

IN THE
SUPREME COURT OF THE UNITED STATES

SARAH McDONALD,

Petitioner,

vs.

GRACE MURRAY, AMANDA ENGEN, STEPHEN BAUER, JEANNE TIPPETT,
ROBIN TUBESING, NIKOLE SIMECEK, MICHELLE MCOSKER,
JACQUELINE GROFF, AND HEATHER HALL, *on behalf of themselves*
and all others similarly situated,
and Grocery Delivery E-Services USA Inc.
(d.b.a. HelloFresh),

Respondents.

APPLICATION FOR EXTENSION OF TIME TO
FILE A PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

TO THE HONORABLE KETANJI BROWN JACKSON, ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE
FIRST CIRCUIT:

Pursuant to this Court's Rules 13.5, 22, 30.2, and 30.3, Sarah
McDonald respectfully requests a 60-day extension of time, to and
including June 22, 2023, to file a petition for a writ of certiorari to

review the decision of the United States Court of Appeals for the First Circuit in *Murray et al. v. Grocery Delivery E-Services USA Inc.*, No. 21-1931 (1st Cir. December 16, 2022)(Appendix A hereto), which is reported as *Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 342 (1st Cir.2022). A timely petition for rehearing was denied on January 23, 2023. (Appendix B hereto).

The appeal arose from the settlement of a consumer class action against Grocery Delivery E-Services USA Inc. (d.b.a. “HelloFresh”) seeking statutory damages under the Telephone Consumer Protection Act (TCPA). The parties sought settlement approval under Federal Rule of Civil Procedure 23(e) in the United States District Court for the District of Massachusetts.

Applicant Sarah McDonald is a class member who appeared through counsel before the District of Massachusetts as an objector challenging the settlement and arguing, *inter alia*, that conflicts of interest required separately represented subclasses, that the payment of “incentive awards” or “service awards” to representative plaintiffs are barred by this Court’s decisions in *Trustees v. Greenough*, 105 U.S. 527, 537 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116,

122 (1885), and that such awards create perverse incentives for named plaintiffs to abandon their duty to maximize recovery for the classes they are supposed to represent.

After the district court's order approving a somewhat modified settlement and incentive awards to the representative plaintiffs, McDonald timely appealed to the United States Court of Appeals for the First Circuit..

The First Circuit entered its opinion and final judgment in *Murray et al. v. Grocery Delivery E-Services USA Inc.*, No. 21-1931, on December 16, 2022 (Appendix A hereto), vacating approval of the class-action settlement and requiring separately represented subclasses on remand, but rejecting McDonald's contentions challenging the representative plaintiffs' incentive awards. *See* Appendix A. As noted above, the First Circuit's opinion is reported as *Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 342 (1st Cir.2022).

McDonald filed a timely petition for rehearing on December 30, 2022. The First Circuit entered an order denying rehearing on January 23, 2023. (Appendix B).

A petition for certiorari would be timely under this Court's rules if filed within ninety days from the January 23, 2023, denial of rehearing. *See* Rules 13.1, 13.3. As the ninetieth day after January 23, 2023, is Sunday April 23, 2023, without an extension the petition would be timely filed by Monday April 24, 2023. *See* Sup.Ct.R. 30.1. This application is being filed more than ten days before that date. *See* Sup.Ct.R. 13.5.

The extension that McDonald seeks, to Thursday June 22, 2023, amounts to an extension of 60 days from Sunday April 23, and 59 days from Monday April 24, 2023.

This Court has jurisdiction under 28 U.S.C. §1254(1) to review the decision of the United States Court of Appeals for the First Circuit in this case.

Reasons for Granting an Extension of Time

Based on the following factors, good cause exists to extend the time to file a petition for a writ of certiorari:

1. Applicant's counsel Eric Alan Isaacson, who is responsible for preparing the petition for a writ of certiorari in this matter, is a solo

practitioner who also is responsible for appellate briefs and arguments in many other matters.

2. Mr. Isaacson's responsibilities in other pending matters have made it impossible for him to complete a petition for a writ of certiorari to be filed in this matter by April 24, 2023.

3. Mr. Isaacson recently had to prepare for and presented oral argument before the United States Court of Appeals for the Second Circuit on March 22, 2023, in *Moses v. The New York Times, Co.*, No. 21-2556, an appeal arising from a complex class action that presents questions of first impression in that Court under the Class Action Fairness Act of 2005.

4. Mr. Isaacson also is counsel of record in four matters currently pending before this Court on petitions for writs of certiorari, all of which at this writing have been distributed for consideration in the conference of April 14, 2023. They are: *Johnson v. Dickenson*, No. 22-389 (counsel of record for Respondent Jenna Dickenson supporting grant of certiorari but opposing Petitioner on the merits with respect to the legality of incentive awards); *Dickenson v. Johnson*, No. 22-517 (counsel of record for Petitioner Jenna Dickenson seeking review of

common-fund attorney's fee standards); *Yeatman v. Hyland*, No. 22-566 (counsel of record for Respondent Richard Estle Carson III supporting Petitioner on the merits concerning cy pres settlements); *Carson v. Hyland*, No. 22-634 (counsel of record for Petitioner Richard Estle Carson III challenging incentive awards). Mr. Isaacson has in recent weeks had to devote substantial time to these matters.

5. Mr. Isaacson also is responsible for researching, writing, and filing an opening brief and appendix due in the Ninth Circuit on April 19, 2023, in *In re Facebook, Inc. Internet Tracking Litig. (Perrin Davis, et al v. Meta Platforms, Inc.)*, No. 22-16904, an appeal involving multiple issues arising from the settlement of a complex class action in which critical portions of the record are under seal. That opening brief will consume the great majority of Mr. Isaacson's time between now and its April 19, 2023, due date.

6. Mr. Isaacson's responsibilities as appellate counsel in *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XII-A LP (Appeal of Charles David Nutley)*, Nos. 22-6124, 22-6125, an appeal pending before the United States Court of Appeals for the Tenth

Circuit, require him to prepare for oral argument currently calendared for May 17, 2023.

7. In addition, Mr. Isaacson is enrolled in graduate studies for credit through the Harvard Extension School, with the current semester's classes and final-paper due dates scheduled to extend into May.

8. As a consequence of Mr. Isaacson's professional and other responsibilities, he cannot complete an adequate petition for a writ of certiorari in this case by the current due date of April 24, 2023.

9. This case presents an issue of national importance, on which the federal circuits are in conflict, concerning whether courts may award special payments to litigants to compensate them for service as representative plaintiffs in class actions producing common-fund settlements. The Eleventh Circuit has concluded that that "Supreme Court precedent prohibits incentive awards." *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1255 (11th Cir.2020), *petition for certiorari pending sub nom. Johnson v. Dickenson*, No. 22-389. Both the Ninth Circuit in *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785 (9th Cir.2022), and the First Circuit in the decision below in this case,

see Murray v. Grocery Delivery E-Servs. USA Inc., 55 F.4th 340, 352-54 (1st Cir.2022), have concluded that such payments to representative plaintiffs are not proscribed by this Court’s decisions in *Greenough* and *Pettus*. The Second Circuit has held that “[s]ervice awards are likely impermissible under Supreme Court precedent,” *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, __F.4th__, 2023 WL 2506455, at *8-*9 (2d Cir.2023), but that the authority of this Court’s opinions has been eclipsed by intervening Second Circuit decisions approving of the awards. *Id.* at *9 (following *Melito v. Experian Mktg. Sols. Inc.*, 923 F.3d 85, 96 (2d Cir.2019), and *Hyland v. Navient Corp.*, 48 F.4th 110, 123-24 (2d Cir.2022), *petitions for certiorari pending sub nom. Yeatman v. Hyland*, No. 22-566 (on cy pres settlements), and *Carson v. Hyland*, No. 22-634 (on incentive awards).

10. The question that Ms. McDonald would present, if she decides to petition for certiorari, is extraordinarily important because it involves not only the authority of this Court’s precedents, and a conflict among the circuits, but also because incentive awards may seriously undermine the integrity of class-action litigation. 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)).

11. This Court likely will be considering two petitions for certiorari relating the legality of incentive awards in its conference of

April 14, 2023. They are: *Johnson v. Dickenson*, No. 22-389; and *Carson v. Hyland*, No. 22-634.

12. This Court’s grant or denial of either or both of the petitions for certiorari in *Johnson v. Dickenson*, No. 22-389, and *Carson v. Hyland*, No. 22-634, can be expected to affect McDonald’s decisions concerning whether to petition for a writ of certiorari in this case, and how to present the issues if a petition is indeed to be filed. With those two cases scheduled for conference on April 14, 2023, however, orders granting or denying certiorari are unlikely to be disclosed before the Order List of April 17, 2023. If the petitions are “relisted” for the conference of April 21, 2023, moreover, orders granting or denying certiorari are unlikely to be disclosed before the Order List of April 24, 2023—which is the date on which the petition for certiorari in this case currently is due. And if the petitions in Nos. 22-389 and 22-634 are “relisted” more than once, any orders granting or denying certiorari would likely come after the current April 24, 2023 due date of McDonald’s petition.

13. McDonald and her counsel hope to be able to take account of this Court’s action on those petitions before deciding on whether to

petition in this case, and if a petition is indeed to be filed in this matter, they hope to frame the contents of that petition in light of the Court's action on the petitions in Nos. 22-389 and 22-634.

CONCLUSION

In light of the applicant's counsel's status as a solo practitioner and obligations in other matters, preparing an adequate petition for a writ of certiorari will require an extension of time, affording good cause to extend the time for Sarah McDonald to file a petition for a writ of certiorari by 60 days, to and including June 22, 2023.

DATED: April 4, 2023

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Eric Alan Isaacson", written over a horizontal line.

ERIC ALAN ISAACSON

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