No. _____

IN THE

Supreme Court of the United States

KARA BOWES,

Petitioner,

—v.—

CHRISTINA MELITO, RYAN METZGER, ALISON PIERCE, GENE ELLIS, WALTER WOOD, CHRISTOPHER LEGG, AMERICAN EAGLE OUTFITTERS, INC., AEO MANAGEMENT CO., EXPERIAN MARKETING SOLUTIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court's longstanding precedent holds that representative plaintiffs whose litigation creates a "common fund" benefiting a larger class may recover from the fund their reasonable litigation expenses (including attorney's fees) but that any payment compensating the named plaintiffs for their own "personal services" is both "decidedly objectionable" and "illegally made." *Trustees v. Greenough,* 105 U.S. 527, 537-38 (1882). A named plaintiff's "claim to be compensated, out of the fund ... for his personal services" has been "rejected as unsupported by reason or authority." *Central R. & Banking Co. v. Pettus,* 113 U.S. 116, 122 (1885). Lower courts long honored this Court's considered precedent on this point.

Lately, though, lower courts have effectively done away with this Court's rule by freely granting "incentive awards" to representative plaintiffs, and this Court's recent dictum in *China Agritech, Inc. v. Resh,* __U.S.__, 138 S.Ct. 1800, 1811 n.7 (2019), seems to acquiesce in the lower courts' abrogation of its own precedent by stating: "The class representative might receive a share of class recovery above and beyond her individual claim. See, *e.g., Cook v. Niedert,* 142 F.3d 1004, 1016 (C.A.7 1998) (affirming class representative's $25,000 incentive award)."

The question presented is:

Do the holdings of *Greenough* and *Pettus*, which prohibit payments in common-fund cases to compensate representative plaintiffs for their service to the class, retain precedential force, or are they in fact abrogated?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the Second Circuit are listed in the caption.

eBay Enterprise, Inc., f.k.a. eBay Enterprise Marketing Solutions, Inc. was named as a defendant in the district court, but the claims against it were terminated and it did not participate in the Second Circuit appeal.

Two additional objectors, Brooke Bowes and Kristian Mierzwicki, appeared in the district court, but were excluded from the class that is bound by the district court's judgment. Pet.App.29a, 57a-58a & n.19, 77a. Neither appealed from the district court's ruling or otherwise participated in proceedings before the Second Circuit.

RELATED PROCEEDINGS

Petitioner Kara Bowes and her daughter Brooke Bowes objected together before the district court to the settlement and payment of incentive awards to the named Plaintiffs. The district court excluded Brooke Bowes from the class bound by its judgment, holding: "The protection for anyone who should have been in the Class but was not included on the Class List is iron-clad: they are not in the Class and therefore any claims they have against AEO are not being released. They are free to bring their own lawsuit." Pet.App.57a-58a n.19.

Brooke Bowes accordingly filed her own lawsuit on October 30, 2017, asserting claims under the Telephone Consumers Protection Act ("TCPA") against defendants American Eagle Outfitters, Inc. and AEO Management Co., in the United States District Court

for the Western District of Oklahoma. *See Brooke Bowes v American Eagle Outfitters, et al.,* No. Civ.-17-1166-R (W.D. Okla.). That court granted the defendants' motion to transfer the matter to the Southern District of New York, where it was docketed as *Brooke Bowes v. American Eagle Outfitters, et al.,* No. 18-CV-9004 (S.D.N.Y.), and where proceedings have been stayed by the district court pending the outcome of all appellate proceedings in this matter—despite the fact that Brooke Bowes' own action challenges neither the judgment below here nor the incentive awards paid to the named plaintiffs that are the subject of this Petition for a Writ of Certiorari.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kara Bowes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

REPORTS OF THE OPINIONS BELOW

The Second Circuit's decision is reported as *Melito v. Experian Marketing Solutions, Inc.,* 923 F.3d 85 (2d Cir. 2019), and is reproduced at Pet.App.1a-22a.

The district court's opinion approving a common-fund settlement with service awards paid to the class representatives is reported by Westlaw as *Melito v. American Eagle Outfitters, Inc.,* 2017 WL 3995619 (S.D.N.Y. Sept. 11, 2017), and appears in the Appendix hereto at Pet.App.25a-74a. The district court's accompanying September 11, 2017, final judgment certified under Federal Rule of Civil Procedure Rule 54(b) appears at Pet.App.75a-85a, and its September 20, 1017, order revising the Rule 54(b) certification appears at Pet.App.86a-88a.

JURISDICTION

The Second Circuit issued its decision and judgment on April 30, 2019. *See* Pet.App.1a-22a. Bowes filed a timely petition for rehearing on May 14, 2019, which the Court of Appeals denied on June 3, 2019. Pet.App.23a-24a. On August 23, 2019, Justice Ruth Bader Ginsburg extended to October 16, 2019, the time for Bowes to file this Petition. *Bowes v. Melito,* No. 19A214 (Aug. 23, 2019).

This Court has jurisdiction under 28 U.S.C. §1254(1) to review, by writ of certiorari, the decision of the Second Circuit.

STATUTES AND RULES INVOLVED

Federal Rule of Civil Procedure 23 appears in the Appendix hereto at Pet.App.89a-99a.

The Rules Enabling Act, 28 U.S.C. §2072, appears at Pet.App.99a.

STATEMENT OF THE CASE

1. This case commenced with the filing of several subsequently consolidated putative class-actions alleging that American Eagle Outfitters Inc. and AEO Management Co. (collectively "AEO") violated the Telephone Consumer Protection Act ("TCPA") by sending numerous spam texts to the named plaintiffs and others. AEO filed claims against third-party defendant Experian Marketing Solutions. This Petition relates solely to the class-action settlement of claims against AEO and payment of incentive awards to the representative plaintiffs. Petitioner Kara Bowes is a class member bound by the final court-approved class-action settlement of the class's TCPA claims, who timely objected to the settlement and payment of "incentive awards" to the named plaintiffs. C.A.App. A242-313 (objection).

The TCPA prohibits unconsented spam texts generated by an automatic telephone dialing system ("ATDS"), *see* 47 U.S.C. §227(b)(1)(A), giving consumers who receive unconsented spam texts violating the statute a right "to receive $500 in damages for each such violation." 47 U.S.C. §227(b)(3)(B). Damages may be trebled to $1,500 per text upon if the defendant "willfully or knowingly" violated the law. 47 U.S.C. §227(b)(3)(C); *Campbell-Ewald Co. v. Gomez,* ___U.S.___, 136 S.Ct. 663, 666-67 (2016).

Although AEO faced potential statutory damages in the *billions* of dollars, the named plaintiffs and AEO entered a settlement releasing class members' claims for only $14.5 million. Given the parties' estimate that the settlement class included approximately 618,289 persons, the $14.5 million settlement provided only $23.45 per class member, which after deductions for attorneys' fees and other expenses would be reduced to about $14 apiece.[1] Assuming most class members would not submit claims, class counsel estimated that those who did might receive from $142 to $285 apiece, and based on the number of claims actually submitted the district court found that "each valid settlement class member who filed a claim would receive approximately $232." Pet.App.27a-28a & n.3.

Bowes submitted documentation showing that she had personally received at least fifty of AEO's unconsented spam texts during the class period, and at least eleven more after the class period had ended.[2] Even after the district court's January 24, 2017, order preliminarily approving the parties' settlement, the unconsented spam text messages just kept coming—into early April 2017, more than two months after the class period's end. C.A.App. A591-93 (deposition).

At $500 per violation, the fifty class-period spam texts that Bowes documented added up to basic statutory damages of $25,000 that could treble to

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[1] C.A.App. A253-54, 263 (objection). The district court entered judgment binding a class of "618,301 persons (identified in the disc attached to this Final Approval Order And Judgment as Exhibit B)." Pet.App.28a, 75a-76a.

[2] *See* C.A.App. A276-313 (declaration & exhibits); C.A.App. A592-93 (deposition testimony that texts continued after the class period's January 24, 2017, close and into early April 2017).

$75,000 if AEO, which continued sending the spam texts after settlement approval and the class period's end, had acted willfully. Adding documented post-class-period texts brought Bowes's document statutory damages approached $90,000—far more than the $23.45 per class member that the settlement recovered.

Bowes objected that the named plaintiffs may have been induced to settle cheaply by the prospect of receiving $10,000 "incentive awards" to which AEO had agreed, and which would afford them individual recoveries many times larger than ordinary class members' pro rata settlement proceeds—of $23.45 apiece based on the size of the class, or of $232 apiece based on the number of claims made and accepted. She cited this Court's foundational common-fund decisions in *Greenough* and *Pettus,* prohibiting payments as compensation for service as representative plaintiffs. C.A.App. A251-52, A263-65 (objection).

The district court nonetheless approved the settlement. Acknowledging that "Class Counsel have neither provided documentation of the time or effort that each representative expended in furtherance of this case, nor identified any personal risks or burdens incurred by the representatives," the district court nevertheless ruled "that an incentive award of $2,500 to each of the class representatives, which represents a recovery of more than ten times what class members receive and reflects ample compensation for the limited time they invested, is fair and reasonable." Pet.App.64a.

The district court opined that it is not bound by this Court's common-fund precedents prohibiting such

payments, because the relevant decisions "are extremely old and pre-date Rule 23 by decades":

> Ms. Bowes argues that *Trustees v. Greenough,* 105 U.S. 527 (1881), and *Central Railroad & Banking Co. of Georgia v. Pettus,* 113 U.S. 116 (1885), preclude an incentive award, in any amount, to class representatives. This argument is meritless. As Plaintiffs point out, both of these case[s] are extremely old and pre-date Rule 23 by decades. As discussed *supra*, courts routinely award named plaintiffs payment for "special circumstances" arising out of their participation in the class litigation.

Pet.App.64a-65a n.21.

The Second Circuit affirmed, holding that it too could safely ignore this Court's precedents proscribing service awards in common-fund cases:

> Bowes contends that incentive bonuses here are unlawful, given that the case involves common funds. The cases cited by Bowes for this proposition are inapposite. Neither *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885), nor *Trustees v. Greenough*, 105 U.S. 527 (1881), provide factual settings akin to those here. *See Muransky v. Godiva Chocolatier, Inc.*, __F.3d__, 2019 WL 1760292, at *14–15 (11th Cir. 2019) (summarily rejecting the same argument by Bowes's counsel as an objector).

Pet.App.21a-22a. The Court of Appeals nowhere explained how this Court's decisions in *Greenough* and *Pettus*—both common-fund class actions in which this Court prohibited payments to representative plaintiffs for services rendered in furtherance of the litigation—

are factually distinguishable from this case, in which the named plaintiffs were paid $2,500 apiece from a common-fund settlement for their service as representative plaintiffs.

The Second Circuit also rejected Bowes' contention that the named plaintiffs were induced to accept an unreasonably low settlement. The Second Circuit observed that Bowes, who

> contends that she herself stood to recover nearly $90,000 ... understandably believes that the number arrived at is insufficient given what she allegedly stood to collect. But the litigation risks in this case were real on both the law and the facts.

Pet.App.20a-21a. The Court of Appeals did not explain how the litigation risks could be so great that class members like Bowes should be satisfied to receive a fraction of a percent of their TCPA statutory damages, while the named plaintiffs received far larger incentive awards for settling so cheaply.

2. The district court's jurisdiction over a case asserting claims under the TCPA was conferred by 28 U.S.C. §1331. *See Mims v. Arrow Financial Services, LLC,* 565 U.S. 368, 371-72 (2012). Third-party defendant Experian Marketing Solutions, Inc. filed its own appeal from the judgment below, with which Bowes's appeal was consolidated, arguing that the named plaintiffs' receipt of numerous spam texts on their cell phones does not support Article III standing under *Spokeo, Inc. v. Robins,* __U.S.__, 136 S.Ct. 1540 (2016). The Second Circuit's rejection of Experian's contentions, Pet.App.10a-18a, comports with this Court's exercise of jurisdiction in *Campbell-Ewald*, where the Chief Justice observed: "All agree that at the

time Gomez filed suit, he had a personal stake in the litigation. In his complaint, Gomez alleged that he suffered an injury in fact when he received unauthorized text messages from Campbell." *Campbell-Ewald,* 136 S.Ct. at 679 (Roberts, Ch.J., dissenting).

Although Bowes argued below that the named plaintiffs could not rest on their pleadings to show their own class membership and standing, the Court of Appeals found that they had submitted evidence showing that they "did in fact receive the text messages in question." Pet.App.19a-20a. The district court accordingly had subject-matter jurisdiction.

REASONS FOR GRANTING THE WRIT

"Since the decisions in *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980); *see generally* John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds,* 87 Harv. L. Rev. 1597, 1601-02 (1974). The Court has applied the rule "in a wide range of circumstances as part of our inherent authority."[3] But the rule's core fundamentals never varied. From the beginning, *Greenough* and *Pettus*

[3] *U.S. Airways, Inc. v. McCutchen,* 569 U.S. 88, 104 (2013); *see, Boeing v. Van Gemert,* 444 U.S. at 478; *Hall v. Cole,* 412 U.S. 1, 6-7 (1973); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 392-93 n.17 (1970); *United States v. Equitable Trust Co.,* 283 U.S. 738, 744 & n.7 (1931); *see also Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 257-58 (1975).

held that a representative plaintiff (and its counsel) may recover reasonable litigation expenses including attorney's fees from a common-fund recovery, but that the representative plaintiff *shall not* be reimbursed for personal service rendered on behalf of the class:

> The Court in *Greenough* ... drew a sharp distinction .... While [Francis] Vose, the active litigant, was held to be entitled to a "charge" for the reasonable value of his lawyers' services, which the lower court would fix with a wide discretion, it had no discretion to award an allowance to Vose himself for his own time and expenses.

Dawson, *Lawyers and Involuntary Clients,* 87 Harv. L. Rev. at 1602.

This Court held that any payment compensating a representative plaintiff for "personal services" in prosecuting the litigation is both "decidedly objectionable" and "illegally made." *Greenough,* 105 U.S. at 537-38. A named plaintiff's "claim to be compensated, out of the fund ... for his personal services" the Court flatly "rejected as unsupported by reason or authority." *Pettus,* 113 U.S. at 122.

For a century lower courts honored that holding, sharply distinguishing between the litigation expenses (including reasonable attorney's fees) that class representatives may recover, and allowances for "personal services" in acting as representative plaintiffs—which *Greenough* and *Pettus* expressly forbade. *See infra* 13-18. Writing in 1974, Harvard's Professor John P. Dawson could find "no case that uses the *Greenough* doctrine to reimburse the litigants themselves for their own time, travel, or personal expenses, however necessary their efforts may have

been to litigation that conferred gains on others." Dawson, *Lawyers and Involuntary Clients,* 87 Harv. L. Rev. at 1602.

That soon changed. Beginning from the mid-to-late 1980s, federal district courts widely ignored the rule stated in *Greenough* and *Pettus*. Many freely rewarded named plaintiffs in common-fund cases with special bonuses to compensate them for services rendered on behalf of the class, and to incentivize the filing and settlement of class actions. *See infra* 18-21. In the 1990s federal appellate courts began to approve the district courts' divergence from this Court's clear rule. *See infra* 21-27.

Lower courts have effectively rejected the rule of *Greenough* and *Pettus*: "Reasoning that it is fair and reasonable to compensate class representatives for the efforts they make and financial and reputational risks they incur in obtaining a recovery on behalf of the class, there is near-universal recognition that it is appropriate for the court to approve an incentive award payable from the class recovery, usually within the range of $1,000-$20,000.*"* 2 *McLaughlin on Class Actions* §6:28 & nn.29-30 (15th ed., 2018). They have done so with no basis at all in law: "The judiciary has created these awards out of whole cloth." 5 *Newberg on Class Actions* §§17:1 (5th ed. 2019); *see id.* at §§17:2, 17:4.

Most decisions approving incentive awards for named plaintiffs fail to acknowledge the rule of *Greenough* and *Pettus*, and the Sixth Circuit has observed that "to the extent that incentive awards are common, they are like dandelions on an unmowed lawn—present more by inattention than by design." *In*

re Dry Max Pampers Litig., 724 F.3d 713, 722 (6th Cir. 2013); *see* 5 *Newberg on Class Actions* §17:4.

The Second Circuit's published opinion in this case, however, follows a recent Eleventh Circuit panel opinion directly rejecting this Court's holdings that "litigants who secure a common fund can recover reasonable attorney's fees and litigation expenses but cannot recover incentive awards for their own services." *Muransky v. Godiva Chocolatier, Inc.,* 922 F.3d 1175, 1196 (11th Cir. 2019). The *Muransky* panel held that this Court's foundational common-fund precedents no longer bind lower courts since, as the panel explained:

> Many circuits have endorsed incentive awards and recognize them as serving the purposes of Rule 23. *See, e.g., Staton* [*v. Boeing Co.*], 327 F.3d [938] at 975–77 [(9th Cir. 2003)]; *Hadix* [*v. Johnson*], 322 F.3d [895] at 897–98 [(6th Cir. 2003)]. No circuit has applied *Greenough* or *Central Bank* [*v. Pettus*], which were decided well before the adoption of Rule 23, to prohibit incentive awards in the class-action context. We do not view granting a monetary award as an incentive to a named class representatives [*sic*] as categorically improper.

Muransky, 922 F.3d at 1196.

Muransky is being reheard *en banc, see Muransky v. Godiva Chocolatier, Inc.,* 2019 WL 4891989 (11th Cir. Oct. 4, 2019) (granting *en banc* rehearing), likely to reconsider the panel opinion's holding that the named plaintiff suffered a concrete Article III injury when he received a retail receipt bearing several more digits of his credit-card number than permitted by law—a point on which the *Muransky* panel opinion conflicts with

Kamal v. J.Crew Group, 918 F.3d 102 (3d Cir. 2019), and *Katz v. Donna Karan Co.,* 872 F.3d 114 (2d Cir. 2017). A finding of no Article III standing will of course preclude the *en banc* court from reconsidering the *Muransky* panel's incentive-awards holding, on which the Second Circuit relied in this case.

Whatever happens in the Eleventh Circuit, the Second Circuit's published decision in this case follows the *Muransky* panel's summary rejection of *Greenough* and *Pettus*—while characterizing this Court's foundational class-action common-fund precedents as somehow "inapposite" to incentive awards compensating named plaintiffs for their personal service as class representatives in common-fund class actions. Pet.App.21a-22a. It states:

> Bowes contends that incentive bonuses here are unlawful, given that the case involves common funds. The cases cited by Bowes for this proposition are inapposite. Neither *Cent. R.R. & Banking Co. v. Pettus,* 113 U.S. 116 (1885), nor *Trustees v. Greenough,* 105 U.S. 527 (1881), provide factual settings akin to those here. *See Muransky v. Godiva Chocolatier, Inc.,* 922 F.3d 1175, 2019 WL 1760292, at *14–15 (11th Cir. 2019) (summarily rejecting the same argument by Bowes's counsel as an objector).

Pet.App.21a-22a.

Both *Greenough* and *Pettus* are common-fund class actions, just like this case is. The one apparent factual distinction is that the named plaintiff in *Greenough* carefully documented "the bestowment of his time for years almost exclusively to the pursuit of" the class action, *Greenough,* 105 U.S. at 21, while the named plaintiffs here "neither provided documentation of the

time or effort that each representative expended in furtherance of this case nor identified any personal risks or burdens incurred," but were paid $2,500 apiece anyway. Pet.App.63a-64a.

Bowes respectfully submits that the lower courts have stepped out of line: "'[I]t is this Court's prerogative alone to overrule one of its precedents.'" *Bosse v. Oklahoma*, __U.S.__, 137 S. Ct. 1, 2 (2016) (citations omitted).

And yet this Court appears to quietly acquiesce in the lower courts' abrogation of *Greenough* and *Pettus,* with a recent a footnote of dictum in *China Agritech Inc. v. Resh,* __U.S.__, 138 S.Ct. 1800 (2019), stating that named plaintiffs should be motivated to file class actions because:

> The class representative might receive a share of class recovery above and beyond her individual claim. See, *e.g., Cook v. Niedert,* 142 F.3d 1004, 1016 (C.A.7 1998) (affirming class representative's $25,000 incentive award).

China Agritech, 138 S.Ct. at 1811 n.7.

That the lower courts have ignored, and even rejected, this Court's foundational common-fund holdings would be reason enough to grant certiorari to consider whether or not the rule of *Greenough* and *Pettus* still controls them.[4]

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[4] *See* Rule 10(c) (certiorari appropriate where lower courts have "decided an important federal question in a way that conflicts with relevant decisions of this Court"); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509 (1991) (certiorari granted "to resolve an apparent conflict with this Court's precedents").

That this Court's opinion in *China Agritech* ostensibly endorses a Court of Appeals decision at odds with *Greenough* and *Pettus* provides a further compelling reason for granting the writ. The lower courts need clear guidance: Are *Greenough* and *Pettus* still the law? Or has this Court really acquiesced in lower tribunals' abrogation of its precedents? *Cf. Gonzaga University v. Doe,* 536 U.S. 273, 278 (2002) (certiorari granted "to resolve conflict among the lower courts and in the process resolve any ambiguity in our own opinions").

Leaving the question open would undermine this Court's perceived authority as the sole arbiter of its own precedents' continuing vitality.

A. This Court's Decisions in *Greenough* and *Pettus* Establish a Clear and Long-Honored Rule Prohibiting Allowances in Common-Fund Cases to Compensate Named Plaintiffs for their Personal Service as Class Representatives

This Court's foundational common-fund decisions hold that a representative plaintiff whose efforts produce a fund benefiting others may recover reasonable litigation expenses including attorneys' fees from the fund, *but not* personal expenses or compensation for personal services rendered as class representative. *Greenough,* 105 U.S. at 537-38; *Pettus,* 113 U.S. at 122; *see* Dawson, *Lawyers and Involuntary Clients,* 87 Harv. L. Rev. at 1601-02

In *Greenough* the representative plaintiff, Francis Vose, was a "holder of bonds of the Florida Railroad Company," who "on behalf of himself and the other bondholders" had litigated for years "with great vigor

and at much expense." *Greenough,* 105 U.S. at 528-29. Vose "bore the whole burden of this litigation, and advanced most of the expenses which were necessary for the purpose of rendering it effective and successful." *Id.* at 529. When Vose sought compensation for his extraordinary service as a representative plaintiff, a court-appointed master found "that peculiar and great personal services have been rendered by the petitioner, Francis Vose ... extending over a period of more than eleven years," and that "by his own vigilance and personal efforts he has saved from spoliation and subjected to the decrees of this court a vast domain of over ten millions of acres of land; and has brought into this court large sums of money"—thereby benefiting the class of bondholders on whose behalf he litigated. *Id.* at 530.

This Court held that "in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund" recovered "at great expense and trouble of the complainant," it would be unjust not to tax the fund for the representative plaintiff's litigation expenses including attorney's fees. *Greenough,* 105 U.S. at 532. To deny Vose his necessary litigation expenses would be, Justice Bradley wrote for the Court,

> not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.

Id.

Despite Vose's "bestowment of his time for years almost exclusively to the pursuit" of the litigation, *id.*, however, he was entitled to recover *only* his reasonable litigation expense including attorney's fees—without any further allowance to compensate him for his personal service as class representative, or even for his personal expenses: "The reasons which apply to his expenditures incurred in carrying on the suit, and reclaiming the property subject to the trust, do not apply to his personal services and private expenses. *Id.* at 537.

This Court held that a named plaintiff cannot recover compensation for his own personal service in representing the class:

> We can find no authority whatever for any such charge by a person in his situation. Where an allowance is made to trustees for their personal services, it is made with a view to secure greater activity and diligence in the performance of the trust, and to induce persons of reliable character and business capacity to accept the office of trustee. These considerations have no application to the case of a creditor seeking his rights in a judicial proceeding. It would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid. Such an allowance has neither reason nor authority for its support.

> We are of opinion, therefore, that *the allowance for these purposes was illegally made*, and that to this extent the orders should be reversed. *We refer to the allowance in the last order*, of $15,003.35 for private expenses, and *of $34,625 for personal services. As to those items the said last order will be reversed ...*

Greenough, 105 U.S. at 537-38 (emphasis added).

This Court reiterated *Greenough's* holding three years later in *Pettus,* 113 U.S. at 122, which similarly involved a class action that recovered a common fund. Writing for the Court, Justice Harlan explained:

> In *Trustees v. Greenough*, 105 U. S. 527, we had occasion to consider the general question as to what costs, expenses, and allowances could be properly charged upon a trust fund brought under the control of court by suits instituted by one or more persons suing in behalf of themselves and of all others having a like interest touching the subject-matter of the litigation. That suit was instituted by the holder of the bonds of a railroad company, on behalf of himself and other bondholders, to save from waste and spoliation certain property in which he and they had a common interest. It resulted in bringing into court or under its control a large amount of money and property for the benefit of all entitled to come in and take the benefit of the final decree. *His claim to be compensated, out of the fund or property recovered, for his personal services and private expenses was rejected as unsupported by reason or authority.*

Pettus, 113 U.S. at 122 (emphasis added).

For a century lower courts honored the rule of *Greenough* and *Pettus,* that named plaintiffs in common-fund cases may be reimbursed for reasonable litigation expenses including attorney's fees, but not for their personal service as class representatives.

In *Crutcher v. Logan,* 102 F.2d 612, 613 (5th Cir. 1939), for example, the Fifth Circuit recognized that under *Greenough* and *Pettus* claimants who are themselves interested in a fund can receive "no compensation for personal services." Writing in 1974, Harvard Law Professor John P. Dawson, could find "no case that uses the *Greenough* doctrine to reimburse the litigants themselves for their own time, travel, or personal expenses, however necessary their efforts may have been to litigation that conferred gains on others." Dawson, *Lawyers and Involuntary Clients,* 87 Harv. L. Rev. at 1602. In 1992, the Sixth Circuit applied *Greenough's* distinction between litigation expenses on the one hand, and "personal services and private expenses," on the other, noting that *Greenough* had specifically disallowed any allowance for the named plaintiff's "personal services and private expenses." *Granada Investments, Inc. v. DWG Corp.,* 962 F.2d 1203, 1207-08 (6th Cir. 1992). As late as 2004, in *Zucker v. Westinghouse Electric,* 374 F.3d 221, 226 (3d Cir. 2004), the Third Circuit reaffirmed and followed this Court's holding in *Greenough,* explaining:

> The Court's refusal [in *Greenough*] to award Vose a fee for "personal services" illustrates its unwillingness to set up financial incentives for objectors to pursue potentially unnecessary litigation to obtain a salary (or fees for "personal services") that might conflict with the best interest of the corporation or other shareholders. The Court thus denied Vose's request for fees for

> "personal services" because such compensation might reward and encourage potentially useless litigation by others seeking lucrative "salaries."

Zucker v. Westinghouse Elec., 374 F.3d 221, 226 (3d Cir. 2004), *aff'g In re Westinghouse Sec. Litig.,* 219 F.Supp.2d 657, 660-61 (W.D. Pa. 2002) (similarly following *Greenough*).

For a century, lower courts honored the rule of *Greenough* and *Pettus.* But lately they do not.

B. Lower Courts Have Effectively Abrogated the Rule of *Greenough* and *Pettus* that Prohibits Allowances to Compensate Named Plaintiffs for Personal Service as Class Representatives

Beginning in the mid-1980s and early 1990s, everything changed. Citing no authorization by statute or rule, or in any intervening decisions of this Court, district courts in the 1980s began paying "service awards," "incentive awards," or "case-contribution awards" to compensate named plaintiffs for services rendered in prosecuting common-fund class-action cases—all without regard to this Court's holdings in *Greenough* and *Pettus* which specifically prohibit such awards, and all without regard to the absence of authorization in statute, rule, or intervening decisions of this Court. The leading treatise on class-action litigation explains:

> Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards. The judiciary has created these awards out of whole cloth. The threads initially appear in the reported case law in the late 1980s: a 1987 decision of a

> federal court in Philadelphia appears to be the first to employ the term "incentive award."

5 *Newberg on Class Actions* §17:2.[5]

Writing in 2006, Professors Theodore Eisenberg and Geoffrey Miller noted the utter "lack of specific authorization for incentive awards in the relevant statutes or court rules."[6] "Beginning around 1990, however, awards for representative plaintiffs began to find readier acceptance," and soon orders "approving incentive awards proliferated," so that "[b]y the turn of the century, some considered these awards to be 'routine.'"[7] These decisions generally failed to cite *Greenough* or *Pettus,* whose holdings they simply ignored.

Dictum in Judge Richard A. Posner's opinion for the Seventh Circuit in *In re Continental Illinois Sec. Litig.,* 962 F.2d 566, 571 (7th Cir. 1992), soon made the case

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[5] *See also, e.g., Bogosian v. Gulf Oil Corp.,* 621 F.Supp. 27, 31 (E.D. Pa. 1985) (awarding an extra "$20,000 apiece to ... the two named class representatives," because "[t]he propriety of allowing modest compensation to class representatives seems obvious"); *Spicer v. Chicago Board of Options Exchange,* 844 F.Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases).

[6] Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study,* 53 U.C.L.A. L. Rev. 1303, 1312-13 (2006).

[7] *Id.* at 1310-11 & n.21; *see also* Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform,* 73 Neb. L. Rev. 646, 673 (1994) ("Cases in the late 1970s and early 1980s abhorred such preferences, but recent cases permit such practices more freely.") (footnotes omitted); Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges,* 71 N.Y.U. L. Rev. 74, 101 n.102 (1996); Andrew Blum, *Class Actions' New Wrinkle: Bonus Awards,* National Law Journal, Oct. 7, 1991, p.1.

for such awards despite this Court's holding in *Greenough.* Judge Posner acknowledged that under *Greenough* a representative plaintiff may recover reasonable litigation expenses," including attorney's fees, "provided they are not personal." *Id.* Judge Posner cited the Sixth Circuit's decision in *Granada Investments,* 962 F.2d 1207-08, which had reiterated and applied *Greenough's* distinction between legitimate litigation expenses and illegitimate compensation for a representative plaintiff's personal service. *See Continental Illinois,* 962 F.2d at 571 (citing *Granada* slip opinion). But Judge Posner then opined that *Greenough's* rule barring compensation for personal services and expenses is bad policy: "Since without a named plaintiff there can be no class action, such compensation as may be necessary to induce him to participate in the suit could be thought the equivalent of the lawyers' nonlegal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable." *Id.* Judge Posner's attack on *Greenough* was limited to dictum, for although "[t]he named plaintiff ... was deposed, which took a few hours, and bore a slight risk of being made liable for sanctions, costs, or other fees should the suit go dangerously awry," the Seventh Circuit held: "The plaintiff has failed to prove his entitlement to a fee." *Id.* at 572.

District courts apparently found Judge Posner's criticism of *Greenough's* rule compelling though, for they proceeded to cite *Continental Illinois* as a basis for awarding the compensation for personal service that *Greenough* and *Pettus* had clearly proscribed.[8]

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[8] *See, e.g., Spicer,* 844 F.Supp. at 1267 (citing *Continental Illinois* as supporting "an incentive award of $10,000 each for named plaintiffs"); *In re Oracle Sec. Litig.,* 1994 WL 502054, at *1

Appellate courts soon joined them in sustaining allowances to compensate representative plaintiffs for personal services and expenses in common-fund cases.

The Eighth Circuit wrote in 1994 that "[w]ith respect to the representative parties' awards, the district court recognized the potential for controversy but cited a series of cases in which named plaintiffs received additional awards based on their efforts and risks in the case." *White v. Nat'l Football League,* 41 F.3d 402, 408 (8th Cir.1994), *overruled on other grounds by Amchem Prods. v. Windsor,* 521 U.S. 591 (1997). The Eighth Circuit sustained the concededly controversial incentive awards citing "substantial evidence that the settlement agreement provides significant benefits to the class." *Id.* Subsequent Eighth Circuit decisions have continued to approve such incentive awards, never acknowledging the contrary rule of *Greenough* and *Pettus*.[9]

(N.D. Cal. June 18, 1994) (citing *Continental Illinois* to justify incentive awards for each of eight class representatives, "lest individuals find insufficient inducement to lend their names and services to the class action"); *cf. In re Chambers Dev. Sec. Litig.,* 912 F.Supp. 852, 863 (W.D. Pa. 1995) (citing *Continental Illinois* as an opinion "disapproving and vacating incentive awards to class representatives" but then holding: "Nevertheless, it has been this Court's practice to approve such incentive awards if they are reasonable ... as the Court finds the $2,500 incentive awards requested in this case to be.").

[9] *See, e.g., Caliguri v. Symantec Corp.,* 855 F.3d 860, 868 (8th Cir. 2017) (approving named plaintiffs' $10,000 incentive awards because "courts in this circuit regularly grant service awards of $10,000 or greater"); *Tussey v. ABB Inc.,* 850 F.3d 951, 961 (8th Cir. 2017) (approving three class representatives' incentive awards from common-fund settlement of $25,000 apiece "to compensate lead plaintiffs for their work"); *In re U.S. Bancorp Litig.,* 291 F.3d 1035, 1038 (8th Cir. 2002) (approving incentive awards of $2,000 to each of five representative plaintiffs where

In 1996 the Seventh Circuit also expressly endorsed incentive awards to named plaintiffs when the panel in *Cook v. Niedert,* 142 F.3d 1004, 1016 (7th Cir. 1998), apparently found Judge Posner's *Continental Illinois* critique of *Greenough* sufficiently persuasive to make Posner's policy preferences the new law of the circuit:

> Having resolved the issues surrounding the attorney's fees, we address the final matter raised by the Fund—the propriety of Archie Cook's $25,000 incentive award. Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit. *See In re Continental,* 962 F.2d at 571. In deciding whether such an award is warranted, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation. *See Spicer v. Chicago Bd. Options Exchange, Inc.*, 844 F.Supp. 1226, 1267 (N.D.Ill.1993). Here these factors are readily satisfied. ... Judge Manning did not err when she approved a $25,000 incentive award.

Cook v. Niedert, 142 F.3d at 1016.

Since then, the Seventh Circuit has repeatedly endorsed incentive awards as appropriate if "'necessary to induce an individual to participate in the suit.'"[10] In *Espencheid v. Direct Sat USA, LLC,* 688

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the common-fund settlement provided only $5 million for division among four million class members).

[10] *Camp Drug Store v. Cochran Wholesale Pharmaceutical,* 897 F.3d 825, 834 (7th Cir. 2018) (quoting *Cook v. Niedert,* 142 F.3d

F.3d 872, 876 (7th Cir. 2012), moreover, the Seventh Circuit approved of incentive awards in Fair Labor Standards Act collective actions, explaining that "[n]o provision of rule or statute authorizes incentive awards in collective actions, but the same is true regarding such awards in class actions, as we noted in *In re Continental Illinois*." *Escpenscheid,* 688 F.3d at 876; *see also Weil v. Metal Techs.,* 925 F.3d 352, 357 & n.4 (7th Cir. 2019).

District courts across the country also have cited *Cook v. Niedert* and *Continental Illinois* to justify incentive awards compensating class representatives for personal services rendered in obtaining common-fund settlements.[11] And other circuits have joined the Seventh and Eighth in abandoning the rule of *Greenough* and *Pettus*.

Devoting half a sentence to the issue, the Ninth Circuit held in *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 463 (9th Cir. 2000), that "the district court did not abuse its discretion ... in

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at 1016); *see also Phillips v. Asset Acceptance, LLC,* 736 F.3d 1076, 1080 (7th Cir. 2013) ("The class representative receives modest compensation (what is called an 'incentive fee' or 'incentive award') for what usually are minimal services in the class action suit ... which is in fact entirely managed by class counsel."); *In re Synthroid Mktg. Litig.,* 264 F.3d 712, 722 (7th Cir. 2001) ("Incentive awards are justified when necessary to induce individuals to become named representatives."); *Montgomery v. Aetna Plywood, Inc.,* 231 F.3d 399, 410 (7th Cir. 2000) ("Incentive awards are appropriate if compensation would be necessary to induce an individual to become a named plaintiff in the suit.").

[11] *See, e.g., In re Relafen Antitrust Litig.,* 231 F.R.D. 52, 82 (D.Mass. 2005); *Varacallo v. Massachusetts Mut. Life Ins. Co.,* 226 F.R.D. 207, 257 (D.N.J. 2005); *In re Compact Disc Minimum Advertised Price Antitrust Litig.,* 292 F.Supp.2d 184, 189 (D.Maine 2003).

awarding an incentive award to the Class Representatives." Some subsequent Ninth Circuit decisions find that incentive awards may have a corrupting influence, causing class representatives' interests to diverge from those of the classes they purport to represent.[12] Yet other Ninth Circuit decisions continue to approve substantial payments to class representatives for agreeing to settlements that recover little for other class members.[13] The Ninth

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[12] *See Staton v. Boeing Co.*, 327 F.3d 938, 977-78 (9th Cir. 2003) (rejecting settlement agreement where a request for large incentive awards suggested the class representatives were "more concerned with maximizing [their own] incentives than with judging the adequacy of the settlement as it applies to class members at large"); *Rodriguez v. West Publishing Corp.,* 563 F.3d 948, 960 (9th Cir. 2009) (reiterating that "excess incentive awards may put the class representative in a conflict with the class and present a 'considerable danger of individuals bringing cases as class actions principally to increase their own leverage to attain a remunerative settlement for themselves and then trading on that leverage in the course of negotiations'") (quoting *Staton,* 327 F.3d at 976-77); *Rodriguez v. Disner,* 688 F.3d 645, 656-57 (9th Cir. 2012) (large incentive awards caused class representatives' interests to diverge from those of the class they purported to represent); *Radcliffe v. Experian Info. Solutions,* 715 F.3d 1157, 1161 (9th Cir.2013) (where "incentive awards significantly exceeded in amount what absent class members could expect upon settlement approval" they "created a patent divergence of interests between the named representatives and the class").

[13] *See, e.g., In re Online DVD-Rental Antitrust Litig.,* 779 F.3d 934, 947 (9th Cir. 2015) (approving incentive awards of $5,000 apiece to nine class representatives even though each "$5,000 incentive award is roughly 417 times larger than the $12 individual award" to be received by the ordinary class members whose interests the named plaintiffs supposedly represented); *Palmer v. Sprint Sols., Inc.,* 2011 WL 13238842, at *4 (W.D. Wash. Oct. 21, 2011) (awarding $17,500 incentive award without explanation*), aff'd sub nom. Palmer v. Nigaglioni*, 508 F.App'x 658, 658-59 (9th Cir. 2013) (conclusorily affirming incentive

Circuit has never explained how these awards might be reconciled with *Greenough* and *Pettus*.

Although the Third Circuit cited and followed *Greenough*'s rule in 2004 in *Zucker v. Westinghouse,* 374 F.3d at 226, the Third Circuit overruled the decision *sub silentio* just six years later when the *en banc* court affirmed class representatives' incentive awards of $220,000 in *Sullivan v. DB Investments, Inc.,* 667 F.3d 273, 333 n.65 (3d Cir. 2010) (*en banc*). Citing only district-court decisions, the *en banc* court explained in a footnote that "'[i]ncentive awards are not uncommon in class action litigation ... particularly where ... a common fund has been created for the benefit of the entire class.'" *Id.* (quoting *In re Lorazepam & Clorazepate Antitrust Litig.,* 205 F.R.D. 369, 400 (D.D.C. 2002)). The *en banc* court did not explain how district courts could be entitled to grant awards that it had recognized in *Zucker v. Westinghouse* are proscribed by *Greenough*.

And although the Sixth Circuit reiterated *Greenough's* rule in its 1992 decision of *Granada Investments,* 962 F.3d at 1207-08, subsequent decisions have treated the general propriety of incentive awards as an open question in the circuit.[14] In *Shane Group, Inc. v. Blue Cross Blue Shield*, 825

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award "in light of the representative's work on behalf of the class").

[14] *See Hadix v. Johnson,* 322 F.3d 895, 898 (6th Cir. 2003); *Vassalle v. Midland Funding LLC,* 708 F.3d 747, 756 (6th Cir. 2013); *In re Dry Max Pampers Litig,* 724 F.3d 713, 722 (6th Cir. 2013); *Shane Group Inc. v. Blue Cross Blue Shield,* 825 F.3d 299, 310-11 (6th Cir. 2016); *see also In re Southern Ohio Correctional Facility,* 24 F.App'x 520, 526 (6th Cir. 2001) ("we intimate no view as to the propriety of such awards in general").

F.3d 299, 310-11 (6th Cir. 2016), the Sixth Circuit summarized "that '[o]ur court has never approved the practice of incentive payments to class representatives, though in fairness we have not disapproved the practice either.'" *Id.* (quoting *Dry Max Pampers,* 724 F.3d at 722). Expressing a "'sensibl[e] fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain,'" the Sixth Circuit vacated a "settlement agreement [that] provides for incentive awards of up to $10,000 per individual named plaintiff," explaining that without detailed documentation of the class representatives' time devoted to the case "the district court has no basis for knowing whether the awards are in fact 'a *disincentive* for the [named] class members to care about the adequacy of the relief afforded unnamed class members[.]'" *Id.* at 311 (emphasis in original) (quoting *Hadix,* 322 F.3d at 897 and *Dry Max Pampers,* 724 F.3d at 722). Were such documentation provided, the court added, "the 'difficult' issue of the propriety of incentive awards would be properly presented." *Id.* (quoting *Hadix,* 322 F.3d at 898).

Although the First Circuit underscored in 2015 that "this circuit has never ruled on when, if ever, such awards are valid," *Bais Yaakov of Spring Valley v. Act, Inc.,* 798 F.3d 46, 50 (1st Cir. 2015), decisions of the

Third,[15] Fourth,[16] Eighth,[17] Ninth,[18] Tenth[19] and District of Columbia Circuits[20] all have approved of incentive awards, without so much as citing the holdings of *Greenough* and *Pettus*.

But with the Eleventh Circuit panel opinion in *Muransky* and the Second Circuit's decision in this case following that opinion, lower courts now are directly rejecting this Court's decisions in *Greenough* and *Pettus* as no longer binding them. *See Muransky,* 922 F.3d at 1196; Pet.App.21a (following *Muransky*). A writ of certiorari should issue to preserve this Court's authority as the final arbiter of its precedents' continuing validity.

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[15] *Sullivan,* 667 F.3d at 333 n.65 (*en banc*); *Brady v. Air Line Pilots Ass'n,* 627 F.App'x 142, 144-46 (3d Cir. 2015) (affirming incentive awards totaling $640,000).

[16] *Berry v. Schulman,* 807 F.3d 600, 613-14 (4th Cir. 2015) (approving incentive awards of $5,000 apiece).

[17] *See, e.g., Caligiuri,* 855 F.3d at 868; *Tussey,* 850 F.3d at 961; *U.S. Bancorp,* 291 F.3d at 1038; *White,* 41 F.3d at 408,

[18] *See, e.g., Online DVD-Rental,* 779 F.3d at 947.

[19] *UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp.,* 352 F.App'x 232, 235 (10th Cir. 2009) ("'Incentive awards [to class representatives] are justified when necessary to induce individuals to become named representatives...'") (quoting *Synthroid,* 264 F.3d at 722-23).

[20] *Keepseagle v. Perdue,* 856 F.3d 1039, 1056 (D.C. Cir. 2017) (approving incentive awards "to compensate the class representative").

C. This Court's Recent Dictum in *China Agritech, Inc. v. Resh* Appears Inadvertently to Endorse the Lower Courts' Abrogation of this Court's Foundational Common-Fund Precedents

Review by writ of certiorari is needed because lower courts are ignoring and rejecting this Court's controlling precedents. This Court's review is all the more critical given its own ostensible, but likely inadvertent, acquiescence in the lower courts' abrogation of its precedents.

Without formally overruling (or even citing) *Greenough* and *Pettus,* this Court in *China Agritech Inc. v. Resh,* __U.S.__, 138 S.Ct. 1800 (2019), which concerned classs actions and *American Pipe* tolling, favorably cited a Seventh Circuit decision awarding approving a $25,000 incentive bonus in derogation of the rule that *Greenough* and *Pettus* established. The incentive award approved by the Seventh Circuit in *Cook v. Niedert,* discussed *supra* at 22, was offered in *China Agritech* as a motivating reason for plaintiffs to file class actions without delay:

> The plaintiff who seeks to preserve the ability to lead the class—whether because her claim is too small to make an individual suit worthwhile or because of an attendant financial benefit[7]—has every reason to file a class action early, and little reason to wait in the wings, giving another plaintiff first shot at representation.
>
> [7] The class representative might receive a share of class recovery above and beyond her

> individual claim. See, *e.g., Cook v. Niedert,* 142 F.3d 1004, 1016 (C.A.7 1998).

China Agritech, 138 S.Ct. at 1810-11 & n.7.

Bowes submits that a tangential snippet of dictum in an opinion that nowhere considers—let alone reconsiders—the common-fund doctrine of *Greenough* and *Pettus*, ought not be deemed to have overruled those decisions. This Court's admonitions on stare decisis are emphatic: "We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton,* 521 U.S. 203, 237 (1997). "This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1, 18 (2000). "'Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.'" *Bosse v. Oklahoma,* __U.S.__, 137 S.Ct. 1, 2 (2016) (quoting *Hohn v. United States,* 524 U.S. 236, 252-53 (1998)). "The notion that [this Court] created a new rule *sub silentio*—and in a case where certiorari had been granted on an entirely different question, and the parties had neither briefed nor argued the ... issue—is implausible." *Mickens v. Taylor,* 535 U.S. 162, 172 (2002).

Given the disregard for *Greenough* and *Pettus* shown by panels of the Eleventh Circuit in *Muransky* and the Second Circuit in this case, however, it seems likely that lower courts already disinclined to follow this Court's foundational common-fund decisions will cite *China Agritech*'s footnote as abandoning them. *Cf. F.E.B. Corp. v. United States,* 818 F.3d 681, 690 (11th

Cir. 2016) ("'there is dicta ... and then there is Supreme Court dicta,'" which "'is not something to be lightly cast aside,' ... but rather is of 'considerable persuasive value'") (citations omitted); *Galli v. New Jersey Meadowlands Comm'n,* 490 F.3d 265, 274 (3d Cir. 2007) ("such dicta are highly persuasive"); *United States v. Baird,* 85 F.3d 450, 453 (9th Cir. 1996) ("we treat Supreme Court dicta with due deference").

This Court should grant certiorari to preserve its authority as the sole arbiter of its own precedents' continuing validity.

D. The Decision Below is Wrong on the Merits

The Eleventh Circuit panel in *Muransky* explained that it was not bound to follow this Court's decisions because "[n]o circuit has applied *Greenough* or *Central Bank*, which were decided well before the adoption of Rule 23, to prohibit incentive awards in the class-action context." *Muransky,* 922 F.3d at 1196. The district court in this case similarly reasoned that could ignore this Court's foundational common-fund precedents because they "are extremely old and pre-date Rule 23 by decades." Pet.App.64a n.21. The Second Circuit affirmed, favorably citing and following *Muransky* for "summarily rejecting the same argument by Bowes's counsel," that this Court's decisions in *Greenough* and *Pettus* in fact retain precedential value. Pet.App.21a.

Yet the Rules Enabling Act clearly states that the federal rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072. And nothing in Rule 23 itself in anywise undermines—let alone overrules—*Greenough* and *Pettus*. Although Rule 23(h)

specifically regulates the award of attorneys' fees (when otherwise authorized by law) in class actions, nowhere does Rule 23 authorize or permit special payments compensating named plaintiffs for service as class representatives or to give them additional incentives to litigate. *See* 5 *Newberg on Class Actions* §17:1. Before the recent advent of incentive awards, federal courts had long held that by "bringing [an] action as a class action" under Rule 23, a class representative "has disclaimed any right to a preferred position in the settlement" of the case.[21]

Nor do this Court's decisions lose their authority with the passage of time, as the Eleventh Circuit *Muransky* panel and the courts below in this case hold. Quite otherwise, "the strength of the case for adhering to such decisions grows in proportion to their 'antiquity.'" *Gamble v. United States*, __U.S.__, 139 S. Ct. 1960, 1969 (2019) (citing *Montejo v. Louisiana*, 556 U. S. 778, 792 (2009)); *cf. South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) ("the respect accorded prior decisions increases, rather than decreases, with their antiquity"). That the federal courts honored the rule of *Greenough* and *Pettus* for a century should have enhanced the decisions' authority rather than undermining them.

"The principle of stare decisis has 'special force,'" moreover, in contexts such as this, where "'Congress remains free to alter'" whatever this Court has done. *Halliburton Co. v. Erica P. John Fund, Inc.,* 573 U.S.

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[21] *Officers for Justice v. Civil Service Comm'n,* 688 F.2d 615, 632 (9th Cir. 1982); *accord, e.g., Bailey v. Great Lakes Canning, Inc.,* 908 F.2d 38, 42 (6th Cir. 1990); *Kincade v. General Tire & Rubber Co.,* 635 F.2d 501, 506 n.5 (5th Cir. 1981); *Flinn v. FMC Corp.,* 528 F.2d 1169, 1175 (4th Cir. 1975).

258, 274 (2014) (citations omitted). And Congress not only can, *but has*, modified the rule of *Greenough* and *Pettus* in very limited contexts where it thought such modification appropriate—while repeatedly rejecting calls to generally abrogate the rule of *Greenough* and *Pettus*.

The exceptions are rare, narrow, and abstemious. The Federal Debt Collection Practices Act ("FDCPA") specifically authorizes incentive awards capped at just $1,000 per named plaintiff.[22] With the Private Securities Litigation Reform Act of 1995's regulation of federal securities class actions, moreover, Congress authorized only "the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class."[23] In the Claims Resolution Act of 2010, Pub.L. No. 111–291, 124 Stat. 3064 (2010), Congress authorized the settlement of particular class-action claims related to the Department of Interior's misadministration of Native American trust accounts,

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[22] 15 U.S.C. §1692k(a)(2)(A), (B); *see Pelzer v. Vassalle,* 655 F.App'x 352, 361 (6th Cir. 2013) ($1,000 incentive awards authorized in FDCPA cases); *Good v. Nationwide Credit, Inc.,* 314 F.R.D. 141, 160 (E.D. Pa. 2016) (awarding $1,000 "[i]n light of this express Congressional authorization"); *Maloy v. Stucky, Lauer & Young, LLP,* 2018 WL 6444918, at *3 (N.D. Ind. Oct. 25, 2018) (incentive award of "$1,000 from the settlement fund ... is the maximum amount ... under the FDCPA"); *Schuchardt v. Law Office of Rory W. Clark,* 2016 WL 232435, at *2 & n.3 (N.D. Cal. Jan. 20, 2016) (observing that "[a]part from this [$1,000] statutory award, neither Plaintiff seeks an incentive award for their service to the Class").

[23] 15 U.S.C. §77z-1(a)(2)(A)(vi), (a)(4), and §78u-4(a)(2)(A)(vi), (a)(4); *see Rodriguez v. West Publishing Corp.,* 563 F.3d 948, 960 n.4 (9th Cir. 2009); *Schwartz v. Arena Pharmaceuticals,* 775 F.App'x 342, 343 (9th Cir. 2019); 2 *McLaughlin on Class Actions* §6:28 & nn.29-30 (15th ed., 2018).

while specifically permitting "the district court to grant 'incentive awards' to the Class Representatives." *Cobell v. Jewell,* 802 F.3d 12, 17 (D.C. Cir. 2015) (citing Claims Act §101(g)(1)).

But Congress has declined to enact similar provisions authorizing incentive awards in class actions more generally, or in TCPA cases such as this.

In fact, calls to allow incentive awards more generally have been repeatedly rejected. With the Small Business Judicial Access Act of 1979, for example, "the Department of Justice under the Carter administration attempted to enact an incentive award as part of a proposed expansion of the class damage procedures of Rule 23(b)(3)," but the proposal "lost momentum and failed to pass." Sofia C. Hubscher, *Making it Worth Plaintiffs' While: Extra Incentive Awards to Named Plaintiffs in Class Action Employment Discrimination Lawsuits,* 23 Colum. Hum. Rts. L. Rev. 463, 483-84 (1992).

And while early versions of the Class Action Fairness Act ("CAFA") would have permitted incentive awards "for reasonable time or costs that a person was required to expend in fulfilling the obligations of that person as a class representative," Sen. Rep. No. 108-123, §1715(b) at 97 (2003), that provision was deleted from the legislation as ultimately enacted in 2005. Congress' findings in the enacted law expressly condemn the "unjustified awards" that "are made to certain plaintiffs at the expense of other class members." Pub.L.No. 109–2, §2(a)(3), 119 Stat. 4 (2005), 28 U.S.C. §1711 note ("Findings and Purposes"); *see Rodriguez v. West Publishing,* 563 F.3d at 960 n.4. CAFA thus provides for the removal of most state-court class actions to federal court, *see* 28 U.S.C.

§§1332(d)(2) & (d)(5)(B), 1453(b), where incentive awards are proscribed by *Greenough* and *Pettus*.

Congress had good reason for generally rejecting incentive awards. The prospect of payments for acting as class representative can induce meritless litigation, as this Court itself warned in *Greenough* and *Pettus*. It also can induce class representatives to enter settlements sacrificing other class members' legitimate claims for a pittance—because the named plaintiffs expect themselves to receive substantial incentive awards. *See* 5 *Newberg on Class Actions* §§17:1, 17:3, 17:18. "Indeed, '[i]f class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard.'"[24]

The named plaintiffs in this case, for example, anticipated incentive awards of $10,000 apiece upon settling other class members' substantial claims for

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[24] *Staton.,* 327 F. 3d at 975; *see also Shane Group,* 825 F.3d at 311 (incentive awards may provide "'a *disincentive* for the [named] class members to care about the adequacy of relief afforded unnamed class members'") (emphasis in original; citation omitted); *Lee v. Buth-Na-Bodhaige, Inc.,* 2019 IL App (5th) 180033, ¶104, ___N.E.3d___, 2019 WL 4231845, at *21 (Ill.App. Sept. 6, 2019) ("Incentive payments raise questions about collusion and whether the interests of the class have been relegated to a less prominent role in the litigation."); *Flemming v. Barnwell Nursing,* 56 A.D.3d 162, 166, 865 N.Y.S.2d 706, 709 (2008) ("Class representatives may be tempted to accept suboptimal settlements at the expense of the remaining class members in exchange for special awards in addition to their share of the recovery, thus undermining their effectiveness as fiduciaries of the class..."), *aff'd,* 15 N.Y.3d 375, 912 N.Y.S.2d 504, 938 N.E.2d 937 (2010) (citation omitted)

the tiniest fraction of a percent of the statutory liabilities involved, and they were awarded $2,500 apiece though they failed to document their contributions to the litigation. *See* Pet.App.63a-64a. That makes this case an ideal vehicle for reviewing the propriety of incentive awards.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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October 16, 2019

Attorneys for Petitioner

APPENDIX

APPENDIX A

17-3277 (L)
Melito v. Experian Mktg. Solutions, Inc.

In the
United States Court of Appeals
For the Second Circuit

August Term, 2018

Argued: November 5, 2018
Decided: April 30, 2019

Docket Nos. 17-3277-cv (L), 17-3279-cv (Con)

CHRISTINA MELITO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, RYAN METZGER, ALISON PIERCE, GENE ELLIS, WALTER WOOD, CHRISTOPHER LEGG, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs–Appellees,

AMERICAN EAGLE OUTFITTERS, INC., A DELAWARE CORPORATION, AEO MANAGEMENT CO., A DELAWARE CORPORATION,

Defendants–Third-Party-Plaintiffs–Appellees,

v.

EXPERIAN MARKETING SOLUTIONS, INC.,

Consolidated Defendant–Third- Party-Defendant–Appellant,

KARA BOWES,

Objector–Appellant,

EBAY ENTERPRISE, INC., FKA EBAY ENTERPRISE MARKETING SOLUTIONS, INC.,

Defendant.

Appeal from the United States District Court for the Southern District of New York
No. 14-cv-2440 – Valerie E. Caproni, *Judge*.

Before: HALL and LYNCH, *Circuit Judges,* and ENGELMAYER, *District Judge.* [*]

Plaintiffs each received unsolicited spam text messages sent from or on behalf of American Eagle Outfitters ("AEO"). They then filed a putative class-action lawsuit against AEO, claiming that these text messages were sent in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §227. Plaintiffs alleged no injury other than the receipt of the unwanted texts.

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[*] Judge Paul A. Engelmayer, of the United States District Court for the Southern District of New York, sitting by designation.

Plaintiffs and AEO agreed to settle the class action and moved in district court for approval of the settlement and certification of the settlement class. Third-party defendant Experian Marketing Solutions, Inc. ("Experian") objected to certification, arguing that Plaintiffs lacked standing under *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016). Class member Kara Bowes objected to the class settlement as unfair. The district court (Caproni, J.) approved the settlement and certified the settlement class, and Experian and Bowes appeal.

The principal question we are tasked with deciding is whether Plaintiffs' receipt of the unsolicited text messages, sans any other injury, is sufficient to demonstrate injury-in-fact. We hold that it is. First, the nuisance and privacy invasion attendant on spam texts are the very harms with which Congress was concerned when enacting the TCPA. Second, history confirms that causes of action to remedy such injuries were traditionally regarded as providing bases for lawsuits in English or American courts. Plaintiffs were therefore not required to demonstrate any additional harm. Having concluded that Plaintiffs have satisfied Article III's standing requirement, we dismiss Experian's appeal for lack of appellate jurisdiction and affirm the judgment of the district court with respect to Bowes's appeal.

AFFIRMED IN PART AND DISMISSED IN PART.

MEIR FEDER, Jones Day, New York, NY (John A. Vogt, Jones Day, Irvine CA, *on the brief*), for *Consolidated Defendant–*

Third-Party- Defendant–Appellant
Experian Marketing Solutions, Inc.

ERIC ALAN ISAACSON, Law Office of Eric Alan Isaacson, La Jolla, CA (C. Benjamin Nutley, Pasadena, CA, *on the brief*), *for Objector– Appellant* Kara Bowes.

BETH E. TERRELL, Terrell Marshall Law Group PLLC, Seattle, WA (Joseph A. Fitapelli, Fitapelli & Schaffer, LLP, New York, NY, *on the brief*), *for Plaintiffs–Appellees.*

HALL, *Circuit Judge*:

Plaintiffs each received unsolicited spam text messages sent from or on behalf of American Eagle Outfitters ("AEO"). They then filed a putative class-action lawsuit against AEO, claiming that these text messages were sent in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §227. Plaintiffs alleged no injury other than the receipt of the unwanted texts.

Plaintiffs and AEO agreed to settle the class action and moved in district court for approval of the settlement and certification of the settlement class. Third-party defendant Experian Marketing Solutions, Inc. ("Experian") objected to certification, arguing that Plaintiffs lacked standing under *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016). Class member Kara Bowes

objected to the class settlement as unfair. The district court (Caproni, *J.*) approved the settlement and certified the settlement class, and Experian and Bowes appeal.

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I.

"In the interest of reducing the volume of unwanted telemarketing calls, the Telephone Consumer Protection Act, in relevant part, makes it 'unlawful ... to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system ["ATDS"] ... to any telephone number assigned to a ... cellular telephone service, ... unless such call is made solely to collect a debt owed to or guaranteed by the United States.'" *King v. Time Warner Cable Inc.,* 894 F.3d 473, 474 (2d Cir. 2018) (quoting 47 U.S.C. §227(b)(1)(A)(iii)). In enacting the

Act, Congress found that "[u]nrestricted telemarketing ... can be an intrusive invasion of privacy" and that "[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call[,] ... is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, §§5, 12, 105 Stat. 2394 (1991).

The TCPA delegated the authority to implement these requirements to the Federal Communications Commission (the "FCC"). *See* 47 U.S.C. §227(b)(2). Although text messages are not explicitly covered under the TCPA, the FCC has interpreted the Act to cover them. *See In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 7 FCC Rcd. 14014, 14115 (July 3, 2003); *see also Campbell-Ewald Co. v. Gomez,* 136 S. Ct. 663, 667 (2016) ("A text message to a cellular telephone, it is undisputed, qualifies as a 'call' within the compass of §227(b)(1)(A)(iii).").[25]

The TCPA provides for statutory damages of $500 per violation, which can be trebled "[i]f the court finds that the defendant willfully or knowingly violated" the statute. 47 U.S.C. §227(b)(1)(A)(iii).

A.

Plaintiffs Christina Melito, Christopher Legg, Alison Pierce, and Walter Wood (collectively,

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[25] In *Campbell-Ewald*, the parties did not dispute that text messages were covered based on prior Ninth Circuit precedent deferring to the FCC's interpretation of the TCPA. *See Satterfield v. Simon & Schuster, Inc.,* 569 F.3d 946, 952–54 (9th Cir. 2009).

"Plaintiffs") brought a putative class-action lawsuit against American Eagle Outfitters, AEO Management Co. (collectively, "AEO"), and Experian Marketing Solutions, Inc. ("Experian"). Plaintiffs alleged that Experian, acting on behalf of AEO, sent spam text messages to their phones using an ATDS platform designed by nonparty Archer USA, Inc. Plaintiffs alleged only that they received the unconsented-to messages in violation of the TCPA.

The district court dismissed the claims against Experian, and AEO filed a third-party complaint against Experian, claiming contractual indemnity, breach of contract, common-law indemnity, and negligence based on Experian's handling of the alleged spam text messages.

Experian moved to dismiss the class-action complaint for lack of subject- matter jurisdiction. According to Experian, all of AEO's claims against it were derivative of Plaintiffs' claims against AEO. Therefore, Experian argued, pursuant to Federal Rule of Civil Procedure 14(a)(2)(c), it could assert any defense that AEO would have had against the Plaintiffs' claims. Experian asserted that Plaintiffs lacked standing under *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016), because they alleged only a bare statutory violation and statutory damages cannot substitute for concrete harm. While Experian's motion was pending, Plaintiffs and AEO filed a notice of conditional settlement. The district court then denied Experian's motion as moot.

B.

Plaintiffs moved for preliminary approval of the class settlement and conditional certification of the

settlement class. The district court granted the motion and conditionally certified the following class:

> The approximate[ly] 618,289 persons who, on or after April 8, 2010 and through and including the date of entry of the Preliminary Approval Order, received a text message from AEO or any entity acting on its behalf, to her or her [sic] unique cellular telephone number, and who did not provide AEO with appropriate consent under the TCPA. Excluded from the Settlement Class are the Judge to whom the Action is assigned and any member of the Court's staff and immediate family, and all persons who are validly excluded from the Settlement Class.

Sp.App. 3. The court appointed a claims administrator who compiled a list of class members consisting of 618,301 unique phone numbers.[26] The administrator provided class notice via email or postcard to those members for whom he had addresses and posted notice regarding the class settlement on a website. The notices explained the nature of the lawsuit. They informed the recipients that AEO had agreed to pay a total of $14,500,000 and explained that, after attorneys' fees, costs, and potential service awards, each claimant could expect to receive between $142 and $285. Further, the notices informed the class members that they could withdraw or object and explained how to do so.

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[26] The list of class members was submitted under seal in the district court. Plaintiffs have moved to supplement the appendix on appeal with redacted portions of the list showing that they are indeed among the class members.

As relevant here, two objections were received. Experian objected to class certification, arguing that Plaintiffs failed adequately to allege injury, not all class members may have received text messages from an ATDS, and the class was unascertainable. Kara Bowes, a class member, objected to the reasonableness of the settlement, arguing that the award was too low, the notice was inadequate, and incentive awards were inappropriate.

C.

After a final approval hearing, the district court entered a final order approving the settlement. The court explained its reasoning in a subsequent memorandum. It first concluded, for the following reasons, that Plaintiffs did not lack standing. Under *Spokeo*, "alleging only a statutory violation, without alleging any *additional* harm *beyond* the one Congress has identified could be sufficient to establish a concrete injury," and "unwanted and unauthorized telephone contact by an automated system is precisely the harm that Congress was trying to avoid when it enacted the TCPA." Sp. App. 32 (internal quotation marks, citation, and alteration omitted).

The court then went on to conclude that the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) were satisfied. With respect to Experian's ascertainability objection, the court ruled that Experian lacked standing to object because it was a nonsettling third-party defendant. Moreover, even if Experian did have standing to object, its objection was meritless because the settling class was clearly ascertainable.

Regarding the settlement, the district court determined that it was fair, adequate, and reasonable. In doing so, it analyzed the nine factors under *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir. 1974), and concluded that all but one (the ability of AEO to withstand a greater judgment) weighed in favor of approving the settlement.[27] The district court overruled Bowes's objection to the adequacy of the settlement amount, noting that she overlooked the very real litigation risks that Plaintiffs would have faced. The court then concluded that notice was adequate and that attorneys' fees, costs, and an incentive award were appropriate. It entered an amended final order, certifying under Federal Rule of Civil Procedure 54(b) that there was "no just reason for delay of enforcement or appeal of the Final Approval Order." Sp. App. 62–63. These consolidated appeals follow.

II.

On appeal, Experian argues that it has standing to pursue its appeal of the district court's class-certification ruling and that, regardless of Experian's standing to appeal, Plaintiffs lack standing under Spokeo to bring this action. For her part, Bowes joins

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[27] The factors are "(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4)the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Grinnel Corp.,* 495 F.2d at 463 (citations omitted).

Experian's argument that Plaintiffs lack standing under Spokeo, albeit for different reasons, and additionally raises a host of challenges to the district court's approval of the class settlement. We first address Experian's standing to appeal. Next, we assure ourselves of our own (and the district court's) subject-matter jurisdiction. Finally, we turn to Bowes's class-settlement challenges.

A.

"[W]e review *de novo* the issue of whether [nonsettling parties] have standing to bring this appeal." *Bhatia v. Piedrahita,* 756 F.3d 211, 217 (2d Cir. 2014) (citing *Denney v. Deutsche Bank AG,* 443 F.3d 253, 262 (2d Cir. 2006); *Shain v. Ellison,* 356 F.3d 211, 214 (2d Cir. 2004)). Plaintiffs urge that, as a nonsettling party, Experian lacks standing to appeal. Plaintiffs rely primarily, as did the district court, on Bhatia, in which we held that nonsettling defendants in a putative class action did not have standing to challenge a provision in a settlement agreement that allegedly barred those defendants' rights. *Bhatia,* 756 F.3d at 215-16.

In *Bhatia,* we "observed that a non-settling defendant generally lacks standing to object to a court order approving a partial settlement because a non-settling defendant is ordinarily not affected by such a settlement." *Id.* at 218. We noted, however, an exception to the general rule: a nonsettling codefendant could appeal "where it can demonstrate that it will sustain some formal legal prejudice as a result of the settlement." *Id.* We further explained that such prejudice "exists only in those rare circumstances when, for example, the settlement agreement formally

strips a non-settling party of a legal claim or cause of action, such as a cross-claim for contribution or indemnification, invalidates a non-settling party's contract rights, or the right to present relevant evidence at a trial." *Id.* Here, the district court concluded that Experian could not demonstrate formal legal prejudice because, although the court's approval of the settlement would necessarily decide the Spokeo issue against Experian, Experian had at least had an opportunity to press its argument.

Experian protests that a third-party defendant is a different creature than a codefendant. It relies on Rule 14's provision that a third-party defendant may "assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim," Fed. R. Civ. P. 14(a)(2)(C), to argue that, as a third-party defendant, it "enjoy[s] a broad range of procedural rights designed to protect [its] interests and ensure that [it is] not prejudiced by the original defendant's failure to exercise its rights." Experian Br. at 18. Among these rights, Experian insists, is the right to appeal a judgment against the original defendant. *See Kicklighter v. Nails by Jannee, Inc.,* 616 F.2d 734, 738 n.1 (5th Cir. 1980).

While true enough, this argument misses the point. Experian still can appeal the district court's conclusion that Plaintiffs satisfied Spokeo—just not yet. As in *Kicklighter,* on which Experian relies, Experian can challenge that ruling on appeal from a final judgment *in the third-party proceeding*. *See id.* (noting that "it logically follows that the third-party defendant may assert on appeal errors in the main case" where the third-party defendant was appealing from a judgment entered in the third-party case).

In other words, that a third-party defendant cannot be made to indemnify a defendant for nonexistent liability does not entitle it to object to that defendant's decision to settle a claim made against it. Should the defendant, having settled its claim, pursue its action for indemnity against the third-party defendant, the latter may raise any defenses that it has, including any argument the defendant could have raised that it was not liable in the first place. But unless the settlement agreement itself purports to strip the third- party defendant of its defenses, all of that must await the development of the third-party action. Because the settlement in itself does not purport to deprive Experian of its right to raise any of its defenses in the third-party action, it lacks standing to object to AEO's decision to settle its dispute with Plaintiffs.

Accordingly, because Experian has not been "*formally* strip[ped]" of any claim or defense, it lacks standing to pursue its appeal, *see Bhatia,* 756 F.3d at 218,[28] which we therefore must dismiss. But as we discuss below, that does not mean that we are free to ignore the jurisdictional issue Experian raises.

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[28] The other sources cited by Experian are in accord with our conclusion. Experian cites to 6 Fed. Prac. & Proc. Civ. §1463 n.21 (3d ed.), for the proposition that "[t]he third-party defendant should be able to appeal from a judgment on the original claim against the third-party plaintiff ... since if no liability were established between the original plaintiff and defendant then the claim for secondary liability no longer would exist." However, the case citation supporting that footnote is *Tejas Dev. Co. v. McGough Bros.,* 167 F.2d 268 (5th Cir. 1948), a case where the main claims and third-party claims were tried together. *Accord United States for Use of Barber-Colman Co. v. U.S. Fid. & Guar. Co.,* 19 F.3d 1431 (4th Cir. 1994) (per curiam).

Having concluded that Experian lacks standing to appeal, we next turn to whether Plaintiffs nonetheless lack standing to bring this case.

B.

Experian asserts that, regardless of its standing to challenge Plaintiffs' standing, we must reach the *Spokeo* issue. We agree. It is fundamental that we have an "independent obligation to satisfy ourselves of the jurisdiction of this court and the court below." *In re Methyl Tertiary Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 121 (2d Cir. 2007). "We review de novo a [district court's] decision as to a plaintiff's standing to sue based on the allegations of the complaint and the undisputed facts evidenced in the record." *Rajamin v. Deutsche Bank Nat'l Trust Co.,* 757 F.3d 79, 84–85 (2d Cir. 2014). We therefore proceed to address the question of Plaintiffs' standing to bring the underlying action. Because Experian's brief helpfully advances the argument that they do not, we treat that brief as, in effect, an amicus curiae submission and address the standing question in part through the lens of the arguments Experian presents.

Article III limits federal judicial power to "Cases" and "Controversies," U.S. Const. art. III, §2, and standing to sue "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong," *Spokeo,* 136 S. Ct. at 1547. To satisfy Article III standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Id. A plaintiff establishes injury in fact if he suffered "'an invasion of a legally

protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)).

Experian contends that Plaintiffs lack standing because they failed to allege a "concrete" injury in fact. We disagree. "In determining whether an intangible harm," as alleged here, "constitutes injury in fact, both history and the judgment of Congress play important roles." *Id.* at 1549. To be sure, this "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* Despite Experian's contrary protestations, however, Plaintiffs here do not "allege a bare procedural violation, divorced from any concrete harm." *Id.*

First, Plaintiffs allege "the very injury [the TCPA] is intended to prevent." *See Sussino v. Work Out World Inc.,* 862 F.3d 346, 351 (3d Cir. 2017) (internal quotation marks omitted). As noted above, "nuisance and privacy invasion" were the harms Congress identified when enacting the TCPA. Pub. L. No. 102-243, §§5, 12. And text messages, while different in some respects from the receipt of calls or faxes specifically mentioned in the TCPA, present the same "nuisance and privacy invasion" envisioned by Congress when it enacted the TCPA.[29] *See id.*

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[29] Experian argues in passing that it was the FCC, not Congress, that interpreted the TCPA to cover text messages. True, but irrelevant. We need not consider the impact of the FCC's interpretation of the TCPA, or whether the Hobbs Act bars our jurisdiction to consider that interpretation, *see* 28 U.S.C. §§2342,

Second, this injury "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American Courts." *See Spokeo,* 136 S. Ct. at 1549. As both the Ninth and Third Circuits have noted, the harms Congress sought to alleviate through passage of the TCPA closely relate to traditional claims, including claims for "invasions of privacy, intrusion upon seclusion, and nuisance." *Van Patten v. Vertical Fitness Grp., LLC,* 847 F.3d 1037, 1043 (9th Cir. 2017); *Sussino,* 862 F.3d at 351–52 (focusing on intrusion upon seclusion); see also Restatement (Second) of Torts §652B (Am. Law Inst. 1977) (discussing intrusion upon seclusion). Neither Experian nor Bowes meaningfully contend otherwise, and we see no reason to diverge from our sister circuits on this point.

Because Plaintiffs have demonstrated a harm directly identified by Congress and of the same character as harms remediable by traditional causes of action, the district court correctly concluded that they "need not allege any additional harm beyond the one Congress has identified." *See Spokeo,* 136 S. Ct. at 1549. Experian protests this conclusion at length,

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2343; *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC,* 883 F.3d 459 (4th Cir.), *cert. granted,* 139 S. Ct. 478 (2018) (mem.); *Nigro v. Mercantile Adjustment Bureau, LLC,* 769 F.3d 804, 806 n.2 (2d Cir. 2014) (per curiam) ("Since neither party actually challenges the FCC's interpretation of the TCPA, we need not decide the extent to which the Administrative Orders Review Act, also known as the 'Hobbs Act,' limits our jurisdiction to review that interpretation."), because this argument concerns whether Plaintiffs have a cause of action under the TCPA, not whether a federal court has subject- matter jurisdiction over the action. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 572 U.S. 118, 127 & n.4 (2014).

relying on decisions including ours in *Katz v. Donna Karen Co., LLC,* 872 F.3d 114 (2d Cir. 2017), and *Strubel v. Comenity Bank,* 842 F.3d 181 (2d Cir. 2016). These cases, however, concern the risk of harms attendant a statutory violation. *See, e.g., Katz,* 872 F.3d at 116–17 (no standing to pursue Fair and Accurate Credit Transactions Act claim because defendants' stores' provision of receipt containing first six digits of credit card did not necessarily entail "any consequence that stemmed from the display" of those numbers); *Strubel,* 842 F.3d at 188–95 (distinguishing between notice deficiencies that created a concrete and personal risk of harm and those creating only a general risk of harm). Here, by contrast, the receipt of unwanted advertisements is itself the harm.

Experian also contends that even the cases on which Plaintiffs rely involved allegations of harm beyond a statutory violation. For instance, Experian observes that the plaintiff in *Van Patten* alleged that the text messages sent by the defendants caused "actual harm, including the aggravation that necessarily accompanies wireless spam and that consumers pay their cell phone service providers for the receipt of such wireless spam." *See Van Patten,* 847 F.3d at 1041 (internal quotation marks omitted). This is inaccurate and irrelevant. First, the allegations to which Experian points concern harms that general "consumers" experienced; the only allegation of harm personal to the plaintiff that the Ninth Circuit noted was "that he received two text messages." *Id.* Second, and in any event, the Ninth Circuit's analysis in no way relied on allegations of harm beyond the statutory violations. "Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and

disturb the solitude of their recipients. A plaintiff alleging a violation under the TCPA 'need not allege any additional harm beyond the one Congress has identified." *Id.* at 1043 (quoting *Spokeo,* 136 S. Ct. at 1549; *see also Susinno,* 862 F.3d at 352 ("For these reasons, we hold that Susinno has alleged a concrete, albeit intangible, harm under the Supreme Court's decision in *Spokeo* .... Because we so hold, we need not address her additional arguments that her various tangible injuries provide alternative grounds for standing.").[30]

Bowes purports additionally to raise a factual challenge to Plaintiffs' standing under *Spokeo*. Unlike Experian, she concedes that Plaintiffs have adequately alleged standing but protests that they have proffered no evidence in support thereof and urges that such evidence is required at the class- certification stage. *Cf. In re LIBOR-Based Fin. Instruments Antitrust Litig.,* 299 F. Supp. 3d 430, 530–31 (S.D.N.Y. 2018) (observing that "class certification does not always fit neatly into [Lujan's] framework," which allows plaintiffs to rely on their allegations at the pleading stage but requires evidence in response to a motion for summary judgment). We have our doubts as to whether Bowes's challenge is properly considered a factual challenge as opposed to a facial challenge: her evidence that she received unsolicited text messages in

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[30] Experian's remaining arguments—whether the text messages in question were actually sent by an ATDS, whether absent class members ineffectively revoked consent, and whether the class is unascertainable—though framed as challenges to the district court's subject-matter jurisdiction, actually attack the merits of Plaintiffs' claims. Accordingly, we do not reach these issue [*sic*].

no way calls into question Plaintiffs' allegations that they did as well. *See, e.g., Carter v. HealthPort Techs., LLC,* 822 F.3d 47, 57 (2d Cir. 2016) ("On appeal, we review the district court's decision on such a facial challenge *de novo*, accepting as true all material factual allegations of the complaint and drawing all reasonable inferences in favor of the plaintiff." (internal quotation marks, citations, and alterations omitted)); *accord John v. Whole Foods Mkt. Grp., Inc.,* 858 F.3d 732, 736 (2d Cir. 2017). In any event, Plaintiffs have moved to supplement the appendix with evidence, submitted under seal in the district court, demonstrating that they did in fact receive the text messages in question. That motion is GRANTED. Thus, we need not, and do not, decide whether plaintiffs generally may rely on allegations in their complaint to establish standing at the class-certification stage.[31]

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[31] Although Experian opposes the motion to supplement the appendix, its opposition relies on an understanding of *Spokeo*'s injury-in-fact requirement that we reject. Bowes also opposes the motion, but her objections are meritless. For instance, Bowes complains that the list provided by Plaintiffs does not include two of the named plaintiffs. To be sure, Plaintiffs' motion to supplement incorrectly lists six, rather than four, named plaintiffs. But as the operative complaint and settlement make clear, two of these individuals are no longer proceeding as named plaintiffs on behalf of the class. *See, e.g.,* App. 51. Finally, in a post-argument letter, Bowes called this Court's attention to the recent Supreme Court decision in *Frank v. Gaos,* 139 S. Ct. 1041 (2019). But *Frank* merely reaffirms the holding of Spokeo and remands for the district court to reconsider the standing of the plaintiffs there. Nothing in Frank alters or elaborates on the *Spokeo* doctrine or casts any doubt on our analysis of the standing issue.

Accordingly, we hold that Plaintiffs have demonstrated injury-in-fact as required by Article III and that the district court therefore did not lack subject-matter jurisdiction. Having satisfied ourselves of our and the district court's jurisdiction, we turn finally to Bowes's challenges to the class settlement.

C.

Bowes presses a potpourri of challenges to the fairness of the class settlement, each of which we review for abuse of discretion. *See D'Amato v. Deutsche Bank,* 836 F.3d 78, 85 (2d Cir. 2001); *see also Denney,* 443 F.3d at 263 (class notice); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 120 (2d Cir. 2005) (discovery rulings); *Lobur v. Parker,* 378 F. App'x 63, 65 (2d Cir. 2010) (summary order) (incentive awards). We address them in turn.

First, Bowes argues that class notice was insufficient because it did not inform the class members of the potential payout if the case went to trial. To the contrary, our review of the record demonstrates that the class notice "fairly apprise[d] the prospective members of the class of the terms of the proposed settlement and of the options that [were] open to them in connection with the proceedings." *Wal-Mart,* 396 F.3d at 114 (quoting *Weinberger v. Kendrick,* 698 F.2d 61, 70 (2d Cir. 1982)).

Second, Bowes argues that the district court erred in its weighing of the nine *Grinnell Corp.* factors. We disagree. The court carefully analyzed each of the factors. Bowes essentially argues that the settlement was just not enough. She contends that she herself stood to recover nearly $90,000, and that the "paltry" $14.5 million settlement could therefore in no way be

reasonable, especially given the district court's purported failure to address AEO's ability to withstand a greater judgment. Bowes understandably believes that the number arrived at is insufficient given what she allegedly stood to collect. But the litigation risks in this case were real on both the law and the facts. Because of those uncertainties, it cannot be said "that the district court's well-reasoned conclusion constituted an abuse of discretion, especially given the deference we accord to trial courts in these situations." *See Charron v. Wiener,* 731 F.3d 241, 248 (2d Cir. 2013).

Third, Bowes faults the district court for accepting a settlement that purports to release liability for claims accruing after the class period. But "[t]he law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." *Wal-Mart,* 396 F.3d at 107 (quoting *TBK Partners, Ltd. v. W. Union Corp,* 675 F.2d 456, 460 (2d Cir. 1982)). Bowes does not realistically argue that text messages sent after the class period, as opposed to those sent during, are somehow different.

Fourth, Bowes contends that incentive bonuses here are unlawful, given that the case involves common funds. The cases cited by Bowes for this proposition are inapposite. Neither *Cent. R.R. & Banking Co. v. Pettus,* 113 U.S. 116 (1885), nor *Trustees v. Greenough,* 105 U.S. 527 (1881), provide factual settings akin to those here. *See Muransky v. Godiva Chocolatier, Inc.,* __F.3d__, 2019 WL 1760292, at *14–15 (11th Cir. 2019)

(summarily rejecting the same argument by Bowes's counsel as an objector).

Fifth and finally, Bowes accuses the district court of "concealing" deposition transcripts of Plaintiffs in this case. But Bowes provided below (and has provided here) no reason why those transcripts are relevant to her settlement objections.[32] *See Wal-Mart,* 396 F.3d at 120 ("Generally, such a discovery request depends on 'whether or not the District Court had before it sufficient facts intelligently to approve the settlement offer. If it did, then there is no reason to hold an additional hearing on the settlement or to give appellants authority to renew discovery." (quoting *Grinnell Corp.,* 495 F.2d at 462–63)).

CONCLUSION

For the foregoing reasons, we hold that (1) Experian lacks standing to pursue its appeal, (2) Plaintiffs satisfied Article III's injury-in-fact requirement, and (3) the district court acted within its discretion in approving the class settlement. We DISMISS Experian's appeal and otherwise AFFIRM the judgment of the district court.

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[32] To the extent Bowes has argued that the deposition transcripts were relevant to her challenge to Plaintiffs' standing, this argument is unavailing given our disposition of that issue in this case.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of June, two thousand nineteen.

Christina Melito, individually and on behalf of all others similarly situated, Ryan Metzger, Alison Pierce, Gene Ellis, Walter Wood, Christopher Legg, on behalf of himself and all others similarly situated,

Plaintiffs-Appellees,

American Eagle Outfitters, Inc., a Delaware Corporation, AEO Management Co, a Delaware Corporation,

Defendants-Third-Party-Plaintiffs-Appellees,

v.

Experian Marketing Solutions, Inc.,

ORDER
Docket Nos:
17-3277 (L)
17-3279 (Con)

Consolidated Defendant-Third-
Party- Defendant-Appellant,

Kara Bowes,

Objector-Appellant,

eBay Enterprise, Inc., FKA eBay
Enterprise Marketing Solutions, Inc.,

Defendant.

Appellant, Kara Bowes, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX C

Opinion of the District Court (Sept. 8, 2017)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DATE FILED: 9/8/2017

14-CV-2440 (VEC)

OPINION & ORDER

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CHRISTINA MELITO, CHRISTOPHER LEGG, ALISON PIERCE and WALTER WOOD, individually and on behalf of all others similarly situated,

Plaintiff, [*sic*]

-against-

AMERICAN EAGLE OUTFITTERS, INC., and AEO MANAGEMENT CO.,

Defendants.

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AMERICAN EAGLE OUTFITTERS, INC., and AEO MANAGEMENT CO.,

Third-Party Plaintiffs,

-against-

EXPERIAN MARKETING SOLUTIONS, INC.,

Third-Party Defendant.

OPINION & ORDER

VALERIE CAPRONI, United States District Judge:

In October 2016, Plaintiffs and Defendants American Eagle Outfitters, Inc., and AEO Management Co. (collectively, "AEO") reached a conditional settlement of this action. Notice of Conditional Settlement of Putative Claims, Dkt. 238.[1] On January 24, 2017, this Court conditionally certified a settlement class ("Settlement Class"), preliminarily approved the class action settlement ("Class Settlement"), approved the notice plan, and scheduled a final approval hearing ("Final Approval Hearing") for August 22, 2017. Preliminary Approval Order.[2]

[1] The third-party action between AEO and Experian Marketing Solutions, Inc. ("Experian") has not been settled.

[2] The Court uses the following abbreviations herein: Order (1) Conditionally Certifying a Settlement Class, (2) Preliminarily Approving Class Action Settlement, (3) Approving Notice Plan and (4) Setting Final Approval Hearing ("Preliminary Approval Order"), Dkt. 259; Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Mem."), Dkt. 293; Plaintiffs' Unopposed Amended Motion for Preliminary Approval of Class Settlement, Conditional Certification of Class and Entry of Scheduling Order ("Prelim. Mem."), Dkt. 252; Declaration of Jay Geraci Regarding Notice Administration and Proof of CAFA Compliance ("Geraci Decl."), Dkt. 294; Supplemental Declaration of Keith J. Keogh in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement

The proposed monetary relief is a $14,500,000 common fund that will pay: (1) Settlement Class Member claims; (2) settlement administration expenses of approximately $665,580.46; (3) incentive awards to the four class representatives in the amount of $10,000 each; (4) attorneys' fees in the amount of $4,832,850 (33% of the settlement fund); and (5) costs in the amount of $110,732.71. Mem. 2. Under this proposal, each valid settlement class member who filed a claim would receive approximately $232.[3]

("Supp. Keogh Decl."), Dkt. 295; Experian Marketing Solutions, Inc.'s Objections to the Proposed Class Action Settlement ("Exp. Obj."), Dkt. 273; Consolidated Third Amended Class Action Complaint for Damages and Injunctive Relief ("Compl."), Dkt. 119; Declaration of Joseph A. Fitapelli in Support of Service Awards, Attorneys' Fees, and Costs ("Fitapelli Decl."), Dkt. 163; Declaration of Keith J. Keogh ("Keogh Decl."), Dkt. 264; Declaration of Beth E. Terrell in Support of Plaintiffs' Motion for Service Awards, Attorneys' Fees, and Costs ("Terrell Decl."), Dkt. 266; Declaration of Bradley K. King ("King Decl."), Dkt. 269; Declaration of Scott D. Owens ("Owens Decl."), Dkt. 316; Experian Marketing Solutions, Inc.'s Reply Memorandum in Support of its Objections to the Proposed Class Action Settlement ("Exp. Reply"), Dkt. 299; Amended Declaration of Beth E. Terrell in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Terrell Prelim. Decl."), Dkt. 253; Objection of Class Members Kara Bowes and Brooke Bowes to Proposed Class-Action Settlement, Incentive Awards, and Attorneys' Fees ("Bowes Obj."), Dkt. 271; Memorandum of Law in Support of Service Awards, Attorneys' Fees, and Costs ("Fees Mot."), Dkt. 268; Order Granting Final Approval of Class Action Settlement, Dismissing Class Plaintiffs' Claims and Entering Final Judgment ("Final Approval Order").

[3] This amount is towards the high end of the range that Class Counsel estimated the Class Members would receive. *See* Prelim. Mem. 18 ("Plaintiffs estimate that each claimant will receive between $142 and $285."). The eventual award will be somewhat

The Settlement Class is defined as follows:

> The 618,301 persons (identified in the disc attached to this Final Approval Order And Judgment as Exhibit B) who, on or after April 8, 2010 and through and including the date of entry of the Preliminary Approval Order, received a text message from AEO or any entity acting on its behalf, to his or her unique cellular telephone number, and who did not provide AEO with appropriate consent under the TCPA. Excluded from the Settlement Class are the Judge to whom the Action is assigned and any member of the Court's staff and immediate family, and all persons who are validly excluded from the Settlement Class.

Final Approval Order ¶2.

The parties engaged a third-party vendor to act as the Settlement Administrator in this case. Geraci Decl. ¶1. The Settlement Administrator compiled a list of Settlement Class members ("Class List") after reviewing records provided by AEO and directory searches conducted by third-party vendors. Geraci Decl. ¶¶5-9. The Settlement Administrator mailed a postcard summary notice and emailed notice to those class members for whom the Settlement Administrator had obtained a mailing or email address. Geraci Decl. ¶¶10-18.[4] The Settlement Administrator also provided

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higher due to the Court-ordered reductions in the request for attorneys' fees, expenses and incentive awards.

[4] For some addresses, the Settlement Administrator received returned notices with undeliverable addresses. The Settlement Administrator performed additional searches for the addresses

additional information on a website regarding the Class Settlement. Geraci Decl. ¶¶21-22.[5]

Ultimately, over one hundred thousand claim forms were submitted. The Settlement Administrator identified 38,141 claim forms as valid claims by class members with phone numbers on the Class List. Geraci Decl. ¶¶23-24. Although 705 claims were filed after the deadline for receipt of claims, Geraci Decl. ¶24, Class Counsel requests that these late-filed claims also be allowed, Supp. Keogh Decl. ¶8. The Court grants that request.

Nine Class Members asked to be excluded from the Settlement Class. Geraci Decl. ¶25. Class Counsel received timely objections from: Kara and Brooke Bowes (Dkt. 271), Patrick Sweeney and Kerry Ann Sweeney (Dkt. 275), and Third-Party Defendant Experian (Dkt. 273). On August 18, 2017—approximately three months after the deadline to submit objections, Preliminary Approval Order ¶26—the Court received via email an objection from Kristian Mierzwicki (Dkt. 306), who purports to be a class member. The Sweeney objections were ultimately withdrawn, Supp. Keogh Decl., Ex. 1, and the Experian, Bowes, and Mierzwicki objections are overruled for the reasons discussed *infra*.

I. Experian's Objections

Experian's primary objection to the Class Settlement is that Plaintiffs lack Article III standing,

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and re-sent the notices if it located updated addresses. Geraci Decl. ¶¶12, 14.

[5] The Court refers to the postcard notice, email notice, and the website notice, collectively, as the "Class Notice."

and therefore, the Court lacks subject matter jurisdiction over the Class Settlement and this case. Although the Court finds, infra, that Experian, as a non-party to the Class Settlement, lacks standing to object to the Class Settlement, the Court will consider Experian's objection because the Court must always satisfy itself of its subject matter jurisdiction. The Court concludes that Plaintiffs have Article III standing and that the Court has subject matter jurisdiction to enter the Class Settlement.

A. Article III Standing

To establish Article III standing, the "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016).

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)). The plaintiff must show that the injury is both "particularized" and "concrete." *Id.* A "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way." *Id.* A "concrete" injury is one that "actually exist[s]," i.e., it is "'real,' and not 'abstract.'" *Id.*

An injury need not be tangible for it to be concrete. *Id.* at 1549. *Spokeo* set forth two "general principles" to determine whether an intangible harm is a concrete injury. *Id.* at 1550. First, "it is instructive to consider whether an alleged intangible harm has a close

relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* Second, Congress's "judgment is also instructive and important" because "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.'" *Id.* (quoting *Lujan,* 504 U.S. at 578).

In *Spokeo,* the plaintiff alleged that the defendant Spokeo, a people search engine, published incorrect information about the plaintiff. *Id.* at 1546. The plaintiff brought suit under the Fair Credit Reporting Act of 1970 ("FCRA"), which "requires consumer reporting agencies to 'follow reasonable procedures to assure maximum possible accuracy' of consumer reports," *id.* at 1545 (quoting 15 U.S.C. §1681e(b)), and authorizes private suits for willful failure to comply with any requirement of the FCRA. *Id.* The Ninth Circuit found that the plaintiff had standing based on the alleged violation of the plaintiff's statutory rights under the FCRA. *Id.* at 1546. The Supreme Court vacated the Ninth Circuit's decision because the Ninth Circuit had considered whether the plaintiff's injury was particularized but not whether it was concrete. *Id.* at 1548, 1550.[6]

The Supreme Court was careful to note that, in some circumstances, the violation of a procedural right

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[6] The Ninth Circuit's analysis was that the plaintiff alleged "that Spokeo violated *his* statutory rights, not just the statutory rights of other people," and the plaintiff's "personal interests in the handling of his credit information are *individualized rather than collective*." *Id.* at 1548. The Supreme Court concluded that these two observations "concern particularization, not concreteness." *Id.*

granted by a statute, by itself, may be sufficient to constitute an injury in fact. *Id.* at 1549 ("a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified"). But in all circumstances, and even in the context of a statutory violation, "Article III standing requires a concrete injury." *Id.* Where the plaintiff alleges only "a bare procedural violation" of the statute that is "divorced from any harm," the plaintiff has not alleged a concrete injury sufficient to establish standing. *Id.* This is because "[a] violation of one of the FCRA's procedural requirements may result in no harm"; for example, "[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Id.* at 1550 (footnote omitted).

In *Strubel v. Comenity Bank,* 842 F.3d 181 (2d Cir. 2016), the Second Circuit held that Spokeo did not "categorically ... preclude[] violations of statutorily mandated procedures from qualifying as concrete injuries supporting standing" and that "some violations of statutorily mandated procedures may entail the concrete injury necessary for standing." 842 F.3d at 189. The Second Circuit elaborated, "[W]here Congress confers a procedural right in order to protect a concrete interest, a violation of the procedure may demonstrate a sufficient 'risk of real harm' to the underlying interest to establish concrete injury without 'need [to] allege any additional harm beyond the one Congress has identified.'" *Id.* (quoting *Spokeo,* 136 S. Ct. at 1549). In considering whether a bare procedural violation is sufficient to constitute a concrete injury, the "central inquiry" is whether the "alleged bare procedural violation [of a statute] ... presents a material risk of harm to the underlying

concrete interest Congress sought to protect in passing" the statute. *Crupar-Weinmann v. Paris Baguette Am., Inc.,* 861 F.3d 76, 81 (2d Cir. 2017). It follows that if a bare procedural violation can cause concrete injury, then a violation of substantive rights created by Congress must surely cause a concrete injury.

B. "Concrete" Injuries Under the TCPA

In the context of the TCPA, the Second Circuit has held, post-Spokeo, that the plaintiff's receipt of "a prerecorded voicemail message, to which [the plaintiff] later listened, on an answering device in the place where [the plaintiff] resided and to which he had legitimate access" was a concrete injury sufficient for Article III standing. *Leyse v. Lifetime Entertainment Services, LLC,* 679 F. App'x 44, 46 (2017). The Second Circuit explicitly did not decide whether "the alleged violation of [the TCPA] would, by itself, be sufficient to establish injury in fact." *Id.*[7] But because "the TCPA protects consumers from certain telephonic contacts," the plaintiff's "receipt of such an alleged contact in the way described demonstrates more than a bare violation and satisfies the concrete-injury requirement for standing." *Id.*

Several district courts have considered cases similar to this one and have found, post- Spokeo, that the plaintiff has standing. In *Zani v. Rite Aid*

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[7] Although Leyse did not explicitly address or cite *Spokeo, Leyse* was decided after *Spokeo,* and *Leyse*'s caveat that it was not deciding whether the bare statutory violation would establish injury in fact clearly invokes Spokeo's instruction that a statutory violation must result in a concrete injury to establish Article III standing.

Headquarters Corp., 14-cv-9701, -- F. Supp. 3d ---, 2017 WL 1383969, (S.D.N.Y. Mar. 30, 2017), Judge Nathan concluded that the plaintiff's receipt of one, prerecorded phone call was sufficient to establish Article III standing. 2017 WL 1383969, at *7 (following *Leyse*). A Connecticut district court similarly concluded that "[a]nswering a single robocall," even though the plaintiff did not incur any financial charge for that call, was "the type of concrete injury-in-fact" sufficient to establish Article III standing. *Bell v. Survey Sampling Int'l, LLC,* No. 3:15-CV-1666 (MPS), 2017 WL 1013294, at *3 (D. Conn. Mar. 15, 2017) (collecting cases). In *Mejia v. Time Warner Cable, Inc.,* 15-CV-6445 (JPO), 15-CV-6518 (JPO), 2017 WL 3278926 (S.D.N.Y. Aug. 1, 2017), Judge Oetken concluded that the plaintiffs' testimony that Time Warner's calls disrupted their privacy established concrete injury because the plaintiffs alleged "precisely the sort of injury that the TCPA was designed to target." 2017 WL 3278926, at *7.[8]

Similar decisions have been reached by courts of appeals post-*Spokeo*. In *Van Patten v. Vertical Fitness Group, LLC,* 847 F.3d 1037 (9th Cir. 2017), the Ninth Circuit held that the plaintiff's receipt of unwanted text messages from a gym was sufficient to establish standing because "[u]nsolicited telemarketing phone calls or text messages, by their nature, invade the

[8] The case for standing was stronger in *Mejia* because, here, Plaintiffs do not allege that AEO's text messages disrupted their privacy; rather, Plaintiffs allege only that they received text messages in violation of the TCPA. Nevertheless, Judge Oetken's reasoning—that Plaintiffs established standing because they alleged the type of injury targeted by Congress—applies to this case for the reasons discussed *infra.*

privacy and disturb the solitude of their recipients." 847 F.3d at 1043. *Van Patten* concluded that the unwanted text messages established a concrete injury because it was the very harm prohibited by the TCPA: "Unlike in *Spokeo,* where a violation of a procedural requirement minimizing reporting inaccuracy may not cause actual harm or present any material risk of harm, the telemarketing text messages at issue here, absent consent, present the precise harm and infringe the same privacy interests Congress sought to protect in enacting the TCPA." Id. Therefore, "[a] plaintiff alleging a violation under the TCPA 'need not allege any *additional* harm beyond the one Congress has identified.'" *Id.* (quoting *Spokeo,* 136 S. Ct. at 1549); *see also Susinno v. Work Out World, Inc.,* 862 F.3d 346, 351-52 (3rd Cir. 2017) (receipt of a single prerecorded telephone call was "the very harm that Congress sought to prevent" in the TCPA and was thereby "a concrete, albeit intangible, harm").

C. Experian Contends That Plaintiffs Have Not Alleged A Concrete Injury.

Experian does not dispute that a violation of the TCPA could, hypothetically, give rise to a concrete injury sufficient to establish standing. Experian argues that Plaintiffs, by alleging only a violation of the TCPA, have not satisfied their burden of showing Article III standing. For the following reasons, the Court disagrees and concludes that Plaintiffs have shown that they suffered concrete injury by alleging that they received unauthorized text messages in violation of the TCPA.

The plaintiff bears the burden of establishing that he has Article III standing. *Spokeo,* 136 S. Ct. at 1547;

see also Warth v. Seldin, 422 U.S. 490, 518 (1975). "Where, as here, a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element." *Spokeo,* 136 S. Ct. at 1547 (internal quotation marks and citation omitted). Because jurisdiction must be affirmatively demonstrated, inferences are not drawn in favor of the plaintiff, *Morrison v. Nat'l Austl. Bank Ltd.,* 547 F.3d 167, 170 (2d Cir. 2008), and conclusory allegations "are insufficient to meet the plaintiff's burden of alleging an injury in fact that is concrete and particularized," *Brown v. F.B.I.,* 793 F. Supp. 2d 368, 374 (D.D.C. 2011) (citation omitted).

Here, Plaintiffs allege that they received unwanted and unauthorized text messages from AEO on their cell phones, Compl. ¶¶45, 49-50, 54-57, 60-62, 67-69, 73, 81-82, and that these text messages were sent in violation of the TCPA, Compl. ¶¶96, 100-101, 105-106, 110-11. Plaintiffs do not, as Experian points out, allege that the text messages infringed their privacy or constituted a trespass of their cell phones, or otherwise allege any facts relative to injury other than the ones set forth above.

Experian argues that alleging only that Defendants violated the TCPA does not satisfy Plaintiff's burden to establish injury in fact and that Plaintiffs must allege further facts that "create a link between th[e] statutory violation and a 'concrete harm.'" Exp. Obj. 5. A Louisiana district court agrees. In *Sartin v. EKF Diagnostics, Inc.,* No. 16-1816, 2016 WL 3598297 (E.D. La. July 5, 2016), the court held that the plaintiff lacked standing because he failed to allege facts "demonstrating how th[e] statutory violation [of the TCPA] caused him concrete harm." 2016 WL 3598297,

at *3. The complaint's "only reference to any kind of injury" was a single sentence stating that the TCPA violation caused the plaintiff to suffer actual and statutory damages. *Id.* This allegation, in that court's view, did not establish a concrete injury; the complaint did "not explain what factual harm ... lawmakers 'contemplated' when enacting the TCPA." *Id.*[9]

This Court respectfully disagrees with *Sartin*. *Spokeo* made clear that alleging only a statutory violation, without "alleg[ing] any *additional* harm beyond the one Congress has identified," *Spokeo,* 136

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[9] Judge Failla followed *Sartin* in *Fullwood v. Wolfgang's Steakhouse, Inc.,* 13 Civ. 7174 (KPF), 2017 WL 377931 (S.D.N.Y. Jan. 26, 2017), which alleged claims under the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"). Judge Failla concluded that the complaint—which, relative to injury, alleged only that the plaintiff received a receipt that had her credit card's expiration date on it, in violation of FACTA—did not "clearly allege facts demonstrating a concrete and particularized injury to support standing." Id. at *6 (citing *Sartin*).

Fullwood is distinguishable because the claim in *Fullwood* is more akin to the hypothetical violation of FCRA discussed in *Spokeo*. Including an erroneous zip code in a credit report, *Spokeo*, 136 S. Ct. at 1550, may violate the procedural requirements of FCRA, but it does not constitute concrete harm. Similarly, including a credit card expiration date on a credit card receipt may violate FACTA rules, but it does not, standing alone, constitute concrete injury. The Second Circuit has concluded similarly. *Crupar-Weinmann,* 861 F.3d at 78 ("Guided by unambiguous statutory language that a receipt with a credit card expiration date does not raise a material risk of identity theft, and finding that the bare procedural violation alleged by the plaintiff does not present a material risk of harm, we conclude that allegations in her amended complaint [that customer receipts displayed the credit card's expiration date] do not satisfy the injury-in-fact requirement necessary to establish Article III standing to bring suit.").

S. Ct. at 1549 (second emphasis added), could be sufficient to establish a concrete injury. Plaintiffs' receipt of unwanted and unauthorized telephone contact by an automated system is precisely the harm that Congress was trying to avoid when it enacted the TCPA. As such, Plaintiffs' concrete injury is the invasion of the right created by the statute; their receipt of the telephone contact "presents a material risk of harm to the underlying concrete interest Congress sought to protect in passing" the TCPA. *Crupar-Weinmann,* 861 F.3d at 81. Plaintiffs need not allege any more than that. *Van Patten,* 847 F.3d at 1043; *Susinno,* 826 F.3d at 351-52. As explained in *A.D. v. Credit One Bank, N.A.,* No. 14 C 10106, 2016 WL 4417077 (N.D. Ill. Aug. 19, 2016), in enacting the TCPA, Congress determined that "unsolicited telephone contact constitutes an intangible, concrete harm." 2016 WL 4417077, at *7. That court concluded, "It would be redundant to require a plaintiff to allege that her privacy and solitude were breached by a defendant's violation of [the TCPA], because Congress has provided legislatively that a violation of [the TCPA] is an invasion of the call recipient's privacy." *Id.*; *see also Aranda v. Caribbean Cruise Line, Inc.,* 202 F. Supp. 3d 850, 857-58 (N.D. Ill. 2016) (same). Because Plaintiffs' receipt of unwanted and unauthorized text messages is the violation of a substantive right created by Congress, the allegation of the statutory violation sufficiently demonstrates Plaintiffs' concrete injury.

Experian argues that by alleging only the statutory violation, without any attendant harm, Plaintiffs have alleged only a "bare procedural violation" insufficient to establish concrete injury under *Spokeo*. Experian's

theory is that because the TCPA prohibits the use of an "Automatic Telephone Dialing System" ("ATDS") to make unconsented calls or text messages,[10] the TCPA "imposes only a *procedural limit* on how one may place or send such calls or texts." Exp. Obj. 5. According to Experian, using an ATDS (in violation of the TCPA) is like disseminating an incorrect zip code (in violation of the FCRA); if *Spokeo* concluded that the latter was a bare procedural violation that does not establish concrete injury, then using an ATDS to send texts without the consent of the recipient is also a bare procedural violation that does not establish concrete injury.

The Court disagrees. *Spokeo* explained that Congress's judgment plays an "important role[]" in determining whether an intangible injury is one that is concrete. *Spokeo,* 136 S. Ct. at 1549. In enacting the TCPA, Congress made findings that "[u]nrestricted telemarketing ... can be an intrusive invasion of privacy" and that "[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call ... is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, §§5, 12, 105 Stat. 2394 (1991). "Congress enacted the TCPA to protect consumers from '[u]nrestricted telemarketing,' which it determined could be "an intrusive invasion of privacy.'" *Reyes v.*

[10] The TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. §227(a)(1).

Lincoln Auto. Fin. Servs., 861 F.3d 51, 55 (2d Cir. 2017), *as amended* (Aug. 21, 2017) (quoting *Mims v. Arrow Financial Services, LLC,* 565 U.S. 368, 372 (2012)). In short, the unconsented telephone contact was the substantive harm that Congress identified and sought to prevent by enacting the TCPA.

The fact that this case involves text messages, rather than phone calls, does not make the substantive harm any less concrete. The Supreme Court has concluded that a "text message to a cellular phone ... qualifies as a 'call'" under the TCPA, *Campbell-Ewald Co. v. Gomez,* 136 S. Ct. 663, 667, *as revised* (Feb. 9, 2016), and this Court finds no basis to conclude that the harm created by using an ATDS to place a text message is different from the harm created by using an ATDS to place a telephone call. Both invade the substantive right created by Congress not to be subjected to robocalls. Unconsented texts, made via an ATDS, are also unwanted intrusions of privacy that are prohibited under the TCPA. Although there may be a difference in the degree of annoyance caused by an unauthorized text relative to an unauthorized telephone call, there is no difference in kind.

Experian's argument elides *Spokeo's* "bare procedural violation" with the substantive harm caused by using a system prohibited by the statute. In *Spokeo,* the plaintiff alleged that the reporting agency violated the FCRA's requirement to "follow reasonable procedures" to ensure the accuracy of consumer reports. *Spokeo,* 136 S. Ct. at 1545-46. According to the Supreme Court, a violation of certain of those procedural requirements (such as disseminating an incorrect zip code) might result in no harm to the plaintiff and would be, therefore, a "bare procedural

violation" of the FCRA insufficient to establish concrete injury. *Id.* at 1550. Here, the defendant's use of an ATDS to place unauthorized texts causes a concrete harm to the plaintiff, made legally cognizable by Congress in the TCPA. An ATDS may, as a matter of fact, be a procedural mechanism for placing calls or texts, but using an ATDS to place unauthorized calls is not a procedural violation of the TCPA; to the contrary, using an ATDS to place unauthorized texts is the substantive conduct prohibited by Congress. For that reason, using an ATDS is different from disseminating an incorrect zip code. Though the latter may violate the letter of the FCRA, standing alone, it causes no injury; on the other hand, the former causes exactly the harm to the Plaintiffs that Congress legislated to prevent.

In any event, *Leyse* controls the outcome in this case. The Second Circuit in *Leyse* concluded that the plaintiff's receipt of an unconsented to voicemail message was sufficient to establish a concrete injury. If an unauthorized voicemail is concrete injury, then this Court fails to see how unauthorized text messages are not also concrete injury.[11] Therefore, this Court concludes—as *Leyse*, *Zani*, and *Bell* did in similar

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[11] Although *Leyse* was decided at the summary judgment and class certification stage, the Court notes that the allegations in the complaint in *Leyse* are comparable to those alleged here. The *Leyse* plaintiff alleged only that the defendant "placed, to Leyse's residential telephone line, a telephone call using an artificial or prerecorded voice that advertised" defendant's services, and that the defendant placed those calls without the plaintiff's consent. Class- Action Complaint ¶¶7, 9, ECF 1, *Leyse v. Lifetime Entm't Servs., LLC,* 1:13-cv-05794-AKH (S.D.N.Y. filed Aug. 16, 2013). Put differently, the plaintiff alleged only the statutory violation, without pleading allegations of further harm.

circumstances—that Plaintiffs have adequately alleged injury in fact sufficient to establish Article III standing.

II. The Court Certifies the Class Action

In certifying a class action for settlement, the Court must ensure that the requirements of Rule 23(a) and (b) of the Federal Rules of Civil Procedure have been met. *Denney v. Deutsche Bank AG,* 443 F.3d 253, 270 (2d Cir. 2006). "These requirements should not be watered down by virtue of the fact that the settlement is fair or equitable." *Id.* Only Experian objects to class certification; the Court overrules Experian's objections for the reasons discussed *infra*.[12]

A. Rule23(a) is Satisfied.

Rule 23(a) sets forth prerequisites to maintaining a suit as a class action. Pursuant to Rule 23(a), a class action may be certified only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

The Court finds that the Settlement Class satisfies the requirements of Rule 23(a). Because there are 618,301 individual members in the settlement class, the numerosity requirement is satisfied. *See Consol.*

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[12] Although Kara Bowes, Brooke Bowes, and Kristian Mierzwicki object to the fairness of the Class Settlement, discussed infra, they do not make any arguments relative to class certification pursuant to Rule 23.

Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995) (numerosity requirement satisfied with class of at least 40 members).

Rule 23(a)(2) requires commonality. The class members must have a "common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350 (2011). "[E]ven a single common question will do." *Id.* at 359. This case raises numerous questions of law and fact common to the class, including the issue of whether AEO is vicariously liable for text messages that were sent on its behalf and whether the system by which the texts were sent is an ATDS; accordingly, the commonality requirement is satisfied.

The Court also finds that the typicality requirement is satisfied because the claims and defenses of the class representatives are typical of those of the Settlement Class; all claims arise from the same events (their receipt of AEO text messages on their cell phones) and are based on the same legal theory (liability under the TCPA). *See In re Smith Barney Transfer Agent Litig.,* 290 F.R.D. 42, 45 (S.D.N.Y. 2013) ("To establish typicality under Rule 23(a)(3), the party seeking certification must show that each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability."). Where, as here, "same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented," the typicality requirement is satisfied. *Id.*

Lastly, to find adequacy, the Court must consider "(i) whether the class representatives' claims conflict with those of the class and (ii) whether class counsel is qualified, experienced, and generally able to conduct the litigation." *In re Glob. Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 453 (S.D.N.Y. 2004). Both of those considerations are met here. The class representatives' interests are aligned with the interests of the Settlement Class: all seek recovery under the TCPA for receipt of unwanted text messages from AEO. In addition, Class Counsel are attorneys experienced in class action (including TCPA) litigation. *See* Terrell Decl. ¶¶17-25; Keogh Decl. ¶¶11-12, 18-29; Fitapelli Decl. ¶5; Owens Decl. ¶¶1, 20-23.

For the foregoing reasons, the Court concludes that the Settlement Class meets the requirements of Rule 23(a).

B. *The Settlement Class Satisfies Rule 23(b)(3).*

In addition to satisfying Rule 23(a), a class action must fall within one of the types of class actions identified in Rule 23(b). Plaintiffs contend that certification of this Settlement Class is appropriate under Rule 23(b)(3), which requires that "the court find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Rule 23(b)(3)'s predominance requirement "is satisfied 'if resolution of some of the legal or factual questions that qualify each class member's case as a

genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.'" *Mazzei v. Money Store,* 829 F.3d 260, 272 (2d Cir. 2016) (quoting *Myers v. Hertz Corp.,* 624 F.3d 537, 547 (2d Cir. 2010)). The central issues in this case are whether the text messages were sent using an ATDS and, if so, whether AEO is liable for those text messages; as such, common questions predominate over individual questions.[13]

In considering whether Rule 23(b)(3)'s superiority requirement has been met, courts may consider:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of

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[13] "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized class-wide proof.'" *In re Petrobras Sec.,* 862 F.3d 250, 270 (2d Cir. 2017) (quoting *Tyson Foods, Inc. v. Bouaphakeo,* 136 S. Ct. 1036, 1045 (2016)).

If Class Counsel had not settled this case, then at the class certification stage, individualized issues of whether a putative class member had consented to or revoked his or her consent to text messages may have precluded a finding of predominance. But here, because the definition of the Settlement Class is limited to those individuals "who did not provide AEO with appropriate consent under the TCPA," no such individualized issues of consent exist.

> the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). In general, "Rule 23(b)(3) class actions can be superior precisely because they facilitate the redress of claims where the costs of bringing individual actions outweigh the expected recovery." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 130 (2d Cir. 2013). Where "substituting a single class action for numerous trials in a matter involving substantial common legal issues and factual issues susceptible to generalized proof will achieve significant economies of time, effort and expense, and promote uniformity of decision," the class action is a superior method of adjudicating disputes. *Id.* (citing Fed. R. Civ. P. 23 advisory committee's notes). The statutory damages available under the TCPA (up to $500 per violation or up to $1,500 if the violation is willful, *see* 47 U.S.C. §227(b)(3)) are small in comparison to the time, effort and expense of litigation. In addition, the resolution of all TCPA claims held by the Settlement Class in a single class action proceeding promotes judicial efficiency and the uniformity of decision. Therefore, the Court finds that a class action is a superior method for the fair and efficient adjudication of this case.

C. *Experian's Objections to Class Certification Are Unavailing.*

In addition to its objection that Plaintiffs lack standing, Experian also asserts various objections, most of which fall away based on the Court's ruling

that Plaintiffs do have standing. *See* Final Approval Hearing Transcript ("Tr.") 16:15-19.[14]

Experian propounds two objections that are not mooted by the Court's rejection of its standing objection: the Settlement Class is unascertainable, Exp. Obj. 13; and the class definition improperly includes members who did not receive a text message via an ATDS, Exp. Obj. 17. The Court is not convinced that Experian has standing to raise these objections, but even if it does, its objections are without merit.

1. Experian's Standing to Object

"[A] non-settling defendant generally lacks standing to object to a court order approving a partial settlement because a non-settling defendant is ordinarily not affected by such a settlement." *Bhatia v. Piedrahita,* 756 F.3d 211, 218 (2d Cir. 2014). The exception to that general rule is that a non-settling defendant does have standing to object if it can demonstrate that it will sustain "some formal legal prejudice as a result of the settlement." *Id.* The requisite "level of formal legal prejudice" necessary for a non-settling defendant to have standing to object "exists only in those rare circumstances when, for example, the settlement agreement formally strips a non-settling party of a legal claim or a cause of action, such as a cross-claim for contribution or indemnification, invalidates a non-settling party's contract rights, or the right to present

[14] For example, Experian argues that the class definition "impermissibly sweeps in individuals" without standing, Exp. Obj. 9, and that any attempt to narrow the class definition to those who have standing would destroy predominance, Exp. Obj. 13. Because the Court has concluded that Plaintiffs have standing, these objections are dismissed as moot.

relevant evidence at a trial." *Id.* In general, "a settlement which does not prevent the later assertion of a non-settling party's claims (although it may spawn additional litigation to vindicate such claims), does not cause the non-settling party 'formal' legal prejudice." *Id.* at 219.

Experian argues that *Bhatia* is inapplicable because that case concerned non-settling co- defendants, rather than a non-settling third-party defendant like Experian. As a third-party defendant, Experian argues that it "fac[es] wholly derivative claims of the settling defendant / third party plaintiff," Exp. Reply 3, and may "participate fully in the case" by asserting any of the defenses and procedural rights available to the settling defendant, AEO, Exp. Reply 2 (quotation marks omitted).

Experian, however, does not cite any persuasive (let alone precedential) cases suggesting that the Bhatia rule does not apply to third-party defendants. In none of the cases cited by Experian, including the cases from this Circuit, did the court address whether a third-party defendant had standing to object to the settlement. *See, e.g., Villanueva v. Wells Fargo Bank,* N.A., 13-CV-5429, 2016 WL 7899255 (S.D.N.Y. Nov. 22, 2016); *see also Atlantic Ritchfield Co. v. Interstate Oil Transport Co.,* 784 F.2d 106 (2d Cir. 1986); *State Mut. Life Assurance Co. of Am. v. Arthur Anderson & Co.,* 581 F.2d 1045 (2d Cir. 1978).

Experian further argues that even if *Bhatia* were applicable, Experian sustained formal legal prejudice because Experian's objection that Plaintiffs lack standing is "a complete defense to [AEO's] third party action." Exp. Reply 8. Put differently, if the Court

concludes that Plaintiffs have standing and approves the Class Settlement, Experian's previously-filed motion to dismiss the third-party action, in which Experian argued that Plaintiffs lack standing, will be denied. Although true,[15] Experian was allowed to press its objection that Plaintiffs lack standing. Having denied that objection, the Court sees no legal prejudice to Experian from this settlement.

Because the Class Settlement will not deprive Experian of any legal claim or defense, it lacks standing to object to that settlement. But even if Experian had standing, its objections would fail.

2. Even if Experian Had Standing, Its Objections Would Fail.

Experian objects to the definition of the Settlement Class, arguing that the Settlement Class is unascertainable and it improperly includes individuals who did not receive a text message via an ATDS, which is necessary to TCPA liability in this case. Experian withdrew its ATDS objection without prejudice,[16] Tr.

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[15] Although the Court dismissed Experian's Rule 12(b)(1) motion for lack of standing as moot upon learning of the settlement in the original action, Experian renewed its motion in the course of objecting to this settlement. Exp. Reply 4. Experian's Rule 12(b)(1) motion is DENIED for the reasons discussed supra.

[16] In its objection, Experian argued that the third-party platform that was used to send the text messages at issue may not be an ATDS; accordingly, Experian requested that the Court stay its approval vel non of the settlement until the D.C. Circuit decides *ACA International v. FCC,* No. 15-01211 (D.C. Cir. filed July 10, 2015), which Experian contends will address what constitutes an ATDS under the TCPA. Exp. Obj. 17. At the Final Approval Hearing, Experian agreed to withdraw this objection so long as its withdrawal did not constitute a waiver of the objection. Tr. 19:2-9. For the purposes of approving this Class Settlement,

17:25-19:8, and the Court overrules the unascertainability objection as meritless.

"The ascertainability doctrine that governs in this Circuit requires only that a class be defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras Sec.,* 862 F.3d at 264.[17] Experian's objection to ascertainability is meritless because the settling parties have identified the 618,301 individual members comprising the Settlement Class, and that Class List has been filed with the Court and placed under seal. *See* Dkt. 315. The Settlement Class is clearly ascertainable.

In short, all of Experian's objections to this Class Settlement are either overruled or dismissed. For the reasons discussed supra, the Court concludes that the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied and certifies the Settlement Class.

III. The Class Settlement Is Fair, Adequate, and Reasonable.

"Rule 23(e) of the Federal Rules of Civil Procedure provides that the settlement of a class action must be

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the Court does not make a finding relative to whether the third-party platform used in this case constitutes an ATDS; Experian is permitted to raise this objection as a defense in the third-party action with AEO.

[17] Although courts previously required consideration of whether it was "administratively feasible for the court to determine whether a particular individual is a member," *Brecher v. Republic of Argentina,* 806 F.3d 22, 24-25 (2d Cir. 2015) (citation omitted), the Second Circuit later clarified that "a freestanding administrative feasibility requirement is neither compelled by precedent nor consistent with Rule 23" and declined to adopt such a requirement. *In re Petrobras Secs.,* 862 F.3d at 264.

approved by the district court." *In re Sony Corp. SXRD,* 448 F. App'x 85, 86 (2d Cir. 2011). In general, the approval of a class settlement is within the district court's discretion, "which should be exercised in light of the general judicial policy favoring settlement." *In re Giant Interactive Grp., Inc. Sec. Litig.,* 279 F.R.D. 151, 159–60 (S.D.N.Y. 2011) (internal quotation marks and citation omitted).

The district court may approve the class-action settlement only if it determines that the settlement is "fair, adequate, and reasonable, and not a product of collusion." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 116–17 (2d Cir. 2005) (citation omitted). The court determines that the settlement is fair "by looking at both the settlement's terms and the negotiating process leading to settlement." *Id.* at 116. In doing so, the court "review[s] the settlement for both procedural and substantive fairness." *In re Giant,* 279 F.R.D. at 159–60 (citing *Wal-Mart*, 396 F.3d at 116).

A. The Settlement is Procedurally Fair.

To find a settlement procedurally fair, the Court "must pay close attention to the negotiating process, to ensure that the settlement resulted from arm's-length negotiations and that plaintiffs' counsel ... possessed the [necessary] experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests." *McReynolds v. Richards-Cantave,* 588 F.3d 790, 804 (2d Cir. 2009) (citation omitted). A class settlement is presumptively fair, adequate, and reasonable if it is the result of "arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart,* 396 F.3d at 117 (citation omitted).

The Court finds that the parties conducted meaningful discovery prior to their settlement. Over the course of the two-year litigation of this case, the parties conducted, among other things, depositions of the class representatives and Defendants' Rule 30(b)(6) witnesses, reviewed nearly twenty thousand pages of documents produced by AEO, and pursued and reviewed extensive third-party discovery (including from Archer, a now-bankrupt third-party texting platform that sent texts on behalf of AEO). *See* Mem. 4-5; *see also* Tr. 36:7-37:5. The Court also finds that the settlement is the product of arm's-length negotiations between competent counsel with experience in litigating and settling class actions, including ones involving TCPA claims. *See* Terrell Decl. ¶¶17-25; Keogh Decl. ¶¶11-12, 18-29; Fitapelli Decl. ¶5; Owens Decl. ¶¶1, 20-23. The parties also mediated with the Honorable Morton Denlow of Judicial Arbitration and Mediation Services, Inc. prior to reaching their settlement. Terrell Prelim. Decl. ¶34. Under such circumstances, the Court finds that the settlement is procedurally fair.

B. The Settlement is Substantively Fair.

To determine whether the class settlement is substantively fair, the Court examines the "fairness, adequacy, and reasonableness of a class settlement according to the '*Grinnell* factors.'" *Wal-Mart,* 396 F.3d at 117. The *Grinnell* factors are:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing

> damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. (citing *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir. 1974)).

1. Complexity, Expense, and Likely Duration of Litigation

The Court finds that the first *Grinnell* factor weighs in favor of final approval of the class settlement. The parties had completed most of their fact discovery, but they needed to conduct expert discovery and brief their motions for class certification and summary judgment. Mem. 7- 8; *see also* Tr. 37:3-13. Continued litigation would have resulted in substantial time and expense to the parties. Many of the legal and factual issues presented in this class action are complex. For example, the Court would have had to resolve whether AEO was vicariously liable for texts made from a third-party text platform and whether the text platform was an ATDS. In addition, the Court would have had to decide whether the consent *vel non* of individual class members to the text messages precluded class certification.

2. Reaction of the Class to the Settlement

The record reflects that the Settlement Class has reacted positively to the settlement. Of the 618,301 Class Members, only nine Class Members have excluded themselves from the settlement, and only six

objections were filed. Although the claim rate is fairly low (roughly six percent), the relatively few number of exclusions and objections nevertheless weighs in favor of the settlement's substantive fairness. *See, e.g., D'Amato v. Deutsche Bank,* 236 F.3d 78, 86 (2d Cir. 2001) (affirming the district court's determination that seventy-two exclusions and eighteen written objections out of 27,883 notices was a "small number of objections [that] weighed in favor of the settlement"). Accordingly, the second *Grinnell* factor also weighs in favor of approval of the Class Settlement.

3. Stage of the Proceedings and the Amount of Discovery Completed

The third *Grinnell* factor examines the stage of the litigation and whether "sufficient discovery has been completed to understand Plaintiffs' claims and negotiate settlement terms." *In re Am. Int'l Grp., Inc. Sec. Litig.,* No. 04 CIV 8141 DAB, 2010 WL 5060697, at *3 (S.D.N.Y. Dec. 2, 2010), *aff'd,* 452 F. App'x 75 (2d Cir. 2012). In reviewing this factor, courts "focus[] on whether the plaintiffs obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." *Fleisher v. Phoenix Life Ins. Co.,* No. 11-CV-8405 (CM), 2015 WL 10847814, at *7 (S.D.N.Y. Sept. 9, 2015) (quoting *In re Advanced Battery Techs., Inc. Sec. Litig.,* No. 11 Civ. 2279 (CM), 2014 WL 1243799, at *6 (S.D.N.Y. Mar. 24, 2014)).

As discussed supra, the parties had the benefit of substantial discovery to make an informed assessment of Plaintiffs' claims and AEO's defenses. The parties also conducted additional discovery to identify the size

of the Settlement Class, which they reviewed prior to deciding to settle. The Court finds that this factor also weighs in favor of its approval of the class settlement.

4. Risks of Class Prevailing (Establishing Liability, Establishing Damages, and Maintaining the Class Action Through the Trial)

The fourth (risk of establishing liability), fifth (risk of establishing damages), and sixth (risk of maintaining the class action through the trial) factors also support the Court's approval of the settlement. "In assessing factors 4, 5 and 6, which are often considered together, the Court is not required to decide the merits of the case, resolve unsettled legal questions, or to foresee with absolute certainty the outcome of the case. Rather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Id.* at *8 (internal marks and citations omitted).

Plaintiffs risked losing on the merits of this case based on AEO's defense that AEO was not vicariously liable for texts made from a third-party text platform and Experian's argument that the system that was used to send the texts was not an ATDS. In addition, class certification may have posed challenges for Plaintiffs because of individualized issues of consent.[18] By reaching a settlement, these risks were alleviated. Therefore, the Court finds that the fourth, fifth, and sixth *Grinnell* factors also weigh in favor of the settlement.

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[18] *See* note 13, *supra*, for a discussion of the potential problems in establishing predominance at the class certification stage.

5. Ability of AEO to Withstand a Greater Judgment

The record does not reflect, and Plaintiffs do not cite any facts, suggesting that AEO could not withstand a larger judgment. But "this factor, standing alone, does not suggest that the settlement is unfair," especially if the other factors weigh in favor of settlement. D'Amato, 236 F.3d at 86. Without any evidence as to whether AEO could withstand a larger judgment, the Court finds that this factor neither weighs in favor of nor against approval of the settlement.

6. Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

The final two *Grinnell* factors—"the range of reasonableness of the settlement fund in light of the best possible recovery" and "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation"—also weigh in favor of approval of the settlement. "The determination of whether a settlement amount is reasonable does not involve the use of a mathematical equation yielding a particularized sum." *Fleisher,* 2015 WL 10847814, at *10 (citation omitted). Rather, the "range of reasonableness" reflects "a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Wal-Mart,* 396 F.3d at 119.

The Court concludes that the settlement amount falls well within the range of reasonableness. The $14,500,000 settlement amount results in a payout of

over $232 to each claiming Class Member, which is a generous recovery for a minor annoyance and exceeds many other court-approved TCPA class settlements. *See, e.g., Gehrich v. Chase Bank USA, N.A.,* No. 12 C 5510, 2016 WL 806549, at *7 (N.D. Ill. Mar. 2, 2016) ($52.50 payout for each claimant). This settlement amount is reasonable in light of the risks involved in litigation discussed supra.

Although Plaintiffs, had they prevailed at trial, may have collected significantly more in statutory damages, "that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell,* 495 F.2d at 455, 455 n.2. Here, although the Class Members "receive less than the maximum value of their TCPA claims, [] they receive a payout without having suffered anything beyond a few unwanted calls or texts, they receive it (reasonably) quickly, and they receive it without the time, expense, and uncertainty of litigation." *See Gehrich,* 2016 WL 806549, at *7. Therefore, the Court finds that the eighth and ninth Grinnell factors also support final approval of the settlement.

C. The Objections to Class Settlement Are Overruled

There were four timely objections to the Class Settlement, Dkts. 271, 275, and one that was untimely, Dkt. 306. Two of the timely objections were withdrawn. Supp. Keogh Decl., Ex. 1. The Court dismisses two other objections for lack of standing and overrules one as meritless.

1. Ms. Brooke Bowes and Mr. Mierzwicki Lack Standing to Object.

Brooke Bowes and Mr. Mierzwicki objected to the fairness of the Class Settlement, but neither is a member of the Settlement Class. *See* Dkt. 315 (enclosing CD-Rom with the Class List).[19] Because they are not parties to the settlement, their rights and claims, if any, against AEO are not impacted by this Class Settlement. Therefore, Ms. Brooke Bowes and Mr. Mierzwicki's objections are dismissed for lack of standing. *See Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care,* L.L.C., 504 F.3d 229, 244 (2d Cir. 2007) ("Nonparties to a settlement generally do not have standing to object to a settlement of a class action.").

2. Ms. Kara Bowes's Objections are Overruled.

Ms. Kara Bowes filed a timely objection to the adequacy of the settlement amount and the adequacy of the Class Notice. Her objections are meritless.

Ms. Bowes objects to the adequacy of the settlement amount because it "recovers only really the tiniest

[19] Class Counsel and AEO proffered during the Final Approval Hearing that Ms. Brooke Bowes and Mr. Mierzwicki were not on the Class List because they have no evidence that either received unauthorized texts. Tr. 32:7-34:4. The Court makes no finding relative to whether Ms. Brooke Bowes and Mr. Mierzwicki should have been members of the Settlement Class. Although it may have not been perfect, the process Class Counsel and the Plan Administrator used to identify the individuals in the Class was fair and reasonable. The protection for anyone who should have been in the Class but was not included on the Class List is iron-clad: they are not in the Class and therefore any claims they have against AEO are not being released. They are free to bring their own lawsuit.

fraction of one percent of the class members' individual statutory damages." Bowes Obj. 5. Here, each claiming Class Member will receive over $232, which is nearly 50% of the available statutory damages for a non-willful violation of TCPA and about 15% of the statutory damages for a willful violation. Even if every individual on the Class List had submitted a valid claim, resulting in a smaller percentage of potential recovery, that fact does not make the settlement amount unreasonable. *See Grinnell,* 495 F.2d at 455, 455 n.2 ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."). In addition, Ms. Bowes' ipse dixit assertion that a larger settlement amount is warranted because TCPA cases "are relatively simple," ignores the very real litigation risks that Plaintiffs faced. Ms. Bowes suggests that AEO can withstand a larger settlement amount, but that factor is not dispositive. Ms. Bowes also makes the laughable argument that even if AEO were to file for bankruptcy as a result of a larger judgment being obtained against it, the Class Members "could expect to do quite well in the bankruptcy reorganization" and potentially emerge as AEO's new owners. Bowes Obj. 9-10. This argument is entirely meritless. The Court concludes, for the reasons discussed *supra*, that the settlement is substantively fair.

Ms. Bowes also argues that the Class Notice was inadequate because it did not apprise her of the "the potential value of the claims being released by the settlement," and there was, therefore, "no way to judge the amount offered against the potential recovery." Bowes Obj. 12. "The standard for the adequacy of a

settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Wal-Mart,* 396 F.3d at 113. "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Id.* at 114 (internal quotation marks omitted).

The Court finds that the Class Notice was reasonable and adequate. The Class Notice fairly apprised the Settlement Class of the claims that were the subject of the settlement, the terms of the settlement (including the size of the settlement, anticipated per-class member recovery, and requested attorneys' fees and service awards), and the options open to the class members in connection with the settlement. Geraci Decl., Ex. C (postcard notice), Ex. D (e-mail notice). The Class Notice additionally directed the potential Class Member to the Class Settlement website, which clearly identified the claims released as part of the settlement. *See* Geraci Decl., Ex. F (website notice) at 5 (discussing claims released by the settlement). Due process does not require more. *See Wal-Mart*, 396 F.3d at 116 (Due process does not "require[] further explanation of the effects of the release provision in addition to the clear meaning of the words of the release." (citation omitted)). To the extent that Ms. Bowes or any other class member had any questions concerning the release, the Class Notice also provided a toll-free number to contact Class Counsel. *See* Geraci Decl., Exs. C, D, F.

If Ms. Bowes had objected that the release was confusingly worded or that the terms of the settlement were unclear, then her objection might have gained more traction. Instead, her objection appears to be that she did not receive all the information she wanted in the Class Notice. But that is not the standard for the adequacy of a Class Notice. Because the Court finds that the Class Notice "fairly apprise[d]" the class members of the settlement terms and of the class members' options, Ms. Bowes' objection is overruled. *See Wal-Mart,* 396 F.3d at 114.

At the Final Approval Hearing, Ms. Bowes objected, for the first time, to the Class Settlement's release of claims arising after the end of the Class Period (January 24, 2017) and before the date of the Final Approval Order (early September 2017). *See* Tr. 23:13-24:7. This objection is untimely because it was raised approximately three months after the deadline to file objections. *See* Preliminary Approval Order ¶26. Therefore, Ms. Bowes waived this objection, and it is accordingly dismissed. *See In re WorldCom, Inc. Sec. Litig.,* 388 F. Supp. 2d 319, 341 (S.D.N.Y. 2005).[20]

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[20] Nevertheless, even if the Court were to consider this objection, the Court would find it meritless because the Class Members were given fair and adequate notice that they would be bound by the settlement's release of their claims. The postcard and email notice stated that the Class Member would be "bound by the Settlement" and would "release AEO from liability," Geraci Decl., Ex. C at 3; Geraci Decl., Ex. D at 2, and the website notice explained, in greater detail, that the Class Member "agree[d] to release AEO and any other Released Parties, as defined in the settlement agreement, from any and all claims that arise from the text messages to your cellphone telephone at issue in this action" unless he or she opted out. Geraci Decl, Ex. F at 5.

D. Motion for Service Awards, Attorneys' Fees, and Costs

Plaintiffs move for: incentive awards in the amount of $10,000 to each of the four named Plaintiffs; attorneys' fees for Class Counsel in the amount of $4,832,850, which is one-third of the settlement fund; and $110,732.71 in costs. Fees Mot. 1. For the following reasons, the Court awards incentive awards, fees, and costs, but at a lesser amount than that requested by Plaintiffs.

1. Incentive Awards

"Incentive awards are not uncommon in class action cases and are within the discretion of the court." *In re AOL Time Warner ERISA Litig.,* No. 02 CV. 8853 (SWK), 2007 WL 3145111, at *2 (S.D.N.Y. Oct. 26, 2007) (citation omitted). Courts "look for the existence of 'special circumstances'" in determining whether and how much to award class representatives. *Id.*; *see also Roberts v. Texaco, Inc.,* 979 F. Supp. 185, 201 (S.D.N.Y. 1997) ("[W]hen it comes to incentive awards, the inquiry is whether there are present special circumstances warranting grant of an award."). Courts often consider the following factors in assessing requests for incentive awards:

The Court finds that the Class Notice fairly apprised the Class Members of the broad release that would bind them. *See In re WorldCom,* 388 F. Supp. 2d at 341 ("Because [the objector] chose to remain a Class Member, there is no unfairness in applying the Release to all of her claims, even if they involve [claims] ... prior to the Class Period, so long as they are predicated on the same facts alleged in the class action complaint."). To the extent the objection was not waived, it is overruled.

> the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim, and of course, the ultimate recovery.

Roberts, 979 F. Supp. at 200. In addition, "courts often ... compare the named plaintiff's requested award to each class member's estimated *pro rata* share of the monetary judgment or settlement." *In re AOL,* 2007 WL 3145111, at *2 (collecting cases). Nevertheless, the Court notes that "although payments can be made to compensate named plaintiffs for hardships caused by the action, class representatives are fiduciaries of the absent class members, and are expected to endure the ordinary inconveniences of litigation without special compensation." *Gulino v. Symbol Techs., Inc.,* No. 06 CV 2810 (JG) (AKT), 2007 WL 3036890, at *3 (E.D.N.Y. Oct. 17, 2007).

Class Counsel move for an award of $10,000 to each of the four class representatives on the basis that the representatives "thoroughly responded to multiple sets of written discovery and sat for depositions, requiring them to set aside work and personal obligations (and in some cases requiring them to travel out-of-state)." Terrell Decl. ¶47. Class Counsel also assert that the representatives "were willing and able to prosecute this case by assisting with the drafting of the complaints, providing information regarding their interactions with AEO, responding to written

discovery, sitting for depositions, and testifying at trial." Terrell Decl. ¶47.

Although other courts may have awarded $10,000 service awards to class representatives, *see* Fees Mot. 7 (collecting cases), an award of $10,000 to each representative in this case would be excessive, particularly in light of the fact that the settlement results in a payout of only approximately $232 to each claiming Class Member. To the extent that the class representatives incurred any expenses in furtherance of this litigation, the Court is not opposed to reimbursing those expenses. But Class Counsel have not provided any documentation of the class representatives' expenses. In addition, Class Counsel have neither provided documentation of the time or effort that each representative expended in furtherance of this case nor identified any personal risks or burdens incurred by the representatives. At the Final Approval Hearing, Class Counsel proffered that each class representative searched for and produced documents, assisted in the preparation of interrogatory responses concerning their claims, and provided seven to eight hours of deposition testimony. Tr. 42:20-43:19. Based on these facts, the Court concludes that an incentive award of $2,500 to each of the class representatives, which represents a recovery of more than ten times what class members receive and reflects ample compensation for the limited time they invested, is fair and reasonable.[21]

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[21] Ms. Bowes argues that *Trustees v. Greenough,* 105 U.S. 527 (1881), and *Central Railroad & Banking Co. of Georgia v. Pettus,* 113 U.S. 116 (1885), preclude an incentive award, in any amount, to class representatives. This argument is meritless. As Plaintiffs point out, both of these case [*sic*] are extremely old and pre-date

2. Attorneys' Fees and Costs

Plaintiffs also move for an award of attorneys' fees and costs, requesting an award of $4,832,850 (one-third of the settlement fund) in attorneys' fees and reimbursement of $110,732.71 in litigation costs. Fees Mot. 8. Plaintiffs argue that the Court should award attorneys' fees using the percentage method, which bases the fee calculation on a percentage of the settlement fund, rather than the lodestar method, which multiplies the number of attorney hours reasonably expended by reasonable hourly rates. *See Wal-Mart,* 396 F.3d at 121 (discussing the percentage and lodestar methods).

Although courts award attorneys' fees under either the lodestar method or the percentage- of-the-fund method, the "trend in this Circuit is toward the percentage method." *Id.*; *see also McDaniel v. County of Schnectady,* 595 F.3d 411, 417 (2d Cir. 2010) (citing *Wal-Mart*). This is because the percentage method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation," whereas the "lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits." *Wal-Mart,* 396 F.3d at 121 (citations omitted). Consistent with the "trend in this Circuit," *id.*, this Court adopts the

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Rule 23 by decades. As discussed *supra,* courts routinely award named plaintiffs payment for "special circumstances" arising out of their participation in the class litigation.

percentage-of-the-fund method in determining Class Counsel's fee award.[22]

a. **The *Goldberger* Factors Support the Reasonableness of Class Counsel's Fee.**

Irrespective of whether the percentage or the lodestar method is used, "the 'Goldberger factors' ultimately determine the reasonableness of a common fund fee." *Id*. Those factors include:

(1) the time and labor expended by counsel;

(2) the magnitude and complexities of the litigation; (3) the risk of the litigation ... ;

(4) the quality of representation;

(5) the requested fee in relation to the settle-ment; and (6) public policy considerations.

Id. at 121-122 (citing *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 50 (2d Cir. 2000)). For the following reasons, the Court concludes that the Goldberger factors support an award equal to thirty (30) percent of the settlement fund.

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[22] Ms. Bowes argues that the Court should instead adopt the lodestar method because that method is presumptively sufficient for cases involving fee-shifting statutes. Bowes Obj. 19. This argument is meritless because the TCPA is not a fee-shifting statute. In addition, Ms. Bowes points out various drawbacks of the percentage method, but, as discussed supra, there also are drawbacks associated with the lodestar method. The Court finds no basis to depart from the percentage method in this case, using the lodestar as a cross-check.

i. *Time and Labor Expended By Counsel*

The record reflects that Class Counsel have litigated this case since early 2014 and have expended over 3,900 hours to this case. *See* Terrell Decl. ¶37; Keogh Decl. ¶16; Fitapelli Decl. ¶16; King Decl. ¶19; Owens Decl. ¶29. Among other things, Class Counsel amended the complaint several times, engaged in substantial motion practice, reviewed hundreds of thousands of pages of documents, and deposed several witnesses. *See* Terrell Decl. ¶¶7-12. The Court finds Class Counsel expended substantial time and labor in furtherance of this case and agrees that this factor tilts in favor of a substantial award.

ii. *Magnitude and Complexities of the Litigation*

As discussed supra in connection with the Court's approval of the Class Settlement, this case involved complex legal issues, including whether AEO was vicariously liable for the texts sent on a third-party platform, whether the platform was an ATDS, and whether issues of individualized consent precluded class certification. Discovery was not straightforward; it required review of hundreds of thousands of pages of documents and substantial third-party discovery, including from a bankrupt third party. In addition, litigation was conducted in several courts (Southern District of New York, Southern District of Florida, Northern District of Illinois) before the cases were consolidated before this Court. The Court finds that this factor weighs in favor of a substantial award.

iii. *Risk of the Litigation*

"The third *Goldberger* factor—i.e., the risk to counsel of pursuing this case on a contingency basis—is 'perhaps the foremost' factor to be considered in determining whether to award an enhancement." *In re Elan Sec. Litig.,* 385 F. Supp. 2d 363, 374 (S.D.N.Y. 2005) (citation omitted). Class Counsel represented Plaintiffs on a contingent basis, investing considerable time and money (e.g., thousands of attorney hours and tens of thousands of dollars in litigation costs) to further this litigation. *See* Terrell Decl. ¶¶37, 41-44; Keogh Decl. ¶¶15- 17; Fitapelli Decl. ¶15-16, 18; King Decl. ¶¶19, 27; Owens Decl. ¶¶29, 32-35. As discussed supra, Plaintiffs faced risks that they would not prevail. In such circumstances, "Class [C]ounsel undertook a substantial risk of absolute non-payment in prosecuting this action, for which they should be adequately compensated." *Maley v. Del Glob. Techs. Corp.,* 186 F. Supp. 2d 358, 372 (S.D.N.Y. 2002) (citation omitted). The Court finds that this factor also supports a substantial award of attorneys' fees.

iv. *Quality of the Representation*

"To evaluate the quality of the representation, courts review the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *In re Citigroup Inc. Sec. Litig.,* 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (internal quotation marks and citation omitted). A $14,500,000 settlement fund reflects a substantial recovery for the Class Members. In addition, Class Counsel are class action litigators with experience in litigating TCPA class actions, as well as other complex consumer cases. *See* Terrell Decl. ¶¶17-25; Keogh Decl. ¶¶11-12, 18-29; Fitapelli Decl. ¶5;

Owens Decl. ¶¶20-23. The Court finds that this factor also weighs in favor of a substantial fee.[23]

v. Requested Fee in Relation to the Settlement

In comparing the amount of the requested fee to the size of the settlement, courts must ensure that "the percentage awarded does not constitute a 'windfall.'" *Johnson v. Brennan,* No. 10 CIV. 4712(CM), 2011 WL 4357376, at *18 (S.D.N.Y. Sept. 16, 2011). The Second Circuit has noted that the "percentage used in calculating any given fee award must follow a sliding-scale and bear an inverse relationship to the amount of the settlement" so as to avoid over- compensating law firms "who obtain huge settlements, whether by happenstance or skill, ... to the detriment of the class members they represent." *Wal-Mart,* 396 F.3d at 122 (quoting *In re Indep. Energy Holdings PLC,* 2003 WL 22244676, at *6 (S.D.N.Y. Sept. 29, 2003)). Thus, "[w]here the size of the fund is relatively small, courts typically find that requests for a greater percentage of the fund are reasonable." *Johnson,* 2017 WL 4357376, at *18.

In addition, courts examine whether the requested percentage "is reasonable when compared to fees awarded in similar cases." *In re Citigroup,* 965 F. Supp.

[23] Although Class Counsel generally did a good job, the Court notes that there were aspects of their representation that were not at the level the Court would have expected from experienced litigators. For example, the Class Notice as originally submitted to the Court for preliminary approval had a number of typographical errors and internal inconsistencies; and the Motion for Service Awards, Attorneys' Fees, and Costs cited to an Owens Declaration that was not filed in connection with the Motion.

2d at 400. Although awards as high as one-third of the settlement fund are not uncommon, *see, e.g., Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar,* No. 06 Civ. 4270 (PAC), 2009 WL 5851465, at *1, 5 (S.D.N.Y Mar. 31, 2009) ($3,265,000 settlement); *Strougo ex rel. Brazilian Equity Fund v. Bassini,* 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) ($1.5 million settlement), smaller percentages are also not uncommon. *See Donoghue v. Morgan Stanley High Yield Fund,* No. 10 CIV. 3131 DLC, 2012 WL 6097654, at *2 (S.D.N.Y. Dec. 7, 2012) ("In 'common fund' cases, the percentage-of-fund recovery typically falls within a 15% to one-third range."). The Court finds that this factor neither weighs nor against Class Counsel's request for a one-third fee.

vi. *Public Policy Considerations*

"In rendering awards of attorneys' fees, the Second Circuit and courts in this district also have taken into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation." *Johnson,* 2011 WL 4357376, at *19 (internal quotation marks and citation omitted); *accord In re WorldCom, Inc. Sec. Litig.,* 388 F. Supp. 2d at 359. The TCPA was enacted to protect consumers from unwanted automated phone contact. *See Reyes,* 861 F.3d at 55. When most consumers' cellular telephone billing packages included per text charges or limits on texts, a case like this one would have been particularly valuable from a public policy perspective. As billing packages have shifted to no limits on text messages and flat billing, the utility of a case like this is less obvious. Although Class Counsel deserves to be adequately compensated,

this factor does not militate in favor of the requested fee.

b. **The Lodestar Cross-Check Suggests the Requested Fee Should be Reduced**.

In assessing the reasonableness of a fee award, courts may compare the lodestar to the fees award under the percentage method "[a]s a cross-check." *In re Citigroup,* 965 F. Supp. 2d at 388 (quoting *Wal-Mart,* 396 F.3d at 123). Where the lodestar method is used as a cross-check, the Court need not exhaustively scrutinize the hours documented by counsel; instead, the reasonableness of the lodestar "can be tested by the court's familiarity with the case*." Sewell v. Bovis Lend Lease, Inc.,* No. 09 CIV. 6548 RLE, 2012 WL 1320124, at *13 (S.D.N.Y. Apr. 16, 2012) (citation omitted). In addition, where the lodestar method is used as a cross-check, "counsel may be entitled to a 'multiplier' of their lodestar rate to compensate them for the risk they assumed, the quality of their work and the result achieved for the class." *In re Telik, Inc. Sec. Litig.,* 576 F.Supp.2d 570, 590 (S.D.N.Y. 2008).

Here, Class Counsel asserts that the firms spent approximately 3,911 hours litigating and settling this matter, which resulted in a lodestar, per their calculations, of approximately $2,068,562.00. *See* Terrell Decl. ¶37; Keogh Decl. ¶16; Fitapelli Decl. ¶16; King Decl. ¶19; Owens Decl. ¶29. Plaintiffs' request for attorneys' fees in the amount of $4,832,850 (or one-third of the fund) is approximately 2.3 times the lodestar. Of course, that assumes that the lodestar is reasonable. The Court notes that, according to the attorneys' fees petition, no fewer than 19 attorneys

worked on this matter, at hourly rates ranging from $250 to $850. *See* Fitapelli Decl. ¶16; Keogh Decl. ¶16; Terrell Decl. ¶37; King Decl. ¶19; Owens Decl. ¶33. There is no showing that any of these attorneys in fact bill their time to non-contingent paying clients at those rates. Additionally, one firm "billed" two paralegals' time at $275 per hour and two secretaries' time at $225 per hour. Terrell Decl. ¶37. Given the fact that five firms were involved in the litigation, there is reason to suspect that there was duplication of effort and hours spent coordinating between the various firms that was not strictly in the interest of the class. Accordingly, the Court finds that the lodestar of approximately $2.06 million is somewhat inflated.

Although there are cases that have approved multipliers in the range sought by Class Counsel, *see, e.g., In re Lloyd's Am. Tr. Fund Litig.,* No. 96 CIV.1262 RWS, 2002 WL 31663577, at *27 (S.D.N.Y. Nov. 26, 2002), *aff'd sub nom. Adams v. Rose*, No. 03-7011, 2003 WL 21982207 (2d Cir. Aug. 20, 2003) ("multiplier of 2.09 is at the lower end of the range of multipliers awarded by courts within the Second Circuit"), lower multipliers are also within the range of what is reasonable. *See Hall v. Children's Place Retail Stores, Inc.*, 669 F. Supp. 2d 399, 403 n.35 (S.D.N.Y. 2009) (collecting cases).

For the foregoing reasons, the Court concludes that an award of $4,350,000, which is 2.1 times the reported lodestar (which, as noted, the Court finds to be somewhat inflated), or 30% of the settlement fund) in attorneys' fees is fair and reasonable.[24]

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[24] Ms. Bowes objects to Class Counsel's requested fee award, arguing (among other things) that the *Goldberger* factors weigh

c. **The Court Awards Class Counsel's Litigation Expenses**.

"It is well-established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses." *In re Marsh ERISA Litig.,* 265 F.R.D. 128, 150 (S.D.N.Y. 2010). Class Counsel seek reimbursement of $110,732.71 in litigation expenses, comprised of expert fees to identify class members, among other things, as well as general litigation expenses. *See* Terrell Decl. ¶41; Keogh Decl. ¶17; Fitapelli Decl. ¶18; King Decl. ¶27; Owens Decl. ¶35. The Court finds that most of these litigation expenses are reasonable, with the exception of Class Counsel's requests for reimbursement of: "Reproductions & Scans," which Ms. Terrell withdrew during the Final Approval Hearing; and Westlaw expenses, which as explained during the Final Approval Hearing, should be part of a law firm's overhead. Accordingly, the Court grants Class Counsel $104,785.52 in litigation expenses.

CONCLUSION

For the foregoing reasons, the Court CERTIFIES the Settlement Class, APPROVES the Class Settlement as fair and reasonable, and DENIES in part Plaintiffs' Motion for Service Awards, Attorneys' Fees, and Costs. The Clerk of Court is respectfully directed to terminate Docket Entry Nos. 267 and 292.

SO ORDERED.

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against the fee award. Ms. Bowes's arguments are largely without basis in law or fact and are meritless for those reasons. The Court concludes that the *Goldberger* factors support a substantial award as noted supra.

/s/_____
Date: September 8, 2017 **VALERIE CAPRONI**
New York, New York **United States**
District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CHRISTINA MELITO, CHRISTOPHER LEGG, ALISON PIERCE and WALTER WOOD, individually and on behalf of all others similarly situated,	NO. 1:14-cv-02440 -VEC
Plaintiffs,	DATE FILED: 9/8/2017
v.	
AMERICAN EAGLE OUTFITTERS, INC., and AEO MANAGEMENT CO.,	
Defendants.	

ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT, DISMISSING CLASS PLAINTIFFS' CLAIMS AND ENTERING FINAL JUDGMENT

This Court having held a Final Approval Hearing on August 22, 2017, having provided notice of that hearing in accordance with the Preliminary Approval Order (Dkt. No. 259), and having considered all matters submitted to it in connection with the Final Approval Hearing and otherwise, and finding no just reason for delay in entry of this Order Granting Final Approval of Class Action Settlement, Dismissing Class

Plaintiffs' Claims and Entering Final Judgment (the "Final Approval Order And Judgment" or this "Order") and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Unless otherwise defined, all capitalized terms in this Final Approval Order and Judgment shall have the same meaning as they do in the Settlement Agreement (Dkt. No. 253-1), a copy of which is attached to this Order as Exhibit A.

2. This Court has jurisdiction over the subject matter of the Action and over the Parties, including all Settlement Class Members with respect to the Settlement Class certified for settlement purposes, as follows:

> The 618,301 persons (identified in the disc attached to this Final Approval Order And Judgment as Exhibit B) who, on or after April 8, 2010 and through and including the date of entry of the Preliminary Approval Order, received a text message from AEO or any entity acting on its behalf, to his or her unique cellular telephone number, and who did not provide AEO with appropriate consent under the TCPA. Excluded from the Settlement Class are the Judge to whom the Action is assigned and any member of the Court's staff and immediate family, and all persons who are validly excluded from the Settlement Class.

Attached to this Order as Exhibit B is a CD-Rom that identifies the 618,301 persons that comprise the Settlement Class (the "Class List"). Given the

confidential nature of the personally identifying information therein, Exhibit B has been filed under seal.

3. This Court concludes that Plaintiffs have Article III standing in this case for the reasons discussed in this Court's September 8, 2017, Opinion & Order.

4. This Court finds that the Agreement is the product of arm's-length settlement negotiations between Plaintiffs and AEO.

5. This Court finds and concludes that Class Notice was disseminated to persons in the Settlement Class in accordance with the terms of the Agreement and that the Class Notice and its dissemination were in compliance with this Court's Preliminary Approval Order.

6. This Court further finds and concludes that the Class Notice fully satisfies Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, was the best notice practicable under the circumstances, provided due and sufficient individual notice to all persons in the Settlement Class who could be identified through reasonable effort, and support this Court's exercise of jurisdiction over the Settlement Class as contemplated in the Agreement and this Final Approval Order And Judgment.

7. This Court hereby finds and concludes that the notice provided by the Class Administrator to the appropriate State and federal officials pursuant to 28 U.S.C. §1715 complied with the requirements of that statute.

8. This Court finds that Brooke Bowes and Kristian Mierzwicki are not class members because their telephone numbers do not appear on Exhibit B. As a

result, they each lack standing to object to the Settlement. Because they are not members of the Settlement Class, Ms. Brooke Bowes and Mr. Mierzwicki are not bound by this Final Approval Order And Judgment or by the Settlement Agreement. Thus, to the extent that they believe they have claims against AEO, they are free to assert such claims against AEO. Nothing in this Order is intended to address or evaluate the merits of claims of Ms. Brooke Bowes or Mr. Mierzwicki or AEO's defenses thereto, which also are not waived or released by this Final Approval Order And Judgment or by the Settlement Agreement. In addition, this Court finds that Gabriella E. Bensur, Dana E. Horban, Haylee Horney, Isabell Major, Nadia Noormohamed, Laurie Petek, Carla Roberts, Dakota Slade, and Natalia Ugaz have timely excluded themselves from the Settlement and are therefore not bound by its terms.

9. This Court finds that the 705 claims that were untimely filed shall be deemed timely and those Class Members shall be allowed to participate in the Settlement.

10. This Court overrules the objections to the Settlement submitted by Ms. Kara Bowes.

11. Although this Court questions whether Third Party Defendant Experian has standing to object to the Settlement Agreement because the Agreement does not affect its defenses in the indemnity action or otherwise prejudice it, assuming Experian has standing, its objections are overruled. Additionally, this Court finds that the Agreement does not preclude Third Party Defendant Experian from asserting in response to claims asserted against it by AEO that an ATDS was not used to send the text messages at issue.

12. This Court finally approves the Agreement and finds that the terms constitute, in all respects, a fair, reasonable, and adequate settlement as to all Settlement Class Members in accordance with Rule 23 of the Federal Rules of Civil Procedure.

13. This Court has broad discretion to narrow the class according to AEO's and Plaintiffs' Agreement. *See* 5 James W. Moore et al., *Moore's Federal Practice* §23.21[4] (3d ed. 2004); *see also Robidoux v. Celani,* 987 F.2d 931, 937 (2d Cir. 1993) (a district court "is not bound by the class definition proposed in the complaint"). Per this authority, this Court finally certifies the Settlement Class for settlement purposes and finds, for settlement purposes, that the Action satisfies all the requirements of Rule 23 of the Federal Rules of Civil Procedure.

14. This Court approves the plan of distribution for the Settlement Fund as set forth in the Agreement. The Claims Administrator is ordered to comply with the terms of the Agreement with respect to distribution of Settlement Awards, the Second Distribution, and disposition of any Remaining Funds. Should any Remaining Funds be distributed, this Court hereby approves the National Foundation for Credit Counseling and the National Consumer Law Center ("NCLC") as the cy pres recipients who shall receive an equal distribution. The funds to NCLC shall be earmarked for work associated with the FCC to protect consumer rights under the TCPA. This Court finds this organization closely aligned with the Settlement Class's interests.

15. As of the Effective Date, Class Plaintiffs and each and all Settlement Class Members, on behalf of themselves and their respective spouses, heirs,

executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, assigns, and other person claiming through any of them, will be deemed to have fully released and forever discharged AEO and the Released Parties from any and all claims, causes of action, suits, obligations, debts, demands, agreements, promises, liabilities, damages, losses, controversies, costs, expenses, and attorneys' fees of any nature whatsoever, whether based on any federal law, state law, common law, territorial law, foreign law, contract, rule, regulation, any regulatory promulgation (including, but not limited to, any opinion or declaratory ruling), common law or equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, punitive or compensatory, as of the date of this Order, that arise out of or relate in any way to the Released Parties' contact or attempt to contact settlement class members from April 8, 2010 through the Effective Date in connection with text message marketing programs, to the fullest extent that those terms are used, defined or interpreted by the TCPA or any other similar statute, relevant regulatory or administrative promulgations and case law, including, but not limited to, claims under or for a violation of the TCPA and any other statutory or common law claim arising under the TCPA as relative to text messages sent to cellular telephones (collectively, the "Released Claims").

16. Without limiting the foregoing, the Released Claims specifically extend to claims that Settlement Class Members do not know or suspect to exist in their favor at the time that the Settlement, and the Releases contained therein, become effective. This Section

constitutes a waiver of, without limitation as to any other applicable law, including Section 1542 of the California Civil Code, which provides: A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

17. Class Plaintiffs and the Settlement Class Members have agreed and covenanted that they understand and acknowledge the significance of these waivers of California Civil Code Section 1542 and any other applicable federal or state statute, case law, rule or regulation relating to limitations on releases. In connection with such waivers and relinquishment, Class Plaintiffs and the Settlement Class Members acknowledge that they are aware that they may hereafter discover facts in addition to, or different from, those facts that they now know or believe to be true with respect to the subject matter of the Settlement, but that it is their intention to release fully, finally and forever all Released Claims with respect to the Released Parties, and in furtherance of such intention, the releases of the Released Claims will be and remain in effect notwithstanding the discovery or existence of any such additional or different facts.

18. Class Plaintiffs and Settlement Class Members have agreed and covenanted, and each Settlement Class member is deemed to have agreed and covenanted, not to sue any Released Party with respect to any of the Released Claims, or otherwise assist others in doing so, and agree to be forever barred from

doing so, in any court of law, equity, or any other forum.

19. The Agreement (including any and all exhibits attached to the Agreement) and any and all negotiations, documents, and discussions associated with it will not be deemed or construed to be an admission or evidence of any violation of any statute, law, rule, regulation or principle of common law or equity, or of any liability or wrongdoing by AEO, or the truth of any of the claims. Evidence relating to the Agreement will not be discoverable or used, directly or indirectly, in any way, whether in the Action or in any other action or proceeding, except for purposes of demonstrating, describing, implementing or enforcing the terms and conditions of the Agreement, the Preliminary Approval Order, or this Final Approval Order And Judgment.

20. For the avoidance of doubt, to the extent that the release provided in Section 17 of the Settlement Agreement and paragraph 15 above applies to third parties other than "AEO" (as defined in the Settlement Agreement), any such release of third parties is limited to AEO-related messages and does not release third parties for non-AEO related messages.

21. In the event that any provision of the Agreement or this Final Approval Order And Judgment is asserted by AEO as a defense in whole or in part to any claim, or otherwise asserted (including, without limitation, as a basis for a stay) in any other suit, action or proceeding brought by a Settlement Class Member or any person actually or purportedly acting on behalf of any Settlement Class Member(s), that suit, action or other proceeding shall be immediately stayed and enjoined until this Court or the court or tribunal in

which the claim is pending has determined any issues related to such defense or assertion. Solely for purposes of such suit, action or other proceeding, to the fullest extent they may effectively do so under applicable law, the Parties irrevocably waive and agree not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of this Court, or that this Court is, in any way, an improper venue or an inconvenient forum. These provisions are necessary to protect the Agreement, this Final Approval Order And Judgment, and this Court's authority to effectuate the Agreement, and are ordered in aid of this Court's jurisdiction and to protect its judgment.

22. By incorporating the Agreement and its terms herein, this Court determines that this Final Approval Order And Judgment complies in all respects with Federal Rule of Civil Procedure 65(d)(1).

23. Class Counsel have moved for an award of attorneys' fees and reimbursement of expenses. Pursuant to Rules 23(h)(3) and 52(a) this Court makes the following findings of fact and conclusions of law:

(a) that the Class Settlement confers substantial benefits on the Settlement Class Members;

(b) that the value conferred on the Settlement Class is immediate and readily quantifiable;

(c) that within forty-five days after the Effective Date, Settlement Class Members who have submitted valid Claim Forms will receive cash payments that represent a significant portion of the damages that would be available to them were they to prevail in an individual action under the Telephone Consumer Protections Act ("TCPA");

(d) that Class Counsel vigorously and effectively pursued the Settlement Class Members' claims before this Court in this complex case;

(e) that the Class Settlement was obtained as a direct result of Class Counsel's advocacy;

(f) that the Class Settlement was reached following extensive negotiation between Class Counsel and Counsel for AEO, and was negotiated in good-faith and in the absence of collusion;

(g) that Settlement Class member Ms. Kara Bowes has submitted written objections to the award of attorneys' fees and expenses;[1]

(h) that an attorney who recovers a common benefit for persons other than himself or his client is entitled to a reasonable attorneys' fee from the Settlement Fund as a whole.

24. Accordingly, Class Counsel are hereby awarded $4,350,000 for attorneys' fees and $104,785.52 for litigation expenses from the balance of the Settlement Fund, which this Court finds to be fair and reasonable, and which amount shall be paid to Class Counsel from the Settlement Fund in accordance with the terms of the Agreement. Class Counsel shall be responsible for allocating and shall allocate this award of attorneys' fees, costs, and expenses that are awarded amongst and between Class Counsel.

25. The Class Representatives, as identified in the Preliminary Approval Order, are hereby compensated

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[1] Two non-class members, Ms. Brooke Bowes and Mr. Mierzwickie, also objected to the award of attorneys' fees and expenses.

in the amount of $2,500 each for their efforts in this case.

26. This Court hereby dismisses all claims against AEO with prejudice and without costs to any party, except as expressly provided for in the Agreement or in this Final Approval Order And Judgment.

27. Based upon this Court's finding that there is no just reason for delay of enforcement or appeal of this Final Approval Order And Judgment notwithstanding this Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement, this Court directs the Clerk to enter final judgment against AEO pursuant to Rule 54(b).

IT IS SO ORDERD. [*sic*]
ADJUDGED AND DECREED.

Date: 9/8/2017

/s/
Honorable Valerie Caproni
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DATE FILED:
9/20/2017

CHRISTINA MELITO, CHRISTOPHER LEGG, ALISON PIERCE and WALTER WOOD, Individually and on behalf of all others similarly situated,	14-CV-2440 (VEC)
Plaintiffs,	
-against-	
AMERICAN EAGLE OUTFITTERS, INC., and AEO MANAGEMENT CO.,	
Defendants.	
AMERICAN EAGLE OUTFITTERS, INC., and AEO MANAGEMENT CO.,	
Third-Party Plaintiffs,	
-against-	
EXPERIAN MARKETING SOLUTIONS, INC.,	

ORDER

:
Third-Party :
Defendant. :
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VALERIE CAPRONI,
United States District Judge:

WHEREAS on September 8, 2017, the Court issued an Order Granting Final Approval of

Class Action Settlement, Dismissing Class Plaintiffs' Claims and Entering Final Judgment ("Final Approval Order"), Dkt. 319;

WHEREAS Paragraph 27 of the Final Approval Order states: "Based upon this Court's finding that there is no just reason for delay of enforcement or appeal of this Final Approval Order And Judgment notwithstanding this Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement, this Court directs the Clerk to enter final judgment against AEO pursuant to Rule 54(b)." Dkt. 319;

WHEREAS Third-Party Defendant Experian requested that the Court amend the Final Approval Order to state the reasons for its determination that there is no just reason for delay of enforcement or appeal of the Final Approval Order pursuant to Federal Rule of Civil Procedure 54(b), Dkt. 320;

WHEREAS the Court ordered Plaintiffs and Defendants American Eagle Outfitters, Inc., and AEO Management Co. ("AEO") to show cause why Paragraph 27 of the Final Approval Order should not be vacated and stricken, Dkt. 321;

WHEREAS on September 19, 2017, Plaintiffs and AEO submitted a letter stating reasons why there is no just reason for delay of enforcement or appeal of the Final Approval Order and that final judgment should be entered against AEO pursuant to Rule 54(b), Dkt. 324;

IT IS HEREBY ORDERED that Paragraph 27 of the Final Approval Order is AMENDED to state the following:

> 27. Based upon this Court's finding that the Agreement does not affect the claims in the third-party action between AEO and Experian and that the equities favor entry of final judgment against AEO so that the Settlement Class Members can receive monetary relief from the Class Settlement, there is no just reason for delay of enforcement or appeal of this Final Approval Order And Judgment. Therefore, this Court directs the Clerk to enter final judgment against AEO pursuant to Rule 54(b). This Court retains jurisdiction to oversee implementation and enforcement of the Agreement.

SO ORDERED.

/s/_____

Date: September 20, 2017
New York, NY

VALERIE CAPRONI
United States
District Judge

APPENDIX F

Federal Rule of Civil Procedure 23
Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a

certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) Notice to the Class.

(A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) Identifying Agreements. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) New Opportunity to Be Excluded. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Class-Member Objections.

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the

class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

APPENDIX G

Rules Enabling Act, 28 U.S.C. §2072

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.