

In the
Supreme Court of the United States

ERIC ALAN ISAACSON, PETITIONER,

vs.

NATIONAL VETERANS LEGAL SERVICES PROGRAM,
NATIONAL CONSUMER LAW CENTER, ALLIANCE FOR
JUSTICE, UNITED STATES OF AMERICA, RESPONDENTS

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

PETITION FOR A WRIT OF CERTIORARI

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

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 Five other circuits have rejected that conclusion, finding it superseded by modern class-action practice.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 reward litigants for serving as representative plaintiffs?

PARTIES TO THE PROCEEDING

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

The National Veterans Legal Services Program, the National Consumer Law Center, and the Alliance for Justice, are Respondents here, and were the Named Plaintiffs-Appellees below.

The United States of America was the Defendant-Appellee below, and is a Respondent here.

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:

National Veterans Legal Servs. Program, et al. v. United States, United States District Court for the District of Columbia, No.1:16-cv-00745, *judgment entered* March 20, 2024, *reported as National Veterans Legal Services Program v. United States*, 724 F.Supp.3d 1 (D.D.C. 2024), *aff'd*, 170 F.4th 1353 (Fed.Cir.2026).

National Veterans Legal Services Program, et al. v. United States, United States Court of Appeals for the Federal Circuit Nos.2018-154 & 2018-155 (petitions for leave to appeal), 2019-1081 & 2019-1083 (appeal & cross-appeal), *judgment entered* August 6, 2020, *and reported as National Veterans Legal Servs Program v. United States*, 968 F.3d 1340 (Fed.Cir.2020).

National Veterans Legal Services Program, et al. v. United States, United States Court of Appeals for the Federal Circuit No.2024-1757, *judgment entered*

March 20, 2026, and reported as *National Veterans Legal Services Program v. United States*, 170 F.4th 1353 (Fed.Cir.2026).

In 2022, a class member Michael T. Pines filed an appeal to the United States Court of Appeals for the District of Columbia Circuit, docketed as No.21-5291, and captioned as *National Veterans Legal Services Program, et al. v. United States, Michael T. Pines Appellant*, which was dismissed for lack of prosecution on September 28, 2022.

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

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	ii
RELATED PROCEEDINGS.....	ii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES.....	vi
REPORTS OF THE OPINIONS BELOW.....	1
JURISDICTION.....	1
RULE INVOLVED.....	1
STATEMENT OF THE CASE.....	1
REASONS FOR GRANTING THE WRIT.....	3
I. REVIEW IS NEEDED TO RESOLVE AN INTRACTABLE INTERCIRCUIT CONFLICT ON WHETHER THIS COURT’S FOUNDATIONAL COMMON-FUND PRECEDENTS CONTINUE TO PROHIBIT SERVICE AWARDS.....	5
II. THE FEDERAL CIRCUIT’S DECISION IN THIS CASE IS WRONG.....	16
III. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING AN EXTREMELY IMPORTANT ISSUE AFFECTING MANY CLASS ACTIONS.....	23
CONCLUSION.....	24

APPENDIX

APPENDIX A –

Opinion of the Federal Circuit (March 20, 2026).....	1a
---	----

APPENDIX B –	
Opinion of the District Court	
(March 20, 2024).....	29a
APPENDIX C –	
Judgment of the District Court	
(March 20, 2024).....	84a
APPENDIX D –	
Order of the Federal Circuit	
Denying Petition for Rehearing	
(June 5, 2026).....	91a
APPENDIX E –	
Federal Rule of Civil Procedure 23.....	93a

TABLE OF AUTHORITIES

CASES

<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	22
<i>Alyeska Pipeline Service Co. v. Wilderness Society</i> , 421 U.S. 240 (1975).....	6
<i>Amchem Products, Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	12, 21
<i>Bloomer v. Liberty Mut. Ins. Co.</i> , 445 U.S. 74 (1980).....	6
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472 (1980).....	i, 5
<i>Central Railroad & Banking Co. v. Pettus</i> , 113 U.S. 116 (1885) ("Pettus").....	i, 2–8, 11–13, 15–18, 21–23
<i>China Agritech Inc. v. Resh</i> , 584 U.S. 732 (2018).....	14–16, 23
<i>Cook v. Niedert</i> , 142 F.3d 1004 (7th Cir.1998).....	15
<i>Crutcher v. Logan</i> , 102 F.2d 612 (5th Cir.1939).....	6
<i>In re Dry Max Pampers Litig.</i> , 724 F.3d 713 (6th Cir.2013).....	20, 24
<i>Egbert v. Boule</i> , 596 U.S. 482 (2022).....	22
<i>In re Equifax Inc. Customer Data Security Breach Litig.</i> , 999 F.3d 1247 (11th Cir.2021).....	9, 14

<i>Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.</i> , 62 F.4th 704 (2d Cir.2023).....	9–11
<i>Gortat v. Capala Bros.</i> , 949 F.Supp.2d 374 (E.D.N.Y.2013).....	21
<i>Granada Investments, Inc. v. DWG Corp.</i> , 962 F.2d 1203 (6th Cir.1992).....	6
<i>Hansberry v. Lee</i> , 311 U.S. 32 (1940).....	8
<i>Hyland v. Navient Corp.</i> , 48 F.4th 110 (2d Cir.2022).....	9, 11
<i>Johnson v. NPAS Solutions, LLC</i> , 975 F.3d 1244 (11th Cir.2020), <i>rehearing denied</i> , 43 F.4th 1138 (11th Cir.2022),.....	i, 3–4, 9–12, 14
<i>Johnson v. NPAS Solutions</i> , 43 F.4th 1138 (11th Cir.2022).....	i, 3, 10, 14
<i>Medical & Chiropractic Clinic, Inc. v. Oppenheim</i> , 981 F.3d 983 (11th Cir.2020).....	9, 14
<i>Melito v. Experian Mktg. Sols., Inc.</i> , 923 F.3d 85 (2d Cir.2019).....	9, 11
<i>Mickens v. Taylor</i> , 535 U.S. 162 (2002).....	15, 23
<i>Moses v. New York Times Co.</i> , 79 F.4th 235 (2d Cir.2023) ("Moses I").....	9, 11–14
<i>Moses v. The New York Times Co.</i> , No.24-2979, 2026 WL 364231 (2d Cir. Feb. 10, 2026)("Moses II").....	9, 14
<i>Murray v. Grocery Delivery E-Servs. USA Inc.</i> , 55 F.4th 340 (1st Cir.2022).....	9, 12

<i>National Veterans Legal Services Program v. United States</i> , 170 F.4th 1353 (Fed.Cir.2026)(“ <i>NVLSP</i> ”).....	ii–iii, 1, 10, 16
<i>Scott v. Dart</i> , 99 F.4th 1076 (7th Cir.2024), <i>reh’g denied</i> , 108 F.4th 931 (7th Cir.2024).....	10, 13, 16
<i>Scott v. Dart</i> , 108 F.4th 931 (7th Cir.2024).....	10, 13
<i>Shalala v. Illinois Council on Long Term Care</i> , 529 U.S. 1 (2000).....	15, 23
<i>Shane Group, Inc. v. Blue Cross Blue Shield</i> , 825 F.3d 299 (6th Cir.2016).....	20, 24
<i>Smith v. Swormstedt</i> , 57 U.S. (16 How.) 288 (1853).....	8, 17
<i>Supreme Tribe of Ben-Hur v. Cauble</i> , 255 U.S. 356 (1921).....	8, 17
<i>Terrett v. Taylor</i> , 13 U.S. (9 Cranch) 43 (1815).....	8
<i>Touche Ross & Co. v. Redington</i> , 442 U.S. 560 (1979).....	22
<i>Trustees v. Greenough</i> , 105 U.S. 527 (1882).....	i, 2–8, 11–18, 20–24
<i>U.S. Airways, Inc. v. McCutchen</i> , 569 U.S. 88 (2013).....	6
<i>West v. Randall</i> , 29 F.Cas. 718 (C.C.D.R.I.1820).....	8
<i>Wormley v. Wormley</i> , 21 U.S. 421 (1823).....	8

STATUTES

28 U.S.C. §1254(1).....	1
28 U.S.C. §1331.....	2
28 U.S.C. §1346(a)(2).....	2
28 U.S.C. §2072(b).....	12, 21

RULES

Fed.R.Civ.P. 23.....	1–2, 4, 7–8, 11–13, 16–22, 24
Supreme Court Rule 14.1(b)(iii).....	iii
Supreme Court Rule 29.6.....	ii

SECONDARY AUTHORITIES

Anne Ashmore,

*Dates of Supreme Court Decisions and Arguments:
United States Reports Volumes 2-107 (1791-1882)*

(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>.....

2

Andrew Blum,

Class Actions' New Wrinkle: Bonus Awards,

National Law Journal, Oct. 7, 1991, p.1.....

7

John P. Dawson,

*Lawyers and Involuntary Clients: Attorney Fees
from Funds,*

87 Harv.L.Rev. 1597 (1974).....

5–6, 17

Howard M. Downs, <i>Federal Class Actions: Diminished Protection for the Class and the Case for Reform,</i> 73 Neb.L.Rev. 646 (1994).....	7, 21
Theodore Eisenberg & Geoffrey P. Miller, <i>Incentive Awards to Class Action Plaintiffs: An Empirical Study,</i> 53 U.C.L.A. L.Rev. 1303 (2006).....	7, 20
Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, <i>An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges,</i> 71 N.Y.U. L.Rev. 74 (1996).....	7, 21

REPORTS OF THE OPINIONS BELOW

The Federal Circuit’s Summary Order affirming the District Court’s approval of a common-fund class-action settlement, along with \$10,000 incentive payments to each of the class representatives, is published as *National Veterans Legal Services Program v. United States*, 170 F.4th 1353 (Fed.Cir. 2026)(“NVLSP”). It is reproduced at Pet.App.1a-28a.

The District Court’s order and opinion approving the class-action settlement and awarding each of the the representative plaintiffs a \$10,000 incentive payment is published as *National Veterans Legal Servicdes Program v. United States*, 724 F.Supp. 3d 1 (D.D.C.2024). See Pet.App.29a–83a.

JURISDICTION

The Court of Appeals issued its decision on March 20, 2026, Pet.App.1a–28a, and on June 5, 2026, denied Isaacson’s timely petition for rehearing. Pet.App.91a–92a.

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

RULE INVOLVED

Federal Rule of Civil Procedure 23 is reproduced at Pet.App.93a–102a.

STATEMENT OF THE CASE

This case involves a \$125 million settlement of a class-action, under Federal Rule of Civil Procedure 23, asserting claims against the United States on behalf of a class of hundreds of thousands of PACER uses. The named plaintiffs are three nonprofit organizations that alleged the government charged them, and other PACER users, legally excessive rates.

In addition to their own share of the settlement proceeds, the three named plaintiffs were awarded \$10,000 each as an “incentive award” or “service award” rewarding them for service rendered as a Rule 23 class representatives, and to encourage others to file class actions in the future.

The District Court exercised jurisdiction under under 28 U.S.C. §1331 and the Little Tucker Act, 28 U.S.C. §1346(a)(2), which authorizes federal district courts to exercise jurisdiction over a “civil action or claim against the United States, not exceeding \$10,000 in amount.” 28 U.S.C. §1346(a)(2).

Petitioner Eric Alan Isaacson is a California attorney and member of the settlement class who appeared below to object to the proposed settlement’s structure, to the proposed attorney’s fee award, and to incentive awards of \$10,000 apiece requested by the three named plaintiffs. Isaacson specifically objected that incentive awards are barred by this Court’s foundational common-fund decisions, *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*”).¹

The District Court overruled Isaacson’s objections and approved the \$125 million settlement, awarding attorney’s fees in the amount of nearly \$24 million, as

¹ Although many lower courts, including both the District Court and Court of Appeals in this case, give *Greenough*’s year of decision as 1881, the case was in fact argued before this Court 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>.

well as incentive awards of \$10,000 apiece to each of the named plaintiffs.

Following the District Court's approval of the settlement, award of attorney's fees, and of \$10,000 incentive awards for each of the Named Plaintiffs, Isaacson timely appealed.

A panel of the Federal Circuit on March 20, 2026, affirmed the settlement, the fee award, and the three \$10,000 incentive awards. Pet.App.1a–28a. It rejected Isaacson's challenge to the district court's Little Tucker Act subject-matter jurisdiction, as well as his objections to the settlement's structure, and to the \$24 million common-fund attorney's fee award, to the \$10,000 incentive awards. The Federal Circuit specifically rejected Isaacson's contention that this Court's decisions in *Greenough* and *Pettus* bar incentive awards. Pet.App.20a–27a.

Isaacson filed a timely petition for rehearing, which the Court of Appeals denied on June 5, 2026. Pet.App.91a–92a.

Isaacson now seeks this Court's review of whether the \$10,000 incentive awards violate this Court's foundational common-fund precedents, which held that payments rewarding representative plaintiffs for their services rendered securing a common fund are both "decidedly objectionable" and "illegally made." *Greenough*, 105 U.S. 537-38; *accord Pettus*, 113 U.S. at 122; *see Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244, 1255 (11th Cir.2020)(*Greenough* rejected such awards "as unsupported by reason or authority"), *reh'g denied*, 43 F.4th 1138 (11th Cir.2022). .

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 reward them for serving as class representatives—and to provide an incentive encouraging others to file and settle class action lawsuits. Faithfully following this Court’s decisions in *Greenough* and *Pettus*, the Eleventh Circuit holds that “Supreme Court precedent prohibits incentive awards.” *NPAS Solutions*, 975 F.3d at 1255. But citing policies they believe underlie Federal Rule of Civil Procedure 23, the First, Second, Seventh, Ninth, and Federal Circuits all hold this Court’s foundational common-fund decisions are inapplicable to common-fund class actions.

They are wrong. Neither Rule 23 nor its underlying policies can overturn decisions of this Court. It is this Court’s sole prerogative to determine whether *Greenough* and *Pettus* retain vitality in barring payments to litigants for service as representative plaintiffs. And it is Congress’ prerogative, not the lower courts’, to determine whether class-action litigation should be rewarded and encouraged by paying named plaintiffs a bonus for pursuing class action litigation.

No statute authorizes such awards as a general matter, Rule 23 says nothing to authorize them, and the policies underlying class-action litigation may not be advanced by paying named plaintiffs to file and settle class actions. The promise of incentive awards can be used by class counsel first to recruit representative plaintiffs, who otherwise would not care to litigate a claim, to nonetheless file class actions on claims that they otherwise do not really care about.

The promise of incentive awards can then be used to induce representative plaintiffs to acquiesce in settlements that recover little for the class, or that award attorney's fee awards compensating class counsel too generously.

I. REVIEW IS NEEDED TO RESOLVE AN INTRACTABLE 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). But this Court's common-fund precedents equally hold 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 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 in *Granada Investments, Inc. v. DWG Corp.*, 962 F.2d 1203, 1207-08 (6th Cir.1992), the Sixth Circuit applied *Greenough*’s distinction between litigation expenses on the one hand, and “personal services and private expenses,” on the other).

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

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

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, 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 representative plaintiffs who wish to litigate too

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).

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.

vigorously to accept settlements that may 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

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

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 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.).

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 the particular *amount* sought was excessive. They broadly proscribed payments to representative plaintiffs, without qualification as to the amount sought.

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 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)(“*Moses I*”), *reaffirmed by Moses v. New York Times Co.*,

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”).

No. 24-2979, 2026 WL 364231, at *3 (2d Cir. Feb. 10, 2026)(“*Moses II*”), *petition for certiorari docketed sub nom. Isaacson v. Moses*, No.25-1411 (filed June 18, 2026);

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*”), *see* Pet.App.20a–27a.

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 has continued to sustain incentive awards even as it 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.” In *Fikes Wholesale* the Second Circuit explained 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 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*”). 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).⁷

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 plainly 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

⁷ On remand, the parties in *Moses I* entered a revised settlement and the district court again awarded the representative plaintiff a \$5,000 incentive award. As an objecting class member in that case (as well as in this one) Isaacson appealed to the Second Circuit which reiterated in *Moses v. The New York Times Co.*, No.24-2979, 2026 WL 364231, at *3 (2d Cir. Feb. 10, 2026)(“*Moses II*”), that *Moses I* controls, and that *Greenough* and *Pettus* do not. Isaacson has filed a petition for certiorari seeking this Court’s review of Second Circuit’s decision in that case. See *Isaacson v. Moses*, No.25-1411 (U.S. June 18, 2026).

authorize the lower courts' 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 concrete 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.⁸

The contrary position of the First, Second, Seventh, Ninth, and Federal Circuits also is settled. They all 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 sustaining an incentive award in order to illustrate that representative plaintiffs have motives for taking charge of class-action lawsuits that they otherwise

⁸ 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 Clinic v. Oppenheim*, 981 F.3d 983, 994 n.4 (11th Cir.2020)(“service awards are foreclosed by Supreme Court precedent”).

might not have cared to get involved in. 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, or significantly limited, the holdings 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—including the Federal Circuit in this case—are citing *China Agritech* to justify incentive awards. In *Moses I* 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)).

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*, 584 U.S. at 747 n.7). 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, Pet.App.26a.

In this case, the Federal Circuit cites *China Agritech* to conclude that “the Supreme Court appears to have regarded class action incentive awards as distinct from the salary-like payments prohibited in *Greenough*,” which it holds “did not speak to Rule 23 class actions [that] would not exist for another eight decades.” Pet.App.26a.

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

II. THE FEDERAL CIRCUIT’S DECISION IN THIS CASE IS WRONG

This case provides an excellent vehicle for resolving the conflict among the circuits and with this Court’s precedents for several reasons—including that the Federal Circuit’s opinion is wrong.

The Court of Appeals asserts that *Greenough* and *Pettus* may be ignored because the “law-suits at issue

in *Greenough* and *Pettus* bear little resemblance to today's class actions." Pet.App.24a. But that is not true. Although the Federal Rules date to 1938, both the common-fund doctrine and class actions preceded Rule 23 by many decades. 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 *supra* p.8 note 5 (collecting cases).

In fact, the *Greenough* and *Pettus* cases were themselves class actions filed on behalf of bondholders, and therefore are directly analogous to current securities class actions. *Greenough* in particular was filed as a class action by Francis Vose, a bondholder "of the Florida Railroad Company, on behalf of himself and the other bondholders." *Greenough*, 105 U.S. at 528. Vose prosecuted the case as a class action that he "filed not only in behalf of the complainant himself, but in behalf of the other bondholders." *Id.* at 532. As a bondholder, the Supreme Court explained, Vose "was a creditor, suing on behalf of himself and other creditors, for his and their own benefit and advantage." *Greenough*, 105 U.S. at 537. *Greenough* plainly was a common-fund class action.

Pettus was similarly "framed as a class action,"⁹ and this Court's opinion emphasized that *Greenough* itself "was instituted by the holder of the bonds of a railroad company, on behalf of himself and other bondholders." *Pettus*, 113 U.S. at 122. These were not merely common-fund cases; they were common-fund class

⁹ John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 Harv.L.Rev. 1597, 1608 (1974).

actions. In this case, the Court of Appeals has plainly erred by dismissing *Greenough* and *Pettus* as irrelevant to class actions.

The Court of Appeals concludes that adoption of Rule 23 somehow renders *Greenough* and *Pettus* irrelevant. As adopted in 1938 to standardize proceedings in federal class actions, and amended in 1966 to rationalize and expand the class-action device, Rule 23 said absolutely nothing to overrule or limit *Greenough* and *Pettus*. Neither have any of its subsequent amendments addressed or authorized incentive awards to representative plaintiffs. The Court of Appeals acknowledges that “Rule 23 is silent with respect to incentive awards.” Pet.App.20a.

So *Greenough* and *Pettus* should still control common-fund class actions—unless this Court says otherwise.

Citing a 1974 Sixth Circuit decision, the Court of Appeals nonetheless asserts that in the face of Rule 23’s silence,

soon after Rule 23’s inception, courts began approving incentive awards for class representatives. *See, e.g., Thornton v. E. Tex. Motor Freight*, 497 F.2d 416, 420 (6th Cir.1974).

Pet.App.20a.

That is not accurate. Class actions were well known in American jurisprudence when the rules governing them were standardized in Rule 23, which has governed federal class actions since 1938. Federal courts found in Rule 23 no authorization for awarding special bonuses to class representatives, and for half a century they declined to do so.

Amendments of 1966 modernized Rule 23 class-action procedures in several respects. *See* Geoffrey C. Hazard, Jr., et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U.Pa.L.Rev. 1849, 1861–65 (1998). But the modifications said nothing to authorize incentive awards, and federal courts, for decades more, found no basis for creating a system of special payments to reward representative plaintiffs.

The Court of Appeals accordingly errs in asserting that federal courts began doing so “soon after Rule 23’s inception.” Pet.App.20a. It gives the Sixth Circuit’s decision in *Thornton v. E. Tex. Motor Freight*, 497 F.2d 416, 420 (6th Cir.1974), as an example. Pet.App.20a. But *Thornton* was decided 36 years after Rule 23’s inception in 1938, and roughly eight years after Rule 23’s 1966 revision. That said, the Sixth Circuit’s opinion in *Thornton* neither mentioned nor approved of incentive awards to representative plaintiffs.

Far from authorizing incentive awards since the 1970s, the Sixth Circuit has repeatedly questioned the practice. In 2013, for example, the Sixth Circuit invalidated a settlement that included the payment of incentive awards, writing:

Our court has never approved the practice of incentive payments to class representatives, though in fairness we have not disapproved the practice either. *See Vassalle [v. Midland Funding LLC]*, 708 F.3d 747, 756 [(6th Cir.2013)]. Thus, to the extent that incentive awards are common, they are like dandelions on an unmowed lawn—present more by inattention than by design. And we have expressed a “sensibl[e] fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to

compromise the interest of the class for personal gain.”

In re Dry Max Pampers Litig., 724 F.3d 713, 722 (6th Cir.2013)(quoting *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir.2003)).

In 2016, the Sixth Circuit reiterated that “[o]ur court has never approved the practice of incentive payments to class representatives.” *Shane Group v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 311 (6th Cir.2016)(quoting *Dry Max Pampers*, 322 F.3d at 722)(quoting *Hadix*, 322 F.3d at 897). In fact, the Sixth Circuit’s decisions have repeatedly expressed “a ‘sensibl[e] fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain.” *Shane Group*, 825 F.3d at 311 (quoting *Hadix*, 322 F.3d at 897). These decisions avoided “the ‘difficult issue’ of the propriety of incentive awards.” *Id.* (quoting *Hadix*, 322 F.3d at 898). The Sixth Circuit has never held that *Greenough* and *Pettus* permit incentive awards.

Not until the late 1980s and early 1990s—decades after the 1966 revisions to Rule 23—did federal district courts’ nonprecedential orders and opinions begin to include the unprecedented novelty of incentive awards to representative plaintiffs. “Beginning around 1990, however, awards for representative plaintiffs began to find readier acceptance,” and soon orders “approving incentive awards proliferated,” so that “[b]y the turn of the century, some considered these awards to be ‘routine.’”¹⁰ The Court of Appeals recognizes as much.

¹⁰ Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 U.C.L.A.

Pet.App.21a. But it offers no explanation for why it took decades before federal courts started awarding incentive awards that were suddenly needed to realize Rule 23's longstanding policies.

A few judges resisted the urge to disregard *Greenough* and *Pettus*. In *Gortat v. Capala Bros.*, 949 F.Supp.2d 374, 379 (E.D.N.Y.2013), Judge Glasser of the Eastern District of New York concluded that *Greenough*, although “decided more than 130 years ago,” should still inform his decision denying an incentive award. *Gortat*, 949 F.Supp.2d at 379.

The Court of Appeals in this case suggests that incentive awards are good public policy because they encourage the filing and settlement of class actions. But it is for Congress, not the judiciary, to decide whether class-action litigation needs any such special incentives. By its terms, Rule 23 creates no new right to any incentive award in addition to the attorneys' fees and litigation expenses long authorized by *Greenough* and *Pettus*. “Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure ‘shall not abridge, enlarge or modify any substantive right.’” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997)(quoting 28 U.S.C. §2072(b)).

L.Rev. 1303, 1310-11 & n.21 (2006); 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).

Federal judges are no more entitled to create incentive awards under Rule 23 than they are to create new implied causes of action under any other statute or rule. Financial incentives to sue, like “private rights of action to enforce federal law[,] must be created by Congress.” *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)(citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)(available remedies are limited to those “that Congress enacted into law”)). Whether or not some federal judges think that incentive awards may promote policies underlying Rule 23, “Congress is ‘far more competent than the Judiciary’ to weigh such policy considerations.” *Egbert v. Boule*, 596 U.S. 482, 491(2022). It is for Congress to create incentive awards, not the courts. Without clear congressional intent to create a new cause of action, none exists, “and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute” or rule that it supposedly promotes. *Alexander*, 532 U.S. 275, 286–87 (2001). “Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.” *Id.* at 287 (citation omitted).

The Court of Appeals suggests that the rule of *Greenough* and *Pettus* may be ignored for the further reason that the payment sought by Vose was too extravagant, amounting perhaps to a “salary.” But *Greenough* and *Pettus* never suggested that smaller request would be permitted. They laydown a bright-line rule that payments to representative plaintiffs for their own “personal services” in litigating such cases are “decidedly objectionable,” “illegally made,” *Greenough*, 105 U.S. at 537–38, and “unsupported by reason or authority.” *Pettus*, 113 U.S. at 122.

Finally, although the Court of Appeals notes dictum in *China Agritech v. Resh*, 584 U.S. 732, 747 n.7 (2018), to the effect that a “class representative might receive a share of class recovery above and beyond her individual claim,” that decision does not cite, let alone, overrule the holdings of *Greenough* and *Pettus*. 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 [it] 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).

Other Circuits are making the same mistakes. It is high time for this Court to take charge.

III. 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 the three Respondents’ \$10,000 incentive awards, with no further issues to be litigated.

The question presented is extraordinarily important as incentive awards have come to affect so many class-action settlements. Plaintiffs’ lawyers doubtless find them an attractive means of obtaining, and then manipulating, compliant representative plaintiffs. The prospect of an incentive award gives

reluctant litigants a reason to act as nominal plaintiffs in cases they otherwise would not bother to bring. 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 may not be in other class members' interest.

The Sixth Circuit has aptly 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,

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

September 3, 2026

APPENDIX

APPENDIX

APPENDIX A –

Opinion of the Federal Circuit (March 20, 2026).....	1a
---	----

APPENDIX B –

Opinion of the District Court (March 20, 2024).....	29a
--	-----

APPENDIX C –

Judgment of the District Court (March 20, 2024).....	84a
---	-----

APPENDIX D –

Order of the Federal Circuit Denying Petition for Rehearing (June 5, 2026).....	91a
---	-----

APPENDIX E –

Federal Rule of Civil Procedure 23.....	93a
---	-----

APPENDIX A

[filed March 20, 2026]]

**United States Court of Appeals
for the Federal Circuit**

NATIONAL VETERANS LEGAL SERVICES
PROGRAM, NATIONAL CONSUMER LAW
CENTER, ALLIANCE FOR JUSTICE,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellee

v.

ERIC ALAN ISAACSON,
Interested Party-Appellant

2024-1757

Appeal from the United States District Court for
the District of Columbia in No. 1:16-cv-00745-PLF,
Senior Judge Paul L. Friedman.

Decided: March 20, 2026

DEEPAK GUPTA, Gupta Wessler LLP, Washington,
DC, argued for plaintiffs-appellees. Also represented
by JONATHAN TAYLOR; WILLIAM H. NARWOLD, Motley
Rice LLC, Hartford, CT; MEGHAN OLIVER, Mt.
Pleasant, SC.

ALEXIS M. DANIEL, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by KIRK THOMAS MANHARDT, YAAKOV ROTH, MARCUS S. SACKS.

ERIC ALAN ISAACSON, Law Office of Eric Alan Isaacson, La Jolla, CA, argued pro se.

Before LOURIE and HUGHES, Circuit Judges, and
FREEMAN,¹ District Judge.

FREEMAN, District Judge.

This appeal challenges the settlement of a nationwide class action claiming that the federal judiciary overcharged members of the public for access to court records through the Public Access to Court Electronic Records (“PACER”) system. The suit was brought in the United States District Court for the District of Columbia by three nonprofit organizations, the National Veterans Legal Services Program, the National Consumer Law Center, and the Alliance for Justice (collectively, “Plaintiffs”), asserting that the Government exceeded its statutory authority by exacting PACER fees to fund not only the expense of operating PACER itself but also other expenses unrelated to the operation of PACER. After nearly eight years of litigation, which encompassed substantial motion practice, an interlocutory appeal, and protracted negotiations, the case settled for \$125,000,000.

¹ Honorable Beth Labson Freeman, District Judge, United States District Court for the Northern District of California, sitting by designation.

The district court approved the settlement, noting that hundreds of thousands of PACER users will be fully or substantially reimbursed for all PACER fees they incurred during the eight-year class period. The district court also approved awards of attorneys' fees and costs, as well as incentive awards² to each of the three nonprofit organizations that served as class representatives.

Appellant-Objector Eric Isaacson ("Objector"), proceeding pro se, appeals the judgment. He asserts that the district court lacked subject matter jurisdiction, abused its discretion in approving the settlement and awarding attorneys' fees, and acted contrary to Supreme Court precedent in granting the incentive awards. We affirm.

BACKGROUND

Collection of PACER fees is governed by a statutory note to 28 U.S.C. §1913 titled "Court Fees for Electronic Access to Information." 28 U.S.C. §1913 note (2002) (the "§1913 Note"). The §1913 Note permits the federal judiciary to "prescribe reasonable fees ... for collection by the courts ... for access to information available through automatic data processing equipment." *Id.* The §1913 Note was amended by the E-Government Act of 2002, Pub.L. No. 107-347, §205(e), 116 Stat. 2899, 2915, which added language providing that the judiciary may prescribe such reasonable fees "only to the extent necessary." *Id.* Since 2012, PACER users have been charged \$0.10 per page for downloading and printing court records. J.A. 2863, 4218. Prior to this litigation, PACER fees were used not only to fund the operation

² The terms "incentive award" and "service award" are used interchangeably in the parties' briefs and applicable authorities.

of PACER, but also to fund six other categories of expenses: (1) the Case Management and Electronic Case Filing (“CM/ECF”) System; (2) Electronic Bankruptcy Noticing (“EBN”); (3) the State of Mississippi Study; (4) the Violent Crime Control Act Notification System; (5) Web-Based Juror Services; and (6) Courtroom Technology. J.A.5, 2865–87.

In April 2016, Plaintiffs filed this class action in the United States District Court for the District of Columbia. J.A.107–21. Plaintiffs claimed that they had been charged PACER fees in excess of those allowed under the §1913 Note, as amended by the E-Government Act, because the fees “far exceed the cost of providing the records” accessed through PACER. J.A.107. They sought refund of the allegedly excessive PACER fees they had paid, asserting that the district court had subject matter jurisdiction under the Little Tucker Act, 28 U.S.C. §1346(a). J.A.120–21. The Little Tucker Act gives district courts original jurisdiction of certain civil actions and claims against the United States that do not exceed \$10,000. 28 U.S.C. §1346(a)(2). The Plaintiffs alleged that each individual download of a public record through PACER gave rise to a separate “illegal exaction” claim falling within the Little Tucker Act’s jurisdictional maximum. J.A.120. The case was vigorously litigated, with the parties engaging in substantial motion practice, including a motion to dismiss, class certification, and cross-motions for summary judgment. J.A. 506, 2433, 3443. The district court certified a class of PACER users and certified one class claim: “that the fees charged for accessing court records through the PACER system are higher than necessary to operate PACER and thus violate the E-Government Act, entitling plaintiffs to monetary relief

from the excessive fees under the Little Tucker Act.” J.A. 2433.

In our prior opinion addressing the parties’ interlocutory cross-appeals of the district court’s summary judgment order, we affirmed the district court’s determination that the certified class claim fell within the district court’s subject matter jurisdiction under the Little Tucker Act. *See Nat’l Veterans Legal Servs. Program v. United States*, 968 F.3d 1340, 1346–49 (Fed.Cir.2020). We also affirmed the district court’s statutory interpretation of the §1913 Note, holding that the “§1913 Note limits PACER fees to the amount needed to cover expenses incurred in services providing public access to federal court electronic docketing information.” *Id.* at 1357. Finally, we agreed with the district court that the Government had been using PACER fees to fund categories of expenses not authorized by the §1913 Note. *See id.*

We remanded the case to the district court in August 2020. *See id.* at 1359. After nearly two years of negotiations, the parties reached the class action settlement at issue here (“Settlement Agreement”). J.A. 3977, 3993, 3997.

The Settlement Agreement provides that the United States will create a common fund of \$125,000,000 to settle the claims of class members, defined as “all persons or entities who paid PACER fees between April 21, 2010, and May 31, 2018,” the date the judiciary stopped using PACER fees to fund prohibited expenses (the “class period”). J.A. 12, 3977–79, 3993.

The Settlement Agreement requires that no less than 80% of the \$125,000,000 common fund, or \$100,000,000, be distributed to the class. J.A.3982.

Class members will not be required to submit claim forms to receive payments. J.A.3981. The claims administrator will use information provided by the federal judiciary, which maintains records of PACER registrants and fees paid, to identify class members and distribute settlement funds. *Id.* The administrator will disburse to each class member a minimum payment equal to the lesser of \$350 or the total amount of PACER fees the class member paid during the class period. J.A.3982. The administrator will disburse any remaining settlement funds to class members who paid more than \$350 in PACER fees pro rata based on the total amount of PACER fees class members paid in excess of \$350 during the class period. J.A.3982–83. Any unclaimed settlement funds will be distributed equally among class members who paid more than \$350 in PACER fees during the class period and collected their payment from the first distribution, with the caveat that class members may not recover more than the total amount of PACER fees they paid during the class period. J.A.3983–84. The Settlement Agreement provides that the total amount of attorneys’ fees, incentive awards, and administrative costs shall not exceed 20% of the \$125,000,000 settlement fund, or \$25,000,000, and that incentive awards shall not exceed \$10,000 per class representative. J.A. 3986.

The district court granted preliminary approval of the settlement on May 8, 2023, after which notice was provided to more than 500,000 PACER account holders through email, postcards, a press release, and a banking newsletter. J.A. 4078, 4287–90. There were thirty-three opt-outs and five objections, only two of which were timely, including that of Objector. J.A. 11, 4292. The district court held a fairness hearing at which Objector appeared and presented oral

argument. J.A.1, 17–18. The district court thereafter issued a thorough and carefully reasoned order finding the settlement to be fair, reasonable, and adequate under the relevant factors identified in Rule 23(e)(2) of the Federal Rules of Civil Procedure. *Nat’l Veterans Legal Servs. Program v. United States*, 724 F.Supp.3d 1 (D.D.C.2024)(“Final Approval Order”). The district court also awarded attorneys’ fees in the amount of \$23,863,345.02, attorney expenses in the amount of \$29,654.98, and settlement administration costs in the amount of \$1,077,000. *Id.* at 30–31. Finally, the district court approved incentive awards in the amount of \$10,000 for each of the three class representatives. *Id.* at 30.

A substantial portion of the Final Approval Order was devoted to addressing arguments raised by Objector. *See, e.g., id.* at 17–21, 23–24, 26–27, 29–30. Objector argued that class members whose aggregate claims exceeded \$10,000 fell outside the subject matter jurisdiction of the district court under the Little Tucker Act; too much of the common fund was allocated pro rata, favoring large-scale PACER users over small-scale PACER users; the attorneys’ fees award should have been limited to counsel’s lodestar; and incentive awards to class representatives were unlawful under Supreme Court authority. The district court rejected each of those arguments. *Id.*

Objector timely filed this appeal. This Court has jurisdiction pursuant to 28 U.S.C. §1295(a)(2).

STANDARD OF REVIEW

“Whether a district court has subject matter jurisdiction over an action is a question of law that we review *de novo*.” *Nat’l Veterans Legal Servs. Program*, 968 F.3d at 1347 (quoting *De Archibold v. United*

States, 499 F.3d 1310, 1313 (Fed.Cir.2007)). We apply the law of the regional circuit to substantive legal issues relating to general areas of law that are not assigned exclusively to the Federal Circuit. *United States v. One (1) Cadillac Coupe De Ville*, 833 F.2d 994, 997–98 (Fed.Cir.1987). The approval of a class action settlement and award of reasonable attorneys’ fees and service awards are reviewed for abuse of discretion. *Cobell v. Salazar*, 679 F.3d 909, 924 (D.C. Cir.2012); *Haggart v. Woodley*, 809 F.3d 1336, 1346, 1354 (Fed.Cir.2016).

DISCUSSION

I

We first consider whether the district court had subject matter jurisdiction under the Little Tucker Act to approve the settlement. Previously, in connection with the interlocutory cross-appeals of the district court’s summary judgment order, we found that the complaint stated a claim over which the district court had Little Tucker Act jurisdiction. *Nat’l Veterans Legal Servs. Program*, 968 F.3d at 1346–49. Now, subject matter jurisdiction is challenged on different grounds. We find that the district court correctly determined that it had Little Tucker Act jurisdiction to approve the settlement.

With exceptions not relevant here, the Little Tucker Act grants district courts original jurisdiction, concurrent with the United States Court of Federal Claims, over any “civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or

unliquidated damages in cases not sounding in tort.” 28 U.S.C. §1346(a)(2).

Objector argues that the district court lacked jurisdiction under the Little Tucker Act to approve the settlement. He contends that some class members’ total recovery exceeded \$10,000, and district courts lose Little Tucker Act jurisdiction when “the recovery sought on behalf of any plaintiff or class member grows to exceed \$10,000.” Appellant’s Br. 18. While Objector is correct that district courts can lose jurisdiction over the course of a case if a claim grows to exceed \$10,000, here, the proper understanding of what constitutes a claim under the Little Tucker Act leads to the clear conclusion that no single claim exceeded \$10,000.

The Little Tucker Act grants federal district courts jurisdiction to hear claims that do not exceed \$10,000. 28 U.S.C. §1346(a)(2). Where the members of a class are not suing with respect to a common interest, their claims are not aggregated for purposes of evaluating Little Tucker Act jurisdiction. *See Chula Vista City Sch. Dist. v. Bennett*, 824 F.2d 1573, 1579 (Fed.Cir. 1987). Instead, the “claim of each member of the class must be examined separately to determine whether it meets the jurisdictional requirement.” *Id.* Thus, the relevant inquiry is whether any class member had a single claim that exceeded the \$10,000 limit. We conclude that none did.

A pair of cases involving airlines helps clarify the issue. *See Am. Airlines v. Austin*, 778 F.Supp. 72, 74 (D.D.C. 1991); *Alaska Airlines, Inc. v. Austin*, 801 F.Supp. 760, 762 (D.D.C. 1992), *aff’d on other grounds*, *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791 (Fed.Cir. 1993). In both cases, airlines sued the government seeking withheld payments for tickets the government

had purchased. And in both cases, each alleged overcharge for an airline ticket was treated as a separate claim for purposes of Little Tucker Act jurisdiction, although the sum of relief sought far exceeded \$10,000.

In *American Airlines*, the plaintiff airlines sued the General Services Administration (“GSA”) based on its withheld offsets of approximately \$350,000 for unused tickets. 778 F.Supp. at 74, 76. The district court determined that it had Little Tucker Act jurisdiction because each individual ticket represented a single claim that did not exceed \$10,000. *Id.* at 76. The court explained that “[t]he government cannot escape this Court’s jurisdiction by taking a lump sum offset that totals over \$10,000 and then alleging that the claims should be aggregated.” *Id.*

In *Alaska Airlines*, the plaintiff airlines sought from GSA the return of withheld funds amounting to \$100 million. 801 F.Supp. at 762. The government contested Little Tucker Act jurisdiction. *Id.* In its jurisdictional analysis, the district court characterized the \$100 million as the “accumulation of disputes over alleged overcharges on thousands of individual tickets,” and likewise found that each claim was based on a single ticket for less than \$10,000. *Id.* Accordingly, the district court found that it had Little Tucker Act jurisdiction.³

³ GSA did not directly challenge the district court’s definition of “claim” on appeal and instead argued that the district court lacked authority to award “money damages.” *See Alaska Airlines*, 8 F.3d at 796–97. We rejected GSA’s argument, holding that “the airlines received money to which they were entitled under the statute, not ‘money damages.’” *Id.* at 797. We also noted that “the district court had concurrent jurisdiction with the Court of Federal Claims over the contracts.” *Id.*

In the airlines cases, each individual ticket gave rise to a separate claim for purposes of Little Tucker Act jurisdiction. So too here, each individual download of a public record for which a class member was charged gives rise to a separate claim. A class member's total recovery of more than \$10,000 did not divest the district court of Little Tucker Act jurisdiction, because each PACER transaction was below the jurisdictional limit.

This interpretation of the Little Tucker Act is consistent with *United States v. Louisville & Nashville Railroad Co.*, 221 F.2d 698 (6th Cir.1955). There, the Sixth Circuit considered whether the district court had Little Tucker Act jurisdiction over a railroad's claims against the government based on seventy-four separate bills of lading. *Id.* at 701. The Sixth Circuit determined that each bill of lading gave rise to a separate claim, and each claim was for less than the \$10,000 jurisdictional limit. *Id.* at 702. As a consequence, the Sixth Circuit found that the district court had subject matter jurisdiction, although the claims in the aggregate exceeded \$10,000. *Id.* at 702–03. The bills of lading in *Louisville*, like the individual plane tickets in the airlines cases, are analogous to the claims arising from the PACER transactions here.

According to Objector, *American Airlines*, *Alaska Airlines*, and *Louisville* are distinguishable because those cases were based on contract claims, while the present class action is not. Appellant's Br. 29. That argument is not well taken. As an initial matter, the relief ordered in *Alaska Airlines* was based not on the individual ticket contracts, but on whether funds were illegally withheld under the relevant statute. *Alaska Airlines, Inc. v. Austin*, 801 F.Supp.3d at 763; accord *Alaska Airlines, Inc. v. Johnson*, 8 F.3d at 798.

Moreover, whether the claims in the cited cases were based in contract was not determinative. Both contract claims and illegal exaction claims can give rise to Little Tucker Act jurisdiction. *See* 28 U.S.C. §1346(a)(2). In *American Airlines*, *Alaska Airlines*, and *Louisville*, the existence of subject matter jurisdiction turned on whether the at-issue transactions gave rise to separate claims, such that their aggregation did not defeat Little Tucker Act jurisdiction.

Objector asserts that this case is more akin to two cases in which Little Tucker Act jurisdiction was lost with respect to back pay claims that were under \$10,000 when filed but later accrued to more than \$10,000. *See* Appellant's Br. 24 (citing *Simanonok v. Simanonok*, 918 F.2d 947, 950 (Fed.Cir.1990); *Smith v. Orr*, 855 F.2d 1544, 1553 (Fed.Cir.1988)). Objector's reliance on those cases is misplaced. As both opinions recognize, the "claim" in a back pay case is expressly defined as "the total amount of back pay the plaintiff stands ultimately to recover in the suit and is not the amount of back pay accrued at the time the claim is filed." *Simanonok*, 918 F.2d at 950–51 (quoting *Smith*, 855 F.2d at 1553). Thus, once a back pay claim grows to exceed \$10,000, Little Tucker Act jurisdiction is lost. Here, by contrast, each individual PACER transaction gave rise to a separate claim. So unlike in the back pay cases, no claim here grew (or had the potential to grow) to exceed \$10,000, even if an individual class member's recovery in the aggregate might have exceeded \$10,000.

Objector also contends—for the first time on reply—that *Keene Corp. v. United States*, 508 U.S. 200 (1993), is "fatal" to Appellees' jurisdictional argument. *See* Appellant's Reply Br. 6. He asserts that *Keene* stands

for the proposition that the term “claim” has an expansive meaning under the Tucker Act, 28 U.S.C. §1491(a)(1). Appellant’s Reply Br. 5–10. Because the Little Tucker Act is part of the same statutory scheme, he argues the same expansive definition of claim should apply here. Appellant’s Reply Br. 10.

Objector’s argument does not withstand even cursory scrutiny. *Keene* interpreted a statute not at issue in this case, 28 U.S.C. §1500, which restricts the jurisdiction of the Court of Federal Claims when a related action is pending elsewhere. *Keene*, 508 U.S. at 202. The statute was enacted “to put an end to parallel litigation seeking duplicative relief against the United States and its agents.” *United States v. Tohono O’Odham Nation*, 563 U.S. 307, 318 (2011) (Sotomayor, J., concurring in the judgment). In *Keene*, the Supreme Court interpreted the word “claim” in the context of evaluating when “two suits are for or in respect to the same claim.” *Tohono O’Odham*, 563 U.S. at 311 (discussing *Keene*). The *Keene* Court held that, under §1500, the jurisdictional analysis turns on whether the two claims are “based on substantially the same operative facts[,] ... at least if there [is] some overlap in the relief requested.” *Keene*, 508 U.S. at 212. The Supreme Court’s discussion of the meaning of the term “claim” in determining whether two lawsuits are duplicative does not illuminate the jurisdictional issue here and simply has no bearing on whether a “claim” is an individual PACER transaction or an aggregate of all of a class member’s PACER transactions for purposes of Little Tucker Act jurisdiction.

In sum, we hold that each individual PACER transaction gave rise to a separate claim, and since no

single claim exceeded \$10,000, the district court properly exercised Little Tucker Act jurisdiction.

II

Turning to the merits, Objector urges that the district court erred in three respects. First, he argues that the district court abused its discretion in approving the Settlement as fair, reasonable, and adequate. Second, he asserts that the district court abused its discretion in awarding class counsel attorneys' fees of \$23,863,345.02. Third, he contends that the district court's approval of incentive awards to the class representatives was unlawful.

A

Objector asserts that the district court abused its discretion when it approved the Settlement Agreement as fair, reasonable, and adequate. We disagree.

As relevant here, the Settlement Agreement provides that each class member will be reimbursed for up to \$350 in class period PACER fees. J.A. 3982. The remainder of the settlement fund is to be distributed pro rata based on the amount of PACER fees paid in excess of \$350 during the class period. J.A. 3982–83. Objector argues that this distribution plan will provide a windfall for class members with the largest total class period PACER fees, because those class members are likely to be large law firms that have already been reimbursed for their PACER expenses by their clients. Appellant's Br. 40–46.

Rule 23 of the Federal Rules of Civil Procedure provides that a court may approve a class action settlement "only after a hearing and only on finding that it is fair, reasonable, and adequate." Fed. R. Civ.

P. 23(e)(2). Nothing in the district court's order suggests that it abused its discretion in approving the Settlement Agreement. To the contrary, the order, which followed a hearing on the fairness of the Settlement Agreement, reflects a careful analysis of Rule 23's enumerated factors in light of the objections. After consideration of those factors, the district court concluded that the benefits of the Settlement Agreement were "substantial" while the likely outcome for the class if the case proceeded to trial was "uncertain." Final Approval Order, 724 F.Supp.3d at 21.

The thrust of Objector's argument is that the Settlement Agreement "abandoned" the interests of "the little user" in favor of large-scale users. Appellant's Br. 44. Objector, a solo practitioner with class period PACER fees of \$3,823.50, appears to count himself among the little users. Appellant's Br. 21. He speculates that some class members have class period PACER fees that total "tens and even hundreds of thousands of dollars," and protests what he perceives to be preferential treatment for those class members. *Id.*

The district court followed the routine practice of approving settlements that provide pro rata distributions of common funds where the settlement fund is insufficient to fully reimburse all class members. Final Approval Order, 724 F.Supp.3d at 18–21. The nature of a settlement is compromise, and the district court acknowledged that "[n]o settlement is perfect." *Id.* at 19. The district court resolved the tension between the competing interests of small-scale users and large-scale users by fully reimbursing all PACER fees paid up to \$350. *Id.* at 18. The \$350 threshold ensured that "the vast majority of class

members [would] receive a full refund.” JA. 4232. That the district court drew the line below the level that would maximize Objector’s personal recovery is not sufficient to demonstrate an abuse of discretion. The district court properly found that the \$350 threshold was a fair and reasonable compromise. Final Approval Order, 724 F.Supp.3d at 18–20.

The district court also expressly considered Objector’s argument that many of the class members are large law firms, which likely would have already been reimbursed for their class period PACER fees. *Id.* at 18–20. Noting that this contention “makes some sense in the abstract,” the district court concluded that large law firms’ claims are just as valid as all other class members’ claims and the law firms were likely the only plaintiffs that could have brought those claims because they—not their clients—paid the fees. *Id.* at 20. Moreover, the district court reasoned that any potential disputes between those firms and their clients regarding the class period PACER fees are best addressed outside the settlement of this case. *Id.* We find this conclusion reasonable.

Thus, we conclude that the district court acted well within its discretion in approving the settlement.

B

Next, Objector contends that the district court abused its discretion in granting attorneys’ fees of \$23,863,345.02. He argues that the district court merely “rubber-stamped” the requested attorneys’ fees. Appellant’s Br. 47–67. We find that the district court applied the correct legal standard and did not abuse its discretion.

Rule 23 provides that a “court may award reasonable attorney’s fees and nontaxable costs that

are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). There are two approaches that may be used to calculate attorneys' fees in common fund cases: the percentage-of-the-fund method and the lodestar method. *See, e.g., Health Republic Ins. Co. v. United States*, 58 F.4th 1365, 1371 (Fed.Cir.2023).

The district court recognized that it must engage in "independent scrutiny of an award's reasonableness," and correctly explained that district courts have discretion to use either the percentage-of-the-fund method or the lodestar method in applying that scrutiny. Final Approval Order, 724 F.Supp.3d at 21–23. "[B]ecause the percentage method promotes efficiency and ensures that class counsel is compensated primarily based on the result achieved," the district court opted to use the percentage method with a lodestar cross-check to "confirm that the fee awarded properly accounts for the effort [c]lass [c]ounsel expended." *Id.* at 23–24. This approach was entirely consistent with governing law. *See Health Republic*, 58 F.4th at 1371; *Haggart*, 809 F.3d at 1355.

Objector's argument to the contrary is unpersuasive because we have recognized that, in common fund cases, "courts may determine the amount of attorney fees to be awarded from the fund by employing a percentage method." *Haggart*, 809 F.3d at 1355. Moreover, the authority on which Objector relies is inapplicable. *Perdue v. Kenney A. ex rel. Winn*, 559 U.S. 542, 546 (2010), interpreted a fee-shifting statute, which arose in an entirely distinct context from the award of attorneys' fees in common fund cases. *See Haggart*, 809 F.3d at 1355.

Nothing in the record supports Objector's contention that the district court presumed the requested attorneys' fees of 19.1% were reasonable. To

the contrary, the district court tested the fee request against each of the seven factors set forth in *Health Republic*: (1) the quality of counsel; (2) the complexity and duration of the litigation; (3) the risk of nonrecovery; (4) the fee that likely would have been negotiated between private parties in similar cases; (5) any class members' objections to the settlement terms or fees requested by class counsel; (6) the percentage applied in other class actions; and (7) the size of the award. Final Approval Order, 724 F.Supp.3d at 24–28; *see also Health Republic*, 58 F.4th at 1372 (citing *Moore v. United States*, 63 Fed. Cl. 781, 787 (2005)). For instance, the district court found that the requested percentage of the common fund was consistent with percentages awarded in comparable complex class actions. Final Approval Order, 724 F.Supp.3d at 27–28. The district court also found that class counsel was exceptionally well qualified to handle this “reasonably complex” case where there “was a significant risk of nonrecovery” until “the moment” the settlement was reached. *Id.* at 24–25. The district court noted that the fee request was below the “typical 33% contingency fee.” *Id.* at 25–26.

The district court went on to conduct a lodestar crosscheck of the requested attorneys' fees, which resulted in a multiplier of 3.96. *Id.* at 28–30. A lodestar cross-check is “an approach taken in many judicial decisions, under which the reasonableness of a potential percentage-of-the-fund fee is checked by ‘dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier.’”⁴

⁴ The lodestar calculation is the product of the number of hours and the rate. *Haggart*, 809 F.3d at 1355.

Health Republic, 58 F.4th at 1372 (quoting *In re AT & T Corp.*, 455 F.3d 160, 164 (3d Cir.2006)). Contrary to Objector’s assertion that an “unenanced lodestar” is presumptively sufficient, Appellant’s Br. 51–52, the normal range for a multiplier in class actions is one to four. *See Health Republic*, 58 F.4th at 1375. In *Health Republic*, which Objector acknowledges is the guiding precedent, *see* Appellant’s Br. 48–49, we found that the Court of Federal Claims abused its discretion in approving a \$185 million fee that was eighteen to nineteen times the lodestar without conducting a lodestar cross-check. 58 F.4th at 1372–73. Here, by contrast, the district court acknowledged that the multiplier in this case was at the high end of the generally accepted one-to-four range. Taking into account the facts of this case, the district court found the multiplier to be warranted given the risks class counsel took in agreeing to litigate this case and the exceptional service provided to the class for more than seven years. Final Approval Order, 724 F.Supp.3d at 29–30.

Objector’s further contention that class counsel failed to submit sufficient documentation to support a meaningful lodestar cross-check was based in part on a concern expressed by the Government. Appellant’s Br. 63. What Objector omits from his argument, however, is that the Government advised the district court that any concern was “remedied” by additional documentation that was supplied by the Plaintiffs. J.A. 4785–86. The district court also explained that a lodestar cross-check is just that—a cross-check—and appropriately declined to engage in “bean-counting.” Final Approval Order, 724 F.Supp.3d at 29–30 (citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306–07 (3d Cir.2005)).

At bottom, Objector's position is that an unenhanced lodestar is all that should be awarded, and nothing more. But that is not the law. *Health Republic*, 58 F.4th at 1375–76; *Haggart*, 809 F.3d at 1355. We conclude that nothing in the record supports Objector's assertion that the district court applied the wrong legal standard or abused its discretion.

C

The district court approved incentive awards of \$10,000 for each of the three class representatives. Final Approval Order, 724 F.Supp.3d at 30. Objector contends that the district court erred by “paying” the class representatives incentive awards. Appellant's Br. 67–71. He argues that such awards are unlawful under *Trustees v. Greenough*, 105 U.S. 527 (1881), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885). We join the clear majority of our sister circuits in holding that district courts are permitted to approve incentive awards, and we find that the district court did not abuse its discretion in approving the incentive awards here.

1

Rule 23 provides that a district court may approve a settlement agreement “only on finding that it is fair, reasonable, and adequate” after considering whether it “treats class members equitably relative to each other.” Fed.R.Civ.P. 23(e)(2)(D). While Rule 23 is silent with respect to incentive awards, courts have uniformly approved such awards on the basis of implementing Rule 23's goals and mandates. Indeed, soon after Rule 23's inception, courts began approving incentive awards for class representatives. *See, e.g., Thornton v. E. Tex. Motor Freight*, 497 F.2d 416, 420 (6th Cir.1974).

“Beginning around 1990,” incentive awards “began to find readier acceptance.” Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1310–11 (2006). By the early 2000s, they were commonplace. *Id.* at 1311. Thereafter, circuit courts’ acceptance of incentive awards in class actions was universal until 2020, when the Eleventh Circuit broke away by holding that incentive awards are unlawful *per se* under *Greenough* and *Pettus*. See *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1260 (11th Cir.2020), *reh’g denied*, 43 F.4th 1138 (11th Cir.2022). The decision acknowledged that incentive awards are commonplace but dismissed the ubiquitous practice as “a product of inertia and inattention, not adherence to law.” *Id.* at 1259. Contrary to the Eleventh Circuit’s decision in *Johnson*, an overwhelming majority of our sister circuits have concluded that *Greenough* and *Pettus* do not preclude district courts from granting incentive awards. See *Moses v. N.Y. Times Co.*, 79 F.4th 235, 253 (2d Cir.2023)(collecting cases).⁵

⁵ Since *Johnson*, every circuit to have expressly considered the question of whether *Greenough* and *Pettus* preclude incentive awards has rejected the Eleventh Circuit’s interpretation of those cases and found that district courts are permitted to approve incentive awards. See *Scott v. Dart*, 99 F.4th 1076, 1088 (7th Cir.2024); *Moses*, 79 F.4th at 256; *Murray v. Grocery Delivery E-Services USA Inc.*, 55 F.4th 340, 353 (1st Cir.2022); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 786–87 (9th Cir.2022). Every other circuit—with the exception of the Eleventh—still accepts the long-standing practice of permitting incentive awards. See *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir.2017); *Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 303 (5th Cir.2017)(vacating a class-action settlement with an incentive award on other grounds and affirming the same settlement after the district court provided further explanation in 742 F.App’x 846 (5th Cir.2018)); *Pelzer v. Vassalle*, 655 F. App’x 352, 361 (6th Cir.2016) (nonprecedential);

Objector urges us to join the Eleventh Circuit and find that incentive awards are *per se* unlawful.⁶ We decline to do so. Joining our sister circuits, we hold that *Greenough* and *Pettus* do not compel a contrary result.

In 1881, the Supreme Court in *Greenough* overturned an award for “personal services and private expenses” given to a railroad bondholder, who sued on behalf of himself and other bondholders. *Greenough*, 105 U.S. at 537. The plaintiff, who sued the Florida Railroad Company for the trustees’ alleged mismanagement of the railroad’s bonds, litigated the case “with great vigor and at much expense.” *Id.* at 529. The district court awarded the bondholder’s attorneys’ fees, litigation expenses, personal fees for litigation-related travel, and a ten-year allowance for “personal services.” *Id.* at 529–30.

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*, 679 F.3d at 922–23; *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir.2011)(en banc).

⁶ Objector also directs us to *Fikes Wholesale v. HSBC Bank USA, N.A.*, 62 F.4th 704 (2d Cir.2023). There, citing *Greenough* and *Johnson*, the Second Circuit explained that “[s]ervice awards are likely impermissible under Supreme Court precedent,” but nonetheless concluded that “practice and usage seem to have superseded *Greenough*” and followed Second Circuit cases approving of such awards. *Id.* at 721. Later that year, in *Moses*, the Second Circuit again considered the issue of whether incentive awards are permissible and “declin[e]d to depart from Rule 23’s mandate, which permits fair and appropriate incentive awards.” 79 F.4th at 254–55. The *Moses* court further held that “neither *Greenough* nor *Pettus* prohibits incentive awards in class actions.” *Id.* at 256. Accordingly, we find Objector’s reliance on *Fikes* to be misplaced.

The Supreme Court affirmed the award of attorneys' fees and litigation expenses. *Id.* at 537. However, the award for personal services and private expenses was struck down because it was held to be analogous to "a salary." *Id.* at 537–38. The Court expressed concern that such an allowance "would present too great a temptation to parties to intermeddle in the management of valuable property or funds." *Id.* at 538. For context, we note that the ten-year allowance of \$2,500 for "personal services" and award of \$15,003.35 for "personal expenditures," *id.* at 530, would be equivalent to more than \$1.4 million today, *Scott v. Dart*, 99 F.4th 1076, 1087 (7th Cir. 2024).

Four years later, in *Pettus*, the Supreme Court confirmed that attorneys may recover expenses for their work on behalf of clients. 113 U.S. at 127–28. *Pettus* involved the "outgrowth of certain litigation in the courts of Alabama," relating to "railroad property." *Id.* at 117–18. Railroad creditors successfully sued a railroad company, requesting that their debts be satisfied. *Id.* at 118–19. In holding that the attorneys were entitled to reasonable compensation for their services, the Court reiterated *Greenough's* conclusion that a leading plaintiff's claim for compensation for personal services and private expenses is unlawful. *Id.* at 122–23.

135 years after *Pettus*, the Eleventh Circuit held that incentive awards in modern class actions are categorically unlawful under *Greenough* and *Pettus* because they compensate class representatives. *Johnson*, 975 F.3d at 1258.

Greenough and *Pettus* are recognized for authorizing attorneys' fees in a common fund case. See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

And they disallow salaried class representatives. As the decades since have borne out, however, *Greenough* and *Pettus* do not illuminate the lawfulness of incentive awards in the context of modern class actions, which represent “a significant historical development.” *Scott*, 99 F.4th at 1085. The lawsuits at issue in *Greenough* and *Pettus* bear little resemblance to today’s class actions. Unlike in the nineteenth century when courts were “confined to the application of federal general common law and equitable principles,” *Moses*, 79 F.4th at 254, there is no “federal general common law” today, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The prohibited salary-like payments to bondholder-plaintiffs in lawsuits in equity are nothing like the types and amounts of incentive awards in modern class actions. Here, for example, the relatively modest award of \$10,000 for each class representative out of a \$125,000,000 settlement for participation over eight years of litigation is a far cry from the “salary” prohibited in *Greenough*, which would exceed \$1.4 million in today’s dollars. Even the Eleventh Circuit found that today’s incentive awards in class actions are only “roughly analogous to a salary” when it precluded such awards. *Johnson*, 975 F.3d at 1257.

Incentive awards are not like salaries. They are token amounts to encourage the participation of representative plaintiffs, who “invest in the case more heavily than their unnamed counterparts.” *Scott*, 99 F.4th at 1086 (citing *Moses*, 79 F.4th at 253). A “named plaintiff is an essential ingredient of any class action” and incentive awards may be appropriate where they are “necessary to induce an individual” to take on this important role. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir.1998). Representative plaintiffs step up, often at significant personal and financial

cost, “to vindicate the rights of others.” *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D.Ohio1990). Courts recognize that class representatives take on a “meaningful burden,” including facing reputational risks and expending time and effort. *Roberts v. Texaco, Inc.*, 979 F.Supp. 185, 202 (S.D.N.Y.1997). Therefore, it has been established for decades that modest incentive awards are sometimes “appropriate to recognize the efforts of the representative plaintiffs to obtain recovery for the class.” *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 358 (N.D.Ga. 1993). Because class representatives take on this extra burden, incentive awards are also in line with Rule 23’s requirement that class members be treated equitably relative to each other. Fed.R.Civ.P. 23(e)(2)(D); *see also Murray*, 55 F.4th at 353.

We disagree with the characterization of incentive awards in *Johnson* as improper inducement to participate in the suit, like a “bounty.” 975 F.3d at 1258. The awards here at issue are so modest that the amount cannot reasonably be likened to a “bounty.”

Although incentive awards are widely accepted as a mechanism for recognizing named plaintiffs, Rule 23 protects against awarding unwarranted or excessive amounts. District courts have a duty to approve settlement agreements only where they are fair, reasonable, and adequate. Courts are attentive to the possibility that incentive awards may be “‘unfair’ to other class members.” *Smith v. Tower Loan of Miss.*, 216 F.R.D. 338, 368 (S.D.Miss.2003). For example, the Ninth Circuit has instructed district courts to “be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives.” *Radcliffe v. Experian Info.*

Sols. Inc., 715 F.3d 1157, 1164 (9th Cir.2013). Incentive awards are prohibited where they create a conflict between the class representatives and the rest of the class or otherwise undermine the equitable treatment of class members relative to each other. *See, e.g., In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir.2013). Rule 23's safeguards address many of the concerns animating the Supreme Court's prohibition against salary-like payments. In 1881, the Supreme Court lacked these tools, but under Rule 23 protection of the other plaintiffs' rights can be assured.

With the exception of the Eleventh Circuit, the uniform acceptance of incentive awards has been met with silence as to *Greenough's* impact on their lawfulness. *Moses*, 79 F.4th at 255. The Supreme Court has never suggested that incentive awards in the context of modern-day class actions are unlawful. To the contrary, the Supreme Court recently noted that a "class representative might receive a share of class recovery above and beyond her individual claim." *China Agritech v. Resh*, 584 U.S. 732, 747 n.7 (2018). Objector urges us to disregard *China Agritech*, arguing that the "Supreme Court does not overrule its own decisions so nonchalantly." Appellant's Reply Br. 35. Perhaps not, but the Supreme Court appears to have regarded class action incentive awards as distinct from the salary-like payments prohibited in *Greenough*. *Greenough* and *Pettus* did not speak to Rule 23 class actions, which would not exist for another eight decades. Moreover, Objector cites no case prior to *Johnson* in which a court precluded incentive awards based on the holding in *Greenough*, and we are aware of none. *See Scott*, 99 F.4th at 1085.

Likewise, Congress and the Advisory Committee on Civil Rules have not revised the Rules to include a blanket ban.⁷ *Moses*, 79 F.4th at 255. Instead, in the Class Action Fairness Act of 2005, Congress noted that class members are “sometimes harmed” where “*unjustified* awards are made to certain plaintiffs at the expense of other class members,” suggesting that reasonable awards are allowed. Pub. L. No. 109-2, §2, 119 Stat. 4 (2005) (emphasis added).

We conclude that a *per se* exclusion of incentive awards is not mandated by *Greenough* and *Pettus* because the modest incentive awards in today’s class actions bear no resemblance to the prohibited salary in *Greenough*. And, when unjustified incentive awards are sought, it is well within the purview of a district court to reject such awards under the review and approval mandates of Rule 23. Case-by-case evaluation of an incentive award is an integral part of a district court’s scrutiny of a proposed class action settlement. Thus, it cannot be said that the existence of an incentive award is, itself, sufficient to undermine a settlement agreement. Accordingly, we join the vast majority of our sister circuits in holding that incentive awards are permitted so long as they are found to be reasonable by a district court.

2

Having concluded that incentive awards are not *per se* prohibited, we turn to consideration of whether the

⁷ This inaction is notable when compared to the Private Securities Litigation Reform Act of 1995, Pub.L.No. 104-67, §101, 109 Stat. 737, 743 (codified at 15 U.S.C. §78u-4), which expressly prohibits incentive awards in connection with securities class action settlements. *See Moses*, 79 F.4th at 255.

district court abused its discretion in approving the incentive awards granted to the class representatives here. We find that it did not.

Other than his argument that service awards are categorically prohibited, Objector does not contend that the district court's award of \$10,000 to each class representative was unreasonable or resulted in unequal treatment of the class representatives relative to other class members. The district court recognized that incentive awards "must be reasonable and proportionate to class representatives' role in the case." Final Approval Order, 724 F.Supp.3d at 23. After considering the time and effort expended by each class representative in this action, the district court found the incentive awards to be appropriate. *Id.* at 30. We conclude that the district court's approval of the incentive awards was well within its discretion.

CONCLUSION

We have carefully considered all of Objector's arguments and conclude that they are without merit. Thus, we affirm the district court's order.

AFFIRMED

APPENDIX B

[filed March 20, 2024]

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL VETERANS LEGAL	)
SERVICES PROGRAM, NATIONAL	)
CONSUMER LAW CENTER, and	)
ALLIANCE FOR JUSTICE, for them-	)
selves and all others similarly situated,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Defendant.	)

OPINION

For over fifteen years, PACER fees – the per-page fees that the federal judiciary charges the public for online access to court documents – have been a subject of controversy. As a result of the litigation in this case, the United States will return over \$100 million of these fees to users of PACER. Today, this litigation substantially comes to a close.

The Court has before it a motion of class representatives National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice (the “Named Plaintiffs”) for final approval of a settlement agreement that would resolve the pending claims of hundreds of thousands of

plaintiffs and reimburse them for PACER fees that the judiciary unlawfully used to fund certain non-PACER services. Counsel for the Named Plaintiffs also request attorney's fees, costs, and service awards.

After careful consideration of the arguments made by the Named Plaintiffs and by the government, and of the comments and objections by interested persons submitted to the Court and made at the hearing held on October 12, 2023, the Court will approve the settlement agreement and award \$23,863,345.02 in attorney's fees, \$1,106,654.98 in costs, and \$30,000 in service awards.¹

¹ The filings and attachments considered by the Court in connection with this matter include: Complaint ("Compl.") [Dkt. No. 1]; Memorandum of Points and Authorities in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment ("Mot. to Dismiss") [Dkt. No. 11]; Plaintiffs' Unopposed Motion for Approval of Revised Plan of Class Notice and Class Notice Documents, Exhibit 3 ("Class Cert. Web Notice") [Dkt. No. 42-5]; Notice of Filing of Revised Notice Documents, Exhibit 1 ("Class Cert. Email Notice") [Dkt. No. 43-1]; Plaintiffs' Motion for Summary Judgment as to Liability ("Pls.' Summ. J. Mot.") [Dkt. No. 52]; Declaration of Jonathan E. Taylor, Exhibit B ("1997 AO Report") [Dkt. No. 52-3]; Declaration of Jonathan E. Taylor, Exhibit E ("Jud. Conf. Letter") [Dkt. No. 52-6]; Declaration of Jonathan E. Taylor, Exhibit H ("Lieberman Letter") [Dkt. No. 52-9]; Plaintiffs' Statement of Undisputed Material Facts ("Pls.' Facts") [Dkt. No. 52-16]; Defendant's Cross-Motion for Summary Judgment ("Def.'s Summ. J. Mot.") [Dkt. No. 74]; Declaration of Wendell A. Skidgel Jr. ("Skidgel Decl.") [Dkt. No. 74-2]; Defendant's Statement of Material Facts as to Which There is No Genuine Dispute and Response to Plaintiffs' Statement of Undisputed Material Facts ("Def.'s Facts") [Dkt. No. 74-3]; Declaration of Wendell A. Skidgel Jr. ("2d Skidgel Decl.") [Dkt. No. 81-1]; Notice of Submission of Revised Proposed Order and Revised Notice Documents, Exhibit 5 ("Sett. Web Notice") [Dkt. No. 152-5]; Plaintiffs' Motion for Final Approval of Class Settlement and for Attorneys' Fees, Costs, and Service Awards ("Pls.' Sett. Mot.") [Dkt. No. 158]; Declaration of Renée Burbank ("Burbank Decl.") [Dkt. No. 158-1]; Declaration of Stuart T.

Rossmann (“Rossmann Decl.”) [Dkt. No. 158-2]; Declaration of Rakim Brooks (“Brooks Decl.”) [Dkt. No. 158-3]; Declaration of Brian T. Fitzpatrick (“Fitzpatrick Decl.”) [Dkt. No. 158-4]; Declaration of Deepak Gupta (“Gupta Decl.”) [Dkt. No. 158-5]; Declaration of Meghan S.B. Oliver (“Oliver Decl.”) [Dkt. No. 158-6]; Declaration of Gio Santiago Regarding Implementation of Settlement Notice Program (“KCC Decl.”) [Dkt. No. 158-7]; Defendant’s Response to Plaintiffs’ Motion for Final Approval of Class Settlement and for Attorneys’ Fees, Costs, and Service Awards (“Def.’s Resp.”) [Dkt. No. 159]; Plaintiffs’ Reply in Support of Motion for Final Approval of Class Settlement and for Attorneys’ Fees, Costs, and Service Awards (“Pls.’ Reply”) [Dkt. No. 160]; Supplemental Declaration of Brian T. Fitzpatrick (“Fitzpatrick Supp. Decl.”) [Dkt. No. 160-1]; Declaration of William B. Rubenstein in Support of Class Counsel’s Motion for Attorneys’ Fees (“Rubenstein Supp. Decl.”) [Dkt. No. 160-2]; Supplemental Declaration of Deepak Gupta (“Gupta Supp. Decl.”) [Dkt. No. 160-3]; Declaration of Meghan S.B. Oliver (“Oliver Supp. Decl.”) [Dkt. No. 160-4]; Declaration of Gio Santiago Regarding Settlement Administration Costs (“KCC Supp. Decl.”) [Dkt. No. 160-5]; Plaintiff-Class Member Don Kozich’s Verified Objections to Settlement and Motion to Appear Telephonically or by Zoom (“Kozich Obj. and Mot.”) [Dkt. No. 163]; Plaintiffs’ Response to Objection of Don Kozich (“Resp. to Kozich Obj.”) [Dkt. No. 165]; and Plaintiffs’ Notice of Filing of All Objections Received to Date (“Compiled Objs.”) [Dkt. No. 166].

The Court also reviewed the following objections to the settlement agreement: Objection of Aaron Greenspan (“Green-span Obj.”) [Dkt. No. 166-1]; Objection of Alexander Jiggetts (“Jiggetts Obj.”) [Dkt. No. 166-2]; Objection of Geoffrey Miller (“Miller Obj.”) [Dkt. No. 166-3]; Objection of Eric Isaacson (“Isaacson Obj.”) [Dkt. No. 166-5]; and Written Statement of Eric Alan Isaacson of Intent to Appeal in Person at the October 12, 2023, Final-Approval Hearing (“Isaacson Stmt.”)[Dkt. No. 166-6].

The Court also reviewed the following prior opinions in this case: *Nat’l Veterans Legal Servs. Program v. United States*, Civil Action No. 16-0745, 2016 WL 7076986 (D.D.C. Dec. 5, 2016) (“Motion to Dismiss Op.”); *Nat’l Veterans Legal Servs. Program v. United States*, 235 F.Supp.3d 32 (D.D.C.2017)(“Class Certification Op.”); *Nat’l Veterans Legal Servs. Program v. United States*, 291 F.Supp.3d 123 (D.D.C.2018)(“Summary Judgment Op.”); and *Nat’l Veterans Legal Servs. Program v.*

I. BACKGROUND

A. Origin and History of PACER Fees

Before the late 1980s, federal courts operated on paper. If members of the public wanted to view court dockets or filings, they had to travel to the courthouses where those records physically existed. Then, in 1988, the judiciary “authorized an experimental program of electronic access for the public to court information.” Jud. Conf. Of The U.S., Report of the Proceedings 83 (Sept. 14, 1988), www.uscourts.gov/file/1642/download [perma.cc/HKS6-4B34]. This experiment gave rise to the Public Access to Court Electronic Records system, or “PACER.” Pls.’ Facts ¶1. PACER allows the public to access court documents without the need to review physical records or travel to the courthouse to access them. *25 Years Later, PACER, Electronic Filing Continue to Change Courts*, U.S. CTS. (Dec. 9, 2013), www.uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts [perma.cc/92NB-8BM7].

Originally, PACER worked via a dial-up phone connection and users were charged fees by the minute. *25 Years Later, PACER, Electronic Filing Continue to Change Courts*, *supra*. But in 1998, PACER moved online, and the judiciary started charging users on a per-page basis. *See* Def.’s Facts ¶16. Around the same time, the judiciary began to use PACER fees to pay for programs other than PACER, like Case Management

United States, 968 F.3d 1340 (Fed.Cir.2020)(“Federal Circuit Op.”).

/ Electronic Case Filing (“CM/ECF”), a new system that allowed parties to file documents electronically. See 1997 AO Report at 36; Pls.’ Facts ¶9. By fiscal year 2000, the judiciary was using the fees to pay for PACER-related costs, CM/ECF-related costs, and Electronic Bankruptcy Noticing (“EBN”) costs. 2d Skidgel Decl. ¶31; *id.* tab 30; *see* Summary Judgment Op., 291 F.Supp.3d at 131.

In 2002, Congress passed the E-Government Act, a statute whose broad purpose was to improve electronic services and processes in government. See E-Government Act of 2002, Pub.L. 107-347, 116 Stat. 2899. As relevant to this litigation, the Act amended the statutory note to 28 U.S.C. §1913 (“Section 1913 Note”) so that it read:

COURT FEES FOR ELECTRONIC ACCESS TO
INFORMATION

[....]

(a) The Judicial Conference may, only to the extent necessary, prescribe reasonable fees . . . for collection by the courts ... for access to information available through automatic data processing equipment. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. The Director of the Administrative Office of the United States Courts, under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the

Director is required to maintain and make available to the public.

(b) The Judicial Conference and the Director shall transmit each schedule of fees prescribed under paragraph (a) to the Congress at least 30 days before the schedule becomes effective. All fees hereafter collected by the Judiciary under paragraph (a) as a charge for services rendered shall be deposited as offsetting collections ... to reimburse expenses incurred in providing these services.

28 U.S.C. §1913 note (internal quotation marks omitted); *see* E-Government Act of 2002, §205(e). The Senate Governmental Affairs Committee explained:

The Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible. For example, the Administrative Office of the United States Courts operates an electronic public access service, known as PACER, that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and from the U.S. Party/Case Index. Pursuant to existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information.

S. REP. NO. 107-174 at 23 (June 24, 2002). At that point, PACER fees were set at \$0.07 per page. *See* Skidgel Decl. Ex. G at 64.

But PACER fees continued to rise. Effective January 2005, the Judicial Conference increased fees to \$0.08 per page. Jud. Conf. Letter at 1. The Director of the Administrative Office of the United States Courts explained that the increase was “predicated upon Congressional guidance that the judiciary is expected to use PACER fee revenue to fund CM/ECF operations and maintenance.” *Id.*

By the end of 2006, the judiciary had accumulated \$32.2 million of excess revenue from PACER fees. Pls.’ Facts ¶16; Summary Judgment Op., 291 F.Supp.3d at 134. For that reason, the judiciary further expanded the categories of programs that would be funded by the fees. See Summary Judgment Op., 291 F.Supp.3d at 134-35. These programs included CM/ECF, EBN, courtroom technology upgrades, an online Jury Management System (“Web Juror”), a Violent Crime Control Act (“VCCA”) notification system, and a study to determine the feasibility of providing access to state court documents through CM/ECF (the “State of Mississippi Study”). 2d Skidgel Decl. tab 11, tab 12; see Summary Judgment Op., 291 F.Supp.3d at 135. In 2012, the judiciary increased PACER fees to \$0.10 per page. Pls.’ Facts at ¶22.

PACER fees have been controversial since at least 2008. That year, a group of activists attempted to download significant portions of the court documents available on PACER and make them available for free. John Schwartz, *An Effort to Upgrade a Court Archive System to Free and Easy*, N.Y. TIMES (Feb. 12, 2009), www.nytimes.com/2009/02/13/us/13records.html. These activists, along with scholars and public officials, argued that PACER fees make it difficult for the public to access information integral to understanding our country’s law and legal system.

E.g., Timothy B. Lee, *The Case Against PACER: Tearing Down the Courts' Paywall*, ARSTECHNICA (Apr. 9, 2009), www.arstechnica.com/tech-policy/2009/04/case-against-pacer [perma.cc/X52V-RYQT]; see also Pls.' Sett. Mot. at 5 ("High PACER fees hinder equal access to justice, impose often insuperable barriers for low-income and pro se litigants, discourage academic research and journalism, and thereby inhibit public understanding of the courts.").

In 2009, Senator Joe Lieberman, sponsor of the E-Government Act, expressed concern that the judiciary may have been violating the Act by collecting PACER fees "well higher than" the cost of funding PACER. Lieberman Letter at 1. Still, this trend continued. From the beginning of fiscal year 2010 to the end of fiscal year 2016, the judiciary collected more than \$920 million in PACER fees; the total amount collected annually increased from about \$102.5 million in 2010 to \$146.4 million in 2016. *See* Pls.' Facts ¶¶28, 46, 62, 80, 98, 116, 134.

B. Procedural History

The current litigation began in April 2016, when the Named Plaintiffs filed a class-action lawsuit against the United States alleging that the judiciary had violated the E-Government Act by charging excessive PACER fees. Compl. ¶¶1-3, 34.² The Named

Plaintiffs alleged jurisdiction under the Little Tucker Act, 28 U.S.C. §1346(a). *Id.* ¶33. The Named

² Judge Ellen Segal Huvelle presided over this case until her retirement, at which time the case was reassigned to the undersigned.

Plaintiffs were, and still are, represented by Gupta Wessler LLP and Motley Rice LLC (“Class Counsel”).

The United States moved to dismiss. *See* Mot. to Dismiss. The government argued that the Court lacked jurisdiction, *id.* at 15-19, that the Named Plaintiffs could not sue without first alerting the PACER Service Center, *id.* at 13-15, and that other similar class action lawsuits challenging PACER fees should be litigated first under the “first-to-file rule.” *Id.* at 12-13. This Court denied the motion to dismiss. *See* Motion to Dismiss Op., 2016 WL 7076986. In January 2017, the Court certified a class. *See* Class Certification Op., 235 F.Supp.3d 32. The class consisted of “[a]ll individuals and entities who have paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding class counsel in this case and federal government entities.” *Id.* at 39. These class members were given notice and an opportunity to opt out. Gupta Decl. ¶14; *see* Order Approving Plan of Class Notice (“1st Notice Appr.”)[Dkt. No. 44]. The parties then engaged in informal discovery, which clarified what categories of expenses were funded by PACER fees. Gupta Decl. ¶15.

In August 2017, the Named Plaintiffs filed a motion seeking “summary adjudication of the defendant’s liability, reserving the damages determination for after formal discovery.” Pls.’ Summ. J. Mot. at 1. The United States then filed a cross-motion for summary judgment as to liability. Def.’s Summ. J. Mot. at 1. In these motions, the parties asked the Court to decide the central question in the case: Under the E-Government Act, what categories of expenses may be funded by PACER fees? *See id.* at 1-2; Pls.’ Summ. J. Mot. at 1. The Named Plaintiffs argued that the Act “prohibits the [judiciary] from charging more in

PACER fees than is necessary to recoup the total marginal cost of operating PACER,” so none of the additional categories of expenses were permitted. Pls.’ Summ. J. Mot. at 11. The United States urged a broader reading of the statute which would allow the judiciary to “charge fees, as it deems necessary, for the provision of information to the public through electronic means,” making all of the additional categories of expenses lawful. Def.’s Summ. J. Mot. at 11.

The Court rejected both positions, holding that the government’s interpretation of the E-Government Act was too broad, but that the Named Plaintiffs’ interpretation was too narrow. *See* Summary Judgment Op., 291 F.Supp.3d at 141-44. The Court concluded that the judiciary “properly used PACER fees to pay for CM/ECF and EBN, but should not have used PACER fees to pay for the State of Mississippi Study, VCCA, Web-Juror, and most of the expenditures for [c]ourtroom [t]echnology.” *Id.* at 146. Using PACER fees to pay for these expenses was improper because the programs failed to further “the public’s ability to access information on the federal court’s CM/ECF docketing system.” *Id.* at 150.

The parties cross-appealed to the United States Court of Appeals for the Federal Circuit. In August 2020, the Federal Circuit affirmed this Court’s interpretation. *See* Federal Circuit Op., 968 F.3d at 1359. The Federal Circuit wrote that Judge Huvelle “got it just right” in interpreting the E-Government Act to “limit[] PACER fees to the amount needed to cover expenses incurred in services providing public access to federal court electronic docketing information.” *Id.* at 1343, 1350. The Named Plaintiffs’ interpretation failed because it “combine[d] part of the

first sentence of paragraph (a) [of the Section 1913 Note] (“The Judicial Conference may, only to the extent necessary, prescribe reasonable fees”) with two parts of the last sentence of paragraph (b) (“to reimburse expenses incurred in providing’ the ‘services rendered,’ which plaintiffs construe to mean PACER access), paying little heed to the substantial amount of text in between.” *Id.* at 1350. Instead, the full text of the Section 1913 Note, along with its legislative history, made clear that the E-Government Act “limits the use of PACER fees to expenses incurred in providing (1) electronic access for members of the public (2) to information stored on a federal court docketing system.” *Id.* at 1351-52.³

Applying this interpretation to the contested categories of expenses, the Federal Circuit agreed with this Court that it was unlawful for the judiciary to use PACER fees to pay for the State of Mississippi Study, VCCA, Web-Juror, and most courtroom technology expenses. Federal Circuit Op., 968 F.3d at 1358. The appellate court declined to decide whether it was lawful for PACER fees to fund all CM/ECF expenditures, holding that the issue was not properly before it and remanding to this Court for further proceedings. *Id.* at 1358-59.

After remand, the parties began settlement discussions. *See* Gupta Decl. ¶¶23-24. Even after the Federal Circuit ruling, the government took the position that it did not owe damages to class members because the class could not prove that PACER fees would have been lower if the judiciary had refrained

³ The Federal Circuit also held that the Little Tucker Act granted jurisdiction over the lawsuit because the E-Government Act was sufficiently “money-mandating.” Federal Circuit Op., 968 F.3d at 1347-49.

from making the unlawful expenditures. *Id.* ¶23. The government also maintained that all CM/ECF expenditures were properly funded by PACER fees. *Id.* The Named Plaintiffs disagreed with both positions. *Id.*

In May 2021, the parties engaged in an all-day mediation session with Professor Eric Green. Gupta Decl. ¶25. During the mediation, the parties agreed to a common-fund settlement structure and the United States made a “final offer” for the total amount of the fund. *Id.* ¶26. Over the next few weeks, Professor Green continued to mediate, and the parties agreed on a fund amount of \$125 million. *See id.* ¶27. Reaching agreement on the remaining sticking points – including how the fund would be distributed, what would happen to unclaimed money, and the scope of the release of legal claims – took many months more. *Id.* ¶¶27-28. In July 2022, the parties executed a settlement agreement, which they amended once in September 2022 and again in April 2023 (collectively, the “Agreement”). *Id.* ¶28; *see id.* Ex. A (“Sett. Agreement”); *id.* Ex. B (“First Supp. Agreement”); *id.* Ex. C (“Second Supp. Agreement”).

On May 8, 2023, the Court granted preliminary approval of the Agreement and scheduled a hearing to consider final approval for October 12, 2023 (the “Settlement Hearing”). *See* Order Granting Plaintiffs’ Revised Motion for Preliminary Approval of Class Settlement (“Prelim. Approval”) [Dkt. No. 153] at ¶¶1, 3. At that time, the Court certified a revised settlement class. *Id.* ¶7. The settlement class included all members of the original class who did not opt out, plus those meeting the same criteria who had paid PACER fees before May 2018 but after the original class was certified. *Id.* The Court directed that notice

of the Agreement and its terms be provided to the settlement class. *Id.* ¶¶15, 16, 18. Using the government's PACER registration data, the claims administrator identified members of the class to be notified. *Id.* ¶13; KCC Decl. ¶¶5-7.

In July 2023, the claims administrator sent the court-approved settlement notice, both through email and through postcards, to over 500,000 PACER account holders. KCC Decl. ¶¶8-11. These notices provided class members with the settlement amount, an overview of the litigation, information about opting out and submitting objections, and a link to additional information and the full Agreement on a website dedicated to the settlement. *Id.* Ex. B; *see* PACER FEES CLASS ACTION, www.pacerfeesclassaction.com [<https://perma.cc/N4L5-AYHS>]. Objections could be filed by mailing or emailing Class Counsel and the Court. *See* Sett. Web Notice at 5. Because some class members already had the opportunity to opt out when the original class was certified, the notice sent to them did not include the option to opt out. KCC Decl. ¶8; *see id.* Ex. A. The claims administrator also issued publication notice through a widely disseminated press release and a banking newsletter. *Id.* ¶¶12, 13.

There were a few hiccups in the notice process. First, the initial notice omitted some class members who were part of the original class. KCC Decl. ¶15. Second, the notice sent to some members of the original class incorrectly indicated that they had another opportunity to opt out. *Id.* ¶16. The settlement administrator corrected both mistakes and sent new notices on August 7, 2023. *Id.* ¶¶15, 16. Thirty-three individuals timely opted out of the

settlement class.⁴ Five individuals filed objections. *See* Compiled Objs.⁵

On August 28, 2023, the Named Plaintiffs moved for final approval of the class settlement and for attorney's fees, costs, and service awards. Pls.' Sett. Mot. The Court held the Settlement Hearing on October 12, 2023. Class Counsel, as well as representatives for each of the three Named Plaintiffs, gave statements in support of the Agreement. Two objectors spoke in opposition to the Agreement. Then the Court gave the parties an opportunity to respond to written and oral objections. Finally, the Court heard from the parties and from objectors on the issue of attorney's fees.

II. THE SETTLEMENT AGREEMENT

The Agreement creates a common fund of \$125 million and provides for the distribution of at least 80% of that fund to the hundreds of thousands of persons or entities who paid PACER fees between April 21, 2010 and May 31, 2018 (the "Class Period").

⁴ While the Named Plaintiffs initially stated that thirty-four individuals timely opted out, Pls.' Sett. Mot. at 13, the parties clarified at the Settlement Hearing that they had included a duplicate in their count and that the correct number is thirty-three. In addition, the parties clarified at the Settlement Hearing that sixteen individuals attempted to opt out after the opt out deadline. But none of these sixteen individuals were actually eligible to opt out, as all were either part of the original class and had the opportunity to opt out in 2017, or were federal employees who were never part of the class to begin with. *See id.*

⁵ These individuals were: Aaron Greenspan, Alexander Jiggetts, Geoffrey Miller, Don Kozich, and Eric Isaacson. Of the written objections, two of the five were timely (Mr. Miller's and Mr. Isaacson's), and one of the three untimely objections was filed by an individual who is likely not a class member (Mr. Kozich). Nevertheless, the Court has considered all five objections filed.

A. The Settlement Class and Fund

The settlement class includes all persons or entities who paid PACER fees in the period beginning six years before the Named Plaintiffs filed their original complaint (April 22, 2010) and ending on the date the judiciary stopped using PACER fees to fund prohibited expenses (May 31, 2018) – with the exception of those who opted out, of federal agencies, and of Class Counsel. Sett. Agreement ¶3; First Supp. Agreement; see Pls.’ Sett. Mot. at 11. This class includes at least several hundred thousand members. See Class Certification Op., 235 F.Supp.3d at 39.

The settlement common fund totals \$125 million. Sett. Agreement ¶11. From this fund, at least 80%, or \$100 million, is to be distributed to class members. *Id.* ¶18. Up to 20%, or \$25 million, is to be used for attorney’s fees, litigation expenses, and service awards for the class representatives. *Id.* ¶28. As to the attorney’s fees and service awards, the Agreement specifies that “the Court will ultimately determine whether the amounts requested are reasonable.” *Id.* The Agreement further specifies that service awards cannot exceed \$10,000 per class representative. *Id.*

B. Fund Allocation and Distribution to Class Members

The Agreement allocates the common fund to class members through a two-step calculation. See Sett. Agreement ¶19. First, all class members are allocated either \$350 or, if they paid less than \$350 in PACER fees during the Class Period, the actual amount that they paid. *Id.* Second, class members who paid over \$350 receive, in addition to the first \$350, a *pro rata* allocation of the remaining common fund. *Id.* This *pro rata* allocation compares the amount that a given

class member paid over \$350 to the amounts that other class members paid over \$350, and allots the remaining common fund accordingly. *See id.* To illustrate the calculation, if a class member paid \$100 in PACER fees during the Class Period, they will get all of it back. *See id.* ¶¶19, 20. But if a class member paid \$1000 in PACER fees during the Class Period, they will get \$350 plus an amount from the remaining common fund proportional to the additional \$650 that they paid. *See id.* If there is unclaimed money after these allocations are distributed to class members, then the rest of the common fund will be distributed to class members who have not been fully reimbursed for the PACER fees they paid during the Class Period and who successfully collected their first distribution. *Id.* ¶23.

In contrast to most class action settlements, class members will not need to submit claims to get their share of this common fund. *See* Pls.’ Sett. Mot. at 13. Instead, the claims administrator will use the information provided to them by the government – which has comprehensive records of PACER registrants and the fees they paid – to identify class members and distribute their payments. *See id.*; Sett. Agreement ¶¶14, 21, 23; KCC Decl. ¶¶5-7. The claims administrator will disburse the first set of payments within 180 days of receiving the settlement fund from the government, and will distribute any remaining money three months after that. Second Supp. Agreement ¶21; Sett. Agreement ¶24.

III. FAIRNESS

Under Rule 23 of the Federal Rules of Civil Procedure, no class action may be dismissed, settled, or compromised without the approval of the Court. FED.R.CIV.P. 23(e). Before giving its approval, the

Court must direct the provision of adequate notice to all members of the class, conduct a hearing, and find, after notice and a hearing, that the settlement is “fair, reasonable, and adequate.” *Id.*; see *Thomas v. Albright*, 139 F.3d 227, 231 (D.C.Cir.1998); *In re Black Farmers Discrimination Litig.*, 856 F.Supp.2d 1, 26 (D.D.C.2011). In performing this task, the Court must protect the interests of those unnamed class members whose rights may be affected by the settlement of the action. See WILLIAM B. RUBENSTEIN, 4 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS §13:40 (6th ed. 2023).

To determine whether a settlement is fair, reasonable, and adequate, the Court “looks to the ‘paramount twin elements of procedural and substantive fairness.’” *Mercier v. United States*, 156 Fed. Cl. 580, 584 (2021)(quoting *Courval v. United States*, 140 Fed.Cl. 133, 139 (2018)(internal quotation marks omitted)). The Federal Rules instruct the Court to consider a variety of factors in doing so. The first two of these factors are procedural: whether “(A) the class representatives and class counsel have adequately represented the class; [and] (B) the proposal was negotiated at arm’s length.” FED.R. CIV.P. 23(e)(2). The remaining factors are substantive; the Court is to consider whether:

(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.

Id.

Having carefully considered the parties' arguments and all of the objections that have been filed with the Court and expressed at the Settlement Hearing, the Court concludes that the settlement is fair, reasonable, and adequate.

A. Procedural Fairness

The Court finds that the Named Plaintiffs and Class Counsel have more than "adequately represented" the class. *See* FED.R.CIV.P. 23(e)(2)(A). The Named Plaintiffs are nonprofit organizations who pay PACER fees despite their nonprofit status, and whose members experienced real burdens because of the fees. Class Certification Op., 235 F.Supp.3d at 42. These characteristics made them "particularly good class representatives." *Id.* The two law firms representing the class, in tandem, have extensive experience both in class actions and in lawsuits against the federal government. *See* Gupta Decl. ¶¶45-48, 50-55, 59-61; *see also infra* Section IV.B.1.

The Named Plaintiffs and Class Counsel have vigorously litigated this case for nearly eight years, over seven of them after the class was certified. *See* Gupta Decl. ¶¶11-13. They engaged in informal discovery, argued (and, in part, won) summary judgment, and successfully defended the summary judgment ruling on appeal. *See id.* ¶¶14-21; *see also infra* Section IV.B.2. After remand, they engaged in extensive settlement negotiations with the government. Gupta Decl. ¶¶23-28.

By all accounts, these settlement negotiations happened at “arm’s length,” indicating no collusion between the parties. *See* FED.R.CIV.P. 23(e)(2)(B). Negotiations came at a point in the litigation where liability was resolved but there were still significant questions about the possibility, and amount, of damages. The negotiations were thus neither “too early to be suspicious nor too late to be a waste of resources.” *In re Vitamins Antitrust Litig.*, 305 F.Supp.2d 100, 105 (D.D.C.2004). And because of “significant informal discovery, ... the parties were well-positioned to mediate their claims.” *Radosti v. Envision EMI, LLC*, 717 F.Supp. 2d 37, 56 (D.D.C. 2010). The negotiations took place over nearly two years but came together “after a lengthy mediation session that was presided over by an experienced mediator,” indicating skilled negotiating on both sides. *See id.* Further evidence that the negotiations were at arm’s length and not collusive is provided by the positions taken by the parties during settlement negotiations and the compromises ultimately reached. *See infra* at 24.

The notice requirements of Rule 23 were also satisfied. When the Court preliminarily approved the settlement, it “direct[ed] notice in a reasonable manner to all class members who would be bound by the proposal.” FED.R.CIV.P. 23(e)(1)(B); *see* Prelim. Approval ¶¶15, 16, 18. The Court also found the planned notice to be “the best notice practicable under the circumstances,” Prelim. Approval ¶21, as was required for the individuals and entities who were not part of the originally certified class. *See* FED.R.CIV.P. 23(c)(2)(B). The claims administrator adequately executed this notice. Using the government’s PACER registration data, it identified over 500,000 potential class members and sent them court-approved notices,

both through email and through postcards. KCC Decl. ¶¶5-7, 8-11; *see* Prelim. Approval ¶13; *see also* FED.R.CIV.P. 23(c)(2)(B) (requiring, for new class members, “individual notice to all members who can be identified through reasonable effort”). The claims administrator also issued publication notice. KCC Decl. ¶¶12, 13. Each form of notice directed class members to additional information on the dedicated settlement website. *See id.* Exs. A-H. While there were a few errors in the notice process – the initial notice omitted some class members and gave some class members incorrect information – the claims administrator promptly corrected these errors and gave recipients sufficient time to opt out or object. *Id.* ¶¶15-18.⁶ The notice also satisfied Rule 23’s substantive requirements for new class members. The emails, postcards, and publications, along with the dedicated settlement website:

clearly and concisely state[d] 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;

⁶ Objector Don Kozich contends that he did not receive notice of the settlement. Kozich Obj. and Mot. at 2. While no method of notice is perfect, Mr. Kozich’s failure to receive notice was likely proper. Mr. Kozich does not appear to be a member of the class. He incurred PACER fees during the Class Period, but he did not pay those fees during the Class Period, and thus is ineligible for relief. Resp. to Kozich Obj. at 1.

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

See FED.R.CIV.P. 23(c)(2)(B). The Court finds that this notice was more than sufficient and was “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Haggart v. Woodley*, 809 F.3d 1336, 1348-49 (Fed.Cir.2016)(quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

After class members were given notice, they had over a month (and most had over two months) to file written objections. See KCC Decl. ¶¶10, 15; Prelim. Approval ¶¶3, 20. Objections could be filed by mailing or emailing Class Counsel and the Court. See Sett. Web Notice at 5. Only five individuals filed written objections. On October 12, 2023, the Court held the Settlement Hearing. After the parties’ opening statements, the Court heard objections to the settlement. No one spoke who had not already submitted a written objection. Then, the Court gave the parties an opportunity to respond to objections. Finally, the Court heard from the parties and from objectors on the issue of attorney’s fees.

Objector Eric Isaacson has questioned a few procedural aspects of the Settlement Hearing. First, he argues that discussing the proper award of attorney’s fees after the time scheduled for objectors to speak deprives objectors of due process and runs afoul of the Federal Rules, Isaacson Stmt. at 7, which instruct the Court to consider “the terms of any proposed award of attorney’s fees” in evaluating the adequacy of “the relief provided for the class” in the proposed settlement. FED.R.CIV.P. 23(e)(2)(C)(iii). Second, Mr. Isaacson argues that objectors at the

hearing should have been given the opportunity to cross-examine declarants who provided support for Class Counsel's requested fees. Isaacson Stmt. at 7.⁷

Both of these arguments overstate an objector's role in the class settlement process. While the Court must consider – and has considered – the arguments of any class member who objects to the settlement, the Court need not give objectors the opportunity to speak at every possible point in the hearing; nor does the Court need to give objectors the opportunity to probe declarations or exhibits through cross-examination or other means. See 4 RUBENSTEIN, *supra*, §13:42. Moreover, to assuage Mr. Isaacson's concerns, the Court allowed him to speak during the portion of the hearing addressing attorney's fees, in addition to his opportunity to speak during the portion of the hearing during which the reasonableness of the settlement was discussed.

B. Substantive Fairness

In considering a proposed class action settlement, the Court must compare the benefits afforded to class members under the settlement with the likely recovery that plaintiffs would have realized if they pursued the resolution of their claims through litigation in court. *Thomas v. Albright*, 139 F.3d at 231; see *In re Black Farmers Discrimination Litig.*, 856 F.Supp.2d at 30. The Court must look at the settlement as a whole and should not reject a

⁷ Mr. Isaacson further objects that “the settling parties arranged with the court to keep class members’ objections off the public record.” Isaacson Stmt. at 3. This objection has no factual basis. Though the objections the Court received through email were not automatically docketed, they were available upon request. In fact, at Mr. Isaacson's request, Class Counsel filed all objections to the public docket. See Compiled Objs.

settlement merely because individual class members claim that they would have received more by litigating rather than settling. *Thomas v. Albright*, 139 F.3d at 231. The Court should scrutinize the terms of the settlement carefully, but should also keep in mind “the interest in encouraging settlements, particularly in class actions, which are often complex, drawn out proceedings demanding a large share of finite judicial resources.” *Christensen v. United States*, 65 Fed. Cl. 625, 629 (2005)(quoting *Mayfield v. Barr*, 985 F.2d 1090, 1092 (D.C. Cir.1993)). And “the opinion of ‘experienced and informed counsel should be afforded substantial consideration by [the C]ourt in evaluating the reasonableness of a proposed settlement.” *Prince v. Aramark Corp.*, 257 F.Supp.3d 20, 26 (D.D.C. 2017) (quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, Civil Action No. 99-0790, 2003 WL 22037741, at *6 (D.D.C. June 16, 2003)).

In its analysis of the Agreement’s substantive fairness, the Court is guided by the substantive factors enumerated in the Federal Rules of Civil Procedure: whether “the relief provided for the class is adequate, taking into account” various subfactors, and whether “the proposal treats class members equitably relative to each other.” FED.R.CIV.P. 23(e)(2).

1. Whether the Relief is Adequate

The relief the settlement provides to class members is substantial. The majority of class members will receive a full refund for the PACER fees they paid during the Class Period. Gupta Decl. ¶43. Although the minority of class members – those who paid over \$350 in fees during the Class Period – will likely not receive a full refund, they may receive substantially more than \$350. See Sett. Agreement ¶19. In addition, the “proposed method of distributing relief to the

class” is efficient. *See* FED.R.CIV.P. 23(e)(2)(C)(ii). There are no claims to process, and class members will receive the relief even if they have never contacted Class Counsel or the claims administrator. *See* Pls.’ Sett. Mot. at 13.

Contrast this substantial relief with the potential “costs, risks, and delay of trial and appeal.” *See* FED.R.CIV.P. 23(e)(2)(C)(i). The Federal Circuit’s liability ruling in this case found some, but not all, of the PACER fees collected during the Class Period to be unlawful. Federal Circuit Op., 968 F.3d at 1350-51, 1357. It left open the question of the extent to which it was lawful for the judiciary to fund CM/ECF through PACER fees. *See id.* at 1358. And the ruling effectively set the maximum possible recoverable damages for the class at around \$500 million. Fitzpatrick Decl. ¶20.

Even putting aside the costs of trial and potential further appeal, the path to obtaining this \$500 million would have been anything but smooth. “[T]here are several reasons to think a full recovery is unrealistic.” *In re APA Assessment Fee Litig.*, 311 F.R.D. 8, 19 (D.D.C.2015). After the Federal Circuit’s ruling, the government continued to assert that the class had no claim to damages because class members could not prove that – but for the unlawful expenditures – PACER fees would have been lower. Gupta Decl. ¶23. Moreover, even if class members would not have had to prove damages with specificity, the amount of potentially recoverable damages still would have been uncertain. Much of the potential recovery came from fees the judiciary used to pay for CM/ECF services, Fitzpatrick Decl. ¶20, and the Federal Circuit explicitly declined to rule on how much of these services were appropriately funded through PACER

fees. Federal Circuit Op., 968 F.3d at 1358. The recoverability of a sizable portion of the potential damages was thus an open question at the time of settlement.

In other words, at the point of the litigation at which the parties agreed on the terms of their settlement, it would have been a substantial risk to class members to proceed to trial. Evidence could have shown that all of the judiciary's CM/ECF expenditures were lawful. Or the government could have convinced the Court of its position on damages. In that case, the Named Plaintiffs would have faced the difficult task of proving that the judiciary would have chosen to charge lower PACER fees had its expenditures been limited to the lawful categories. The common fund amount – roughly a quarter of the potential recovery if every legal and factual issue had gone the plaintiffs' way – was impressively large in comparison to the risks of continuing to litigate.

Some objectors see a quarter of the maximum potential recovery as an unimpressive figure. *See* Isaacson Obj. at 3 (calling the settlement “remarkably mediocre”); Greenspan Obj. at 1 (asserting that the settlement should have fully reimbursed PACER users). These views do not properly account for the formidable arguments that were available to the government if the case had proceeded to trial. In addition, Objector Aaron Greenspan asserts that the common fund amount is too low because the judiciary can only legally charge for the marginal cost of document transmission, and that marginal cost is zero. Greenspan Obj. at 1. But the Court has explicitly rejected an interpretation of the E-Government Act that would limit lawful fees to those necessary to pay the marginal cost of operating PACER. Summary

Judgment Op., 291 F.Supp.3d at 140-43. Instead, the judiciary can use PACER fees to fund the full cost of providing public access to federal court electronic docketing information, including fixed costs. *See* Federal Circuit Op., 968 F.3d at 1349-52.

Other objectors argue that the Agreement is unreasonable because of its provision regarding attorney's fees, expenses, and service awards. *See* Isaacson Obj. at 9-17; Greenspan Obj. at 1-2. The Court has conducted a full analysis of the proper fee awards below. *See infra* Section IV. For now, it suffices to say that the fees provision of the Agreement is reasonable. *See* FED.R.CIV.P. 23(e)(2)(C)(iii) (instructing courts to consider the provisions of settlement agreements that relate to attorney's fees). The Agreement does not fix an amount of attorney's fees or service awards. Instead, it sets an upper limit on both – Class Counsel was able to request up to 20% of the common fund for attorney's fees, expenses, and service awards, including no more than \$10,000 per service award for each class representative. *Sett. Agreement* ¶28. The Agreement leaves to the Court the ultimate determinations of how much to award. *Id.* Rather than setting an unreasonably high amount of attorney's fees or service awards, the Agreement thus caps the amount the Court has the opportunity to approve as reasonable.

Finally, the relative paucity of objections to the Agreement is a strong indicator of the adequacy of the relief. *See In re Black Farmers Discrimination Litig.*, 856 F.Supp.2d at 29; *Mercier v. United States*, 156 Fed. Cl. at 597. As Class Counsel notes, the settlement class is comprised of hundreds of thousands of PACER users and is “perhaps the most litigious group of people and entities ever assembled in a single class

action, ... including sophisticated data aggregators, federal-court litigators, and law firms of every stripe.” Pls.’ Reply at 1. Of this group, only thirty-three opted out of the class, and only five have objected to the settlement. In light of the terms of the Agreement and class members’ lack of opposition to them, the Court finds the settlement relief adequate.

2. Whether the Settlement Treats Class Members Equitably

The Court concludes that the Agreement “treats class members equitably relative to each other.” FED.R.CIV.P. 23(e)(2)(D). While it treats those who paid \$350 or less in PACER fees during the Class Period differently from those who paid more than \$350, this difference in treatment is fair and justified.

The requirement of intra-class equity exists to ensure that “class counsel ha[s] not sold out some of the class members at the expense of others, or for their own benefit.” 4 RUBENSTEIN, *supra*, §13:56. If class counsel prioritizes settling a case over vigorously advocating for all class members’ claims, counsel may agree to provide some (more powerful or more vocal) class members more relief than they deserve while giving other class members less than they deserve. To ensure that class counsel has not done so, it falls upon the Court to determine whether similarly situated class members are treated similarly and whether “dissimilarly situated class members are not arbitrarily treated as if they were similarly situated.” *Id.*

There is absolutely no indication that Class Counsel “sold out” any group of class members in this case. The Agreement strikes a balance between two competing goals: First, to give relief to small-scale PACER users

– the non-lawyer members of the public and individual law practitioners who were most affected by having to pay unlawful fees; the full reimbursement of all PACER fees paid up to \$350 makes it more likely that small-scale users will be wholly compensated. See Sett. Agreement ¶20. And second, to treat all class members – including large-scale users like law firms – equitably based on what they actually paid. The pro rata allocation above \$350 makes it more likely that the sizable fees paid by large-scale users will be adequately accounted for. *See id.* The Agreement thus does a good job of treating similarly situated class members similarly, while accounting for the differences between dissimilarly situated class members.

The details the parties have provided about the settlement negotiations further support the reasonableness of the Agreement’s common fund distribution. As to the allocation of settlement funds, the Named Plaintiffs initially took the position that the fund should be distributed on an exclusively pro rata basis. Gupta Decl. ¶28. The government countered that, before the pro rata allocation, class members should first be fully reimbursed up to a large amount. *Id.* It grounded this position in the E-Government Act’s authorization to “distinguish between classes of persons’ in setting PACER fees ... ‘to avoid unreasonable burdens and to promote public access to’” electronic docketing information. *Id.* (quoting 28 U.S.C. §1913 note). Consistent with the judiciary’s policy of offering waivers and other pricing mechanisms to make PACER cheaper for some groups of users, the government wanted more of the settlement fund to go to reimbursing those who used PACER less. *See id.* The \$350 figure reflected a compromise between the Named Plaintiffs’ position

and the government's position. Far from "selling out" class members, the different treatment of different groups within the class reflects vigorous negotiation on both sides, and reflects the text of the E-Government Act.

A number of the objectors dispute the reasonableness of the distribution. Mr. Isaacson argues that too much of the common fund is allocated pro rata, unfairly favoring large-scale users over small-scale users. Isaacson Obj. at 4-5. Objector Geoffrey Miller argues that too much of the common fund is allocated to fully reimbursing users who paid \$350 or less, unfairly favoring small-scale users over large-scale users. Miller Obj. at 1-2.⁸ As Class Counsel points out, these arguments cannot both be correct, and the fact that each of them was made indicates, if anything, a good compromise. See Pls.' Reply at 4. Moreover, the structure of the distribution is on sound legal footing. "Neither the Federal Rules of Civil Procedure nor the Supreme Court requires that settlements offer a *pro rata* distribution to class members" *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 629 (6th Cir.2007). At the same time, courts routinely approve settlements providing for pro

⁸ Mr. Miller also objects that "[t]he proposed plan of allocation under Federal Rule 23 is in tension with the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, because, by providing different treatment to litigants with identical legal claims, it arguably abridges their right to be treated equally before the law." Miller Obj. at 2. But the Rules Enabling Act is irrelevant to allocations between class members in common-fund settlements. Instead, as applied to class actions, the Rules Enabling Act prevents courts from "giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 458 (2016).

rata distributions of common funds because such distributions directly account for the differences in the value of the claims of different class members. *See, e.g., In re APA Assessment Fee Litig.*, 311 F.R.D. at 13; *In re Facebook Biometric Info. Priv. Litig.*, 522 F.Supp.3d 617, 629 (N.D.Cal.2021); *In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d 570, 580-81 (S.D.N.Y. 2008).

The fact that two objectors (Mr. Isaacson and Mr. Miller) hold these contradictory positions is understandable. A class member who paid substantially more than \$350 in PACER fees, but substantially less than a large-scale user, may look at large-scale users and feel disappointed that these users are getting so much more in absolute dollars. And a large-scale user may look at a class member who paid \$350 or less in PACER fees and find it unfair that that class member is getting fully reimbursed by the Agreement, while the large-scale user is not. At bottom, however, this dissatisfaction arises from the amount of the common fund, not its allocation. There is simply not enough money in the common fund to reimburse every class member for all of what they paid in PACER fees – nor should there be, as some of the fees were lawful. No settlement is perfect. But the Court finds that the difference in how this settlement treats different class members is justified, fair, and equitable.

Mr. Isaacson raises another issue of equity. He points out that many of the institutional class members are law firms, and that these firms have likely already been reimbursed – by their clients or through settlement agreements in other cases – for PACER fees paid during the Class Period. Isaacson Obj. at 4-7. Because these law firms have already been reimbursed, he argues, it is inequitable to treat them

like other class members, particularly like individuals who never received reimbursement. *See id.* at 4.⁹

This argument makes some sense in the abstract. While a reasonable settlement hypothetically could differentiate between law firm class members who had been reimbursed for their PACER fees and other class members who had not been reimbursed for their PACER fees, there were good reasons not to do so here. First, prior to settlement, the claims of the law firms that had been reimbursed by their clients were just as valid as the claims of other class members. *See S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918). In fact, the law firm class members were likely the only plaintiffs who could have brought claims against the government to recover the relevant PACER fees. Their clients could not have brought such claims because damages under the Little Tucker Act are available only to those who paid unlawful fees to the government, to those who paid unlawful fees to others “at the direction of the government to meet a governmental obligation,” *see Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed.Cir.1996), or to those against whom the government took action, related to unlawful fees, that had a “direct and

⁹ Mr. Isaacson further argues that the common fund allocations to many large-scale claimants are improper because entities whose aggregated claims total over \$10,000 fall outside of Little Tucker Act jurisdiction. Isaacson Obj. at 7-8. This argument misunderstands the law. “A suit in district court under the Little Tucker Act may seek over \$10,000 in total monetary relief, as long as the right to compensation arises from separate transactions for which the claims do not individually exceed \$10,000.” Class Certification Op., 235 F.Supp.3d at 38 (citing *Am. Airlines, Inc. v. Austin*, 778 F.Supp. 72, 76-77 (D.D.C.1991); *Alaska Airlines v. Austin*, 801 F.Supp. 760, 762 (D.D.C.1992); *United States v. Louisville & Nashville R.R. Co.*, 221 F.2d 698,701 (6th Cir.1955)).

substantial impact.” See *Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298, 1303 (Fed.Cir. 2004) (quoting *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1361 (Fed.Cir.2002)). Because clients who reimbursed law firms for unlawful PACER fees do not appear to fit into any of these categories, it would have been difficult – perhaps impossible – for them to recover anything from the government. Instead, once law firm class members have received their distributions under the Agreement, clients may have claims against them – to recover what the clients paid to the law firms in PACER fees – through sources of law unrelated to class actions, like contract law or state statutes. See *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F.Supp.2d 935, 967 (N.D.Ill.2011) (approving a settlement even though some class members had been reimbursed for unlawful fees). That is between lawyers and their clients and beyond the scope of this litigation.

Second, it makes sense to leave disputes concerning reimbursement to law firm class members and the clients who reimbursed them, rather than to the claims administrator. It is true, as Mr. Isaacson points out, that law firms often bill clients for PACER fees. Isaacson Obj. at 4; see, e.g., *Decastro v. City of New York*, Civil Action No. 16-3850, 2017 WL 4386372, at *10 (S.D.N.Y. Sept. 30, 2017). But it would be complicated and burdensome for the claims administrator to sort through billing records to determine what happened with respect to each set of PACER fees billed. Sometimes, firms write fees off. Sometimes, clients do not pay. And if a client paid part, but not all, of their bills, it may not even be possible for the claims administrator to figure out what portion of a client’s payment went towards

PACER charges. On the other hand, law firm class members are better equipped to determine which of their clients to reimburse for PACER charges, and by how much. If the clients believe the firms to be unlawfully withholding reimbursement, they can sue. More likely, law firms and clients will resolve any disputes over reimbursement out of court. Allowing this process to play out does not make the settlement inequitable.

In short, the benefits offered to class members by the Agreement are substantial, and the likely outcome for the class if the case were to proceed to trial is uncertain. The Court is convinced that the Agreement is fair, reasonable, and adequate.

IV. ATTORNEY'S FEES, COSTS, AND SERVICE AWARDS

“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.” FED.R.CIV.P. 23(h). Here, the Agreement authorizes attorney’s fees, costs, and services awards, but limits the amount the Court can award for these categories combined to no more than 20% of the common fund, or \$25 million. Sett. Agreement ¶28. The Agreement further specifies that service awards cannot exceed \$10,000 per Named Plaintiff. *Id.*

Class Counsel effectively requests the maximum amount allowed by the settlement: \$1,106,654.98 in costs, \$30,000 in service awards (\$10,000 for each of the three Named Plaintiffs), and \$23,863,345.02 – the difference between the \$25 million cap and the other

two amounts – in attorney’s fees. Pls.’ Sett. Mot. at 4.¹⁰ The government does not oppose their request.¹¹

The Court must independently determine the reasonableness of the requested fees, costs, and service awards. After carefully considering the submissions of the parties, the relevant Federal Rule, and the case law, and after considering all of the objections that have been filed with the Court and expressed at the Settlement Hearing, the Court awards the full amount requested by Class Counsel in fees, costs, and service awards.

A. Legal Background

1. Attorney’s Fees

“The ‘common fund doctrine’ allows an attorney whose efforts created, increased or preserved a fund ‘to recover from the fund the costs of his litigation, including attorneys’ fees.’” *In re Baan Co. Sec. Litig.*, 288 F.Supp.2d 14, 16 (D.D.C.2003) (quoting *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir.1977)). In common-fund cases, courts have a duty to “ensure that claims for attorneys’ fees are reasonable, in light of the results obtained.” *Rogers v. Lumina Solar, Inc.*, Civil Action No. 18-2128, 2020 WL 3402360, at *11 (D.D.C. June 19, 2020)(K.B. Jackson, J.)(quoting *In re Black Farmers Discrimination Litig.*, 953 F.Supp.2d 82, 87 (D.D.C.2013)). The Court’s

¹⁰ The \$1,106,654.98 that Class Counsel requests in costs is comprised of \$29,654.98 in attorney expenses and \$1,077,000 in settlement-administration and noticing costs. Pls.’ Sett. Mot. at 4.

¹¹ In its briefs, the government raised concerns about the size of the requested fees. Def.’s Resp. at 4-7. At the Settlement Hearing, however, the government indicated that Class Counsel’s reply brief had alleviated their concerns.

independent scrutiny of an award's reasonableness is particularly important in common-fund cases because "the conflict between a class and its attorneys may be most stark where a common fund is created and the fee award comes out of, and thus directly reduces, the class recovery." *Democratic Cent. Comm. of D.C. v. Washington Metro. Area Transit Comm'n*, 3 F.3d 1568, 1573 (D.C.Cir.1993) (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir.1991)). Thus, in common-fund cases, the court acts "as fiduciary for the beneficiaries" of the fund "because few, if any, of the action's beneficiaries actually are before the court at the time the fees are set" and because "there is no adversary process that can be relied upon in the setting of a reasonable fee." *In re Dep't of Veterans Affs. (VA) Data Theft Litig.*, 653 F.Supp.2d 58, 60 (D.D.C.2009)(quoting *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 251 (1985)).

Courts have identified two approaches to calculating reasonable attorney's fees in common-fund cases. The first is the "percentage-of-the-fund method, through which 'a reasonable fee is based on a percentage of the fund bestowed on the class.'" *Health Republic Ins. Co. v. United States*, 58 F.4th 1365, 1371 (Fed.Cir.2023)(quoting *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984)). The second is the lodestar method, "through which the court calculates the product of reasonable hours times a reasonable rate, and then adjusts that 'lodestar' result, if warranted, on the basis of such factors as the risk involved and the length of the proceedings." *Id.* (cleaned up).

While courts have discretion to use either method, fee awards in common-fund cases are "typically based on some percentage of the common fund." *Moore v.*

United States, 63 Fed. Cl. 781, 786 (2005). The lodestar method, by contrast, generally is used in fee-shifting cases. *Health Republic Ins. Co. v. United States*, 58 F.4th at 1371. Many courts of appeals have expressed an explicit preference for using the percentage method in common-fund cases. 5 RUBENSTEIN, *supra*, §15:64 & n.15; *see, e.g., Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C.Cir. 1993); *see also In re Baan Co. Sec. Litig.*, 288 F.Supp.2d at 17. This is because the percentage method “helps to align more closely the interests of the attorneys with the interests of the parties,” *Democratic Cent. Comm. of Dist. of Columbia v. Washington Metro. Area Transit Comm’n*, 3 F.3d at 1573, by discouraging inflation of attorney hours and promoting “efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system.” *Trombley v. Nat’l City Bank*, 826 F.Supp.2d 179, 205 (D.D.C. 2011)(quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 383 (D.D.C. 2002)). The lodestar method, on the other hand, may give attorneys “an incentive to run up” “the number of hours they have billed,” which could “prolong[] litigation unnecessarily and hence defer[] the class’s compensation.” 5 RUBENSTEIN, *supra*, §15:65; *see Swedish Hosp. Corp. v. Shalala*, 1 F.3d at 1268.

When using the percentage-of-the-fund method, the Federal Circuit has identified the following factors to consider:

- (1) the quality of counsel; (2) the complexity and duration of the litigation; (3) the risk of nonrecovery; (4) the fee that likely would have been negotiated between private parties in similar cases; (5) any class members’

objections to the settlement terms or fees requested by class counsel; (6) the percentage applied in other class actions; and (7) the size of the award.

Health Republic Ins. Co. v. United States, 58 F.4th at 1372 (quoting *Moore v. United States*, 63 Fed.Cl. at 787). In addition, “as settlement amounts increase in magnitude, the percentage of fees awarded should decrease.” *Haggart v. United States*, 116 Fed.Cl. 131, 147 (2014). This is because “[i]n many instances the increase [in recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel.” *Id.* (alterations in original) (quoting *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 339 (3d Cir.1998)).

Courts sometimes employ a “lodestar cross-check” when they use the percentage method. *See* 5 RUBENSTEIN, *supra*, §15:85. In a lodestar cross-check, “the reasonableness of a potential percentage-of-the-fund fee is checked by dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier, and when this implicit multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award.” *Health Republic Ins. Co. v. United States*, 58 F.4th at 1372 (cleaned up). While “the resulting multiplier need not fall within any pre-defined range, ... courts must take care to explain how the application of a multiplier is justified by the facts of a particular case, ... [and] must provide sufficient analysis and consideration of multipliers used in comparable cases to justify the award made.” *Id.* at 1375 (cleaned up). That said, lodestar cross-checks “need entail neither mathematical precision nor bean-counting,” as “district courts may rely on summaries

submitted by the attorneys and need not review actual billing records.” *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir.2005). Although not required, the Federal Circuit has strongly suggested using a lodestar cross-check, “at least as a general matter.” *Health Republic Ins. Co. v. United States*, 58 F.4th at 1374 n.2.

2. Costs and Service Awards

Rule 23 contemplates recovery of “nontaxable costs,” FED.R.CIV.P. 23(h), the “reasonable expenses normally charged to a fee paying client.” 5 RUBENSTEIN, *supra*, §16:5; see *Quimby v. United States*, 107 Fed. Cl. 126, 135 (2012). And “[i]t is well settled that counsel who have created a common fund for the benefit of a class are entitled to be awarded for out-of-pocket costs reasonably incurred in creating the fund.” *Mercier v. United States*, 156 Fed.Cl. at 593. Aside from being reasonable, such expenses must be adequately documented. 5 RUBENSTEIN, *supra*, §16:10.

Service awards, also known as “incentive” or “case-contribution” awards, are distributions from the common fund to class representatives in recognition of their service to the class and their role in the litigation. See 5 RUBENSTEIN, *supra*, §17:1. Service awards “recognize the unique risks incurred and additional responsibility undertaken by named plaintiffs in class actions,” *Mercier v. United States*, 156 Fed.Cl. at 589, and also compensate class representatives for expenses and work performed by in-house counsel. See *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. at 400. Service awards must be reasonable and proportionate to class representatives’ role in the case. See 5 RUBENSTEIN, *supra*, §17:13.

B. Reasonableness of Requested Attorney's Fees

Class Counsel and the government agree that the Court should use the percentage-of-the-fund method to assess the reasonableness of the requested fees. Pls.' Sett. Mot. at 27; Def.'s Resp. at 8-9. Mr. Isaacson argues that the Court should use the lodestar method and award fees not exceeding Class Counsel's lodestar. Isaacson Obj. at 9-10. He relies primarily on Supreme Court precedent discussing fee-shifting cases and on precedent predating Rule 23 and the modern class action lawsuit. *Id.* But as the D.C. Circuit has noted, "the latest guidance from the High Court counsels the use of a percentage-of-the-fund methodology." *Swedish Hosp. Corp. v. Shalala*, 1 F.3d at 1268 (citing *Blum v. Stenson*, 465 U.S. at 900 n.16); *see also In re Home Depot Inc.*, 931 F.3d 1065, 1085 (11th Cir.2019)("[T]he Supreme Court precedent requiring the use of the lodestar method in statutory fee-shifting cases does not apply to common-fund cases."); *In re BioScrip, Inc. Sec. Litig.*, 273 F.Supp.3d 474, 479-89 (S.D.N.Y.2017)(Nathan, J.)(rejecting similar arguments made by Mr. Isaacson). For these reasons, and because the percentage method promotes efficiency and ensures that class counsel is compensated primarily based on the result achieved, the Court will use the percentage method.

The government urges the Court to also employ a lodestar cross-check. Def.'s Resp. at 7. Class Counsel points out, rightly, that a lodestar cross-check is not required, but it stops short of arguing that the Court should refrain from doing one. Pls.' Sett. Mot. at 35; *see id.* at 36-37; Pls.' Reply at 10. The Court will add a lodestar cross-check to its percentage-method analysis to confirm that the fee awarded properly accounts for the effort Class Counsel expended to litigate the case.

The Court will first analyze the percentage requested using each of the above-described Federal Circuit factors, and then will conduct a lodestar cross-check.

1. The Quality of Counsel

As the Court has stated before, “[t]here is no dispute about the competency of class counsel.” Class Certification Op., 235 F.Supp.3d at 43. Gupta Wessler is one of the nation’s leading plaintiff and public interest appellate boutiques, and also has extensive experience in complex litigation against the federal government. See Gupta Decl. ¶¶46-48, 50-55, 59-61. Motley Rice is a leading class-action law firm. *Id.* ¶45. In dividing case responsibilities, each firm took charge of what it does best – Gupta Wessler led the briefing, argument, research, and legal analysis, and Motley Rice led the case management, discovery, and settlement administration. *Id.* These two firms have “thoroughly impress[ive] ... qualifications” and class members undoubtedly “benefit[ted] from the wealth of experience” they brought to the case. *Steele v. United States*, Civil Action No. 14-2221, 2015 WL 4121607, at *4 (D.D.C. June 30, 2015)(describing groups of attorneys including current members of Class Counsel).

2. The Complexity and Duration of the Litigation

The litigation was reasonably complex. As in most class actions, the litigation involved a motion to dismiss, disputes regarding class certification, and cross-motions for summary judgment. See Motion to Dismiss Op., 2016 WL 7076986; Class Certification Op., 235 F.Supp.3d 32; Summary Judgment Op., 291 F.Supp.3d 123. But unlike most class actions, this case required appellate argument both as to a novel theory of jurisdiction and as to the most important

merits issue in the case. *See* Federal Circuit Op., 968 F.3d at 1343. After remand, Class Counsel engaged in lengthy settlement negotiation with the government. Gupta Decl. ¶¶23-28. And even after the parties reached an agreement, Class Counsel put significant effort into answering class members' questions. Gupta Supp. Decl. ¶¶2, 3. All told, Class Counsel worked on this case for nearly eight years. *See* Gupta Decl. ¶¶11, 12.

Mr. Isaacson asserts that this case was easy to litigate because it involved an issue of statutory construction that was ultimately settled by the Federal Circuit. Isaacson Obj. at 14. But this argument ignores the fact that it was Class Counsel's very efforts that caused the Federal Circuit to construe the statute in a way that would allow the class to recover. The unsettled interpretation of the E-Government Act at the outset of the litigation speaks to the complexity of the case, not against it.

3. The Risk of Nonrecovery

There was an exceptionally high risk of nonrecovery in this case. As one of the attorneys representing the class describes, before this lawsuit, "litigation against the federal judiciary was not seen as a realistic way to bring about reform of the PACER fee regime" – both because "the judiciary has statutory authority to charge at least some amount in fees" and because "the fees were still assumed to be beyond the reach of litigation." Gupta Decl. ¶7. He points out correctly that the Administrative Procedure Act – which normally provides jurisdiction and a waiver of sovereign immunity for lawsuits against agencies – explicitly exempts the federal judiciary from its reach. *See id.*; 5 U.S.C. §551(1)(B).

Even after Class Counsel identified their alternative and ultimately successful strategy of arguing that the Little Tucker Act provided the necessary jurisdiction and waiver of sovereign immunity, there was still a significant risk of nonrecovery for class members. To show illegal exaction under the Little Tucker Act, the Named Plaintiffs had to “demonstrate that the statute or provision causing the exaction itself provides, either expressly or by necessary implication, that the remedy for its violation entails a return of money unlawfully exacted.” Federal Circuit Op., 968 F.3d at 1348 (internal quotation marks omitted)(quoting *Norman v. United States*, 429 F.3d 1081, 1095 (Fed.Cir.2005)). But the E-Government Act, which Class Counsel argued caused the exaction, “nowhere explicitly requires payment of damages by the government for overcharging users.” *Id.* Thus, before even getting to the merits, Class Counsel had to fight an uphill interpretive battle.

On the merits, Class Counsel’s argument was similarly difficult. Take, for example, the one sentence in the E-Government Act that explicitly spoke to PACER fees: “The Judicial Conference may, only to the extent necessary, prescribe reasonable fees ... for collection by the courts under those sections for access to information available through automatic data processing equipment.” 28 U.S.C. §1913 note. As the Federal Circuit acknowledged, far from supporting its ultimate holding, this sentence “supports the government’s interpretation, as it authorizes charging fees for electronic access to information without any express restrictions.” Federal Circuit Op., 968 F.3d at 1351. Nevertheless, Class Counsel persuaded the Federal Circuit that the rest of the statute, and its context, imposed restrictions on the sorts of electronic

information dissemination for which the judiciary could use PACER fees. *See id.* at 1352-57.

Finally, there was litigation risk even after the Federal Circuit held that the E-Government Act did impose such restrictions. *See supra* Section III.B.1. Whether the judiciary could use PACER fees to pay for all of CM/ECF was still an open question. *See* Federal Circuit Op., 968 F.3d at 1358. And the government made plausible arguments that the class could not recover damages without an additional evidentiary showing. *See* Gupta Decl. ¶23. Until the moment the Named Plaintiffs reached a settlement with the government, there was a significant risk of nonrecovery.

4. The Fee that Likely Would Have Been Negotiated in Similar Cases

The Court is to consider what fee “likely would have been negotiated between private parties in similar cases.” *Health Republic Ins. Co. v. United States*, 58 F.4th at 1372 (quoting *Moore v. United States*, 63 Fed. Cl. at 787). The truth is that there are few “similar cases” with which to compare this case: a class action lawsuit against the federal judiciary for charging too much in fees that it is explicitly authorized to charge at least in part. *See infra* Section IV.B.6. Still, it is worth noting that the percentage award Class Counsel requests here is below the typical 33% contingency fee. And as Class Counsel points out, each Named Plaintiff signed a retainer agreement providing for a contingency fee of up to 33% of the common fund, Gupta Decl. ¶65, and each class member who was also part of the original class agreed to a contingency fee of up to 30% by declining to opt out. Class Cert. Email Notice; Class Cert. Web Notice at 7; *see* 1st Notice Appr. At the same time, the Court

takes these agreements with a grain of salt. Each plaintiff in a class action “typically has a small interest in the overall controversy” and thus “has no incentive to negotiate a competitive rate with class counsel.” 5 RUBENSTEIN, *supra*, §15:74. And while one third of the recovery may be the typical fee in cases with relatively few plaintiffs, it is not the standard for large class actions where the size of the class is one of the main determinants of the size of the recovery. This factor thus has minimal bearing on the reasonableness of Class Counsel’s requested fee. *See Mercier v. United States*, 156 Fed.Cl. at 592 (“Even if some other class members had agreed to a 33.3% contingency fee, they almost certainly would have evaluated the fee’s reasonableness in terms of their own recoveries, overlooking the economies of scale that class counsel enjoyed by representing thousands of similarly situated plaintiffs.”).

5. Class Members’ Objections to the Settlement Terms or Fees Requested by Class Counsel

Most of the objections to the Agreement or the requested fees have already been discussed in the context of the fairness of the settlement, *see supra* Section III, or with regard to another fee approval factor. *See supra* Section IV.B.2. Mr. Isaacson raises several additional arguments regarding attorney’s fees. First, Mr. Isaacson argues that the Court should not consider the supplemental declarations of Professor William Rubenstein and Professor Brian Fitzpatrick because Class Counsel submitted these declarations after the deadline for class members to file objections. Isaacson Stmt. at 3. Second, Mr. Isaacson quibbles with the content of these supplemental declarations. *Id.* at 3-6.

Strictly construed, Mr. Isaacson's first argument lacks merit. Under the Federal Rules of Civil Procedure, the only relevant requirement is that notice of a motion for attorney's fees must be "directed to class members in a reasonable manner" so that class members "may object to the motion." FED.R.CIV.P. 23(h). The Advisory Committee notes that, "[i]n setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion." *Id.* advisory committee's note (2003). Rule 23 thus requires only that class members have sufficient time to respond to the fee motion and accompanying evidence, not to evidence submitted in response or reply. Here, Class Counsel submitted their motion for attorney's fees over two weeks before the objection deadline, giving objectors sufficient time to respond. See Pls.' Sett. Mot.

That said, it is a fair point that class members lack a meaningful opportunity to object to attorney's fees requests if counsel submits declarations raising new bases of support for the requested fees after the objection deadline. And the professors' supplemental declarations do just that. Professor Fitzpatrick's declaration provides information about why the Fitzpatrick Matrix should not be used as Mr. Isaacson suggests. See Fitzpatrick Supp. Decl. ¶¶4-6. Professor Rubenstein's declaration examines the data used in the Fitzpatrick Matrix and comes to certain conclusions about reasonable fees based on a subset of that data. See Rubenstein Supp. Decl. ¶¶13-26. Neither of these points was raised in the professors' original declarations, which accompanied Class Counsel's fees motion.

Based on Mr. Isaacson's objections, the Court will not rely on the supplemental declarations of Professor Fitzpatrick or Professor Rubenstein in assessing the reasonableness of Class Counsel's requested fees. Because the Court will not rely on the declarations, it need not address Mr. Isaacson's arguments about their content.

6. The Percentage Applied in Other Class Actions

Thirty years ago, the D.C. Circuit noted that "a majority of common fund class action fee awards fall between twenty and thirty percent." *Swedish Hosp. Corp. v. Shalala*, 1 F.3d at 1272. This remains true today. See 5 RUBENSTEIN, *supra*, §15:83 (summary of empirical studies on common fund fee awards finding means between 22% and 27% and medians between 24% and 29%). For cases in which the common fund is especially large, fee awards tend towards the low end of this range. The latest comprehensive study on class action fee awards, using data from 2009-2013, reports that the mean percentage awarded from common funds greater than \$67.5 million is 22.3%. Theodore Eisenberg et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 948 (2017).

Although it is difficult to locate good comparisons to the settlement in this case, the comparisons that the Court did find are in line with these statistics. Two cases involving insufficient pay by the Department of Veterans Affairs provide the closest analogues. In *Quimby v. United States*, a class of over 40,000 health professionals formerly employed by the Department alleged that they were deprived of additional pay that they earned for working undesirable shifts. *Quimby v. United States*, 107 Fed.Cl. at 128-29. As this Court has done in this case, the Court of Claims granted in part and denied in part cross-motions for summary

judgment on the government's liability. *Id.* at 128. The class ultimately settled with the government in 2012 – after eleven years of contentious litigation – and the settlement agreement provided for a common fund of \$74 million. *See id.* at 133. The Court of Claims granted class counsel's request for 30% of the common fund in attorney's fees, *id.* at 132, 135, reasoning that the attorneys obtained "excellent results," *id.* at 133 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983)), and that "[t]he complexity of this litigation, the government's opposition to the Court's ruling on the merits, and the absence of controlling precedent concerning many of the issues presented together indicate that continued litigation would have created substantial uncertainty for members of the class." *Id.*

The plaintiffs in *Mercier v. United States* brought similar claims. *See Mercier v. United States*, 156 Fed. Cl. 580. There, a class of over 3,000 nurses and physician assistants sued the Department of Veterans Affairs, alleging that they were deprived of overtime pay. *Id.* at 583. The Court of Claims granted the government's motion to dismiss, but was reversed on appeal. *Id.* The litigation continued. *Id.* The class settled with the government in 2021 – after eight years of litigation – and the settlement agreement provided for a common fund of \$160 million. *Id.* at 583-84. Class counsel requested 30% of the common fund in attorney's fees. *Id.* at 590. In analyzing the reasonableness of this request, the Court of Claims found that class counsel was skilled and experienced, that the litigation was complex, and that the risk of nonrecovery was substantial. *Id.* at 591. But because the common fund was so large (in part due to the size of the class itself), the court rejected class counsel's request and awarded 20% of the fund instead of the requested 30%. *Id.* at 592-93. The court found that the

awarded percentage would “protect[] the interests of the class members but also provide[] ample compensation to counsel for their excellent work in this case” and “encourage other counsel to take on the representation of plaintiffs in similar cases.” *Id.* at 593.

Here, the requested percentage is 19.1%. It is smaller than the percentage the Court of Claims awarded in *Quimby*, a complex case that lasted longer than this one – and where, as here, the government opposed the court’s rulings on novel issues of law. *See Quimby v. United States*, 107 Fed. Cl. at 128-133. It is approximately what the Court of Claims awarded in *Mercier*, another complex case, of similar duration to this one – and where, as here, counsel for the class successfully litigated issues of liability on appeal. *See Mercier v. United States*, 156 Fed.Cl. at 583-84, 591-93. Furthermore, according to the most recent comprehensive study on class action fee awards, the requested percentage is around the average for common funds in the range of the fund created by this settlement. *See Eisenberg et al., supra*, at 948. Because the requested fee award fits neatly within the relevant statistical range and aligns with the best case analogues, this factor strongly counsels in favor of approval of the attorney’s fees request.

7. The Size of the Award

The size of the requested fee award – nearly \$24 million – is large. But “so is the class members’ total recovery.” *See Raulerson v. United States*, 108 Fed.Cl. 675, 680 (2013)(approving fee award of approximately \$11 million). Three additional considerations convince the Court that the absolute size of the requested award is not a cause for concern. First, \$24 million is nowhere near the highest amounts courts have

awarded in attorney's fees in common-fund cases. *See, e.g., 52 Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 723-24 (2d Cir.2023)(affirming fee award of approximately \$523 million); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1281 (11th Cir.2021)(affirming fee award of \$77.5 million); *see also Eisenberg et al., supra*, at 943-44 (finding yearly average fee awards between \$37.9 million and \$124 million in common-fund cases with recoveries greater than \$100 million). Second, \$24 million is close to the absolute size of the fees awarded in the closest comparator cases identified above. *See Mercier v. United States* 156 Fed. Cl. at 593 (awarding \$32 million in fees); *Quimby v. United States*, 107 Fed. Cl. at 135 (awarding approximately \$22 million in fees). And third, the Court's lodestar cross-check, performed below, directly accounts for the size of the fee award by comparing it to the amount of effort that Class Counsel expended in this case. As a result, this factor does not move the needle in either direction.

8. Lodestar Cross-Check

The Federal Circuit has noted a "norm of ... multipliers in the range of 1 to 4" in lodestar cross-checks of reasonable fee requests. *Health Republic Ins. Co. v. United States*, 58 F.4th at 1375. Statistics show that, between 2009 and 2013, the mean lodestar multiplier was 1.48. *Eisenberg et al., supra*, at 965 tbl.12. For cases with common funds over \$67.5 million, the mean multiplier was 2.72. *Id.* at 967 tbl.13. Multipliers significantly above this mean may be cause for concern. In *Mercier*, for example, the Court of Claims found a multiplier of 4.4 to be too high, but a multiplier of 2.95 to result in "a very generous but reasonable recovery." *Mercier v. United States*, 156 Fed.Cl. at 592; *see also* 5 RUBENSTEIN,

supra, §15:87 (“Empirical evidence of multipliers across many cases demonstrates that most multipliers are in the relatively modest 1-2 range; this fact counsels in favor of a presumptive ceiling of 4, or slightly above twice the mean.”).

Here, Class Counsel estimates their lodestar at \$6,031,678.25 based on the hourly rates that the firms’ attorneys charge in non-contingency cases. Gupta Decl. ¶¶63, 64; Oliver Decl. ¶¶12, 13. Both the government and Mr. Isaacson suggest that Class Counsel’s lodestar should be estimated using the hourly rates in the U.S. Attorney’s Office Fitzpatrick Matrix, instead of using Class Counsel’s actual rates. Def.’s Resp. at 5-7; Isaacson Obj. at 12-13. But the Fitzpatrick Matrix was not designed to be used for lodestar cross-checks in common fund class actions; instead, “[t]he matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover ‘reasonable’ attorney’s fees.” U.S. ATTYS OFF. FOR D.C., THE FITZPATRICK MATRIX, Explanatory Note 2, www.justice.gov/usao-dc/page/file/1504361/download [<https://perma.cc/EVQ5-NNMC>]; *see, e.g., J.T. v. District of Columbia*, 652 F.Supp.3d 11, 26-27, 31-36 (D.D.C. 2023) (using Fitzpatrick Matrix to calculate reasonable attorney’s fees under the fee-shifting provision of the Individuals with Disabilities Education Act). Mr. Isaacson also asserts that the Court should require Class Counsel to submit itemized records of hours billed in order to make “appropriate deductions.” Isaacson Obj. at 12. But the Court declines to engage in the “bean-counting” that it has been cautioned against, and instead will “rely

on summaries submitted by the attorneys.” *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 306-07.¹²

In addition, the government argues that Class Counsel’s use of current billing rates “fail[s] to account [for the fact] that the litigation began in 2016, with class certification in 2017, when rates for both firms presumably were lower.” Def’s Resp. at 4. But courts routinely use current billing rates for lodestar cross-checks, even when the attorneys requesting fees charged lower rates at the outset of litigation. *See, e.g., Bakhtiar v. Info. Res., Inc.*, Civil Action No. 17-4559, 2021 WL 4472606, at *9 (N.D. Cal. Feb. 10, 2021); *In re Apollo Grp. Inc. Sec. Litig.*, Civil Action No. 04-2147, 2012 WL 1378677, at *7 & n.2 (D. Ariz. Apr. 20, 2012). Until fees are awarded, class action attorneys work on a case without pay. Using current billing rates, which are almost always higher than historical rates, accounts for this delay in payment. *See James v. District of Columbia*, 302 F.Supp.3d 213, 226-28 (D.D.C.2018)(citing *Perdue v. Kenny A. ex. rel. Winn*, 559 U.S. 542, 556 (2010)); cf. *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir.2016)(when calculating attorney’s fees using the lodestar method, rather than the percentage-of-the-fund method, in common-fund cases, “[t]he lodestar should be computed either using an hourly rate that reflects the prevailing rate as of the date of the fee request, to compensate class counsel for delays in payment inherent in contingency-fee cases, or using historical rates and

¹² The Court agrees with the government, as it represented at the Settlement Hearing, that any concerns about Class Counsel’s future time estimate included in their estimated lodestar have been addressed through Class Counsel’s supplemental declarations. *See* Gupta Supp. Decl. ¶¶2-3; Oliver Supp. Decl. ¶¶3-5.

compensating for delays with a prime-rate enhancement”). Dividing Class Counsel’s requested fees (\$23,863,345.02) by their estimated lodestar (\$6,031,678.25) results in a multiplier of 3.96. Put another way, Class Counsel’s requested fee award would compensate them at slightly below four times their hourly rates for the work they performed in this case. This multiplier is within the normal range of one to four – although, admittedly, on the high end of it. The Court believes that a multiplier of this magnitude is warranted due to the risk Class Counsel took on in agreeing to litigate the case. Class Counsel provided exceptional service to the class for over seven years, all the while in danger of being paid nothing (or close to it). And multipliers of this size, or even higher, are by no means unheard of. See 5 RUBENSTEIN, *supra*, §15:89 (noting “roughly 70 reported cases with multipliers over 4”); *e.g.*, *Kane Cnty., Utah v. United States*, 145 Fed. Cl. 15, 20 (2019)(multiplier of 6.13 for attorney’s fee award of approximately \$6 million, one third of the common fund); *Geneva Rock Prod., Inc. v. United States*, 119 Fed. Cl. 581, 595 (2015)(multiplier of 5.39 for attorney’s fee award of approximately \$4 million, 17.5% of the common fund). After all, when counsel in a class action request a reasonable percentage of a common fund, the lodestar cross-check must remain a cross-check of that percentage, and no more. “[T]he point is not to identify the precise outdoor temperature at noon but to know whether or not a coat might be necessary when venturing out for lunch.” 5 RUBENSTEIN, *supra*, §15:87. Here, the temperature is just fine.

The Court will award the full amount of attorney’s fees requested by Class Counsel. In addition to reflecting a reasonable lodestar multiplier, the fees requested reflect a percentage of the fund around the

average for common funds of similar size – even though Class Counsel’s representation, and the result they achieved for the class, were well above average. Class Counsel did an exceptional job in novel litigation with a high risk of nonrecovery. For these reasons, their fee request is warranted.

C. Expenses and Service Awards

Class Counsel requests \$10,000 for each of the three Named Plaintiffs as service awards. Pls.’ Sett. Mot. at 40-41. Mr. Isaacson objects that awards of this type are unlawful under nineteenth-century Supreme Court precedent. Isaacson Obj. at 14-15; *see Trustees v. Greenough*, 105 U.S. 527 (1882); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885). The “overwhelming majority” of circuits disagree with Mr. Isaacson’s interpretation of these cases. *Moses v. N.Y. Times Co.*, 79 F.4th 235, 253 (2d Cir.2023)(collecting cases). Mr. Isaacson urges the Court to adopt the reasoning of the Eleventh Circuit, the one outlier from this modern consensus. *See Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1255 (11th Cir.2020). But even the Eleventh Circuit – and the Supreme Court cases on which Mr. Isaacson relies – acknowledges that “[a] plaintiff suing on behalf of a class can be reimbursed for attorneys’ fees and expenses incurred in carrying on the litigation.” *Id.* at 1257; *see Trustees v. Greenough*, 105 U.S. at 537; *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. at 122-23. And each Named Plaintiff in this case has expended over \$10,000 worth of attorney time and expenses in leading this litigation. *See* Burbank Decl. ¶6; Rossman Decl. ¶3; Brooks Decl. ¶2. Thus, the Court finds the award to the Named Plaintiffs here appropriate. As one of the attorneys representing the class stated in his declaration:

[E]xperienced in-house lawyers [for the Named Plaintiffs] performed invaluable work that was necessary to prosecute this case effectively and ethically. Had they not performed that work on the litigation, the same work would have had to be performed by class counsel or, perhaps more likely, by other outside counsel hired by each organization at far greater expense.

Gupta Supp. Decl. ¶7.

The Court also approves Class Counsel's request for \$29,654.98 in attorney expenses and \$1,077,000 in settlement administration costs. Pls.' Sett. Mot. at 40. As documented by Class Counsel, the attorney expense reimbursements requested include travel, food, lodging, court fees, Westlaw/Lexis fees, photocopying, printing, and mail services; they also include the plaintiffs' portion of the cost of mediation services. Oliver Decl. ¶¶14-18. The settlement administration amount was calculated based on the noticing expenses, as well as the "not-to-exceed" amount quoted by the settlement administrator. *Id.* ¶19; KCC Supp. Decl. ¶4. The Court finds these expenses and administration costs to be reasonable and adequately documented.

V. CONCLUSION

The Named Plaintiffs and the United States have reached an historic settlement agreement in this case that reimburses PACER users for \$100 million of the fees they paid within a period of over eight years. The Agreement reimburses many small-scale PACER users for all of the fees they paid during this period. And it reimburses large-scale users substantially, and

in proportion to what they paid. The Court finds the Agreement to be fair, reasonable, and adequate.

Before reaching a settlement in this unique case, Class Counsel impressively litigated for nearly eight years. They took the case from an untested idea, to a certified class action, to a win on partial summary judgment, to a successful appeal. They negotiated with the federal government to deliver to the class much of the recovery the class sought – although, as with any compromise, not all of it. The Court approves Class Counsel’s full request for attorney’s fees, costs, and service awards.

Plaintiffs’ Motion for Final Approval of Class Settlement and for Attorneys’ Fees, Costs, and Service Awards [Dkt. No. 158] is hereby GRANTED. The Final Judgment and Order on Final Approval of Class Settlement, Attorney’s Fees, Costs, and Service Awards will issue this same day.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: 3/20/24

APPENDIX C

[filed March 20, 2024]

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL VETERANS LEGAL	)
SERVICES PROGRAM, NATIONAL	)
CONSUMER LAW CENTER, and	)
ALLIANCE FOR JUSTICE, for them-	)
selves and all others similarly situated,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Defendant.	)
	)

**FINAL JUDGMENT AND ORDER ON FINAL
APPROVAL OF CLASSSETTLEMENT,
ATTORNEY'S FEES, COSTS,
AND SERVICE AWARDS**

This matter came before the Court on October 12, 2023 for a hearing pursuant to the Order of this Court, dated May 8, 2023, on the application of the Settling Parties for approval of the Settlement set forth in the Class Action Settlement Agreement, as amended. Due and adequate notice having been given to the Class as required in the Order, the Court having considered all papers filed and proceedings held herein, and for the reasons explained in this Court's Opinion issued today, and good cause having been shown, IT IS

HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This Judgment incorporates by reference the definitions in the Settlement Agreement, and all terms used herein shall have the same meanings as set forth in the Settlement Agreement, unless otherwise stated herein.

2. This Court has jurisdiction over the subject matter of the Litigation and over all parties to the Litigation, including all members of the Class.

3. Excluded from the Class is any person who timely and validly sought exclusion from the Class, as identified in Exhibit 1 hereto.

4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby approves the Settlement set forth in the Agreement, and finds that:

a. in light of the benefits to the Class and the complexity and expense of further litigation, the Settlement Agreement is, in all respects, fair, reasonable, and adequate and in the best interests of the Class;

b. there was no collusion in connection with the Settlement Agreement;

c. Class Representatives and Class Counsel had adequately represented the Class;

d. the Settlement Agreement was the product of informed, arm's-length negotiations among competent, able counsel;

e. the relief provided for the Class is adequate, having taken into account (i) the costs, risks and delay of trial and appeal; (ii) the effectiveness of the proposed method of distributing relief to the Class,

including the use of billing data maintained by the Administrative Office of the U.S. Courts and the notification and dispute procedures on the class website; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Federal Rule of Civil Procedure 23(e)(3);

f. the Settlement Agreement treats Class Members equitably relative to each other; and

g. the record is sufficiently developed and complete to have enabled Class Representatives and Defendant to have adequately evaluated and considered their positions.

5. Accordingly, the Court authorizes and directs implementation and performance of all the terms and provisions of the Settlement Agreement, as well as the terms and provisions set forth in this Order. Except as to any individual claim of those persons who have validly and timely requested exclusion from the Class, the Litigation and all claims alleged therein are dismissed with prejudice as to the Class Representatives, and the other Class Members, as defined in the Settlement Agreement.

6. No person shall have any claim against the Class Representatives, Class Counsel, or the Claims Administrator, or any other person designated by Class Counsel, based on determinations or distributions made substantially in accordance with the Settlement Agreement or order of this Court.

7. Upon release of the Aggregate Amount of \$125,000,000 from the U.S. Department of the Treasury's Judgment Fund, the Class Representatives, and each of the Class Members not timely and validly excluded, shall be deemed to have

and by operation of this Judgment shall have, fully, finally, and forever waived, released, discharged, and dismissed as to the United States, its political subdivisions, its officers, agents, and employees, including in their official and individual capacities, any and all claims, known or unknown, that were brought or could have been brought against the United States for purported overcharges of any kind arising from their use of PACER during the Class Period, with prejudice on the merits, whether or not the Class Representatives, or each of the Class Members ever obtains any distribution from the Settlement Fund. Claims to enforce the terms of the Stipulation and the Agreement are not released.

8. The distribution and publication of notice of the settlement as provided for in this Court's Order of May 8, 2023, constituted the best notice practicable under the circumstances, including individual notice to Class Members in the data maintained by the Administrative Office of the U.S. Courts. This notice fully satisfied the requirements of Federal Rule of Civil Procedure 23 and due process. No Class Member is relieved from the terms of the Settlement Agreement, including the releases provided for, based on the contention or proof that such Class Member failed to receive actual or adequate notice. A full opportunity has been offered to the Class Members to object to the proposed Settlement and to participate in the approval hearing. It is hereby determined that all members of the Class are bound by this Judgment, except those persons listed in Exhibit 1 to this Judgment.

9. Any order entered regarding any fee and expense application, any appeal from any such order, or any reversal or modification of any such order shall not

affect or delay the finality of the Final Judgment in this litigation.

10. Neither the Settlement Agreement, nor any act performed or document executed pursuant to or in furtherance of the Settlement Agreement: (a) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any released claim, or of any wrongdoing or liability of the United States; or (b) is or may be deemed to be or may be used as an admission or evidence that any claims asserted by plaintiffs were not valid or that the amount recoverable would not have exceeded the Aggregate Amount of \$125,000,000 in any civil, criminal, or administrative proceeding in any court, administrative agency or other tribunal. The United States may file the Settlement Agreement or this Judgment in any other action that may be brought against it in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

11. The United States shall pay \$125,000,000 into the PACER Class Action Settlement Trust upon the expiration of the period to appeal from this Order.

12. Without affecting the finality of this Judgment in any way, this Court hereby retains continuing jurisdiction over: (a) implementation of the Settlement and any award or distribution from the Aggregate Amount paid by the United States in settlement of this litigation; (b) disposition of the PACER Class Action Settlement Trust; (c) hearing and determining any fee and expense application; and

(d) all parties hereto for the purpose of construing, enforcing and administering the Settlement.

13. The Court finds that during the course of the Litigation, plaintiffs and the United States, and their respective counsel at all times complied with the requirements of Federal Rule of Civil Procedure 11.

14. In the event that the settlement does not become effective in accordance with the terms of the Settlement Agreement, then this Judgment shall be rendered null and void and shall be vacated; and in such event, all orders entered and releases delivered in connection with this Order and Final Judgment shall be null and void and shall be vacated, and the parties shall revert to their respective positions in the Litigation as of July 12, 2022.

15. Plaintiffs ask that the Court grant their request for 20% of the settlement fund to cover attorney's fees, notice and settlement costs, litigation expenses, and service awards. That request is granted. Specifically, the Court hereby (1) awards \$10,000 to each class representative, (2) awards \$29,654.98 to class counsel to reimburse litigation expenses, (3) orders that \$1,077,000 of the common fund be set aside to cover notice and settlement-administration costs, and (4) awards the remaining amount (\$23,863,345.02) to class counsel as attorney's fees.

16. Upon consideration of this submission and the entire record before the Court, and for the reasons stated in the Opinion issued this same day, the Court finds that the attorney's fees, costs and expenses, and service awards, as agreed by the parties, are fair and reasonable pursuant to paragraph VI(A) of the Settlement Agreement and Federal Rule of Civil Procedure 23(e)(2)(C)(iii), (h).

17. The parties are hereby authorized, without further approval of the Court, to unanimously agree to and adopt in writing amendments, modifications, and expansions of the Settlement Agreement, provided that such amendments, modifications, and expansions of the Settlement Agreement are not materially inconsistent with this Judgment, and do not materially limit the rights of the Members of the Class under the Settlement Agreement.

18. Without further order of the Court, the parties to the Settlement Agreement may agree to reasonable extensions of time to carry out any of the provisions of the Settlement Agreement.

19. The Court directs immediate entry of this Judgment by the Clerk of the Court.

20. The Court's orders entered during this litigation relating to the confidentiality of information shall survive the settlement and resolution and dismissal of this litigation.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: 3/20/24

APPENDIX D

[filed June 5, 2026]

**United States Court of Appeals
for the Federal Circuit**

NATIONAL VETERANS LEGAL SERVICES
PROGRAM, NATIONAL CONSUMER LAW
CENTER, ALLIANCE FOR JUSTICE,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellee

v.

ERIC ALAN ISAACSON,
Interested Party-Appellant

2024-1757

Appeal from the United States District Court for
the District of Columbia in No. 1:16-cv-00745-PLF,
Senior Judge Paul L. Friedman.

**ON PETITION FOR PANEL REHEARING
AND REHEARING EN BANC**

Before Moore, *Chief Judge*, Lourie, Dyk, Prost, Reyna, Taranto, Chen, Hughes, Stoll, Cunningham, Stark, *Circuit Judges*,¹ and Freeman, District Judge.²

PER CURIAM.

O R D E R

Eric Alan Isaacson filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT

Jarret B. Perlow
Clerk of Court

June 5, 2026

Date

¹ Circuit Judge Newman did not participate.

² Honorable Beth Labson Freeman, District Judge, United States District Court for the Northern District of California, sitting by designation, participated only in the decision on the petition for panel rehearing.

APPENDIX E
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).