No. 22-____

IN THE

In the Supreme Court of the United States

RICHARD ESTLE CARSON III, PETITIONER,

vs.

KATHRYN HYLAND, MELISSA GARCIA, JESSICA SAINT-PAUL, REBECCA LAWSON, MICHELLE MEANS, ELIZABETH KAPLAN, JENNIFER GUTH, MEGAN NOCERINO, ELIZABETH TAY- LOR, ANTHONY CHURCH, NAVIENT CORPORATION, AND NAVIENT SOLUTIONS LLC, 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

"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). Any additional payment to compensate representative plaintiffs for their own "personal services" on behalf of a class is both "decidedly objectionable" and "illegally made." *Greenough,* 105 U.S. at 537-38. A representative plaintiff's "claim to be compensated, out of the fund ... for his personal services" was "rejected as unsupported by reason or authority." *Pettus,* 113 U.S. at 122.

Nonetheless, in the late 1980s lower courts began approving "incentive awards" or "service awards" to compensate representative plaintiffs for their personal service in connection with Rule 23 class-action settlements. Such awards have become commonplace. But the circuits have divided on their propriety. The Eleventh Circuit holds "Supreme Court precedent prohibits incentive awards." *Johnson v. NPAS Solutions,* 975 F.3d 1244, 1255 (11th Cir.2020). The First, Second, and Ninth Circuits reject that conclusion, holding this Court's foundational common-fund precedents inapplicable to Rule 23 class actions.

The question presented is:

> Does Rule 23 abrogate this Court's holdings that payments in common-fund class actions to compensate representative plaintiffs for their personal services are inequitable, "illegal," and "decidedly objectionable"?

PARTIES TO THE PROCEEDING

Petitioner Richard Estle Carson III is a member of the plaintiff class. He was an objector in the district court proceedings and an appellant in the Court of Appeals.

Respondents Kathryn Hyland, Melissa Garcia, Jessica Saint-Paul, Rebecca Lawson, Michelle Means, Elizabeth Kaplan, Jennifer Guth, Megan Nocerino, Elizabeth Taylor, and Anthony Church were named plaintiffs in the district court proceedings and appellees in the Court of Appeals.

Respondents Navient Corporation and Navient Solutions LLC were the defendants in the district court proceedings and appellees in the Court of Appeals.

Respondent William Yeatman is a member of the plaintiff class. He was an objector in the district court proceedings and an appellant in the Court of Appeals. Yeatman has filed his own petition for a writ of certiorari in this Court: *Yeatman v. Hyland,* No. 22-566.

Because Carson is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

Carson's co-appellant below, William Yeatman, has filed a certiorari petition seeking review of the Court of Appeals' decision concerning the propriety of, and standards governing, *cy pres* awards in Rule 23 class actions. *Yeatman v. Hyland,* No. 22-566.

A petition for writ of certiorari filed October 21, 2022, in *Johnson v. Dickenson,* No. 22-389, concerns the propriety of incentive awards.

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REPORTS OF THE OPINIONS BELOW

The Second Circuit's decision is reported at 48 F.4th 110, and is reproduced at Pet.App.1a-24a. The district court's decision approving the class-action settlement under Rule 23 is reported at 2020 U.S. Dist. LEXIS 211676, 2020 WL 6554826 (S.D.N.Y. 2020), and is reproduced at Pet.App.25a-33a.

JURISDICTION

The Second Circuit issued its opinion on September 7, 2022, and denied Objector-Appellant Richard E. Carson III's petition for rehearing and for rehearing en banc on October 7, 2022. Pet.App.34a-35a. This Court has jurisdiction under 28 U.S.C. §1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23 is reproduced at Pet.App.34a-36a.

STATEMENT OF THE CASE

This case was filed by eleven members of nonparty American Federation of Teachers, AFL-CIO ("AFT"), that AFT had recruited to front class-action litigation for which it secretly paid the class counsel who ultimately crafted and obtained judicial approval of a Settlement. Identifying AFT as a "releasing party" though it had never formally appeared in the action, the Settlement called for creation of a $2.4 million common fund that the settling parties dedicated primarily to creating and funding a new public-interest education and advocacy organization called Public Service Promise—after deduction of $150,000 to pay $15,000 apiece to the ten Named Plaintiffs who acquiesced in the arrangement. *Not a penny* was allocated to members of the class whose interests they purported to represent, and whose equitable and

aggregate-action claims the Named Plaintiffs agreed to release and bar.

The Named Plaintiffs purported from the outset to represent the interests of similarly situated public servants and nonprofit-organization employees whose educational loans were serviced by defendants Navient Corp. (or its predecessor Sallie Mae) and Navient Solutions LLC (collectively "Navient" or "Defendants"). The Named Plaintiffs alleged that Navient misled them and other class members who were employed by qualifying employers (governmental entities and nonprofits) concerning their eligibility for participation in the Public Service Loan Forgiveness ("PSLF") program under which "a public service worker's federal student debt is forgiven entirely after 120 qualifying payments."[1]

Navient allegedly profited by misleading class members so that they would continue making payments to Navient that would ***not*** qualify them for PSLF debt forgiveness, and by discouraging them from consolidating loans and transferring loans to FedLoan Servicing, as required for class members' payments to qualify them for loan forgiveness. As a result of Navient's wrongdoing, many thousands of class members, including Objector-Appellant Richard E. Carson III, were left subject to crushing debt that, but for Navients' wrongdoing, could have been forgiven.[2]

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[1] Dist.Ct.DE32:3¶4[Ct.App.Appx.32¶4] (Amended Complaint) (citing College Cost Reduction and Access Act, Pub.L.No. 110-84, §401, 121 Stat. 784, 800 (2007)(codified at 20 U.S.C. §1087e(m))). Record citations to "Dist.Ct.DE" reference docket entries in the district court, with page or paragraph numbers, or both, following a colon.

[2] Employed by a nonprofit organization, Carson had made payments on his loans since 2011, but because his Federal Family

The district court had jurisdiction under 28 U.S.C. §1332(d)(2) because the amount in controversy exceeded $5 million and the matter was filed as a class action satisfying the requirement of minimal diversity.

The Named Plaintiffs, for their part, made public appearances and gave interviews to news media in an AFT-coordinated publicity campaign concerning the case, while AFT itself secretly paid millions of dollars to the Named Plaintiffs' lawyers. Although AFT never appeared as a named party in the case, and although Named Plaintiffs failed until the final-approval hearing to disclose to the district court—or to the class—that AFT was paying their attorneys, those lawyers included AFT in the Settlement Agreement as one of the "Releasing Class Representative Parties":

> 40. "Releasing Class Representative Parties" means each Class Representative and any executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns of the Class Representatives, including AFT.

Dist.Ct.DE98-1:4¶40 & DE125-4¶40[Ct.App.Appx. 315¶40].

Releasing and barring the equitable and class-action claims of class members without allocating them a penny from the $2.4 million common-fund recovery,

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Education Loan ("FFEL") loans were serviced by Navient until 2019, his *eight years* of payments on those loans did not begin counting toward the ten years of payments needed to qualify for PSLR forgiveness. *See* Dist.Ct.DE166[Ct.Appx.490-500]. After consolidating and transferring his loans to FedLoan Servicing, so that his payments could begin to qualify him for loan forgiveness, Carson's current balance exceeded two-hundred thousand dollars. Dist.Ct.DE166:3¶10[Ct.App.Appx.493¶10].

the Settlement Agreement clearly served the interests of the ten Named Plaintiff who were allocated payments of $15,000 apiece as "service awards" or "incentive awards" for their personal services rendered in reaching the settlement. It also served the interests of AFT—which had orchestrated and financed the litigation—by creating a new nonprofit "public interest" political-lobbying organization that could be expected to focus on advancing issues and interests favored by AFT.

The Settlement Agreement also provided for allocating $500,000 of the $2.4 million common fund to "attorney's fees," which the Class Notice and supporting papers failed to disclose was in reality intended not to compensate the attorneys, who had already been paid, but was a kickback to AFT, which had been paying them. Pet.App.32a. The district court was sufficiently offended by this lack of candor, that it rejected the request for "attorney's fees" and redirected the $500,000 kickback to be used as additional funding for the new *cy pres* educational and lobbying organization, Public Service Promise.

Although the Settlement provided for the Named Plaintiffs to be paid $15,000 apiece as "service awards," from the Class's $2.4 million common fund, it allowed for no monetary relief at all to other Class members—whose claims for equitable relief and aggregate damages it released. And although it allowed that other Class members would retain the right to pursue claims against Navient on an individual basis, it affirmatively barred them from seeking monetary relief in any "aggregate action" that combined the claims of five or more individual class members.

Named Plaintiffs and their AFT-paid counsel expected this to effectively bar the vast majority of Class Members from seeking any relief at all. Class Counsel conceded that the case was filed as a class action "on behalf of small claimants who lack the financial incentive to obtain a recovery on their own behalf" because they cannot afford to pursue individual actions at their own expense. Dist.Ct.DE122:17-18. The Named Plaintiffs submitted declarations seeking approval of a Settlement giving them $15,000 apiece in return for barring meaningful relief for the rest of the Class. Those declarations show they knew that effective relief could *only* be obtained in the kind of class action or "aggregate action" that their Settlement affirmatively barred. For the Named Plaintiffs, like most class members, lacked the financial means to pursue individual lawsuits—making litigation viable only if they could band together with other victims of Navient's misconduct to pursue litigation that aggregated their claims. [3]

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[3] Named Plaintiff Kathryn Hyland attested that "[b]efore participating in this action, I strongly considered retaining counsel to pursue a legal remedy against Navient, but did not have the funds to do so." Dist.Ct.DE130:10¶36[Ct.Appx.416¶36] (Hyland Decl.). Named Plaintiff Elizabeth Kaplan averred that "[b]efore participating in this action, I never would have pursued litigation against Navient because I lacked the means to do so." Dist.Ct.DE131:8¶32[Ct.App.Appx.424¶32] (Kaplan Decl.). Named Plaintiff Michelle Means joined them, attesting: "Before I participated in this action, I had thought about bringing an action against Navient because I knew that their actions were completely wrong and likely illegal. But I did not pursue a legal action on my own because I do not have the resources to do so." Dist.Ct.DE132:10¶45[Ct.App.Appx.435¶45] (Means Decl.). Named Plaintiff Rebecca Spitler-Lawson similarly attested: "Before I participated in this action, I had thought about bringing an action against Navient. However, I knew that it was not a realistic option because I did not have the resources to do so."

ATF, the individual Named Plaintiffs, and their counsel thus were quite aware that the Settlement Agreement's bar of aggregate or class litigation for monetary damages amounts, in reality, to a wholesale release of other individual Class Members' monetary damages claims. But the Named Plaintiffs also knew they need not worry much about the release's effect on the rest of the Class, since by agreeing to the Settlement they each could pocket $15,000 apiece for themselves as "service awards." They and their AFT-financed Class Counsel arranged, moreover, for the Settlement to be submitted for approval under Rule 23(b)(2), rather than under Rule 23(b)(3), so that other Class Members would be denied any opportunity to opt out. Class Notice failed to disclose AFT's role in the litigation, and its behind-the-scenes payment of millions of dollars to Class Counsel.

The record shows that the new nonprofit created by the Settlement, Public Service Promise, could not possibly serve the interests of more than a tiny fraction of the class. The Second Circuit ruled "that the settlement's *cy pres* award ... benefits the whole class by funding a nonprofit, Public Service Promise, that will help all borrowers learn whether or not they are eligible for loan forgiveness and 'provide[e] guidance on [PSLF] applications or assistance in challenging denials.'" Pet.App.14a n.2. Named Plaintiffs conceded, however, that Public Service Promise could not possibly benefit more than a very few of the estimated 300,000 Settlement Class members. The Term Sheet on the new *cy pres* organization estimated that it would

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Dist.Ct.DE135:10¶38[Ct.App.Appx.471¶38] (Spitler-Lawson Decl.).

reach only 7,000 to 11,250 borrowers annually.[4] And only a tiny fraction of those would be class members, as Public Service Promise is designed primarily to serve *future* borrowers.

As Carson pointed out below,[5] Named Plaintiff Jessica Saint-Paul's declaration, submitted in support of her requested $15,000 incentive award, said "I am proud that as a result of this settlement, *a nonprofit will be created for future borrowers* that are interested in pursuing PSLF." Dist.Ct.DE134:12¶46[Ct.App. Appx.458¶46] (Saint-Paul Decl.)(emphasis added). The *cy pres* award would, Saint-Paul explained, "help build an infrastructure for future borrowers." Dist.Ct.DE134:12¶46[Ct.App.Appx.458¶46]. "I hope that when the time comes for my students to choose a loan repayment plan, that they will be able to do so with an accurate understanding of how it will impact their future." Dist.Ct.DE134:14¶53[Ct.App.Appx. 460¶53].

Public Service Promise, to which the vast majority of the common-fund settlement was allocated, would do nothing to help the vast majority of the Settlement Class, who lost rights with the Settlement Agreement's approval.

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[4] DE125-8:4[Ct.App.Appx.357 (Term Sheet chart, p.4). Named Plaintiffs' papers seeking approval of the Settlement confirmed: "In total, Public Service Promise expects that PSLF Project activities will reach as many as 11,250 borrowers annually." Dist.Ct.DE120:18; *see also* Dist.Ct.DE97:16 (Preliminary Approval Memorandum: "In total, the *cy pres* recipient expects that PSLF Project activities will reach as many as 11,250 borrowers annually.").

[5] *See* Dist.Ct.DE167:8 (Memorandum of Law Supporting Objection of Class Member Richard E. Carson III); Carson's Ct. App. Opening Brief at 38.

Neither would the prospective injunctive relief regulating Navient's business practices and communications going forward provide a meaningful benefit to class members, such as Carson, who have consolidated their loans with FedLoan so that they may begin to qualify for loan forgiveness. The Court of Appeals relied on a statement of counsel at oral argument, suggesting that class members who no longer have an ongoing relationship with Navient might benefit by calling Navient for advice, though nothing in the record supports the notion that Navient is expected to provide assistance to former customers.

Denied any opportunity to opt out, and deprived of full information about the litigation's organization and financing, more than one hundred Class Members filed objections to the Settlement.[6] Many objected that the Settlement was unfair because it recovered nothing for Class Members other than the Named Plaintiffs. But only two, William Yeatman and Richard Estle Carson III, were represented by counsel. Dist.Ct.DE161 (Yeatman Objection); Dist.Ct.DE166(Carson Memorandum) & Dist.Ct.DE167[Ct.App.Appx.490-572] (Carson Objection).

Those two, Yeatman and Carson, pursued appeals from the district court's Order approving the $2.4 million Settlement, with its *cy pres* award to create a new educational and advocacy nonprofit, and its service awards of $15,000 apiece to the Named Plaintiffs.

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[6] Dist.Ct.DE176:2-22¶¶2-3 & 7-138; Dist.Ct.DE176-1(Objectors James E. Alston through Uma Dorn); Dist.Ct.DE176-2(Samantha Dorsch through Linda J. Kreutzer); Dist.Ct.DE176-3(Maries Laurel through Martine Robinson); Dist.Ct.DE176-4(Sharon Ross through Rachael Wilson).

Carson's appeal specifically challenged the Settlement Agreement's service awards paying $15,000 apiece to the ten Named Plaintiffs who had acquiesced in the Settlement and release of class members' claims. Carson argued before the Second Circuit, as he had before the district court, that the service awards are foreclosed by this Court's foundational common-fund precedents, *Trustees v. Greenough,* 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885), which hold 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, but that any additional payment to compensate representative plaintiffs for their own "personal services" on behalf of a beneficiary class is both "decidedly objectionable" and "illegally made." *Greenough,* 105 U.S. at 537-38. A representative plaintiff's "claim to be compensated, out of the fund ... for his personal services" was "rejected as unsupported by reason or authority." *Pettus,* 113 U.S. at 122.

The Second Circuit affirmed approval of the Settlement, holding that the case is not subject to Rule 23(b)(3)'s notice and opt-out requirements, that Class Members were appropriately denied any ability to opt out, that the $2.4 million common fund may be used to create a new public-advocacy organization, and that the arrangement does not treat class members unfairly relative to the Named Plaintiffs, who received $15,000 apiece as "service awards." *See* Pet.App.12a-24a.

In so doing, the Court of Appeals refused to apply this Court's foundational common-fund class-action decisions, *Greenough* and *Pettus,* to bar service awards to the Named Plaintiffs: "That reading is foreclosed by our decision in *Melito* [*v. Experian Mktg. Solutions, Inc.,* 923 F.3d 85, 96 (2d Cir.2019)]." Pet.App.23a.

> In that case, we considered whether the district court had abused its discretion by approving incentive awards of $2,500 for the class representatives in recognition of their litigation efforts. *See Melito,* 923 F.3d at 96. The appellant, the lone objector to the settlement, argued that such awards were unlawful under *Greenough* and *Pettus*. We rejected that argument, explaining that *Greenough* and *Pettus* were "inapposite" because they did not "provide factual settings akin to those" present in *Melito*. *Id*. at 96. *Melito* compels our conclusion that Rule 23 does not *per se* prohibit service awards like the ones at issue here.

Pet.App.23a. The Court of Appeals explained: "We are bound by *Melito*'s holding unless or until it is overruled by the Supreme Court or the Second Circuit in banc." Pet.App.23a n.5.

Yeatman has filed a petition for certiorari seeking this Court's review of the Second Circuit's approval of the *cy pres* award. Carson believes that Yeatman's certiorari petition is meritorious, and that it should be granted.

Carson files this certiorari petition focusing specifically on the Second Circuit's deviation from this Court's holdings in *Greenough* and *Pettus,* and asking this Court to resolve the conflict among the circuits on "service awards" or "incentive awards" in common-fund class actions.

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S REVIEW IS NEEDED TO RESOLVE A CLEAR CONFLICT AMONG THE CIRCUITS

This case presents a clear conflict among the circuits on the propriety of paying representative plaintiffs "service awards" or "incentive awards" from common-fund recoveries, in order to compensate them for personal service as class representatives and as an incentive to encourage others to file and settle additional class actions. The conflict concerns application of this Court's longstanding precedents holding that while class-action plaintiffs whose litigation creates a "common fund" benefiting a larger class may recover from the fund their reasonable litigation expenses (including attorney's fees), any payment compensating representative plaintiffs for their own "personal services" on behalf of the class 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" was "rejected as unsupported by reason or authority." *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116, 122 (1885).

Applying *Greenough* and *Pettus* to class-action cases filed and settled under Federal Rule of Civil Procedure 23, the Eleventh Circuit holds that "Supreme Court precedent prohibits incentive awards." *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244, 1255 (11th Cir.2020), *en banc rehearing denied,* 43 F.4th 1138, 1139 (11th Cir.2022); *accord, e.g., In re Equifax Inc. Customer Data Security Breach Litig.,* 999 F.3d 1247, 1257 (11th Cir.2021)("such awards are prohibited"); *Medical & Chiropractic Clinic, Inc. v. Oppenheim,* 981

F.3d 983, 994 n.4 (11th Cir.2020)("service awards are foreclosed by Supreme Court precedent").

The First, Second, and Ninth Circuits all have rejected that conclusion, dismissing this Court's foundational common-fund class-action decisions as wholly "inapposite" nineteenth-century precedents that have been impliedly superseded by Federal Rule of Civil Procedure 23. *See Murray v. Grocery Delivery E-Services USA,* 55 F.4th 340, 352-54 (1st Cir.2022); Pet.App.22a-24a, *published as Hyland v. Navient Corp.,* 48 F.4th 110, 124 (2d Cir.2022); *Melito v. Experian Mktg. Solutions, Inc.,* 923 F.3d 85, 96 (2d Cir.2019); *In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 787 (9th Cir.2022).

The Second Circuit held in *Melito* that this Court's foundational common-fund class-action precedents were simply "inapposite" to a Rule 23 consumer class-action settling TCPA claims, as *Greenough* and *Pettus* (both filed as bondholder class actions) did not "provide factual settings akin to those here." *Melito,* 923 F.3d at 96. In this case the Second Circuit extended *Melito*, dismissing *Greenough* as a case "decided decades before the adoption of Rule 23," and holding that "[w]e are bound by *Melito's* holding unless or until it is overruled by the Supreme Court or the Second Circuit in banc." Pet.App.23a, n.5. The Court of Appeals denied Carson's petition for en banc rehearing. Pet.App.34a-35a.

Acknowledging that "*Greenough* and *Pettus* established 'the "common fund doctrine," a traditional equitable doctrine,'" the Ninth Circuit held in *Apple Performance Device* that "we have previously considered this nineteenth century caselaw in the context of incentive awards and found nothing discordant." 50 F.4th at 785 (quoting *Rodriguez v.*

Disner, 688 F.3d 645, 653 (9th Cir.2012)). The Ninth Circuit specifically rejected the Eleventh Circuit's "opposite conclusion," in *Johnson v. NPAS Solutions,* "that *Greenough* and *Pettus* prohibit any incentive award to class representatives." *Apple Device Performance,* 50 F.3d at 785 n.13.

And in *Murray,* the First Circuit similarly dismissed this Court's *Greenough* and *Pettus* decisions as "late-nineteenth-century creditor lawsuits" that, though litigated by bondholders as class actions, cannot be deemed to control "modern-day class actions under Rule 23." *Murray,* 55 F.4th at 352.

This Court's review thus is needed to resolve a clear and already deeply embedded conflict among the circuits. The Eleventh Circuit adhered to its September 2020 holding in *Johnson v. NPAS Solutions* despite Judge Jill Pryor's lengthy August 2022 dissent from denial of en banc rehearing, which concludes that "it will be up to the Supreme Court to overrule or clarify *Greenough* and *Pettus*." *Johnson v. NPAS Solutions, LLC,* 43 F.4th 1138, 1139-53 (11th Cir.2022)(Pryor, Cir.J., joined by Wilson, Jordan, and Rosenbaum, Cir.JJ., dissenting from denial of en banc rehearing). That "Supreme Court precedent prohibits incentive awards" is well-settled Eleventh Circuit law. *Johnson v. NPAS Solutions,* 975 F.3d at 1255; *accord, e.g., Equifax,* 999 F.3d at 1257 ("such awards are prohibited"); *Oppenheim,* 981 F.3d at 994 n.4 (11th Cir.2020) ("service awards are foreclosed by Supreme Court precedent").

The contrary position of the First, Second, and Ninth Circuits also is settled. They all reject the Eleventh Circuit's conclusion that *Greenough* and *Pettus* bar incentive awards compensating named plaintiffs for personal service as class representatives. The Second

Circuit denied en banc rehearing not only in *Melito,* but also in this case. Pet.App.34a-35a. The time to petition for rehearing of the Ninth Circuit's decision in *Apple Device Performance* has run. Although a timely petition for en banc rehearing of the First Circuit's decision in *Murray* has been filed, it cannot resolve the conflict between the Eleventh Circuit on the one hand, and the Second and Ninth Circuits, on the other.

II. *GREENOUGH* AND *PETTUS* BAR INCENTIVE AWARDS

This Court's review and resolution of the conflict is all the more important because the Eleventh Circuit is correct in holding that "Supreme Court precedent prohibits incentive awards." *Johnson v. NPAS Solutions,* 975 F.3d at 1255. Independent of any inter-circuit conflict, certiorari is appropriate where, as here, lower courts have "decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c).

"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."[7]

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[7] *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-

The common-fund doctrine of *Greenough* and *Pettus* firmly established that a representative plaintiff 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. 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.

As Harvard Professor John P. Dawson explained in an article that this Court has repeatedly cited concerning the common-fund doctrine:

> 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.[8]

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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).

[8] For examples of opinions favorably citing Professor Dawson's article see: *U.S. Airways, Inc. v. McCutchen,* 569 U.S. 88, 103 (2013); *Bloomer v. Liberty Mut. Ins. Co.,* 445 U.S. 74, 88 n.15

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 common fund can receive "no compensation for personal services."

Writing in 1974, Professor Dawson observed that *Greenough* "has been followed in this." Dawson, *Lawyers and Involuntary Clients,* 87 Harv. L. Rev. at 1602. He 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." *Id.*

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

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(1980); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 258 (1975).

> 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*).

Beginning in the late 1980s and early 1990s, however, district courts began to approve incentive awards to compensate settling named plaintiffs for personal service as class representatives settling and releasing other class members' claims—doing so without so much as acknowledging, let alone distinguishing, *Greenough* and *Pettus,* and without citing any statutory authority for granting such awards.

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."[9] "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

[9] 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).

the century, some considered these awards to be 'routine.'"[10]

The Fifth Edition of *Newberg on Class Actions,* edited by Professor William B. Rubenstein, explained in 2015 that lower courts had acted without authority:

> 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, yet both judges—and Congress—have expressed concerns about them. The concerns center on the fact that incentive awards have the potential to interfere with a class representative's ability to perform her job adequately. That job is to safeguard the interests of the absent class members. But with the promise of a significant award upon settlement of a class suit, the representative might prioritize securing that payment over serving the class. Thus, incentive awards threaten to generate a conflict between the representative's own interests and those of the class she purports to represent.

5 William B. Rubenstein, *Newberg on Class Actions* §17:1 at 492 (5th ed. 2015); *see also id.* §17:2 at 494.

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[10] *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.

Under the heading "**§17:4 Legal basis for incentive awards,**" Professor Rubenstein wrote:

> It might be most apt to leave this section of the Treatise blank as 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. In doing so, courts have explained the[ir] rationale for incentive awards, as discussed in the preceding section; but few courts have paused to consider the legal authority for incentive awards. The Sixth Circuit's observation that "to the extent that incentive awards are common, they are like dandelions on an unmowed lawn—present more by inattention than by design" therefore accurately describes the judiciary's attention to the legal basis for making incentive awards.

5 William B. Rubenstein, *Newberg on Class Actions* §17:4 at 510-11 (5th ed. 2015)(footnotes omitted; quoting *In re Dry Max Pampers Litig.,* 724 F.3d 713, 722 (6th Cir.2013)).

"Given that incentive awards are relatively common in class action practice," Professor Rubenstein added, "their legal basis is surprisingly thin." 5 William B. Rubenstein, *Newberg on Class Actions* §17:4 at 516 (5th ed. 2015). Federal appellate courts nonetheless began to affirm district courts' awards of payments from common-fund recoveries to compensate representative plaintiffs for personal services in securing common-fund settlements, and to incentivize further litigation. Judge Posner opined in dictum 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." *In re Continental Illinois Securities Litig.,* 962 F.2d 566, 571 (7th Cir.1992).

Some found Judge Posner's attack on controlling precedent persuasive. In *Cook v. Niedert,* 142 F.3d 1004, 1016 (C.A.7 1998), the Seventh Circuit approved a $25,000 incentive award, citing *Continental Illinois* for the notion that "an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." District courts across the country cited *Continental Illinois* and *Cook v. Niedert* and to justify incentive awards compensating class representatives for personal services rendered in obtaining common-fund settlements.[11]

Although it had cited and followed *Greenough*'s rule in 2004 in *Zucker*, 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

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[11] *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).

explain how district courts could be entitled to grant awards that *Zucker* had recognized 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.[12] In *Shane Group, Inc. v. Blue Cross Blue Shield,* 825 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 v. Johnson,* 322 F.3d 895, 897 (6th Cir.2003), and *Dry Max Pampers*, 724 F.3d at 722). Were such documentation provided, the court added,

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[12] *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).

"the 'difficult' issue of the propriety of incentive awards would be properly presented." *Id*. (quoting *Hadix,* 322 F.3d at 898).

Even this Court has noted the practice, albeit without approving of it. A footnote of dictum in this Court's opinion in *China Agritech Inc. v. Resh*, __U.S.__, 138 S.Ct. 1800 (2019), cited *Cook v. Niedert* to illustrate representative plaintiffs' motives for taking charge of class-action lawsuits that they otherwise might not much care about:

> 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.

China Agritech can hardly be taken as a decision that considered and overruled the doctrine of *Greenough* and *Pettus,* which it does not even cite, let alone discuss. "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). "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). Yet lower courts are now citing *China Agritech* to justify incentive awards.

The Ninth Circuit in *Apple Device Performance,* for example, wrote that

> the Supreme Court recently acknowledged that "[a] class representative might receive a share of class recovery above and beyond her

> individual claim" through an incentive award, *China Agritech, Inc. v. Resh,* __U.S.__, 138 S.Ct. 1800, 1811 n.7 123 (2018). Nonetheless, the Feldman objectors contend that our twenty-first century precedent allowing such awards conflicts with Supreme Court precedent from the nineteenth century—*Trustees v. Greenough*, 105 U.S. 527 (1881), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885). To the contrary, we have previously considered this nineteenth century caselaw in the context of incentive awards and found nothing discordant.

Apple Device Performance Litig., 50 F.4th at 785 (footnote omitted).

But the Eleventh Circuit remains correct in holding that "Supreme Court precedent prohibits incentive awards." *Johnson v. NPAS Solutions,* 975 F.3d at 1255. No decision of this Court has overruled *Greenough* and *Pettus.* They remain controlling.

Suggestions that *Greenough* and *Pettus,* though both class actions themselves, are irrelevant to "modern" class-action litigation under Rule 23 ignore the fact that this Court deems them still directly relevant—and applicable—to common-fund class actions. It deemed them controlling in *Boeing v. Van Gemert,* 444 U.S. 472, 478 (1980), for example, which concerned the award of attorney's fees in a Rule 23 class action. The Court declared:

> 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. See *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375 (1970); *Sprague v. Ticonic National Bank,* 307 U.S. 161 (1939); cf. *Hall v. Cole,* 412 U.S. 1 (1973).

Boeing Co. v. Van Gemert, 444 U.S. at 478.

The Court was pretty clear that *Greenough* still governs common-fund class actions:

> The common-fund doctrine reflects the traditional practice in courts of equity, *Trustees v. Greenough, supra* 105 U.S., at 532–537, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees, *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S., at 257-258. The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. See, *e. g., Mills v. Electric Auto-Lite Co.,* 396 U.S., at 392. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit. See *id.*, at 394.

Boeing Co. v. Van Gemert, 444 U.S. at 478.

Greenough and *Pettus* also are identified as important—and still pertinent—decisions in *Alyeska Pipeline Serv. Co. v. Wilderness Society,* 421 U.S. 240, 257-58 (1975), which specifically cited *Greenough* for sustaining

> the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit. That rule has been consistently followed. *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885); *Harrison v. Perea,* 168 U.S. 311, 325-326 (1897); *United States v. Equitable Trust Co.,* 283 U.S. 738 (1931); *Sprague v. Ticonic National Bank,* 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375 (1970); *Hall v. Cole, supra*; *cf. Hobbs v. McLean,* 117 U.S. 567, 581-582 (1886). See generally Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds,* 87 Harv.L.Rev. 1597 (1974).

Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 257-58 (1975).

In light of *Boeing,* lower courts' efforts to distinguish *Greenough* and *Pettus*—both class actions—on the basis that they were "decided decades before the adoption of Rule 23," as the Second Circuit put it in this case, Pet.App.23a, are misplaced. Yet in *Murray* too the First Circuit dismissed this Court's *Greenough* and *Pettus* decisions as "late-nineteenth-century creditor lawsuits" that, though litigated by bondholders as class actions, cannot be deemed to control "modern-day class actions under Rule 23." *Murray,* 55 F.4th at 352.

Professor Rubenstein has joined them. The Sixth Edition of his *Newberg* treatise, on which the First Circuit relied in *Murray*, abandons his position in the

Fifth Edition, and now favors incentive awards—dismissing *Greenough* as an "old equity case" that may safely be ignored. 5 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* §17:4 at 606 (6th ed. 2022). That take is an entirely new development, articulated by Professor Rubenstein only after the Eleventh Circuit relied on the Fifth Edition's candor:

> The uncomfortable fact is that "[t]he judiciary has created these awards out of whole cloth," and "few courts have paused to consider the legal authority for incentive awards." Rubenstein, supra, § 17:4

Johnson v. NPAS Solutions, 975 F.3d at 1259 (quoting 5 William B. Rubenstein, *Newberg on Class Actions* §17:4 at 510 (5th ed. 2015)).

Rubenstein's newly revised Sixth Edition asserts the contrary, insinuating that a 2018 amendment to Rule 23(e), requiring district courts to evaluate whether a class-action settlement "treats class members *equitably* relative to each other," somehow supersedes this Court's common-fund precedents. 5 William B. Rubenstein, *Newberg on Class Actions* §17:4 at 609 (6th ed. 2022)(quoting amended Rule 23(e)(2)(D); Rubenstein's emphasis). Professor Rubenstein writes: "Congress's insistence that the court ensure equitable distribution of a common fund arguably trumps any hesitation found in ancient cases or in other areas of unjust enrichment." *Id.* Rubenstein's new (and concededly, at best, only "arguable") theory is entirely contrary to his Fifth Edition's analysis. It also entirely ignores the fact that the venerably "ancient cases" of *Greenough* and *Pettus* are themselves high-court directives concerning the *equitable* distribution of common funds obtained in class actions.

If anything, the 2018 amendment to Rule 23(e) must be deemed to incorporate their holdings. Nothing in Rule 23 authorizes lower courts' general abrogation of the rule of *Greenough* and *Pettus,* which prohibits payments to representative plaintiffs for their service on behalf of a class.

III. THE QUESTION PRESENTED IS EXTRAORDINARILY IMPORTANT

The issue is an extremely important one, as incentive awards seriously impair class representatives' ability to provide the adequate representation required both by Rule 23 and by fundamental due process. Yet they have come to affect *most* class-action settlements.

That incentive awards undermine the very integrity of class-action litigation should be clear. The Sixth Circuit has warned that incentive awards to representative plaintiffs provide "'a *disincentive* for the [named-plaintiff] class members to care about the adequacy of relief afforded unnamed class members[.]'" *Shane Group, Inc. v. Blue Cross Blue Shield,* 825 F.3d 299, 311 (6th Cir.2016)(quoting *In re Dry Max Pampers Litig.,* 724 F.3d 713, 722 (6th Cir.2013)(court's emphasis)). The Ninth Circuit has recognized that incentive awards raise "red flags that the defendants may have tacitly bargained for the named plaintiffs' support for the settlement by offering them significant additional cash awards." *Roes 1-2 v. SFBSC Mgmt., LLC,* 944 F.3d 1035, 1057 (9th Cir.2019)(vacating settlement where two named plaintiffs were to receive incentive awards of $20,000 apiece). "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.'" *Staton v. Boeing Co.,* 327 F.3d 938, 975 (9th Cir.2003)(quoting *Weseley v. Spear, Leeds & Kellogg*, 711 F.Supp. 713, 720 (E.D.N.Y. 1989)).

Despite their corrosive effect on Named Plaintiffs' ability to provide unconflicted representation, incentive awards now affect the great majority of class-action settlements. Professor Rubenstein reports in the Sixth Edition of his treatise that while a "1993-2002 study found courts providing incentive awards in 27.8% of all cases, the 2006-2011 data shows courts providing incentive awards in 71.3% of all cases." 5 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* §17:7, at 622 (6th ed. 2022). Professor Rubenstein elaborates:

> The increased prevalence of incentive awards in our study was so stunning that we broke the data down among each of the six years of the study (2006-2011). Doing so demonstrated that the frequency of incentive awards increased across those years (but for a blip in the second year). Therefore, our conclusion that courts approved incentive awards in 71.3% of all cases between 2006-2011 masks the facts that courts approved awards in 69.6% and 62.8% of cases in the first two years (2006-2007) but in nearly 80% of all cases (78.6%) by 2011.

5 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* §17:7, at 622 (6th ed. 2022).

The facts of this case illustrate the danger: Named Plaintiffs compromised the class's equitable and class-action damages claims with a Settlement Agreement that pays the Named Plaintiffs $15,000 apiece, with not a penny going to the rest of the class. Such payments create an incentive to sell out the interests

of the class. Settlements that include such provisions should not be approved.

The need for this Court's review is apparent from the new ubiquity of incentive awards in class-action settlements, giving representative plaintiffs powerful incentives to abandon class members' interests in favor of their own. The question presented clearly warrants this Court's attention.

CONCLUSION

The circuits are in conflict on the question of whether this Court's foundational common-fund precedents control common-fund class-action settlements entered under Rule 23. The question implicates this Court's sole prerogative to reconsider or overrule its own decisions. It also implicates the integrity of class-action litigation, given incentive awards' tendency to seriously undermine class representatives' ability to adequately represent absent class members' interests. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 5, 2023

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2021

(Argued: March 10, 2022 Decided: September 7, 2022)

Docket Nos. 20-3765-cv, 20-3766-cv

KATHRYN HYLAND, MELISSA GARCIA, JESSICA SAINT-PAUL, REBECCA SPITLER-LAWSON, MICHELLE MEANS, ELIZABETH KAPLAN, JENNIFER GUTH, MEGAN NOCERINO, ELIZABETH TAYLOR, AND ANTHONY CHURCH, EACH INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

NAVIENT CORPORATION, NAVIENT SOLUTIONS LLC,

Defendants-Appellees,

v.

WILLIAM YEATMAN, RICHARD ESTLE CARSON, III,

Objectors-Appellants.∗[*]

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[*] The Clerk of Court is directed to amend the caption to conform to the caption above.

Before:

SACK, LOHIER, and NARDINI, Circuit Judges.

In this class action, the United States District Court for the Southern District of New York (Cote, J.) certified a settlement class under Federal Rule of Civil Procedure 23(b)(2), approved a settlement agreement that included a cy pres award to establish a nonprofit that would provide student loan counseling to borrowers, and approved $15,000 in service awards for the named plaintiffs. We conclude that the District Court acted within the bounds of its discretion in making each of these decisions. AFFIRMED.

CAITLIN J. HALLIGAN (Faith E. Gay, Yelena Konanova, David A. Coon, Max Siegel, *on the brief*), Selendy & Gay PLLC, New York, NY; Mark Richard, Phillips, Richard & Rind, P.A., Miami, FL, *for Plaintiffs-Appellees* Kathryn Hyland, Melissa Garcia, Jessica Saint-Paul, Rebecca Spitler-Lawson, Michelle Means, Elizabeth Kaplan, Jennifer Guth, Megan Nocerino, Elizabeth Taylor, and Anthony Church, each individually and on behalf of all others similarly situated.

Ashley M. Simonsen, Covington & Burling LLP, Los Angeles, CA; Andrew A. Ruffino, Covington & Burling LLP, New York, NY, *for Defendants-Appellees* Navient Corporation, Navient Solutions, LLC.

ANNA ST. JOHN, Hamilton Lincoln Law Institute, Center for Class Action Fairness,

Washington, DC, *for Objector-Appellant* William Yeatman.

ERIC ALAN ISAACSON, Law Office of Eric Alan Isaacson, La Jolla, CA, *for Objector-Appellant* Richard Estle Carson, III.

LOHIER, *Circuit Judge*:

This appeal concerns a settlement that a class of public servants negotiated with the loan servicing companies Navient Corporation and Navient Solutions, LLC (together, "Navient"). As part of the settlement, Navient agreed to deliver better and more accurate information to borrowers and to contribute a cy pres award of $2.25 million to establish a nonprofit organization that provides counseling to borrowers at all stages of the repayment process. In exchange, the class agreed to release their claims for non-monetary relief, though they retain the right to sue Navient individually for money damages.

The United States District Court for the Southern District of New York (Cote, J.) certified a class for settlement purposes under Federal Rule of Civil Procedure 23(b)(2) and approved the settlement as "fair, reasonable, [ ] adequate," and "in the best interest of the Settlement Class as a whole." Hyland v. Navient Corp., 18 Civ. 9031, 2020 WL 6554826, at *1 (S.D.N.Y. Oct. 9, 2020). Two objectors now appeal that judgment, arguing that the District Court erred in certifying the class, approving the settlement, and approving service awards of $15,000 to the named plaintiffs. Because we conclude that the District Court did not abuse its discretion in making any of these determinations, we **AFFIRM**.

BACKGROUND

In 2007 the federal government created the Public Service Loan Forgiveness program ("PSLF") to help address the problem of overwhelming student debt. See College Cost Reduction and Access Act, Pub. L. No. 110–84, § 401, 121 Stat. 784, 800 (2007). Under PSLF, teachers, social workers, police officers, and others working in public service may have their federal student debt forgiven after 120 qualifying payments. To administer the program, the federal Department of Education contracts with for-profit "servicing companies," including Navient, which alone services more than $205.9 billion in federal student loans.

Navient aims to help borrowers "understand the complex array of federal loan repayment options so they can make informed choices about the plans that are aligned with their financial circumstances and goals." App'x 35. In October 2018, however, a group of public servants who had contacted Navient for help repaying their loans (collectively, "Plaintiffs") filed a putative class action lawsuit in the Southern District of New York, alleging that Navient had not "liv[ed] up to its obligation to help vulnerable borrowers get on the best possible repayment plan and qualify for PSLF." App'x 36. They claimed that Navient had "[d]eceived borrowers by [erroneously] informing them PSLF was not available to them," "[m]isled borrowers by stating they were 'on track' for PSLF when in fact their repayment plan did not qualify for PSLF," and "[a]dvised borrowers not to submit paperwork that would verify their employment and other qualifying factors for PSLF." App'x 37. As a result, according to the Plaintiffs' amended complaint, borrowers were "denied loan forgiveness at alarming rates, with

horrifying effects on the borrowers and their families and communities." App'x 37.

Plaintiffs brought a number of tort and contract claims, as well as claims under state statutes protecting against unfair and deceptive trade practices. Navient's business practices, they asserted, were largely to blame for their injuries. Plaintiffs alleged that Navient structured employee compensation "to incentivize short calls by rewarding employees for rushing borrowers off the phone, thereby preventing borrowers from receiving full and accurate information about their best repayment options." App'x 39. They also alleged that Navient's employees, looking for quick and easy solutions to present on the phone, pushed cash-strapped borrowers to enter loan forbearance, despite the availability of more flexible repayment plans and the fact that forbearance pauses PSLF-qualifying payments and can increase the total amount a borrower ultimately owes. In addition to various sub-classes based on geography, Plaintiffs proposed a nationwide class of public servants who have or had loans serviced by Navient and who contacted the company regarding their eligibility for PSLF, as well as a nationwide injunctive class of borrowers who have loans actively serviced by Navient, previously contacted Navient about PSLF eligibility, and intended to contact Navient in the future regarding PSLF eligibility.

Navient moved to dismiss the amended complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, which the District Court (Cote, J.) granted in part, dismissing all claims except "the claim brought under New York's General Business Law Section 349," App'x 160, which prohibits "deceptive acts or practices in the conduct of any

business ... or in the furnishing of any service" in the state, App'x 154. At a hearing in July 2019 Judge Cote informed the parties that she saw "an enormous hurdle to certifying this class." App'x 214. "I just can't imagine there would be any uniform[ ] oral representation," she explained, "[b]ecause anyone who picks up a phone to call Navient has a question ... [that] comes out of their individual circumstances and needs." App'x 215. She reiterated this concern at a hearing a few months later, saying that "there [was] an underlying problem ... with respect to the plaintiffs' theory, which [she had] been frank about in [her] prior conferences." App'x 253.

Spurred in part by Judge Cote's comments, the parties reached a settlement in April 2020 in which they agreed to seek certification of a mandatory nationwide settlement class pursuant to Rule 23(b)(2). Class members also agreed to release their claims for non-monetary relief, though they retained the right to "file individual lawsuits for monetary relief on a non-class basis and excluding Aggregate Actions" of five or more individuals. App'x 328. In return, Navient agreed to implement a number of business reforms, including (1) enhancing internal resources for call-center representatives by, among other things, "updat[ing] job aids to clarify that customer service representatives should discuss loan forgiveness including PSLF with borrowers prior to offering forbearance"; (2) updating written communications with borrowers by "creat[ing] forms that can be sent via email to borrowers who request additional information about PSLF"; (3) improving its website and chat communications with borrowers by "requiring customer service representatives to look for keywords or phrases that indicate borrowers' possible eligibility for forgiveness programs"; and (4) training customer

service representatives to follow the new practices, and regularly monitoring their calls to ensure compliance. App'x 319–21. In what the parties and the District Court called a cy pres – or "next best" – award, Navient also agreed to contribute $1.75 million (later increased to $2.25 million) to establish a nonprofit that would "provide education and student loan counseling to borrowers employed in public service," App'x 354, and "generate administrative and legislative reforms" to improve PSLF, App'x 355. A project proposal estimated that the new organization could reach a projected 7,700 to 11,250 borrowers a year. App'x 357.

In June 2020 the District Court preliminarily approved the settlement agreement and the cy pres recipient. The District Court also conditionally certified a Rule 23(b)(2) settlement class of:

> [a]ll individuals who, at any point from October 1, 2007 to the Effective Date (i) have or had Federal Family Education Loans ("FFEL") or Direct Loans serviced by Navient; (ii) are or were employed full-time by a qualifying public service employer or employers for purposes of PSLF; and (iii) spoke to a Navient customer service representative about subjects relating to eligibility for PSLF.

App'x 292. The District Court found that "Defendants [were] alleged to have acted or refused to act on grounds that appl[ied] generally to the Settlement Class," and that certification was therefore proper under Rule 23(b)(2). App'x 293.

Less than a month later, this Court decided Berni v. Barilla S.p.A., 964 F.3d 141 (2d Cir.2020), which held that a class of past purchasers of a product (in that case, Barilla pasta) could not be certified under

Rule 23(b)(2) because they were "not likely to encounter future harm of the kind that makes injunctive relief appropriate." Id. at 147. In response to the District Court's request for briefing on the effect of Berni on their proposed settlement, both parties insisted that Berni was distinguishable. At a fairness hearing in October 2020 the District Court agreed with the parties that Berni did not prevent final approval of the settlement.

A number of class members at the hearing—including the appellants here, William Yeatman and Richard E. Carson, III (together, "Appellants")—objected to the settlement, arguing that the cy pres award would not benefit the class, that the settlement improperly released monetary claims, and that class counsel were compromised by a conflict of interest. The District Court rejected their objections and, citing the factors in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir.1974), abrogated on unrelated grounds by Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 49-50 (2d Cir.2000), found the settlement to be fair, adequate, and reasonable.

The District Court also granted $15,000 incentive awards to the named plaintiffs based on "evidence that they have suffered attack[s] personally because they have served in their role here ... and tried to achieve a benefit on behalf of absent class members." App'x 651–52. The District Court acknowledged that incentive awards could encourage class representatives to agree among themselves to a settlement that was not in the best interests of the class, but it found that such collusion was unlikely in this case. App'x 649–50. Finally, the court denied a request for $500,000 in attorney's fees after learning that the money would be used to reimburse a labor union, the American

Federation of Teachers ("AFT"), that had been paying Plaintiffs' counsel's bills on a monthly basis. See App'x 653–54.

On October 9, 2020, consistent with the fairness hearing and its preliminary approval of the settlement, the District Court entered a final order certifying the settlement class, approving the settlement agreement as "in the best interest of the Settlement Class as a whole," approving the $15,000 service awards, denying class counsel's application for attorney's fees, and dismissing the case. Navient Corp., 2020 WL 6554826, at *1-3.

This appeal followed.

DISCUSSION

I.

Appellants challenge the District Court's decision to certify a Rule 23(b)(2) class, approve the settlement, and approve service awards for the named plaintiffs. We review each of these decisions for abuse of discretion. See Berni, 964 F.3d at 146 (class certification); McReynolds v. Richards-Cantave, 588 F.3d 790, 800 (2d Cir.2009) (approval of settlement); Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 95 (2d Cir.2019) (grant of service awards). A district court abuses its discretion when its decision "rests on a legal error or clearly erroneous factual finding, or [ ] falls outside the range of permissible decisions." Berni, 964 F.3d at 146 (quotation marks omitted).

II.

Before considering whether the District Court properly certified the class under Rule 23(b)(2), we address the threshold issue of standing. Some class

members were no longer using Navient to service their loans when the class was certified. Appellants, citing Berni, argue that the class as a whole therefore lacked standing to pursue injunctive relief. See Yeatman Br. 20; Carson Br. 36–37. We disagree.

"Whether a plaintiff has constitutional standing is a question of law that we review de novo." Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C. ("Cent. States"), 504 F.3d 229, 241 (2d Cir.2007). Standing is satisfied so long as at least one named plaintiff can demonstrate the requisite injury. Dep't of Commerce v. New York, ——__U.S.__,139 S.Ct. 2551, 2565, 204 L.Ed.2d 978 (2019) ("For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue."); Town of Chester v. Laroe Estates, Inc., __U.S. __, 137 S.Ct. 1645, 1651, 198 L.Ed.2d 64 (2017)

("[W]hen there are multiple plaintiffs[,] [a]t least one plaintiff must have standing ...."); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 & n.9, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) ("[We] have at least one individual plaintiff who has demonstrated standing ... Because of the presence of this plaintiff, we need not consider whether the other ... plaintiffs have standing to maintain the suit."). Class actions are no exception to this long-standing rule. See Frank v. Gaos, 139 S.Ct. 1041 (2019) ("A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing."); Liberian Cmty. Ass'n of Conn. v. Lamont, 970 F.3d 174, 185 n.14 (2d Cir.2020) ("Because we conclude that none of the named plaintiffs has standing to pursue their claims for prospective relief, the class proposed by Appellants necessarily fails as well."); Cent. States,

504 F.3d at 241 ("As a threshold matter, we note that only one of the named Plaintiffs is required to establish standing in order to seek relief on behalf of the entire class."); Comer v. Cisneros, 37 F.3d 775, 788 (2d Cir.1994) (noting that, in the context of a class action, "only one named plaintiff need have standing with respect to each claim"); see also 1 Newberg and Rubenstein on Class Actions § 2:1 (6th ed. 2022) ("Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court; there is no further, separate 'class action standing' requirement.").[1]

Here, the amended complaint plausibly alleged that the named plaintiffs were likely to suffer future harm because they continued to rely on Navient for information about repaying their student loans. See, e.g., App'x 53, 61, 63. At least six of the named plaintiffs continue to have a relationship with Navient. See App'x 574. That is enough to confer standing on

[1] Some may interpret a single sentence in Denney v. Deutsche Bank AG, 443 F.3d 253 (2d Cir.2006), as suggesting that all class members must have standing for the class to proceed. See id. at 264 ("[N]o class may be certified that contains members lacking Article III standing."). But Denney was decided before the Supreme Court in Gaos clarified the minimal requirement for standing in class actions. And, in any event, we acknowledged in Denney that "[o]nce it is ascertained that there is a named plaintiff with the requisite standing, [ ] there is no requirement that the members of the class also proffer such evidence." Id. at 263–64 (quotation marks omitted); see also 1 Newberg and Rubenstein on Class Actions § 2:3 (noting that, "[w]hile [Denney] did contain that sentence, it was embedded in a paragraph that also stated, ... [in an explanatory parenthetical] that: '[P]assive members need not make any individual showing of standing, because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court.' ").

the entire class. See Amador v. Andrews, 655 F.3d 89, 99 (2d Cir.2011) ("In a class action, once standing is established for a named plaintiff, standing is established for the entire class." (quotation marks omitted)).

III.

Having satisfied ourselves that the class has standing, we turn to whether the District Court abused its discretion in certifying the settlement class. "According to the Federal Rules of Civil Procedure, a class may be certified under Rule 23(b)(2) in a single circumstance: when '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.'" Berni, 964 F.3d at 146 (quoting Fed. R. Civ. P. 23(b)(2)). "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." Id. (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011)). As we put it in Berni, "a class may not be certified under Rule 23(b)(2) if any class member's injury is not remediable by the injunctive or declaratory relief sought." Id.

Appellants first argue that certification was improper because not all members of the class stand to benefit from the proposed injunctive relief. As part of the settlement, however, Navient has agreed to implement a number of business-practice enhancements, including requiring call center representatives to listen for keywords indicating PSLF eligibility; updating forms sent to borrowers to include more information about PSLF; and improving website and chat communications to better reach borrowers who

might be eligible for loan forgiveness. See App'x 304. Navient's reforms will benefit class members whose loans continue to be serviced by Navient. But the reforms will also benefit the remaining class members who, for example, are no longer with Navient or who no longer have student loans, by providing them accurate information about PSLF and helping them determine whether they have viable individual claims for damages. See App'x 635 (Plaintiffs' counsel explaining that the proposed reforms "help borrowers advance their individual claims [ ] because they are now able to receive accurate information from Navient" regarding their loan histories); see also Oral Arg. at 17:28-18:22 (same). Specifically, improvements to Navient's communications system will make it easier for class members to access their loan-repayment record, learn how PSLF is supposed to work, and assess whether they would have been eligible for loan forgiveness had Navient initially provided them with accurate information. See Oral Arg. at 18:46-19:23. Access to payment records will be particularly useful to class members who may need to explain their credit history to secure mortgages or other loans. See Oral Arg. at 20:21-21:15; see also App'x 379 (declaration of a named plaintiff explaining how his "inflated loan balance posed a substantial barrier while [he] was attempting to purchase a home, as [he] was disqualified from a number of mortgage options in light of [his] outstanding debt alone"). The evidence of these benefits, which plausibly accrue to even those class members who have paid off their loans in full or no longer have Navient-serviced loans,

supports the District Court's finding that the settlement was in the best interest of the class.[2]

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[2] Though we need go no further, we note that the settlement's cy pres award also benefits the whole class by funding a nonprofit, Public Service Promise, that will help all borrowers learn whether or not they are eligible for loan forgiveness and "provid[e] guidance on [PSLF] applications or assistance in challenging denials." App'x 355. Yeatman broadly resists these descriptions of the award's class-wide benefits, responding that a cy pres award "cannot serve as the grounds upon which a class member benefits from a settlement for the (b)(2) analysis" because "[c]y pres is not injunctive or declaratory relief." Yeatman Reply Br. 5. We disagree that a cy pres award cannot be characterized as injunctive, or equitable, relief. See Restatement (Third) of Trusts § 67, cmt. a. (Am. L. Inst. 2003) (noting that "[t]he judicial power of cy pres has evolved in this country along lines generally similar to the equity power under English common law"). That is especially so here. The award in this case was not a court-fashioned remedy aimed at repurposing funds that would otherwise have been distributed to the class as money damages. It was instead a provision of a settlement reached by private parties. Where, as here, the parties in a Rule 23(b)(2) injunctive class action reach a settlement that requires the defendant to make a monetary contribution to a third party, the award is more accurately described as a mandatory injunction to establish or contribute to a selected organization than as a refashioning of monetary relief. See In re Google Inc. Cookie Placement Consumer Priv. Litig., 934 F.3d 316, 328 (3d Cir.2019) (certifying a Rule 23(b)(2) class where the cy pres award was "never intended to compensate class members monetarily" but instead served as equitable relief that "enhance[d] the settlement's deterrent effect"). In deciding whether the settlement's equitable relief benefits the class, we may therefore consider the benefits class members receive from the cy pres award in addition to those they obtain from the injunction related to Navient's business practices. See 4 Newberg and Rubenstein on Class Actions § 12:26 (6th ed. 2022) (describing how a cy pres award "furthers the deterrence goals of the class suit" and "fund[s] activities that are in the class's interest").

Appellants offer two additional reasons why Rule 23(b)(2) certification was improper, neither of which we find persuasive.

First, Yeatman argues that the class should have been certified under Rule 23(b)(3) instead of (b)(2) because the class primarily sought monetary relief for the unjust enrichment claim upon which certification was based. See Yeatman Br. 27–28. But we determine whether certification was appropriate by assessing the District Court's justification for certifying the settlement class. The District Court explained that "Defendants [were] alleged to have acted or refused to act on grounds that apply generally to the Settlement Class." Navient Corp., 2020 WL 6554826, at *2; see Barrows v. Becerra, 24 F.4th 116, 130 (2d Cir.2022) (certification is proper under Rule 23(b)(2) if defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief ... is appropriate respecting the class as a whole" (quoting Fed. R. Civ. P. 23(b)(2))). That justification finds support in the record, as Plaintiffs' amended complaint sought injunctive relief on behalf of the class to prevent Navient from, among other things, "providing incorrect information to Plaintiffs and members of the Classes regarding PSLF," and "incentiviz[ing] Navient's employees to steer Plaintiffs and members of the Classes into" non-PSLF repayment plans. App'x 157. Because that conduct clearly applies to all Plaintiffs, we decline Yeatman's invitation to find that the District Court abused its discretion on this ground. See Barrows, 24 F.4th at 132 ("Rule 23(b)(2) does not require that the relief to each member of the class be identical, only that it be beneficial. That means that different class members

can benefit differently from an injunction." (quotation marks omitted)).

Second, Appellants challenge the certification on the ground that the release obtained by the certified class eliminates the right of individual class members to pursue claims for monetary damages "on an aggregate basis." Yeatman Br. 28. Fundamentally, they argue that the settlement violates the due process rights of absent class members by denying them the opportunity to opt out of the class and sue for money damages in addition to injunctive relief. But as the District Court explained, "individual class members [in fact] retain their right to bring individual lawsuits," and the settlement does not prevent absent class members from pursuing monetary claims.[3] See App'x 648; see also Navient Corp., 2020 WL 6554826, at *3 ("[A]ll other Settlement Class Members do not release or discharge, but instead expressly preserve, their right to file individual lawsuits for monetary relief on a non-class basis and excluding Aggregate Actions."). We therefore conclude that the District Court did not abuse its discretion when it certified the settlement class under Rule 23(b)(2).

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[3] Carson insists that class members will not be able to bring individual actions in practice because such lawsuits "are beyond the[ir] financial means." Carson Br. 48. But one of the functions of Public Service Promise is to advise class members of their litigation options and refer them to outside organizations for further assistance, including representation at lower costs. See Oral Arg. at 19:23–19:50; see also App'x 635 (Plaintiffs' counsel explaining that the organization can "refer borrowers out for litigation of the individual claims").

IV.

Appellants' challenge to the District Court's approval of the settlement itself fares no better.

A. Fairness of the Settlement

First, Appellants ask us to reject the settlement as unfair under Rule 23(e), which authorizes a district court to approve a class action settlement only if the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). To evaluate the fairness, reasonableness, and adequacy of a class settlement, courts employ the nine factors set out in City of Detroit v. Grinnell Corp.:

> (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.

495 F.2d at 463 (citations omitted). On appeal, "[t]he trial judge's views" of these factors are entitled to "great weight." Joel A. v. Giuliani, 218 F.3d 132, 139 (2d Cir.2000)(quoting Grinnell, 495 F.2d at 454).

The District Court carefully analyzed each of the nine factors. See App'x 645–48. In particular, in considering the final three factors, the court reasonably concluded that although Navient could have "withst[ood] a greater judgment," the settlement was "absolutely within the range of reasonable settlements," especially "because there [was] a grave risk that there would have been no recovery at all" had the case proceeded. App'x 647–48. We find no abuse of discretion in the District Court's application of the Grinnell factors to the facts before it.

B. Cy Pres Award

Appellants separately object to the cy pres award in this case. As an initial matter, they say that a cy pres award is never appropriate in a class action settlement because it provides no direct benefit to class members. See Yeatman Br. 33 ("[C]y pres awards typically fail to redress class members' alleged injuries for which they are waiving their rights."); id. at 37 ("Cy pres ... provides no redress to ... class members."); see generally Yeatman Br. 31-44; Carson Br. 37-44. We disagree. As our sister circuits have recognized, class members can "benefit – albeit indirectly – from a defendant's payment of funds to an appropriate third party." In re Google Inc. Street View Elec. Commc'ns Litig., 21 F.4th 1102, 1116 (9th Cir.2021); see id. (where a cy pres award has a "direct and substantial nexus" to the interests of the class and "account[s] for the nature of the plaintiffs' lawsuit," as the award in question does here, it "necessarily prioritizes class members' interests, even if it also provides a diffuse benefit to society at large" (quotation marks omitted)); see also In re Google Inc. Cookie Placement, 934 F.3d at 330 (recognizing that the "proposed cy pres awards would be used for a purpose directly and substantially

related to the class's interests"); In re Lupron Mktg. and Sales Practices Litig., 677 F.3d 21, 35 (1st Cir.2012) (recognizing that cy pres award in the form of funded research can "accrue both to the claimant class members and to the living absent class members"). So it is here: The cy pres award funds Public Service Promise and thereby assists all class members in navigating PSLF and determining whether they have a viable individual monetary claim against Navient.

Appellants also argue that a cy pres award is not appropriate if it is feasible to distribute the funds that support the award directly to the class instead. This argument, however, misconstrues the settlement fund as a damages award that was redistributed to Public Service Promise through the cy pres doctrine. But the settlement fund never belonged to class members as damages (indeed, the class members expressly reserved their individual right to later sue Navient for money damages), and there is no evidence to suggest that Navient would have otherwise agreed to distribute the funds to the class. See App'x 646 (the District Court rejecting objections over "the lack of an award of damages," in part because "there is no sound argument to suggest[ ] that there could be a class action that would result in a monetary award to individual class members").

C. First Amendment Challenge

Finally, Appellants maintain that the cy pres award to Public Service Promise unlawfully compels speech in violation of the First Amendment. "We review a First Amendment challenge to the district court's approval of a settlement," including a cy pres award, "de novo." In re Google Street View, 21 F.4th at 1110.

We reject Appellants' constitutional challenge to the settlement. The settlement agreement does not involve state action that implicates the First Amendment. Instead, the "[D]istrict [C]ourt's review of the settlement agreement in this case essentially determined whether it was 'fair, reasonable, and adequate' and was merely an exercise in compliance with Rule 23(e)." Christina A. ex rel. Jennifer A. v. Bloomberg, 315 F.3d 990, 992 (8th Cir.2003); see also 5 Moore's Federal Practice – Civil 23.161[1] (2022) ("A class-action settlement, like an agreement resolving any other legal claim, is essentially a private contract negotiated between the parties."). Nothing about the settlement "require[d] the court to establish the terms of the agreement." Bloomberg, 315 F.3d at 992-93. Without more (and outside the context of a claim of discrimination under the Equal Protection Clause), "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient" to constitute state action. Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982); see In re Motor Fuel Temperature Sales Practices Litig., 872 F.3d 1094, 1114 (10th Cir.2017). The private class settlement agreement in this case thus "may be enforced, without implicating the First Amendment." IMDb.com Inc. v. Becerra, 962 F.3d 1111, 1120 (9th Cir.2020) (citing Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991)); see In re Motor Fuel Temperature Sales Practices Litig., 872 F.3d at 1114.

D. Involvement of the Labor Union

Appellants object to the relationship between Plaintiffs' counsel and AFT, the labor union that paid Plaintiffs' counsel's bills. They argue that AFT's presence "strongly suggests that the interests of the

class were not adequately represented" under Rules 23(a)(4) and 23(g).[4] Yeatman Br. 45 (quotation marks omitted); see Marisol A. v. Giuliani, 126 F.3d 372, 378 (2d Cir.1997)(per curiam)("Rule 23(a)(4) requires that plaintiffs demonstrate that class counsel is qualified, experienced, and generally able to conduct the litigation." (quotation marks omitted)); Fed. R. Civ. P. 23(g)(1)(B) (providing that a court, in appointing class counsel, may consider any matter "pertinent to counsel's ability to fairly and adequately represent the interests of the class").

In advancing this claim, however, Appellants have not pointed to any evidence that conflicts with Judge Cote's finding that "the motive behind AFT acting as it has and the commitment it has shown in this litigation ... is nothing but admirable." App'x 655; see also id. at 654 ("[B]ecause of AFT's work and its decision and its generosity, the class has achieved a significant benefit, and that significant benefit will have or may have a profound impact on all public service employees."). Nor, on review of the record, do we see evidence that class counsel abandoned the litigation or otherwise acted in bad faith in pursuing this case. To the contrary, counsel agreed to settle only after the District Court indicated that Rule 23(b)(3) certification would likely fail. See Plaintiffs-Appellees' Br. 54.

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[4] Appellants also argue that Plaintiffs ought to have notified the class of AFT's role in the litigation. See Carson Br. 64; Yeatman Br. 47. We agree with Plaintiffs, however, that "[n]othing in Rule 23 required that the class notice disclose the proposed reimbursement [to AFT]." Plaintiffs-Appellees' Br. 56 n.28. In any event, the District Court took the lack of notice into account in denying the motion for attorney's fees; beyond that, Appellants do not establish how the alleged deficiencies in notice are grounds for invalidating the settlement as a whole. See App'x 654.

Absent settlement, the class members here may not have received anything at all. See App'x 648 (the District Court noting "a grave risk that there would have been no recovery at all" without the settlement).

V.

Finally, Appellants challenge the District Court's decision to approve service awards for the named plaintiffs, arguing that such awards are prohibited under a pair of nineteenth-century Supreme Court cases, Trustees v. Greenough, 105 U.S. 527 (1881), and Central R.R. & Banking Co. v. Pettus, 113 U.S. 116, 5 S.Ct. 387 (1885). We are not persuaded.

Greenough involved a suit brought by a bondholder of the Florida Railroad Company, Francis Vose, against the trustees of the Internal Improvement Fund of Florida, which "consisted of ten or eleven million acres of lands belonging to the State," the proceeds of which were "pledged for the payment of the interest accruing on the bonds." 105 U.S. at 528. On behalf of himself and other bondholders, Vose alleged that the trustees were "wasting and destroying the fund by selling [the land] at nominal prices." Id. at 528–29. The litigation was successful: The trustees were ultimately removed from their positions, and the court appointed agents to sell the land, which resulted in "a large number of sales" and "a considerable amount of money" for the bondholders. Id. at 529.

Vose, who had financed most of the litigation personally, petitioned to have his expenses reimbursed by the fund. The Supreme Court held that Vose could receive "reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit," id. at 537, explaining that it would be "unjust" and an "unfair advantage" for the rest of the bondholders to

benefit from his efforts without some compensation for the time and money he spent "work[ing] for them as well as for himself," id. at 532. But the Court held that he could not receive a refund for "his personal services and private expenses," id. at 537, reasoning that "[i]t would present too great a temptation to parties to intermeddle in the management of valuable property or funds ... if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid," id. at 538; see also Pettus, 113 U.S. at 122-23 (same).

Although Greenough was decided decades before the adoption of Rule 23, Carson argues that it stands broadly for the proposition that "[a] class representative cannot claim reimbursement from a common-fund settlement for his or her own service on behalf of the class." Carson Br. at 60. That reading is foreclosed by our decision in Melito. In that case, we considered whether the district court had abused its discretion by approving incentive awards of $2,500 for the class representatives in recognition of their litigation efforts. See Melito, 923 F.3d at 96. The appellant, the lone objector to the settlement, argued that such awards were unlawful under Greenough and Pettus. We rejected that argument, explaining that Greenough and Pettus were "inapposite" because they did not "provide factual settings akin to those" present in Melito. Id. at 96. Melito compels our conclusion that Rule 23 does not per se prohibit service awards like the ones at issue here.[5]

[5] We are bound by Melito's holding unless or until it is overruled by the Supreme Court or the Second Circuit in banc. See Anilao v. Spota, 27 F.4th 855, 873 n.13 (2d Cir.2022).

Turning to the awards themselves, we note that the District Court offered compelling reasons for compensating the class representatives, including that they "opened their lives to scrutiny"; "laid bare their financial circumstances, their career choices, and their personal histories"; suffered personal attacks; and were "subjected to vitriol." App'x 651–52. These determinations, which were supported by the record, see App'x 402, 434, 443–44, 456–57 (declarations of named plaintiffs), did not lie outside the bounds of the District Court's discretion.[6]

CONCLUSION

We have considered Appellants' remaining arguments and conclude that they are without sufficient merit to warrant reversal. For the foregoing reasons, we **AFFIRM** the judgment of the District Court.

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[6] Carson also cites New York State cases prohibiting service awards under state law, see Carson Br. 61, but those cases are inapposite here since they do not address the grant of service awards under Rule 23.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

KATHRYN HYLAND, MELISSA GARCIA, ELIZABETH TAYLOR, JESSICA SAINT-PAUL, REBECCA SPITLER- LAWSON, MICHELLE MEANS, ELIZABETH KAPLAN, JENNIFER GUTH, MEGAN NOCERINO, and AN- THONY CHURCH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

NAVIENT CORPORA- TION and NAVIENT SOLUTIONS, LLC,

Defendants.

No. 18-cv-9031-DLC-BCM
USDC SDNY DOCUMENT
ELECTRONICALLY FILED
DOC#_____
DATE FILED:10/9/2020

FINAL APPROVAL ORDER

WHEREAS, Plaintiffs Katluyn Hyland, Melissa Garcia, Elizabeth Taylor, Jessica Saint-Paul, Rebecca Spitler-Lawson, Michelle Means, Elizabeth Kaplan, Jennifer Guth, Megan Nocerino, and Anthony Church ("Plaintiffs" or "Class Representatives," and collectively with the other members of the Settlement Class, the "Settlement Class") entered into a Settlement Agreement and Release (the "Settlement

Agreement")[1] with Defendants Navient Solutions, LLC and Navient Corporation (collectively, "Defendants" or "Navient"), on April 24, 2020 to resolve the claims in the above-captioned class action lawsuit (the "Litigation");

WHEREAS, the Court on June 19, 2020 issued an order granting preliminary approval of the Settlement Agreement and conditional certification of the Settlement Class, and appointing the Plaintiffs as Class Representatives and Plaintiffs' counsel as Class Counsel (the "Preliminary Approval Order");

WHEREAS, the Settlement Administrator has filed proof of dissemination and publication of the Short-Form Notice and the Long-Form Notice, and proof of maintenance of the Class Settlement Website and Toll-Free Number (the "Class Notice"), in accordance with the Notice Plan set forth in Section VI of the Settlement Agreement, as modified by the Court in the Preliminary Approval Order;

WHEREAS, Plaintiffs filed a Motion for Final Approval of the Settlement Agreement and Certification of the Settlement Class (the "Final Approval Motion"), an Application for Service Awards for Class Representatives (the "Service Awards Application"), and an Application for Award of Reasonable Attorneys' Fees and Reimbursement of Expenses (the "Fees Application") on August 28, 2020, none of which was opposed by Navient;

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[1] All terms not defined herein have the meaning ascribed to them in the Settlement Agreement.

WHEREAS, on October 2, 2020, a hearing was held before the Court to consider the fairness, reasonableness, and adequacy of the proposed settlement and whether it should be finally approved by the Court pursuant to a final approval order and judgment (the "Final Approval Hearing"), after which hearing the Court requested that Class Counsel submit a revised proposed final approval order (the "Final Approval Order");

and

WHEREAS, the Court, having read and considered the Settlement Agreement and its exhibits, the Final Approval Motion and its accompanying memorandum of law, the Service Awards Application and its accompanying memorandum of law, the Fees Application and its accompanying memorandum of law, the pleadings, all other papers filed in this Litigation, and all matters submitted to it at the Final Approval Hearing, hereby finds that the Final Approval Motion and the Service Awards Application should be **GRANTED** and the Fees Application should be **DENIED**.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

FINAL APPROVAL OF THE SETTLEMENT AGREEMENT

1. The Settlement Agreement, including the releases contained therein, is approved as being fair, reasonable, and adequate under Federal Rules of Civil Procedure 23(b)(2) and 23(e) and in the best interest of the Settlement Class as a whole. Class Representatives and Defendants are directed to

implement the settlement in accordance with the terms and conditions of the Settlement Agreement.

2. The Court further approves the Cy Pres Recipient, described in Section V.C of the Settlement Agreement, to launch the PSLF Project, as set fotih in the Term Sheet for Cy Pres Recipient and PSLF Project Proposal, Dkt. 125-8, and to receive a total distribution of $2,250,000 from the Settlement Fund.

3. The Court finds that the Settlement Agreement was entered into at arm's length by experienced counsel, including after an in-person mediation supervised by the Honorable Barbara C. Moses, United States Magistrate Judge of the United States District Court for the Southern District of New York.

CERTIFICATION OF THE SETTLEMENT CLASS

4. The Settlement Class described herein is ce1iifiedpursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(e):

> All individuals who, at any point from October 1, 2007 to the Effective Date (i) have or had Federal Family Education Loans ("FFEL") or Direct Loans serviced by Navient; (ii) are or were employed full-time by a qualifying public service employer or employers for purposes of PSLF; and (iii) spoke to a Navient customer service representative about subjects relating to eligibility for PSLF.

5. Pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, the Court finds, for settlement purposes only, that: (a) the Settlement Class Members are so numerous as to make joinder of all the

Settlement Class Members impracticable; (b) there are questions of law and fact common to the Settlement Class Members; (c) the claims of the Class Representatives are typical of the claims of the Settlement Class Members; and (d) the Class Representatives and Class Counsel will fairly and adequately protect the interests of the Settlement Class Members.

6. The Court further finds, for settlement purposes only, that Defendants are alleged to have acted or refused to act on grounds that apply generally to the Settlement Class, and that Settlement Class certification is accordingly proper under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

NOTICE TO SETTLEMENT CLASS MEMBERS

7. The Court finds that the Class Notice as modified by the Court in the Preliminary Approval Order (a) fairly and adequately described the terms and effects of the Settlement Agreement, (b) fairly and adequately described the date by which Class Counsel were required to file the Final Approval Motion and Fees Application, (c) fairly and adequately described the method and date by which any member of the Settlement Class could object to or comment upon the Settlement Agreement, (d) set a date by which Class Counsel could respond to any objections to the Settlement Agreement, and (e) provided notice to the Settlement Class of the time and place of the Final Approval Hearing. Subject to paragraph 16 below, the Court finds that the Class Notice constituted appropriate and reasonable notice under the circumstances and otherwise met all requirements of applicable law.

RELEASES

8, In accordance with the terms of Section IX.A.3 of the Settlement Agreement, upon distribution to the Cy Pres Recipient, each Settlement Class Member and their related patties (defined in the Settlement Agreement as "Releasing Class Member Parties") release all claims for monetary relief brought on an aggregate or class basis or for non-monetary relief arising out of the same facts underlying this lawsuit (defined in the Settlement Agreement as "Released Class Claims") against Navient and its related patties (defined in the Settlement Agreement as "Released Defendant Parties"). In accordance with the terms of Section IX.A.7 of the Settlement Agreement, the Settlement Class does not release or discharge, but instead expressly preserves, the right of any and all Settlement Class Members to file individual lawsuits for monetary relief on a non-class basis and excluding Aggregate Actions.

9. In accordance with the terms of Section IX.A.2 of the Settlement Agreement, upon payment of the Incentive Awards, each Class Representative and their related parties (defined in the Settlement Agreement as "Releasing Class Representative Parties") release all claims for monetary or non-monetaty relief arising out of the same facts underlying this lawsuit (defined in the Settlement Agreement as "Released Class Representative Claims") against each of the Released Defendant Patties. In accordance with the terms of Section IX.A.8 of the Settlement Agreement, the Class Representatives do not release, waive, or discharge claims to enforce any provision of the Settlement Agreement. As set forth above in paragraph 8, all other Settlement Class Members do not release or discharge, but instead expressly preserve, their right to file

individual lawsuits for monetary relief on a non-class basis and excluding Aggregate Actions.

10. In accordance with the terms of Section IX.A.9 of the Settlement Agreement, as of the Effective Date of the Settlement Agreement, Navient and its related parties (enumerated in Settlement Agreement § IX.A.9) release all claims for any damages or other relief relating to the prosecution of this Litigation that Navient may have against the Class Representatives, Class Counsel, and their related parties.

APPROVAL OF THE SERVICE AWARDS

11. The Court finds that the requested service awards are justified under the circumstances of this case in recognition of the time and effort that each Class Representative expended in furtherance of this case and the personal risks and burdens incurred by the Class Representatives on behalf of the class.

12. Each Class Representative is or was a public service employee who holds or held at one time significant debts, and if properly advised, they would have had significant opportunity to have those debts forgiven. An award of $15,000 will compensate each Class Representative for only a fraction of the debt that they held at some point in time, if not currently. Nevertheless, the Class Representatives agreed to give up the right to sue Navient individually.

13. In addition, the Class Representatives opened their lives to scrutiny when they stepped forward on behalf of the class and laid bare their financial circumstances, their career choices, and their personal histories, without which commitment this litigation could not have been brought. There is evidence that the Class Representatives have suffered personal attacks

because they have served in their role as named Plaintiffs in order to benefit all class members. These attacks should not be part of the burden of serving as Class Representatives.

14. Finally, because individualized issues regarding any misrepresentations or omissions by Navient would likely have prevented class certification, and therefore there is likely no monetary relief that could have been awarded to absent class members on an aggregate basis, there is little risk that the Class Representatives breached their duty to absent class members in agreeing to this settlement.

15. Weighing all of those factors, the requested service awards are approved and each Class Representative is awarded $15,000 pursuant to the Settlement Agreement.

ATTORNEYS' FEES

16. The Court declines to reach the merits of the Fees Application because counsel's papers, and therefore the Class Notice, did not disclose that the American Federation of Teachers ("AFT") had paid counsel's fees or that an attorneys' fees award would be used to reimburse AFT for those payments. Therefore, under Settlement Agreement §V.C.4, the $500,000 requested for such award shall be distributed to the Cy Pres Recipient, for a total distribution to the Cy Pres Recipient of $2,250,000.

17. The Comt reserves continuing and exclusive jurisdiction over Plaintiffs, Defendants, and the Settlement Class with respect to the Settlement Agreement and this Order. Subject to the foregoing, this Litigation is hereby dismissed with prejudice and without costs.

IT IS SO ORDERED.

This ninth day of October, 2020

By: Hon. Denise Cote
United States District Court Judge

APPENDIX C

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 7th day of October, two thousand twenty-two.

Kathryn Hyland, Melissa Garcia, Jessica Saint-Paul, Rebecca Spitler-Lawson, Michelle Means, Elizabeth Kaplan, Jennifer Guth, Megan Nocerino, Elizabeth Taylor, and Anthony Church, each individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

Navient Corporation, Navient Solutions LLC,

Defendants-Appellees,

v.

William Yeatman, Richard Estle Carson, III,

Objectors-Appellants.

ORDER

Docket Nos: 20-3765 (Lead)
20-3766 (Con)

Appellant, Richard Estle Carson, III, 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 D

Federal Rule of Civil Procedure Rule 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).

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)