No. 22-_____

IN THE
Supreme Court of the United States

JENNA DICKENSON,

Petitioner,

vs.

CHARLES T. JOHNSON, AND NPAS SOLUTIONS LLC.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERIORARI

C. BENJAMIN NUTLEY
ATTORNEY AT LAW
65-1279 Kawaihae Rd.,
Suite 203
Kamuela, HI 96743-8444

JOHN W. DAVIS
LAW OFFICE OF JOHN W. DAVIS
3030 N. Rocky Point Dr. W.,
Suite 150
Tampa, FL 33607

ERIC ALAN ISAACSON
Counsel of Record
LAW OFFICE OF
ERIC ALAN ISAACSON
6580 Avenida Mirola
La Jolla, CA 92037-6231
Telephone: (858)263-9581
ericalanisaacson@icloud.com

Counsel for Petitioner Jenna Dickenson

QUESTIONS PRESENTED

This Court has long held attorney's fees may be awarded from a common fund or equitable fund based either on the attorney's fees reasonably incurred and billed, *see Trustees v. Greenough,* 105 U.S. 527, 530-31, 537-38 (1882), or as a modest percentage of the fund, *see Central RR & Banking Co. v. Pettus,* 113 U.S. 116, 128 (1885)(cutting fee award from 10% to 5%).

The Eleventh Circuit, however, requires district courts to calculate common-fund fee awards *only* as a percentage of the fund, mandating that they do so using the 12-factor approach of *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir.1974), that this Court has repudiated as too subjective to cabin trial courts' discretion or even "to permit meaningful judicial review." *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 551-52 (2010).

The questions presented are:

1. Whether district courts may be required to use the inherently subjective and effectively unreviewable *Johnson* factors to determine common-fund fee awards despite *Perdue*'s rejection of the *Johnson*-factors approach.

2. Whether district courts may be required to calculate common-fund attorney's fees only as a percentage of the fund, or may instead award fees based on the attorney's lodestar as is permitted by Courts of Appeals other than the Eleventh Circuit and the District of Columbia Circuit.

3. Whether the Court of Appeals may mandate that district courts adopt a 25% "benchmark" for percent-of-fund attorney's fee awards.

PARTIES TO THE PROCEEDING

Petitioner Jenna Dickenson is a class member who timely appeared through counsel and objected in the District Court to the proposed class-action settlement, attorney's fees, and incentive award for the named plaintiff. She was the Interested-Party Appellant before the Court of Appeals.

Respondent Charles T. Johnson was the named Plaintiff and sole class representative in the District Court proceedings, and was Plaintiff-Appellee before the Court of Appeals.

Respondent NPAS Solutions, LLC ("NPAS") was the Defendant in the District Court proceedings and was Defendant-Appellee before the Court of Appeals.

LIST OF PROCEEDINGS

Charles T. Johnson v. NPAS Solutions, LLC, United States District Court for the Southern District of Florida, No. 9:17-cv-80393;

Charles T. Johnson v. NPAS Solutions, LLC, Eleventh Circuit No. 18-12344;

Charles T. Johnson, Petitioner v. Jenna Dickenson, Respondent, U.S. No. 22-389, petition for certiorari filed October 21, 2022;

Jenna Dickenson, Applicant v. Charles T. Johnson, et al., No. 22A343, application for extension of time to petition for certiorari, filed October 21, 2022 (extension granted to December 1, 2022).

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The decision of the Court of Appeals is published as *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244 (11th Cir.2020), and is reprinted at Pet.App. 34a-80a.

The Court of Appeals' order denying rehearing, along with a concurring opinion of Judge Newsom, and dissenting opinion of Judge Jill Pryor joined by Judges Wilson, Jordan, and Rosenbaum, is published as *Johnson v. NPAS Solutions,* 43 F.4th 1138 (11th Cir.2022), and is reprinted at Pet.App. 1a-33a.

The underlying decision of the District Court is unreported. It is reprinted at Pet.App. 81a-89a.

JURISDICTION

The decision and judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 17, 2020. Pet.App. 34a-80a.

The Court Appeals granted motions to extend the time for filing petitions for rehearing and for rehearing en banc, and timely rehearing petitions were filed on October 22, 2020. The Court of Appeals issued a published Order denying rehearing on August 3, 2022. Pet.App. 1a-33a. The Court of Appeals' mandate issued on October 25, 2022.

On October 26, 2022, Justice Thomas granted Dickenson an extension of time to December 1, 2022, in which to file her petition for a writ of certiorari. *Jenna Dickenson, Applicant v. Charles T. Johnson, et al.*, No. 22A343 (Oct. 26, 2022).

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

RULE INVOLVED

Federal Rule of Civil Procedure 23(h) governs the award of attorney's fees in class actions. It provides:

> (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).

Fed.R.Civ.P. 23(h).

STATEMENT OF THE CASE

This case was filed as a class action asserting claims under the Telephone Consumer Protection Act ("TCPA"). Pet.App. 104a (Complaint); Pet.App. 90a (Amended Complaint). The District Court's juris-

diction over a case asserting claims under the TCPA was conferred by 28 U.S.C. §1331. *See Mims v. Arrow Financial Services, LLC,* 565 U.S. 368, 371-72 (2012).

The TCPA prohibits unconsented phone calls placed to cell phones using an automatic telephone dialing system ("ATDS") or using an artificial or prerecorded voice. Section 227(b)(1)(A)(iii) makes it unlawful "to make any call" to a cell phone "(other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C. §227(b)(1)(A)(iii).

The statute provides a private right of action and imposes liability of $500 per violative call—trebled to $1,500 per call for willful (i.e., knowing or reckless) violators. *See* 47 U.S.C. §227(b)(3)(B) ($500 statutory damages for each violation); 47 U.S.C. §227(b)(3)(C) (permitting trebling, to $1,500 each for "willful" violations). Johnson's Amended Complaint asked for "statutory damages pursuant to 47 U.S.C. §227(b)(3) in an amount up to $1,500 per violation." Pet.App.101a ¶55(c).

Johnson alleged that Defendant NPAS Solutions, LLC ("NPAS")violated the TCPA both by using an ATDS to place calls to cell phones, and also by using an artificial or prerecorded voice in those calls. Pet.App. 94a-95a ¶¶23-25. He alleged that NPAS called his own cellular phone number "on, among other dates, February 27, 2017, March 3, 2017, March 7, 2017, and March 13, 2017," and that NPAS's "records show additional calls made by it to Plaintiff's cellular telephone number with an [ATDS] or an artificial or prerecorded voice, starting in January 2017." Pet.App. 93a ¶¶14-15 & n.6. The calls continued even after Johnson asked NPAS to stop. Pet.App. 94a ¶¶19-20.

Johnson sought to represent a class of persons who received similar calls on their cell phones, and NPAS itself conceded that 179,642 unique cellular telephone numbers fall within the class definition. Pet.App. 37a n.1, 40a, 84a. Assuming that 179,642 class members received but one violative phone call apiece, TCPA statutory damages at $500 to $1,500 per call ranged from a low of $89,821,000 for negligent violations to $269,463,000 if the violations were willful—which is to say, reckless. As many class members doubtless received multiple violative calls, just as Johnson did, the class's statutory damages might exceed a billion dollars.

Named Plaintiff Charles T. Johnson nonetheless agreed to settle and bar fellow class members' claims for just $1.432 million—which is less than two percent of the lowest statutory damages figure that would have been awarded had NPAS's violations been proved to be merely negligent, and each class member received but one violative call. Assuming a class of 179,642, which NPAS conceded, the $1.432 million settlement comes to just $7.97 apiece. Johnson agreed to the settlement, however, expecting to receive a bonus "service award" or "incentive award" of $6,000 for acting as the class representative who would compromise other class members' claims for less than $8 apiece.

Presenting nothing to indicate how many hours they had worked on the case or what their hourly billing rates might be, Johnson's attorneys requested 30% of the $1.432 million fund as attorney's fees. The District Court complied, awarding "Plaintiff's attorneys' fees in the amount of 30 percent of the Settlement Fund," and directing that the Named Plaintiff "Charles T. Johnson will receive $6,000 as acknowledgement of his role in prosecuting this case on behalf of the Class Members." Pet.App. 86a (Final Order). The District Court pro-

vided no reasoned explanation for approving the settlement, or for why 30% of the fund constituted a reasonable fee award under the circumstances. *See* Pet.App. 81a-89a (Final Order).

Class member Jenna Dickenson, who had appeared through counsel and objected before the District Court, appealed to the Eleventh Circuit, which held that "service award" or "incentive award" payments to representative plaintiffs are illegal under this Court's foundational common-fund decisions, *Trustees v. Greenough,* 105 U.S. 527, 537-38 (1882), and *Central RR & Banking Co. v. Pettus,* 113 U.S. 116, 122 (1885). *See* Pet.App. 35a, 51a-62a, 69a.

The panel also held that the District Court's rulings approving the settlement and attorney's fee award provided insufficient explanations to permit meaningful appellate review. Pet.App. 63a-69a.

But it rejected

> Dickenson's argument that the district court's fee award is unlawful because the Supreme Court's decision in *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542 (2010), overruled *Camden I Condo-minium Ass'n v. Dunkle,* 946 F.2d 768 (11th Cir.1991), which instructs courts to calculate a common-fund award as a percentage of the fund using a 12-factor test.

Pet.App. 65a n.14. The Court of Appeals held that "*Camden I,* therefore remains good law, and the district court should apply it in the first instance on remand." *Id.*

The Eleventh Circuit accordingly remanded to the District Court, to apply *Camden I,* which requires district courts to calculate common-fund attorney's fees as a percentage of the fund rather than based on

the reasonable value of the services rendered, and which mandates that the percentage be determined using the twelve "*Johnson* factors" from *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir.1974). *See Camden I,* 946 F.2d at 775; *see also, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.,* 999 F.3d 1247, 1278 (11th Cir.2021)("The percentage method requires a district court to consider a number of relevant factors called the *Johnson* factors in order to determine if the requested percentage is reasonable."); *In re Home Depot Inc.,* 931 F.3d 1065, 1090 (11th Cir.2019)(citing *Camden I*: "With the percentage method, courts use the *Johnson* factors to help determine what percentage of the fund to award to counsel."); *Waters v. International Precious Metals Corp.,* 190 F.3d 1291, 1294 & n.5 (11th Cir.1999) (noting *Camden I*'s requirement that district courts use "the factors set forth in *Johnson*" to determine percent-of-fund fee awards).

Both Johnson and Dickenson filed petitions for rehearing, with Johnson seeking en banc rehearing on whether incentive awards are prohibited by this Court's decisions in *Greenough* and *Pettus,* and Dickenson seeking en banc rehearing on whether the Eleventh Circuit's *Camden I* decision, mandating percent-of-fund attorney's fees based on the *Johnson*-factor analysis violates this Court's precedents—including *Perdue,* which specifically repudiates the *Johnson* factors.

The Eleventh Circuit denied rehearing on September 17, 2022, over the dissent of Judge Jill Pryor, joined by Judges Wilson, Jordon, and Rosenbaum, who urged en banc rehearing on the incentive-awards issue. Pet.App. 1a-33a.

On October 21, 2022, Johnson filed a petition for a writ of certiorari, noting that both the Second Circuit and the Ninth Circuit have rejected the Eleventh Circuit's conclusion that this Court's decisions in *Greenough* and *Pettus* preclude incentive awards compensating named plaintiffs for personal service as representative plaintiffs. *See Johnson v. Dickenson,* No. 22-389 (Petition for Certiorari); *compare* Pet.App. 51a ("Supreme Court precedent prohibits incentive awards") *with Hyland v. Navient Corp.,* 48 F.4th 110, 123-24 (2d Cir.2022)(rejecting that position), *In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 785-87 (9th Cir.2022)(same).

On October 26, 2022, Justice Thomas granted Dickenson an extension of time to December 1, 2022, in which to file her petition for a writ of certiorari. *Jenna Dickenson, Applicant v. Charles T. Johnson, et al.*, No. 22A343 (Oct. 26, 2022).

She now files this petition for certiorari seeking this Court's review of the Eleventh Circuit's holding that attorney's fees must be determined as a percentage of the common fund using the *Johnson* factors that this Court repudiated in *Perdue,* 559 U.S. at 551-52.

REASONS FOR GRANTING THE WRIT

"Since the decisions in *Trustees v. Greenough,* 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885), this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980); *accord, e.g., US Airways, Inc. v. McCutchen,* 569 U.S. 88, 104 (2013); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 257-58 (1975). The leading decision emphasized

that "allowances of this kind, if made with moderation and a jealous regard to the rights of those who are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice." *Greenough,* 105 U.S. at 536-37.

This Court's foundational common-fund precedents have approved of awarding attorney's fees from a common-fund recovery calculated either on the basis of a successful litigant's counsel's actual reasonable billings, as in *Greenough,* 105 U.S. at 530-31, 537-38, or as a modest percentage of the fund, as in *Pettus,* 113 U.S. at 128 (cutting an unreasonable 10% award to 5%).

This Court's subsequent decisions defining the "reasonable attorney's fees" that may be awarded to prevailing plaintiffs under fee-shifting statutes have, moreover, held that courts are bound to apply a strong presumption that the lawyers' unenhanced lodestar—calculated by multiplying hours reasonably expended by the attorneys' reasonable hourly rates—constitutes the reasonable attorney's fee award, sufficient to attract and compensate competent counsel. *See, e.g., Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 552-3 (2010); *City of Burlington v. Dague,* 505 U.S. 557, 562 (1992); *Blum v. Stenson,* 465 U.S. 886, 896-97 (1984).

Perdue, moreover, directly repudiates the twelve so-called "*Johnson* factors," that some lower courts have used instead of the unenhanced lodestar to determine "a reasonable attorney's fee."[1] *Perdue,* which involved

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[1] As this Court observed in *Perdue,* 559 U.S. at 551 n.4:

> These factors were: "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by

an attorney's fee award in a contingent-fee class action that had settled producing a consent decree but no common fund, holds that "unlike the *Johnson* approach, the lodestar calculation is 'objective,'" and that it "thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results." *Perdue,* 559 U.S. at 551-52.

The Eleventh Circuit's approach to attorney's fees in common-fund cases does exactly the opposite. By requiring district courts to award attorney's fees as a percentage of the common fund, rather than based on the reasonable value of the services performed, and by demanding that district courts determine common-fund attorney's fees using the expressly disfavored *Johnson* factors, the Eleventh Circuit produces "exactly the sort of unguided and freewheeling choice—and the disparate results that come with it—that [the Supreme] Court has sought to expunge" from attorney's fee determinations. *Murphy v. Smith,* 138 S.Ct. 784, 789-90 (2018). This Court's intervention is

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> the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases."

Perdue, 559 U.S. at 551 n.4 (citation omitted); *see also, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1278 n.22 (11th Cir.2021); *Camden I Condo. Ass'n, Inc. v. Dunkle,* 946 F.2d 768, 772 (11th Cir.1991).

needed to restore objectivity and fairness to Eleventh Circuit law on common-fund attorney's fees.

The Eleventh Circuit held in this case that the District Court on remand must follow *Camden I*, *see* Pet.App. 65 n.14, which requires district courts to award common-fund attorney's fees based not on the actual value of the services rendered, or the amount needed to attract and fairly compensate competent counsel, but rather as percentage of the fund determined using the twelve *Johnson* factors. *See Camden I,* 946 F.2d at 775; *see also, e.g., Equifax,* 999 F.3d at 1278; *Home Depot,* 931 F.3d at 1090; *Waters,* 190 F.3d at 1294 & n.5.

Although this Court had already questioned the *Johnson* factors' utility in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 562-63 (1986), the *Camden I* court ruled that "the *Johnson* factors continue to be appropriately used in evaluating, setting, and reviewing the percentage fee awards in common fund cases," *Camden I,* 946 F.2d at 775, a holding to which the Eleventh Circuit has stubbornly adhered ever since.[2]

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[2] *See, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.,* 999 F.3d 1247, 1278 (11th Cir.2021)("The percentage method requires a district court to consider a number of relevant factors called the *Johnson* factors in order to determine if the requested percentage is reasonable."); *Waters v. International Precious Metals Corp.,* 190 F.3d 1291, 1294-95 & n.5 (11th Cir.1999)(district courts must set common-fund fee awards "using the factors set forth in *Johnson v. Georgia Highway Express*"); *see also Amorin v. Taishan Gypsum Co.,* 861 F.App'x 730, 735–36 (11th Cir.2021)(affirming 45% fee award based on the district court's *Johnson* factors analysis); *Dikeman v. Progressive Exp. Ins. Co.,* 312 F.App'x 168, 172 (11th Cir.2008) ("Whether the district court uses the lodestar or the common-fund method, the district court should apply the twelve factors

Indeed, the Eleventh Circuit's opinion in this case expressly reaffirms *Camden I's* directive, "which instructs courts to calculate a common-fund award as a percentage of the fund using a 12-factor test." Pet.App. 65a n.14. The Eleventh Circuit holds once again that *Camden I* "remains good law, and the district court should apply it in the first instance on remand." *Id.*

But it is law that conflicts both with this Court's precedents, and with the law of other circuits. Attorney's fees are a critical issue in class-action litigation, and uniform rules governing their calculation are a matter of overriding national importance.

I. Review is Needed Because the Eleventh Circuit Insists that District Courts Apply the *Johnson* Factors Despite this Court's Repudiation of that Approach as too Subjective Either to Cabin District Judges' Discretion or Even to Permit Meaningful Appellate Review

This Court's review is needed because the Eleventh Circuit continues to require district courts to use the *Johnson* factors to set attorney's fees, despite this Court's holding in *Perdue,* 559 U.S. at 550-52, that the *Johnson* approach is too subjective to guide district judges' discretion, or even to permit meaningful appellate review. Despite this Court's clear repudiation of the *Johnson* factors, the Eleventh Circuit continues to require their application—both in

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listed in *Johnson v. Georgia Highway Express* ... to determine the appropriate statutory fee or the percentage to be utilized.").

statutory fee-shifting cases,[3] and in common-fund cases such as this.[4]

This Court's disapproval of the *Johnson* factors in *Perdue* could not have been clearer. The underlying civil-rights claims were covered by a fee-shifting statute authorizing a prevailing party to recover "a reasonable attorney's fee." *Perdue,* 559 U.S. at 550. Although the case had settled, *Perdue* focused on the meaning of "a reasonable attorney's fee." It held that awarding attorneys' unenhanced lodestars ordinarily is enough to attract and compensate capable counsel to take meritorious cases. *Id.* at 552-53. It accordingly directed lower courts to honor a "strong presumption that the lodestar is sufficient" whenever courts are empowered to award a reasonable attorney's fee. *Id.* at 546, 552.

This Court specifically repudiated the alternative approach of *Johnson v. Georgia Highway Express,* Inc., 488 F.2d 714, 717-719 (5th Cir.1974), "which listed 12 factors that a court should consider in determining a reasonable fee," because it "'gave very little actual

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[3] *See, e.g., In re Horne,* 876 F.3d 1076, 1084 (11th Cir.2017); *Walker v. Iron Sushi LLC,* 752 F.App'x 910, 916 (11th Cir. 2018).

[4] Pet.App. 65a n.14; *see also, e.g., Equifax,* 999 F.3d at 1278 ("The percentage method requires a district court to consider a number of relevant factors called the *Johnson* factors in order to determine if the requested percentage is reasonable."); *Waters,* 1294-95 & n.5 (courts must set common-fund fee award "using the factors set forth in *Johnson v. Georgia Highway Express*"); *Dikeman,* 312 F.App'x at 172 ("Whether the district court uses the lodestar or the common-fund method, the district court should apply the twelve factors listed in *Johnson v. Georgia Highway Express* ... to determine the appropriate statutory fee or the percentage to be utilized.").

guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results.'" *Perdue,* 559 U.S. at 550-51 (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 563 (1986)); *cf. Murphy,* 138 S.Ct. at 789-90.

Most critically here, *Perdue* holds that "unlike the *Johnson* approach, the lodestar calculation is 'objective,'" and that it "thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results." *Perdue,* 559 U.S. at 551-52 (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983)). The *Johnson* factors approach employed by the Eleventh Circuit does none of those things. *See id.* Rather, it engenders "exactly the sort of unguided and freewheeling choice—and the disparate results that come with it—that this Court has sought to expunge" from attorney's fee determinations. *Murphy,* 138 S.Ct. at 790.

Even before *Perdue*—indeed, even before the *Camden I* panel opinion required their use in common-fund cases—the Eleventh Circuit had recognized: "The Supreme Court seems to feel that the twelve factors approach of *Johnson* creates a theoretical attorney's fee based on subjective evaluations." *Norman v. Housing Authority,* 836 F.2d 1292, 1299 (11th Cir. 1988) (citing *Delaware Valley,* 478 U.S. at 563). The *Camden I* panel ought not to have adopted an already discredited standard. After this Court's repudiation in *Perdue* the Eleventh Circuit's *Johnson* factors methodology surely should have been jettisoned.

Yet the Eleventh Circuit's opinion in this case retains it, baselessly hypothesizing that *Perdue* does not apply to common-fund fees:

> As we recently explained, *Perdue* didn't abrogate *Camden I*. *See Home Depot,* 931 F.3d at 1084–85 (stating that "[t]here is no question that the Supreme Court precedents stretching from *Hensley* to *Perdue* are specific to fee-shifting statutes" and that "Supreme Court precedent requiring the use of the lodestar method in statutory fee-shifting cases does not apply to common-fund cases"). *Camden I* therefore remains good law, and the district court should apply it in the first instance on remand.

Pet.App. 65a n.14.

That distinction is unsupportable, and this Court has never endorsed it. *Perdue*'s holding that the *Johnson* factors are too subjective to "cabin[] the discretion of trial judges" or to "permit[] meaningful judicial review" of a fee award, 559 U.S. at 552, cannot sensibly be limited strictly to awards under fee-shifting statutes. If the *Johnson* factors do not provide an objective and meaningfully reviewable standard for awarding a reasonable fee, then they are equally useless whether the fee is taken from an opposing party under a fee-shifting statute, or from a common fund belonging to absent class members. There is no principled rationale for continuing to use the *Johnson* factors to determine any fee award, common-fund or otherwise.

This Court's review thus is needed to firmly jettison the *Johnson* factors, once and for all, from class-action fee awards.

II. *Camden I*'s Requirement that Common-Fund Attorney's Fees be Calculated and Awarded Only as A Percentage of the Common Fund Conflicts with this Court's Decision in *Greenough,* and with the Law of Other Circuits

Camden I's holding that common-fund attorney's fees must always be awarded as a percentage of the fund also conflicts with this Court's holding in *Greenough,* which approved of a common-fund attorney's fee award based not on a percentage of the fund, but rather on the attorney's fees actually incurred and paid. *See Greenough,* 105 U.S. at 530 (citing an itemized "statement of expenditures made by Vose in the cause ... being for fees of solicitors and counsel, costs of court, and sundry small incidental items"); *see also Trustees v. Greenough,* [Oct. Term 1881 No. 601], Transcript of Record at 711-23, 770-78 (original) 228-32, 247-56 (print)(1881)(listing the itemized expenditures).

This Court's next decision on common-fund fee awards permitted them also to be awarded as a modest percentage of the fund. *See Pettus,* 113 U.S. at 128. *Pettus* cut an attorney's fee award from an unreasonable 10% of the fund to just 5%. *Id.* But *Pettus* did not overrule *Greenough*'s holding that common fund fees may be awarded on the basis of the attorney's fees actually incurred and billed, rather than as a percentage of the fund. And the Eleventh Circuit is not entitled to do so. *See Bosse v. Oklahoma,* 137 S.Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477, 484 (1989).

Camden I's holding has always rested on the false premise that "every Supreme Court case addressing the computation of a common fund fee award has

determined such fees on a percentage of the fund basis." *Camden I,* 946 F.2d at 773. That is wrong: *Greenough* itself involved itemized disbursements for attorneys' fees, and not a percent-of-fund fee award. *See Greenough*, 105 U.S. at 530. *Camden I* also presented *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161 (1939), and *Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980), as Supreme Court decisions determining fees as a percentage of the fund. *See Camden I,* 946 F.3d at 773. In truth, neither did.[5]

Only two circuits—the Eleventh Circuit and the District of Columbia Circuit—have held, contrary to this Court's holding in *Greenough,* that attorneys' fees in common fund-cases must be awarded only as a percent-of-the-fund. *See Camden I,* 946 F.2d at 774 (11th Cir.1991); *Swedish Hospital Corp. v. Shalala,* 1 F.3d 1261, 1265-71 (D.C. Cir.1993).

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[5] The record in *Sprague* reveals that the petitioner sought reimbursement only for fees actually billed by, and paid to, the lawyers. *See Sprague v. Ticonic Nat'l Bank,* 28 F.Supp. 229, 231 (D.Me. 1939), *aff'd in relevant part and rev'd in part on other grounds,* 110 F.2d 174, 178 (1st Cir.1940)("The decree of the District Court is affirmed insofar as it allows the original petition for reimbursement in the amount of $1,214.51."). In *Boeing,* moreover, this Court reaffirmed *Greenough*'s common-fund doctrine without saying a word for percent-of-fund awards, leaving the district court to apply lodestar methodology on remand. *See Van Gemert v. Boeing Co.,* 516 F.Supp. 412, 414 (S.D.N.Y. 1981)(employing lodestar methodology rather than percent-of-fund to calculate attorneys' fees: "'The starting point of every fee award ... must be a calculation of the attorney[s'] services in terms of the time [they have] expended on the case.'")(quoting *City of Detroit v. Grinnell,* 495 F.2d 448, 470 (2d Cir.1974)).

Other circuits have expressly rejected *Camden I*'s holding, and permit common-fund fee awards based on attorneys' lodestars. *See, e.g., Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 50 (2d Cir.2000)(refusing to follow "the District of Columbia and Eleventh Circuits [which] mandate the exclusive use of the percentage approach in common fund cases"); *Gottlieb v. Barry,* 43 F.3d 474, 483 (10th Cir.1994)(rejecting "two cited cases, *Swedish Hosp. Corp.* and *Camden I Condominium Ass'n,* [as] the only two circuit decisions explicitly rejecting the use of the lodestar method in common fund cases"); *Florin v. Nationsbank of Georgia, NA,* 34 F.3d 560, 565-66 (7th Cir.1994) (similarly rejecting *Swedish Hospital* and *Camden I*); *In re WPPSS Litig.,* 19 F.3d 1291, 1295 (9th Cir.1994) ("Class Counsel urge us to follow the Eleventh Circuit's lead in mandating the use of the percentage method in common fund cases. *See Camden I* … Because the law in our circuit is settled on this issue, we are not at liberty to follow the Eleventh Circuit. We instead apply the law of our circuit that the district court has discretion to use either method in common fund cases."); *Rawlings v. Prudential-Bache Properties, Inc.,* 9 F.3d 513, 515-16 (6th Cir.1993)(also declining to follow *Camden I* and *Swedish Hospital*).

A leading treatise on class actions summarizes: "Eight of the 12 circuits—the First, Second, Third, Fifth, Sixth, Eighth, Ninth, and Tenth—have explicitly held that their district courts have discretion as to whether to use a percentage or lodestar method." William B. Rubenstein, *Newberg on Class Actions* §15:67, at 228 (5th ed. 2015). "Two of the 12 circuits—the Eleventh and the District of Columbia—both require district courts to use the percentage method." *Id.* (citing *Camden I* and *Swedish Hospital*).

Yet the Eleventh Circuit in this case regards *Camden I* as binding, against this Court's contrary authority, and in conflict with the law of the other circuits. This Court's review is needed to conform Eleventh Circuit law with this Court's decisions in *Greenough* and *Perdue,* and to resolve a well-developed and deeply entrenched conflict among the circuits. This case presents an ideal vehicle to resolve that conflict.

III. The Eleventh Circuit's 25% Benchmark for Common-Fund Fee Awards Has Been Rejected by the Second Circuit and Far Exceeds What this Court has Deemed Permissible in Common-Fund Cases

Camden I also established "25%, as a 'benchmark' percentage fee award" for common-fund cases. *Camden I,* 946 F.2d at 775; *see Faught,* 668 F.3d at 1243 (recognizing a "25% benchmark" and analyzing fee award against "the 25% fee that this circuit has said is the benchmark"). Only the Ninth Circuit has joined the Eleventh Circuit in mandating a 25% "benchmark" fee as "a per se equitable rule" when common-fund attorney's fees are awarded as a percentage of the fund.[6] This places the Ninth and Eleventh Circuits in

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[6] *Fritsch v. Swift Transp. Co.,* 899 F.3d 785, 796 (9th Cir.2018); *see, e.g., Stanger v. China Electric Motor, Inc.,* 812 F.3d 734, 738 (9th Cir.2016)("The Ninth Circuit has set 25% of the fund as a 'benchmark' award under the percentage-of-fund method.")*; In re Bluetooth Headset Prod. Liab. Litig.,* 654 F.3d 935, 942 (9th Cir.2011)(citing "25% of the fund as the 'benchmark' for a reasonable fee award" and requiring an "adequate explanation in the record of any 'special circumstances' justifying a departure" from the benchmark); *In re Coordinated Pretrial Proceedings,* 109 F. 3d 602, 607 (9th Cir.1997)("'the district court should take note that 25 percent

square conflict with the Second Circuit which, "disturbed by the essential notion of a benchmark," has rejected the 25% benchmark as "an all too tempting substitute for searching assessment that should properly be performed in each case." *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 52 (2d Cir.2000). "Starting an analysis with a benchmark could easily lead to routine windfalls." *Id.*

The 25% benchmark also is at odds with this Court's decisions finding far smaller percentage awards to be excessive—and cutting them.

Pettus, for example, slashed a common-fund award from ten percent to just five percent of the fund. The Court "consider[ed] whether the sum allowed appellees was too great. We think it was. The decree gave them an amount equal to ten per cent." *Pettus,* 113 U.S. at 128. "One-half the sum allowed was, under all the circumstances, sufficient." *Id.*; *see also Harrison v. Perea,* 168 U.S. 311, 325 (1897)(approving reduction of a $5,000 fee award (or about 14% of an equitable fund) to just 10% of the fund).

In *United States v. Equitable Trust Co.,* 283 U.S. 738 (1931), this Court again rejected the notion that counsel whose efforts secure a fund may receive more than necessary to compensate them adequately for their time. The Second Circuit already had rejected the district court's conclusion that counsel were entitled to a quarter to a third of the fund, cutting the attorney's fee award to just $100,000 (about 15% of the fund) and warning that "[t]he allowance is a payment for legal services, not a speculative interest in a lawsuit." *Barnett v. Equitable Trust Co.,* 34 F.2d 916, 919 (2d

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has been a proper benchmark figure.'")(quoting *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 270 (9th Cir.1989)).

Cir.1929)(Learned Hand). The attorneys then complained to this Court that "from a percentage standpoint, the allowance of $100,000 is but slightly over fifteen per cent," and that "never yet have counsel been cut down to such a low percentage in any contested case taken upon a contingent basis." Brief for Respondents to Whom Allowances Were Made, *United States v. Equitable Trust,* 283 U.S. 738, [Oct. Term 1929 No. 530], at 55-56 (filed April 16, 1930). But this Court found even "the allowance of $100,000 unreasonably high, and that to bring it within the standard of reasonableness it should be reduced to $50,000," which was about $7^1/_2$% of the fund. *Equitable Trust,* 283 U.S. at 746.

The 25% benchmark mandated by the Ninth and Eleventh Circuits is out of line with this Court's precedents, and places both of those circuits in direct conflict with the Second Circuit—which rejects the very notion of a benchmark. The conflict is well-established and entrenched, and this case presents the perfect opportunity to resolve it.

CONCLUSION

This Court should grant certiorari to determine the standards properly applicable to common-fund attorneys fee awards in class actions under Rule 23.

Respectfully submitted,

ERIC ALAN ISAACSON
Counsel of Record
LAW OFFICE OF
ERIC ALAN ISAACSON
6580 Avenida Mirola
La Jolla, CA 92037-6231

Telephone: (858) 263-9581
ericalanisaacson@icloud.com

C. BENJAMIN NUTLEY
ATTORNEY AT LAW
65-1279 Kawaihae Rd.,
Suite 203
Kamuela, HI 96743-8444

JOHN W. DAVIS
LAW OFFICE OF JOHN W. DAVIS
3030 N. Rocky Point Dr. W.,
Suite 150
Tampa, FL 33607

Attorneys for Petitioner
Jenna Dickenson

December 1, 2022

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12344

CHARLES T. JOHNSON,
on behalf of himself and others
similarly situated,

Plaintiff-Appellee,

JENNA DICKENSON,

Interested Party-Appellant,

versus

NPAS SOLUTIONS, LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:17-cv-80393-RLR

Before WILLIAM PRYOR, Chief Judge, WILSON, JORDAN,
ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK,
LAGOA, and BRASHER, Circuit Judges.

BY THE COURT:

A petition for rehearing having been filed and a member of this Court in active service having requested a poll on whether this case should be reheard by the Court sitting en banc, and a majority of the judges in active service on this Court having voted against granting rehearing en banc, it is ORDERED that this case will not be heard en banc.

NEWSOM, J., Concurring

NEWSOM, Circuit Judge, concurring in the denial of rehearing en banc:

It has become customary for the author of a panel opinion to file a "concurral" defending his or her handiwork against a colleague's "dissental" when the full Court declines to rehear a case en banc. Ordinarily, I'd be inclined to do just that. (Perhaps it's a character flaw, but giving others the last word isn't always my strong suit. *See, e.g., Keohane v. Florida Dep't of Corr. Sec'y*, 981 F.3d 994, 996–1003 (11th Cir. 2020).) This case, though, has been pending too long already. The panel issued its

decision in September 2020—almost two full years ago now. The parties and the bar are entitled to closure. Given the circumstances, I'm content to let the panel opinion speak for itself.

JILL PRYOR, J., Dissenting

JILL PRYOR, Circuit Judge, joined by WILSON, JORDAN, and
ROSENBAUM, Circuit Judges, dissenting from the denial of reahearing en banc:

In the panel decision in this case, the majority held that two Supreme Court cases decided in the 1880s prohibit district courts from approving, under any circumstances, incentive or service awards for class representatives in class action settlement agreements. *See Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1255 (11th Cir. 2020). According to the majority opinion, these two cases dictate that such awards—despite the parties having agreed to them and district courts having approved them as reasonable and fair to the entire class under Federal Rule of Civil Procedure 23—are simply barred. *See Trustees v. Greenough*, 105 U.S. 527 (1881); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).

By holding that incentive awards are unlawful per se, the majority opinion broke with decisions from this and every other circuit allowing these awards when properly approved under the strictures of Rule 23. Indeed, the majority opinion adopted a position that had never been embraced by any court. Of course, the mere fact that an argument has never been accepted before does not mean it is wrong. One circuit has expressly rejected the novel Greenough-Pettus argument,

however,[1] and since the majority opinion in this case issued, every court outside this circuit to have considered it has declined to follow it.[2] And no wonder. In *Greenough* and *Pettus*, decided long before modern class actions were born, the Supreme Court applied equitable trust principles in the absence of any authority for

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[1] *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019).

[2] *See Knox v. John Varvatos Enters. Inc.*, 520 F. Supp. 3d 331, 349 (S.D.N.Y. 2021); *Somogyi v. Freedom Mortg. Corp.*, 495 F. Supp. 3d 337, 353–54 (D.N.J. 2020); *Halcom v. Genworth Life Ins. Co.*, No. 3:21-cv-19, 2022 WL 2317435, at *10, *13 (E.D. Va. June 28, 2022); *Grace v. Apple, Inc.*, No. 17-cv-00551, 2021 WL 1222193, at *7 (N.D. Cal. Mar. 31, 2021); *In re Apple Inc. Device Performance Litig.*, No. 5:18-md-02827, 2021 WL 1022866, at *11 (N.D. Cal. Mar. 17, 2021); *Wickens v. Thyssenkrupp Crankshaft Co., LLC*, No. 1:19-cv-6100, 2021 WL 267852, at *2 (N.D. Ill. Jan 26, 2021); *Vogt v. State Farm Life Ins. Co.*, No. 2:16-cv-04170, 2021 WL 247958, at *3–4 (W.D. Mo. Jan. 25, 2021); *Wood v. Saroj & Manju Invs. Phila. LLC*, No. 19-cv-2820, 2020 WL 7711409, at *5 n.8 (E.D. Penn. Dec. 28, 2020); *Izor v. Abacus Data Sys., Inc.*, No. 19-cv-01057, 2020 WL 12597674, at *8 (N.D. Cal. Dec. 21, 2020); *Hunter v. CC Gaming, LLC*, No. 19-cv-01979, 2020 WL 13444208, at *7–8 (D. Colo. Dec. 16, 2020); *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-02420, 2020 WL 7264559, at *24 n.24 (N.D. Cal. Dec. 10, 2020); see also *Hart v. BHH, LLC*, No. 15-cv-4804, 2020 WL 5645984, at *5 n.2 (S.D.N.Y. Sept. 22, 2020) (noting that Second Circuit precedent prevented the court from following *Johnson* but calling on Congress to address the validity of incentive awards).

compensating creditors who through litigation benefitted a common fund. Operating in that now-superseded legal landscape, the Court rejected compensation for a creditor's expenses that were—as the panel majority opinion candidly acknowledged—only "roughly analogous" to today's incentive awards approved under Rule 23. *Johnson*, 975 F.3d at 1257. So it seems to me more than a stretch to hold that these cases prohibit incentive awards in all cases, no matter that the parties and the district court agree the awards are fair and appropriate.

I agree with Judge Martin's well-reasoned dissent to the panel opinion that the majority was wrong. The fairness-based standard for evaluating disparate settlement distributions between representative plaintiffs and class members set forth in *Holmes v. Continental Can Company*, 706 F.2d 1144 (11th Cir. 1983), which panels of this court have continually applied in reviewing class action settlements, does not conflict with Supreme Court precedent and should continue to govern our analysis of incentive awards authorized by class action settlement agreements. *See Johnson*, 975 F.3d at 1264 (Martin, J., concurring in part and dissenting in part).

The stakes are high. If the panel majority opinion was wrong that *Greenough* and *Pettus* compel its holding, then it far over-reached by banning all incentive awards in class actions. As it stands, the panel majority's opinion threatens the very viability of class actions in this circuit. This is particularly so in small-dollar-value class actions, where incentive awards help to encourage potential plaintiffs to serve as class representatives despite having to take on significant additional responsibilities while receiving the same modest recovery as other class members. I respectfully dis-sent from the denial of

rehearing en banc to correct the panel majority opinion's grave error.

I. BACKGROUND

NPAS Solutions, a company that collects medical debts, repeatedly robocalled[3] Charles Johnson on his cell phone, trying to collect a debt. Unfortunately, NPAS was trying to collect the debt from a person Mr. Johnson did not know. Again and again, Mr. Johnson informed NPAS that it was calling the wrong number and asked it to stop calling. Yet NPAS persisted with its collection calls.

Fed up, Mr. Johnson took the initiative to sue the company, on behalf of himself and a putative class of similarly situated individuals, alleging violations of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. Mr. Johnson hired legal counsel with significant experience in TCPA class action litigation to investigate his and the other class members' claims. No one disputes that after initiating the suit, Mr. Johnson was "actively involved in [the] case throughout the proceedings." Doc. 44-1 at 14.[4] For example, he spoke frequently with his attorneys, read and approved documents before his attorneys filed them, and supplied information in response to NPAS's discovery requests.

NPAS agreed to settle the claims with Mr. Johnson and the putative class. The settlement agreement required NPAS to pay $1.432 million into a

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[3] "Robocalling" means calling using an automatic dialing system and an artificial prerecorded voice.

[4] "Doc." numbers refer to the district court's docket entries.

settlement fund to compensate participating class members. Under the terms of the agreement, Mr. Johnson would receive $6,000 from the fund for serving as class representative. The remainder of the fund—the other 99.58 percent—minus the plaintiffs' attorney's fees and costs, would be distributed equally among the participating class members. The parties sub-mitted the proposed settlement agreement to the district court for preliminary approval under Rule 23, and the court gave its approval. At the same time, the district court set a deadline for any class member to file a claim for recovery or object to the settlement agreement.

More than 9,500 class members submitted claims for recovery, resulting in an estimated recovery of approximately $80 per class member. No class member opted out. Only one class member, Jenna Dickenson, objected to the settlement agreement. Among other objections, she argued that the Supreme Court's decisions in *Greenough* and *Pettus* established binding precedent that prohibited the district court from approving the agreed-upon incentive award to Mr. Johnson. The district court overruled the objections and approved the settlement, concluding that it was "in all respects fundamentally fair, reasonable, adequate, and in the best interest of the class members."[5] Doc. 53 at 4. Ms. Dickenson then appealed.

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[5] Although the district court did not include this calculation in its order, I note that the incentive award of $6,000 to Mr. Johnson, divided by the approximate number of class members who submitted claims (9,500), would have amounted to $0.63 per class member.

On appeal, the panel majority opinion reversed the incentive award portion of the district court's order approving the settlement. Despite acknowledging that incentive awards were "commonplace" in modern class action litigation, the panel majority opinion concluded that the district court lacked the power to ap-prove the $6,000 award to Mr. Johnson in the settlement agreement. *Johnson*, 975 F.3d at 1255–61. The panel majority opinion agreed with Ms. Dickenson that Greenough and Pettus prohibit incentive awards included in class action settlement agreements. *Id.* at 1260. According to the panel majority opinion, for class representatives to receive incentive awards, either the Supreme Court must overrule its decisions in *Greenough* and *Pettus* or else the "Rules Committee or Congress" would need to "amend Rule 23 or to provide for incentive awards by statute." *Id.* at 1260.

II. DISCUSSION

The panel majority opinion misread *Greenough* and *Pettus* to impose a categorical bar on incentive awards for class representatives in class actions. Given the holding's significance to the future of class action litigation[6], I disagree with the decision of a majority of my colleagues not to rehear this case en banc.

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[6] According to data from one prominent class action scholar, courts approved incentive awards in 93.4% of consumer class actions between 2006 and 2011 and in 71.3% of all class actions during that same time period. 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 17:7 (6th ed., June 2022 update).

To explain my disagreement, I begin with a description of the Supreme Court's decisions in Greenough and Pettus. I then ex-plain how the panel majority opinion incorrectly interpreted these cases to forbid all incentive awards. Next, I discuss how, in arriving at the conclusion that these two nineteenth century cases were on-point precedent, the majority opinion plucked Greenough and Pettus out of their historical context and ignored several decades of law developing incentive awards within class action settlements under Rule 23, as well as Congress's and the Supreme Court's in-action on such awards despite intermittent review. I conclude with the real-world implications of the panel majority opinion's holding.

A. *Greenough* and *Pettus* Were Products of and Limited to Their Historical Circumstances, Which Pre-dated Rule 23 Class Actions.

The Supreme Court's decisions in *Greenough* and *Pettus* addressed then-unanswered questions about litigation benefitting a common fund before the Supreme Court and the Advisory Committee on Civil Rules created a new form of action and rules answering those very questions. As I explain, the Supreme Court's decision in *Greenough*[7] arose from the fact that, at the time, no existing authority permitted a creditor-plaintiff who was instrumental in preserving a common fund for the benefit of other creditors to receive compensation from that fund after successfully preserving it. So the Court had to rely

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[7] As the panel majority opinion pointed out, "*Pettus* is significant principally as a reiteration of the dichotomy drawn in *Greenough*." *Jones*, 975 F.3d at 1257. Thus, I focus on *Greenough*.

on trust and equity principles in defining what compensation was appropriate.

The plaintiff in *Greenough* was a bondholder who sought attorneys' fees and litigation expenses as well as fees for personal services and travel expenses after suing to preserve assets securing bonds owned by himself and others. *Greenough*, 105 U.S. at 530–31. The state of Florida had conveyed several million acres of land to a fund held in a trust as security for bonds issued by the Florida Railroad Company. *Id.* at 528. The bonds' returns depended on the trustees' management of the property held by the fund. *Id.* Francis Vose, one of the bondholders, brought on behalf of himself and other bondholders a lawsuit in equity against the trustees of the fund. *Id.* He alleged that the trustees were selling the fund's land at discounted prices, which harmed the bondholders by diminishing the value of the security for their bonds. *Id.* at 528–29. He sought to set aside earlier land sales as fraudulent conveyances, to enjoin the trustees from selling land in the future, and to appoint a receiver to manage the fund. *Id.* at 529.

Ultimately, after years of litigation, Vose was successful. *Id.* A receiver was appointed, "a large amount of the trust fund was secured and saved," "a considerable amount of money" was realized from the proper sale of the land, and the railroad made payments to Vose and other bondholders to make them whole. *Id.*

After winning the case, Vose sought from the district court an "an allowance out of the fund for his expenses and services." *Id.* A court-appointed special master recommended awarding him attorneys' fees and fees for other "necessary expenditures," such as "sundry

expenses" for "copying records and the like." *Id.* at 530, 531. In addition, the special master recommended granting Vose "an allowance of $2,500 a year for ten years" for his "peculiar and great personal services," along with nearly $10,000 in interest and almost $15,000 for his hotel and transportation expenses incurred while prosecuting the case. *Id.* The district court approved the special master's recommendations. Id. at 531.

On appeal, the Supreme Court affirmed some components of Vose's award but not others. The Court allowed Vose to retain the money he received for "his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund." *Id.* at 537. Vose could recover these expenses, the Court reasoned, because it was "a general principle that a trust estate must bear the expenses of its administration." *Id.* at 532. Citing cases from state and English courts, the Supreme Court concluded that "sufficient authority" permitted compensating Vose for his actions to prevent the destruction of a trust. Id. at 532–34.

But the Supreme Court vacated Vose's award for collateral expenses—the payments amounting to a salary and the compensation for his railroad fares and hotel bills. *Id.* at 537–38. The Court explained that the reasons for compensating Vose for his "expenditures incurred in carrying on the suit [did] not apply" to the salary and private travel expenses *Id.* at 538. And the Court could "find no authority whatever" that sanctioned awarding Vose, a creditor of the fund, compensation for these collateral expenses. *Id.* at 537–38.

It was this lack of authority that led the Supreme Court to deny Vose compensation for his collateral expenses. By contrast, the Supreme Court readily affirmed the award of his attorney's fees and litigation expenses because common law trust principles authorized repayment for those expenses. But because the Court concluded that trust principles did not guide it as to Vose's compensation for collateral expenses, it would have had to craft a new rule to address these items. In declining to create a rule that would allow creditors to receive the additional compensation Vose sought, the Court reasoned that such awards would "present too great a temptation to parties to intermeddle in the management of valuable property or funds." *Id.* at 538. Perhaps the Court's concern was born of the magnitude of the compensation Vose was awarded: a personal salary for 10 years and lavish travel expenses, totaling more than $1.4 million in today's dollars.[8]

The Court's later decision in *Central Railroad & Banking Co. v. Pettus* merely repeated this language from *Greenough*; it added nothing to aid our interpretation of the earlier case. In *Pettus*, the Court considered whether attorneys could present independent claims for compensation from a fund created through their efforts on behalf of their clients. See *Pettus*, 113 U.S. at 127–28. The Supreme Court concluded that attorneys who recover a common fund for the benefit of others are entitled to a

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[8] *See Consumer Price Index, 1800-*, Federal Reserve Bank of Minneapolis (last visited July 27, 2022), https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator/consumer-price-index-1800- ($1 in 1881 dollars is worth $28.07 in 2021 dollars based on the Consumer Price Index by Ethel D. Hoover).

reasonable fee from the fund. *Id. Pettus* did not concern or address what a plaintiff could recover.

Greenough can be summed up as follows: Although the common law of trusts allowed Vose to be compensated for his expenses in prosecuting the lawsuit against the funds' trustees, at the time no authority permitted him, a creditor, to receive compensation for collateral expenses connected to his litigation to preserve the value of the bonds for the benefit of all bondholders. The Supreme Court declined to fashion a new common law rule that would authorize this type of compensation due to its fear of creditors running amok with litigation. Of course, Rule 23 class actions as we know them today did not exist. Yet, the panel majority opinion held that Greenough created a blanket ban on incentive awards in class actions.[9]

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[9] The panel majority opinion also failed to address that *Greenough* was based on general federal common law. Greenough arose under Florida law. *See Vose v. Fla. R.R Co.*, 28 F. Cas. 1285 (C.C.N.D. Fla. 1870); *Vose v. Internal* Improvement Fund, 28 F. Cas. 1286 (C.C.N.D. Fla. 1875). When the Supreme Court issued its decision in *Greenough*, the regime of *Swift v. Tyson*, 41 U.S. 1 (1842), governed, and federal courts applied a general common law when addressing state-law issues in diversity cases. To divine the general common law in *Greenough*, the Supreme Court relied on both old English cases and state court cases to determine what Vose could receive as compensation which was the correct approach at the time. *See Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) ("[Federal] common law . . . cite[s] cases from [the Supreme] Court, from the Circuit

B. The Panel Majority Opinion Failed to Consider the Historical Development of Incentive Awards Within Class Actions.

The panel majority opinion's myopic focus on *Greenough* and *Pettus* ignored the advent of Rule 23 and the development of the modern class action that took place in the intervening 140 years between those cases and this one. This history is important because incentive awards evolved within the framework of class actions under Rule 23. I begin this section by providing a brief history of the modern class action and the role of incentive awards within it. I then explain how the panel majority's decision disregards the vast development of the legal landscape that occurred between Greenough and Johnson.

1. The Modern Class Action Emerged with the Creation and Revision of Rule 23, and

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Courts of Appeal, from the State Courts, from England and the Colonies of England."). But, in 1938, the Court's *Erie* decision renounced reliance on federal general common law, famously recognizing that "[t]here is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). One additional reason to be wary of *Greenough* is that it created general common law to resolve what was a state-law issue. Here the question of incentive payments is a federal question governed solely by federal law. And with respect to federal law *Greenough* is "no longer . . . legally authoritative because it was based on the federal courts' subsequently abandoned authority to formulate common law principles in suits arising under state law though litigated in federal court." *McKevitt v. Pallasch*, 339 F.3d 530, 534 (7th Cir. 2003).

Incentive Awards Arose and Developed in the Context of This Rule.

The development of Rule 23 of the Federal Rules of Civil Procedure ushered in an entirely new regime for the federal courts' treatment of collective actions.[10] Before Rule 23, class actions did not exist as we know them today but were merely "an outgrowth of the compulsory joinder rule that prevailed in courts of equity." 1 William B. Rubenstein, *Newberg and Rubenstein* on Class Actions § 1:13 (6th ed., June 2022 update) [hereinafter *Newberg*]. Under equity's regime, the Supreme Court tried during the nineteenth century to deal with "group representative litigation" through Equity Rule 48. 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 1:1 (18th ed., Oct. 2021 update) [hereinafter *McLaughlin*] (internal quotation marks omitted). But this rule had the significant limitation of lacking binding effect: any decree submitted under it would "be without prejudice to the rights and claims of all the ab-sent parties." *Id.* (internal quotation marks omitted). After the merger of law and equity, the Supreme Court promulgated the original Rule 23 in 1938. Newberg § 1:14. The rule suffered from several deficiencies,

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[10] I use "collective actions" to refer generally to actions brought by a repre-sentative plaintiff or plaintiffs who makes claims on behalf of other similarly-situated individuals against the same defendant or defendants, rather than spe-cifically to the mechanism provided to employees under the Fair Labor Stand-ards Act. See 29 U.S.C. § 216(b) ("An action to recover . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.").

however. It divided class actions into three difficult-to-apply categories.[11] *McLaughlin* § 1:1. And it failed to prescribe how class action suits advance through litigation. *Newberg* § 1:14. "Under heavy criticism, [the original rule] was completely rewritten, and sweeping innovations were introduced with the 1966 amendments." *Id.*

The modern class action emerged with the implementation of the 1966 amendments. *McLaughlin* § 1:1. With the new Rule 23, the Advisory Committee on

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[11] The original Rule 23 categorized class suits based on the "'jural relations' of the parties." *Newberg* § 1:14. The rule authorized a representative suit where the right to enforcement was:

> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

Id.

Civil Rules hoped to "correct technical flaws" with the original Rule 23's difficult-to-apply categories "and bring [the] badly shopworn procedural rule in line with caselaw developments." David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 Wash. U. L. Rev. 587, 599 (2013). Alongside this more modest goal, a major purpose of the new rule was to "provide a method of protecting the rights of those who would not realistically bring individual claims for practical reasons."[12] *McLaughlin* § 1:1. This goal was in accord with a belief that the new Rule 23 should not "freez[e] out the claims of people" especially disadvantaged people with small value claims. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 398 (1967).

Not long after the new Rule 23's implementation, federal courts began to recognize that under the Rule class representatives could receive benefits—beyond what the class received—for their efforts in bringing and maintaining lawsuits to vindicate not only their own rights but the rights of other class members. *See, e.g., Bryan v. Pittsburgh Plate Glass Co. (PPG Indus., Inc.)*, 59 F.R.D. 616, 617 (W.D. Pa. June 12, 1973) (approving "special awards in the aggregate amount of $17,500 to those members of the plaintiff class who were most active in the prosecution of this case and who de-voted substantial time

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[12] For example, the Advisory Committee envisioned the new rule as a tool "which could deal with civil rights and, explicitly, segregation." John P. Frank, *Response to 1996 Circulation of Proposed Rule 23 on Class Actions*, in 2 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23 at 266 (1997), https://perma.cc/9SJW-KMXK.

and expense on behalf of the class."), *aff'd*, 494 F.2d 799 (3d Cir. 1974); *Lo Re v. Chase Manhattan Corp.*, No. 76 Civ. 154, 1979 WL 236, at *6 (S.D.N.Y. May 25, 1979) (approving award for class representatives because they, among other things, "initiated this action at some risk to their own job security."). In 1974, the Sixth Circuit became the first circuit to examine the pro-priety of awarding additional benefits to plaintiffs for their time and effort in pursuing litigation that benefited other plaintiffs in the class. *Thornton v. East Texas Motor Freight*, 497 F.2d 416, 420 (6th Cir. 1974). In that case, the district court held that a motor freight company violated Title VII by employing a discriminatory transfer policy that prevented Black drivers from accessing certain jobs. *Id.* at 419. The district court ordered the company to rescind its transfer policy and awarded the Black drivers "who actively sought an end" to the policy with extended seniority in the positions previously foreclosed to them. Id. at 420. The Sixth Circuit affirmed, explaining that "there is something to be said for rewarding those drivers who protest and help to bring rights to a group of employees who have been the victims of discrimination." *Id.*

During the 1980s and 1990s, incentive awards proliferated. *See Re Continental/Midlantic S'holders Litig.*, Civ. A. No. 86–6872, 1987 WL 16678, at *4 (E.D. Pa. Sept. 1, 1987) ("Plaintiffs' counsel have provided numerous citations in this district, in this circuit and elsewhere, in which substantial incentive payments to named plaintiffs . . . have been made."); *In re Dun & Bradstreet Credit Servs. Customer Litig*, 130 F.R.D. 366, 373–74 (S.D. Ohio Feb. 23, 1990) (collecting cases). "By the turn of the century," incentive awards were commonplace. Theodore Eisenberg & Geoffrey P. Miller,

Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1311 (2006).

Despite the widespread acceptance of incentive awards, al-most since their inception, courts have worried that they might be unfair to the other class members. See, e.g., *Plummer v. Chem. Bank*, 91 F.R.D. 434, 442 (S.D.N.Y. 1981) ("While there may be circumstances in which additional benefits to the named plaintiffs may be justified, such disparities must be regarded as prima facie evidence that the settlement is unfair to the class."); *Women's Comm. for Equal Emp. Opportunity v. Nat'l Broad. Co.*, 76 F.R.D. 173, 181 (S.D.N.Y. 1977) (approving settlement with incentive awards "notwithstanding our doubts about a general policy of awarding class representatives a settlement on terms different from the other class members"). To address this concern, courts developed tests "to identify the appropriate conditions" for granting incentive awards. Eisenberg & Miller, *supra*, at 1311. Under this regime, a party seeking an incentive award for the class representative has the "burden of proving" that the class representative "deserve[s] an award" and that it is "reasonable" before a court can approve it.[13] *Newberg* § 17:13.

Our own circuit's law tracks our sister circuits' development of safeguards around incentive awards. In

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[13] To decide whether this burden has been met, courts look at a variety of factors including the class representatives' specific services to the class, any potential risks they incurred, and the amount of the incentive award in comparison to the overall recovery. See *Newberg* § 17:13 n.7 (collecting tests used by different circuits for approving incentive awards).

Holmes v. Continental Can Co., we recognized that "[w]hen a settlement explicitly pro-vides for preferential treatment for the named plaintiffs in a class action, a substantial burden falls upon the proponents of the settlement to demonstrate and document its fairness." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983). The panel majority opinion brushed aside Holmes as having nothing to do with incentive awards. *Johnson*, 975 F.3d at 1261 n.13. Although *Holmes* does not mention incentive awards specifically, that fact does not render it irrelevant as a bulwark against potential incentive award abuses. An incentive award creates an unequal settlement distribution be-tween the class representatives and the other class members, thus triggering *Holmes's* requirement that the proponents of the settlement demonstrate its fairness.

As this history shows, federal courts have had decades to examine Rule 23's authorization of incentive awards in class action settlements, to evaluate these awards' costs and benefits, and to develop safeguards to prevent them from resulting in unfair settlements. Yet I cannot find a single case before this one in which a court concluded that *Greenough* precludes their approval under Rule 23.

The silence concerning *Greenough's* impact on incentive awards extends to the United States Supreme Court, as Judge Martin observed in her dissent to the panel majority opinion. In *Frank v. Gaos*, 139 S. Ct. 1041, 1043 (2019), the Supreme Court considered whether a settlement agreement that would distribute several million dollars among the named plaintiffs, class counsel,

and *cy pres* recipients[14] satisfied Rule 23. The settlement agreement included "incentive payments" for the named plaintiffs. *Id.* at 1045. The Supreme Court majority remanded the case based on standing, so it had no reason to address the incentive awards. *Id.* at 1046. Justice Thomas wrote in dissent that the Court should address the merits and conclude that the settlement agreement did not comply with Rule 23. *Id.* at 1046–1049 (Thomas, J., dissenting). He criticized the settlement agreement because of the *cy pres* and incentive payments. *Id.* at 1047. He explained that the incentive payments for the named plaintiffs and the lack of monetary relief for the other class members "strongly suggest[ed] that the interests of the class were not adequately represented." Id. Granted, it appears that no party raised the *Greenough* argument in *Frank*, but the argument was not unknown because it had been raised previously in *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455, 466–67 (10th Cir. 2017).[15] Like Judge Martin, I find it notable that Justice Thomas's analysis focused solely on Rule 23; he did not mention *Greenough* or *Pettus*. Nor did he suggest that incentive awards are illegal per se. Instead, his dissent simply noted that a settlement in which only class representatives receive monetary awards may fail to comply with Rule 23.

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[14] In class actions, "*cy pres* refers to the practice of distributing settlement funds not amenable to individual claims or meaningful pro rata distribution to nonprofit organizations whose work is determined to indirectly benefit class members." *Frank v. Gaos*, 139 S. Ct. 1041, 1045 (2019).

[15] The Tenth Circuit treated the argument as forfeited below, however, and did not decide it.

Indeed, a year before *Frank*, the Supreme Court acknowledged that a class representative "might receive a share of class recovery above and beyond her individual claim." *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 n.7 (2018) (citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming a class representative's $25,000 incentive award)). The panel majority opinion dismissed the Supreme Court's reference to incentive awards as dicta, noting that the Court "didn't cite or consider—let alone over-rule—*Greenough* and *Pettus*." *Johnson*, 975 F.3d at 1260 n.12. True, but I suggest that the Supreme Court did not mention *Greenough* and *Pettus* because those cases have nothing to say about the lawfulness of incentive awards in settlements under Rule 23.

Congress and the Advisory Committee on Civil Rules, too, have been aware of the rise of incentive awards for decades, yet they have never acted to impose a blanket ban on such awards. This silence stands in stark contrast to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), in which Congress prohibited incentive awards or special payments for class representatives in securities class action settlements. *See* 15 U.S.C. § 78u-4(a)(2)(A) (requiring each plaintiff who seeks to serve as class representative to provide a sworn certification stating that she "will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery"); *see id.* § 78u-4(a)(4) ("The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement

awarded to all other members of the class.").[16] From the PSLRA, we can see that Congress knows how to ban class representative incentive awards when it wants to do so. Yet Congress has not acted to ban inventive awards in any other class action context. And this is so despite its observation in the Class Action Fairness Act ("CAFA") that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . unjustified awards are made to certain plaintiffs at the expense of other class members." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4 (2005). Congress's inaction to-ward incentive awards in most class action contexts suggests that it does not view these awards as illegal or even as the type of "unjustified awards" identified in the CAFA. *Id.*

As for the Advisory Committee, at its request in 1996, the Federal Judicial Center collected and analyzed empirical data on incentive awards. *See* Thomas E. Willging, et al., *An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 101 (1996). After receiving the Federal Judicial Center's report demonstrating the prevalence and scope of these awards, tellingly, the Advisory Committee took no action to limit them.

As I have shown, incentive awards grew out of the 1966 revised version of Rule 23 under the watchful eyes of the courts, the Advisory Committee, and Congress. I now turn to why the panel majority opinion's failure to account

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[16] But see *Newberg* § 17:19 ("Most, *though not all*, courts have read these provisions as barring incentive awards.") (emphasis added).

for the historical development of incentive awards led to its erroneous holding.

2. The Panel Majority Opinion Misapplied Greenough to a Context Completely Changed by Rule 23.

The panel majority opinion deemed the compensation Vose sought in *Greenough* "roughly analogous" to incentive awards in class action settlement agreements. *Johnson*, 975 F.3d at 1257. This rough analogy crumbles upon closer inspection. As I have explained, the *Greenough* court concluded that there existed no general federal common law authorizing compensation for the type of collateral expenses Vose sought to recover. In *Greenough* the Court was not examining a class action settlement and obviously could not rely on the revised Rule 23, which would not exist for another 85 years. And so, of course, *Greenough* is silent as to whether Rule 23 allows a court to approve an incentive award.

Despite recognizing that the *Greenough* Court rejected Vose's requested compensation because the district court was "without legal basis" to approve the award from a common fund, *Johnson*, 975 F.3d at 1257, the panel majority opinion nonetheless leapt to the conclusion that *Greenough* broadly forbids any incentive award in the class action context. The panel majority opinion also failed to wrestle with the fact that Vose sought more than 1.4 million in today's dollars, which exceeds by orders of magnitude both the $6,000 incentive award in this case and average incentive awards in class

action settlements.[17] By plucking *Greenough* out of its context and disregarding the development of class actions to conclude that *Greenough* dictates the outcome in this case, the panel ignored the wisdom of Chief Justice Marshall (which the Supreme Court has continually invoked) "that 'general expressions, in every opinion, are to be . . . respected, but ought not . . . control the judgment in a subsequent suit.'" *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 35 (2012) (quoting *Cohens v. Virginia*, 19 U.S. 264, 399 (1821)); see also *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1518 n.2 (2020) (Thomas, J., dissenting) ("The proper approach is to 'read general language in judicial opinions . . . as referring in context to circumstances similar to the circum-stances then before the Court and not referring to quite different circumstances that the Court was not then considering.'") (quoting *Illinois v. Lidster*, 540 U.S. 419, 424 (2004)).

The panel majority opinion paid scant attention to Rule 23, noting that the rule does not explicitly mention incentive awards. *Johnson*, 975 F.3d at 1257. But the opinion failed to engage with Rule 23(e)(2)(D)'s requirement that in approving proposed settlement agreements courts must evaluate whether the agreement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). Incentive awards are subject to this requirement, which addresses one of the primary objections that has been levied against incentive awards. *See Newberg* § 17:4 ("[Rule 23(e)] most obviously protects absent class members from being subjected to excessive

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[17] An empirical study reviewed approximately 1,200 class actions from 2006–2011 and reported that the average incentive award per class representative was $11,697 (or $14,371 in 2021 dollars). *Newberg* § 17:8.

incentive awards[.]"). The Supreme Court in *Greenough* worried that Vose's award for collateral expenses—which, of course, the district court did not review under Rule 23(e)—would present too great a temptation for intermeddling in lawsuits. The panel majority opinion argues that those concerns are present in the class action context as well. But the panel majority's worries about whether incentive awards are good policy does little to strengthen its legal argument about the scope and breadth of *Greenough's* holding. And, again, this argument represents a mis-taken attempt to apply *Greenough* to a context irrevocably altered by Rule 23. Rule 23 defuses the potential for parties to intermeddle because under Rule 23(e) courts must reject incentive awards that are excessive compared to the service provided by the class representative or that are unfair to the absent class members. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 945–46 (9th Cir. 2011) ("[B]ecause the parties expressly negotiated a possibly unreasonable amount of fees, and because the district court did not take this possibility into account in reviewing the settlement's fairness the first time around, we must vacate and remand the Approval Order as well, so that the court may appropriately factor this into its Rule 23(e) analysis.").

It could equally well be argued that had Congress or the Advisory Committee wanted to disallow any award that treats class members inequitably relative to one another, they could have done so, as Congress effectively did in the PSLRA. So, the lack of an express reference to incentive awards in Rule 23 does not help the panel majority's argument.

More likely, the reason incentive awards have not been dis-allowed is that a class representative's responsibilities are often time-consuming and burdensome. *See* Amicus Br. of Impact Fund at 5–8. A class representative's activities may also expose her to reputational risk and even financial, emotional, and physical harm. *Id.* at 8–12. Indeed, the leading treatise on class actions observes that "if the class representatives face particular risks in serving the class and/or undertake valuable work on behalf of the class but cannot recover any of the costs of those efforts through an incentive award, they have a fair argument [under Rule 23(e)(2)(D)] that the settlement is not treating them *equitably* relative to absent class members." *Newberg* § 17:4 (emphasis in original). The panel majority opinion failed to acknowledge, much less grapple with, its inconsistency with the rule.

To sum up, the panel majority opinion disregarded that in between *Greenough* and *Johnson*, the modern class action was created, developed, studied, and tweaked. The panel majority opinion did not satisfactorily explain how *Greenough* can be read as barring courts from approving incentive awards under Rule 23. It also did not address the inconsistencies its holding creates with Rule 23's requirements that all class members be treated equitably.

C. The Panel Majority Opinion Is in Tension with Decisions of All Other Circuits and Has Severe Implications on Class Action Viability.

The panel majority opinion not only misread *Greenough* and *Pettus*, it also created a split among circuits by distinguishing ours as the only circuit to read

these cases as barring incentive awards for class action representatives. The Second Circuit expressly considered and rejected the argument that *Greenough* and *Pettus* forbid incentive awards. *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019). And all circuits—including ours[18]— have universally accepted—and affirmed district courts' approval of—settlement agreements incorporating these awards. *See, e.g., Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 296 (5th Cir. 2017) (vacating a class action settlement with an incentive award on other grounds and affirming the same settlement after district court provided further explanation in 742 F. App'x 846 (5th Cir. 2018)); *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 861 (8th Cir. 2017); *Pelzer v. Vassalle*, 655 F. App'x 352, 360 (6th Cir. 2016) (unpublished); *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 82 (1st Cir. 2015); *Tennille v. W. Union Co.*, 785 F.3d 422, 434–36 (10th Cir. 2015); *Berry v. Schulman*, 807 F.3d 600, 613–14 (4th Cir. 2015); *Cobell v. Salazar*, 679 F.3d 909, 922–23 (D.C. Cir. 2012); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 290 (3d Cir. 2011) (en banc); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722–23 (7th Cir. 2001); *In re Mego Fin. Corp. Sec. Lit.*, 213 F.3d 454, 463 (9th Cir. 2000). Although courts infrequently question incentive

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[18] *See Carter v. Forjas Taurus, S.A.*, 701 F. App'x 759, 763 (11th Cir. 2017) (un-published) (affirming the district court's approval of a settlement that included a $15,000 incentive award for the class representative); *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 432 (11th Cir. 2012) (unpublished) (affirming the district court's approval of a settlement where one named plaintiff received a $10,000 incentive award, four named plaintiffs each received $2,500 incentive awards, and the remaining named plaintiffs each received $1,000 incentive awards).

awards based on suspicion of collusion or unfairness, there is "near-universal recognition that it is appropriate for the court to approve an incentive award payable from the class recovery, usually within the range of $1,000–$20,000." *McLaughlin* § 6:28. The panel majority opinion brushed aside this near-universal acceptance of incentive awards as "a product of inertia and inattention, not adherence to law." *Johnson*, 975 F.3d at 1259. I find it difficult to believe that for decades we and all our sister circuits have missed what the panel majority saw as a bright line drawn by the Supreme Court.

The circuit split created by the panel majority opinion does not just make good fodder for law review articles; it has very real-world implications. In line with the Advisory Committee's goals in 1966, courts have recognized that Rule 23 allows plaintiffs in class actions "to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). In our circuit, we have repeatedly acknowledged this core purpose of class action. *See Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1240 n.21 (11th Cir. 2000) (recognizing that the "most compelling justification for a Rule 23(b)(3) class action [is] the possibility of negative value suits"); *In re Charter Co.*, 876 F.2d 866, 871 (11th Cir. 1989) ("[T]he effort and cost of investigating and initiating a claim may be greater than many claimants' individual stake in the outcome, discouraging the prosecution of these claims absent a class action filing procedure."). Our outlier rule, however, potentially undermines this purpose in our circuit and threatens the viability of consumer class actions in

particular.[19] *See* Eisenberg & Miller, *supra*, at 1305–06 (2006) (noting that in consumer class actions "a class member may even experience a net loss from acting as class champion because the small recoveries . . . are not enough to cover the increased costs of serving as the named plaintiff").

In consumer class actions especially, "damages per class member tend to be slight." *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 876 (7th Cir. 2012). Yet a class representative may spend hundreds of hours providing essential services for the litigation. See Amicus Br. of The Committee to Support the Antitrust Laws at 6–8. Without

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[19] *Johnson* has already begun to impact settlement agreements in consumer class actions. Bound to follow it, a panel of this Court has reversed an incentive award in a settlement of a class action asserting violations of the Fair Credit Reporting Act. *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1257 (11th Cir. 2021). Post-*Johnson*, district courts have denied incentive awards in settlements of class actions brought under the Fair Debt Collection Practices Act, the Fair Labor Standards Act, the Telephone Consumer Protection Act, and state consumer protection laws. See *Kuhr v. Mayo Clinic Jacksonville*, 530 F. Supp. 3d 1102, 1108 n.1 (M.D. Fla. 2021) (Fair Debt Collection Practices Act); *Poblano v. Russell Cellular Inc.*, 543 F. Supp. 3d 1293, 1294 (M.D. Fla. 2021) (Fair Labor Standards Act); *Drazen v. GoDaddy.com, LLC*, No. 1:19-00563-KD-B, 2020 WL 8254868, at *1, 14 (S.D. Ala. Dec. 23, 2020) (Telephone Consumer Protection Act); *Fruitstone v. Spartan Race, Inc.*, No. 20-cv-20836, 2021 WL 2012362, at *1, 13 (S.D. Fla. May 20, 2021) (Florida Deceptive and Unfair Trade Practices Act).

the "prospect of an incentive award," potential class representatives understandably may be reluctant to take on these responsibilities.[20] *Espenscheid*, 688 F.3d at 876. The public will be the ultimate loser from this undermining of class actions as an important tool for protecting consumers. *See* Jason Jarvis, *A New Approach to Plaintiff Incentive Fees in Class Action Lawsuits*, 115 Nw. U. L. Rev. 919, 928 (2020) ("[A]bsent an incentive fee, a multimillion-dollar consumer class action case might not be brought for want of a named plaintiff. Therefore, when individual recoveries are small, incentive fees provide a necessary enforcement mechanism for consumer-protection statutes."); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero in-dividual suits, as only a lunatic or a fanatic sues for $30.") (emphasis in original).

The effects of *Johnson* will be felt by small businesses, too. Class actions are an important tool for small businesses to combat anticompetitive business practices. *See* Amicus Br. of Main Street Alliance at 5–6.

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[20] The majority opinion is wrong to characterize incentive awards as "bounty" and "promot[ing] litigation by providing a prize to be won." *Johnson*, 975 F.3d at 1258. It is true that the prospect of an incentive award might encourage plaintiffs to serve as class representatives, but the award's purpose is to enable suits against defendants who cause widespread harms that are of low dollar value to individual plaintiffs, not to promote unnecessary or frivolous litigation. And, as I explained, if an incentive award is so large as to be unfair or compromise the interest of the class, the court reviewing the settlement agreement must reject it under Rule 23(e).

As one scholar has written, class actions are "the most effective way to hold corporations accountable" and ensure trust in the free market by disincentivizing theft, breach of contract, and fraud. Brian T. Fitzpatrick, *The Conservative Case for Class Actions 3*, 22–28 (2019). Despite these benefits of business class actions, the small businesses that serve as class representatives face daunting challenges. A small-business class representative must devote significant time to the litigation which otherwise could be devoted to running the business. *See, e.g., Bradburn Parent Teacher Store, Inc. v. 3M (Minn. Mining & Mfg. Co.)*, 513 F. Supp. 2d 322, 342 (E.D. Pa. 2007) (approving incentive award because class-representative small business devoted four years to the litigation, including providing and preparing a representative for nine depositions); *In re Navistar Maxxforce Engines Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 1:14-cv-10318, 2020 WL 2477955, at *4 (N.D. Ill. Jan. 21, 2020) (approving incentive awards to class-representative businesses because they sat for depositions, searched through thousands of documents to respond to discovery, and presented their defective equipment for inspection). In addition, small-business class representatives may face retaliation and reputational harm, especially in the antitrust context. *See* Amicus Br. of The Committee to Support the Antitrust Laws at 4–6. The panel majority's holding extinguished one way to assure small business owners that their businesses will not wind up worse off for attempting to vindicate their own and other small businesses' rights.

The panel majority's reading of *Greenough*—which applied federal common law and equitable principles in the absence of any authority like Rule 23—as banning incentive awards placed this circuit at odds

with more than 50 years of class action law and decisions from every other federal court in the country. And this is not some esoteric disagreement. The opinion has already begun to eliminate incentive awards, and although it is too early to measure, I expect that it will have a very real and detrimental impact on class actions in this circuit, an impact that will be felt not least by the most vulnerable plaintiffs such as consumers and small businesses. *See In re Synthroid Mktg. Litig.*, 264 F.3d 712, 723 (7th Cir. 2001) (recognizing that the "lure of an 'incentive award'" can cause a named plaintiff to initiate suit when she would not have otherwise).

III. CONCLUSION

The panel majority opinion fundamentally undermined class action law based on a misinterpretation of two Supreme Court cases that long preceded the creation of the modern class action. No other circuit has gone down this path. Given the panel majority opinion's novel reading of these cases, the circuit split it occasioned, and the magnitude of its likely impact, this case is more than worthy of en banc review. Unfortunately, by denying rehearing en banc, our court has struck a lasting blow to class actions as a device for righting wrongs in this circuit.

Given our failure to act, it will be up to the Supreme Court to overrule or clarify *Greenough* and *Pettus* to undo this problem of our making. If the Supreme Court does not act, then I urge either the Advisory Committee on Civil Rules to amend Rule 23 or Congress to enact a statute that explicitly authorizes incentive awards. *See Johnson*, 975 F.3d at 1260. Respectfully, I dissent from the denial of rehearing en banc.

APPENDIX B

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12344

D.C. Docket No. 9:17-cv-80393-RLR

CHARLES T. JOHNSON,
on behalf of himself and others
similarly situated,

Plaintiff-Appellee,

JENNA DICKENSON,

Interested Party-Appellant,

versus

NPAS SOLUTIONS, LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(September 17, 2020)

Before MARTIN, NEWSOM, and BALDOCK, Circuit Judges. NEWSOM, Circuit Judge:

The class-action settlement that underlies this appeal is just like so many others that have come before it. And in a way, that's exactly the problem. We find that, in approving the settlement here, the district court repeated several errors that, while clear to us, have become commonplace in everyday class-action practice.

First, the district court set a schedule that required class members to file any objection to the settlement—including any objection pertaining to attorneys' fees—more than two weeks before class counsel had filed their fee petition. In so doing, we hold, the court violated the plain terms of Federal Rule of Civil Procedure 23(h).

Second, in approving the settlement, the district court awarded the class representative a $6,000 "[i]ncentive [p]ayment," as "acknowledgment of his role in prosecuting th[e] case on behalf of the [c]lass [m]embers." In so doing, we conclude, the court ignored on-point Supreme Court precedent prohibiting such awards.

Finally, in approving class counsel's fee request, overruling objections, and approving the parties' settlement, the district court made no findings or conclusions that might facilitate appellate review; instead, it offered only rote, boilerplate pronouncements ("approved," "overruled," etc.). In so doing, we hold that the court violated the Federal Rules of Civil Procedure and our precedents requiring courts to explain their class-related decisions.

We don't necessarily fault the district court—it handled the class-action settlement here in pretty much exactly the same way that hundreds of courts before it have handled similar settlements. But familiarity breeds inattention, and it falls to us to correct the errors in the case before us. We will reverse in part, vacate in part, and remand for further proceedings.

I

This case began in March 2017, when Charles Johnson—on behalf of both himself and a putative class of similarly situated individuals—sued NPAS Solutions, LLC in the U.S. District Court for the Southern District of Florida, alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227. As relevant here, the TCPA makes it unlawful to "us[e] any automatic telephone dialing system" to call a person without his or her "prior express consent," *id.* § 227(b)(1)(A); it also provides for statutory damages of "$500 . . . for each . . . violation" and authorizes up to treble damages against anyone who "willfully or knowingly violate[s]" the law, *id.* § 227(b)(3). Johnson claimed that NPAS—an entity that collects medical debts—had used an automatic telephone-dialing system to call his cell phone without his consent.

In particular, Johnson challenged NPAS's practice of calling "wrong number[s]"—*i.e.*, phone numbers that had originally belonged to consenting debtors but had been reassigned to non-consenting persons.

The case quickly proceeded to the settlement phase. After some preliminary discovery and motions practice, the parties jointly filed a notice of settlement on November 2—less than eight months after Johnson had filed suit. Not long thereafter, Johnson moved to certify the class for settlement purposes; he argued that settlement was in the class members' best interest because, despite NPAS's possible defenses, he had obtained a meaningful recovery of $1,432,000.

On December 4, the district court preliminarily approved the settlement and certified the class for settlement purposes.[1] The court appointed Johnson as the class representative and his lawyers as class counsel, and its order stated that Johnson could "petition the Court to receive an amount not to exceed $6,000 as acknowledgment of his role in prosecuting this case on behalf of the class members." The district court set March 19, 2018 as the deadline for class members to opt out of the settlement and, more importantly for our purposes, to

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[1] The defined class comprised "[a]ll persons in the United States who (a) received calls from NPAS Solutions, LLC between March 28, 2013 and [December 4, 2017] that (b) were directed to a phone number assigned to a cellular telephone service, (c) for which NPAS Solutions' records contain a 'WN' designation, and (d) were placed using an automatic telephone dialing system." NPAS acknowledged that 179,642 phone numbers fell within that class.

file objections to the settlement. The court set April 6, 2018—18 days after the opt-out/objection deadline—as the date by which Johnson and NPAS had to submit their motion for final approval of the settlement and their responses to objections, and (more importantly) by which class counsel had to submit their petition for attorneys' fees and costs.

The following month, class members were notified about the settlement and informed that NPAS would establish a settlement fund, that class counsel would seek attorneys' fees amounting to 30% of the fund, and that Johnson would seek a $6,000 incentive award from the fund. In total, 9,543 class members submitted claims for recovery.

When the objection deadline of March 19 arrived, no class member opted out, and only one objected to the settlement—Jenna Dickenson, our appellant. As a procedural matter, Dickenson challenged the district court's decision to set the objection deadline before the deadline for class counsel to file their attorneys'-fee petition, which she contended violated Federal Rule of Civil Procedure 23 and the Due Process Clause. On the merits, Dickenson (1) objected to the amount of the settlement, arguing that it should have been higher; (2) argued that the court should conduct a lodestar calculation in determining reasonable attorneys' fees; and (3) contended that Johnson's $6,000 incentive award both contravened the Supreme Court's decisions in *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), and created a conflict of interest between Johnson and other class members.

On the parties' April 6 filing deadline, Johnson and NPAS opposed Dickenson's objection and urged the district court to approve the settlement as fair, reasonable, and adequate. Johnson also filed a motion for final approval of the settlement and requested attorneys' fees, costs and expenses of the litigation, as well as an incentive award, all of which he said were reasonable and in line with the amounts approved in similar settlements.

About a month later, the district court held a final fairness hearing. After class counsel, NPAS, and Dickenson had presented their arguments, the district court announced its intention to approve the settlement. The court explained that it "ha[d] carefully considered all of the submissions before the Court," including Dickenson's objection. The court stated that it was "going to overrule that objection, but nevertheless appreciate[d] the argument [Dickenson's] counsel ha[d] made."

The same day, the district court entered a brief, seven-page order approving the settlement. The court's evaluation of the fairness of the settlement consisted of the following sentence:

> The Court finds that the settlement of this action, on the terms and conditions set forth in the Settlement Agreement, is in all respects fundamentally fair, reasonable, adequate, and in the best interest of the class members, when considering, in their totality, the following factors: (1) the absence of any fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of

> the proceedings and the amount of discovery completed; (4) the probability of the Plaintiff's success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and the substance and amount of opposition to the settlement.

Dist. Ct. Order at 4 (citing *Leverso v. SouthTrust Bank of Ala.*, 18 F.3d 1527, 1530 (11th Cir. 1994)).

The order specified that NPAS would create a non-reversionary $1,432,000 settlement fund, from which the following would be deducted before class members received any payout: (1) costs and expenses disbursed in administering the settlement and providing notice to the class; (2) attorneys' fees in the amount of 30% of the fund (or $429,600), as well as $3,475.52 for class counsel's litigation costs and expenses; and (3) a $6,000 "[i]ncentive [p]ayment" to Johnson, "as acknowledgment of his role in prosecuting this case on behalf of the [c]lass [m]embers." *Id.* at 5. After subtracting out those deductions, each of the potential 179,642 class members stood to receive only $7.97. (Happily, because only 9,543 class members submitted claims, each stands to receive a whopping $79.) The district court's order provided no analysis to accompany its approval of the attorneys'-fee percentage or the incentive award. The order also stated, without further explanation, that "[t]he objection of Jenna Dickenson is OVERRULED."
Id.

This is Dickenson's appeal.

II

Dickenson raises several challenges—three, as we categorize them—to the district court's approval of the settlement. First, she contends that the district court erred when it required class members to file objections to the settlement—including to attorneys' fees—before class counsel had filed their fee petition. Second, she insists that the district court's approval of Johnson's $6,000 incentive award contravenes Supreme Court precedent. Finally, and more broadly, she maintains that the district court didn't provide sufficient explanation to enable meaningful appellate review—either in awarding attorneys' fees, in overruling her objections, or in determining that the settlement was fair. We consider Dickenson's arguments in turn.[2]

A

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[2] "In reviewing the validity of a class action settlement, a district court's decision will be overturned only upon a clear showing of abuse of discretion." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983). A district court's decision to award attorneys' fees is also reviewed for abuse of discretion, although "that standard of review allows us to closely scrutinize questions of law decided by the district court in reaching the fee award." *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 770 (11th Cir. 1991). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in [reaching its decision], or makes findings of fact that are clearly erroneous." *Fitzpatrick v. Gen. Mills, Inc.*, 635 F.3d 1279, 1282 (11th Cir. 2011) (alteration in original) (quotation omitted).

Dickenson's first challenge is procedural. In its order preliminarily approving the settlement, certifying the class, and establishing a schedule, the district court required class members to file any objection to the settlement—including any objection pertaining to attorneys' fees—by March 19, 2018. In the same order, the district court gave class counsel until April 6 to file their fee petition—eighteen days *after* class members' objections were due. Dickenson contends that by ordering the deadlines in this manner, the district court inhibited her from objecting to the fee request, in violation of Federal Rule of Civil Procedure 23(h) and the Due Process Clause. As relevant here, Rule 23(h) provides as follows:

> 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 . . . 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.

Fed. R. Civ. P. 23(h).[3]

We hold that Rule 23(h)'s plain language requires a district court to sequence filings such that class counsel file and serve their attorneys'-fee motion *before* any objection pertaining to fees is due. By its terms, the Rule not only authorizes attorneys'-fee awards but also goes on to specify that "[n]otice" of any attorneys'-fee motion must be "directed to class members in a reasonable manner," and then to state that a class member may "object *to the motion*." *Id.* (emphasis added). As one treatise has explained, "[t]he logical extension of the class members' right to object to class counsel's fee request is that the fee petition itself must be filed prior to the class members' objection deadline, particularly given the ease with which the petition papers can be made available to the class." William B. Rubenstein, 5 *Newberg on Class Actions* § 15:13 (5th ed. 2020).

Johnson asks us to disregard Rule 23(h)'s clear terms. He says that class members were adequately informed by the class *notice*, which preceded the objection deadline and which stated that class counsel planned to seek a 30% fee. But "[t]he plain text of the rule requires that any class member be allowed an opportunity to object to the fee 'motion' itself, not merely to the preliminary notice that such a motion will be filed." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993–94 (9th Cir. 2010); *see also* Fed. R. Civ. P. 23(h)(2), Advisory

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[3] While we generally review a district court's approval of a settlement for abuse of discretion, "[i]nterpreting the Federal Rules of Civil Procedure presents a question of law subject to *de novo* review." *Burns v. Lawther*, 53 F.3d 1237, 1240 (11th Cir. 1995).

Committee Note to 2003 Amendment ("In setting the date objections are due, the court should provide sufficient time *after the full fee motion is on file* to enable potential objectors to examine the motion." (emphasis added)).[4]

Reading Rule 23(h) in accordance with its plain text also happens to make good practical sense in at least two respects. First, it ensures that class members have full information when considering—and, should they choose to do so, objecting to—a fee request. While class members may learn from a class notice the all-in amount that counsel plan to request, they would be "handicapped in objecting" based on the notice alone because only the later-filed fee *motion* will include "the details of class counsel's hours and expenses" and "the rationale . . . offered for the fee request." *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014); *see also Mercury*, 618 F.3d at 994 ("Allowing class members an opportunity thoroughly to examine counsel's fee motion, inquire into the bases for various charges and ensure that they are adequately documented and supported is essential for the protection of the rights of class members."); *Keil v. Lopez*, 862 F.3d 685, 705 (8th Cir. 2017) (raising similar concerns).

Second, a plain-language reading of Rule 23(h) ensures that the district court is presented with a fee petition that has been tested by the adversarial process. While, in theory, class counsel act as fiduciaries for the

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[4] *See Horenkamp v. Van Winkle and Co.*, 402 F.3d 1129, 1132 (11th Cir. 2005) (explaining that, while "not binding," Advisory Committee Notes "are nearly universally accorded great weight in interpreting federal rules" (quotation omitted)).

class as a whole, once a class action reaches the fee-setting stage, "plaintiffs' counsel's understandable interest in getting paid the most for its work representing the class" comes into conflict "with the class' interest in securing the largest possible recovery for its members." *Mercury*, 618 F.3d at 994. Accordingly, "the district court must assume the role of fiduciary for the class plaintiffs" and "ensure that the class is afforded the opportunity to represent its own best interests." *Id.* (quotation omitted). The district court cannot properly play its fiduciary role unless—as in litigation generally—class counsel's fee petition has been fully and fairly vetted.

For all these reasons, we have no difficulty concluding that by requiring class members to object to an award of attorneys' fees before class counsel had filed their fee petition, the district court violated Rule 23(h).[5]

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[5] In so holding, we have plenty of company. At least three other circuits have reached this conclusion explicitly, *see, e.g.*, *Keil*, 862 F.3d at 705 (holding "that the district court erred by setting the deadline for objections on a date before the deadline for class counsel to file their fee motion"); *Redman*, 768 F.3d at 637–38 (holding that class counsel's filing of an attorneys'-fee motion "after the deadline set by the court for objections to the settlement had expired" violated Rule 23(h) and stating that "[t]here was no excuse for permitting so irregular, indeed unlawful, a procedure"); *Mercury*, 618 F.3d at 993 ("We hold that the district court abused its discretion when it erred as a matter of law by misapplying Rule 23(h) in setting the objection deadline for class members on a date before the deadline for lead counsel to file their fee motion."), and at least one has suggested as much in dicta,

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The more difficult question is whether, in the circumstances of this case, the district court's Rule 23(h) error was harmless. Unsurprisingly, the parties disagree. Johnson contends that class members were advised in the class notice that counsel would seek a 30% award and, further, that Dickenson wasn't totally prevented from objecting—not only did she submit written objections before the fee petition was filed, but she also presented oral objections afterwards, at the fairness hearing. For her part, Dickenson responds that the error can't be deemed harmless because the district court didn't allow for supplemental briefing after the Rule 23(h) violation was brought to its attention, "gave no serious consideration to the objections that [she] filed," and further, that "other unnamed class members" might have offered "additional cogent arguments that [she] did not." Reply Br. of Appellant at 5–6.

Although we haven't yet applied the harmless-error doctrine to a Rule 23(h) violation, at least one other circuit has. In *Keil*, the Eighth Circuit held that a similar Rule 23(h) error was harmless because "there [wa]s no reasonable probability that it affected the outcome of the proceeding"—in particular, it said, "even if class members had an opportunity to object to the fee motion, there [wa]s no reasonable probability that their objections would have

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see In re Nat'l Football League Players Concussion Injury Litig., 821 F.3d 410, 446 (3d Cir. 2016), *as amended* (May 2, 2016) (stating that the court "ha[d] little trouble agreeing that Rule 23(h) is violated in th[e] circumstances" presented in *Redman* and *Mercury*).

resulted in the court awarding a lower fee." 862 F.3d at 705–06. The court explained that the objectors "had an ample opportunity on appeal to respond to the specific arguments contained within class counsel's fee motion" and "[d]espite raising a number of objections, none of their arguments [were] meritorious." *Id.* at 705.

The *Keil* court's analysis mirrors how we ordinarily conduct harmless-error review—that is, by asking whether the complaining party's substantial rights have been affected. *See, e.g.*, *Vista Mktg., LLC v. Burkett*, 812 F.3d 954, 979 (11th Cir. 2016) (explaining that "the challenging party must establish that the error affected substantial rights to obtain reversal and a new trial"); *see also* 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.").[6] We have explained

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[6] Additionally, Federal Rule of Civil Procedure 61 states: "Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." Although Rule 61 "in a narrow sense . . . applies only to the district courts, it is well-settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (citation omitted); *see also id.* (explaining that "Congress has further

that errors "affect a substantial right of a party if they have a 'substantial influence' on the outcome of a case or leave 'grave doubt' as to whether they affected the outcome of a case." *United States v. Frazier*, 387 F.3d 1244, 1266 n.20 (11th Cir. 2004) (en banc) (quoting *Kotteakos v. United States*, 328 U.S. 750, 764–65 (1946)).

In a similar context, we have held that if a district court's misapplication of a Federal Rule doesn't deny a party the opportunity to present arguments that would have changed the outcome, the error is harmless. In *Restigouche, Inc. v. Town of Jupiter*, we considered a district court's potential violation of Federal Rule of Civil Procedure 56(c), which at the time required that "the non-moving party must be given 10-day advance notice that a summary judgment motion will be taken under advisement." 59 F.3d 1208, 1213 (11th Cir. 1995). We emphasized, though, that the non-moving party there "had ample opportunity to marshal facts and arguments, and d[id] not assert on appeal that there exist[ed] additional evidence . . . which would create material issues of fact." *Id.* "Because [the non-moving party] ha[d] not been deprived of the opportunity to present facts or arguments which would have precluded summary judgment," we held that "any violation of the 10-day notice rule [wa]s harmless." *Id.*

For similar reasons, we conclude that although the district court here violated Rule 23(h), its error was harmless. While a Rule 23(h) error can undoubtedly

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reinforced the application of Rule 61 by enacting the harmless error statute, 28 U.S.C. § 2111, which applies directly to appellate courts and which incorporates the same principle as that found in Rule 61").

"handicap[]" class members who oppose an attorneys'-fee award—because, without the fee petition itself, they lack the requisite information to formulate a compelling objection, *see Redman*, 768 F.3d at 638—it doesn't appear that such harm materialized here. Before class counsel filed their fee petition, Dickenson lodged a detailed objection to the attorneys'-fee award, challenging it on several grounds, including (1) that the district court should conduct a lodestar analysis and (2) that Johnson's incentive award was prohibited by law and otherwise excessive. Then, at the fairness hearing—having had an opportunity to review the fee petition—Dickenson's counsel reiterated her objection but didn't raise any new arguments. Even now, on appeal—with the benefit of time to consider the fee petition even more carefully—Dickenson's objections remain essentially the same. Given the consistency of Dickenson's position in response to class counsel's attorneys'-fee request—both before and after receipt of their fee petition—we can't see how she was "deprived of the opportunity to present" additional objections. *Restigouche*, 59 F.3d at 1213; *cf. Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that a "notice error" was harmless because the respondent "ha[d] not explained to the Veterans Court, to the Federal Circuit, or to us how the notice error to which he points could have made any difference"); Rubenstein, *supra*, § 15:13 (stating that "failure to comply with fee notice procedures does not automatically require reversal" and that "[a]bsent some prejudice to the objectors, notice failure is considered harmless error and generally excused").

To be sure, Dickenson argues that "[s]he had no way of knowing what rationale or record class counsel would offer as a basis for their motion, let alone any way to frame an objection responsive to their application." Br.

of Appellant at 24. The problem, it seems to us, is that by the time of the fairness hearing—let alone proceedings in this Court—she knew exactly class counsel's "rationale [and] record," and yet she hasn't offered any new arguments in opposition to their fee request. Because Dickenson makes essentially the same arguments before us that she did when filing her written pre-petition objection, we cannot conclude that the district court's procedural error was harmful—*i.e.*, that it "affected the outcome of the proceeding." *Keil*, 862 F.3d at 705.[7]

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[7] Dickenson separately argues that the district court's actions in setting the deadlines violated her due-process rights. We can't imagine (and Dickenson hasn't explained) how the Due Process Clause would be any more protective of her right to be heard than our interpretation of Rule 23. In any event, we needn't address the precise interaction between Rule 23 and due-process requirements here because there was no due-process violation. "Due process requires notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). Under the circumstances presented here, the notice provided to class members—although insufficient to satisfy Rule 23(h)—informed class members the percentage of the fund that class counsel would seek and, in fact, enabled Dickenson to file an objection. Although Dickenson wasn't given the opportunity to submit another *written* filing after class counsel filed their fee petition, her lawyer appeared at the fairness hearing and presented her objections to the

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Dickenson next challenges the district court's approval of a $6,000 "[i]ncentive [p]ayment" to Johnson as the class representative. She contends that the Supreme Court's decisions in *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), prohibit incentive awards like Johnson's and, more generally, that the award creates a conflict of interest between Johnson and the other class members. In short, we agree with Dickenson that Supreme Court precedent prohibits incentive awards like the one earmarked for Johnson here. To explain why, we will (1) review *Greenough* and *Pettus*, (2) demonstrate their application to modern-day incentive awards, and (3) respond to Johnson's counterarguments.

1

Greenough and *Pettus* are the seminal cases establishing the rule—applicable in so many class-action cases, including this one—that attorneys' fees can be paid from a "common fund." *See, e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("Since the decisions in [*Greenough*] and [*Pettus*], 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."). Importantly for our purposes, *Greenough* and *Pettus* also establish limits on the types of

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settlement and fee request. It seems to us that Dickenson received the baseline notice and opportunity to be heard that due process requires.

awards that attorneys and litigants may recover from the fund. Because of their significance to our decision—and because they seem to have been largely overlooked in modern class-action practice—we will explain the cases in some detail.

First, and most importantly, *Greenough*. In that case, Francis Vose, who held bonds of the Florida Railroad Company, sued the trustees of the Internal Improvement Fund of Florida (and others) on behalf of himself and other bondholders. *Greenough*, 105 U.S. at 528. Vose argued "that the trustees were wasting and destroying the fund by selling at nominal prices" land that had been earmarked to service the bonds that he and the other bondholders held. *Id.* at 528–29. He was successful. After "[t]he litigation was carried on with great vigor and at much expense, . . . a large amount of the trust fund was secured and saved." *Id.* at 529. As a result, "a considerable amount of money was realized, and dividends [were] made amongst the bondholders, most of whom came in and took the benefit of the litigation." *Id.* Vose "bore the whole burden of this litigation" himself, and he "advanced most of the expenses which were necessary for the purpose of rendering it effective and successful." *Id.* Accordingly, he filed a petition seeking "an allowance out of the fund" to cover "his expenses and services." *Id.*

A special master recommended that Vose be granted an award from the fund. First, the master recommended that Vose receive an award for "necessary expenditures," including what amounted to attorneys' fees and litigation expenses. *Id.* at 530 ("fees of solicitors and counsel," "costs of court," "sundry small incidental items for copying records and the like," "sundry fees paid in maintaining other suits in New York," fees paid in

appealing to the Supreme Court, "attorneys' fees for resisting fraudulent coupons," and "expenses paid to attorneys and agents to investigate fraudulent grants of the trust lands"). Second, and separately, the master "reported in favor of an allowance to Vose for his personal services and expenditures"—in particular, "an allowance of $2,500 a year for ten years of personal services" and reimbursement for Vose's "personal expenditures" for "railroad fares and hotel bills." *Id.*

The lower court approved the master's recommendations in the main, "allowing generally the fees of the officers of the court, and those of the attorneys and solicitors employed in the cause, including charges as between attorney and client," as well as "sundry expenses for looking after and reclaiming the trust lands." *Id.* at 531. The court also approved an award "for the personal expenses and services of Vose." *Id.* The court disallowed, however, "certain fees paid to advisory counsel and other items not directly connected with the suit." *Id.*

On appeal, the Supreme Court approved of some of the payments to Vose but disapproved of others. It held that it was proper for the lower court to reimburse Vose for "his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund." *Id.* at 537. The Court explained that Vose had sued on "behalf of the other bondholders having an equal interest in the fund," who "ha[d] come in and participated in the benefits resulting from his proceedings." *Id.* at 532. "There is no doubt," the Court said, that Vose "expended a large amount of money for which no allowance has been made" and that he gave "his time for years almost exclusively to the pursuit" of the action. *Id.* If Vose wasn't compensated

out of the fund for these expenses, the Court explained, the other bondholders would be unjustly enriched. *See id.*

Importantly for our analysis of modern-day incentive awards, however, the Court went on to hold that "there [was] one class of allowances" that was "decidedly objectionable"—namely, "those made for [Vose's] personal services and private expenses." *Id.* at 537. The Court explained that "[t]he reasons which apply to his expenditures incurred in carrying on the suit, and reclaiming the property subject to the trust"—*i.e.*, those that it approved—"do not apply to his personal services and private expenses." *Id.* The Court reasoned that while there might be reasons to award *trustees* "for their personal services"—*e.g.*, "to secure greater activity and diligence in the performance of the trust, and to induce persons of reliable character and business capacity to accept the office of trustee"—such "considerations have no application to the case of a creditor seeking his rights in a judicial proceeding." *Id.* at 537–38. In the case of a creditor, like Vose, "the allowance of a salary for [his] time and . . . [his] private expenses" in carrying on litigation "would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors." *Id.* at 538. The Court thus concluded that "[s]uch an allowance has neither reason nor authority for its support." *Id.*

To sum up, then, the Supreme Court in *Greenough* upheld Vose's award of attorneys' fees and litigation expenses but rejected as without legal basis the award for his "personal services and private expenses"—in particular, the yearly salary and reimbursement for the money he spent on railroad fares and hotel bills.

Pettus came just three years later. In some respects, *Pettus* broke new ground. We have described *Pettus*, for instance, as "the first Supreme Court case recognizing that attorneys"—as distinct from the lead plaintiff—"had a claim to fees payable out of a common fund which has been created through their efforts," and noted that, in *Pettus*, "a fee was awarded based upon a percentage of the fund recovered for the class." *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991). But as relevant to our analysis of incentive awards, *Pettus* is significant principally as a reiteration of the dichotomy drawn in *Greenough*: While a class representative's claim for "the expenses incurred in carrying on the suit and reclaiming the property subject to the trust" is proper, his "claim to be compensated, out of the fund or property recovered, for his personal services and private expenses" is "unsupported by reason or authority." *Pettus*, 113 U.S. at 122.

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We take the rule of *Greenough*, confirmed by *Pettus*, to be fairly clear: A plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses. It seems to us that the modern-day incentive award for a class representative is roughly analogous to a salary—in *Greenough*'s terms, payment for "personal services." *See, e.g.*, *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455, 468 (10th Cir. 2017) ("[C]ourts regularly give incentive awards to compensate named plaintiffs for the work they performed—their time and effort invested in the case.");

Berry v. Schulman, 807 F.3d 600, 613 (4th Cir. 2015) (similar); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) (similar).

If anything, we think that modern-day incentive awards present even more pronounced risks than the salary and expense reimbursements disapproved in *Greenough*. Incentive awards are intended not only to compensate class representatives for their time (*i.e.*, as a salary), but also to promote litigation by providing a prize to be won (*i.e.*, as a bounty). As our sister circuits have described them—even while giving them general approval—incentive awards are designed "to induce [a class representative] to participate in the suit," *Matter of Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992), *as amended on denial of reh'g* (May 22, 1992), and "to make up for financial or reputational risk undertaken in bringing the action" and "to recognize [a class representative's] willingness to act as a private attorney general," *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009); *see also, e.g.*, *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003) (explaining that "applications for incentive awards are scrutinized carefully by courts who sensibly 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").[8]

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[8] So far as we can tell, the only circuit to have directly confronted whether *Greenough* and *Pettus* prohibit incentive awards summarily dismissed the cases as "inapposite" because they presented a different "factual setting[]." *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir.), *cert. denied sub nom. Bowes v. Melito*, 140 S. Ct. 677 (2019). We are unpersuaded by the Second

The incentive award that Johnson seeks, it seems to us, is part salary and part bounty. Class counsel's fee petition asserted that Johnson was entitled to the $6,000 incentive payment because he "took critical steps to protect the interests of the class, and spent considerable time pursuing their claims"—*e.g.*, by "frequently communicat[ing] with his counsel," "ke[eping] himself apprised of th[e] matter," "approving drafts before filing," and "respond[ing] to NPAS Solutions' discovery requests." In other words, he wants to be compensated for the time he spent litigating the case, or his "personal services"—an award that the Supreme Court has deemed "decidedly objectionable." *Greenough*, 105 U.S. at 537. In his brief to us, Johnson also suggests that he is requesting a bonus for bringing the suit, inasmuch as he has "subjected himself to scrutiny from NPAS Solutions, class members, and the public at large," "successfully brought a class action that provides meaningful cash benefits to thousands of persons," and "provided an important public service by enforcing consumer protection laws." Br. of

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Circuit's position. Other circuits have recognized the continuing vitality of *Greenough* as prohibiting awards for "private" and "personal" expenses in common-fund cases, although they haven't applied the decisions specifically to incentive awards. *See, e.g.*, *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1208 (6th Cir. 1992) (explaining that costs awarded to the shareholders' representative in derivative litigation "related to advancing the litigation" and were "not 'private' in the sense found objectionable in *Greenough*"); *Matter of Cont'l Ill. Sec. Litig.*, 962 F.2d at 571 (citing *Greenough* for the proposition that expenses other than attorneys' fees can be awarded out of a common fund, "provided they are not personal").

Appellee Johnson at 48. Whether Johnson's incentive award constitutes a salary, a bounty, or both, we think it clear that Supreme Court precedent prohibits it.[9]

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[9] We note, in addition, that our holding that *Greenough* and *Pettus* prohibit incentive awards accords with our precedent carefully scrutinizing settlements that give class representatives preferred treatment. We have explained that, "by choosing to bring their action as a class action . . . named plaintiffs 'disclaim[] any right to a preferred position in the settlement.'" *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 506 n.5 (5th Cir. 1981) (quotation omitted); *see also Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (holding that all decisions of the former Fifth Circuit handed down before October 1, 1981 are binding precedent). We can't see why paying an incentive award isn't tantamount to giving a "preferred position" to a class representative "simply by reason of his status." *Kincade*, 635 F.2d at 506 n.5. Other circuits have likewise viewed the preferential treatment of some class members with skepticism. *See, e.g.*, *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 755 (6th Cir. 2013) (holding that "the district court abused its discretion in finding that the settlement was fair, reasonable, and adequate" because "the named plaintiffs receive 'preferential treatment,' while the relief provided to the unnamed class members [was] 'perfunctory'" (quotation omitted)); *Staton v. Boeing Co.*, 327 F.3d 938, 976 (9th Cir. 2003) ("Such special rewards for counsel's individual clients are not permissible when the case is pursued as a class action. Generally, when a person 'join[s] in bringing [an] action as a class action . . . he has disclaimed any right to a preferred position in the settlement.'" (alterations in original) (quotation omitted)).

To *Greenough* and *Pettus*, Johnson offers two responses. As an initial matter, he argues that those decisions aren't binding here because neither "discusses incentive awards to class representatives, as both predate Rule 23 by decades." Br. of Appellee Johnson at 47. Two problems. First, Johnson fails to engage with the logic of *Greenough*, which, while not directed to class representatives per se, involved an analogous litigation actor—*i.e.*, a "creditor seeking his rights in a judicial proceeding" on behalf of both himself and other similarly situated bondholders. 105 U.S. at 538. Second, Johnson's argument implies that Rule 23 has something to say about incentive awards, and thus has some bearing on the continuing vitality of *Greenough* and *Pettus*. But it doesn't—and so it doesn't: "Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards." Rubenstein, *supra*, § 17:4.[10] The fact that Rule 23 postdates *Greenough* and *Pettus*, therefore, is irrelevant.

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[10] For example, Rule 23(h) states, in relevant part, that "[i]n 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." One could argue that this suggests that, by implication, that items other than "attorney's fees and nontaxable costs" can't be awarded. *Cf. Fla. Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1327 (11th Cir. 2001) (explaining that under "the interpretive canon of *expressio unius est exclusio alterius* . . . the expression of one thing implies the exclusion of another" (quotation omitted)).

Separately, Johnson appeals to ubiquity. "[I]ncentive awards are routine in class actions," he contends, so *Greenough* and *Pettus* can't possibly prohibit them. Br. of Appellee Johnson at 47. Johnson is partly right; incentive awards do seem to be "fairly typical in class action cases." *Berry*, 807 F.3d at 613 (quotation omitted). But, so far as we can tell, that state of affairs is a product of inertia and inattention, not adherence to law. 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; *see also In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013) ("[T]o the extent that incentive awards are common, they are like dandelions on an unmowed lawn—present more by inattention than by design.").[11] Needless to say, we are not at liberty to sanction a device or practice, however

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[11] It is perhaps unsurprising that inertia has taken over, because challenges to incentive awards are so few and far between. And understandably so. Because "most class suits settle, the parties typically agree to pay the class representatives some incentive award," and "[t]he only adversarial challenge to this would come from objectors." Rubenstein, *supra*, § 17:4. "Absent class members," for their part, are "unlikely to object to such awards because even if they were successful, the money would simply remain in the common fund to be distributed to the class and the single member's share of it would be negligible." *Id.* Consider that redistribution of Johnson's $6,000 among all 9,543 claimants would increase each person's take by only $.63. Needless to say, this set of circumstances has "created few occasions in which courts have been required to consider seriously the legal basis" for incentive awards. *Id.*

widespread, that is foreclosed by Supreme Court precedent. *Cf. Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (quotation omitted)).[12]

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[12] We note that the Supreme Court recently alluded to incentive awards in footnoted dicta. In *China Agritech, Inc. v. Resh*, the Court addressed the question whether, following denial of class certification, a putative class member could commence a new class action "beyond the time allowed by the applicable statute of limitations." 138 S. Ct. 1800, 1804 (2018). The Court held that while the limitations period is tolled "during the pendency of a putative class action" such that an unnamed class member can file an *individual* suit following a denial of class certification, he may not file "a follow-on class action past expiration of the statute of limitations." *Id.* In the course of its opinion, the Court observed that, as a practical matter, would-be lead plaintiffs have "little reason to wait in the wings, giving another plaintiff first shot at representation," noting (among other things) the "attendant financial benefit" of being the lead dog. *Id.* at 1810–11. To the "attendant financial benefit" language, the Court appended a footnote citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998), in which the Seventh Circuit had "affirm[ed] [a] class representative's $25,000 incentive award." *China Agritech*, 138 S. Ct. at 1811 n.7. While Supreme Court dicta are not "to be lightly cast aside" and can be "of considerable persuasive value," *F.E.B. Corp. v. United States*, 818 F.3d 681, 690 n.10 (11th Cir. 2016) (quotations omitted), *China Agritech* doesn't impact our holding or analysis here, for two reasons.

* * *

In conclusion, we hold that *Greenough* and *Pettus* prohibit the type of incentive award that the district court approved here—one that compensates a class representative for his time and rewards him for bringing a lawsuit. Although it's true that such awards are commonplace in modern class-action litigation, that doesn't make them lawful, and it doesn't free us to ignore Supreme Court precedent forbidding them. If the Supreme Court wants to overrule *Greenough* and *Pettus*, that's its prerogative. Likewise, if either the Rules Committee or Congress doesn't like the result we've reached, they are free to amend Rule 23 or to provide for incentive awards by statute. But as matters stand now, we find ourselves constrained to reverse the district court's approval of Johnson's $6,000 award.[13]

First, it is clear in context that the Court there was simply acknowledging a reality of modern class-action practice in response to policy arguments that the parties had put before it, rather than endorsing the legality of incentive awards. *See China Agritech*, 138 S. Ct. at 1810–11. Second, and even more importantly, the Court didn't cite or consider—let alone overrule—*Greenough* and *Pettus*. The Supreme Court has told us that it "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*," *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000), and so we, as a lower court, remain bound to apply *Greenough* and *Pettus*.

[13] Rather than contesting our reading of *Greenough* and *Pettus*, our dissenting colleague asserts that we have "disregard[ed]" *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), which she says is "binding in our

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Finally, we consider Dickenson's argument that the district court didn't sufficiently explain itself to enable meaningful appellate review. In particular, she contends that the district court failed to adequately explain (1) its award of attorneys' fees, (2) its denial of her objections, and (3) its approval of the settlement. As we will explain, we agree.

1

First, the district court's approval of the attorneys'-fee award. Federal Rule of Civil Procedure 23(h)(3) states that when awarding "reasonable attorney's fees and nontaxable costs," the court "must find the facts and state its legal conclusions under Rule 52(a)." *See also* Fed. R.

Circuit." Dissenting Op. at 37–38. *Holmes* is binding, to be sure, but only with respect to the issue that it addressed and decided. *Holmes* had nothing to do with incentive awards; instead, the question there was whether an apparent inequity in the distribution of a settlement fund—half to eight named plaintiffs, half to the remaining 118 class members—rendered the settlement itself unfair. *See* 706 F.2d at 1147–50. And the answer to that question didn't turn on whether any of the named plaintiffs were entitled to a salary or bounty, but rather on whether (as the settlement proponents contended and the objectors denied) the "disparities in money payments were justified by the value of the unique, individual claims of the named plaintiffs." *Id.* at 1148. Unsurprisingly to us, the *Holmes* panel never even mentioned—let alone saw a need to explain away or distinguish—either *Greenough* or *Pettus*.

Civ. P. 52(a)(1) (requiring that a court "must find the facts specially and state its conclusions of law separately"). Although "a district court has ample discretion in awarding fees," its order "must allow meaningful review—the district court must articulate the decisions it made, give principled reasons for those decisions, and show its calculation." *In re Home Depot Inc.*, 931 F.3d 1065, 1088–89 (11th Cir. 2019); *see also Camden I*, 946 F.2d at 775 ("The district court's reasoning should identify all factors upon which it relied and explain how each factor affected its selection of the percentage of the fund awarded as fees."). "In other words, the court must 'provide a concise but clear explanation of its reasons for the fee award.'" *Home Depot*, 931 F.3d at 1089 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)); *see also Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 558 (2010) (explaining that even in "a matter that is committed to the sound discretion of a trial judge . . . [i]t is essential that the judge provide a reasonably specific explanation for all aspects" of its determination because otherwise "adequate appellate review is not feasible").

The district court here didn't make the required findings or conclusions. In its final order, the district court didn't explain its approval of the attorneys'-fee award, the litigation costs, or the incentive payment; instead, it merely said that class counsel's request with respect to each was "approved." Under these circumstances, the appropriate disposition is to remand for additional findings on the fees and costs issues. *See, e.g.*, *Compulife Software Inc. v. Newman*, 959 F.3d 1288, 1309 (11th Cir. 2020) ("Rule 52 violations require us to vacate and remand for new findings and conclusions because '[w]e are . . . a court of review, not a court of first view.'" (alterations in original) (quoting *Callahan v. U.S. Dep't of Health &*

Human Servs., 939 F.3d 1251, 1266 (11th Cir. 2019))); *Complaint of Ithaca Corp.*, 582 F.2d 3, 4 (5th Cir. 1978) ("When, because of absence of findings of fact or conclusions of law, an appellate court cannot determine whether the record supports the trial court decision, it should remand the action for entry of findings of fact and conclusions of law.").[14]

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Second, the district court's denial of Dickenson's objections. When a class member objects to a settlement, "the trial judge must assume additional

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[14] We briefly address—and reject—Dickenson's argument that the district court's fee award is unlawful because the Supreme Court's decision in *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010), overruled *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991), which instructs courts to calculate a common-fund award as a percentage of the fund using a 12-factor test. As we recently explained, *Perdue* didn't abrogate *Camden I*. *See Home Depot*, 931 F.3d at 1084–85 (stating that "[t]here is no question that the Supreme Court precedents stretching from *Hensley* to *Perdue* are specific to fee-shifting statutes" and that "Supreme Court precedent requiring the use of the lodestar method in statutory fee-shifting cases does not apply to common-fund cases"). *Camden I* therefore remains good law, and the district court should apply it in the first instance on remand. *Cf. Piambino v. Bailey*, 610 F.2d 1306, 1329 (5th Cir. 1980) (explaining that it "is not our normal practice" to "independently evaluate the reasonableness of" attorneys' fees because "the District Court is infinitely better situated to conduct the factual inquiry necessary").

responsibilities"—most notably, to "examine the settlement in light of the objections raised and set forth on the record a reasoned response to the objections including findings of fact and conclusions of law necessary to support the response." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *see also Home Depot*, 931 F.3d at 1089 (explaining that "[t]he level of specificity required by district courts is proportional to the specificity of the fee opponent's objections").

Here, the district court gave no "reasoned response" whatsoever to Dickenson's objections in its final order, instead stating simply that "[t]he objection of Jenna Dickenson is OVERRULED." True, at the fairness hearing, the district court summarized Dickenson's objections and stated that it had "carefully considered" them, but it proceeded to dismiss them without further explanation. Nothing else in the record gives any indication that the district court meaningfully considered or responded to Dickenson's objections. Because the district court didn't "set forth on the record a reasoned response to [Dickenson's] objections" and provide "findings of fact and conclusions of law necessary to support [its] response," we conclude that a remand is necessary so that the district court can do so. *Cotton*, 559 F.2d at 1331.

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Third, the district court's approval of the settlement. Before approving a class-action settlement, a district court must "determine that it [is] fair, adequate, reasonable, and not the product of collusion." *Leverso*, 18 F.3d at 1530. In so doing, "[a] threshold requirement is that the trial judge undertake an analysis of the facts and

the law relevant to the proposed compromise." *Cotton*, 559 F.2d at 1330. "A 'mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law' will not suffice." *Id.* (quoting *Protective Comm. v. Anderson*, 390 U.S. 414, 434 (1968)). We have also recognized that a district court must "support [its] conclusions by memorandum opinion or otherwise in the record" because appellate courts "must have a basis for judging the exercise of the trial judge's discretion." *Id.*; *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) ("Appellate courts 'must have a basis for judging the exercise of the district judge's discretion.'" (quoting *Cotton*, 559 F.2d at 1330)).

The district court's final order approving the settlement agreement falls far short of what our precedents require. There, the court recited the factors that we identified in *Leverso v. SouthTrust Bank of Alabama*, 18 F.3d 1527 (11th Cir. 1994), and then, without any accompanying analysis, conclusorily asserted that the settlement "is in all respects fundamentally fair, reasonable, adequate, and in the best interest of the class members, when considering" the factors "in their totality." Dist. Ct. Order at 4.[15]

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[15] The district court's order preliminarily approving the settlement provided no additional analysis and, in fact, recited the same conclusory statement. Nor does the fairness-hearing transcript enlighten us as to the district court's reasoning. There, the court simply recounted the case's procedural history and summarized the settlement and Dickenson's objections to it, heard argument from the parties, concluded that it had "carefully considered all of the submissions before the Court," and announced that it

While there may be cases in which we can look past the district court's lack of reasoning to conduct our own review, *see, e.g.*, *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 678 F.3d 1199, 1201 (11th Cir. 2012), this isn't one of them. From the record before us, we can't tell whether the district court abused its discretion. "[W]ere we at this juncture to affirm the approval of the settlement[], we would not be reviewing the district court's exercise of discretion but, rather, exercising our own discretion on the basis of the record before us." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 218 (5th Cir. 1981). We must therefore remand to the district court for a fuller explanation. *See id.* at 206–07 (stating that "we are, under these circumstances, compelled to remand to the district court for findings of fact sufficient for us to determine whether its approval of the settlements was a proper exercise of discretion")[16]

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was "going to enter the proposed final order and judgment that has been proposed by the Plaintiff and Defense."

[16] Even if we were to conclude that the record was sufficient for us to review the district court's approval of the settlement, we would still be obliged to remand. Federal Rule of Civil Procedure 23(e)(2)(C) requires district courts to consider "the terms of any proposed award of attorney's fees" in determining whether "the relief provided for the class is adequate." Accordingly, it seems to us that the district court will in any event have to re-do its adequacy-of-the-settlement analysis after it explains its attorneys'-fees decision.

As with the district court's approval of Johnson's incentive award, it is no answer to say, "That's just how it's done." The law is what the law is, and the law requires more than a rubber-stamp signoff. We must conclude, therefore, that the district court failed to adequately explain its award of attorneys' fees, its denial of Dickenson's objections, or its approval of the settlement. Accordingly, we vacate the district court's order and remand so that the court can make the required on-the-record findings and conclusions.

III

In sum, we hold that the district court violated Rule 23(h) by setting the deadline for class members to object to the settlement—including its attorneys'-fees provisions—before the due date for class counsel's fee petition, but we conclude that, on the record here, that error was harmless. We reverse the district court's approval of Johnson's $6,000 incentive award, as it is prohibited by the Supreme Court's decisions in *Greenough* and *Pettus*. Finally, we conclude that we must remand the case so that the district court can adequately explain its fee award to class counsel, its denial of Dickenson's objections, and its approval of the settlement.

REVERSED IN PART, VACATED IN PART, AND REMANDED

MARTIN, Circuit Judge, concurring in part and dissenting in part:

This is Jenna Dickenson's appeal of the District Court order approving, over her objections, the settlement agreement of this class action brought under the Telephone Consumer Protection Act. Ms. Dickenson also objected to the District Court's award of attorneys' fees and the incentive award to named plaintiff Charles Johnson. Those awards are challenged in this appeal as well.

I write separately because I disagree with the majority's decision to take away the incentive award approved by the District Court for the named plaintiff. See Maj. Op. at 23–25. In reversing this incentive award, the majority takes a step that no other court has taken to do away with the incentive for people to bring class actions. For class actions, the class must be represented by a named plaintiff, who incurs costs serving in that role. Those costs may include time and money spent, along with all the slings and arrows that accompany present day litigation. By prohibiting named plaintiffs from receiving incentive awards, the majority opinion will have the practical effect of requiring named plaintiffs to incur costs well beyond any benefits they receive from their role in leading the class. As a result, I expect potential plaintiffs will be less willing to take on the role of class representative in the future.

The majority's analysis also disregards the analysis set forth in this Court's ruling in Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983), which is binding in our Circuit. I understand Holmes to have required our panel to determine whether the incentive

award to Mr. Johnson is fair. That is, we were charged with deciding whether the award creates a conflict between Mr. Johnson and other class members like Ms. Dickenson. I respectfully dissent from the majority's failure to conduct this analysis.

I.

My review of class action treatises makes clear that incentive awards (also referred to as service awards or case contribution awards) are routine. As the majority seems to observe, courts have not generally addressed their legal basis for approving incentive awards. See William B. Rubenstein, 5 Newberg on Class Actions §§ 17:2 & n.1, 17.4 (5th ed., June 2020 Update) [hereinafter Newberg]. But a review of the history of incentive awards provides worthwhile background for our discussion here. In the 1980s and 1990s, courts began to approve awards for named plaintiffs and to develop tests to determine the appropriate conditions for granting an award. See Theodore Eisenberg & Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1310–11 (2006) [hereinafter Incentive Awards]. In discussing the first case to use the term "incentive award," Newberg says "although labeling the payment an 'incentive award,' the rationale that the court employs speaks more to compensation than incentive, suggesting that the class representatives are being paid for their service to the class, not so as to ensure that class members will step forward in the future." § 17:2 (discussing Re Cont'l/Midlantic S'holders Lit., Civ. A. No. 86-6872, 1987 WL 16678 (E.D. Pa. Sept. 1, 1987) (unreported)).

This viewpoint sparked debate. "Even as incentive awards were achieving recognition, however, the pendulum had begun to swing against them." Incentive Awards, 53 UCLA L. Rev. at 1311. The arguments centered around whether incentive awards create a conflict between the named plaintiff's interests and those of the class members she is representing. See id. at 1312–13; see also Newberg § 17:1. Courts across the country discuss the reasons for and against incentive awards, but few have "paused to consider the legal authority for incentive awards."[1] Newberg § 17:4. Rule 23 does not

[1] Newberg posits two possible bases for incentive awards. First, in common fund cases, "restitution supports a fee award" because "the presence of a fund under the court's supervision serves as both the source of the award and, in a sense, as the source of authority for an award." Newberg § 17:4 (emphasis omitted); see also Incentive Awards, 53 UCLA L. Rev. at 1313 ("From a doctrinal perspective, incentive awards have been justified as a form of restitution for a benefit conferred on others."). The theory is that "if the class representative provides a service to the class without the class paying for it, the class members will be unjustly enriched by virtue of receiving these services for free, and/or the class representatives are not realizing the full value of their services." Newberg § 17:4.

But the restitution analogy doesn't fit squarely within the unjust enrichment doctrine because a person who does not seek services does not generate any entitlement to payment. Id. Rather, the traditional attorneys' fee award in common fund cases can be viewed as an "exception" to the traditional unjust enrichment

make (and has never made) any reference to incentive awards. See id. Indeed, Newberg recognizes that, as of June 2020, no court has addressed its authority to approve incentive awards head on. Id. Instead, courts have "created these awards out of whole cloth." Id. The few scattered references in reported case law "suggest that courts generally treat incentive awards as somewhat analogous to attorney's fee awards." Id. In effect, courts have treated class representatives as providing professional services to the class, despite a named plaintiff not engaging in traditional—i.e., legal—services. See id. (explaining there is an exception to the unjust enrichment rule that provides a legal basis for incentive awards). Courts gradually expanded the application of this rule in common fund cases like this one.

Around the 1990s, courts "tended to limit incentive awards to cases where the representative plaintiff had provided special services to the class—for example, providing financial or logistical support to the litigation or acting as an expert consultant." Incentive Awards, 53 UCLA L. Rev. at 1310. For instance, the Seventh Circuit upheld the District Court's rejection of a proposed $10,000

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rule, which is "typically justified by the fact that class counsel are providing professional (legal) services to the class." Id. In other words, a person providing professional services should be compensated so that the person receiving services is not unjustly enriched. Yet even this possible basis for incentive awards does not typically apply to a named plaintiff, because the class representative generally is not providing professional services. See id. ("If you dive into a lake and save a drowning person, you are entitled to no fee." (quotation marks omitted)).

award to a named plaintiff "for his admittedly modest services." Matter of Cont'l Ill. Sec. Litig., 962 F.2d 566, 571–72 (7th Cir. 1992), as amended on denial of reh'g (May 22, 1992).

But over time, circuits began to endorse the sort of incentive awards we see today. Courts recognized that incentive awards serve the purposes of Rule 23 even in circumstances in which the plaintiff did not provide special services. The principal inquiry became not whether there is any legal basis for an incentive award, but whether such an award is fair.

II.

Many other circuits, including this one, look to the fairness of an award to a named class representative. If it does not appear that an incentive award "compromise[s] the interest of the class" for the class representative's personal gain, courts routinely uphold them. See Hadix v. Johnson, 322 F.3d 895, 897 (6th Cir. 2003); see id. at 898 (holding that "this case is clearly not a case where an incentive award is proper"). This Court has approved of this analysis. In Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983), we recognized that courts routinely "refuse[] to approve settlements on the ground that a disparity in benefits" between the named plaintiffs and the absent members of the class "evidenced either substantive unfairness or inadequate representation." Id. at 1148. Therefore, "[w]hen a settlement explicitly provides for preferential treatment for the named plaintiffs in a class action, a substantial burden falls upon the proponents of the settlement to demonstrate and document its fairness." Id. at 1147; see id. at 1146–1147 (explaining that eight named plaintiffs were not entitled

to receive approximately one-half of the common fund based on their meritorious individual claims). The "inference of unfairness" associated with such unequal distributions "may be rebutted by a factual showing that the higher allocations to certain parties are rationally based on legitimate considerations." Id. at 1148.

Our approach tracks the case law of our sister circuits. For example, the Ninth Circuit requires district courts to "individually" evaluate the award to each named plaintiff, "using relevant factors including the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, the amount of time and effort the plaintiff expended in pursuing the litigation . . . ." See Staton v. Boeing Co., 327 F.3d 938, 977 (9th Cir. 2003) (alterations adopted and quotation marks omitted). In In re U.S. Bancorp Litigation, 291 F.3d 1035 (8th Cir. 2002), the Eighth Circuit relied on similar factors to approve as fair $2,000 payments to five named plaintiffs out of a class potentially numbering more than 4 million in a settlement of $3 million. Id. at 1038 (citing, inter alia, Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998)). Several other circuits have also recognized the proper inquiry as being whether the incentive award is fair. See, e.g., Chieftain Royalty Co. v. Enervest Energy Inst. Fund XIII-A, L.P., 888 F.3d 455, 468–69 (10th Cir. 2017) (rejecting percentage-based incentive award because, among other things, it encouraged a class representative to favor monetary remedy over injunctive relief, "creating a potential conflict between the interest of the class representative and the class"); Berry v. Schulman, 807 F.3d 600, 613–14 (4th Cir. 2015) (rejecting objector's argument that incentive award created a conflict of interest and upholding award); Cobell v. Salazar, 679 F.3d 909, 922

(D.C. Cir. 2012) (holding that incentive award was fair and did not create "an impermissible conflict" because the settlement agreement "provided no guarantee" that class representatives would receive incentive payments; agreement left it to discretion of the district court); Sullivan v. DB Invs., Inc., 667 F.3d 273, 333 n. 65 (3d Cir. 2011) (holding that district court did not abuse its discretion in approving incentive award because it "discussed the role played by the several class representatives and the risks taken by these parties in prosecuting this matter").

This fairness-to-ensure-no-conflict analysis goes to the heart of Ms. Dickenson's stated concerns, and its application would dispel her fear of collusion here. See Br. of Appellant at 53 ("Johnson . . . did nothing to dispel the presumption of unfairness."). Our court adopted this analysis in Holmes. And it addresses the concerns about incentive awards raised by at least one member of the Supreme Court. In Frank v. Gaos, 586 U.S. ___, 139 S. Ct. 1041 (2019), a majority of the Supreme Court acknowledged that a proposed settlement award included incentive payments for the named plaintiffs, and did not question the viability of those incentive awards.[2] Id. at 1045. The majority of the Court remanded the case to the

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[2] One year earlier, the Supreme Court similarly recognized the viability of a "financial benefit" to a class representative that goes "above and beyond her individual claim." China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 1810–11 & n.7 (2018). The majority calls this dicta, Maj. Op. at 28 n.12, but it cannot seriously dispute that the Supreme Court acknowledged that a class representative may be entitled to compensation in his or her role as the person bringing suit.

Ninth Circuit for that court to decide standing. Id. at 1046. Again, the majority did not address the merits of the settlement award. Id. Justice Thomas dissented, however, and in doing so, took issue with the cy pres payments to non-party nonprofits on behalf of the class as well as the incentive awards to the named plaintiffs. Justice Thomas noted that the cy pres-only arrangement did not obtain any relief for the class, while securing "significant benefits" for class counsel and the named plaintiff. Id. at 1047 (Thomas, J., dissenting). Justice Thomas said this "strongly suggests that the interests of the class were not adequately represented." Id. I read Justice Thomas's brief dissent in Frank to address his concern about whether the cy pres arrangement in that case was fair, as opposed to whether disparate awards in class actions are legally permissible as a general matter. I continue to have confidence that the fairness analysis developed by many circuit courts, including our own, can protect against conflicts between a class representative and absent class members.

Based on this Court's precedent in Holmes, and in keeping with the approach taken by other circuits, I believe it was the job of our panel to determine, in light of the totality of the circumstances, whether the District Court abused its discretion in finding the $6,000 award to Mr. Johnson was fair in this case. See Holmes, 706 F.2d at 1147; Hadix, 322 F.3d at 897–98. And I do not believe the District Court abused its discretion in finding that the $6,000 award was fair.

The settlement agreement here was not contingent on Mr. Johnson receiving an incentive award. It merely allowed him to seek one. If the District Court had denied Mr. Johnson an incentive award, the class still would have

had the benefit of his representation under the terms of the settlement fund set out in the agreement. I think this arrangement mitigates any concern that the settlement was unfair to the class. Cf. Holmes, 706 F.2d at 1146–47 (scrutinizing a settlement agreement that required, rather than merely allowed, the court to approve disparate treatment of class members); In re Dry Max Pampers Litig., 724 F.3d 713, 722 (6th Cir. 2013) (reversing a settlement approval where the settlement required $1,000 payments to named plaintiffs). The record also contains class counsel's affidavit attesting to the fact that Mr. Johnson invested his own time and effort in litigating the action, including by regularly conferring with his counsel and responding to the defendant's written discovery requests. Thus there was a factual basis for the District Court's decision to give Mr. Johnson an incentive award. Under the fairness analysis, I would uphold the District Court's ruling.

III.

Now back to the majority's holding. The majority opinion observes that Trustees v. Greenough, 105 U.S. 527 (1881), and Central Railroad & Banking Co. v. Pettus, 113 U.S. 116 (1885), "seem to have been largely overlooked in modern class-action practice." Maj. Op. at 18. It holds that the "modern-day incentive award" is equivalent to a salary and is barred by Greenough and Pettus. Id. at 23, 25. At the same time, the majority opinion recognizes that no other court has directly confronted the issue here: whether Greenough and Pettus prohibit awards like the $6,000 awarded to Mr. Johnson in this case. See id. at 24 n.8.

I believe the majority's decision goes one step too far in deciding this issue and does so in the face of our binding precedent that recognizes a monetary award to a named plaintiff is not categorically improper. See Holmes, 706 F.2d at 1147 (setting standards for what an appropriate award looks like). True, Holmes mentioned that the proposed preferential treatment was based on the named plaintiffs' meritorious individual claims, id., but the analysis itself matters. This approach from Holmes has been adopted by several other circuits and applied to awards that look to me more like salaries than awards for litigation expenses. Indeed, one legal basis for an incentive award is the services performed by a named plaintiff, which may include "their time and effort invested in the case." Chieftain Royalty, 888 F.3d at 468. And that is the basis on which Mr. Johnson sought compensation here. I don't think the majority opinion does enough to directly grapple with why it is not sufficient for us, like other circuits, to determine whether there is evidence of a conflict between Mr. Johnson and class members like Ms. Dickenson.[3] See Maj. Op. at 8, 33 (citing Holmes for the abuse of discretion standard); see also id. at 29 n.13 (acknowledging that Holmes, which answered the question of whether there was "an apparent inequity" between named plaintiffs and the remaining

[3] The majority opinion calls the $6,000 awarded to Mr. Johnson "part salary and part bounty." Maj. Op. at 24. The majority expresses concerns about a bounty compromising the interests of the class, see id. at 24–25, but it fails to take any step to alleviate those concerns. It bears repeating that Holmes's fairness analysis would eliminate any apprehension that the incentive award created a conflict between Mr. Johnson's interests and the interests of the absent class members.

class members in the distribution of a settlement fund, "is binding"). I would not reverse the award to Mr. Johnson based on Greenough and Pettus. Because the $6,000 award to Mr. Johnson seems to provide "for preferential treatment" for a named plaintiff, I believe our Circuit precedent binds us to determine whether Mr. Johnson has demonstrated the settlement agreement is fair. See Holmes, 706 F.2d at 1147. I think he has.

* * *

The majority's decision to do away with incentive awards for class representatives in class actions takes our court out of the mainstream. To date, none of our sister circuit courts have imposed a rule prohibiting incentive awards. Indeed, none has even directly addressed its authority to approve incentive awards. But upon deciding to undertake this issue here, the majority skips any analysis about our modern authority to approve these awards. It goes straight to decisions from the 1880s that do not reflect the current views of the Supreme Court or other circuits. The majority never properly addresses the main issue before us: whether the incentive award created a conflict between Mr. Johnson and absent class members. I would answer this question by engaging in the fairness analysis called for by our precedent. And that analysis leads me to say the District Court did not abuse its discretion in approving an award of $6,000 to Mr. Johnson.

I respectfully dissent.

APPENDIX C

UNTIED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO.: 9:17-cv-80393-ROSENBERG/HOPKINS

CHARLES T. JOHNSON, on behalf of himself and others similarly situated,	X
Plaintiff,	:
vs.	:
NPAS SOLUTIONS, LLC	:
Defendant.	:
	X

FINAL ORDER AND JUDGMENT

On March 28, 2017, Charles T. Johnson ("Plaintiff") filed a class action complaint (hereinafter referred to as the "Lawsuit") against NPAS Solutions, LLC ("NPAS Solutions") in the United States District Court for the Southern District of Florida, Case No. 9:17-cv-80393, asserting class claims under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, *et seq.*

NPAS Solutions has denied any and all liability alleged in the Lawsuit.

On November 28, 2017, after appropriate arms-length negotiations, Plaintiff and NPAS Solutions (the "Parties") entered into a written settlement agreement (the "Settlement Agreement"), which is subject to review under Fed. R. Civ. P. 23.

On November 29, 2017, Plaintiff filed the Settlement Agreement, along with his Unopposed Motion for Preliminary Approval of Class Action Settlement (the "Preliminary Approval Motion").

In compliance with the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(D), 1453, and 1711-1715, NPAS Solutions caused written notice of the proposed class settlement as directed.

On December 4, 2017, upon consideration of Plaintiff's Preliminary Approval Motion and the record, the Court entered an Order of Preliminary Approval of Class Action Settlement (the "Preliminary Approval Order"). Pursuant to the Preliminary Approval Order, the Court, among other things, (i) preliminarily certified (for settlement purposes only) a class of plaintiffs (the "Class Members") with respect to the claims asserted in the Lawsuit; (ii) preliminarily approved the proposed settlement; (iii) appointed Charles T. Johnson as the Class Representative; (iv) appointed Greenwald Davidson Radbil PLLC as Class Counsel; and (v) set the date and time of the Settlement Approval Hearing.

On April 6, 2018, Plaintiff filed his Unopposed Motion for Final Approval of Class Action Settlement (the "Final Approval Motion").

On May 7, 2018, this Court held a Final Approval Hearing pursuant to Fed. R. Civ. P. 23 to determine whether the Settlement Class satisfies the applicable prerequisites for class action treatment and whether the proposed settlement is fundamentally fair, reasonable, adequate, and in the best interest of the Class Members and should be approved by the Court.

Plaintiff now requests final certification of the settlement class under Fed. R. Civ. P. 23 (b)(3) and final approval of the proposed class action settlement.

The Court has read and considered the Settlement Agreement, Motion for Final Approval, and record. All capitalized terms used herein have the meanings defined herein and in the Agreement.

NOW, THEREFORE, IT IS HEREBY ORDERED:

The Court has jurisdiction over the subject matter of the Lawsuit and over all settling parties hereto.

Pursuant to Fed. R. Civ. P. 23(b)(3), the Lawsuit is hereby certified, for settlement purposes only, as a class action on behalf of the following Class Members with respect to the claims asserted in the Lawsuit:

> All persons in the United States who (a) received calls from NPAS Solutions, LLC between March 28, 2013 and [preliminary

> approval] that (b) were directed to a phone number assigned to a cellular telephone service, (c) for which NPAS Solutions' records contain a "WN" designation, and (d) were placed using an automatic telephone dialing system.

NPAS Solutions LLC has identified 179,642 unique cellular telephone numbers that fall within the class definition.

Pursuant to Fed. R. Civ. P. 23, the Court certifies Plaintiff Charles T. Johnson as the Class Representative and Michael L. Greenwald, James L. Davidson, and Aaron D. Radbil of Greenwald Davidson Radbil PLLC as Class Counsel.

Pursuant to the Court's Preliminary Approval Order, the approved class action notices were mailed. The form and method for notifying the Class Members of the settlement and its terms and conditions was in conformity with this Court's Preliminary Approval Order and satisfied the requirements of Fed. R. Civ. P. 23(c)(2)(B) and due process, and constituted the best notice practicable under the circumstances. The Court finds that the notice was clearly designed to advise Class Members of their rights.

The Court finds that the Settlement Class satisfies the applicable prerequisites for class action treatment under Fed. R. Civ. P. 23, namely:

A. The Class Members are so numerous that joinder of all of them in the Lawsuit is impracticable;

B. There are questions of law and fact common to the Class Members, which predominate over any individual questions;

C. Plaintiff's claims are typical of the claims of the Class Members;

D. Plaintiff and Class Counsel have fairly and adequately represented and protected the interests of all Class Members; and

E. Class treatment of these claims will be efficient and manageable, thereby achieving an appreciable measure of judicial economy, and a class action is superior to other available methods for a fair and efficient adjudication of this controversy.

The Court finds that the settlement of this action, on the terms and conditions set forth in the Settlement Agreement, is in all respects fundamentally fair, reasonable, adequate, and in the best interest of the class members, when considering, in their totality, the following factors: (1) the absence of any fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of the Plaintiff's success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and the substance and amount of opposition to the settlement. *See Leverso v. SouthTrust Bank of AL., N.A.*, 18 F.3d 1527, 1530 (11th Cir. 1994).

The Settlement Agreement, which is deemed incorporated herein, is finally approved and must be consummated in accordance with the terms and provisions thereof, except as amended by any order issued by this Court. The material terms of the Settlement Agreement include, but are not limited to, the following:

A. Settlement Fund – Defendant will establish a $1,432,000.00 Settlement Fund (the "Settlement Fund").

B. Deductions - The following are to be deducted from the Settlement Fund before any other distributions are made:

a. The costs and expenses for the administration of the settlement and class notice, including expenses necessary to identify class members;

b. Plaintiff's attorneys' fees, in the amount of 30 percent of the Settlement Fund, and the reimbursement of Class Counsel's litigation costs and expenses, in the amount of $3,475.52; and

c. The Incentive Payment to Plaintiff. Charles T. Johnson will receive $6,000 as acknowledgment of his role in prosecuting this case on behalf of the Class Members.

C. Settlement Payment to Class Members - Each Class Member who has submitted a valid and timely claim form will receive compensation as set forth in the Settlement Agreement. Each settlement check will be void one-hundred twenty (120) days after issuance.

The Class Members were given an opportunity to object to the settlement. One Class Members objected to the settlement. The objection of Jenna Dickenson is OVERRULED.

No Class Members made a valid and timely request for exclusion.

This Order is binding on all Class Members.

Plaintiff, Settlement Class Members, and their successors and assigns are permanently barred from pursuing, either individually or as a class, or in any other capacity, any of the Released Claims against any of the Released Parties, as set forth in the Settlement Agreement. Pursuant to the release contained in the Settlement Agreement, the Released Claims are compromised, settled, released, and discharged, by virtue of these proceedings and this order.

This Final Order and Judgment bars and permanently enjoins Plaintiff and all members of the Settlement Class from (a) filing, commencing, prosecuting, intervening in or participating as a plaintiff, claimant or class member in any other lawsuit, arbitration or individual or class action proceeding in any jurisdiction (including by seeking to amend a pending complaint to include class allegations or seeking class certification in a pending action), relating to the Released Claims, and (b) attempting to effect Opt Outs of a class of individuals in any lawsuit or arbitration proceeding based on the Released Claims, except that Settlement Class Members are not precluded from addressing, contacting, dealing with, or complying with requests or inquiries from any

governmental authorities relating to the issues raised in this class action settlement.

The Lawsuit is hereby dismissed with prejudice in all respects.

This Order, the Settlement Agreement, and any and all negotiations, statements, documents, and/or proceedings in connection with this Settlement are not, and shall not be construed as, an admission by NPAS Solutions of any liability or wrongdoing in this or in any other proceeding.

The Court hereby retains continuing and exclusive jurisdiction over the Parties and all matters relating to the Lawsuit and/or Settlement Agreement, including the administration, interpretation, construction, effectuation, enforcement, and consummation of the settlement and this order, including the award of attorneys' fees, costs, disbursements, and expenses to Class Counsel.

Class Counsel's request for an award of attorneys' fees of 30 percent of the Settlement Fund is approved.

Class Counsel's request for reimbursement of reasonable litigation costs and expenses in the amount of $3,475.52 is approved.

Plaintiff's request for an incentive award of $6,000.00 is approved.

Accordingly, Plaintiff's Motion for Final Approval of Class Action Settlement [43] and Class Counsel's Motion for Attorneys' Fees, Costs, Expenses, And An Incentive

Award [44] are GRANTED. This case shall REMAIN CLOSED.

DONE and ORDERED in Chambers at West Palm Beach, Florida, this 7th day of May, 2018.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to Counsel of Record

APPENDIX D

UNTIED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO.: 9:17-cv-80393-ROSENBERG/HOPKINS

CHARLES T. JOHNSON, on behalf of himself and others similarly situated,	:	Class Action
Plaintiff,	:	Jury Trial Demanded
vs.	:	
NPAS SOLUTIONS, LLC	:	AMENDED COMPLAINT
Defendant.	:	

Nature of the Action

1. Charles T. Johnson ("Plaintiff") brings this class action against NPAS Solutions, LLC ("Defendant") under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.

2. Section 227(b)(1)(A)(iii) of the TCPA sets forth restrictions on the use of automated telephone equipment and prerecorded voice calls, and provides in

pertinent part:

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

*****

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States[.]

3. Upon information and belief, Defendant routinely violates the TCPA by placing non- emergency telephone calls to consumers' cellular telephone numbers by using an automatic telephone dialing system or an artificial or prerecorded voice, without the prior express consent of the consumers, in that Defendant routinely dials wrong or reassigned telephone numbers that do not belong to the intended recipients of the calls.

Jurisdiction

4. This Court has subject matter jurisdiction under 47 U.S.C. § 227(b)(3) and 28 U.S.C. § 1331.

5. Venue is proper before this Court under 28 U.S.C. § 1391(b), as Plaintiff resides in this District,

Defendant transacts business in this District, and as a substantial part of the events giving rise to this action occurred in this District.

Parties

6. Plaintiff is a natural person who at all relevant times resided in Lantana, Florida.

7. Defendant is a debt collection company based in Tennessee.

8. Defendant touts itself as a "leading provider [of] patient collection services for the health care industry since 1980."[1]

9. Defendant has a public Utility Commission of Texas Automatic Dial Announcing Device permit, no. 120054, which it first obtained in 2012 and last renewed in December 2016.[2]

10. Defendant operates a call center in Kentucky, and its collection specialists "use various skip tracing techniques to locate the right patients in order to negotiate payment arrangements."[3]

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1 http://npasweb.com/ (last visited May 8, 2017).

2 *See* https://www.puc.texas.gov/industry/communications/directories/adad/report_adad.aspx?ID=ADSQL01DB1245626600006 (last visited May 8, 2017).

3 *See* https://careersathca.com/careers/search.dot?jobId=26618-126509&src=CWS-10230 (last visited May 8, 2017).

11. Defendant's Kentucky call center "is part of the Parallon [Business Solutions, LLC] call center."[4]

12. Parallon Business Solutions, LLC states that it utilizes "best-in-class technology and automation to improve [] collection results."[5]

Factual Allegations

13. In an attempt to contact a third party named "Stephanie" for the purpose of attempting to collect a debt in default, Defendant placed numerous calls to cellular telephone number (561) 619- xxxx—a number for which Plaintiff is the sole subscriber.

14. By way of example, Defendant called Plaintiff's cellular telephone number on, among other dates, February 27, 2017, March 3, 2017, March 7, 2017, and March 13, 2017.

15. Defendant's records show additional calls made by it to Plaintiff's cellular telephone number with an automatic telephone dialing system or an artificial or prerecorded voice, starting in January 2017.[6]

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[4] *See* https://talent.insiderlouisville.com/parallon/sara-leonard-rediscovers-the-rewards-of-working-at-parallons-npas-solutions/ (last visited May 8, 2017).

[5] *See* http://www.parallon.com/services/revenue-cycle/solutions/bad-debt-collections (last visited May 8, 2017).

[6] *See* ECF No. 13-3.

16. Defendant called Plaintiff's cellular telephone number from (866) 258-1104, a number assigned to Defendant.

17. Defendant placed all of the above-referenced calls in an effort to contact and collect a debt allegedly owed by a third party, unknown to Plaintiff, named "Stephanie".

18. Upon answering several of Defendant's calls, Plaintiff was greeted by a voice recording instructing "Stephanie" to hold for the next available operator.

19. Upon answering one of Defendant's calls, Plaintiff informed Defendant that it was calling the wrong person and instructed Defendant to stop calling him.

20. No matter, and despite Plaintiff's demand that the calls stop, Defendant continued to place calls to Plaintiff's cellular telephone number.

21. In March 2017, Plaintiff called Defendant and again demanded that Defendant stop calling him.

22. Defendant's representative stated that she would remove Plaintiff's cellular telephone number from its call list.

23. Upon information and good faith belief, and in light of the frequency, character, and nature of the calls, including that Defendant's calls utilized an artificial or prerecorded voice, Defendant placed its calls to Plaintiff's cellular telephone number using an automatic telephone dialing system, as defined by 47 U.S.C. § 227(a)(1).

24. Upon information and good faith belief, and in light of the frequency, character, and nature of the calls, including that Defendant's calls utilized an artificial or prerecorded voice, Defendant placed its calls to Plaintiff's cellular telephone number by using (a) equipment which has the capacity (i) to store or produce telephone numbers to be called, using a random or sequential number generator, and (ii) to dial such numbers, or (b) technology with the capacity to dial random or sequential numbers, or (c) hardware, software, or equipment that the FCC characterizes as an automatic telephone dialing system through the following, and any related, declaratory ruling and order: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 15-72 (adopted June 18, 2015 and released July 10, 2015).

25. Upon information and good faith belief, and in light of the frequency, character, and nature of the calls, including that Defendant's calls utilized an artificial or prerecorded voice, Defendant placed its calls to Plaintiff's cellular telephone number by using (a) an automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that "predicts" the time when a consumer will answer the phone and a person will be available to take the call, or (b) equipment that dials numbers and, when certain computer software is attached, also assists persons in predicting when a sales agent will be available to take calls, or (c) hardware, that when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers, or (d) hardware, software, or equipment that the FCC characterizes as a predictive dialer through the following, and any related, reports and

orders, and declaratory rulings: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 FCC Rcd 17459, 17474 (September 18, 2002); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14092-93 (July 3, 2003); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd 559, 566 (Jan. 4, 2008); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 15-72 (adopted June 18, 2015 and released July 10, 2015).

26. Upon information and good faith belief, Defendant utilizes hardware and software with the capacity to store telephone numbers and to dial such numbers sequentially, predictively, or randomly, and to dial telephone numbers without human intervention.

27. Upon information and good faith belief, Defendant used such hardware and software to place the calls at issue to Plaintiff's cellular telephone number.

28. Defendant did not have Plaintiff's prior express consent to make any calls to his cellular telephone number.

29. Rather, Defendant was attempting to reach a third party named Stephanie who is unknown to Plaintiff.

30. Plaintiff never provided his cellular telephone number to Defendant.

31. Plaintiff never had any business

relationship with Defendant.

32. Defendant did not place any calls to Plaintiff's cellular telephone number for emergency purposes.

33. Upon information and good faith belief, Defendant placed the calls at issue to Plaintiff willfully and knowingly in that it consciously and deliberately made the calls referenced herein.

34. Upon information and good faith belief, Defendant had knowledge that it was using, and intended to use, an automatic telephone dialing system or an artificial or prerecorded voice to place the calls at issue to Plaintiff.

35. Plaintiff suffered harm as a result of Defendant's telephone calls at issue in that he suffered an invasion of his privacy, an intrusion into his life, and a private nuisance.

36. As well, Defendant's telephone calls at issue depleted or consumed, directly or indirectly, Plaintiff's cellular telephone minutes, for which he paid a third party.

37. Additionally, the unwanted calls at issue unnecessarily tied up Plaintiff's telephone line.

Class Action Allegations

38. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b) on behalf of himself and a class of similarly situated

individuals as defined below:

> All persons and entities throughout the United States (1) to whom NPAS Solutions, LLC placed, or caused to be placed, more than one call (2) directed to a number assigned to a cellular telephone service, but not assigned to the intended recipient of NPAS Solutions, LLC's calls—in that the intended recipient of the calls was not the customary user of, or subscriber to, the telephone number, by (3) using an automatic telephone dialing system or an artificial or prerecorded voice, (4) from March 28, 2013 through and including the date of class certification.

Excluded from the class are Defendant, its officers and directors, members of their immediate families and their legal representatives, heirs, successors, or assigns, and any entity in which Defendant has or had a controlling interest.

39. The proposed class is so numerous that, upon information and belief, joinder of all members is impracticable.

40. The exact number of members of the class is unknown to Plaintiff at this time and can only be determined through appropriate discovery.

41. The proposed class is ascertainable because it is defined by reference to objective criteria.

42. In addition, and upon information and belief, the cellular telephone numbers of all members of the class can be identified in records maintained by Defendant, class members, and third parties.

43. Plaintiff's claims are typical of the claims of the members of the class because all of the class members' claims originate from the same conduct, practice and procedure on the part of Defendant, and Plaintiff possesses the same interests and has suffered the same injuries as each class member.

44. Like all members of the proposed class, Plaintiff received telephone calls from Defendant using an automatic telephone dialing system or an artificial or prerecorded voice, without his consent and at a wrong number, in violation of 47 U.S.C. § 227.

45. Plaintiff will fairly and adequately protect the interests of the members of the class and has retained counsel experienced and competent in class action litigation.

46. Plaintiff has no interests that are contrary to or in conflict with the members of the class that he seeks to represent.

47. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy, since joinder of all members is impracticable.

48. Furthermore, as the damages suffered by individual members of the class may be relatively small, the expense and burden of individual litigation make it

impracticable for the members of the class to individually redress the wrongs done to them.

49. There will be little difficulty in the management of this action as a class action.

50. Issues of law and fact common to the members of the class predominate over any questions that may affect only individual members, in that Defendant has acted on grounds generally applicable to the class.

51. Among the issues of law and fact common to the class are:

a. Defendant's violations of the TCPA as alleged herein;

b. Defendant's use of an automatic telephone dialing system as defined by the TCPA;

c. Defendant's use of an artificial or prerecorded voice;

d. Defendant's practice of placing calls to wrong or reassigned cellular telephone numbers; and

e. the availability of statutory damages.

52. Absent a class action, Defendant's violations of the law will be allowed to proceed without a full, fair, judicially supervised remedy.

Count I: Violations of 47 U.S.C. § 227(b)(1)(A)(iii)

53. Plaintiff repeats and re-alleges each and

every factual allegation contained in paragraphs 1 – 52.

54. Defendant violated 47 U.S.C. § 227(b)(1)(A)(iii) by utilizing an automatic telephone dialing system or an artificial or prerecorded voice to make and/or place telephone calls to Plaintiff's cellular telephone number, without his consent.

55. As a result of Defendant's violations of 47 U.S.C. § 227(b)(1)(A)(iii), Plaintiff and the class are entitled to damages in an amount to be proven at trial.

WHEREFORE, Plaintiff prays for relief and judgment, as follows:

(a) Determining that this action is a proper class action and designating Plaintiff as class representative under Rule 23 of the Federal Rules of Civil Procedure;

(b) Adjudging that Defendant violated 47 U.S.C. § 227(b)(1)(A)(iii), and enjoining Defendant from continuing to place calls to Plaintiff's cellular telephone number, from placing calls to consumers' cellular telephone numbers by using an automatic telephone dialing system or an artificial or prerecorded voice without the prior express consent of the consumers, and from committing further violations of 47 U.S.C. § 227(b)(1)(A)(iii);

(c) Awarding Plaintiff and members of the class actual damages, or statutory damages pursuant to 47 U.S.C. § 227(b)(3) in an amount up to $1,500.00 per violation;

(d) Awarding Plaintiff and members of the class their reasonable costs, expenses, and attorneys' fees incurred in this action, including expert fees, under Rule 23 of the Federal Rules of Civil Procedure; and

(e) Awarding other and further relief as the Court may deem just and proper.

Jury Trial Demanded

Plaintiff hereby demands a trial by jury.

Dated: May 11, 2017 Respectfully submitted,

/s/ Michael L. Greenwald
Michael L. Greenwald
James L. Davidson
Jesse S. Johnson
Greenwald Davidson Radbil PLLC
5550 Glades Road, Suite 500
Boca Raton, FL 33431
561-826-5477
561-961-5684 (Fax)
mgreenwald@gdrlawfirm.com
jdavidson@gdrlawfirm.com
jjohnson@gdrlawfirm.com

Aaron D. Radbil
Greenwald Davidson Radbil PLLC
106 East Sixth Street, Suite 913
Austin, Texas 78701
(512) 322-3912
(561) 961-5684 (Fax)
aradbil@gdrlawfirm.com

Counsel for Plaintiff and the proposed class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been electronically filed on May 11, 2017, via the Court Clerk's CM/ECF system, which will provide notice to all counsel of record.

/s/ Michael L. Greenwald
Michael L. Greenwald

APPENDIX E

UNTIED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 9:17-cv-80393

CHARLES T. JOHNSON, on behalf of himself and others similarly situated,	:	Class Action
Plaintiff,	:	Jury Trial Demanded
vs.	:	
NPAS SOLUTIONS, LLC	:	COMPLAINT
Defendant.	:	

Nature of the Action

1. Charles T. Johnson ("Plaintiff") brings this action against NPAS Solutions, LLC ("Defendant") under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, and the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692d.

2. Section 227(b)(1)(A)(iii) of the TCPA sets forth restrictions on the use of automated telephone

equipment and prerecorded voice calls, and provides in pertinent part:

> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—
>
> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—
>
> *****
>
> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States.[.]

3. Upon information and belief, Defendant routinely violates the TCPA by placing non-emergency telephone calls to consumers' cellular telephone numbers by using an automatic telephone dialing system or an artificial or prerecorded voice, without the prior express consent of the consumers, in that Defendant routinely dials wrong or reassigned telephone numbers that do not belong to the intended recipients of the calls.

4. Section 1692d of the FDCPA provides, in pertinent part:

> A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.

5. Upon information and good faith belief, Defendant routinely violates 15 U.S.C. § 1692d by engaging in conduct the natural consequence of which is to harass, oppress, or abuse consumers in connection with the collection of debts, in that it continues to call consumers for the purpose of debt collection even after being informed that it is calling the wrong person.

Jurisdiction

6. This Court has subject matter jurisdiction under 47 U.S.C. § 2274(b)(3), 15 U.S.C. 1692k(d), and 28 U.S.C. § 1331.

7. Venue is proper before this Court under 28 U.S.C. § 1391(b), as Plaintiff resides in this District, Defendant transacts business in this District, and as a substantial part of the events giving rise to this action occurred in this District.

Parties

8. Plaintiff is a natural person who at all relevant times resided in Lantana, Florida.

9. Plaintiff is a "consumer" as defined by 15 U.S.C. § 1692a(3).

10. Defendant is a debt collection company based in Tennessee.

11. Defendant touts itself as a "leading provider [of] patient collection services for the health care industry since 1980."[1]

12. Defendant's name—NPAS—stands for "National Patient Account Services."

13. Defendant is a "debt collector" as defined by 15 U.S.C. § 1692a(6).

14. Defendant has a public Utility Commission of Texas Automatic Dial Announcing Device permit, no. 120054, which it first obtained in 2012 and last renewed in December 2016.[2]

15. Parallon Business Solutions, LLC owns

Defendant.

16. Parallon Business Solutions, LLC, like Defendant, is based in Tenneesee.

17. Parallon Business Solutions, LLC touts that its "customer service professionals across the country speak to thousands of patients each day with one goal in mind: motivate those who can pay to take action to

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[1] http://npasweb.com/ (last visited Mar. 27, 2017).

[2] See https://www.puc.texas.gov/industry/communications/directories/adad/report_adad.aspx?ID=ADSQL01DB1245626600006 (last visited Mar. 27, 2017).

clear their balance in full while providing an empathetic customer-focused approach."[3]

18. Parallon Business Solutions, LLC states that it utilizes "best-in-class technology and automation to improve [] collection results."[4]

19. Parallon Business Solutions, LLC describes its bad debt collections business as a three-step process: (1) "Load, link & scrub," (2) "Score and segment," and (3) "Customer experience."[5]

20. During the second step, "Score and segment," Parallon Business Solutions, LLC state that it utilizes its "scoring and segmentation methodology" and "accounts are strategically assigned to automated workflows proven to prompt the right response and result."[6]

Factual Allegations

21. In an attempt to contact a third party named "Stephanie" for the purpose of attempting to collect a debt in default, Defendant placed numerous calls to cellular telephone number (561) 619-xxxx—a number for which Plaintiff is the sole subscriber.

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[3] *See* http://www.parallon.com/services/revenue-cycle/solutions/bad-debt-collections (last visited Mar. 27, 2017).
[4] *Id.*
[5] *Id.*
[6] *Id.*

22. By way of example, Defendant called Plaintiff's cellular telephone number on, among other dates, February 27, 2017 and March 3, 2017.

23. Upon information and good faith belief, Defendant's records will show additional calls made by it to Plaintiff's cellular telephone with an automatic telephone dialing system or an artificial or prerecorded voice.

24. Defendant called Plaintiff's cellular telephone number (866) 258-1104, a number assigned to Defendant.

25. Defendant placed all of the above-referenced calls in an effort to contact and collect a debt allegedly owed by a third party, unknown to Plaintiff, named "Stephanie".

26. On several of Defendant's calls, Plaintiff was greeted by a voice recording instructing "Stephanie" to hold for the next available operator.

27. Upon receiving one of Defendant's calls, Plaintiff informed Defendant that it was calling the wrong person and instructed Defendant to stop calling him.

28. No matter, despite Plaintiff's demand that the calls stop, Defendant continued to place calls to Plaintiff's cellular telephone number.

29. On March 14, 2017, Plaintiff called Defendant and again demanded that Defendant stop calling him.

30. Defendant's representative stated that Plaintiff's phone number would be removed from its call list.

31. Upon information and good faith belief, and in light of the frequency, character, and nature of the calls, including that Defendant's calls utilized a prerecorded voice, Defendant placed its calls to Plaintiff's cellular telephone number using an automatic telephone dialing system, as defined by 47 U.S.C. § 227(a)(1).

32. Upon information and good faith belief, and in light of the frequency, character, and nature of the calls, including that Defendant's calls utilized a prerecorded voice, Defendant placed its calls to Plaintiff's cellular telephone number by using (a) equipment which has the capacity (i) to store or produce telephone numbers to be called, using a random or sequential number generator, and (ii) to dial such numbers, or (b) technology with the capacity to dial random or sequential numbers, or (c) hardware, software, or equipment that the FCC characterizes as an automatic telephone dialing system through the following, and any related, declaratory ruling and order: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 15-72 (adopted June 18, 2015 and released July 10, 2015).

33. Upon information and good faith belief, and in light of the frequency, character, and nature of the calls, including that Defendant's calls utilized a prerecorded voice, Defendant placed its calls to Plaintiff's cellular telephone number by using (a) an automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a

manner that "predicts" the time when a consumer will answer the phone and a person will be available to take the call (b) equipment that dials numbers and, when certain computer software is attached, also assists persons in predicting when a sales agent will be available to take calls, or (c) hardware, that when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a dataset of numbers, or (d) hardware, software, or equipment that the FCC characterizes as a predictive dialer through the following, and any related, reports and orders, and declaratory rulings: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 FCC Rcd 17474 (September 18, 2002); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14092-93 (July 3, 2003); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FRCC Rcd 559, 566 (Jan. 4, 2008); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 15-72 (adopted June 18, 2015 and released July 10, 2015).

34. Upon information and good faith belief, Defendant utilizes hardware and software with the capacity to store telephone numbers and to dial such numbers sequentially, predictively, or randomly, and to dial telephone numbers without human intervention.

35. Upon information and good faith belief, Defendant used such hardware and software to place the calls at issue to Plaintiff's cellular telephone number.

36. Defendant did not have Plaintiff's prior express consent to make any calls to his cellular telephone number.

37. Rather, Defendant was attempting to reach a third party named Stephanie who is unknown to Plaintiff.

38. Plaintiff never provided his cellular telephone number to Defendant.

39. Plaintiff never had any business relationship with Defendant.

40. Defendant did not place any calls to Plaintiff's cellular telephone number for emergency purposes.

41. Upon information and good faith belief, Defendant placed the calls at issue to Plaintiff willfully and knowingly in that it consciously and deliberately made the calls referenced herein.

42. Upon information and good faith belief, Defendant had knowledge that it was using, and intended to use, an automatic telephone dialing system or an artificial or prerecorded voice to place the calls at issue to Plaintiff.

43. Plaintiff suffered harm as a result of Defendant's telephone calls at issue in that he suffered an invasion of his privacy, an intrusion into his life, and a private nuisance.

44. As well, Defendant's telephone calls at issue depleted or consumed, directly or indirectly, Plaintiff's cellular telephone minutes, for which he paid a third party.

45. Additionally, the unwanted calls at issue unnecessarily tied up Plaintiff's telephone line.

46. As a result of unwanted calls to his cellular telephone, Plaintiff activated a call blocking application for which he pays a monthly fee.

Class Action Allegations

47. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b) on behalf of himself and two classes of similarly situated individuals as defined below:

TCPA Class

> All persons and entities throughout the United States (1) to whom NPAS Solutions, LLC placed, or caused to be placed, calls (2) directed to a number assigned to a cellular telephone service, by (3) using an automatic telephone dialing system or an artificial or prerecorded voice, (4) from March 28, 2013 through and including the date of class certification, (5) absent prior express consent—in that the called party was not the intended recipient of the calls.

FDCPA Class

> All persons and entities throughout the United States (1) to whom NPAS Solutions, LLC placed, or caused to be placed, calls, (2) from March 28, 2016 through and including the dates of class certification, (3) and in connection with the collection of a consumer debt, (4) after the called party informed NPAS Solutions, LLC that it was calling the wrong person.

Excluded from the classes are Defendant, its officers and directors, members of their immediate families and their legal representatives, heirs, successors, or assigns, and any entity in which Defendant has or had a controlling interest.

48. The proposed classes are so numerous that, upon information and belief, joinder of all members is impracticable.

49. The exact number of members of the classes is unknown to Plaintiff at this time and can only be determined through appropriate discovery.

50. The proposed classes are ascertainable because they are defined by reference to objective criteria.

51. In addition, and upon information and belief, the cellular telephone numbers of all members of the classes can be identified in business records maintained by Defendant and third parties.

52. Plaintiff's claims are typical of the claims of the members of the classes because all of the class members' claims originate from the same conduct, practice and produce on the part of Defendant, and Plaintiff possesses the same interests and has suffered the same injuries as each class member.

53. Like all members of the proposed TCPA Class, Plaintiff received telephone calls from Defendant using an automatic telephone dialing system or an artificial or prerecorded voice, without his consent, in violation of 474 U.S.C. § 227.

54. Further, like all members of the proposed FDCPA Class, Plaintiff received telephone calls from Defendant in connection with the collection of a consumer debt that he did not owe, after informing Defendant that it was calling the wrong person.

55. Plaintiff will fairly and adequately protect the interests of the members of the classes and has retained counsel experienced and competent in class action litigation.

56. Plaintiff has no interests that are contrary to or in conflict with the members of the classes that he seeks to represent.

57. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy, since joinder of all members is impracticable.

58. Furthermore, as the damages suffered by individual members of the classes may be relatively small,

the expense and burden of individual litigation make it impracticable for the members of the classes to individually redress the wrongs done to them.

59. There will be little difficulty in the management of this action as a class action.

60. Issues of law and fact common to the members of the classes predominate over any questions that may affect only individual members, in that Defendant has acted on grounds generally applicable to each class.

61. Among the issues of law and fact common to the classes are:

a. Defendant's violations of the TCPA as alleged herein;
b. Defendant's violations of the FDCPA as alleged herein;
c. Defendant's use of an automatic telephone dialing system as defined by the TCPA;
d. Defendant's use of an artificial or prerecorded voice;
e. Defendant's practice of making calls to wrong or reassigned telephone numbers;
f. Defendant's practice of continuing to call consumers after being informed it is calling the wrong number;
g. Defendant's status as a debt collector as defined by the FDCPA; and
h. the availability of statutory damages.

62. Absent a class action, Defendant's violations of the law will be allowed to proceed without a full, fair, judicially supervised remedy.

Count I: Violations of 47 U.S.C. § 227(b)(1)(A)(iii)

63. Plaintiff repeats and re-alleges each and every factual allegation contained in paragraphs 1 – 62.

64. Defendant violated 47 U.S.C. § 227(b)(1)(A)(iii) by utilizing an automatic telephone dialing system or an artificial or prerecorded voice to make and/or place telephone calls to Plaintiff's cellular telephone number, without his consent.

65. As a result of Defendant's violations of 47 U.S.C. § 227(b)(1)(A)(iii), Plaintiff and the TCPA Class are entitled to damages in an amount to be proven at trial.

Count II: Violations of 15 U.S.C. § 1692d

66. Plaintiff repeats and re-alleges each and every factual allegation contained in paragraphs 1 – 62.

67. Defendant violated 15 U.S.C. § 1692d by engaging in conduct the natural consequence of which is to harass, oppress, or abuse Plaintiff in connection with the collection of consumer debts.

68. Defendant did so by repeatedly dialing Plaintiff's cellular telephone number for the purpose of attempting to collect a debt after being informed it was calling the wrong person and after being instructed to stop calling.

WHEREFORE, Plaintiff prays for relief and judgment, as follows:

(a) Determining that this action is a proper class action and designating Plaintiff as class representative under Rule 23 of the Federal Rules of Civil Procedure;

(b) Adjudging that Defendant violated 47 U.S.C § 227(b)(1)(A)(iii), and enjoining Defendant from continuing to place calls to Plaintiff's cellular telephone number, from placing calls to consumers' telephone numbers by using an automatic telephone dialing system or an artificial or prerecorded voice without the prior express consent of the consumers, and from committing further violations of 47 U.S.C § 227(b)(1)(A)(iii);

(c) Adjudging that Defendant violated 15 U.S.C. § 1692d, and enjoining Defendant from further violations of 15 U.S.C. § 1692d with respect to Plaintiff and the other members of the FDCPA Class;

(d) Awarding Plaintiff and members of the TCPA Class actual damages, or statutory damages pursuant to 47 U.S.C. § 227(b)(3) in an amount up to $1,5000.00 per violation;

(e) Awarding Plaintiff and members of the FDCPA Class statutory damages pursuant to 15 U.S.C. § 1692k;

(f) Awarding Plaintiff and members of the classes their reasonable costs, expenses, and attorney's fees incurred in this action, including expert

fees, under 15 U.S.C. § 1692k and Rule 23 of the Federal Rules of Civil Procedure; and

(g) Awarding other and further relief as the Court may deem just and proper.

Jury Trial Demanded

Plaintiff hereby demands a trial by jury.

Dated: March 28, 2017 Respectfully submitted,

/s/ Michael L. Greenwald
Michael L. Greenwald
James L. Davidson
Jesse S. Johnson
Greenwald Davidson Radbil PLLC
5550 Glades Road, Suite 500
Boca Raton, FL 33431
561-826-5477
561-961-5684 (Fax)
mgreenwald@gdrlawfirm.com
jdavidson@gdrlawfirm.com
jjohnson@gdrlawfirm.com

Aaron D. Radbil
Greenwald Davidson Radbil PLLC
106 East Sixth Street, Suite 913
Austin, Texas 78701
(512) 322-3912
(561) 961-5684 (Fax)
aradbil@gdrlawfirm.com

Counsel for Plaintiff and the proposed classes