and ongoing, more intrusive relief may be appropriate."[37]

Here, such misconduct and malfeasance are both historical and on-going. Therefore, plaintiffs expect that such ultimate relief would include the appointment of a receiver if this Court chooses not to remove the unfit Interior trustee-delegates. However, plaintiffs acknowledge that an election of less intrusive equitable remedies, including removal and disgorgement may obviate the need for this Court to opt for the more intrusive receivership remedy.

There can be no dispute that a finding of a breach of trust duties declared or continuing malfeasance allows this Court to exercise its broad authority to order effective equitable relief. This is particularly true where, as here, such relief is necessary to prevent on-going harm to the beneficiary class. We will discuss in Section IV, *infra*, the relief that plaintiffs believe is necessary at this time.

D. This Court has Broad case Management Authority

As this Court is well aware, the government insists this Court has limited ability to manage this case and that case management is not within this discretion. Accordingly, the trustee-delegates' claim that this Court has in error ordered them to submit quarterly status reports and periodic briefings. *Cobell XIII* reiterates that this impotent view of Article III Courts is plainly wrong. The

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[35] *Id. See also id.* ("'[I]f 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.'" (quoting *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992).

[36] *Cobell XII* at 257-58.

[37] *Id.* at 478.

Court of Appeals once again has acknowledged the "the district court's broad case management authority"[38] in determining how to move this case along towards final judgment. We make specific mention of this because there are many potential avenues that this Court can proceed down at this juncture. In section IV, we explain what plaintiffs believe are realistic steps that would ensure prompt resolution of this case on the merits and, equally importantly, to protect individual Indian trust beneficiaries and their property from further irreparable injury in the meantime.

In short, the Court of Appeals now has re-affirmed once again the broad scope of this Court's authority both to manage this case and fashion effective equitable relief. This framework provides a sound basis for the Court to identify continuing breaches of trust, on-going malfeasance, and further undue delay – factual issues that can be established in an evidentiary hearing – and then order specific equitable remedies "necessary to cure the appellants' legal transgressions."

E. There are Limits on Congressional Power to Interfere in This Litigation

In *Cobell XIII,* the Court of Appeals failed to reach the historical accounting portions of the September 25 SI, because Congress has enacted the truly "bizarre"[39] timeout provision in the Interior Appropriations Act, P.L. 108-108 (hereafter "Midnight Rider"). Specifically, the Court held that the one-year break "remove[d] the legal basis for the historical accounting elements of the injunction."[40] By Congress' doing so, the appellate court decided not to review the trial court's historical accounting duty until after the Rider expired on December 31, 2004.

While the Court of Appeals believed that this one-year Midnight Rider was constitutional, that was so only because of its temporary nature. Had the Rider purported to extinguish the declared duty to account, it would have violated the Fifth Amendment Takings Clause.[41] Moreover, such action would constitute a repudiation of the Trust itself, requiring that this Court place the

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[38]*Cobell XIII* at 474.

[39]*Cobell,* 2005 WESTLAW 419293, at *7.

[40]*Id.* at 465.

[41]*Id.* at 468.

Trust in receivership to protect the Trust assets. Importantly, the *Cobell XIII* court acknowledged that Congress was not free to gerrymander the accounting duty retrospectively. In fact, whatever Congress did it would have to "assur[e] that each individual [beneficiary] receives his due or more."[42] Put another way, any retroactive legislative modification of the declared accounting duty that would not ensure each beneficiary "his due or more" would necessarily constitute a taking of that individuals' property and, hence, constitutionally infirm.

F. The Government Owes Beneficiaries Interest and Imputed Yield

In upholding the Midnight Rider as constitutional, the *Cobell XIII* court held that it did not constitute an impermissible taking because any delay in the distribution of plaintiffs' trust funds necessarily would require payment to the trust beneficiaries of imputed interest earned throughout the period that the government retained such funds. Specifically, the court held: "As trust income beneficiaries are typically entitled to income from trust assets for the entire period of their entitlement to income, and for imputed yields for any period of delay in paying over income or principal, *see* G.G. Bogert & G.T. Bogert, Law of Trusts and Trustees § 814, pp. 321-25 (rev.2d ed. 1981) ...."[43] In so holding, *Cobell XIII* has now settled a longstanding dispute between the parties. The government is required to correct and restate the account balances of each trust beneficiary and distribute to each trust beneficiary all such funds, including without limitation all accrued and imputed "interest" and "imputed yields." This makes the determination of an effective remedy easier to determine.[44]

III. FEBRUARY 8, 2005 MEMORANDUM OPINION OF THE COURT

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[42] *Id.*

[43] *Id.* at 465.

[44] Of course, the statute limitations does not temporally limit the accounting and restatement either. *See Cobell v. Norton*, 260 F. Supp.2d 98, 107 (D.D.C. 2003) (applying general principle that "the statute of limitations does not commence running for a beneficiary's equitable claim to enforce the obligations of the trustee until the trustee has repudiated the beneficiary's right to the benefits of the trust").

To properly assess plaintiffs' plans to proceed, it is important that we briefly discuss the nature and scope of this case. This Court's February 8th decision[45] does provide important parameters on the scope of this case, but importantly, they are not as limiting as the trustee-delegates suggest.

On February 8, 2005, this Court reconfirmed that "the scope of this litigation" presently is confined:

> to issues related to the defendants' duty to provide to the Indian beneficiaries an accounting of the trust, which is the subject matter of the only claim the plaintiffs assert that is statutorily-based. As such, the claim for an accounting is the only "live" claim in this litigation.

Cobell v. Norton, 2005 WL 310516 at *7 (D.D.C.) (emphasis original). This Court made clear that "the only aspects of the defendants' activities as trustee-delegates that are properly within the Court's jurisdiction are **those that relate directly to the capacity of the defendants** to render the accounting required by law." *Id.* at *8 (emphasis added). This is critical language to understand the nature and scope of this case – those aspects of trust that go to trustee-delegates "capacity" to render an adequate accounting are within the scope of this litigation. Accordingly, prospective aspects of trust reform at issue in this litigation necessarily include those related to the trustee-delegates' (in)ability – their lack of capability and integrity – to render an accurate and complete accounting of the IIM trust.

Trustee-delegates repeatedly and deliberately have misconstrued and distorted this Court's holding to argue that any and all manner of prospective trust management (*e.g.* trust reform), other than accounting activities, are outside the scope of this litigation. But that is a patently dishonest and selective reading and is completely inconsistent with the February 8th decision and prior Court of Appeals decisions. Specifically, this Court's February 8, 2005 opinion is unambiguous:

> **A necessary precondition** to the defendants' achieving the **necessary capability** to render the required accounting, however, requires remedying these infrastructure problems. Accordingly, these matters continue to be mandatory subjects of the quarterly reports because **the Court has determined that they are directly**

[45] *Cobell*, 2005 WL 310516.

> **relevant** to the defendants' accounting duties--a determination that the Court of Appeals affirmed in *Cobell VI.*

Id. at *10 (emphasis added). Because such prospective aspects of trust reform are "directly relevant to the defendants accounting duties," they necessarily are at issue in this litigation. Plaintiffs are not of the view that pure "asset management" claims are presently part of this case – and, trustee-delegates' obfuscation and deliberate misuse of the term "asset management" cannot make it so. Plaintiffs, for example, have not sought to peer into internal Interior administrative processes of how the trustee-delegates have implemented irrigation systems on trust lands – as of yet. Nor do plaintiffs now seek recovery of compensation for the trustee-delegates' failure to attain fair market value. However, that does not mean such "asset management" issues are irrelevant to this case. Indeed –

> [t]o the extent that some aspects of what might otherwise be purely matters of "asset management" have an impact on class members' right to a full and accurate accounting of their trust assets . . . this Court has jurisdiction to require or restrict agency conduct as a consequence of the Court's remedial jurisdiction to enforce Interior's established fiduciary duties. To be sure, not all aspects of Interior's dealings with the trust, trust assets, or trust income will fall under the Court's jurisdiction in this way. However, **where there is a substantial connection between some Interior action and the rendering of the required accounting, that action is subject to scrutiny under this Court's continuing jurisdiction to ensure that the required accounting is, in fact, produced without further delay**.

Cobell v Norton, 225 F.R.D. 41, 47 (D.D.C. 2004) (emphasis added, citation omitted). For example, whether an item was collected and properly credited can only be determined by tracing items from each lease. This makes these matters highly relevant to the accounting "all funds." Indeed, because trustee-delegates' incompetent and inept trust management has so fouled up the Trust and has impaired their ability to render an adequate accounting, the trustee-delegates, themselves, have ensured that all Interior's actions with respect to the trust are "substantial[ly] connect[ed]" to the rendering of an adequate accounting. Otherwise, the accounting declared is reduced to utter nonsense.

Until plaintiffs amend the complaint, we understand that there are certain aspects of trust reform and asset mismanagement that are outside the scope of this case. But this Court has made

clear that matters related to – "substantial[ly] connect[ed]" to – the rendering of an adequate accounting (whether or not they fall within trustee-delegates' category of "asset management" or "trust reform") remain relevant to the accounting duty enforced in this litigation and accordingly are matters squarely within the scope of this litigation.

IV. EQUITABLE REMEDIES AVAILABLE TO THIS COURT

In light of this Court's broad equitable authority to remedy violations of law and breaches of the trust – which was again reaffirmed by the U.S. Court of Appeals – and pursuant to this Court's broad case management authority plaintiffs hereby present their case management plan to remedy the trustee-delegates' violations of law and breaches of trust. As stated, the Court has many options. Plaintiffs respectfully suggest that the following approach is the best available manner to proceed.

In reality, the trustee-delegates' deplorable record historically[46] and in these proceedings proves that they are utterly incapable of rehabilitating their decrepit trust management systems to render a complete and accurate accounting.[47] It should be obvious to even these trustee-delegates

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[46]*See, e.g., Cobell XIII* at 464 (and internal citations omitted)(noting the well-established "dismal history of inaction and incompetence").

[47]Thus, to compel production of the "To-Be Plan" will be useful for the Court to further confirm the unfitness of the trustee-delegates, but it will not and cannot enable the trustee-delegates to rectify the eleven breaches of trust found by this Court – including the seven breaches stipulated to by the trustee-delegates – on December 21, 1999 and it will not ameliorate the continuing ruination and waste of the trust funds and all other trust assets. Notably, plaintiffs are aware that on this date defendants filed their *Notice of Filing the Department Of The Interior's Fiduciary Trust Model and To-Be Model*. But, while such a notice suggests the filing of the vaunted "To-Be Plan," in fact, there is no plan attached. There is not even a plan to make a plan; much less any detailed time lines whereby plaintiffs and this Court may finally expect reform of the Trust to be completed. There is no discussion of the corrupted or lost trust data. No "plan" to implement effective trust systems for the first time in the history of this Trust. No articulation of any standards whereby this Trust is "to be" administered. No details about how the deplorable records management program will be remedied. This is the great "To Be Plan" that was promised this Court and plaintiffs? If this sham notice constitutes trustee-delegates' attempt to comply with their vaunted To-Be Plan – which plaintiffs and this Court have been awaiting for almost three-and-one-half years – to bring themselves into compliance with declared and admitted breaches, then it is more contemptuous and dishonest than the quarterly reporting process.

For plaintiffs to continue to "identify flaws" in habitually dishonest filings will continue to

that once a statute is identified that permits the government to exercise control over trust assets – including, trust lands – the "court may look to common law trust principles to particularize that [fiduciary] obligation."[48] Furthermore, once such duties are grounded in statutes or treaties, as in accordance with the law governing trust funds, the fiduciary duties that apply to the trustee-delegates' management of trust lands will be "defined in traditional equitable terms."[49]

> [Plaintiffs have proven and the courts have found that] the IIM funds are by statute under the full control of the United States, to be invested for the benefit of individual Indians in public debt of the United States or deposited in banks.[50]

Once this finding is made, "conventional fiduciary duties" attach, "requir[ing] that statutory ambiguities be resolved in favor of Indians"[51] and permitting the district court to fashion equitable remedies to provide relief for the breach of such duties. Among the equitable remedies that plaintiffs will request is the disgorgement of all trust funds and the deposit of such funds into the

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accomplish nothing in this litigation, given the persistent bad faith of defendants and their counsel, particularly because this Court may not prescribe with specificity those actions which must be taken to achieve broad and meaningful programmatic trust reform. Indeed, this Court is limited to proscribing those actions which would further delay the rendering of an adequate accounting – such authority has been confirmed in both *Cobell XII* and *Cobell XIII*. *See, e.g., Cobell XIII* at 473:

> While a court might certainly act to prevent or remedy a trustee's wrongful intermingling of trust accounts, this does not imply that the normal remedy would be an order specifying *how* the trustee should program its computers to avoid intermingling, **as opposed to, for example, barring the use of a program that had caused forbidden intermingling or was clearly likely to do so.**

Id. (italics in original, emphasis added, citation omitted). By way of analogy, it is both a plain abuse of discretion and a constitutional violation to employ statistical sampling as an alternative to a conventional accounting of all funds, including deposits, withdrawals, accruals, and imputed income and interest if such methodology will further delay the court-ordered historical accounting. Therefore, statical sampling is properly barred. It is even more appropriate where, as here, trustee-delegates admit that such a methodology cannot ensure that each trust beneficiary receives at least what he or she is due.

[48]*Cobell XIII* at 472.

[49]*Id.* (*citing Cobell VI* at 1099).

[50]*Id.* at 464 (citing 25 U.S.C. §§ 161a(b), 162a(a)).

[51]*Id. at* *8 (citing *Montana v. Blackfeet Tribe of Indians).*

registry of the Court to ensure their preservation and protection.[52] Such a remedy is particularly appropriate to the necessities and particulars of this case because the trustee-delegates cannot and will not render an adequate accounting to each individual Indian trust beneficiary. The reasons for their recalcitrance are easily understood.

For over one hundred years, the trustee-delegates have deliberately destroyed the vast majority of records which establish their historic breaches of trust. Such records would have not only identified the breaches through the rendering of an adequate accounting, but enabled a court sitting in equity to quantify such breaches in order to fashion an appropriate remedy. Unfortunately, such a remedial paradigm is not in the offing whether the plaintiff class and this Court wait until 2007, 2009 or even 2055.[53] For it is not in the trustee-delegates' interest – no matter what this Court declares or orders – to begin to attempt to undertaken an adequate accounting. Simply put, the trustee-delegates' liability is astronomical as a result of their historical incompetence, malfeasance in the administration of the trust and willful spoliation of trust records and no order of this Court will compel these obdurate trustee-delegates to begin to render an adequate accounting. Here, for trustee-delegates and their counsel, the fulfillment of their trust duty to render an adequate accounting is worse than any cognizable sanction. Unfortunately, the only individuals to suffer as a result of the trustee-delegates' cynical campaign of delay are the individual Indian trust beneficiaries. But this Court is not without the full panoply of remedial powers to fashion

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[52]*See e.g., Philip Morris v. U.S.*, 396 F.3d 1190, 1198 (February 4, 2005) (*Sentelle concurring*):

> Disgorgement . . . is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo. *See, e.g., Tull v. United States*, 481 U.S. 412, 424, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987). It is measured by the amount of prior unlawful gains and is awarded without respect to whether the defendant will act unlawfully in the future. Thus it is both aimed at and measured by *past* conduct.

Id. (emphasis original).

[53]This Court will recall that then-lead counsel for defendants, Phillip Brooks, advised this Court in the presence of plaintiffs' counsel that this Court would wait 50 years for an adequate accounting. Such a statement is tantamount to an admission that an adequate accounting will never be rendered no matter what injunction is entered – or what schedule is adopted – by this Court.

immediate, meaningful relief given the record of these proceedings.

A. Removal of the Trustee-Delegate

Without an evidentiary hearing conducted for the purpose of eliciting additional proof of an abuse of discretion,[54] the most appropriate equitable remedy is the removal of the Interior defendants as trustee-delegates – an intermediate remedy always within the inherent authority of this Court – given the constraints imposed on the district court's authority to explicitly direct what is necessary for meaningful trust reform.[55] Absent the removal of the trustee-delegates, trust funds – and other assets, including the trust records themselves – will continue to fall into waste and ruin. A court's exercise of this power is viewed as inherent in a court sitting in equity to "enforce trusts and protect beneficiaries." *See, e.g.*, Bogert at § 571. Indeed, based on serious breaches of trust found by this Court, including the obdurate refusal of the Interior defendants to even begin to render the accounting declared; the willful spoliation of evidence, including trust records; the knowing and willful violations of this Court's orders; the historical malfeasance found by this Court and the Court of Appeals in the management of the trust; the bad faith the trustee-delegates and their counsel have practiced in this litigation; the abject hostility of the Interior trustee-delegates to plaintiffs and this Court; and the irreparable harm plaintiffs have been forced to endure for generations, it is clear that the Interior trustee-delegates should have been removed years ago. In that regard, Bogert explains:

> **Breaches of trust** which have been regarded by the courts as **sufficiently serious to justify removal** are **disobedience of court orders,** or to directions in the trust instrument, **failure or refusal to act,** mingling of trust property with the trustee's individual property, **failure to account, ... disloyalty,** ... **the appropriation or attempted appropriation of trust funds, ...**
>
> * * * *
>
> **A further cause for removal is sometimes found ... where the defendant has been guilty of obstinate and obstructive conduct and a stalemate in the administration results.**
>
> * * * *
>
> [I]n some instances, **the hostile relations between the trustee and beneficiary**

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[54] *Id.* at 473.

[55] *Id.* at 478 ("[T]he court may not micromanage court-ordered reform efforts ....").

> **have gone so far that the court feels a new trustee should be appointed. Where the malicious or vindictive conduct of the trustee is the cause of disagreement and bitterness, removal is apt to be decreed.**

Id. at 573-74 (emphasis added, citations omitted). Here, of course, the trustee is the government and the co-trustee delegate is the Treasury Secretary. Neither the government nor the co-trustee delegate would be the subject of removal proceedings. Thus, the constitutional issues implicated in the removal of the government as trustee are not implicated by the removal of these manifestly unfit Interior trustee-delegates. This is particularly so given the 100 pages of this Court's established findings of malfeasance, bad faith, fraud, violations of court orders, and other misconduct that remain undisturbed.

Indeed, where, as here, malfeasance and dishonesty, including fraud and corruption have pervaded, and continue to plague, the Interior trustee-delegates' management of the Individual Indian Trust and relentless bad faith in this litigation, not even Congress – the settlor of the Individual Indian Trust – can intervene to protect Norton from removal by this Court:

> No matter how broad the language of the trust instrument may be in conferring discretion upon the trustee, **[s]he will never be permitted to act dishonestly or in bad faith** .... Even if the settlor does intend to confer upon him [or her] the power to act in bad faith, the trustee will not be permitted to do so. **Public policy does not permit the creator of a trust to deprive the courts of all power of control.**[56]

B. Disgorgement

The trustee-delegates have admitted that approximately $13 billion in IIM funds were collected on behalf of the individual Indian trust beneficiaries. The duty to account for such reported income – and imputed interest and accrued income – and the actual and imputed interest earned thereon has been held to be unconditional by this Court and has been reconfirmed repeatedly by the Court of Appeals in *Cobell VI*, *XII*, and *XIII*. However, because the government willfully has ignored this Court's December 21, 1999 declaratory judgment notwithstanding the trustee-delegates' promise that they would honor it as they would honor an order or injunction, and because

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[56]Scott on Trusts, Vol. III § 187.3 at 44-45 (emphasis added, citations omitted). *See also*, Bogert at § 161, 572 ("The settlor may .... not deprive the court of its inherent authority to remove.").

the trustee-delegates continue to retain such funds and unlawfully refuse to disburse such funds to each trust beneficiary in the correct amount, it is appropriate for this Court to order disgorgement as an equitable remedy.

Plaintiffs have stated repeatedly that, in reality, the trustee-delegates are incapable of rendering an adequate accounting and they have done everything possible to ensure that the discharge of their accounting duty is utterly futile because of their systemic spoliation of electronic and hard copy trust data and their knowing and willful failure to ensure the trustworthiness and integrity of their information technology systems to secure the records housed therein. Accordingly, and consistent with more than 800 years of trust law and the inherent authority of this Court to fashion equitable remedies, trust beneficiaries may select the remedies that they believe are appropriate for the trustee-delegates' repeated breaches of trust, including without limitation their willful and continuing breach of their duty to account.[57]

Where, as here, the trustee-delegates have unlawfully withheld from plaintiffs at least $13 billion in revenues that were collected from trust lands plus the interest earned, the appropriate equitable remedy is the disgorgement of plaintiffs' funds and the payment of such funds into the registry of this Court. This is a standard equitable remedy that this Court is authorized to fashion under these circumstances:

> [T]he defendant (often a fiduciary) has profited by using something which in good conscience belongs to the plaintiff and that the defendant ought to disgorge his profits in much the same way a constructive trustee would be required to do so.[58]

A disgorgement order would force the trustee-delegates to disburse the trust funds (into the registry of the Court) that they have collected and retained unlawfully for their use. Such a disbursement would not interfere with, or diminish in any way, trustee-delegates' duty to render a complete and

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[57]*See, e.g.*, Scott on Trusts, Vol. III § 212 ("[T]he beneficiaries have a choice among the remedies afforded for each breach of trust.").

[58]Dobbs Law of Remedies (2d ed.) ("Dobbs") at 158 § 2.6(3). Dobbs states further that this type of case is among "[t]he most obvious cases of specific restitution ... [because] ... the defendant has acquired possession or custody of the plaintiffs' goods or property ...."). *Id.* at 625 § 4.3(5).

accurate accounting. Further, such an order would keep the burden of proof where it properly resides – on the trustee-delegates to proffer an adequate accounting.

Specifically, in an evidentiary hearing, the trustee-delegates would be required to prove the validity of each disbursement made from the trust. And, if such proof is made with competent evidence and properly supported, the trustee-delegates may deduct such confirmed disbursements from the $13 billion before this court determines the interest that was earned while such funds have been held in trust. Dobbs explains the enormous benefits and judicial economy of a disgorgement proceeding that would provide appropriate protection for trust beneficiaries prior to the rendering of the declared accounting, particularly where, as here, the trustee-delegates have engaged, and continue to engage, in bad faith in this litigation and malfeasance in the management and administration of the trust:

> The terms "account" and "profits" are used in many common expressions .... The kind of accounting for profits discussed here has two main effects in current practice: First it forces the fiduciary defendant to disgorge gains received from improper use of plaintiff's property or entitlements. Second, it imposes on the fiduciary defendant the burden of proving appropriate deductions for expenses he incurred in reaping those profits; that is, the plaintiff makes a *prima facie* case by showing breach of fiduciary duty plus gross receipts resulting to the fiduciary, and the defendant must prove what deductions are appropriate to figure out the net profit.[59]

Of course, as defense counsel know well, this remedy is an equitable remedy – not damages.[60]

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[59]Dobbs at 610 § 4.3(5). Dobbs notes that the term "profits" is not to be construed as business profits; rather, it refers to "net rents" derived from plaintiffs' lands and other natural resources. *Id.* at n. 10 (citation omitted) ("The term 'profits' in the occupation of land context is based upon ancient usage which has nothing to do with business profits. Today, it ordinarily refers to net rents.").

[60]*See, e.g.*, Plaintiffs' Exhibit 1 (March 4, 2005 United States Petition for Panel Rehearing and Petition for Rehearing En Banc, *US v. Philip Morris USA Inc.*, No. 04-5252) at 8:

> The delineation of a court's power to 'restrain' violations, however, must be informed by an understanding of the remedial powers of courts once they are vested with equity jurisdiction. . . . [E]quity courts have long ordered disgorgement as a remedy to prevent unjust enrichment. *See Tull v. United States*, 481 U.S. 412, 424 (1987).

Id. *See also id.* at 10 ("The Court recognized that '[d]isgorgement is an equitable remedy designed to deprive the wrongdoer of his unjust enrichment and to deter others from violating' federal law. The Court further noted that . . . '[u]nless otherwise provided by statute, all equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.'")

Dobbs concurs and concludes that disgorgement is grounded in "unjust enrichment."[61] Accordingly, plaintiffs will by separate motion ask this Court to set a date certain for a disgorgement evidentiary hearing to calculate the amounts to be deposited into the registry of the Court. In the course of that hearing, the trustee delegates can net the amounts they have actually paid to each beneficiary from the $13 billion they admit they have collected. Once disbursement proofs are proffered in accordance with governing rules of evidence and trust law, this Court may determine the funds to be disgorged – including interest – and order the deposit of such funds into the registry of the Court so that it can make the distributions that have been unlawfully withheld and begin to relieve the harm that plaintiffs have suffered for generations.

V. CONCLUSION

Cobell XII and *Cobell XII*, taken together, re-affirm this Court's broad authority provide remedies that address declared breaches of trust. The Court has declared certain of these duties and breaches already. Plaintiffs have set forth our views as to how this Court should proceed given the present circumstances of continuing malfeasance and further unreasonable delay. We respectfully suggest that this is the time to proceed with effective, conventional and traditional equitable remedies to address identified breaches to begin to ensure the protection of individual Indians and their property.

(citations omitted).

[61]Dobbs at 611.

Respectfully submitted,

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March 15, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' BRIEF IN COMPLIANCE WITH THE COURT'S ORDER OF FEBRUARY 23, 2005 SETTING FORTH THE EFFECT OF *COBELL XIII* ON THE PROVISIONS OF THE SEPTEMBER 25, 2003 INJUNCTION OTHER THAN THE HISTORICAL ACCOUNTING PROVISIONS was served on the following via facsimile, pursuant to agreement, on this day, March 15, 2005.

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/s/ Geoffrey Rempel
_____
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6918097

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ORIGINAL

(Petitioner)

[ORAL ARGUMENT HEARD ON NOVEMBER 17, 2004]

No. 04-5252

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

UNITED STATES OF AMERICA,
Appellee,

v.

PHILIP MORRIS USA INC. et al.,
f/k/a PHILIP MORRIS INCORPORATED,
Appellants,

PHARMACIA CORPORATION AND PFIZER INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

Page

GLOSSARY

CONCISE STATEMENT OF THE ISSUE AND ITS IMPORTANCE 1

STATEMENT 3

ARGUMENT 5

A. The Majority's Cramped Reading Of Section 1964(a) Cannot Be Squared With Decisions Of The Supreme Court, This Court, And Other Courts Of Appeals Construing The Same And Similar Provisions 5

B. The Majority's Holding Severely Undermines Congress's Purpose To "Divest" RICO Enterprises Of "Ill-Gotten Gains." 12

CONCLUSION 15

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

Cases:	Page
CFTC v. American Metals Exchange Corp., 991 F.2d 71 (3d Cir. 1993)	11
CFTC v. British American Commodity Options Corp., 788 F.2d 92 (2d Cir. 1986)	10
CFTC v. Co Petro Marketing Group, Inc., 680 F.2d 573 (9th Cir. 1982)	11
CFTC v. Hunt, 591 F.2d 1211 (7th Cir. 1979)	10
F. Hoffman-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359 (2004)	12
FTC v. Gem Merchandising Corp., 87 F.3d 466 (11th Cir. 1996)	10
ICC v. B & T Transportation Co., 613 F.2d 1182 (1st Cir. 1980)	10
Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996)	11, 12
* Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960)	1, 6, 7, 8, 9, 10, 11
* Porter v. Warner Holding Co., 328 U.S. 395 (1946)	1, 6, 7, 8, 9, 10, 11, 12
Richard v. Hoechst Celanese Chem. Group, Inc., 355 F.3d 345 (5th Cir. 2003)	1, 5, 6
SEC v. Banner Fund Int'l., 211 F.3d 602 (D.C. Cir. 2000)	10
SEC v. Bilzerian, 29 F.3d 689 (D.C. Cir. 1994)	10
* SEC v. First City Financial, 890 F.2d 1215 (D.C. Cir. 1989)	1, 2, 10, 11
Schine Theaters v. United States, 334 U.S. 110 (1948)	13
Tull v. United States, 481 U.S. 412 (1987)	8
United States v. Carson, 52 F.3d 1173 (2d Cir. 1995)	1, 3, 5, 6
United States v. Gypsum Co., 340 U.S. 76 (1950)	13
* United States v. Turkette, 452 U.S. 576 (1981)	2, 12, 13

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* Authorities chiefly relied upon are marked with asterisks.

Statutes :

Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 ..... 9, 12

Racketeer Influenced and Corrupt Organizations Act (RICO):

18 U.S.C. § 1963(a) 4, 5
* 18 U.S.C. § 1964(a) 1, 2, 3, 4, 5, 7, 8, 9, 13
18 U.S.C. § 1964(c) 4, 5

15 U.S.C.§ 78i 10
15 U.S.C.§ 78r 10
15 U.S.C.§ 78p(b) 10
15 U.S.C.§ 78t 10
15 U.S.C.§ 78ff 10

28 U.S.C. § 1292(b) 4, 5

29 U.S.C. § 217 8

Legislative Materials:

S. Rep. No. 617, 91st Congress, 1st Sess. (1969) 9, 13

GLOSSARY

App.	United States' Appendix, submitted to the panel in this case
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act of 1980
Defendants' post-appeal mem.	Defendants' Memorandum Regarding Non-Disgorgement Remedies Pursuant to Order #875 (filed Feb. 22, 2005)
EPCA	Emergency Price Control Act
FLSA	Fair Labor Standards Act
JA	Defendants' Appendix, submitted to the panel in this case
RCRA	Resource Conservation and Recovery Act
RICO	Racketeer Influenced and Corrupt Organizations Act

CONCISE STATEMENT OF THE ISSUE AND ITS IMPORTANCE

The panel majority held that, as a matter of law, an equitable order directing racketeering defendants to disgorge their ill-gotten gains is never available in a civil action by the United States under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964(a). Majority 21. As the majority acknowledged (id. at 20) that holding is in direct conflict with decisions of two other circuits on the precise issue presented. See Richard v. Hoechst Celanese Chem. Group, Inc., 355 F.3d 345, 354-55 (5th Cir. 2003) ("disgorgement is generally available under § 1964"); United States v. Carson, 52 F.3d 1173, 1181 (2d Cir. 1995) ("disgorgement is among the equitable powers available to the district court by virtue of . . . § 1964"). Moreover, as the Dissent observed (Dissent 15), the majority's holding contradicts the repeated recognition by the Supreme Court and this Court that a grant of equitable jurisdiction is presumed to encompass all forms of equitable relief, including the power to order disgorgement. See Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 290-93 (1960) (authorization "to restrain violations" of the Fair Labor Standards Act encompasses power to order reimbursement of wrongfully denied wages); Porter v. Warner Holding Co., 328 U.S. 395, 397-98 (1946) (grant of jurisdiction "to enjoin acts and practices made illegal by" the Emergency Price Control Act and "to enforce compliance with the Act" conferred power to enter a "decree compelling [defendant] to disgorge profits . . . acquired in violation" of the Act); SEC v. First City Financial, 890 F.2d 1215, 1229-30 (D.C. Cir. 1989) (authority "to enjoin" violations of the Securities Exchange Act of 1934 encompasses an order directing "disgorgement of profits").

The majority's categorical rule barring disgorgement is fundamentally flawed and threatens critical objectives Congress sought to achieve through RICO. That erroneous holding would warrant review by the en banc court in any case, but such review is especially merited here, in the largest civil RICO case ever brought by the government.

The United States filed this action under RICO to obtain equitable relief against the defendant cigarette manufacturers and related entities, which are alleged to have engaged in a pattern of criminal activity spanning more than half a century. The defendants' conduct exerts an ongoing hold on millions of Americans who have fallen prey to the defendants' fraudulent practices and become addicted to defendants' products. Because of the addictive character of defendants' cigarettes (which defendants artificially enhance by manipulating ingredients while, at the same time, obscuring the truth through fraud), defendants stand to gain billions of dollars in future profits from their past criminal conduct, in addition to the billions already reaped. Pursuant to § 1964(a) of RICO, which authorizes the courts to issue appropriate orders "to prevent and restrain violations" of the Act, the government's suit seeks equitable relief, including disgorgement of defendants' illegal profits and injunctive relief designed to undo the effects of an alleged 50-year pattern of fraud.

Without acknowledging the Supreme Court's explicit recognition that the aim of RICO's civil remedies "is to divest the [RICO enterprise] of the fruits of its ill-gotten gains," United States v. Turkette, 452 U.S. 576, 585 (1981), the panel majority excluded disgorgement categorically from the arsenal of remedies under § 1964(a) precisely because disgorgement is "aimed at separating the criminal from his prior ill-gotten gains." Majority 18. The majority likewise ignored this Court's holding in First City Financial that the authority "to enjoin" statutory violations encompasses an order "direct[ing] disgorgement of profits." 890 F.2d at 1229-30.

The effects of the majority's holding are sweeping and threaten to cripple RICO's remedial force. Under the broad language of the majority's opinion, defendants argue that the district court is barred not only from ordering disgorgement, but also any "remedies that 'cure ill effects of past unlawful conduct.'" Defendants' post-appeal mem. 3. The district court apparently agrees: "Judge Sentelle's Opinion, as this Court reads it, simply does not permit non-disgorgement remedies to

prevent and restrain the effects of past violations of RICO." Order #886, at 5 (Feb. 28, 2005). The panel majority's decision, so construed, would leave the district court virtually powerless to prevent these defendants from reaping, for years to come, the benefits from their fraudulent conduct or to remedy the enormous injury from the alleged fraud.

The majority's holding that disgorgement is unavailable as a matter of law in actions under § 1964(a), even when necessary to prevent and restrain future RICO violations, presents an issue of exceptional importance in a compellingly important context. Review by the full Court is warranted.

STATEMENT

A. The United States brought this suit in 1999 seeking, inter alia, equitable relief pursuant to 18 U.S.C. 1964(a), which authorizes district courts "to prevent and restrain violations" of RICO by "issuing appropriate orders, including, but not limited to" ordering persons to divest themselves of interests in an enterprise, restricting future activities and investments, and "ordering dissolution or reorganization of any enterprise." As part of its request for equitable relief, the government seeks equitable disgorgement of profits obtained as a result of defendants' statutory violations.

Defendants moved to dismiss. In an opinion issued in September 2000, the district court denied defendants' motion to dismiss the government's RICO claims, rejecting the contention that disgorgement can never be appropriate relief in a civil RICO suit. Defendants did not seek leave to take an interlocutory appeal from that ruling.

B. After four years of discovery, defendants moved for partial summary judgment. Relying on the Second Circuit's decision in United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), defendants argued that the scope of any disgorgement award should be limited to those proceeds that either "'are being used to fund or promote the illegal conduct, or constitute capital available for that purpose.'" App. 49 (quoting Carson, 52 F.3d at 1182). In defendants' view, that requirement would limit

disgorgement to the specific proceeds of their unlawful activities, and, therefore, disgorgement could be defeated by a showing that those proceeds had already been spent. App. 51. Defendants noted in a footnote their disagreement with the court's prior rejection of their argument that disgorgement is totally unavailable under RICO, App. 35 n.4, but did not ask the court to reconsider that ruling.

In May 2004, the court denied defendants' summary judgment motion. The court rejected the defendants' contention that disgorgement under RICO is limited to ill-gotten proceeds presently available to fund further unlawful activities. JA 832. On defendants' motion, however, the district court certified its summary judgment order for interlocutory appeal. JA 839, 841. The court did not revisit its 2000 ruling rejecting defendants' argument that disgorgement is entirely unavailable in RICO actions as a matter of law, nor did the court certify that order for interlocutory review. The government opposed interlocutory review, urging that whether disgorgement was an appropriate remedy is a case-specific inquiry that did not satisfy 28 U.S.C. § 1292(b).

In their appellate briefs, defendants addressed the issue decided in the district court's certified order only briefly, focusing instead on the proposition – decided in the district court's uncertified 2000 order – that equitable disgorgement is never authorized under § 1964(a).

C. A divided panel held that, as a matter of law, an order of disgorgement is outside RICO's grant of authority to enter appropriate orders to "prevent and restrain" statutory violations. Judge Sentelle, writing for the majority, declared that "[t]his language indicates that the jurisdiction is limited to forward-looking remedies that are aimed at future violations," whereas disgorgement "is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo." Majority 15. The majority noted that RICO's criminal forfeiture provision, 18 U.S.C. 1963(a), and the private right of action for treble damages, 18 U.S.C. 1964(c), specifically address remedies for past conduct, and concluded from this fact that "[t]his 'comprehensive and

reticulated' scheme, along with the plain meaning of the words themselves, serves to raise a 'necessary and inescapable inference,' . . . that Congress intended to limit relief under § 1964(a) to forward-looking orders, ruling out disgorgement." Majority 18-19 (citation omitted).

Judge Tatel dissented. He concluded, first, that the case was inappropriate for interlocutory review and sharply criticized what he described as defendants' "bait and switch" misuse of the § 1292(b) process, Dissent 7, declaring that "[t]his court should not be rewarding such tactics by exercising its discretion to hear this appeal," id. at 13. On the merits, the dissent concluded that the panel's approach was at odds with Supreme Court and circuit precedent, and rejected the proposition that disgorgement was, by its nature, "backward-looking." Id. at 14-21, 28.

ARGUMENT

A. The Majority's Cramped Reading Of Section 1964(a) Cannot Be Squared With Decisions Of The Supreme Court, This Court, And Other Courts Of Appeals Construing The Same And Similar Provisions.

1. The Second and Fifth Circuits in United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), and Richard v. Hoechst Celanese Chem. Group, Inc., 355 F.3d 345 (5th Cir. 2003), have each recognized that disgorgement is available in an appropriate case under § 1964(a) of RICO. As the panel majority recognized (Majority 20), its holding that disgorgement is categorically excluded from the equitable remedies available to the courts under RICO creates a direct conflict with the Second and Fifth Circuits, and leaves this Court isolated as the only court of appeals to reject disgorgement regardless of the facts. The majority's holding is not, however, merely in conflict with the views of other courts of appeals. The majority's decision also cannot be squared with the principles of statutory construction articulated by the Supreme Court concerning grants of equitable authority. Nor can it be reconciled with this Court's own precedent applying those principles.

2. Congress enacted RICO against the backdrop of Supreme Court decisions that made clear that a general grant of equitable authority, such as the power to "enjoin" or "restrain" statutory violations, encompasses all the traditional equitable powers of chancery, including the power to order disgorgement of ill-gotten profits. In Porter v. Warner Holding Co., 328 U.S. 395 (1946), the Court construed the Emergency Price Control Act of 1942 (EPCA), which authorized the courts to "enjoin[]" "acts or practices which constitute or will constitute a violation . . . of this Act" or to "enforc[e] compliance" with the Act. Id. at 397 (quoting EPCA § 205(a)). The Court held that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." Id. at 398. Thus, the Court held that EPCA's grant of equitable authority encompassed a "decree compelling one to disgorge profits." Id. at 398. In Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960), the Court similarly held that the statutory authorization "to restrain violations" of the Fair Labor Standards Act (FLSA) placed no restriction on the court's inherent power to order reimbursement of wages lost because of an unlawful discharge. See id. at 290-93.

Porter and Mitchell are not fact-specific decisions construing particular statutory language. Rather, the Supreme Court quite specifically laid down general principles of statutory construction with respect to grants of equitable jurisdiction. In Porter, the Court held that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise" of the grant of equitable jurisdiction. 328 U.S. at 398. The Court emphasized that the "comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." Ibid. Thus, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." Ibid. Moreover, when "the public interest

is involved," the court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." Ibid.

The panel majority's opinion turns the governing presumption on its head. The majority reasoned that § 1964(a)'s scope should be restricted because the majority could not find "any necessary implication" in RICO that § 1964(a) includes disgorgement. Majority 16. Porter, however, establishes the opposite presumption; a grant of equitable jurisdiction must be interpreted to include "the full scope" of equitable powers, including disgorgement, "unless a statute . . . by a necessary and inescapable inference, restricts" that authority. 328 U.S. at 398 (emphasis added).

None of the majority's purported bases for declining to follow Porter and Mitchell survives scrutiny. The majority attempts to confine Porter to the particular statute it construed by noting that, after it announced the controlling principles of construction, the Court's analysis went on to "set forth two theories under which" the restitution order fit within the specific language of the statute. Majority 14. But, in Mitchell, the Supreme Court rejected just such an attempt to limit Porter. The Court stated that "[t]he applicability of [Porter's] principle is not to be denied . . . because, having set forth the governing inquiry, [Porter] went on to find in the language of the statute affirmative confirmation of the power to order reimbursement." Mitchell, 361 U.S. at 291. Rather, the Court clarified, Porter states a rule of general applicability: "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." Mitchell, 361 U.S. at 291-92.

The majority also states that Porter is distinguishable on the ground that the courts' authority under RICO to "prevent and restrain" violations is uniquely forward-looking in a way that EPCA's grant of jurisdiction to enter an order "enforcing compliance" with the statute is not. Majority 13-14.

The delineation of a court's power to "restrain" violations, however, must be informed by an understanding of the remedial powers of courts once they are vested with equity jurisdiction. Porter thus did not rely on the particular wording of EPCA, but on the more general point that the court's jurisdiction under the EPCA "is an equitable one." 328 U.S. at 398. It is undeniable that the jurisdiction conferred by § 1964(a) "is an equitable one." And equity courts have long ordered disgorgement as a remedy to prevent unjust enrichment. See Tull v. United States, 481 U.S. 412, 424 (1987). Moreover, Mitchell applied Porter's principle of construction to the FLSA, which, like RICO, authorizes the courts to "restrain violations" of the act, a phrase that the Court equated to "the enforcement of prohibitions contained in [the] enactment." Mitchell, 361 U.S. at 289, 291-92.

The majority's attempt to distinguish Mitchell is equally unfounded. The majority asserts that RICO "grant[s] jurisdiction defined with the sort of limitations not present in the FLSA." Majority 18. As the dissent observed, however, the majority could so conclude only by ignoring the relevant language of the FLSA. As the dissent noted, "[t]he only jurisdictional hook in the FLSA's text . . . was its language: 'the district courts are given jurisdiction . . . for cause shown, to restrain violations' of the act, 29 U.S.C. § 217. If that language opens the door to all equitable relief, then RICO's language – 'the district courts . . . shall have jurisdiction to prevent and restrain violations' – certainly does the same." Dissent 20-21.

The majority's additional contention that the other remedies provided in RICO constitute a "'comprehensive and reticulated' remedial scheme" that, by implication, excludes disgorgement from the equitable powers available under § 1964(a), Majority 18, cannot be reconciled with the fact that EPCA and FLSA provided similarly broad ranges of remedies. As the dissent observed, EPCA, which was at issue in Porter, "authorized a broad array of other remedies, both criminal and civil," including a right for individual suits for treble damages and a provision that the Administrator could

sue for the same remedy on behalf of the United States if the individual was not entitled to sue. Dissent 15. Similarly, contrary to the views of a dissenting justice, the Mitchell majority "thought it insignificant that because both the aggrieved employees and the Secretary could seek lost wages in actions at law under FLSA . . . duplicative recovery might occur," Dissent 20 (citing 361 U.S. at 303 (Whittaker, J. dissenting)).

The majority also errs in suggesting that the "overlap" between disgorgement and criminal forfeiture would circumvent "the additional procedural safeguards that attend criminal charges." Majority 19. Congress did not intend RICO's criminal and civil remedies to be mutually exclusive. Rather, Congress understood RICO's "enhanced sanctions and new remedies," 84 Stat. 923, to give the government a full range of criminal and civil tools and the ability to choose whichever would be most effective. See S. Rep. No. 617, 91st Congress, 1st Sess. 80 (1969) (observing that criminal prosecution is "a relatively ineffectual tool" for implementing RICO's "economic policy"). Indeed, Congress recognized the potential "overlap" between RICO's criminal and civil remedies, noting that a criminal influence "can be legally separated from the organization, either by the criminal law approach . . . or through a civil law approach of equitable relief." Id. at 79. The majority's analysis also fails to apprehend the crucial distinction between § 1964(a) and the provisions for damages and criminal forfeiture: any equitable relief under § 1964(a), including an award of disgorgement, is subject to the court's sound discretion. See Dissent 31. The equitable tools available to a court are broad and flexible, but the court must necessarily determine that issuance of a particular remedy is equitable under the circumstances and that it will further the purposes of the statute.

3. This is not the first time this Court has been called upon to interpret Porter and Mitchell. In SEC v. First City Financial, 890 F.2d 1215 (D.C. Cir. 1989), this Court applied Porter and Mitchell to a provision of the Securities Exchange Act of 1934, which at that time authorized the

district courts "to enjoin" future violations of the Act. The Court recognized that "[d]isgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating" federal law. Id. at 1230. The Court further noted that, under Porter, "[u]nless otherwise provided by statute, all equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." Ibid. (quoting Porter, 328 U.S. at 398). On that basis – notwithstanding that the Securities Exchange Act itself contains a comprehensive scheme of remedies, see 15 U.S.C.78i, 78r 78p(b), 78t, 78ff – the Court held that the district court had authority to order disgorgement "simply because the relevant provisions of the Securities Exchange Act of 1934 . . . vest jurisdiction in the federal courts." Ibid. See also SEC v. Banner Fund Int'l., 211 F.3d 602, 617 (D.C. Cir. 2000); SEC v. Bilzerian, 29 F.3d 689, 695-96 (D.C. Cir. 1994).

The majority's method of analysis cannot be squared with the Court's approach in First City Financial, which the majority opinion does not even address, much less distinguish. Nor does the majority acknowledge the decisions of numerous other courts of appeals holding that similarly phrased grants of authority do not restrict a district court's inherent power to order disgorgement or restitution. See, e.g., FTC v. Gem Merchandising Corp., 87 F.3d 466, 469 (11th Cir. 1996) (authorization "to enjoin" violations of the Federal Trade Commission Act does not restrict the power to order disgorgement); ICC v. B & T Transportation Co., 613 F.2d 1182, 1183, 1184-85 (1st Cir. 1980) (provision of Motor Carrier Act empowering ICC "to seek only prospective injunctions to restrain future conduct," encompassed authority to seek restitution); CFTC v. Hunt, 591 F.2d 1211, 1223 (7th Cir. 1979) (in the absence of an express restriction, the Commodity Exchange Act authorized an order compelling disgorgement of illegally obtained profits); CFTC v. British American Commodity Options Corp., 788 F.2d 92, 94 (2d Cir. 1986) (following Hunt); CFTC v.

American Metals Exchange Corp., 991 F.2d 71, 76 & n.9 (3d Cir. 1993) (same); CFTC v. Co Petro Marketing Group, Inc., 680 F.2d 573, 583-84 (9th Cir. 1982) (same).

4. The majority's heavy reliance upon the Supreme Court's decision in Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996), is misplaced. In Meghrig, the Court held that § 6972(a) of the Resource Conservation and Recovery Act (RCRA), which authorizes district courts "to restrain any person [responsible for toxic waste], to order such person to take such other action as may be necessary, or both," did not authorize a private party suing under § 6972(a)(1)(B) (which provides for suits concerning hazardous wastes posing an imminent and substantial endangerment) to seek recovery of already expended cleanup costs. Id. at 484.

Meghrig does not justify the majority's refusal to follow Porter, Mitchell, and First City Financial here. Meghrig did not purport to overrule Porter and Mitchell, but, rather, rejected the creation of a private right for monetary relief based on features unique to RCRA. The Court contrasted the limited remedies available under RCRA with cost recovery provisions expressly provided in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), under which the government may institute a cost-recovery action and private individuals may seek contribution from those liable for cleanup costs. 516 U.S. at 485. In light of that contrast between parallel statutes addressed to the same subject matter – as well as the text of § 6972(a)(1)(B) that focused on elimination of imminent and substantial endangerment and thus on prospective relief -- the Court concluded that "Congress did not intend for a private citizen to be able to undertake a cleanup and then proceed to recover its costs under RCRA" for past changes. Id. at 487 (emphasis added). Indeed, after reviewing other details of RCRA's enforcement scheme, the Court stressed that "if RCRA were designed to compensate private parties for their past cleanup efforts, it would be a wholly irrational mechanism for doing so." Id. at 486 (emphasis added). The Court noted, for

instance, that RCRA "contains no statute of limitations," "does not require a showing that response costs being sought are reasonable," and, notably, requires that a private individual give the EPA 90-days notice and prohibits the private individual from bringing suit if EPA initiates its own enforcement action. Ibid. Finally, the relief that the plaintiffs sought under RCRA in Meghrig did not involve disgorgement of defendant's ill-gotten gains, but compensation of monies plaintiffs themselves had expended, regardless of any likelihood of future violations or continuing effects of defendants' past misconduct. Thus, the remedy sought more closely resembled a private right of action for damages than an equitable action to enforce the public interest. Cf. Porter, 328 U.S. at 398 (noting that greater equitable flexibility is appropriate when "the public interest is involved"); F. Hoffman-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359, 2370 (2004) (government entitled to broader antitrust relief than private plaintiffs).

B. The Majority's Holding Severely Undermines Congress's Purpose To "Divest" RICO Enterprises Of "Ill-Gotten Gains."

While the numerous conflicts identified above would warrant en banc review in any case, review by the full Court is particularly called for here, in light of the fact that the statute involved is the government's most potent weapon for combating organized crime and the issue arises in the biggest civil RICO action the government has ever brought. The majority's holding threatens to severely undermine Congress's purpose in RICO's civil remedies to "divest the association of the fruits of its ill-gotten gains." United States v. Turkette, 452 U.S. 576, 585 (1981).

1. Congress explicitly provided that RICO "shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947. The statute's remedial purpose is to "deal . . . with the economic base" of violators and "free the channels of commerce from all illicit activity," and Congress provided the courts with authority to craft "equitable relief broad enough to do all that is necessary" to accomplish that end. S. Rep.

No. 617, supra, at 79. Thus, "[a]lthough certain [equitable] remedies are set out, the list is not exhaustive." Id. at 160.

After surveying RICO's legislative history, the Supreme Court recognized that one of the ills Congress intended to address was organized crime's prospective use of "revenue and power" derived from past illegal conduct and that RICO was designed as "'an attack . . . on [that] source of economic power itself.'" Turkette, 452 U.S. at 591-92 (quoting, with emphasis, S. Rep. No. 617, supra, at 79). The aim of RICO's civil remedies, including Section 1964(a), the Court summarized, is "to divest the association of the fruits of its ill-gotten gains." Id. at 585 (emphasis added). Yet, the panel majority held that disgorgement is categorically excluded from § 1964(a) precisely because it is "aimed at separating the criminal from his prior ill-gotten gains." Majority 18. The panel's holding thus frustrates one of the chief aims of RICO's civil remedies. And accomplishment of that purpose is especially important in the context of this case, because the addictive nature of the products sold through defendants' pattern of fraud ensured that their conduct would have a lasting effect, in its impact on victims and in generating profits for defendants, that continues to this day and beyond.

It is particularly anomalous to strip from courts under Section 1964(a) the power to deprive defendants of the fruits of past violations, because the statute on which RICO's remedial provisions are most closely modeled – the antitrust laws – have long been understood to authorize relief that removes the fruits of illegal conduct from the wrongdoer's hands. Section 4 of the Sherman Act, which uses the identical phrase "prevent and restrain violations," was said by the Supreme Court to empower trial courts to, "so far as practicable, cure the ill effects of the illegal conduct, . . . assure the public freedom from its continuance," and "den[y] [the conspirators] future benefits from their forbidden conduct." United States v. Gypsum Co., 340 U.S. 76, 88-89 (1950); see also Schine Theaters v. United States, 334 U.S. 110, 128 (1948) (divestiture, among other its purposes, "deprives

the antitrust defendants of the benefits of their conspiracy"). RICO's equitable remedies should receive at least equal scope, particularly since a central purpose of the statute is to strike at the economic base of unlawful enterprises.

Tellingly, defendants have seized upon the panel majority's rewriting of the statute as authorizing only orders "to prevent or restrain future violations," Majority 14 (emphasis added), and are now urging the district court that the panel's decision precludes not only disgorgement, but more broadly "prohibits remedies that 'cure ill effects of past unlawful conduct,'" including: (i) a "smoking cessation program . . . aimed at ameliorating . . . the addiction of smokers . . . deceived by fraudulent conduct"; (b) "monitoring [of] smokers for the onset of smoking-related diseases"; or (c) a "public education campaign and . . . youth smoking prevention campaign" that would "protect the public from being negatively impacted by Defendants' violations." Defendants' post-appeal mem. 3, 9, 10, 11. The district court, while not definitively ruling on the scope of relief that might be warranted, has stated unequivocally that the majority's opinion "simply does not permit non-disgorgement remedies to prevent and restrain the effects of past violations of RICO." Order #886, at 5 (Feb. 28, 2005). The apparent lesson to be drawn from the majority's holding is that violators of RICO are free to retain their unjust gains from, and cannot be required to undo the effects of, their past statutory violations, no matter how lucrative or destructive, so long as they can persuade a court that they have mended their ways. The majority's message – that RICO's potent equitable remedies are in fact a paper tiger – is precisely the opposite of the message Congress intended RICO to send.

2. Even if RICO's equitable remedies were construed as limited to orders designed to prevent and restrain future violations, it is impossible to make a categorical determination, as the majority did, that an order of disgorgement will never be necessary to deter a criminal enterprise from further violations. In this case, as the Dissent recognized, the government's expert evidence

shows, as a factual matter, "that disgorgement will in fact 'prevent and restrain' defendants from committing future RICO violations." Dissent 33. As the government's expert testified, disgorgement will "deter future misconduct" by "strengthen[ing] the credibility of existing laws." App. 814. Disgorgement also "prevents and restrains" future violations by "altering the defendants' expectations about the returns they might receive from future misconduct" (J.A. 704, 813) – a critical consideration when well-established criminal laws failed to prevent an alleged decades-long fraud. Where, as here, the defendants' conduct has yielded hundreds of billions of dollars in allegedly ill-gotten profits from sales to persons who became addicted as youths due to defendants' violations, and their continued participation in the same industry holds out the ever-present temptation to engage in more deception to lure more youths into addiction, a disgorgement order designed to bring home the message that fraud does not pay may be the only way to "prevent and restrain" future violations.

As the dissent observed, the ultimate vice of the majority's decision is its categorical nature. The majority should not have reached out to resolve this question as a matter of law because, as the dissent explained, "'in equity, as nowhere else, courts [should] eschew rigid absolutes,' . . . and precisely what remedy or combination of remedies, within the bounds of . . . equitable doctrines . . ., will serve to prevent and restrain defendants from committing RICO violations, is an issue of fact, not statutory interpretation." Id. at 33 (citation omitted). Rather, as the dissent suggested, the Court should "rely in the first instance not on what we appellate judges can or cannot imagine will 'prevent or restrain,' but on tried and true methods of fact-finding before district courts – including cross-examination and presentation of contrary evidence." Ibid. Governing precedent leaves no doubt that the panel erred in foreclosing the court's exercise of equitable discretion.

CONCLUSION

For the foregoing reasons, the case should be reheard en banc.

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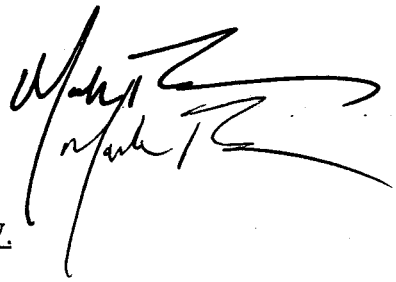

MARCH 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2005, I caused copies of the foregoing petition to be filed with the Court and served upon the following counsel by hand delivery and caused copies of the brief to be served upon the following counsel by electronic mail:

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