No. 25-____

In the

# Supreme Court of the United States

ERIC ALAN ISAACSON, PETITIONER,

vs.

MARIBEL MOSES,
THE NEW YORK TIMES COMPANY, D/B/A THE NEW YORK TIMES, RESPONDENTS

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

"Since the decisions in *Trustees v. Greenough,* 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885), this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole," *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980), provided the fee award is "made with moderation." *Greenough,* 105 U.S. at 536–37. But payments to representative plaintiffs for their own "personal services" in the case are "decidedly objectionable," "illegally made," *id.* at 537–38, and "unsupported by reason or authority." *Pettus,* 113 U.S. at 122. The Eleventh Circuit thus holds that "Supreme Court precedent prohibits incentive awards" to reward litigants for serving as representative plaintiffs in class-action litigation. *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244, 1255 (11th Cir.2020), *reh'g denied*, 43 F.4th 1138 (11th Cir.2022). Five other circuits have rejected that conclusion as superseded by modern class-action practice.

The question presented is:

> May district courts, consistent with the common-fund doctrine of *Greenough* and *Pettus,* and without authorization by statute or rule, approve payments from class-action common-fund settlement funds to compensate litigants for their personal service as representative plaintiffs?

## PARTIES TO THE PROCEEDING

Eric Alan Isaacson, the Petitioner here, was an Objector-Appellant below.

Maribel Moses, is a Respondent here, was the Named Plaintiff-Appellee below.

The New York Times Company, d/b/a *The New York Times,* whose stock trades on the New York Stock Exchange under the ticker symbol NYT, is a Respondent here, and was the Defendant-Appellee below.

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

## RELATED PROCEEDINGS

This case arises from the following proceedings:

*Moses v. New York Times Co.,* No.1:20-CV-04658-RA (S.D.N.Y. October 10, 2024).

*Moses v. New York Times Co.,* No.24-2979, 79 F.4th 235 (2d Cir. August 17,2023).

*Moses v. New York Times Co.,* No.24-2979, 2026 WL 364231 (2d Cir. Feb. 10, 2026).

No other proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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It follows an opinion from a prior appeal in this case, which is published as *Moses v. New York Times Co.,* 79 F.4th 235 (2d Cir.2023)("*Moses I*"), and which appears at Pet.App.11a–53a.

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The District Court's order approving a prior settlement and awarding a $5,000 incentive payment is available on Westlaw as *Moses v. New York Times Co.,* No.1:20-CV-04658-RA, 2021 WL 4931657 (S.D.N.Y. Sept. 13, 2021), *vacated and remanded,* 79 F.4th 235 (2d Cir.2023), and appears at Pet.App.66a–77a.

## JURISDICTION

The Court of Appeals issued its decision on February 10, 2026, Pet.App.1a–10a, and on March 20, 2026, denied Isaacson's timely petition for rehearing. Pet.App.78a–79a.

This Court has jurisdiction under 28 U.S.C. §1254(1).

## RULE INVOLVED

Federal Rule of Civil Procedure 23 is reproduced at Pet.App.78a–89a.

## STATEMENT OF THE CASE

This case involves settlement of a class-action, under Federal Rule of Civil Procedure 23, asserting state-law claims on behalf of a class of 876,606 California *New York Times* subscribers against the New York Times Co. for alleged violations of California law concerning subscription renewals. The case ultimately settled for $2,375,000, or roughly $2.71 per class member, with Named Plaintiff Maribel Moses receiving a $5,000 "incentive award" or "service award" to compensate her for service rendered as a Rule 23 class representative, and to encourage others to file similar class actions. Class Counsel were allocated one third of the fund.

Moses had asserted claims under California law against the New York Times Co. on her own behalf, and on behalf of a class of other similarly situated *New York Times* subscribers whose month-to-month subscriptions were automatically renewed in alleged violation of California law.

The District Court exercised diversity jurisdiction under 28 U.S.C. §1332(d)(2)(A), as amended by the Class Action Fairness Act of 2005 ("CAFA"), because the case is a class action in which the aggregate claims of all members of the proposed class exceed $5 milion, exclusive of interest and costs, there are over 100 members of the putative class, and the Named Plaintiff, Maribel Moses (like most members of the putative class alleged) is a citizen of a state (California) which is different from the principal place of business (New York) corporate defendant The New York Times Co.

The case initially settled for a common fund of $1.65 million, of which $1.25 million—or roughly 76% of the settlement fund—was earmarked for Class Counsel's common-fund attorney's fees, and from which Named Plaintiff Moses was to receive a $5,000 "incentive award" rewarding her for service on the Class's behalf. That left around $400,000 to be distributed pro rata to any members of the 876,606-member class who took the trouble to submit claims. Class members who submitted no claim would receive only an "Access Code" for one month's access to a *New York Times* publication to which they hadn't cared to subscribe, and which could not be used to help pay for the subscription that was alleged to have been unlawfully renewed.

Petitioner Eric Alan Isaacson is a member of the class whose *New York Times* subscription automatically renewed during the Class Period, who appeared below and timely objected to the proposed settlement, attorney's fee award, and $5,000 incentive payment to the Named Plaintiff.

When the District Court overruled Isaacson's objections, he timely appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals reversed, saying "we agree with Isaacson that the district court exceeded its discretion when it approved the settlement based on the wrong legal standard in contravention of Rule 23(e)," and that "[w]e also agree that the Access Codes are coupons, which subject the attorneys' fees calculation to CAFA's coupon settlement requirements." *Moses v.*

*New York Times Co.,* 79 F.4th 235, 239 (2d Cir.2023)("*Moses I*"), Pet.App.14a. Under the CAFA "the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed." 28 U.S.C. §1712(a)). That would, of course, have greatly reduced Class Counsel's attorney's fee award. The settlement itself was "fatally undermined" because the District Court had overvalued Access Codes amounting to mere coupons, "many of which are unlikely to be redeemed." *Moses I,* 79 F.4th at 257, Pet.App.52a.

But the Court of Appeals rejected Isaacson's argument that this Court's decisions in *Trustees v. Greenough,* 105 U.S. 527, 537-38 (1882)("*Greenough*"), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116, 122 (1885)("*Pettus*"), bar incentive awards to compensate named plaintiffs for their service as class representatives, and to encourage further class-action litigation, as the Eleventh Circuit has held. *See Moses I,* 79 F.4th at 253-56, Pet.App.44a–50a.[1]

The Court of Appeals held, in effect, that its own decisions in *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 721 (2d Cir.2023), *Hyland v. Navient Corp.,* 48 F.4th 110, 124 (2d Cir.2022), and

[1] Although the Court of Appeals, and many other authorities, give *Greenough*'s year of decision as 1881, it was in fact argued on March 15, 1882, and decided on May 8, 1882. *See* Anne Ashmore, *Dates of Supreme Court Decisions and Arguments: United States Reports Volumes 2-107 (1791-1882)* at 162 (Library of the Supreme Court of the United States, August 2006), online: https://www.supremecourt.gov/opinions/datesofdecisions.pdf ; https://bit.ly/3G8HQGm ; https://perma.cc/4DJC-JT4S.

*Melito v. Experian Marketing Solutions,* 923 F.3d 85, 96 (2d Cir.2019), trumped *Greenough* and *Pettus.*

Despite the Second Circuit's acknowledgement in *Fikes Wholesale's* that such "[s]ervice awards are likely impermissible under Supreme Court precedent," *Fikes Wholesale,* 62 F.4th at 721, the Court of Appeals has adhered to Second Circuit "precedent that permits district courts to approve fair and appropriate incentive awards to class representatives." *Moses I,* 79 F.4th at 253, Pet.App.44a (citing *Fikes Wholesale,* 62 F.4th at 721; *Hyland,* 48 F.4th at 124; *Melito,* 923 F.3d at 96). The *Moses I* panel nonetheless held "that the district court erred by failing to evaluate the settlement's fairness, reasonableness, and adequacy in light of the attorneys' fee award and incentive award." *Moses I*, 923 F.4th at 243, Pet.App.24a. It accordingly vacated the settlement, the attorney's fee award, and the incentive award, remanding for further proceedings.

On remand the settling parties jettisoned their original coupon settlement, and entered a new agreement, under which the cash settlement fund increased from $1.65 million to $2.375 million, with Class Counsel now requesting but one-third of that amount as attorney's fees, while Moses's $5,000 incentive award remained unchanged.

Isaacson again objected. Dividing the $2.375 million settlement fund by the 876,606 class members yields a recovery of only $2.71 per class member which, Isaacson observed, "is not enough to compensate Class Members for the time that it takes them to read the six-page Class Notice and 38-page Settlement Agreement, let alone enough to compensate them for releasing any genuinely valuable claims. After deducting one-third for attorney's fees, the per-Class

Member recovery drops to just $1.81." 2dCir.APX308(DE85:3[ECFp12]). Yet Moses had agreed to the new settlement expecting an incentive-award payment to herself of $5,000, despite the trifling amount that other class members would receive.

Isaacson opposed awarding the representative plaintiff $5,000 for securing a settlement that secured only $2.71 per class member. And he preserved, for purposes of further appellate review, his objection that incentive awards are contrary to Supreme Court precedent. 2dCir.APX339(DE85:35&n.16).

Following the District Court's approval of the new settlement, proposed attorney's fees, and $5,000 incentive award, Isaacson again timely appealed. But this time a panel of the Second Circuit on February 10, 2026, affirmed the new settlement, the fee award, and the $5,000 incentive award with an unpublished Summary Order reiterating that "[t]his Court in *Moses I* rejected Isaacson's claim that incentive awards are per se impermissible." Pet.App.9a.

Isaacson timely petitioned for rehearing, which the Court of Appeals denied on March 20, 2026. Pet.App.78a–79a.

Isaacson now seeks this Court's review of whether the $5,000 incentive award violates this Court's foundational common-fund precedents, *Trustees v. Greenough,* 105 U.S. 527, 537-38 (1882)("*Greenough*"), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116, 122 (1885)("*Pettus*"), which held that payments rewarding representative plaintiffs for their own "personal services" in securing a common fund are both "decidedly objectionable" and "illegally made." *Greenough,* 105 U.S. 537-38; *accord Pettus,* 113 U.S. at 122 (*Greenough* rejected such awards "as unsupported by reason or authority").

## REASONS FOR GRANTING THE WRIT

This case presents a clear conflict among the circuits on the propriety of paying representative plaintiffs "service awards" or "incentive awards," from common-fund recoveries, in order to compensate them for personal service as class representatives—and as an incentive to encourage others to file and settle further class actions. The Eleventh Circuit holds that "Supreme Court precedent prohibits incentive awards." *NPAS Solutions,* 975 F.3d at 1255, while the First, Second, Seventh, Ninth and Federal Circuits all hold that this Court's foundational common-fund decisions no longer bind them.

The issue is extremely important. The promise of incentive awards can be used by class counsel first to recruit representative plaintiffs to file new class actions, and then to induce those plaintiffs to agree to settlements that recover little for the class, and to attorney's fee awards that compensate class counsel too generously. Moreover it should be this Court's prerogative to determine whether *Greenough* and *Pettus* retain vitality in barring payments to litigants for service as representative payments.

### I. REVIEW IS NEEDED TO RESOLVE AN INTRACTIBLE INTERCIRCUIT CONFLICT ON WHETHER THIS COURT'S FOUNDATIONAL COMMON-FUND PRECEDENTS CONTINUE TO PROHIBIT SERVICE AWARDS

"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). At the same time, however, this Court's common-fund doctrine holds that any payment compensating a representative plaintiff for his or her own "personal services" in prosecuting the litigation is both "decidedly objectionable" and "illegally made." *Greenough,* 105 U.S. at 537-38. A named plaintiff's "claim to be compensated, out of the fund ... for his personal services" the Court has flatly "rejected as unsupported by reason or authority." *Pettus,* 113 U.S. at 122.; *see generally* John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds,* 87 Harv.L.Rev. 1597, 1601-02 (1974).

*Greenough* and *Pettus* seemed to be pretty clear. Professor John P. Dawson explained in his 1974 article reviewing the common-fund doctrine:

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

Dawson, *Lawyers and Involuntary Clients,* 87 Harv. L. Rev. at 1602.[2] For a century lower courts honored

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

the rule of *Greenough* and *Pettus,* that named plaintiffs in common-fund cases may be reimbursed for reasonable litigation expenses including attorney's fees, but not for their personal service as class representatives. In *Crutcher v. Logan,* 102 F.2d 612, 613 (5th Cir.1939), for example, the Fifth Circuit recognized that under *Greenough* and *Pettus* claimants who are themselves interested in a common fund can receive "no compensation for personal services." And writing in 1974, Professor Dawson observed that *Greenough* "has been followed in this." Dawson, *Lawyers and Involuntary Clients,* 87 Harv. L. Rev. at 1602. He could find "no case that uses the *Greenough* doctrine to reimburse the litigants themselves for their own time, travel, or personal expenses, however necessary their efforts may have been to litigation that conferred gains on others." *Id.*

That soon changed, and the circuits now are in clear conflict concerning whether *Greenough* and *Pettus* continue to bar payments from common-fund recoveries to compensate litigants for their service as representative plaintiffs, and to encourage others to file even more class actions.

Nothing in Rule 23 purports to supersede *Greenough* and *Pettus* by authorizing such awards. Writing in 2006, Professors Theodore Eisenberg and Geoffrey Miller noted the "lack of specific authorization for incentive awards in the relevant statutes or court rules."[3] "Beginning around 1990,

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

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

however, awards for representative plaintiffs began to find readier acceptance," and soon orders "approving incentive awards proliferated," so that "[b]y the turn of the century, some considered these awards to be 'routine.'"[4] Today they are ubiquitous, their promise employed by class-action lawyers to recruit representative plaintiffs who otherwise wouldn't care enough to litigate, and then to induce any who wish to litigate too vigorously to accept settlements that recover little for the class while rewarding class counsel with rich fees.

The dramatic change cannot be attributed to anything in Federal Rule of Civil Procedure 23, which currently governs class actions, for it says nothing at all to authorize payments prohibited by *Greenough* and *Pettus* which, although they preceded Rule 23, were themselves class actions that produced common-fund recoveries. Class actions, it is well to remember, were around long before Rule 23's promulgation in 1938, let alone its amendment in 1966.[5]

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

[5] *See Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356, 363 (1921)("Class suits have long been recognized in federal jurisprudence.")(citing, e.g., *Smith v. Swormstedt,* 57 U.S. (16 How.) 288, 303 (1853)); *see also Hansberry v. Lee,* 311 U.S. 32, 42-42 (1940)(collecting citations); *Terrett v. Taylor,* 13 U.S. (9 Cranch) 43, 43 (1815)(Taylor and other vestrymen of the Episcopal Church of Alexandria sued "*on behalf of themselves and others*, members of the said church, and of the congregation

Both *Greenough* and *Pettus* held that when a representative plaintiff's litigation produces a "common fund" benefiting a larger class, the fund may be assessed for representative plaintiff's litigation expenses and reasonable attorney's fees. *See Greenough,* 105 U.S. at 536-37; *Pettus,* 113 U.S. at 122. But *Greenough* and *Pettus* also clearly held that any payment from a common fund compensating representative plaintiffs for their own "personal services" on behalf of a class is both "decidedly objectionable" and "illegally made." *Greenough,* 105 U.S. at 537-38. A named plaintiff's "claim to be compensated, out of the fund ... for his personal services" was "rejected as unsupported by reason or authority." *Pettus,* 113 U.S. at 122.

Neither decision focused on whether or not *the amount* sought was reasonable. They broadly proscribed payments to representative plaintiffs, without qualification.

The Eleventh Circuit accordingly holds that "Supreme Court precedent prohibits incentive awards." *NPAS Solutions,* 975 F.3d at 1255.[6] Yet the First, Second, Seventh, Ninth and Federal Circuit now all hold to the contrary, that this Court's foundational common-fund decisions have been superseded by the

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belonging to the said church'")(syllabus; emphasis added); *Wormley v. Wormley,* 21 U.S. 421, 451, n.v (1823)(reporter's note); *West v. Randall,* 29 F.Cas. 718, 722 (C.C.D.R.I.1820)(Story, J.).

[6] *Accord, e.g., In re Equifax Inc. Customer Data Security Breach Litig.,* 999 F.3d 1247, 1257 (11th Cir.2021)("such awards are prohibited"); *Medical & Chiropractic Clinic, Inc. v. Oppenheim,* 981 F.3d 983, 994 n.4 (11th Cir.2020)("service awards are foreclosed by Supreme Court precedent").

lower courts' more recent practice, since the 1990s, of freely awarding bonuses to representative plaintiffs.

Five circuits are in plain conflict with the Eleventh Circuit —

The First Circuit: *Murray v. Grocery Delivery E-Servs. USA Inc.,* 55 F.4th 340, 352-53 (1st Cir.2022);

The Second Circuit: *Melito v. Experian Mktg. Sols., Inc.,* 923 F.3d 85, 96 (2d Cir.2019); *Hyland v. Navient Corp.,* 48 F.4th 110, 123-24 (2d Cir.2022); *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.,* 62 F.4th 704, 721 (2d Cir.2023); *Moses v. New York Times Co.,* 79 F.4th 235, 253–56 (2d Cir.2023);

The Seventh Circuit: *Scott v. Dart,* 99 F.4th 1076, 1082, 1084-88 (7th Cir.2024), *reh'g denied,* 108 F.4th 931 (7th Cir.2024);

The Ninth Circuit: *In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 785-87 (9th Cir.2022);

The Federal Circuit: *National Veterans Legal Services Program v. United States,* 170 F.4th 1353, 1364–68 (Fed.Cir. 2026)("*NVLSP*").

These decisions typically note controversy surrounding the Eleventh Circuit's decision in *Johnson v. NPAS Solutions,* which was accompanied by Judge Beverly Martin's vigorous dissent. *See NPAS Solutions,* 975 F.4th at 1264–1269 (Martin, Cir.J., dissenting). When it took the Eleventh Circuit the better part of two years to deny en banc rehearing, moreover, the order was accompanied by a further dissent authored by Judge Jill Pryor and joined by Judges Charles R. Wilson, Adalberto Jordan, and

Robin S. Rosenbaum. *See Johnson v. NPAS Solutions,* 43 F.4th 1138, 1139-53 (11th Cir.2022)(Jill Pryor, Cir.J., dissenting from denial of en banc rehearing).

The Second Circuit nonetheless acknowledged in *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.,* 62 F.4th 704, 721 (2d Cir.2023), that "[s]ervice awards are likely impermissible under Supreme Court precedent." The Second Circuit declared, however, that it would adhere to its own precedents allowing incentive awards—even though they conflict with this Court's foundational common-fund decisions—because "practice and usage seem to have superseded *Greenough* (if that is possible)." *Fikes Wholesale,* 62 F.4th at 721. In a concurring opinion the *Fikes Wholesale* panel opinion's author, Judge Dennis Jacobs, explained that the panel could not follow the Eleventh Circuit's "thorough and well-reasoned opinion" in *Johnson v. NPAS Solutions,* because the Second Circuit "has twice come out the opposite way," first in *Melito v. Experian Marketing Solutions,* 923 F.3d 85, 96 (2d Cir.2019), which contained no real analysis, and then in *Hyland v. Navient Corp.,* 48 F.4th 110, 124 (2d Cir.2022), which "over-read *Melito* to hold that 'Rule 23 does not *per se* prohibit service awards.'" *Fikes Wholesale,* 62 F.4th at 729 (Jacobs, Cir.J., concurring). As a consequence of *Melito* and *Hyland*, Judge Jacobs wrote, "we now find ourselves on the wrong side of a circuit split." *Id.*

A different Second Circuit panel subsequently asserted on the first appeal in this case that this Court's holdings in "*Greenough* and *Pettus* have been superseded, not merely by practice and usage" in the lower courts, "but by Rule 23, which creates a much broader and more muscular class action device than the common law predecessor that spawned nineteenth-century precedents." *Moses v. New York Times Co.,* 79 F.4th 235, 254 (2d Cir.2023)("*Moses I*"), Pet.App.48a. According to *Moses I*, this Court's common-fund precedents—explicitly prohibiting payments to compensate litigants for their service as representative plaintiffs—were implicitly overruled by Federal Rule of Civil Procedure 23 (which says nothing at all on the subject). *Moses I* did not explain when or how Rule 23 created a claim for representative plaintiffs to be compensated from a common fund recovery—let alone how it might be reconciled with the Rules Enabling Act's provision that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b); *see Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 612-13 (1997).

As the *Moses I* panel vacated both the settlement and the incentive award, the decision would have been a poor vehicle for seeking this Court's review of whether incentive awards are permitted from common-fund settlements. On remand, however, the parties entered a revised (and substantially improved) settlement, again asking that Moses be awarded a $5,000 incentive award. Pet.App.61a. And the *Moses II* panel now has reiterated that *Moses I* controls. *Moses v. The New York Times Co.,* No.24-2979, 2026 WL 364231, at *3 (2d Cir. Feb. 10, 2026)("*Moses II*"), Pet.App. 9a.

Justified or not, the First, and Seventh, Ninth, and Federal Circuits all have joined the Second Circuit in dismissing the continuing relevance of this Court's foundational common-fund class-action decisions to current litigation under Rule 23. The Ninth Circuit, for example, has specifically rejected the Eleventh Circuit's conclusion "that *Greenough* and *Pettus* prohibit any incentive award to class representatives." *Apple Device,* 50 F.4th at 785 n.13 (9th Cir.2022)(citing *Johnson v. NPAS Solutions,* 975 F.3d at 1255, with disapproval).

The First Circuit in *Murray* dismissed this Court's *Greenough* and *Pettus* decisions as "late-nineteenth-century creditor lawsuits" that, though litigated by bondholders as class actions, cannot be deemed to control "modern-day class actions under Rule 23." *Murray,* 55 F.4th at 352. The First Circuit's opinion identified nothing in Rule 23 that purports to authorize the incentive awards of the past several decades.

The Seventh Circuit also has declined to follow the Eleventh Circuit—in a decision holding that a named plaintiff who after a denial of class certification had settled his individual claim for $7,500 should nevertheless be able pursue claims on behalf of a class on remand, with a potential incentive award giving him the stake in the case required by Article III. *Scott v. Dart,* 99 F.4th 1076, 1084-88, *reh'g denied,* 108 F.4th 931, 932 (7th Cir.2024). The Seventh Circuit endorsed the view expressed in *Moses I*: "As the Second Circuit recently explained, '*Greenough* and *Pettus* have been superseded, not merely by practice and usage, but by Rule 23, which creates a much broader and more muscular class action device than the common law predecessor that spawned nineteenth-century precedents.'" *Scott v. Dart,* 99 F.4th at 1085 (quoting *Moses I,* 79 F.4th at 254-55).

Dissenting in other respects, Judge Kirsh observed that the circuits will remain in conflict on incentive awards no matter what the Seventh Circuit does, adding that "'[u]nless our circuit is an outlier, 'it makes little sense for us to jump from one side of the circuit split to the other.'" *Scott v. Dart,* 99 F.4th at 1093-94 (Kirsch, dissenting)(citation omitted). Judge Easterbrook's opinion on denial of en banc rehearing said he "agree[d] with that view and therefore have not called for a vote on the petition for rehearing en banc." *Scott v. Dart,* 108 F.4th 931, 932 (7th Cir.2024). Whatever the Seventh Circuit might do, Judge Easterbrook observed, "[t]he Supreme Court must sooner or later resolve this conflict." *Id.* The Seventh Circuit clearly has no intention of revisiting the issue itself.

This Court's review is needed now to resolve this already clear and deeply embedded conflict among the circuits. The Eleventh Circuit has adhered to its September 2020 *Johnson v. NPAS Solutions* holding despite Judge Jill Pryor's lengthy August 2022 dissent from denial of en banc rehearing, which itself concludes that "it will be up to the Supreme Court to overrule or clarify *Greenough* and *Pettus*." *Johnson v. NPAS Solutions, LLC,* 43 F.4th 1138, 1139-53 (11th Cir.2022)(Jill Pryor, Cir.J., joined by Wilson, Jordan, and Rosenbaum, Cir.JJ., dissenting from denial of en banc rehearing). That "Supreme Court precedent prohibits incentive awards," *Johnson v. NPAS Solutions,* 975 F.3d at 1255, now is well-settled Eleventh Circuit law.[7]

The contrary position of the First, Second, Seventh, Ninth, and Federal Circuits also is settled. They all

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[7] *See, e.g., In re Equifax Inc. Customer Data Security Breach Litig.*, 999 F.3d 1247, 1257 (11th Cir.2021)("such awards are prohibited"); *Medical & Chiropractic Clinicv. Oppenheim,* 981 F.3d 983, 994 n.4 (11th Cir.2020)("service awards are foreclosed by Supreme Court precedent").

emphatically reject the Eleventh Circuit's conclusion that *Greenough* and *Pettus* bar incentive awards compensating named plaintiffs for personal service as class representatives. Only this Court can resolve the conflict.

The need for this Court's review is intensified, moreover, by the influence of a footnote of passing dictum in in *China Agritech Inc. v. Resh*, 584 U.S. 732, 747 n.7 (2018), an opinion on *American Pipe* tolling that cites a 1998 Seventh Circuit opinion affirming an incentive award in order to illustrate representative plaintiffs' motives for taking charge of class-action lawsuits that they otherwise might not care about. The footnote said:

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

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

*China Agritech* can hardly be taken as a decision that considered and overruled the doctrine of *Greenough* and *Pettus,* which it does not even cite, let alone discuss. "This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Illinois Council on Long Term Care,* 529 U.S. 1, 18 (2000). "The notion that [this Court] created a new rule *sub silentio*—and in a case where certiorari had been granted on an entirely different question, and the parties had neither briefed nor argued the ... issue—is implausible." *Mickens v. Taylor,* 535 U.S. 162, 172 (2002).

Yet lower courts are citing *China Agritech* to justify incentive awards. In *Moses* I, for example, the Second

Circuit rationalized its approval of incentive awards by asserting that "the Supreme Court appears to have left *Greenough* and *Pettus* in the rear view," when "without reference to either case, the Supreme Court acknowledged that a class representative 'might receive a share of class recovery above and beyond her individual claim.'" *Moses I,* 79 F.4th at 255 (quoting *China Agritech,* 584 U.S. at 747 n.7 (citing *Cook v. Niedert*, 142 F.3d at 1016), Pet.App.48a–49a.

The Ninth Circuit rationalized its approval of incentive awards in *Apple Device* on the ground that "the Supreme Court recently acknowledged that '[a] class representative might receive a share of class recovery above and beyond her individual claim" through an incentive award. *Apple Device Performance Litig.,* 50 F.4th at 785 (citing *China Agritech*). The Seventh Circuit and Federal Circuit have similarly cited *China Agritech'*s footnote as a basis for approving incentive awards notwithstanding this Court's opinions in *Greenough* and *Pettus*. *See Scott v. Dart,* 99 F.4th at 1087; *NVLSP,* 170 F.4th at 1367.

It should be this Court's exclusive prerogative to decide whether to overrule, reaffirm, or modify *Greenough* and *Pettus*. Else the lower Courts will conclude that it has indeed abandoned its leading common-fund precedents.

## II. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING AN EXTREMELY IMPORTANT ISSUE AFFECTING MANY CLASS ACTIONS

This case presents an excellent vehicle for resolving an entrenched conflict among the circuits on the continuing effect of *Greenough* and *Pettus,* as the issue was both squarely presented and decided below. The Court of Appeals has sustained Respondent's $5,000 incentive award, with no further issues to be litigated below.

The question presented is extraordinarily important as incentive awards have come to affect many class-action settlements. Plaintiffs' lawyers doubtless find them an attractive means of obtaining, and of manipulating, compliant representative plaintiffs. The prospect of an incentive award gives litigants a reason to act as nominal plaintiffs in cases they otherwise would not bother with. And the prospect of an incentive award in the thousands of dollars gives named plaintiffs a powerful motive to approve settlements and attorney's fee awards that are not in other class members' interest.

The Sixth Circuit has warned that incentive awards to representative plaintiffs provide "'a *disincentive* for the [named-plaintiff] class members to care about the adequacy of relief afforded unnamed class members[.]'" *Shane Group, Inc. v. Blue Cross Blue Shield,* 825 F.3d 299, 311 (6th Cir.2016)(quoting *In re Dry Max Pampers Litig.,* 724 F.3d 713, 722 (6th Cir.2013)(court's emphasis)).

Yet despite their corrosive effect on Named Plaintiffs' ability to provide unconflicted representation, incentive awards affect increasing numbers of class-action settlements. The time is ripe for this Court's review.

## CONCLUSION

The circuits are in conflict on whether this Court's foundational common-fund class-action precedents retain vitality in the context of class actions under Rule 23. The question presented implicates this

Court's sole prerogative to reconsider or overrule its own decisions. It also implicates the integrity of class-action litigation, given incentive awards' propensity to undermine class representatives' ability to adequately represent absent class members' interests.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 18, 2026

# APPENDIX

## APPENDIX

## APPENDIX A

24-2979

*Moses v. The New York Times Company*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

[filed February 10, 2026]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of February, two thousand twenty-six.

PRESENT:

DENNIS JACOBS,
GERARD E. LYNCH,
RICHARD J. SULLIVAN,

*Circuit Judges.*

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MARIBEL MOSES,

on behalf of herself and all others similarly situated,

*Plaintiff-Appellee,*

v.

No. 24-2979

THE NEW YORK TIMES COMPANY, d/b/a

The New York Times,

*Defendants-Appellee*,

v.

ERIC ALAN ISAACSON,

---------------------------------------------------------------

| | |
|---|---|
| **For Appellant:** | ERIC ALAN ISAACSON, Law Office of Eric Alan Isaacson, La Jolla, California. |
| **For Plaintiff-Appellee:** | NEAL J. DECKANT, (Julia K.Venditti, on the brief), Bursor &Fisher, P.A., Walnut Creek, CA. |
| **For Defendant-Appellee:** | KRISTEN C. RODRIGUEZ, (Sandra D. Hauser, Natalie J. Spears, on the brief), Dentons US LLP, New York, NY & Chicago, IL. |

Appeal from the October 10, 2024, judgment of the United States District Court for the Southern District of New York (Ronnie Abrams, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,** ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Objector-Appellant Eric Alan Isaacson appeals from the judgment of the district court approving a settlement agreement (the "Settlement Agreement") between Defendant-Appellee The New York Times Company and Plaintiff-Appellee Maribel Moses, acting on behalf of a class. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision.

Moses filed this putative class action in 2020 on behalf of California subscribers to the New York Times whose subscriptions were allegedly automatically renewed without proper notice in violation of the California Automatic Renewal Law, Cal. Bus. & Prof. Code §§17600, *et seq*. The parties reached a settlement in 2021 (the "First Settlement") and, over Isaacson's objections, the district court approved the settlement. On appeal, this Court vacated the approval of the First Settlement in part because the New York Times access codes provided to the class as part of the settlement constituted "coupons" under the coupon settlement provisions of the Class Action Fairness Act, which subjected the calculation of attorneys' fees to a different standard. *Moses v. New York Times Co.,* 79 F.4th 235, 241, 252-53 (2d Cir.2023)("*Moses I*"). We did not resolve the question whether the First Settlement was fair and reasonable and remanded the case for further proceedings. *Id.* at 257.

Upon remand, the parties revoked the First Settlement, returned to formal mediation, and subsequently entered into the current Settlement Agreement in April 2024. The district court held a final settlement approval hearing to assess the reasonableness of the settlement and address objections raised by Isaacson and another class member. At the hearing, the district court explained its reasoning for approving the settlement and subsequently issued a final settlement approval order and judgment.

* * *

We review the district court's approval of the Settlement Agreement for abuse of discretion. *See Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.,* 62 F.4th 704, 723 (2d Cir.2023); *Hyland v. Navient Corp.,* 48 F.4th 110, 117 (2d Cir.2022). "A district court abuses—or more precisely, exceeds—its discretion when its decision rests on an 'error of law' or a 'clearly erroneous factual finding,' or 'cannot be located within the range of permissible decisions.'" *JTH Tax, LLC v. Agnant,* 62 F.4th 658, 666 (2d Cir.2023)(quoting *Zervos v. Verizon N.Y., Inc.,* 252 F.3d 163, 169 (2d Cir.2001)).

**1.** Isaacson argues that the Settlement Agreement contemplates injunctive relief that Moses lacked Article III standing to pursue. The "SETTLEMENT RELIEF" section of the Settlement Agreement has two subsections: 2.1 Payment to Settlement Class Members, and 2.2 Practice Changes. The latter reads:

Defendant already has revised the presentation and wording of the automatic renewal terms on the checkout pages in its mobile and desktop platforms and in its direct mail offers to be consistent with the requirements of Cal. Bus. & Prof. Code §17602(a)(1)-(2). Defendant also now provides consumers who submit an order for a new automatically renewing subscription with an e-mail or paper acknowledgment (appropriate to the method of subscription) that includes the automatic renewal terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer, consistent with Bus. & Prof. Code §17602(c). App'x at 170. The parties agree, and the district court acknowledged, that "courts cannot permit injunctive relief through class settlement when plaintiffs would otherwise lack standing to seek such relief under Article III." *Berni v. Barilla S.P.A.,* 964 F.3d 141, 148-49 (2d Cir.2020). But, as the district court determined, the Settlement Agreement confers only monetary relief because the "Practice Changes" provision memorializes steps already taken by New York Times and in no way prohibits it from reverting them. As such, Isaacson's challenge to Moses's standing fails.

**2.** Isaacson also contends that the district court erred in approving the Settlement Agreement because Moses failed to show that all members of the Settlement Class suffered injury to establish Article III standing. Isaacson relies on the Supreme Court's holding in *TransUnion LLC v. Ramirez* that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." 594 U.S. 413, 431 (2021)(quoting *Tyson Foods, Inc. v. Bouaphakeo,* 577 U.S. 442, 466 (2016)(Roberts, *C.J.,* concurring)).

But all the class members here have Article III standing because they share Moses's injury, which she demonstrated in her sworn declaration. *See Denney v. Deutsche Bank AG,* 443 F.3d 253, 264 (2d Cir.2006) (explaining that a class will satisfy Article III if it is "defined in such a way that anyone within it would have standing"). Because Moses did not receive a notice of auto-renewal to which, under California law, she was entitled, Cal. Bus. & Prof. Code §17602, she should have received at least one month's subscription as an "unconditional gift," *id.* §17603. Instead, she was charged for it. That injury does not depend on whether Moses, or any individual class member, had desired the auto-renewal itself. Regardless of the ultimate merits of Moses's theory, she established her standing, and hence "standing is established for the entire class." *Hyland v. Navient Corp.,* 48 F.4th 110, 118 (2d Cir.2022)(quoting Amador v. Andrews, 655 F.3d 89, 99 (2d Cir.2011)).[1] No claimant would receive any award without demonstrating that they suffered exactly that injury.

**3.** Isaacson argues that the district court abused its discretion by failing to require data from class counsel pertaining to two of the nine factors for assessing the reasonableness of a settlement laid out in City of *Detroit v. Grinnell Corp.,* 495 F.2d 448, 462-63 (2d Cir.1974). A district court may approve a settlement proposal that binds class members only "after a hearing and only on finding that it is fair, reasonable,

[1] Isaacson argues that the holdings in *Denney* and *Hyland* are distinct because they concern claims for injunctive relief, under Rule 23(b)(2), rather than for money damages, under Rule 23(b)(3). This Court does not distinguish the plaintiff's burden to show standing at the settlement stage in a Rule 23(b)(2) action and that in a Rule 23(b)(3) action. *See Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.,* 504 F.3d 229, 241 (2d Cir.2007)(similarly requiring "only one of the named [p]laintiffs . . . to establish standing in order to seek relief on behalf of the entire class" in a Rule 23(b)(3) action). In any event, the Ninth Circuit case Isaacson cites for this proposition concerns standing for certifying a litigation class and therefore does not reach the question of Article III standing for purposes of settlement. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC,* 31 F.4th 651, 682 n.32 (9th Cir.2022) (en banc)(affirming certification of a class under 23(b)(3)).

and adequate." Fed.R.Civ.P. 23(e)(2). To assess the reasonableness of a settlement, courts have historically applied the nine Grinnell factors, which are: "(1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Hyland,* 48 F.4th at 121 (quoting *Grinnell Corp.,* 495 F.2d at 463). Although a 2018 revision to Rule 23 updated the guidance on the "core concerns of procedure and substance" for approving a settlement, Fed.R.Civ.P. 23(e)(2) Advisory Committee's Note to 2018 Amendment, this Court affirmed in *Moses I* that the *Grinnell* factors "remain a useful framework for considering the substantive fairness of a settlement." 79 F.4th at 243.

Isaacson argues that the district court failed to properly evaluate the last two factors: (8) the range of reasonableness of the settlement fund in light of the best possible recovery, and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. He contends that because class counsel did not provide a sum for the best possible recovery, the court could not have properly evaluated these factors. However, the district court, in evaluating the eighth and ninth Grinnell factors, considered plaintiff's representation

that the number of class members times four dollars—an estimate of the average cost of one month's subscription—could serve as a benchmark of the best possible recovery. App'x at 442-43, 481. Using that benchmark, "the settlement fund amounts to 74% of the best possible recovery." App'x at 481. The court noted that the proportion exceeded that of other class action settlements approved by district courts in this Circuit, while acknowledging that "[i]ndeed, 'there is a range of reasonableness with respect to a settlement, a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" Id. at 481-82 (quoting *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.1972)). The court therefore did not abuse its discretion by accepting the 74% monthly sum in lieu of demanding an exact value for the best possible recovery when evaluating the eighth and ninth Grinnell factors, and it did not abuse its discretion in its holistic assessment that the nine factors supported a finding that the settlement is reasonable.

**4.** Isaacson argues that the district court applied the wrong legal standard when it approved attorneys' fees. The Settlement Agreement consists of a $2,375,000 non-reversionary fund, and class counsel requested and were granted attorneys' fees, costs, and expenses of $791,666.66, representing one-third of the total settlement value. Isaacson argues that the district court gave blanket approval of the attorneys' fees based on the ratio alone; but the settlement hearing record includes a more robust analysis. The district court correctly explained that "[r]easonableness is the touchstone when determining whether to award attorneys' fees" and evaluated the six factors this Court has set out for assessing the reasonableness of a fee: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public-policy considerations." App'x at 475-76 (citing *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43 (2d Cir.2000)).

The district court made a holistic assessment of reasonableness and applied the correct legal standard. The court first noted the 1,069 hours already expended by counsel and the additional work expected before the case is concluded. The court determined that the "litigation had the potential to be complex and risky, as it rests on what Plaintiff concedes is a relatively novel theory of liability," and that "[c]ounsel are experienced in this area and have provided vigorous representation." App'x at 476 (internal quotation marks omitted). Only then did the district court comment that the requested fee represents one-third of the settlement and note that other district courts in this Circuit have approved such a share.

**5.** Isaacson finally argues that the $5,000 incentive award granted to Moses is both inequitable and per se illegal. This Court in *Moses I* rejected Isaacson's claim that incentive awards are per se impermissible and explained why this conclusion aligns the Second Circuit with nearly every other circuit, 79 F.4th at 253, so we decline to revisit the argument.

Isaacson contends that the incentive award is unreasonable because $5,000 relative to the per-class-member award of $2.71 is outsized. As this Court detailed in *Moses I,* incentive awards must be evaluated "in light of Moses's contributions to the case," but 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." 79 F.4th at 255 n.12 (internal quotation marks omitted)). The district court found the incentive award reasonable in light of representations by class counsel that Moses's "active involvement in this case was critical to its ultimate resolution. Both counsel and Ms. Moses have attested to the assistance that Ms. Moses provided to counsel in, among other things, conducting pre-litigation investigation, drafting the complaint, and producing documents in informal discovery in advance of mediation." App'x 478-79 (internal quotation marks and citations omitted). Given these contributions and the general landscape of reasonably sized awards, the district court did not abuse its discretion by approving the $5,000 incentive award to Moses.

We have considered Isaacson's remaining arguments and conclude that they are without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

## APPENDIX B

[filed August 17, 2023 & published as *Moses v. New York Times Co.,* 79 F.4th 235 (2d Cir.2023)]

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

August Term, 2022

Argued: March 22, 2023 Decided: August 17, 2023

Docket No. 21-2556-cv

MARIBEL MOSES, on behalf of herself and all others similarly situated,

*Plaintiff-Appellee,*

— v. —

THE NEW YORK TIMES COMPANY, d/b/a The New York Times

*Defendant-Appellee,*

— v. —

ERIC ALAN ISAACSON,

*Objector-Appellant.*

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Before:

PARKER, LYNCH, and LOHIER, Circuit Judges.

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Objector-Appellant Eric Alan Isaacson appeals from a judgment of theUnited States District Court for the Southern District of New York (Abrams, J.) approving a settlement award, attorneys' fee award, and incentive award in a class action brought by Plaintiff-Appellee Maribel Moses against Defendant-Appellee The New York Times ("NYT"). Plaintiff's complaint alleges that NYT violated California's Automatic Renewal Law, Cal. Bus. & Prof. Code §17600 *et seq.,* by automatically renewing subscriptions without providing the disclosures and authorizations required by that law. Following mediation, the district court (1) approved a settlement that provides class members with Access Codes valid for a free one-month subscription to a NYT product, (2) awarded attorneys' fees in the amount of $1.25 million (76% of the settlement's cash fund), and (3) awarded a $5,000 incentive payment to Moses. Isaacson appeals all three determinations, arguing that the district court applied the wrong legal standard in its Rule 23 analysis of the settlement's fairness; incorrectly concluded that Access Codes are not coupons subject to the Class Action Fairness Act, 28 U.S.C. §1712; and contravened Supreme Court precedent by awarding an incentive payment. We agree with the first two contentions, but reject the third. We therefore **VACATE** the district court's judgment and **REMAND** for further proceedings.

FREDERICK J. KLORCZYK III (Neal J. Deckant, on the brief), Bursor & Fisher, P.A., New York, NY &

Walnut Creek, CA,28 *for Plaintiff-Appellee.*

KRISTEN C. RODRIGUEZ (Natalie J. Spears, Sandra D. Hauser, on the brief), Dentons US LLP, Chicago, IL & New York, NY, *for Defendant-Appellee.*

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

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Gerard E. Lynch, Circuit Judge:

***239** Objector-Appellant Eric Alan Isaacson, proceeding *pro se*, appeals from a judgment of the United States District Court for the Southern District of New York (Ronnie Abrams, *J.*) approving a settlement award, attorneys' fee award, and incentive award in a class action lawsuit. Plaintiff-Appellee Maribel Moses, on behalf of similarly situated subscribers in California, sued Defendant-Appellee The New York Times ("NYT"), claiming that NYT automatically renewed NYT subscriptions without providing the disclosures and authorizations required by California's Automatic Renewal Law, Cal. Bus. & Prof. Code §17600, *et seq.* (the "ARL").

The parties negotiated a settlement agreement whereby class members dropped their claims in exchange for NYT's reformation of its business practices and either Access Codes for one-month NYT subscriptions or *pro rata* cash payments. The settlement agreement also provided for the payment of substantial attorneys' fees to class counsel and an incentive award to the class representative. Isaacson objected to the proposed settlement, primarily arguing that the settlement is unfair, the attorneys' fees calculation improperly exceeds limits set by the coupon settlement provisions of the Class Action Fairness Act ("CAFA"), 28 U.S.C. §1712, and the incentive award is not authorized by law. The district court disagreed, certifying a class for settlement purposes under Rule 23(b)(2) of the Federal Rules of Civil Procedure and approving the settlement, $1.25 million attorneys' fees, and a $5,000 incentive award.

On appeal, we agree with Isaacson that the district court exceeded its discretion when it approved the settlement based on the wrong legal standard in contravention of Rule 23(e). We also agree that the Access Codes are coupons, which subject the attorneys' fees calculation to CAFA's coupon settlement requirements. However, we reiterate our holding in *Melito v. Experian Marketing Solutions, Inc.*, 923 F.3d 85, 96 (2d Cir.2019), that incentive awards are not *per se* unlawful. Because the district court's conclusions are intertwined, we **VACATE** the district court's judgment in its entirety and **REMAND** the case to the district court for further proceedings consistent with this opinion.

## BACKGROUND

### I. Factual Background

On June 17, 2020, Moses brought a putative class action in the Southern District of New York on behalf of a class of California NYT subscribers whose subscriptions, she alleged, were automatically renewed in violation of the ARL. The subsequently filed amended complaint alleged that when consumers sign up for an NYT subscription through NYT's Website or App, NYT enrolls them in an automatically renewing subscription without providing the disclosures and authorizations required by the ARL.

NYT moved to dismiss the amended complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. Before the district court ruled on the motion, however, the parties engaged in informal discovery and mediation. After a nine-hour mediation with the assistance of a professional mediator, the ***240** parties executed a binding Settlement Term Sheet.

## II. The Settlement Agreement

A formal Settlement Agreement was signed on March 30, 2021, settling the claims of more than 876,000 persons who – from June 17, 2016, through May 12, 2021 – directly enrolled in an automatically renewing NYT subscription using a California billing and/or delivery address, and who were charged and made to pay an automatic renewal fee (the "class" or "class members").

Under the terms of the Settlement Agreement, NYT agreed to implement business reforms to comply with the ARL, including revising the presentation of its automatic renewal terms and providing consumers who enroll in an automatically renewing subscription with an acknowledgment. Class members agreed to release their claims against NYT in exchange for those business reforms and either (1) a *pro rata* cash payment from a non-reversionary Settlement Fund of $1.65 million or (2) Access Codes for one-month NYT subscriptions to certain NYT publications.

The Settlement Fund was established to pay all approved claims by class members, notice and administration expenses, a court-approved incentive award to Moses of up to $5,000, and attorneys' fees of up to $1.25 million. Although class members were directed to submit a cash election form in order to receive cash payment, no claim form was necessary for class members to obtain an Access Code.[1] The Access Codes provide class members – or persons to whom they transfer the Access Codes – with a free one-month subscription to a NYT product valued between $3 to $5, and are valid for at least 50 years. However, they cannot be used to pay for or extend an existing subscription. In other words, a class member must start a new subscription in order to apply the Access Codes.[1]

The type of NYT subscription a class member is eligible to receive depends on whether his or her subscription was Fully Active, Active, or Inactive as of May 12, 2021. Fully Active class members – those class members "who are currently active subscribers entitled to access to all of NYT's digital [s]ubscription offerings," App'x 119 – are entitled to a NYT Basic Digital Access subscription (NYT's core news subscription). Active class members – those class

[1] Under the settlement, the Settlement Administrator will email the Access Codes to the remaining 800,000+ class members who took no action.

members with at least one active NYT subscription – are entitled to a subscription to either of two NYT Digital Products (NYT Cooking and NYT Games) to which the class member does not currently subscribe. Inactive class members – those class members "who do not currently have any active NYT [s]ubscription," *id.* – are entitled to a NYT Basic Digital Access subscription.

### III. The Settlement Approval

On May 12, 2021, the district court conditionally certified the class for purposes of the settlement and preliminarily approved the Settlement Agreement. Notice was subsequently disseminated in compliance with the district court's preliminary approval order. About 95.2% of 876,606 class members received direct notice of the settlement; 10,541 class members submitted valid and timely claims to receive *pro rata* cash payments rather than Access Codes; 18 class members requested to be excluded from the settlement class; and three class members,[2] including Isaacson, objected to the settlement.

[*241] On September 10, 2021, the district court conducted a fairness hearing, where it heard Isaacson's arguments regarding the consideration offered to class members, attorneys' fees, and incentive award. The district court rejected Isaacson's objections and approved the settlement. First, the

[2] Two class members sent letters summarily objecting to the lawsuit on "frivol[ity]" grounds, asserting that the "suit ... is not fair [or] reasonable" and is "utterly silly." App'x 448-49. Only Isaacson raised detailed objections and filed a notice to appear at the final approval hearing.

district court applied a presumption of fairness to the settlement because "it was reached in arm's-length negotiation between experienced, capable counsel ... after a nine-hour mediation before a mutual third party." App'x 258. Based on a review of the settlement's substantive terms, the district court concluded that the settlement demonstrated sufficient fairness, adequacy, and reasonableness as supported by the factors outlined in Rule 23(e)(2) and *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462-63 (2d Cir.1974).

Then, the district court addressed Isaacson's objections. As to the adequacy of consideration to class members, the district court noted that the relief afforded to the class was "commensurate with the harm alleged" as evidenced by the "reaction of the class" and "risks associated with litigating this action." App'x 259. With regard to Isaacson's argument about the impropriety of a $5,000 incentive award to Moses, the district court explained that such awards are permitted under Second Circuit precedent and that the award did not preclude Moses from adequately representing the class.

Finally, the district court addressed concerns about the value of the settlement relief and its impact on the proposed attorneys' fee award. The district court concluded that the case was not subject to CAFA's coupon settlement provisions and "judge[d] the propriety of the fee award as compared to the value of the entire settlement, including the [A]ccess [C]odes," which had a face value of $3.9 million. App'x 261. As a result, the district court found that an attorneys' fee award of $1.25 million – 22.5% of the total face value of the settlement ($5,563,000) – was reasonable under the factors outlined in *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir.2000), even when cross-checked against the lodestar amount.

Accordingly, on September 13, 2021, the district court certified the settlement class and approved the settlement, awarding $1.25 million in attorneys' fees (about 76% of the $1.65 million cash Settlement Fund, and 22.5% of the total value of the settlement including the face value of the Access Codes) and an incentive payment of $5,000 to Moses. The district court noted that the fee awards were "considered ... separately from the [c]ourt's consideration of the fairness, reasonableness and adequacy of the settlement." Special App'x 6.

This appeal followed.

**DISCUSSION**

Isaacson argues that the district court erred in three primary aspects of its ruling: (1) misapplying Rule 23(e)'s legal standard in its review of the proposed settlement, (2) awarding $1.25 million in attorneys' fees based on a conclusion that the Access Codes are not "coupons" under CAFA, and (3) awarding Moses an incentive award of $5,000 and concluding that she provided adequate representation. We address each argument in turn.

**I. Standard of Review**

We review a district court's approval of a settlement agreement, including attorneys' fees and incentive awards, ***242** for abuse of discretion. *See Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th

704, 723 (2d Cir.2023); *Hyland v. Navient Corp.*, 48 F.4th 110, 117 (2d Cir.2022). "A district court abuses – or more precisely, exceeds – its discretion when its decision rests on an 'error of law' or a 'clearly erroneous factual finding,' or 'cannot be located within the range of permissible decisions.' " *JTH Tax, LLC v. Agnant*, 62 F.4th 658, 666 (2d Cir.2023), quoting *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir.2001).

We review questions of statutory interpretation, like the scope of CAFA's coupon settlement provisions, *de novo*. *See United States v. Bedi*, 15 F.4th 222, 225-26 (2d Cir.2021). "We [also] review *de novo* any issues of law underlying the Rule 23 ruling, including the question of whether the district court applied the correct [legal standard to the approval of the settlement]." *Teamsters Loc. 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 201 (2d Cir.2008).

**II. Rule 23(e)**

Isaacson argues that the district court applied the wrong legal standard when it approved the proposed settlement, attorneys' fee award, and incentive award.

A district court may approve a settlement proposal that binds class members only "after a hearing and on finding that it is fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(2). To evaluate the fairness, reasonableness, and adequacy of a class settlement, we have historically applied the nine factors set out in *Grinnell Corp.*, 495 F.2d at 463.[3]

In 2018, however, Congress approved a revision of Rule 23 to include a list of four "primary procedural considerations and substantive qualities that should always matter to the decision whether to approve [a settlement] proposal." Fed. R. Civ. P. 23(e)(2) Advisory Committee's Note to 2018 Amendment. The revision was "not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance," *id.,* including whether:

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

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

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

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

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[3] These factors include: "(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Hyland*, 48 F.4th at 124, quoting *Grinnell Corp.*, 495 F.2d at 463.

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

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

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

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

Fed.R.Civ.P. 23(e)(2). The first two factors are procedural in nature and the latter two guide the substantive review of a proposed settlement. *See* ***243** Fed.R.Civ.P. 23(e)(2) Advisory Committee's Note to 2018 Amendment.

For the reasons discussed below, we hold that Rule 23(e)(2)'s procedural factors prohibit courts from applying a presumption of fairness to proposed settlements arising from an arms-length agreement. Courts evaluating the fairness, reasonableness, and adequacy of a proposed settlement must consider the four factors outlined in Rule 23(e)(2) holistically, taking into account – among other substantive considerations stated in the rule – the proposed attorneys' fees and incentive awards. As discussed below, the revised Rule 23(e)(2) does not displace our traditional *Grinnell* factors, which remain a useful framework for considering the substantive fairness of a settlement. But the rule now mandates courts to evaluate factors that may not have been highlighted in our prior case law, and its terms prevail over any prior analysis that are inconsistent with its requirements.

*A. Procedural Fairness*

Isaacson argues that the district court erred "when it imposed a presumption of fairness, adequacy, and reasonableness to the parties' proposed class-action settlement on the ground that it was negotiated between the settling parties at arm's length." Appellant Br. 25. We agree.

Prior to Rule 23(e)(2)'s codification of the core factors that should guide a court's approval of a proposed settlement, we applied a presumption of fairness to settlement agreements resulting from arms length negotiations. *See McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir.2009); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir.2005); 4 Herbert B. Newberg & William B. Rubenstein, Newberg and Rubenstein on Class Actions §13:50 (6th ed. 2022)(citing cases). The codification of arm's-length negotiation as one of two procedural factors (the other being the adequacy of class representatives and counsel) – and one of four core factors – that courts must consider when approving a proposed settlement supplants its historic role as a presumption. As the Ninth Circuit observed, applying a "presumption of fairness [to settlement proposals negotiated at arm's length] ... is very likely inappropriate under the standards now codified in Rule 23(e)(2)" because the rule "does not suggest that an affirmative answer to that one [factor] creates a favorable presumption on review of the other three."

*Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049 n.12 (9th Cir.2019). We agree, and conclude that Rule 23(e)(2) prohibits courts from applying a presumption of fairness to a settlement agreement based on its negotiation at arm's length.

Thus, notwithstanding the district court's careful consideration of the settlement's procedural fairness – concluding that Moses adequately represented the class and that the Settlement Agreement was reached in an arm's-length negotiation involving a neutral mediator, *see* Fed.R.Civ.P. 23(e)(2)(A)-(B) – and notwithstanding that the arms-length quality of the negotiations remain a factor in favor of approving the settlement (one whose absence would count significantly against approval), the district court erred when it *presumed* that the proposed settlement was fair, reasonable, and adequate because it was reached in an arm's-length negotiation.

*B. Substantive Fairness*

Isaacson argues that the district court erred by failing to evaluate the settlement's fairness, reasonableness, and adequacy in light of the attorneys' fee award and incentive award. We agree.

***244** Historically, we "evaluate substantive fairness [by] considering the nine *Grinnell* factors." *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir.2013). Although the factors outlined in *Grinnell* and the revised Rule 23(e)(2) largely overlap,[4] the rule now requires courts

[4] *Compare Grinnell Corp.*, 495 F.2d at 463 (directing courts to consider "(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed;

to expressly consider two core factors when reviewing the substantive fairness of a settlement: the adequacy of relief provided to a class and the equitable treatment of class members. *See* Fed.R.Civ.P. 23(e)(2)(C)-(D).

As to the adequacy of class relief, courts must "tak[e] into account," among other considerations, "the terms of any proposed award of attorney's fees." Fed.R.Civ.P. 23(e)(2)(C)(iii). "This review provides a backstop that prevents unscrupulous counsel from quickly settling a class's claims to cut a check." *Fresno County Employees' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.*, 925 F.3d 63, 72 (2d Cir.2019); *see also Briseño v. Henderson*, 998 F.3d 1014, 1024 (9th Cir.2021)(noting that "the plain language [of the revised Rule 23(e)(2)] indicates that a court must examine whether the attorneys' fees arrangement shortchanges the class"). Similarly, "the relief actually delivered to the class can be a significant factor in determining the appropriate fee award." Fed.R.Civ.P. 23(e)(3) Advisory Committee's Note to 2018

(4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation"), *with* Fed.R.Civ.P. 23(e)(2)(C) (directing courts to approve a settlement after "taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other").

Amendment. The symbiotic review of proposed relief and attorneys' fees aligns with "[t]he express goal of [our] *Grinnell* opinions [which] was to prevent unwarranted windfalls for attorneys." *Goldberger*, 209 F.3d at 49.

Thus, when reviewing the substantive fairness of a proposed settlement, "the district court is required to review both the terms of the settlement and any fee award encompassed in a settlement agreement" in tandem. *Fresno County Employees' Ret. Ass'n*, 925 F.3d at 72; *see also McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 607 (9th Cir.2021)("[T]he new Rule 23(e) makes clear that courts must balance the proposed award of attorney's fees vis-à-vis the relief provided for the class in determining whether the settlement is adequate for class members." (internal quotation marks omitted)).

Similar considerations apply to a proposed incentive award. Prior to approving a settlement, the court must take into account whether the "proposal treats class members equitably relative to each other." Fed.R.Civ.P. 23(e)(2)(D). The express consideration of such equity will, among other things, ensure that such incentive payments will not result in unfair settlements. *See Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 353 (1st Cir.2022)(explaining that "Rule 23(e) ensures that incentive payments will not result in unfair settlements by requiring that ***245** any settlement ... tak[e] into account whether 'the class representatives ... have adequately represented the class' and whether 'the proposal treats class members equitably relative to each other' ").

As discussed more fully below, Rule 23(e)(2)(D) does not forbid incentive awards. *See infra* Section IV (discussing the legality of incentive awards). The Advisory Committee Note to the 2018 Amendment suggests that incentive awards, far from being a central concern of the requirement of "equitabl[e]" treatment of class members, may not have been on the drafters' radar at all. The drafters singled out, as "[m]atters of concern ... [in the equitable evaluation,] whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed.R.Civ.P. 23(e)(2) Advisory Committee's Note to 2018 Amendment. Such matters of concern – where inequity arises from treating different class members the same – are substantively momentous compared to the generally modest incentive payments awarded to class representatives. It bears emphasis that Rule 23(e)(2)(D) requires that class members be treated *equitably*, not identically.

Nevertheless, the existence and extent of incentive payments is relevant to whether "class members [are treated] equitably relative to each other." Fed.R.Civ.P. 23(e)(2)(D). On the one hand, the equitable-treatment requirement protects the interests of class representatives who play an active role in the litigation – often providing the background information that forms the basis of the lawsuit, engaging in fact discovery, and devoting considerable time and effort into the settlement process – "from having absent class members free ride on their efforts." 5 Newberg and Rubenstein on Class Actions

§§17:3-4 (explaining 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 fee award, they have a fair argument that the settlement is not treating them equitably relative to the absent class members" (emphasis omitted)); *see also Murray*, 55 F.4th at 353 ("[I]ncentive payments remove an impediment to bringing meritorious class actions and fit snugly into the requirement of Rule 23(e)(2)(D) that the settlement 'treats class members equitably relative to each other.' " (quoting Fed.R.Civ.P. 23(e)(2)(D))).

At the same time, the rule requires that courts 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* 5 Newberg and Rubenstein on Class Actions §17:4 ("The equitable treatment requirement most obviously protects absent class members from being subjected to excessive incentive awards[.]"); *see also Cline v. TouchTunes Music Corp.*, 765 F.App'x 488, 493 (2d Cir.2019)(summary order)(affirming denial of incentive award in light of the lawsuit's value); *Ayers v. SGS Control Services, Inc.*, 2008 WL 4185813, at *6 (S.D.N.Y. 2008)(denying incentive awards where the time and effort spent by the class representatives did not justify the $20,000 incentive awards requested), *aff'd in part and remanded on other grounds*, 353 F.App'x 466, 467 (2d Cir.2009)(summary order). Thus, courts evaluating the substantive fairness of a settlement must ensure that proposed incentive awards are reasonable and promote equity between class representatives and absent class members.

***246** Here, following a common practice in pre-2018 cases evaluating class action settlements for fairness, *see, e.g.*, *Stefaniak v. HSBC Bank USA*, No. 05-CV-720S, 2008 WL 314417, at *3 (W.D.N.Y. Feb. 4, 2008), *In re Worldcom, Inc. Securities Litigation*, No. 02-CV-3288, 2005 WL 78807, at *7 (S.D.N.Y. Jan. 11, 2005), the district court expressly did the opposite of what Rule 23(e)(2) now requires, reviewing the appropriateness of the attorneys' fee and incentive awards "separately from [its] consideration of the fairness, reasonableness and adequacy of the [s]ettlement," Special App'x 6. Although the district court "reviewed the settlement's substantive terms and conclud[ed] that they demonstrate[d] sufficient fairness, adequacy and reasonableness. ... [as] supported by the factors outlined in [*Grinnell*], and in Rule 23(e)(2)," App'x 258-59, "address[ed] those factors that relate to the objections raised to the settlement," *id.* at 259, and then approved the attorneys' fees and incentive award, the court erred when it evaluated the proposed fees "*separately*" from the settlement's fairness, *id.* at 202 (emphasis added).

In sum, the district court abused its discretion when it evaluated and approved the settlement based on the wrong legal standard. *See Metzler Inv. Gmbh v. Chipotle Mexican Grill, Inc.*, 970 F.3d 133, 142 (2d Cir.2020). Of course, the error does not automatically require the reversal of the settlement's approval. Given the substantial overlap between the traditional *Grinnell* factors and the Rule 23(e)(2) factors, it is possible that the court's errors – in according a presumption of fairness based on the settlement's arm's-length negotiation, and not considering the attorneys' and incentive awards in evaluating the fairness of the settlement – could be harmless. In an appropriate case, we might be able to conclude that a settlement was so obviously fair or the attorneys' fees so plainly reasonable that the judge would have reached the same conclusion about the overall fairness of the settlement if the judge had not applied a presumption or had included the evaluation of the fees as part of the fairness inquiry rather than as a separate issue.

But as we will see, that is not the case here. In this case, the error cannot be written off as harmless. The fee awards – especially the $1.25 million in attorneys' fees (about 76% of the $1.65 million Settlement Fund) – are intimately intertwined with the settlement. Indeed, there is effectively an inverse correlation between the amount of attorneys' fees and incentive payment awarded and the cash available for *pro rata* distribution to class members that opt for cash. *See* App'x 472 ("The Settlement Fund shall be used for payment of the ... cash benefits submitted by Settlement Class Members[,] ... the Fee Award ... [,] [and] any Incentive Award ...."). The district court was obligated to take these intertwined fees into account prior to approving the settlement, and erred when it treated the appropriateness of the awards as a separate matter, divorced from the overall evaluation of the fairness of the settlement. As discussed below, moreover, the failure to recognize that the attorneys' fee award violated CAFA's coupon settlement requirements and that the Access Codes were in fact coupons illustrates the importance of considering the fee award structure in assessing the overall fairness of the settlement.

**III. Coupon Settlements**

Isaacson argues that the district court erred in failing to apply CAFA's coupon settlement provisions when calculating the attorneys' fee award because the Access Codes are coupons. We agree and conclude that if those provisions are fairly applied, ***247** the revised calculation of the fee award undermines any argument that the failure to consider the Rule 23(e)(2) factors in the evaluation of the settlement was harmless error.

In 2005, Congress enacted CAFA to address concerns surrounding class actions, including the problem of excessive attorneys' fee awards in "coupon settlements." S. Rep. No. 109-14, at 14–15 (2005). The concern with the attorneys' fee awards in coupon settlements – those "in which class members receive nothing more than promotional coupons to purchase more products from the defendants," *id.* at 15 – was that they provide attorneys with a perverse incentive to pursue class settlements, which provide class members with low-benefit coupons but fatten the pockets of class attorneys who "reap the lion's share of the [settlement] benefits" by inflating their attorneys' fees based on the exaggerated and unrealistic face value of nonmonetary relief. *In re: Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Pracs. & Prod. Liab. Litig.*, 952 F.3d 471, 488 (4th Cir.2020)(alteration in original). Although Congress "d[id] not intend to forbid all non-cash settlements" – "[s]uch settlements may be appropriate where they provide real benefits to consumer class members ... or where the claims being resolved appear to be of marginal merit"– there are raised brows when "the real winners in the settlement are the lawyers who sued the company, who will be paid in cash, not coupons." S.Rep. No. 109-14, at 30–32 (internal quotation marks omitted).

To curb class action abuse in coupon settlements, CAFA directs courts to calculate attorneys' fee awards in such settlements based on the redemption value of the coupons, rather than their face value. *See* 28 U.S.C. §1712(a); *McKinney-Drobnis*, 16 F.4th at 602 (noting that CAFA "ensures that class counsel benefit[s] only from coupons that provide actual relief to the class" (internal quotation marks omitted)); *Linneman v. Vita-Mix Corp.*, 970 F.3d 621, 634 (6th Cir.2020)(noting that the "face value of a coupon may be quite different from its actual value to class members"). Here, the district court declined to do so because it concluded that the Access Codes were not coupons.

To determine whether Congress's concerns in enacting CAFA extended to settlements such as the instant one, we turn to the statutory text, first reviewing the plain meaning of the word "coupon," and then determining whether the Access Codes fall within the scope of that word.

*A. The Definition of Coupons*

Despite Congress's policy goals regarding class action settlement awards involving coupon relief, CAFA does not define "coupon." Hence, "we look to the word's plain meaning," *i.e.*, "the ordinary, commonsense meaning of the word[ ]." *23–34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health*, 685 F.3d 174, 182 (2d

Cir.2012), quoting *United States v. Dauray*, 215 F.3d 257, 260 (2d Cir.2000).

A coupon is generally defined as an item that entitles its user to free or discounted products or services. *See Coupon*, New Oxford American Dictionary 389 (2d ed. 2005)(defining a coupon as "a voucher entitling the holder to a discount for a particular product"); *Coupon*, Merriam-Webster's Third New International Dictionary 266 (2002) (defining coupon as a "form surrendered in order to obtain an article, service, or accommodation").[5] Although [*248] a coupon is often described as a physical piece of paper, there is no dispute that coupons may be (and in today's economy often are) held in digital form.

"To the extent there is any ambiguity in the word[ ] [coupon, as used in] the ... statute, the legislative history eliminates any doubt." *Federal Housing Finance Agency v. UBS Americas Inc.*, 712 F.3d 136, 142 (2d Cir.2013). Legislative history makes clear that CAFA's coupon settlement provisions apply to settlements where the non-cash relief provided to

[5] Although many consumers are familiar with the term "coupon" as "cents off" benefits, which may be applied to purchase groceries at a discounted price, contemporary dictionaries expressly note that a coupon may be used to obtain a free product. *See, e.g.*, *Coupon*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/coupon (last visited July 31, 2023)(defining a coupon as "a small piece of paper that allows one to get a service or product for free or at a lower price"); Coupon, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/coupon (last visited July 31, 2023)(defining a coupon as "a piece of paper that you can use to buy a product or service at a reduced price or to get it free, or to get information").

class members entitles them to free or discounted products or services. For example, in illustrating coupon settlements where "class members receive nothing more than promotional coupons to purchase more products from the defendants," Congress cited a settlement that offered relief in the form of "discounts or free water" to Poland Spring customers. S.Rep. No.109-14, at 16-17; *cf. id* at 31-32 (noting that a coupon settlement may be appropriate where the proposed relief "entitle[s] class members to receive something of actual value free of charge"). That the non-cash relief provided to class members is not labeled a coupon is not determinative. *See id.* at 18-19 (criticizing settlement relief labeled a "voucher").

Courts interpreting the plain meaning of "coupon" and reviewing CAFA's legislative history have outlined additional considerations to guide the inquiry of whether non-cash relief constitutes a coupon. The Ninth Circuit looks at three non-dispositive factors: "(1) whether class members have 'to hand over more of their own money before they can take advantage of' a credit, (2) whether the credit is valid only 'for select products or services,' and (3) how much flexibility the credit provides, including whether it expires or is freely transferrable." *In re Easysaver Rewards Litig.*, 906 F.3d 747, 755 (9th Cir.2018), quoting *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 951 (9th Cir.2015). "Other courts have considered similar criteria in evaluating whether a settlement provides for coupon relief." *Does 1-2 v. DéJà Vu Servs., Inc.*, 925 F.3d 886, 902 (6th Cir.2019)(citing cases)(reviewing settlement relief in light of the Ninth Circuit's criteria); *see also In re: Lumber Liquidators*, 952 F.3d at 491; *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 706 (7th Cir.2015). In addition to evaluating similar factors, the Seventh Circuit has "rejected ..., for purposes of §1712, a proposed distinction between 'vouchers' (good for an entire product) and 'coupons' (good for price discounts)." *In re Sw. Airlines Voucher Litig.*, 799 F.3d at 706 (concluding that "vouchers for free drinks on Southwest flights" are coupons), quoting *Redman v. RadioShack Corp.*, 768 F.3d 622, 636-37 (7th Cir.2014).

For the reasons discussed below, we conclude that the Access Codes are coupons under the plain meaning of the word "coupon," the legislative history of CAFA, and even under the Ninth Circuit's interpretation of the scope of the coupon settlement provisions.

*B. The Access Codes are Coupons*

Isaacson contends that the Access Codes are coupons because they can be used only **[*249]** to start new subscriptions; are valid only for select products or services; and are a "promotional gimmick for which no market exists." Appellant Br. 35. Appellees argue that the Access Codes differ from coupons because they "provide an entire product free of charge, not merely a discount;" "do not require class members to hand over more of their money in order to enjoy the Settlement's benefit;" and "feature a long period of usability and are freely transferrable." Appellee Moses Br. 23 (emphases omitted); *see* Appellee NYT Br. 19-22.

The Access Codes are coupons under the plain meaning of the word: they are, in substance, digital vouchers that are "surrendered in order to obtain" a one-month subscription to a NYT publication. *Coupon*, Merriam-Webster Third New International Dictionary; *see also In re: Lumber Liquidators*, 952 F.3d at 490 (concluding that vouchers that entitled their holders "to obtain discounted or free flooring and flooring-related products ... are within the generally understood meaning of a 'coupon' "); *In re Sw. Airlines Voucher Litig.*, 799 F.3d at 706 (vouchers for free drinks on Southwest flights). Contrary to the district court's conclusion that the Access Codes are not coupons because NYT "provides an entire product free of charge," App'x 261, Congress expressly contemplated settlements such as the instant one where the proposed relief "entitle[s] class members to receive something ... free of charge" when it enacted CAFA's coupon settlement provisions. S.Rep. No.109-14, at 17, 31-32 (explaining that a settlement that offered "free water to Poland Spring customers" was a coupon settlement); *see also id.* at 17 (free golf balls). That the Access Codes are coupons is consistent with dictionary definitions of the term, and accords with the common understanding of the term to frugal shoppers who use coupons that offer particular products for free, even if such offers are less frequent at the supermarket than coupons that provide a discounted price.

Accordingly, Congress envisioned the plain meaning of the term "coupon" to cover this settlement. But even if we were to take a more restrictive view of the meaning of "coupon" keyed to the presumed legislative purpose of the term as encapsulated by the Ninth Circuit's three-factor guide, our conclusion that the Access Codes are coupons would remain the same.

First, although class members do not expressly "hand over more of their own money before they can take advantage of" the Access Codes, *In re Online DVD*, 779 F.3d at 951, the Access Codes require class members "to do business with defendants again in order to redeem the" free one-month subscription, *Roes, 1-2*, 944 F.3d at 1052; *see also Does 1-2,* 925 F.3d at 903 (noting that the first factor weighed in favor of finding that credits were coupons where "the settlement forces class members to continue doing business with [the] [d]efendants"). By requiring class members to start a new subscription with NYT to take advantage of the settlement, class members – however disgruntled they may be with NYT because of its alleged illegal billing practices – are left two choices: continue doing business with NYT or obtain a minimal settlement benefit. *See, e.g.*, *Does 1-2*, 925 F.3d at 903 (noting that credits which would be "of no value to former dancers unless they return to work" were coupons). Like the infant crib settlement that gave Congress pause – where class members who alleged that a company was selling defective infant cribs received settlement relief of either a crib repair kit or a $55 coupon to purchase products from the same company, *see* S.Rep. No.109-14, at 17 – class members in the instant lawsuit "cannot reap the benefits ***250** of the settlement without reengaging in the same [subscription-based] activity that they believe led to their injury," *In re Easysaver Rewards Litig.*, 906 F.3d at 757. In other words, the free subscriptions are "only valuable for consumers who plan to [have a new NYT subscription] and still trust the company." S.Rep. No.109-14, at 20 (noting coupon settlement that offered "coupons to use with Register.com (assuming [the class members] ever plan to register one of the company's domains again)"). Thus, the first factor weighs in favor of concluding that the Access Codes are coupons.

Second, the Access Codes are valid only "for select products or services." *In re Online DVD*, 779 F.3d at 951. The Access Codes neither provide class members with the option to extend their current subscription nor the option to select what product they prefer from the entire catalogue of NYT offerings. *See* S.Rep. No.109-14, at 16 (settlement that provided a discount on "selected products" was a coupon settlement). The range of products available to class members is considerably smaller than those in *McKinney-Drobnis*, 16 F.4th at 605, where the Ninth Circuit concluded that a $36.28 voucher that could be used to purchase more than 250 health and wellness products at Massage Envy was a coupon. There, the court noted that "[t]he limited range of products and services available at Massage Envy, even considering the breadth offered within the product category, favors viewing the vouchers as coupons under CAFA." *Id.*; *see also In re: Lumber Liquidators*, 952 F.3d at 490 (concluding that vouchers, which can be used only to purchase flooring and flooring tools were coupons). In this case, NYT offers a "limited universe" of products to subscribers to begin with, *In re Easysaver Rewards Litig.*, 906 F.3d at 757, and the settlement further restricts the universe of products that class members are entitled to obtain via Access Codes based on their subscription status. *See Berkson v. Gogo LLC*, 147 F.Supp. 3d 123, 129 (E.D.N.Y. 2015)(concluding that promotional codes for free WiFi service were coupons subject to CAFA's relevant provisions where the length of free use awarded varied by class member).

The limited applicability of the Access Codes suggests that, rather than sanctioning NYT for the company's alleged violation of the ARL, they provide a "promotional opportunity and not a penalty" to NYT. S.Rep. No.109-12, 15. The redemption of the Access Codes has the potential to increase NYT's subscriber base by "driving traffic." *Id.* at 16. As was the case in *Wilson v. DirectBuy, Inc.* –where a district court concluded that a settlement, which offered continued or renewed membership at a retail store was a coupon settlement – NYT receives "a clear benefit by maintaining its members for as long as possible" and the settlement "might well result in an increase in [its] membership base." No.09-CV-590, 2011 WL 2050537, at *6 (D.Conn. May 16, 2011). For example, NYT might convince an Inactive class member to return to NYT or an Active class member to enroll in a secondary subscription to NYT Cooking or Games that they would otherwise have passed upon. *See, e.g.*, S.Rep. No.109-14, at 16 (noting that settlement, which provided discounts for a cruise was a "promotional opportunity" for the defendant).

Moreover, the Access Codes provide limited utility to class members who claim that they have been harmed by NYT's challenged practices. Given that the premise of the ARL underlying the class action claims is that automatic renewals risk ensnaring subscribers into unwanted extensions, *see* Cal.Bus. & Prof. Code §17600 (noting "the intent of the [l]egislature to ***251** end the practice of ongoing charging of consumer ... accounts without the consumers' explicit consent"), Inactive class members – those "who do not currently have any active NYT subscription," App'x 119 – are presumably persons who have decided they do not want to subscribe, and have taken affirmative steps to extricate themselves. The offer of a free one-month subscription is likely to be of little or no value to such class members.

Similarly, Fully Active class members – those who are entitled to access "all of NYT's digital [s]ubscription offerings," *id.* – have no use for a second subscription and are barred from using the Access Codes to pay for one month of their existing subscription. And Active class members – those who already subscribe to one or more (but not all) of NYT's offerings – have presumably already made an election as to which products they want and those they simply do not. The lure of a trial subscription to NYT Cooking or NYT Games seems to "operate more as a promotional campaign, as is somewhat common among coupon settlements" than a benefit to such a selective subscriber. *Reed v. Continental Guest Servs. Corp.*, No. 10-CV-5642, 2011 WL 1311886, at *3 (S.D.N.Y. Apr. 4, 2011)(concluding that a settlement offering free and discounted posters was a coupon settlement). Thus, the second factor weighs in favor of concluding that the Access Codes are coupons.

Third, although the Access Codes do not expire for at least fifty years and may be transferred, they are somewhat inflexible. *See In re Easysaver*, 906 F.3d at 755 (considering whether non-cash relief is a coupon in light of whether it is flexible, *i.e.*, it "expires or is freely transferrable"). The Ninth Circuit's third factor is designed to mitigate the improper application of CAFA's coupon settlement provisions to settlements that may fail the first two factors but were outside

Congress's purview when it enacted the statute. A settlement that provides relief that arguably meets the dictionary definition of "coupon" and is redeemable only to obtain more products from a defendant may generate less skepticism the closer the relief approaches the utility of cash. Thus, in *In re Online DVD-Rental Antitrust Litigation*, the Ninth Circuit held that a $12 Walmart gift card, while not a precise cash equivalent, was arguably more valuable than the traditional coupon: The range of products available, accessability of a nationwide chain of stores, and online shopping capacity made it likely that recipients of such a gift card could easily utilize the card to obtain a product they actually wanted. 779 F.3d at 950-51. And if a recipient could not, the gift card could likely be transferred at close to face value. *Id.* at 951.

The Access Codes, in contrast, "cannot be used in anywhere near the same way as cash – including because they cannot be used [in the manner in] which people would be most interested in using them" – to extend subscriptions. *In re Easysaver*, 906 F.3d at 757. In *Does 1-2*, the Sixth Circuit concluded that settlement relief, which "impos[ed] [similarly] severe restrictions on the redemption of ... credits," including "limits on possible recovery based on the length of time a class member has worked" was "much less flexible than the gift cards and vouchers found to fall outside CAFA's reach." 925 F.3d at 903. As discussed above, the restrictive nature of the Access Codes renders them worthless for many class members, and the face value of NYT's products ("a value of $3-$5, depending on the subscription," App'x 121) is so low that a potential transferee has little incentive to buy an Access Code from a class member rather than purchase a subscription from NYT directly. It is no surprise, therefore, that "there ***252** is no evidence that a secondary market for [Access Codes] exists." *McKinney-Drobnis*, 16 F.4th at 605; *see also Redman*, 768 F.3d at 628 (noting that "the secondary market in coupons is bound to be thin," at least in part because of "the bother of going online to buy $10 coupons at small discounts"). Thus, the third factor of the Ninth Circuit's test does not favor the proponents of the settlement.[6] The Access Codes, accordingly, are coupons even under the Ninth Circuit's three-factor test.[7]

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[6] Any claim that the Access Codes are comparable to cash is further belied by the fact that class counsel did not elect to take any of their own compensation in the form of coupons. *Cf.* S.Rep. No.109-14, at 30 (2005)(noting that CAFA's coupon settlement provisions are aimed at situations where class members receive coupons but attorneys are paid "in cash, not coupons" (internal quotation marks omitted)). It is inconceivable that any attorney would opt for the coupons as compensation because no reasonable person would consider the coupons as equivalent to cash.

[7] Appellees' reliance on our non-precedential summary order in *Blessing v. Sirius XM Radio Inc.*, 507 F.App'x 1 (2d Cir.2012) is misplaced. In *Blessing*, the parties entered into a settlement agreement, which provided class members with a month subscription to the defendant's internet radio service and a subscription price-freeze. After the terms of the settlement agreement were reached, the parties negotiated the attorneys' fees and agreed that the fees come directly from the defendant, "rather than from funds (or coupons) earmarked for the class." *Id.* Although the district court found that the settlement was not subject to CAFA's coupon settlement provision, *see Blessing v. Sirius XM Radio Inc.*, 09-CV-10035, 2011 WL 3739024, at *2 (S.D.N.Y. Aug. 24, 2011), on appeal, we did not opine on the definition of "coupon," 507 F.App'x at 4. Rather, we noted that even if the settlement included coupons, no portion of the attorneys' fee award was attributable to the award of the coupons. Thus, the attorneys' fee calculation was not subject to CAFA. *Id.* at 5, citing 28 U.S.C. §1712(b), (c)(2).

Finally, contrary to Appellees' argument, the availability of optional cash relief based on a timely claim does not shift the ball. Our sister circuits have generally recognized CAFA's "coupon" settlement provisions as applicable to settlements awarding both cash and coupon relief, *see In re: Lumber Liquidators*, 952 F.3d at 491; *In re Easysaver Rewards Litig.*, 906 F.3d at 759 n.11; *In re Sw. Airlines Voucher Litig.*, 799 F.3d at 710, and have rejected the argument that CAFA's coupon settlement provisions do not apply to a settlement that provides class members with the option to receive cash payments in lieu of coupons, *see McKinney-Drobnis*, 16 F.4th at 611; *Does 1-2*, 925 F.3d at 893; *see also Copley v. Bactolac Pharm., Inc.*, No. 18-CV-00575, 2023 WL 2470683, at *8 (E.D.N.Y. Mar. 13, 2023). Keeping with CAFA's directive that §1712 applies to "a proposed settlement under which class members would be awarded coupons," 28 U.S.C. §1712(e), we are disinclined to adopt a position that exempts a settlement which awards coupons from §1712's requirements simply because class members may opt out for cash.[8] *See In re: Lumber Liquidators*, 952 F.3d at 491 (rejecting the same argument because to hold otherwise "would defeat CAFA's purpose of

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[8] Even assuming arguendo that under some circumstances, a settlement that provides a meaningful cash alternative to a coupon could escape the strictures of CAFA's coupon settlement provisions, this is not such a case. Here, unlike in *In re Online DVD-Rental Antitrust Litigation*, 779 F.3d at 950, where class members could opt for $12 in cash instead of the $12 Walmart gift card, the cash option does not provide claimants with a fixed amount of money but a *pro rata* share of the Settlement Fund – or more accurately of what remains of the Settlement Fund after attorneys' fees, the incentive award, and the potentially substantial administrative expenses of the settlement are paid.

exacting scrutiny of 'coupon' settlements and permit parties to perform an end run around CAFA by including ***253** a nominal cash award as a settlement term").

In sum, the district court erred in concluding that the Access Codes were not coupons, which subject the attorneys' fee calculation to CAFA's coupon settlement provisions.[9]

**IV. Incentive Award**

Isaacson next challenges the district court's approval of a $5,000 incentive award to Moses as the class representative. In support, Isaacson contends that Supreme Court precedents from the nineteenth century, *Trustees v. Greenough*, 105 U.S. 527 (1881) and *R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885), prohibit such incentive awards because they create a conflict of interest between Moses and other class members.

Rule 23(e)(2)(D) directs courts to approve a settlement proposal only if it "treats class members equitably relative to each other." Fed.R.Civ.P. 23(e)(2)(D). That mandate is harmonious with, and promoted by, our clear precedent that permits district courts to approve fair and appropriate incentive

[9] That the district court cross-checked the attorneys' fees against the lodestar amount does not persuade us otherwise because the nominal value of the Access Codes, as opposed to their redemption value, impermissibly informed the district court's calculation. *See* 28 U.S.C. §1712(a); *Does 1-2*, 925 F.3d at 904 ("Nor is the fee award saved by the fact that the district court cross-checked the fee against the lodestar, because the district court's ultimate calculation assumed the [nominal] total settlement value.").

awards to class representatives. *See Melito*, 923 F.3d at 96; *see also Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 721 (2d Cir.2023); *Hyland*, 48 F.4th at 124.

Incentive awards encourage class representatives to participate in class action lawsuits, which are "designed to provide a mechanism by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same harm and seek redress for their injuries." S.Rep. No.109-14, at 5; *see also* 1 Joseph McLaughlin, McLaughlin on Class Actions §1:1 (19th ed. 2022)(narrating the historical purposes of incentive awards); *Johnson v. NPAS Sols., LLC*, 43 F.4th 1138, 1145 (11th Cir.2022)(Pryor, *J.*, dissenting from the denial of rehearing en banc)(same). Such incentive awards often level the playing field and treat differently situated class representatives equitably relative to the class members who simply sit back until they are alerted to a settlement. *See supra* Section II.B.

Accordingly, an overwhelming majority of our sister circuits have concluded that district courts are permitted to grant incentive awards. *See Murray*, 55 F.4th at 353; *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785-86 (9th Cir.2022); *Jones v. Singing River Health Servs. Found.*, 865 F.3d 285 (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, 867 (8th

Cir.2017); *Pelzer v. Vassalle*, 655 F.App'x 352, 361 (6th Cir.2016); *Tennille v. W. Union Co.*, 785 F.3d 422, 434-35 (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, 333 n.65 (3d Cir.2011)(en banc); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir.2001). Only recently in *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir.2020) did the Eleventh Circuit depart from ***254** this previously universally accepted consensus and create a circuit split by adopting an "outlier rule [that] potentially undermines th[e] purpose [of class actions] and threatens the viability of consumer class actions." *Johnson*, 43 F.4th at 1151 (Pryor, *J.*, dissenting).

In *Johnson*, the Eleventh Circuit held that incentive awards in class actions are unlawful *per se*, regardless of whether the parties and the district court agree that the award is fair and appropriate. 975 F.3d at 1244, 1256. Although the court acknowledged that the equitable trust principles that applied to the compensation of creditors from a common fund in the nineteenth century was only "roughly analogous" to the metrics for the compensation of class members under Rule 23 today, the court concluded that *Greenough* and *Pettus*, Supreme Court precedents from over 140 years ago, precluded incentive awards. *Id.* at 1257.

Isaacson argues that we should adopt the Eleventh Circuit's approach and reverse our established precedent. We decline to depart from Rule 23's mandate, which permits fair and appropriate incentive awards. *See supra* Section II.B. Neither *Greenough* nor *Pettus* compel a different conclusion.

In *Greenough*, a railroad bondholder brought suit on behalf of himself and other bondholders against trustees of a fund that had engaged in transactions that affected the values of their bonds. After obtaining a favorable judgment, the district court approved the bondholder's request for attorneys' fees, litigation expenses, personal fees for his travel associated with the lawsuit, and a ten-year allowance. The Supreme Court affirmed the attorneys' and litigation fees but reversed the personal fees and allowance, which was analogous to "a salary" and had totaled more than $1.4 million in today's dollars.[10] 105 U.S. at 537-38.

In vacating the bondholder's compensation, the Supreme Court explained that, unlike the attorneys' and litigation fees which were authorized under common law trust principles, there was "no authority whatever" that sanctioned a named plaintiff's compensation award. *Id.* at 537. The Court declined to create such compensation under common law for fear that it would "present too great a temptation to parties to intermeddle in the management of valuable property or funds." *Id.* at 538.

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[10] *See* Consumer Price Index, 1800-, Federal Reserve Bank of Minneapolis (last visited July 31, 2023), https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator/consumer-price-index-1800- (noting that official U.S. data for a Consumer Price Index ("CPI") goes back to 1913 and that $1 in 1913 dollars is worth $30.72 in 2023 dollars based on the CPI).

A few years later, in *Pettus*, without further opining on the compensation of class representatives, the Supreme Court concluded that attorneys could present independent claims for compensation from a common fund that was recovered on behalf of their clients. 113 U.S. at 125.

*Greenough* and *Pettus* have been superseded, not merely by practice and usage, but by Rule 23, which creates a much broader and more muscular class action device than the common law predecessor that spawned the nineteenth-century precedents. Today – unlike in the nineteenth century when there was "no authority whatever" that guided the compensation of litigants in common fund cases, *Greenough*, 105 U.S. at 537, and courts were confined to the application of federal general common law and equitable principles – there is no longer "federal general common law," ***255** *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and we are bound by the framework of Rule 23 in modern class actions, *Hyland*, 48 F.4th at 123-24. Neither *Greenough* nor *Pettus* examined "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." *Johnson*, 43 F.4th at 1148 (Pryor, *J.*, dissenting); *see also In re Apple Inc. Device Performance Litig.*, 50 F.4th at 785-86 (rejecting argument that *Greenough* and *Pettus* prohibit incentive awards); *Murray*, 55 F.4th at 352-53 (same).

Given historical developments, the Supreme Court appears to have left *Greenough* and *Pettus* in the rear view. More recently, without reference to either case, 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*, — U.S.—, 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); *see also* 5 Newberg and Rubenstein on Class Actions §§17:2, 17:4 (explaining that *Greenough* "seems distant in both time and fact").

Indeed, despite the long history of incentive awards post-*Greenough* and *Pettus*, and several iterations of statutes and Rules, neither Congress nor the Advisory Committee on Federal Rules of Civil Procedure has suggested (yet alone imposed) a blanket prohibition 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)(reviewing empirical data on incentive awards collected on behalf of the advisory committee); Private Securities Litigation Reform Act, 15 U.S.C. §78u-4(a)(2)(A), (a)(4) (prohibiting incentive awards in securities class action settlements). Rather, in CAFA, Congress addressed its reservations concerning settlements where "*unjustified* awards are made to certain plaintiffs at the expense of other class members" who "receive little or no benefit." Pub.L. No.109-2, §2, 119 Stat. 4 (2005)(emphasis added).

Such unjustified incentive awards – more aptly analogized to a salary – exceed the amount necessary to serve their purpose, exemplify Congress' concerns, and create the very conflict between class representatives and other class members that

*Greenough* and *Pettus* sought to prevent.[11] *See supra* Section II.B. But we cannot say that incentive awards are *per se* improper.[12]

***256** In sum, we reiterate that neither *Greenough* nor *Pettus* prohibits incentive awards in class actions, and that providing incentive payments to class representatives for their role in advancing litigation is, on its own, insufficient to create a conflict of interest. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 943 ("Incentive payments to class representatives do not, by themselves, create an impermissible conflict between class members and their representatives.").

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[11] To the extent Isaacson argues that incentive awards should be prohibited because attorneys may be incentivized to pursue frivolous class actions in order to obtain attorneys' fees, those concerns are more appropriately addressed in the determination of attorneys' fee awards, and not the incentive awards for class representatives.

[12] To be clear, we do not opine on whether Moses' incentive award is excessive. On remand, if the present settlement is disapproved and a new settlement agreement comes before the district court, the district court has the discretion to reevaluate whether an incentive award is appropriate in light of Moses's contributions to the case. *See also Melito*, 923 F.3d at 96 (affirming $2,500 incentive awards); *Johnson*, 43 F.4th at 1150 (Pryor*, J.*, dissenting)(noting a "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" (internal quotation marks omitted)). For the moment, however, we are presented with no argument that the award was excessive, but only with Isaacson's argument that such awards are categorically prohibited. We therefore identify no error in the incentive award that would independently require any further action by the district court in the absence of the other errors that require vacatur of the district court's approval of the settlement.

**V. Overall Settlement Approval**

Appellees argue that the order approving the settlement should be upheld even if the attorneys' fee calculation is subject to CAFA's coupon settlement provisions because "the validity of the Settlement is not contingent upon approval of the amount of attorneys' fees, per the agreement's own terms" and, in any event, the district court "complied with CAFA's requirements for court approval of a coupon settlement." Appellee NYT Br. 17. We disagree.

Although the Settlement Agreement states that the court's failure to approve attorneys' fees does not terminate the settlement, the revised Rule 23(e) requires courts to "tak[e] into account ... the terms of any proposed award of attorney's fees" prior to approving a settlement. Fed.R.Civ.P. 23(e)(2)(C)(iii). The district court neither evaluated the settlement in light of the fee awards nor complied with CAFA's coupon settlement requirements when it awarded attorneys' fees based on the face value of the Access Codes. On remand, the district court must apply those provisions in determining the appropriate attorneys' fee award.

The consequences of the district court's latter error are not only fatal to the approval of the attorneys' fee award, but extend to the court's determination of whether the settlement terms were fair, reasonable, and adequate as required by Rule 23(e)(2). It may be that even if the attorneys' fee award provided in the Settlement Agreement is ultimately determined to be excessive when calculated pursuant to CAFA's coupon settlement provisions, the relief provided to the class members is appropriate. Although a more rigorous examination of the redemption value of the Access Codes may result in a significant reduction in its purported value, it is also possible that a similarly rigorous examination of the merits of the case and the actual harm suffered by the class members would lead the court to conclude that the relief provided to the class members nevertheless fairly apportioned any likely recovery that would have been obtained had the case proceeded to conclusion. *See* S.Rep. No.109-14, at 31-32 (clarifying that Congress "does not intend to forbid all non-cash settlements" as coupon "settlements may be appropriate where they provide real benefits to consumer class members ... or where the claims being resolved appear to be of marginal merit"). In light of the district court's examination of the settlement, however, we simply cannot assume that such would be the case.

Moreover, the flawed attorneys' fee award is closely tied to the valuation of the settlement. The district court found that the fee award was reasonable because, as compared to the purported face value of the Access Codes and the resulting inflated value of relief obtained by the class, it represented a reasonable contingency fee ***257** recovery (22.5% of the total face value of the settlement). Given that a fair evaluation of the redemption value of the Access Codes, many of which are unlikely to be redeemed – *see* 28 U.S.C. §1712(a) (providing that "the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed") – is likely far lower than the face value attributed in the district court's calculation, a critical predicate to the district court's evaluation of the reasonableness of the settlement is fatally undermined.

For the reasons set forth above, we vacate and remand the district court's order approving the settlement and the attorneys' fees. In reaching our conclusion, we do not opine on the fairness of the settlement. Nor do we suggest that the district court must overturn the settlement. On remand, the district court is simply directed to recalculate the attorneys' fees pursuant to 28 U.S.C. §1712 and evaluate the settlement in light of Rule 23's appropriate legal standard.

**CONCLUSION**

We have considered Appellees' other arguments and conclude that they are without merit. Thus, for the foregoing reasons, we **VACATE** the district court's judgment and **REMAND** the case to the district court for further proceedings consistent with this opinion.

## APPENDIX C

## UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF NEW YORK

MARIBEL MOSES, on behalf of herself and all others similarly situated,

*Plaintiff,*

v.

THE NEW YORK TIMES COMPANY, d/b/a The New York Times.

*Defendant.*

Civil Action No.: 1:20-cv-04658-RA
Hon. Judge Ronnie Abrams

## ~~[PROPOSED]~~ FINAL APPROVAL ORDER AND JUDGMENT

On June 6, 2024, this Court granted preliminary approval of the proposed class action settlement agreement between the parties (the "Settlement Agreement" or "Settlement").

The Court also provisionally certified a Settlement Class for settlement purposes, approved the procedure for giving notice and forms of Notice, and set a final approval hearing to take place on October 4, 2024, at 2:00 p.m. in Courtroom 1506 at the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, New York. The Settlement Class is defined as: all Persons who, from June 17, 2016, to and through May 12, 2021, enrolled in an automatically renewing NYT Subscription directly through NYT using a California billing and/or delivery address, and who were charged and paid an automatic renewal fee(s) in connection with such subscription. Excluded from this definition are the Released Parties. Settlement Class Members who exclude themselves from the Settlement, pursuant to the procedures set forth in Paragraph 4.5 of the Settlement, shall no longer thereafter be Settlement Class Members and shall not be bound by the Settlement and shall not be eligible to make a claim for any benefit under the terms of the Settlement.

On October 4, 2024, the Court held a duly noticed final approval hearing to consider: (1) whether the terms and conditions of the Settlement are fair, reasonable and adequate; (2) whether a judgment should be entered dismissing the complaint on the merits and with prejudice in favor of Defendant and against all persons or entities who are Settlement Class members herein who have not requested exclusion from the Settlement Class; and (3) whether and in what amount to award attorneys' fees, costs and expenses to Class Counsel and whether and in what amount to make an incentive award to Plaintiff Maribel Moses.

The Court, having considered all matters submitted to it at the hearing and otherwise, and it appearing that the Class Notice substantially in the form approved by the Court was given in the manner that the Court ordered to persons who purchased the NYT Subscriptions at issue, as ordered by the Court, and having considered and determined that the proposed settlement of the claims of the Settlement Class Members against Defendant, as well as the release of

Defendant and the Released Parties, and the awards of attorneys' fees, costs, and expenses and incentive award requested, are fair, reasonable and adequate, hereby ORDERS THAT:

1. The definitions in the Settlement Agreement and the Court's Preliminary Approval Order are hereby incorporated herein as though fully set forth in this Order, and all other terms and phrases in this Order shall have the same meaning as ascribed to them in the Settlement Agreement and in the Court's Preliminary Approval Order, and/or in any Order of this Court prior to the entry of final Judgment.

2. The Court finds that the prerequisites for a settlement class under Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 23(a) and (b)(3) have been satisfied, for purposes of settlement only, in that: (a) the number of Settlement Class Members is so numerous that joinder of all members thereof is impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the claims of the Class Representative are typical of the claims of the Settlement Class she seeks to represent; (d) the Class Representative has and will fairly and adequately represent the interests of the Settlement Class; (e) the questions of law and fact common to the Settlement Class Members predominate over any questions affecting any individual Settlement Class Member; and (f) a class action is superior to the other available methods for the fair and efficient adjudication of the controversy.

3. The Court finds that the requirements of Rule 23(e) of the Federal Rule of Civil Procedure and other

laws and rules applicable to final settlement approval of class actions have been satisfied, and the Court approves the settlement of this Action as memorialized in the Settlement Agreement as being fair, just reasonable and adequate to the Settlement Class and its members. The Court further finds that the Settlement Agreement substantially fulfills the purposes and objectives of the class action, and provides substantial relief to the Settlement Class without the risks, burdens, costs or delays associated with continued litigation, trial and/or appeal. The Settlement is not a finding or admission of liability by the Defendant or any other person, nor a finding of the validity of any claims asserted in the Action or of any wrongdoing or any violation of law.

4. Pursuant to Fed.R.Civ.P. 23, this Court hereby finally certifies this action, for purposes of settlement, a class action on behalf of all Persons who, from June 17, 2016, to and through May 21, 2021, enrolled in an automatically renewing NYT Subscription directly through NYT using a California billing and/or delivery address, and who were charged and paid an automatic renewal fee(s) in connection with such subscription. Excluded from this definition are the Released Parties. Settlement Class Members who exclude themselves from the Settlement, pursuant to the procedures set forth in Paragraph 4.5 of the Settlement Agreement, shall no longer thereafter be Settlement Class Members and shall not be bound by the Settlement Agreement and shall not be eligible to make a claim for any benefit under the terms of this Settlement Agreement.

5. The Court appoints Neal Deckant of Bursor & Fisher, P.A. as Class Counsel for the Settlement Class. The Court designates Plaintiff Maribel Moses as the Class Representative.

6. Notice of the pendency of this action as a class action and of the proposed settlement was given to Settlement Class Members in a manner reasonably calculated to provide the best notice practicable under the circumstances. The form and method of notifying the Settlement Class of the pendency of the Action as a class action and of the terms and conditions of the proposed Settlement met the requirements of Fed. R. Civ. P. 23, due process, and any other applicable law, and constituted due and sufficient notice to all persons and entities entitled thereto. In addition, the Court finds that Defendant fully satisfied any obligation to provide Notice of the proposed Settlement Agreement to the public officials designated under the Class Action Fairness Act, 28 U.S.C. §1715, to receive such notice, as set forth in the Defendant's Notice of Compliance with 28 U.S.C. §1715.

7. The Court has considered and finds Class Counsel and the Class Representative have adequately represented the Class. Plaintiff, by and through her counsel, has investigated the pertinent facts and law, and has evaluated the risks associated with continued litigation, class certification, trial, and/or appeal. The Court finds that the Settlement Agreement was reached in the absence of collusion, is the product of informed, good-faith, arms-length negotiations between the parties and their capable and experienced counsel.

8. The Court finds that the Settlement is effective in appropriately distributing relief to the Settlement Class in light of the claims and defenses asserted, that the method of processing Settlement Class Member claims is reasonable and appropriate, and that the Settlement Agreement treats all Settlement Class Members equitably relative to each other.

9. The Court has evaluated this overall reaction of the Class to the Settlement, and finds that the overall acceptance of the Settlement Agreement by Settlement Class Members supports the Court's conclusion that the Settlement Agreement is in all respects fair, reasonable, adequate, and in the best interests of the Class.

10. The Parties are directed to consummate the Settlement Agreement in accordance with its terms and conditions.

11. As set forth at Paragraph 2.2 of the Settlement Agreement, Defendant already has revised the presentation and wording of the automatic renewal terms on the checkout pages in its mobile and desktop platforms and in its direct mail offers to be consistent with the requirements of Cal. Bus. & Prof. Code §17602(a)(1)-(2).

12. JND is finally appointed to continue to serve as the Claims Administrator as provided in the Settlement Agreement. The Claims Administrator is directed to process all Authorized Claims in accordance with the Settlement Agreement. Class Counsel and Counsel for Defendant are hereby authorized to employ all reasonable procedures in

connection with administration of the Settlement Agreement that are not materially inconsistent with this Order or the Settlement Agreement.

13. The Claims Administrator shall administer the Escrow Account, which is a Qualified Settlement Fund within the meaning of Treasury Regulation §1.468B-1. The Claims Administrator, as administrator of the fund within the meaning of Treasury Regulation §1.468B- 2(k)(3), shall be solely responsible for filing or causing to be filed all informational and other tax returns as may be necessary or appropriate (including, without limitation, the returns described in Treasury Regulation §1.468B-2(k)) for the Escrow Account. The Claims Administrator shall also be responsible for causing payment to be made from the Escrow Account of any Taxes and Tax Expenses owed. None of the Releasees, Plaintiff, Class Counsel or Counsel for Defendant shall have any liability or responsibility for any such Taxes or Tax Expenses, or any required filings regarding same.

14. There shall be no recourse to any Defendant, Releasee, Released Party or their counsel, or to the Class Representative or Class Counsel, or to the Claims Administrator or to this Court, for any determination made by the Claims Administrator pursuant to its responsibilities under the Settlement Agreement. In addition, notwithstanding anything else in this Order, if the Claims Administrator or any Party has reason to believe that a false or fraudulent Claim has been submitted in this Settlement, or that any Claim has been submitted under false pretenses, the Claims Administrator may reject the Claim.

15. The Court has evaluated the application for a Fee Award and Incentive Award in connection with its consideration of the overall fairness, reasonable and adequacy of the Settlement.

16. Pursuant to Fed. R. Civ. P. 23(h), the Court hereby awards Class Counsel attorneys' fees, costs, and expenses in the amount of $ 791,666.66. The Court also orders payment of an incentive award(s) in the amount(s) of $ 5,000 to Plaintiff Maribel Moses. These amounts are to be paid in the time and manner described in the Settlement Agreement.

17. Any appeal from any Fee Award or Incentive Award or other order relating thereto, shall not operate to terminate or cancel the Settlement Agreement, nor affect or delay the finality of this Final Order and Judgment.

18. The Action is hereby dismissed with prejudice and without costs as against Defendant and the Released Parties.

19. Class Representative and all Settlement Class Members (except any such person who has filed a proper and timely request for exclusion) and all persons acting on behalf of or inconcert with any of the above, are hereby permanently barred and enjoined from instituting, commencing or prosecuting, either directly or in any other capacity, any and all of the Released Claims against any of the Released Parties. The Court finds that issuance of the permanent injunction described in this paragraph is necessary and appropriate in aid of the Court's jurisdiction over this Action and to protect and effectuate this Order.

20. Effective as of the Final Settlement Approval Date, each and all of the Settlement Class Members (except any such person who has filed a proper and timely request for exclusion) shall be deemed to have, and by operation of the Final Judgment shall have, fully, finally, and forever released, relinquished, and discharged, and shall be forever barred from asserting, instituting, or maintaining against any or all of the Released Parties, any and all causes of action or claims for relief, whether in law or equity, including but not limited to injunctive relief, actual damages, nominal damages, statutory damages, punitive damages, exemplary or multiplied damages, restitution, disgorgement, expenses, attorneys' fees and costs, and/or any other form of consideration whatsoever (including Unknown Claims), whether in law or in equity, accrued or un-accrued, direct, individual or representative, of every nature and description whatsoever, that were brought or could have been brought in the Action relating to any and all Releasing Parties, any NYT Subscription associated with any of them, or that in any way relate to or arise out of Defendant's automatic renewal and/or continuous service programs in California from June 17, 2016 to date of judgment in this action, including but not limited to any of the facts, transactions, events, matters, occurrences, acts, disclosures, statements, representations, omissions or failures to act related thereto. Plaintiff, the Settlement Class and the Releasing Parties each individually covenant not to bring any Released Claim and expressly agree that this Release will be, and may be raised as, a complete defense to and will preclude any action or proceeding encompassed by the

release(s) contained herein in respect to any NYT Subscription associated with a Class Member.

21. Neither the Settlement Agreement, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

(a) offered by any person or received against Defendant as evidence or construed as or deemed to be evidence of any presumption, concession, or admission by Defendant of the truth of the facts alleged by the Class Representative or any Settlement Class Member or the validity of any claim that has been or could have been asserted in the Action or in any litigation, or other judicial or administrative proceeding, or the deficiency of any defense that has been or could have been asserted in the Action or in any litigation, or of any liability, negligence, fault or wrongdoing of Defendant;

(b) offered by any person or received against Defendant as evidence of a presumption, concession or admission of any fault, misrepresentation or omission with respect to any statement or written document approved or made by Defendant or any other wrongdoing by Defendant;

(c) offered by any person or received against Defendant as evidence of a presumption, concession, or admission with respect to any liability, negligence, fault, or wrongdoing, or in any way referred to for any other reason against any of the settling parties, in any civil, criminal, or administrative action or proceeding; provided, however, that nothing contained in this paragraph shall prevent the Settlement Agreement from being used, offered, or received in evidence in any proceeding to approve, enforce, or otherwise effectuate the Settlement or the Settlement Approval Order and Final Judgment, or in which the reasonableness, fairness, or good faith of the parties in participating in the Settlement (or any agreement or order relating thereto) is an issue, or to enforce or effectuate provisions of the Settlement, the Settlement Approval Order and Final Judgment, the releases as to the Released Parties.

22. Claims documents in this case, and all materials and data held by the Claims Administrator regarding the Settlement Class, including the Class List, shall be strictly confidential and not subject to publication or disclosure, and shall not be used for any other purposes beyond providing notice to the Settlement Class and assisting with the determination of valid claims. No person other than the Parties and their counsel, the Claims Administrator, and the Court shall be permitted to obtain or review any Claim Form, or any decision of the Claims Administrator with respect to accepting or rejecting any Claim, except as provided for herein or upon Court Order for good cause shown.

23. This Settlement Approval Order and Final Judgment constitutes a judgment within the meaning and for purposes of Rule 54 of the Federal Rules of Civil Procedure. Without affecting the finality of the Settlement Approval Order and Final Judgment in any way, this Court hereby retains continuing jurisdiction over: (a) the disposition of the settlement benefits; (b) the settling parties for purposes of

construing, enforcing and administering the Settlement Agreement; and (c) enforcement of the Stipulation and Order Regarding Undertaking Re: Attorneys' Fees and Costs.

24. Without further order of the Court, the settling parties may agree to reasonably necessary extensions of time to carry out any of the provisions of the Settlement Agreement.

25. In the event that the Final Settlement Approval Date does not occur, this Settlement Approval Order and Final Judgment shall automatically be rendered null and void and shall be vacated and, in such event, all orders entered in connection herewith, except the Stipulation and Order Regarding Undertaking Re: Attorneys' Fees and Costs, shall be null and void.

DONE this 10th day of October , 2024.

Hon. Judge Ronnie Abrams
United States District Court Judge,
Southern District of New York

## APPENDIX D

## UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF NEW YORK

MARIBEL MOSES, on behalf of herself and all others similarly situated,

*Plaintiff,*

v.

THE NEW YORK TIMES COMPANY, d/b/a The New York Times.

*Defendant.*

Civil Action No.: 1:20-cv-04658-RA
Hon. Judge Ronnie Abrams

## FINAL APPROVAL ORDER AND JUDGMENT

On May 12, 2021, this Court granted preliminary approval of the proposed class action settlement agreement between the parties (the "Settlement Agreement" or "Settlement").

The Court also provisionally certified a Settlement Class for settlement purposes, approved the procedure for giving notice and forms of Notice, and set a final approval hearing to take place on September 10, 2021. The Settlement Class is defined as: all Persons who, from June 17, 2016, to and through the Preliminary Approval Date, enrolled in an automatically renewing NYT Subscription directly through NYT using a California billing and/or delivery address, and who were charged and paid an automatic renewal fee(s) in connection with such subscription. Excluded from this definition are the Released Parties. Settlement Class Members who exclude themselves from the Settlement, pursuant to the procedures set forth in Paragraph 4.5 of the Settlement, shall no longer thereafter be Settlement Class Members and shall not be bound by the Settlement and shall not be eligible to make a claim for any benefit under the terms of the Settlement.

On September 10, 2021, the Court held a duly noticed final approval hearing to consider: (1) whether the terms and conditions of the Settlement are fair, reasonable and adequate; (2) whether a judgment should be entered dismissing the complaint on the merits and with prejudice in favor of Defendant and against all persons or entities who are Settlement Class members herein who have not requested exclusion from the Settlement Class; and (3) whether and in what amount to award attorneys' fees, costs and expenses to Class Counsel and whether and in what amount to make an incentive award to Plaintiff Maribel Moses.

The Court, having considered all matters submitted to it at the hearing and otherwise, and it appearing that the Class Notice substantially in the form approved by the Court was given in the manner that the Court ordered to persons who purchased the NYT Subscriptions at issue, as ordered by the Court, and having considered and determined that the proposed settlement of the claims of the Settlement Class Members against Defendant, as well as the release of Defendant and the Released Parties, and the awards of attorneys' fees, costs, and expenses and incentive award requested, are fair, reasonable and adequate, hereby ORDERS THAT:

1. The definitions in the Settlement Agreement and the Court's Preliminary Approval Order are hereby incorporated herein as though fully set forth in this Order, and all other terms and phrases in this Order shall have the same meaning as ascribed to them in the Settlement Agreement and in the Court's Preliminary Approval Order, and/or in any Order of this Court prior to the entry of final Judgment.

2. The Court finds that the prerequisites for a settlement class under Federal Rules of Civil Procedure ("Fed.R.Civ.P.") 23(a) and (b)(3) have been satisfied, for purposes of settlement only, in that: (a) the number of Settlement Class Members is so numerous that joinder of all members thereof is impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the claims of the Class Representative are typical of the claims of the Settlement Class she seeks to represent; (d) the Class Representative has and will fairly and adequately represent the interests of the Settlement Class; (e) the questions of law and fact common to the Settlement Class Members predominate over any questions affecting any individual Settlement Class Member; and (f) a class action is superior to the other available methods for the fair and efficient adjudication of the controversy.

3. The Court finds that the requirements of Rule 23(e) of the Federal Rule of Civil Procedure and other laws and rules applicable to final settlement approval

of class actions have been satisfied, and the Court approves the settlement of this Action as memorialized in the Settlement Agreement as being fair, just reasonable and adequate to the Settlement Class and its members. The Court further finds that the Settlement Agreement substantially fulfills the purposes and objectives of the class action, and provides substantial relief to the Settlement Class without the risks, burdens, costs or delays associated with continued litigation, trial and/or appeal. The Settlement is not a finding or admission of liability by the Defendant or any other person, nor a finding of the validity of any claims asserted in the Action or of any wrongdoing or any violation of law.

4. Pursuant to Fed. R. Civ. P. 23, this Court hereby finally certifies this action, for purposes of settlement, a class action on behalf of all Persons who, from June 17, 2016, to and through the Preliminary Approval Date, enrolled in an automatically renewing NYT Subscription directly through NYT using a California billing and/or delivery address, and who were charged and paid an automatic renewal fee(s) in connection with such subscription. Excluded from this definition are the Released Parties. Settlement Class Members who exclude themselves from the Settlement, pursuant to the procedures set forth in Paragraph 4.5 of the Settlement Agreement, shall no longer thereafter be Settlement Class Members and shall not be bound by the Settlement Agreement and shall not be eligible to make a claim for any benefit under the terms of this Settlement Agreement.

5. The Court appoints Frederick J. Klorczyk III of Bursor & Fisher, P.A. as Class Counsel for the

Settlement Class. The Court designates Plaintiff Maribel Moses as the Class Representative.

6. Notice of the pendency of this action as a class action and of the proposed settlement was given to Settlement Class Members in a manner reasonably calculated to provide the best notice practicable under the circumstances. The form and method of notifying the Settlement Class of the pendency of the Action as a class action and of the terms and conditions of the proposed Settlement met the requirements of Fed. R. Civ. P. 23, due process, and any other applicable law, and constituted due and sufficient notice to all persons and entities entitled thereto. In addition, the Court finds that Defendant fully satisfied any obligation to provide Notice of the proposed Settlement Agreement to the public officials designated under the Class Action Fairness Act, 28 U.S.C. §1715, to receive such notice, as set forth in the Defendant's Notice of Compliance with 28 U.S.C. §1715.

7. The Court has considered and finds Class Counsel and the Class Representative have adequately represented the Class. Plaintiff, by and through her counsel, has investigated the pertinent facts and law, and has evaluated the risks associated with continued litigation, class certification, trial, and/or appeal. The Court finds that the Settlement Agreement was reached in the absence of collusion, is the product of informed, good-faith, arms-length negotiations between the parties and their capable and experienced counsel.

8. The Court finds that the Settlement is effective in appropriately distributing relief to the Settlement

Class in light of the claims and defenses asserted, that the method of processing Settlement Class Member claims is reasonable and appropriate, and that the Settlement Agreement treats all Settlement Class Members equitably relative to each other.

9. The Court has evaluated this overall reaction of the Class to the Settlement, and finds that the overall acceptance of the Settlement Agreement by Settlement Class Members supports the Court's conclusion that the Settlement Agreement is in all respects fair, reasonable, adequate, and in the best interests of the Class.

10. The Parties are directed to consummate the Settlement Agreement in accordance with its terms and conditions.

11. Defendant shall implement the Prospective Relief - Practice Changes described in Paragraph 2.3 of the Settlement Agreement within a reasonably practicable time from the date of this order.

12. JND is finally appointed to continue to serve as the Claims Administrator as provided in the Settlement Agreement. The Claims Administrator is directed to process all Authorized Claims in accordance with the Settlement Agreement. Class Counsel and Counsel for Defendant are hereby authorized to employ all reasonable procedures in connection with administration of the Settlement Agreement that are not materially inconsistent with this Order or the Settlement Agreement.

13. The Claims Administrator shall administer the Escrow Account, which is a Qualified Settlement Fund within the meaning of Treasury Regulation §1.468B-1. The Claims Administrator, as administrator of the fund within the meaning of Treasury Regulation §1.468B- 2(k)(3), shall be solely responsible for filing or causing to be filed all informational and other tax returns as may be necessary or appropriate (including, without limitation, the returns described in Treasury Regulation §1.468B-2(k)) for the Escrow Account. The Claims Administrator shall also be responsible for causing payment to be made from the Escrow Account of any Taxes and Tax Expenses owed. None of the Releasees, Plaintiff, Class Counsel or Counsel for Defendant shall have any liability or responsibility for any such Taxes or Tax Expenses, or any required filings regarding same.

14. There shall be no recourse to any Defendant, Releasee, Released Party or their counsel, or to the Class Representative or Class Counsel, or to the Claims Administrator or to this Court, for any determination made by the Claims Administrator pursuant to its responsibilities under the Settlement Agreement. In addition, notwithstanding anything else in this Order, if the Claims Administrator or any Party has reason to believe that a false or fraudulent Claim has been submitted in this Settlement, or that any Claim has been submitted under false pretenses, the Claims Administrator may reject the Claim.

15. The allowance or disallowance by the Court of, any Fee Award or Incentive Award have been considered by the Court separately from the Court's consideration of the fairness, reasonableness and

adequacy of the Settlement. Any Order or proceeding related to the application for an award of fees, costs and expenses, or any appeal from any Fee Award or Incentive Award or other order relating thereto, shall not operate to terminate or cancel the Settlement Agreement, nor affect or delay the finality of this Final Order and Judgment.

16. Pursuant to Fed. R. Civ. P. 23(h), the Court hereby awards Class Counsel attorneys' fees, costs, and expenses in the amount of $ 1,250,000. The Court also orders payment of an incentive award(s) in the amount(s) of $5,000 to Plaintiff Maribel Moses. These amounts are to be paid in the time and manner described in the Settlement Agreement.

17. The Action is hereby dismissed with prejudice and without costs as against Defendant and the Released Parties.

18. Class Representative and all Settlement Class Members (except any such person who has filed a proper and timely request for exclusion) and all persons acting on behalf of or in concert with any of the above, are hereby permanently barred and enjoined from instituting, commencing or prosecuting, either directly or in any other capacity, any and all of the Released Claims against any of the Released Parties. The Court finds that issuance of the permanent injunction described in this paragraph is necessary and appropriate in aid of the Court's jurisdiction over this Action and to protect and effectuate this Order.

19. Effective as of the Final Settlement Approval Date, each and all of the Settlement Class Members (except any such person who has filed a proper and timely request for exclusion) shall be deemed to have, and by operation of the Final Judgment shall have, fully, finally, and forever released, relinquished, and discharged, and shall be forever barred from asserting, instituting, or maintaining against any or all of the Released Parties, any and all causes of action or claims for relief, whether in law or equity, including but not limited to injunctive relief, actual damages, nominal damages, statutory damages, punitive damages, exemplary or multiplied damages, restitution, disgorgement, expenses, attorneys' fees and costs, and/or any other form of consideration whatsoever (including Unknown Claims), whether in law or in equity, accrued or un-accrued, direct, individual or representative, of every nature and description whatsoever, that were brought or could have been brought in the Action relating to any and all Releasing Parties, any NYT Subscription associated with any of them, or that in any way relate to or arise out of Defendant's automatic renewal and/or continuous service programs in California from June 17, 2016 to date of judgment in this action, including but not limited to any of the facts, transactions, events, matters, occurrences, acts, disclosures, statements, representations, omissions or failures to act related thereto. Plaintiff, the Settlement Class and the Releasing Parties each individually covenant not to bring any Released Claim and expressly agree that this Release will be, and may be raised as, a complete defense to and will preclude any action or proceeding encompassed by the

release(s) contained herein in respect to any NYT Subscription associated with a Class Member.

20. Neither the Settlement Agreement, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

(a) offered by any person or received against Defendant as evidence or construed as or deemed to be evidence of any presumption, concession, or admission by Defendant of the truth of the facts alleged by the Class Representative or any Settlement Class Member or the validity of any claim that has been or could have been asserted in the Action or in any litigation, or other judicial or administrative proceeding, or the deficiency of any defense that has been or could have been asserted in the Action or in any litigation, or of any liability, negligence, fault or wrongdoing of Defendant;

(b) offered by any person or received against Defendant as evidence of a presumption, concession or admission of any fault, misrepresentation or omission with respect to any statement or written document approved or made by Defendant or any other wrongdoing by Defendant;

(c) offered by any person or received against Defendant as evidence of a presumption, concession, or admission with respect to any liability, negligence, fault, or wrongdoing, or in any way referred to for any other reason against any of the settling parties, in any civil, criminal, or administrative action or proceeding; provided, however, that nothing contained in this paragraph shall prevent the Settlement Agreement from being used, offered, or received in evidence in any proceeding to approve, enforce, or otherwise effectuate the Settlement or the Settlement Approval Order and Final Judgment, or in which the reasonableness, fairness, or good faith of the parties in participating in the Settlement (or any agreement or order relating thereto) is an issue, or to enforce or effectuate provisions of the Settlement, the Settlement Approval Order and Final Judgment, the releases as to the Released Parties.

21. Claims documents in this case, and all materials and data held by the Claims Administrator regarding the Settlement Class, including the Class List, shall be strictly confidential and not subject to publication or disclosure, and shall not be used for any other purposes beyond providing notice to the Settlement Class and assisting with the determination of valid claims. No person other than the Parties and their counsel, the Claims Administrator, and the Court shall be permitted to obtain or review any Claim Form, or any decision of the Claims Administrator with respect to accepting or rejecting any Claim, except as provided for herein or upon Court Order for good cause shown.

22. This Settlement Approval Order and Final Judgment constitutes a judgment within the meaning and for purposes of Rule 54 of the Federal Rules of Civil Procedure. Without affecting the finality of the Settlement Approval Order and Final Judgment in any way, this Court hereby retains continuing jurisdiction over: (a) the disposition of the settlement benefits; (b) the settling parties for purposes of

construing, enforcing and administering the Settlement Agreement; and (c) enforcement of the Stipulation and Order Regarding Undertaking Re: Attorneys' Fees and Costs.

23. Without further order of the Court, the settling parties may agree to reasonably necessary extensions of time to carry out any of the provisions of the Settlement Agreement.

24. In the event that the Final Settlement Approval Date does not occur, this Settlement Approval Order and Final Judgment shall automatically be rendered null and void and shall be vacated and, in such event, all orders entered in connection herewith, except the Stipulation and Order Regarding Undertaking Re: Attorneys' Fees and Costs, shall be null and void.

DONE this 13 day of , 2021.

______________________________

Hon. Judge Ronnie Abrams
United States District Court Judge,
Southern District of New Yor

## APPENDIX E

## UNITED STATES COURT OF APPEALS
## FOR THE
## SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of March, two thousand twenty-six.

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Maribel Moses, on behalf of herself and all others similarly situated,

Plaintiff - Appellee,

v.

The New York Times Company, d/b/a The New York Times,

Defendant - Appellee,

v.

Eric Alan Isaacson,

Appellant.

**ORDER**

Docket No: 24-2979

[Filed March 20, 2026]

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Appellant, Eric Alan Isaacson, has filed a petition for rehearing en banc. The active members of the Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

## APPENDIX F

## Federal Rule of Civil Procedure Rule 23

## Class Actions

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

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

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

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

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

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

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

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

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

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

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

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

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

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

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

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order*.

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

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

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

(2) *Notice*.

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

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

(i) the nature of the action;

(ii) the definition of the class certified;

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

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

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

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

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

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

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

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

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

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

(d) CONDUCTING THE ACTION.

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

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

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

(i) any step in the action;

(ii) the proposed extent of the judgment; or

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

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

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

(E) deal with similar procedural matters.

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

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) *Class-Member Objections*.

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

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

(i) forgoing or withdrawing an objection, or

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

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

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

(g) CLASS COUNSEL.

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

(A) must consider:

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

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

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

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

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

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

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

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

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

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

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

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

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

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

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

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