No. 2008-5043

In the United States Court of Appeals for the Federal Circuit

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TOHONO O'ODHAM NATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN CASE NO. 06-CV-944, SENIOR JUDGE ERIC G. BRUGGINK

REPLY BRIEF OF PLAINTIFF-APPELLANT TOHONO O'ODHAM NATION

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I. SECTION 1500 BARS CLAIMS THAT ARE DUPLICATIVE IN TERMS OF THE OPERATIVE FACTS INVOLVED AND THE RELIEF SOUGHT.

Several fundamental principles inform the proper interpretation of § 1500 and its correct application in this case:

1. For present purposes, the critical term in § 1500 is "claim." 28 U.S.C. § 1500. Because "the statute does not provide ... a definition of 'claims,'" the "meaning and scope of the term, then, has been left to caselaw development." *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1549 (Fed. Cir. 1994) (en banc). *See* Tohono O'Odham Nation Opening Br. ("T-O Br.") 15; Govt. Br. 12.

2. Section 1500 deprives the CFC of jurisdiction where the two suits at issue present "the same claims." *Loveladies*, 27 F.3d at 1549; *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1562 (Fed. Cir. 1988), *cert. denied,* 489 U.S. 1066 (1989); T-O Br. 15; Govt. Br. 2-3.

3. The courts have defined "claim" in terms of the operative facts involved and the relief sought. *See Keene Corp. v. United States*, 508 U.S. 200, 212 (1993); *Loveladies*, 27 F.3d at 1551; *Johns-Manville*, 855 F.2d at 1564; T-O Br. 15-16; Govt. Br. 15-16.

4. The "operative facts" and "relief sought" requirements are separate and conjunctive. If either one is not satisfied, § 1500 does not apply. *See Loveladies*, 27 F.3d at 1551-52; T-O Br. 16; Govt. Br. 12.

5. Section 1500 prohibits "duplicative" suits and is designed to protect the government from "having to litigate and defend against the same claim in both courts." *Harbuck v. United States*, 378 F.3d 1324, 1328 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1153 (2005); *Keene*, 508 U.S. at 206 ("duplicative lawsuits"); T-O Br. 18, 22; Govt. Br. 3, 11-12.

6. Section 1500's bar on duplicative litigation involving the same claims is illustrated by the circumstances that led to the enactment of the statute in 1868. Following the Civil War, residents of the Confederate states sought to recover for confiscated property by bringing a statutory claim against the United States in the Court of Claims and a tort claim against individual government officials in federal district court. Those suits involved the same conduct (confiscation of property) and sought the same relief (compensation for the confiscated property). *See Keene*, 508 U.S. at 206; *Johns-Manville*, 855 F.2d at 1560-62; T-O Br. 22; Govt. Br. 2-3.

7. The concept of "same claims" should be defined and applied in light of this history and the statutory design to preclude duplicative litigation. *See Loveladies*, 27 F.3d at 1556; *Johns-Manville*, 855 F.2d at 1560-62; T-O Br. 22; Govt. Br. 2-3.

8. Accordingly, "operative facts" are those facts that are necessary to set forth the allegedly wrongful conduct of the defendant that is the gravamen of the

suit. *See* Govt. Br. 27-28 ("the operative facts, that is, what the government allegedly did with respect to managing the Nation's trust property and funds"). "Operative facts" do not include "background facts" that provide the background or context of the case but are not necessary to the claim. The "operative facts" requirement of § 1500 is satisfied where the two cases contest the same acts of the defendant. *See Loveladies*, 27 F.3d at 1550 (operative facts were the same where "the two suits involved the same conflict between the same parties"); *d'Abrera v. United States*, 78 Fed. Cl. 51, 58 (2007); T-O Br. 25-26, 28; Govt. Br. 12.

9. The "operative facts" of the two cases are not rendered different simply because the complaints assert different legal theories or different legal causes of action. "Operative facts" focus on the defendant's conduct at issue. Thus, the operative facts of two claims challenging the same conduct would be the "same" under § 1500 even though the complaints sound in different causes of action. *See Johns-Manville*, 855 F.2d at 1562; *Los Angeles Shipbuilding & Drydock Corp. v. United States*, 152 F. Supp. 236, 238, 138 Ct. Cl. 648 (1957); *British American Tobacco Co. v. United States*, 89 Ct. Cl. 438, 440 (1939), *cert. denied*, 310 U.S. 627 (1940); T-O Br. 31-32; Govt. Br. 20-24.

10. At the same time, the plaintiff's cause of action is pertinent in determining whether a fact is "operative" or "background" for purposes of § 1500. "Operative facts" are those facts about the defendant's conduct that are essential to

the plaintiff's claim for relief, and thus they must be measured against the elements of the cause of action. *See Loveladies*, 27 F.3d at 1551 n.17; T-O Br. 24-27; Govt. Br. 24-25; *see also* pages 9-10, *infra*.

11. To illustrate: if the defendant engages in wrongful conduct that gives rise to two causes of action that are brought in separate suits in the district court and the CFC, the "operative facts" would be the same under § 1500, and that conclusion is not altered simply because there are two causes of action with different legal elements. However, in assessing whether a fact alleged in a complaint is "operative" or "background" for purposes of § 1500, the legal elements of the cause of action are germane because they determine which facts are essential to the plaintiff's claim.

12. Where the operative facts establishing the defendant's alleged conduct are the same in the two cases, it is not possible for the plaintiff to lose one case and prevail in the other *on the facts*. For instance, if a plaintiff alleges the defendant confiscated his cotton, which gives rise to a statutory claim in the CFC and a tort claim in the district court, but he fails to prove in the CFC the underlying conduct that his cotton was confiscated, he necessarily could not succeed in the tort action in district court. Conversely, if it is possible for the plaintiff to succeed on the facts in one case and not the other, the operative facts do not satisfy the requirement of § 1500. Finally, if the plaintiff loses one case not on the operative

facts but on a legal ground (*e.g.*, he loses the cotton claim in the CFC because, even though the facts of the government's confiscation are proven, the statutory element of providing no aid or comfort to the Confederacy is not met), that provides no guidance on whether the operative facts are the same for purposes of § 1500. *See Johns-Manville*, 855 F.2d at 1562-63; *Los Angeles Shipbuilding*, 152 F. Supp. at 238; *British American*, 89 Ct. Cl. at 440; T-O Br. 30; Govt. Br. 32-33; *see also* pages 13-14, *infra*.

13. Likewise, the "relief sought" requirement of § 1500 is satisfied where the complaint prays for the same relief against the government in both cases. If different relief is requested, the suits are not duplicative and § 1500 is inapplicable. *See Loveladies*, 27 F.3d at 1550, 1554; *Casman v. United States*, 135 Ct. Cl. 647, 648 (1956); T-O Br. 35-37; Govt. Br. 16. It is the relief sought in the complaints that is controlling, and the plaintiff is the master of his complaints. *See Loveladies*, 27 F.3d at 1551; *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913); T-O Br. 42, 53; Govt. Br. 31, 36, 40-41.

14. Where the plaintiff requests relief in the form of money in each case, the "relief sought" will be the same where the same money is at issue. In that situation, the suits are duplicative because the government is exposed to double liability for the same relief in both cases. Where, however, the two cases involve different money, the "relief sought" is not the same. *See Dico v. United States*, 48

F.3d 1199, 1203 (Fed. Cir. 1995); *Loveladies*, 27 F.3d at 1556; *Cooke v. United States*, 77 Fed. Cl. 173, 178 (2007); *OSI, Inc. v. United States*, 73 Fed. Cl. 39, 45 (2006); T-O Br. 36-37, 52-53; Govt. Br. 42-45.

15. Where both cases seek the same relief and one also seeks additional relief – that is, where the relief requested in one suit is subsumed in that sought in the other – § 1500 applies. *See Keene*, 508 U.S. at 212 (citing *Skinner & Eddy Corp.*, 265 U.S. 86 (1924)); *Harbuck*, 378 F.3d at 1329; T-O Br. 19-20; Govt. Br. 16.

16. Section 1500 bars CFC jurisdiction in suits that seek duplicative relief; it is not designed to deprive plaintiffs of the full and complete relief to which the law entitles them. *See Loveladies*, 27 F.3d at 1556; T-O Br. 18, 36-37; Govt. Br. 2-3.

17. No case has ever applied § 1500 in such a way to make it impossible for a plaintiff to obtain full and complete relief. *See Johns-Manville*, 855 F.2d at 1564 ("[Section 1500] was intended to force an election where both forums could grant the same relief, arising from the same operative facts"); *Allied Materials & Equip. Co. v. United States*, 210 Ct. Cl. 714, 716 (1976) ("In neither court could [the plaintiff] combine all its claims. In these circumstances Sec. 1500 does not [apply]"); *Casman*, 135 Ct. Cl. at 649 ("[h]ere the plaintiff obviously had no right to elect between courts").

18. Courts have utilized various verbal formulations to state the "operative facts" and "relief sought" requirements of § 1500. *See, e.g.*, *Keene*, 508 U.S. at 212 ("[t]he comparison ... would turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested"); *id.* at 213 n.6 ("[b]ecause the issue is not presented on the facts of this case, we need not decide whether two actions based on the same operative facts, but seeking completely different relief, would implicate § 1500"); *id.* at 216 ("[t]he *Casman* court recognized an exception ... for plaintiffs who seek distinctly different types of relief in the two courts"); *Harbuck*, 378 F.3d at 1329 ("the second prong of ... § 1500 require[s] that the 'same relief' be involved in both cases"); *Dico*, 48 F.3d at 1202 ("[d]ifferent relief means different claims, which in turn means that § 1500 does not apply"); *Loveladies*, 27 F.3d at 1551 ("[t]he claim pending in another court must arise from ***the same operative facts***, and must seek ***the same relief***" (emphases in original)); *id.* at 1552 ("*Casman* and *British American* establish two applicable principles – (i) identity of relief requested, and (ii) identity of operative facts – with which to test the identity of claims"); *id.* at 1551-52 ("To come within the proscription of § 1500, the claims must also seek the same relief. Each of Loveladies' two suits prays for distinctly different relief."); T-O Br. 17-22; Govt. Br. 15-16.

19. Those various formulations do not reflect substantive differences in the applicable legal standard. Rather, the courts are seeking to characterize, in general terms, the circumstances in which claims are or are not the "same" for purposes of § 1500. At the opposite extremes, if the claims involve substantially the same operative facts and relief sought, § 1500 applies; conversely, if they involve distinctly different operative facts or relief, the statute is inapplicable. For cases that fall between those ends of the spectrum, the dispositive issue is whether the operative facts and relief sought are sufficiently the "same," in terms of the purpose and history of § 1500, to require the plaintiff to proceed upon its request for complete relief in one rather than two cases in order to protect the government from duplicative suits.

20. In sum, in light of the caselaw and the foregoing propositions, § 1500 applies only where the operative facts involved and the relief sought in the two cases are materially the same. Where there are material differences in either the operative facts or the relief, § 1500 does not bar CFC jurisdiction.[1]

21. Section 1500 should be narrowly construed in order not to deprive plaintiffs of their rights under the law and the full and complete relief to which

[1] In this case, for the reasons fully discussed below and in our opening brief, the precise formulation of the legal standard does not affect the outcome because the "operative facts" and "relief sought" are substantially and distinctly different under any test.

they are entitled in non-duplicative cases. *See Loveladies*, 27 F.3d at 1556; T-O Br. 22-23, 40-41.

Given these principles, neither the "operative facts" nor the "relief sought" requirements of § 1500 is satisfied here. On either of these independent grounds, the judgment of the Court of Federal Claims should be reversed.

II. THE NATION'S COMPLAINTS IN THE DISTRICT COURT AND THE CFC DO NOT INVOLVE THE SAME OPERATIVE FACTS BECAUSE THEY CONTEST DIFFERENT WRONGFUL CONDUCT BY THE GOVERNMENT AS TRUSTEE.

As a matter of law, the operative facts alleged in the Nation's District-Court and CFC complaints are not the same. Accordingly, § 1500 does not apply.

A. The Government Ignores The Term "Operative Facts" By Indiscriminately Comparing Operative And Background Facts.

The court below candidly recognized that its ruling was based not on the operative facts but on the background facts. *See* 79 Fed. Cl. 645, 656 (2007) ("[a]s a practical matter, will the same background facts be relevant?"); *id.* at 657 (there is "virtually 100% overlap [in the facts]"). Although the government acknowledges (Govt. Br. 15), as it must under the caselaw, that § 1500 applies only to the operative and not to the background facts, it then proceeds to predicate its argument on all of the facts – operative and background – without distinction. For the reasons discussed above, this is error. *See* pages 3-4, *supra*.

The government fails to recognize that the background facts upon which it relies are not essential to the Nation's claims and could have been omitted from the Complaints without affecting the sufficiency of the Nation's allegations. For example, the government argues that the Nation "included allegations of mismanagement and lack of prudent investment in both its District Court and CFC complaints." Govt. Br. 6-7, 29. While those allegations are essential to the damages action in the CFC, they are unnecessary in the accounting action; the government must remedy its failure to account regardless of its success or failure as a manager and investor of the Nation's assets.

Likewise, the references in the Nation's CFC Complaint to the government's failure to account are not essential to that case. *See* Govt. Br. 7, 46. Even if the Nation had punctiliously accounted for the Nation's assets, the Nation still could proceed on its claims for failure prudently to manage and invest that money. Accordingly, the Nation's allegations of the government's failure to account in the CFC action are not operative facts under § 1500. *See also* pages 13-14, *infra*.

B. Contrary To The Government's Argument, The Complaints Do Not Allege The Same Wrongful Conduct.

Contrary to the government's argument, the "operative facts" in the two cases are not the same but rather are materially – indeed, largely – different.

Foremost among the government's errors is its repeated insistence that the Nation's "claims in both courts arise from the same alleged conduct of the United

States . . . and the same alleged breaches of trust," and therefore they "arise from the same operative facts." Govt. Br. 12; *see also id.* at 18-19, 27-28, 30. That is simply, and reversibly, wrong.

In the District Court, the Nation demands that the government provide it with a complete, accurate, and adequate accounting of all property held in trust by the United States for the Nation's benefit. Therefore, the only conduct at issue is the government's failure to provide a full and correct accounting of the Nation's trust assets.

By contrast, in the CFC the Nation seeks to recover damages for entirely different wrongful conduct: the government's failure prudently to manage and invest the Nation's trust assets. For example, the Nation might recover damages for the government's failure to lease mineral rights that should have been used for their highest and best use, or for its failure to invest financial assets that could prudently have been invested to earn a reasonable rate of return. Whether the Nation's assets earned less than a reasonable rate of return (including no return at all) is relevant in the CFC but not the District Court.

In short, the government's failure to undertake prudent management and investment and its failure to provide an accounting do not involve the same conduct. At issue in the CFC, and only in the CFC, is the government's performance as an investor and manager of the Nation's assets; the government's

failure as trustee to account to the Nation is not at issue there but only in the District Court. Accordingly, the "operative facts" requirement of § 1500 is not satisfied.

As explained in our opening brief, a consistent line of authority has rejected motions to dismiss under § 1500 where, as here, the complaints allege different wrongful conduct. *See* T-O Br. 25-27. Although the government does not challenge those decisions, it attempts to distinguish them from the present appeal on the ground that they involved complaints that alleged "temporally distinct and different government conduct." Govt. Br. 26-28. This distinction is unavailing.

For the reasons explained above, the Nation's complaints *do* allege "different" government conduct. Furthermore, nothing in § 1500 requires that the conduct be temporally distinct to be different. *See, e.g.*, *d'Abrera*, 78 Fed. Cl. at 58 (contemporaneous conduct alleged in the two suits). The fact that the conduct is separated in time merely serves as an indication that the conduct is different.

In any event the government's proposed standard is satisfied here. The conduct establishing the failure to account and that establishing the failure of prudent management and investment occurred over a decades-long relationship between the parties, and it is quite possible (indeed likely) that the government misstated accounts and mismanaged assets at quite different times.

C. That The Nation Could Prevail In One Case *On The Facts* And Lose The Other Case *On The Facts* Demonstrates The Claims Do Not Allege The Same Operative Facts.

It is indisputable that the Nation could prevail on the operative facts of the management and investment claim in the CFC and lose on the operative facts of the accounting claim in the District Court, and vice versa. This further demonstrates that the two cases do not involve the same operative facts. *See* pages 4-5, *supra*.

For example, the government may show in the CFC that it managed and invested the Nation's assets with great skill and acumen, and yet fail in the District Court to show that it has ever provided an accounting to the Nation. Conversely, the government may show in the District Court that it scrupulously accounted for all of the Nation's assets, but in the CFC fail to prove that it prudently managed and invested those assets.

The government misunderstands this point. *See* Govt. Br. 32-33. The government's example posits a plaintiff that has two claims sounding in contract and tort, proves the essential facts in the contract case, but ultimately loses on a legal ground, *e.g.*, the lack of adequate consideration. In that situation, the government is correct that this would shed no light on whether the operative facts are different. But that hypothetical is not this case; here, the Nation could win one

case and lose the other *on the facts*. Accordingly, different operative facts underlie each claim.

D. The Government Is Wrong That Any Commonality In The Operative Facts Satisfies § 1500.

The government is incorrect that § 1500 applies as a matter of law "even where *only some* of the operative facts [are] the same as those supporting a claim pending before another federal court." Govt. Br. 28 (quoting *Passamaquoddy Tribe v. United States*, 82 Fed. Cl. 256, 282 (2008)). As previously discussed, § 1500 applies if the operative facts in the two cases are materially the same. *See* pages 8-9, *supra*. Thus, it is not any overlap in the operative facts, but only those that render the claims the same, that satisfies § 1500.

Indeed, in virtually every pair of cases under § 1500, there will be some overlap in the operative facts, but that does not require dismissal of the CFC action. In an employment case, for example, nearly all of the employee's claims will require the plaintiff to establish an employment relationship with the employer, but § 1500 does not preclude CFC jurisdiction. *See Cooke*, 77 Fed. Cl. 173; *see also d'Abrera*, 78 Fed. Cl. 51. Similarly, in this case, the Nation as beneficiary must prove there is a trust relationship with the United States as trustee and that the property in question is part of the trust corpus, but those few common facts, while operative, do not come close to demonstrating that the claims are the same. *See* T-O Br. 32-33.

E. The Government Is Wrong That The Nation Resurrects The Long-Rejected Argument That § 1500 Turns Upon The Legal Theory Asserted.

Finally, as discussed above, the government simply is wrong that our brief resurrects the long-rejected argument that the same conduct by the defendant does not involve the same operative facts merely because it is challenged under different legal theories embodied in different causes of action. *Compare* pages 3-4, *supra*, *with* Govt. Br. 12-13, 15, 20-21, 32-33, 35.

The cases the government cites are not to the contrary. *See* Govt. Br. 21-24. Indeed, in those cases, the conduct that gave rise to both claims was the same; it was only the legal theories that differed. For example, in *Los Angeles Shipbuilding*, a taxpayer filed suit for the refund of taxes for the same years in two courts under different legal theories. In each case, the wrongful conduct was the same: the withholding of an overpayment of taxes during the same years. 152 F. Supp. at 237-38. Similarly, in *Harbuck*, the plaintiff sought to recover in one court under Title VII and in the other under the Equal Pay Act, but in each court the wrongful conduct underlying the plaintiff's claims was the same – "the Air Force discriminated against women by paying them less than men." *Harbuck*, 378 F.3d at 1329. *See also Johns-Manville*, 855 F.2d at 1563-64 (plaintiff pursued contract theory in one court and tort theory in another but both claims arose from same allegations of wrongful conduct: the United States' failure to enforce a safety

standard requiring limits to asbestos exposure); *British-American*, 89 Ct. Cl. at 440 (plaintiff's claims were for the same wrongful conduct – the unlawful withholding of gold bullion surrendered to the Federal Reserve Bank – but were pleaded in tort and contract in two different courts).

In sum, § 1500 applies where a plaintiff pursues the same wrongful conduct in two courts by merely attaching a different legal label to the conduct. The jurisdictional bar does not apply, however, where, as here, the two cases involve different wrongful conduct.

III. THE EQUITABLE ACCOUNTING SOUGHT IN THE DISTRICT COURT AND THE MONEY DAMAGES REQUESTED IN THE CFC ARE NOT THE SAME RELIEF AND DO NOT SUBJECT THE GOVERNMENT TO DUPLICATIVE REMEDIES.

In addition, the "relief sought" requirement of § 1500 is not satisfied here. On this independent ground, the judgment of the CFC should be reversed.

A. The District Court And CFC Complaints Do Not Seek The Same Relief, And Both Proceedings Are Necessary To Provide Full And Complete Relief To The Nation For All Of The Government's Wrongful Conduct In Violation Of Its Trust Duties.

The accounting sought in the District Court and the money damages sought in the CFC are quite distinct and by no means sufficiently the same to invoke § 1500. The Nation could receive all of the relief sought in each case without subjecting the government to duplicative remedies.

Contrary to the government's assertion, both the accounting in the District Court and money damages in the CFC are necessary to provide the Nation with full and complete relief for all of the government's wrongful conduct in violation of its trust duties. As explained more fully below, the general pre-liability equitable accounting sought (and available only) in the District Court to redress the government's failure to account for trust assets is not the same as the accounting in aid of judgment that might be employed in the CFC to determine the quantum of damages to which the Nation is entitled for the government's imprudent management and investment of trust assets. *See* pages 18-20, *infra*. Likewise, any restatement of accounts or equitable restitution or disgorgement in the District Court, which move funds in the trust from the incorrect to the correct accounts, does not involve the same money – and hence is not the same relief – as money damages in the CFC to compensate the Nation for returns that should have been but never in fact were earned due to the government's failure of prudent management and investment. *See* pages 22-27, *infra*.

Once these errors are corrected, it becomes evident that the Nation seeks – as it must in light of jurisdictional limitations on the District Court and the CFC – different relief in different courts to remedy different wrongful acts by the government.

In the end, the government's position founders on the bedrock principle that § 1500 does not serve to deprive a plaintiff of full and complete relief for all of the government's wrongful conduct. *See* pages 6, 8-9, *supra*. That is precisely the situation in this case. Accordingly, the "relief sought" requirement of § 1500 is not satisfied here.

B. The General Pre-Liability Equitable Accounting Sought In The District Court Is Not The Same As The Accounting In Aid Of Judgment Available In The CFC.

Critically, neither the court below nor the government disputes that a general pre-liability equitable accounting is available only in federal district court and not in the CFC. Indeed, the court conceded this proposition (79 Fed. Cl. at 653), and the government essentially does so (Govt. Br. 47) and has expressly done so in other cases (*see* T-O Br. 38). As previously explained, the law is well established that a general pre-liability accounting may be had only in district court. *See* T-O Br. 37-38.

It equally is well established that a general pre-liability accounting and an accounting in aid of judgment to calculate the amount of damages are fundamentally different. The general equitable accounting, which is principally informational in nature, is independent of any liability against the government and will require the government to render a detailed account of all assets it holds in trust. An accounting in aid of judgment, by contrast, follows only after a

determination of liability and is a procedural tool at the court's disposal when necessary to determine the quantum of damages for that specific liability and only that liability – here, the difference between the rate a prudent investor would have earned and the amount obtained by the government for the Nation. *See* T-O Br. 45-50.

The government does not dispute these settled differences. Nonetheless, it asserts that the general pre-liability equitable accounting and an accounting in aid of judgment are "duplicative." Govt. Br. 14. That is wrong, for several reasons.

First, the government contends that these are the same "form of relief." Govt. Br. 48. This is nothing but a play on words. That the term "accounting" appears in both phrases, while a potential source of superficial confusion, does not affect the basic nature, described above, of the general pre-liability equitable accounting or the accounting in aid of judgment.

Second, an accounting in aid of judgment is not subsumed in the general pre-liability equitable accounting. *See* Govt. Br. 47. As explained in more detail below, the general accounting addresses the assets that are in the trust and corrects the records if assets have been placed in the wrong account. By contrast, an accounting in aid of judgment in this case is a procedure to determine the amount of damages based on the difference between a prudent return on investment of trust

assets and the actual return (if any) obtained by the government for the Nation. *See* pages 21-25, *infra*. The former does not duplicate the latter.

Finally, the government raises two brief arguments that simply ignore the Nation's opening brief. The government argues that "[t]he Nation seeks relief in the form of an accounting in both courts." Govt. Br. 45. However, an accounting in aid of judgment is not relief at all but rather a procedure for computing damages, and the Nation's CFC complaint nowhere requested an accounting in aid of judgment. *See* T-O Br. 43. Similarly, the government is wrong that an accounting in aid of judgment is "unavoidable" (Govt. Br. 46) in the CFC in this case. *See* T-O Br. 43.[2]

C. The Money Damages Sought In The CFC Are Not The Same As The Restatement, Equitable Restitution, And Disgorgement Requested, If Appropriate, In The District Court.

The government utterly ignores the principle that an accounting is informational in nature. Even if the accounting provides information that enables the beneficiary to bring a subsequent suit for money damages in the CFC, that does

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[2] The government also seeks to raise in passing an argument – not accepted by the CFC – that a finding of liability in connection with damages in the CFC is the same relief as a declaration of trust duties in the District Court. *See* Govt. Br. 48 n.12. To begin with, an argument briefly outlined in a footnote is not properly presented to this Court. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006). In any event, the argument is misconceived. The Nation's prayer for damages in the CFC does not seek a declaratory judgment at all and therefore is not the same as the declaratory relief requested in the District Court. *See Loveladies*, 27 F.3d at 1553.

not alter the essential nature of the accounting or transform it into monetary relief. *See* T-O Br. 48-50.

Instead, the government focuses on the prayer in the District-Court complaint for the ancillary relief of restatement and (if appropriate) equitable restitution and disgorgement. This argument does not support dismissal under § 1500.

In the CFC, the Nation seeks money damages to compensate it for the pecuniary losses it suffered as a result of the government's imprudent management and investment actions. Those proceeds were never in fact received and therefore were never part of the trust. The measure of damages is the difference between a reasonable rate of return on the prudent management and investment of the assets and the return (if any) that was actually earned. *See* T-O Br. 51-52.

In the District Court, on the other hand, the Nation seeks an accounting and, to the extent errors are uncovered, a restatement of the accounts and, if appropriate, equitable disgorgement and restitution. The function of restitution and disgorgement is to deprive the government of its unlawful gains due to its failure to account, and the measure of those remedies is the benefit to the government, not (as with damages) the loss to the Nation. *See* T-O Br. 58-61.

The government asserts that the relief of money damages in the CFC and the relief of restatement and (if appropriate) equitable restitution and disgorgement are

the same for purposes of § 1500. This argument reflects a fundamental misunderstanding.

Most importantly, these different types of relief do not concern the same money. Money damages relate to proceeds that should have been but were never earned and are measured by that loss to the Nation. By contrast, restatement, restitution, and disgorgement concern funds that are already in the trust (albeit not properly accounted for), and the latter remedies are measured by the gain to the government due to the fact that it rather than the Nation had the use of such funds. Money damages involve what has been referred to in this case as "new money" in the sense that the prudent return was not in fact earned, and therefore to compensate the Nation for that loss the government will have to put up additional sums; restatement, restitution, and disgorgement involve "old money" that already exists in the trust and is being moved from an incorrect to the correct account.

To illustrate this distinction, consider an asset of $100 that is in the Nation's trust account but in fact was never invested by the government. If the reasonable return on a prudent investment was 5%, the Nation would be entitled to the difference between the prudent return (5%) and the actual return (0%), or $5. And because the asset was not invested, the prudent return of $5 was not actually earned, and thus the government will have to provide "new money" to compensate the Nation for this loss.

The accounting case is entirely different. There, assume that $100 should have been in the Nation's trust account but instead was erroneously retained by the government and used or invested to return $10 to the government's account. Restatement would transfer the original $100 to the Nation's account, and restitution and disgorgement would take away the government's gain on those funds that it should not have had in the first place. At the end of the day, this relief involves only "old money" that currently is in the hands of the government; the government does not have to provide any "new money" but simply is deprived of those funds that it never was entitled to. And the measure of restitution or disgorgement is the gain the government actually made ($10), not a hypothetical return based on reasonable and prudent investment ($5).

Once this fundamental distinction in the complaints is understood, the government's central argument collapses. The damages sought in the CFC and the funds at issue in the District Court are not the same money and are not determined in the same way, and therefore they are not the same relief under § 1500.

For this reason, it is inherent in the complaints that the two suits relate to different moneys. The government asserts that both of the cases "see[k] both 'old' and 'new' money" (Govt. Br. 39 n.8), but, as just explained, that simply is not so. The government also contends that in the CFC the Nation will be "made whole . . . by the payment of money for the government's breaches of trust" (Govt. Br. 39);

that ignores, however, the fact that the CFC suit seeks damages only for the government's wrongful failure prudently to manage and invest trust assets, and the damages to be awarded are not the same money, and are not measured in the same way, as the funds in the trust that are to be disgorged in the District Court to deny the government of its ill-gotten gain from its failure to account. Nor is it "passing strange" (*id.*) that the accounting and restatement in the District Court would not themselves redress the loss to the Nation from the government's mismanagement of trust assets; that is not the purpose, and goes beyond the proper scope of, the accounting.

In the same way, the government is wrong that the restatement of the Nation's accounts will remedy the "very same uncollected, under-collected, or under-invested receipts and investment" for which money damages are sought in the CFC. Govt. Br. 18-19; *see also id.* at 34-35. The restatement simply corrects the records where assets have been placed in the wrong account; it cannot compensate the Nation for the government's failure to collect or to invest its assets. Such amounts are not in the trust and thus not the subject of the accounting in the District Court but rather of damages in the CFC. Accordingly, the government could not be more mistaken that "[i]n order to come up with an accurate restatement of the Nation's trust account, the District Court must necessarily

address and resolve what, if any, mismanagement or lack of prudent investment occurred." Govt. Br. 30.

The government simply repeats the argument it has made unsuccessfully elsewhere that an accounting action is an attempt to obtain money damages in the district court that a plaintiff could obtain in the CFC. The courts have rejected this argument every time it has been raised. *See, e.g., Osage Tribe v. United States*, No. CIVA04-0283, 2005 WL 578171 (D.D.C. Mar. 9, 2005) (rejecting argument that accounting action in district court was the same as money-damages actions pending in the CFC and noting the court shared with the court of appeals "the dubious distinction of having heard these same arguments on multiple occasions").

For these reasons, this appeal is entirely different from *Dico,* upon which the government heavily relies. *See* Govt. Br. 43-44. There, the plaintiff in the district court sought reimbursement under CERCLA for remediation costs expended pursuant to an EPA order, and in the CFC it sought damages for the exact same expenditures on a takings theory under the Fifth Amendment. *Dico,* 48 F.3d at 1202-04. The only difference between the two claims was the legal theory the plaintiff asserted in each court. *Id.* at 1203. In these circumstances, *Dico* held that § 1500 applied because both complaints had requested the same money "for the same expenses in exactly the same amount." *Id.* at 1203. Moreover, nothing in *Dico* precluded the plaintiff from recovering complete relief – the plaintiff was

merely compelled to choose one legal theory and one court in which to pursue its claim. By contrast, the Nation's two complaints here do not seek the same money and, unless the Nation is allowed to proceed in both courts, it will be denied complete relief.[3]

Faced with these difficulties, the government falls back on the argument that § 1500 is satisfied if "the form of relief sought in the two courts is the same." Govt. Br. 13; *see also id.* at 36, 37, 43, 44. We doubt that the money damages sought in the CFC and the equitable relief sought in the District Court constitute the "same form" of relief. But in any event that is not the standard. The government's position seems to be that two cases that have financial consequences involve the "same relief." *See* Govt. Br. 37 ("[T]he Nation has monetary claims in both its District Court and CFC complaints. That is all the overlap that is required for Section 1500 to apply"). The caselaw, however, has soundly rejected that argument, concluding that even two express requests for money are not the "same

[3] Relying upon *Dico*, the government also asserts that the Nation failed to make clear in the two complaints that they involved different claims. *See* Govt. Br. 31 (citing *Dico* 48 F.3d at 1204). But *Dico* merely holds that complaints that are "in all material respects identical" will be dismissed under § 1500 and therefore that the plaintiff must provide an "analysis" to "identify the distinction" that will avoid dismissal. *Id.* at 1201, 1204. As the en banc Court explained in *Loveladies*, it is hardly fatal under § 1500 that the plaintiff "might have framed [its] pleadings with more precision." 27 F.3d at 1554. *See also id.* at 1556 (§ 1500 should not be applied "to deny remedies the Constitution and statutes otherwise provide").

relief" where the remedies represent different redress and are measured in different ways. *See Cooke*, 77 Fed. Cl. at 178; *OSI,* 73 Fed. Cl. at 45.

Finally, the government misunderstands the proper role here of *Bowen v. Massachusetts*, 487 U.S. 879 (1988). *See* Govt. Br. 45 n.11. Our argument is not, as the government portrays it, that § 1500 turns on *Bowen*'s holding that (in the government's parlance) "money damages" differ from other "monetary relief" for purposes of the waiver of sovereign immunity in § 702 of the **Administrative Procedure Act, 5 U.S.C. § 702**. Rather, it is that the law generally distinguishes – as *Bowen* recognized – between specific relief like equitable restitution and disgorgement that deprives the defendant of its wrongful gain by giving the plaintiff the very thing to which it is entitled, and money damages that are measured by and compensate for the plaintiff's loss. *See* T-O Br. 58-59, 61-62. Under this settled principle, the relief sought here is not the same.

CONCLUSION

The judgment of the CFC should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

Pursuant to Fed. R. Appellate P. 32(a)(7) and Fed. Cir. R. 28(a)(13), I hereby certify that a copy of the foregoing REPLY BRIEF OF PLAINTIFF-APPELLANT TOHONO O'ODHAM NATION has been served by U.S. Postal Service this 11th day of September, 2008, upon the following counsel of record:

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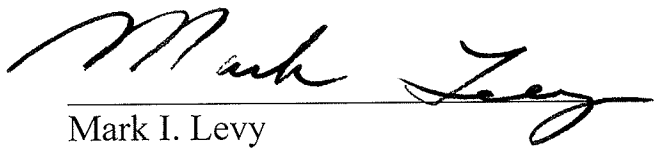

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 6,665 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

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