2024-1757

Volume III (Appx4356-4817)

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

Appeal from the United States District Court
for the District of Columbia
in 1:16-cv-00745-PLF
The Honorable Paul L. Friedman

CORRECTED JOINT APPENDIX
VOLUME III (Appx4356-4817)

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Interested Party-Appellant

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,	)	
Plaintiffs,	)	Civil Action No. 16-0745 (PLF)
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

The United States files this response to Plaintiffs' motion for final approval of class settlement and for attorneys' fees, costs, and service awards.[1] In short, while the United States concurs that this Court should grant final approval to the preliminary settlement and bring this long-running litigation against the federal judiciary to a close, the Court should exercise its discretion in determining attorneys' fees, costs, and service awards to Plaintiffs' and Plaintiffs' counsel. *See Hensley v. Eckhart*, 461 U.S. 424 (1983) (holding that a trial court enjoys substantial discretion in making reasonable fee determinations); *see Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1272 (D.C. Cir. 1993). Herein, the United States provides some context and further information to aid the Court in its determination as to fees, costs, and service awards.

[1] Paragraph 20 of the Court's Order (ECF No. 153) provides the United States the ability to respond to Plaintiffs' motion for fees "thirty days" prior to the Settlement Hearing, which is scheduled for October 12, 2023. ECF No. 153 at 6.

I. The Settlement is Fair and Reasonable

First, the United States offers its concurrence that the settlement be approved. As noted by Plaintiffs, there are four factors established by Federal Rule of Civil Procedure 23(e)(2) that govern final approval. These factors consider 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"; and "(D) the proposal treats class members equitably relative to each other." Although the United States offers no position on the first prong (*i.e.*, the class representatives and class counsel have adequately represented the class), the Government concurs that the proposal was negotiated at arm's length, that the relief provided for the class is adequate, and that the proposal treats class members equitably relative to each other. The United States will focus its response on the last two factors.

The Government agrees that the relief provided for the class is more than adequate, as described by Plaintiffs, "extraordinary." Pls.' Mot. at 28. The total value of the settlement is $125 million, and class members will be fully reimbursed, up to $350, for all PACER fees that they paid during the class period. Those who paid more than $350 in fees during the class period will receive a payment of $350 plus their pro rata share of the remaining settlement funds. As discussed further below, this division is in line with the judiciary's long-standing policy of access to judicial records. As to the requested amount in attorneys' fees, costs, and service awards, the United States addresses that *infra* Section II.

Further, the proposal treats class members equitably relative to each other. On this particular point, the United States offers a couple considerations. First, although there was one objection by a class member regarding the payment threshold of $350, there is nothing inherently inequitable about distributing payments *pro rata* with a minimum cut-off, particularly in a

common fund case. For example, in *In re Automotive Parts Antitrust Litig.*, No. 12-md-02311, 2019 WL 7877812, at *2 (E.D. Mich. Dec. 20, 2019), the district court approved a pro rata distribution up to $100 then distributed the remaining funds to all class members whose weighted pro rata allocation exceeds $100 (subject to their being sufficient funds for each class member claimant to receive at least $100). *See also Downes v. Wis. Energy Corp. Ret. Account Plan*, No. 09–C–0637, 2012 WL 1410023, at *3 (E.D. Wis. April 20, 2012) (overruling an objector's objection to the plan of allocation and approving a $250 guaranteed minimum net settlement to each class member). Second, this position is consistent with the E-Government Act, 28 U.S.C. § 1913, which permits electronic public access fees to "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." It is also consistent with "efforts undertaken by the judiciary to ensure that public access fees do not create unnecessary barriers or burdens to the public have resulted in an allocation of the vast majority of PACER maintenance costs to the system's largest users (typically commercial entities that resell PACER data for profit)." Report of the Proceedings of the Judicial Conference of the United States, Sept. 2019 at 10, https://www.uscourts.gov/sites/default/files/judicial_conference_report_of_the_proceedings_september_2019_0.pdf (last accessed Sept. 12, 2023).

In sum, the United States concurs with this Court approving the proposed settlement. Counsel for both parties "are clearly of the opinion that the settlement in this action is fair, adequate, and reasonable," which only further confirms its reasonableness. *Cohen v. Chilcott*, 522 F. Supp. 2d 105, 121 (D.D.C. 2007).

II. Attorneys' Fees, Costs, and Service Awards

Through their motion ("Pls.' Mot.", ECF No. 158), class counsel requests an attorneys' fees award of over $23 million, which amounts to slightly less than 20% of the common fund ($125 million).[2] This amount includes approximately $900,000 in work that has not yet occurred and may or may not occur. *See* Pls.' Mot., Gupta Decl. ¶¶ 63-64, ECF No. 158-5 at 22 (noting approximately $400,000 in anticipated fees by Gupta Wessler LLP and $500,000 by Motley Rice "for time that will be incurred to address post-settlement issues and inquiries."). The Court may wish to inquire as to how counsel came to that approximation, as the declarations provided in support of Plaintiffs' motion provide little, if any, explanation for these estimates.

In addition, the declarations submitted in support of Plaintiffs' motion calculate the lodestar with 2023 hourly rates, but fail to account that the litigation began in 2016, with class certification in 2017, when rates for both firms presumably were lower. *See e.g.*, Gupta Decl. ¶ 22 (noting Gupta's "current rate" as $1,150 per hour); *see also* Oliver Decl. ¶ 12, ECF No. 158-6 at 5 (identifying William Narwold's hourly rate as $1,250 and Meghan Oliver's hourly rate as $950). In assessing whether to award current or historical rates, courts may consider, among other factors, whether the delay in payment was "unusually long [ ] or attributable to the defendant's dilatory or stalling conduct." *West v. Potter*, 717 F.3d 1030, 1034 (D.C. Cir. 2013). Such is not the case here. The Supreme Court and lower courts have held that where payment is delayed in fee-shifting cases, a court may compensate for the time value of money by either using historic billing rates plus interest or by using present-day rates. *See Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989);

[2] The parties' agreed that "when combined, the total amount of attorney fees, service awards, and administrative costs shall not exceed 20% of the Aggregate Amount. With respect to the attorney fees and service awards, the Court will ultimately determine whether the amounts requested are reasonable." *See* Mot. Prelim. Approval, Settle. Agmt. ¶ 28, ECF No. 141-1 at 11.

Mathur v. Bd. of Tr. of S. Illinois Univ., 317 F.3d 738, 744–45 (7th Cir.2003). However, a significant number of those cases, including *Missouri v. Jenkins*, dealt specifically with fee shifting under 42 U.S.C. § 1988 in protracted civil rights litigation. This case cannot be compared to those cases, and Plaintiffs' counsel do not present any data in support of their claimed rates. *See In re LivingSocial Mktg. & Sales Pracs. Litig.*, 298 F.R.D. 1, 21-22 (D.D.C. 2013). Furthermore, as courts in this jurisdiction have noted, "[t]he market generally accepts higher rates from attorneys at firms with more than 100 lawyers than from those at smaller firms—presumably because of their greater resources and investments, such as attorneys, librarians, researchers, support staff, information technology, and litigation services." *Id*. (citing *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 46-48 (D.D.C. 2011)). Though Motley Rice appears to fall above this threshold, Gupta Wessler LLP does not.

Importantly, though Plaintiffs rely on the declaration of Brian T. Fitzpatrick ("Fitzpatrick Decl.," ECF No. 158-4) in support of the reasonableness of their fees, they have chosen (with no explanation) not to utilize the U.S. Attorney's Office Fitzpatrick Matrix (created in conjunction with the very same Brian Fitzpatrick). *See* https://www.justice.gov/usao-dc/page/file/1504361/download. This is evident because class counsel seeks compensation for Gupta's 2023 rate of $1,150, which is significantly more than the top of the Fitzpatrick Matrix rate (*see id.*, which indicates $807 per hour for attorneys with over 35 years of practice). Gupta graduated from law school in 2002, making his 2023 rate $742, approximately $408 less per hour than the rate at which he seeks compensation. *See* https://www.linkedin.com/in/deepakguptalaw (last accessed Sept. 6, 2023). Similarly, Jonathan Taylor, also a principal at Gupta Wessler LLP, seeks compensation at a rate of $935 per hour (Gupta Decl. ¶ 63), even though public records indicate that Taylor graduated law school in 2010, and his 2023 Fitzpatrick Matrix rate is

significantly lower, at $664 per hour. *See* https://www.linkedin.com/in/jonathan-taylor-071b61b. As for the Gupta Wessler firm, the lowest amount billed for an associate is $700, which is appropriate for an attorney with more than fifteen years of experience under the Fitzpatrick Matrix. https://www.justice.gov/usao-dc/page/file/1504361/download. Yet the associates identified in the Gupta Declaration range from law school graduation years of 2013 through 2015, and do not have anywhere near the 17 years' experience to justify an hourly rate of $700.

Along the same vein, the rates sought by Motley Rice are significantly above those contemplated by the Fitzpatrick Matrix. Mr. Narwold has been practicing the longest at approximately 44 years, but his 2023 rates are $807 per the Fitzpatrick Matrix, almost $450 less *per hour* than his requested rate. Oliver Decl. ¶ 12 (seeking $1,250 per hour). Oliver's rates are also higher; she is a 2004 law school graduate with approximately 19 years of experience, billing more than $150 per hour more for rates reserved for attorneys practicing over 35 years. *See* https://www.justice.gov/usao-dc/page/file/1504361/download (establishing 2023 rates for attorneys with 19 years' experience at $726 per hour).

Though not in the class action context, other judges in this District have reasoned that the Fitzpatrick Matrix "presumptively applies" in federal complex litigation. In the published opinions in this district in which the Fitzpatrick Matrix has been juxtaposed against the LSI Matrix, the Fitzpatrick Matrix has won out. *See J.T. v. District of Columbia*, Civ. A. No. 19-989 (BAH), 2023 WL 355940, at *14-15 (D.D.C. Jan. 23, 2023); *Louise Trauma Ctr. LLC v. Dep't of Homeland Sec.*, Civ. A. No. 20-1128 (TNM), 2023 WL 3478479, at *4 (D.D.C. May 16, 2023) (explaining that "Fitzpatrick Matrix rates presumptively apply" in complex federal litigation and citing *J.T.*); *see also Brackett v. Mayorkas*, Civ. A. No. 17-0988 (JEB), 2023 WL 5094872, at *4-5 (D.D.C. Aug. 9, 2023) (in employment discrimination case, reasoning that it was appropriate to apply

Fitzpatrick Matrix rates across the board and rejecting plaintiff's challenges to the Fitzpatrick Matrix and attempts to obtain even higher than LSI Matrix, attorney-specific rates); *see also Hartman v. Pompeo*, Civ. A. No. 77-2019 (APM), 2020 WL 6445873, at *19 (D.D.C. Nov. 3, 2020) (before availability of Fitzpatrick Matrix, noting in class action context that it would not be unduly burdensome to apply the LSI-adjusted matrix or "something similar," finding that plaintiffs failed to meet their burden to establish propriety of attorney-specific rates and that the court lacked the information necessary to "adjust the attorney's hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate"). In light of Plaintiffs' failure to satisfy their burden to establish that above-market rates are appropriate in this case, *Winston & Strawn LLP v. FDIC*, 894 F. Supp. 2d 115, 130 (D.D.C. 2012) (citing *Perdue v. Kenny A.*, 559 U.S. 542 (2010)), the Court may wish to inquire as to the basis for counsels' rates, and determine whether a reduction in line with prevailing market rates pursuant to the Fitzpatrick Matrix rate is appropriate.

Plaintiffs also request payment of over $1 million to the class Administrator, including approximately $100,000 for work not yet performed. Pls.' Mot. at 48; Oliver Decl. ¶ 19. Importantly, Plaintiffs seek an extra $100,000 beyond what was originally contemplated, due to "unexpected complexities in the notification and dispute process," but do not provide any further details as to those complexities. *Id.* The Court may wish to seek further detail from Plaintiffs' as to these estimated amounts, and exercise its discretion in determining whether Plaintiffs' have adequately demonstrated that such payments are likely and/or reasonable.

Finally, the Court may wish to apply a lodestar cross-check to determine the reasonableness of the sought-after fee.[3] *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 101

[3] The United States reserved its right to request that the Court apply a lodestar crosscheck in the parties' settlement agreement. Settle. Agmt. ¶ 28, ECF No. 141-1 at 11.

(D.D.C. 2013). Plaintiffs indicate that their total lodestar (without inclusion of estimated future fees) is approximately $5.13 million. Gupta Decl. ¶ 63; *see also* Fitzpatrick Decl. ¶ 27, ECF No. 158-4 at 17. Plaintiffs seek over $23.8 million as compensation, which results in a multiplier of approximately 4.65 percent. With Plaintiffs' inchoate "anticipated future fees," this number drops to a multiplier of approximately 3.9 percent. Gupta Decl. ¶ 64. Regardless of the multiplier used, as the Fitzpatrick declaration concedes, this multiplier is "above average." Fitzpatrick Decl. ¶ 27; *see In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d at 19–20 (reviewing counsel's reported lodestar and finding "that a multiplier of 2.0 or less falls well within a range that is fair and reasonable"); *see also Swedish Hosp. Corp*., 1 F.3d at 1272 (approving fee award approximately 3.3 times the lodestar amount).

In sum, "once it is determined that the attorneys are entitled to be paid from the common fund, it is the duty of the court to determine the appropriate amount," based on "reasonableness under the circumstances of a particular case." *Democratic Cent. Comm. of Dist. of Columbia v. Washington Metro. Area Transit Comm'n*, 3 F.3d 1568, 1573 (D.C. Cir. 1993). The Court's 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." *Id*. (quotation omitted); *see Swedish Hosp. Corp.*, 1 F.3d at 1265. "[W]here the settlement agreement creates a common fund against which individual plaintiffs may make claims," the Court must "'act 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 Affairs Data Theft Litig.*, 653 F. Supp. 2d 58, 60 (D.D.C. 2009). Defendant does not take issue with the

general approach of awarding Plaintiffs' counsel a percentage of the common fund in this case, but there are indicia—including above-market hourly rates that Plaintiffs' counsel have not shown to be reasonable and inadequately explained predictions of future work—that the common fund may be excessively depleted, to the detriment of class members, if Plaintiffs' counsel are awarded the percentage of the common fund that they have requested. The Court should carefully examine this fee matter to ensure that class members' rights and recovery are appropriately safeguarded.

Dated: September 12, 2023
Washington, DC

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745-PLF

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND FOR FEES, COSTS, AND SERVICE AWARDS

The Court should grant final approval of the settlement. Although this case involves perhaps the most litigious group of people and entities ever assembled in a single class action, the reception to the settlement continues to be almost universally positive. Out of a nationwide class of hundreds of thousands—including sophisticated data aggregators, federal-court litigators, and law firms of every stripe—we have received just three objections, all of them *pro se*. This reply addresses those objections and the government's response and is being filed within nine days of the hearing, as directed by the Court's preliminary-approval order. ECF No. 153 ¶ 6. It is accompanied by several supporting declarations that update the information provided with the motion, including declarations from counsel, the class administrator, and two experts (Professor Brian Fitzpatrick of Vanderbilt Law School and Professor William Rubenstein of Harvard Law School).

I. The objections regarding the settlement's fairness are misplaced. We begin by summarizing the position of the government and that of each objector regarding the settlement's overall fairness. The government agrees that the settlement is fair and "concurs that the proposal

was negotiated at arm's length, that the relief provided for the class is adequate, and that the proposal treats class members equitably relative to each other." Gov. Resp. 2. The three *pro se* objectors complain that the settlement is unfair—but in different and even contradictory ways.

A. Aaron Greenspan's objection. Mr. Greenspan notes that he "was the plaintiff in one of the only lawsuits—if not the only lawsuit—to ever challenge the PACER fee structure, prior to this one." Greenspan Obj. 1. He contends that, because he "should not have had to pay a single penny to the federal government for fees that were unlawfully charged in the first place," "all of that money should be refunded in full." *Id.* ("I want my money—stolen by the courts—back. All of it. And I want the Administrative Office staff and the judges who approved this held accountable, by name."). Mr. Greenspan believes that "the judiciary has scammed the American public." *Id.* In his view, "the plaintiffs [were] 100% right, the government [was] 100% wrong," and so any "legal limitations" on the refund of all fees paid are "manifestly unjust." *Id.* His objection was filed two days late; he has not indicated an intent to appear at the hearing.

B. Eric Alan Isaacson's objection. Mr. Isaacson, a serial class-action objector, contends that this is a "run-of-the-mill settlement" and that class counsel has "achieved a remarkably mediocre result." Isaacson Obj. 3. In his assessment, this first-ever class action against the federal judiciary "was obviously an easy one to litigate" and an "easy one to settle." *Id.* at 14. Mr. Isaacson objects to the requested fees and service awards, objections that we address separately below. With respect to the settlement's overall fairness, his complaint is that class counsel disserved the class "by advocating a purely pro-rata distribution of settlement funds"—an approach that, in his view, "favor[s] large institutional users." *Id.* at 5 ("Named Plaintiffs' advocacy for pro-rata distribution was grossly inappropriate. The 'blend' reached as a compromise allocates far too much to a pro rata distribution that unfairly advantages large users and law firms[.]"). His objection was timely; he says that he intends to appear remotely.

C. Geoffrey Miller's objection. Mr. Miller's objection is exactly the opposite: Whereas Mr. Isaacson believes that class counsel's sin was to "favor large institutional users," *id.*, Mr. Miller thinks the settlement "favor[s] smaller users." Miller Obj. 2. And while Mr. Isaacson believes that counsel advocated too vigorously for a pro rata distribution, Mr. Miller contends they didn't do so vigorously enough. He derides the settlement's allocation plan—which reimburses every PACER user for up to $350 in fees paid, with a pro rata distribution to users who paid more—as a "[r]edistribution of wealth." *Id.* Mr. Miller does not contend that he himself is an allegedly disfavored large institutional user. And no large institutional users have seen fit to object, despite their presumed access to sophisticated legal counsel. Mr. Miller "has no problem with the total cash compensation or with the proposed maximum of 20% of the common fund for" fees and service awards. *Id.* at 1. His objection was timely; he does not plan to appear.[1]

D. Class counsel's responses to the objections. Mr. Greenspan's frustration is perhaps understandable. But his demand for a perfect settlement overlooks the fact that any settlement is necessarily a compromise—one that must be reached within the bounds of the law. Here, that law included a Federal Circuit decision holding that some of the PACER fees that were charged by the federal judiciary during the class period were lawful because they covered "expenses incurred in services providing public access to federal court docketing information." *NVLSP v. United States*, 968 F.3d 1340, 1350 (Fed. Cir. 2020). Mr. Greenspan's preferred settlement, one that would reimburse every penny paid during the class period, would be impossible in light of that ruling. He also ignores the fact that, under *this* settlement, the vast majority of class members will

[1] In addition to these three objections, the Court received an email on September 26, 2023 from Alexander Jiggetts, indicating that he "oppose[s] the settlement" because he was "the first person to complain about Pacer Fees" and has not been credited for his efforts. Mr. Jiggetts's submission is without merit. Although untimely, class counsel has no objection to the Court's consideration of this submission on its merits.

in fact receive a full refund—one hundred cents on the dollar—of PACER fees that they paid during the class period.

Mr. Isaacson's and Mr. Miller's objections are diametrically opposed. They cannot both be correct. That is, it cannot simultaneously be true that the settlement both unfairly *advantages* and unfairly *disadvantages* large institutional users. Our motion (at 21–24) already responds to Mr. Miller's objection in detail; we will not repeat all those points here. In a nutshell: The plan of allocation reflects a reasonable compromise between, on the one hand, the plaintiffs' strong advocacy for a purely pro rata distribution and, on the other, the government's longstanding policy of expanding public access for the average PACER user, the E-Government Act's express authorization that the judiciary may "distinguish between classes of persons" to "avoid unreasonable burdens and promote public access," 28 U.S.C. § 1913 note, and the government's litigating and negotiating positions. The government makes similar points in its response. Gov. Resp. 2–3.

Mr. Isaacson's objection is much harder to fathom. He identifies no authority for the puzzling notion that it was "grossly inappropriate" for the class representatives to advocate for a pro rata distribution. Isaacson Obj. 5. Although Rule 23 does not *require* a pro rata distribution, *see UAW v. GM*, 497 F.3d 615, 629 (6th Cir. 2007), it has always been true—both in modern class actions and at equity—that "fair treatment" is "assured by straightforward pro rata distribution of proceeds of litigation amongst the class." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855 (1999); *see id.* at 840–41 (explaining that, historically, "the simple equity of a pro rata distribution provid[ed] the required fairness"). Much of Mr. Isaacson's objection also rests on a basic misunderstanding of the jurisdictional framework for this case. He wrongly asserts (at 7–9) that this class action, and hence this settlement, can't include entities whose claims total more than $10,000. Not so. As this Court explained when it certified the class, "[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," as is the case here. ECF No. 33 at 6; *see also* ECF No. 8 at 9–11. Mr. Isaacson's jurisdictional arguments are simply mistaken.[2]

II. The percentage fee requested (19.1%) is reasonable. The government and Mr. Isaacson also opine on various aspects of class counsel's fee request. Although their points differ in many respects, they all suffer from the same basic flaw: They treat this case as if it were a standard fee-shifting case, where fees are sought from a defendant under a fee-shifting statute (an exception to the "American rule" that each party must pay its own fees), rather than a "fee-spreading" case, where fees are sought from a common fund created for the benefit of the class (consistent with the American rule). *See In re Home Depot Inc.*, 931 F.3d 1065, 1079 n.12 (11th Cir. 2019).

A. The government's response. The government does not object to using the percentage-of-the-fund approach to determine the fee in this case—the approach used in the overwhelming majority of common-fund cases. *See* Mot. 25–27; *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("[A] percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases."). Nor does the government deny that a fee of 19.1% is reasonable in this case and is reasonable for funds of this size. *See* Mot. 33–34 (citing

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[2] Mr. Isaacson also contends that large institutional class members, like law firms, have "suffered no injury" to the extent that they have passed on PACER charges to their clients, so any recovery for them is an "unfair windfall." Isaacson Obj. 4–5. This, too, is mistaken. The law has long held that, if plaintiffs are harmed "in the first instance by paying [an] unreasonable charge," they may recover the full amount of the overcharges even if they have "pass[ed] on the damage" to others. *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918). Indeed, damages under the Little Tucker Act are available *only* to those who paid the unlawful fee to the government—not to third-parties. *See Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298, 1303 (Fed. Cir. 2004). Thus, as other courts have recognized, subsequent reimbursement by third parties poses no barrier to the settlement. *See AT & T Mobility Wireless Data Services Sales Tax Litigation*, 789 F. Supp. 2d 935, 967 (N.D. Ill. 2011) (rejecting objections to a class-action settlement on this ground because, "[i]f third-party employers subsequently reimbursed Class Members for the pertinent tax charges, then the question whether such Class Members must in turn reimburse their employers is a separate matter involving a question of law and equity between the employer and employee").

cases). As our motion explains, a fee award of 19.1% is well below the standard one-third recovery and is even "below the average percentage … for settlements between $69.6 and $175.5 million." *Id.* (quoting Fitzpatrick Decl. ¶ 19).

Instead, proceeding as if this were an ordinary fee-shifting case, the government directs its attention almost exclusively to the details of the lodestar calculation. But this "discussion of the lodestar and how it is calculated is an unnecessary sideshow." Fitzpatrick Supp. Decl. ¶ 2. Again, the lodestar is not the basis of the fee request, and it is relevant only to the extent that the Court believes that a cross-check is necessary. Regardless, none of the issues raised by the government require any lodestar reduction, nor provide any basis for reducing the percentage fee requested.

1. Future time. The government first correctly notes that the lodestar includes an estimate for work that had not yet been performed when the lodestar was calculated ($400,000 for Gupta Wessler and $500,000 for Motley Rice). The government does not deny that an estimate for future work is appropriate and that precision is not required. *See* Mot. 37–38 n.3 (citing cases). But, without acknowledging the relevant case law, the government asserts that there has been "little, if any, explanation for these estimates." Gov. Resp. 4. As explained in the motion, however (at 37–38 n.3), the estimates include projections for "responding to inquiries from class members about legal issues, damages calculations, and the mechanics of the settlement; responding to potential objections and filing any replies in support of the settlement; preparing for and participating in the fairness hearing; handling any appeal; assisting class members during the settlement-administration process and ensuring that it is carried out properly; and addressing any unanticipated issues that may arise." Further, Motley Rice's projection was extrapolated from the "time spent on [class-administration] tasks since notice was sent in July." Oliver Decl. ¶ 9.

Nevertheless, class counsel have prepared supplemental declarations that provide additional support for their estimates. *See* Gupta Supp. Decl. ¶¶ 2–3; Oliver Supp. Decl. ¶¶ 3–5.

Class counsel note, for example, that the time they have spent working on the case since calculating the lodestar only confirms the reasonableness of their estimates. *Id.* And while only three class members have filed objections, the possibility of an appeal is very real given that Mr. Isaacson touts himself as "a prominent appellate litigator" who has objected to many class-action settlements and who has pursued appeals after his objections were overruled. Gupta Supp. Decl. ¶ 3.

2. Current versus historical rates. The government next contends that the lodestar should not include class counsel's current billing rates but should instead use their historical rates. Gov. Resp. 4–5. But even in fee-shifting cases (which can raise sovereign-immunity questions not present here), courts "generally" compensate for the delay "either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." *Perdue v. Kenny A. ex. rel. Winn*, 559 U.S. 542, 556 (2010); *see, e.g.*, *James v. District of Columbia*, 302 F. Supp. 3d 213, 226–28 (D.D.C. 2018) (explaining that courts "routinely" use this approach and apply "current rates when calculating the lodestar" "to account for a delay in payment," because "it is only fair to award attorneys the present value of the services that they rendered"); *Thomas v. District of Columbia*, 908 F. Supp. 2d 233, 248–49 (D.D.C. 2012) (same). In common-fund cases, some courts go so far as to mandate use of "one of [these] two delay-compensation methods," holding that "failure to do so is an abuse of discretion." *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 740 (9th Cir. 2016). Because class counsel have been working on this case for nearly eight years without compensation, it is appropriate for their lodestar to reflect their current rates to account for this delay.

3. The Fitzpatrick Matrix. The government suggests that the Court "inquire as to the basis for [class counsel's] rates" and consider using rates from "the U.S. Attorney's Office Fitzpatrick Matrix." Gov. Resp. 5–7. But as the matrix's creator himself explains, the government misunderstands its purpose. By its own terms, the Fitzpatrick Matrix is for cases "in which a fee-shifting statute permits the prevailing party to recover 'reasonable' attorney's fees." *See* Fitzpatrick

Matrix, Explanatory Note 2, https://perma.cc/EVQ5-NNMC. Even then, the matrix is only "a settlement tool, designed 'to minimize fee disputes' with the Department [of Justice]" because the government has "agreed not to oppose any fee-shifting request based on the rates in the Matrix." Fitzpatrick Supp. Decl. ¶ 5 (quoting Explanatory Note 10); *see* Explanatory Note 3. For these reasons, the matrix is "irrelevant to this fee request." Fitzpatrick Supp. Decl. ¶ 5

"Nothing about the matrix precludes" counsel from seeking higher rates. *Id.* ¶ 5. That is particularly true because the matrix represents rates found in the *middle* of data from a potpourri of cases, including individual employment and FOIA matters. *Id.* ¶ 6. The rates "ranged from $100 to $1250." *Id.* As Professor Fitzpatrick explains: "Above-average lawyers commanded rates at the high end of the range and below-average lawyers at the low end. Class counsel here include some of the best class action lawyers not just in the District of Columbia, but in the entire United States of America. It is not surprising that their rates fall at the high end of the range. What is surprising is that class counsel's rates do not exceed the range altogether given that the range was drawn from data from several years ago." *Id.*

In fact, an examination of the data used in the matrix, once filtered for class-action cases, strongly supports the fee request here. As Professor William Rubenstein of Harvard Law School points out, the data underlying the Fitzpatrick Matrix is drawn largely from garden-variety fee-shifting cases and contains few class actions. Professor Rubenstein "reviewed the entire PACER docket in each of [the] 84 cases" in the Fitzpatrick dataset and "found that only 8 were class action cases and that many of the remaining 76 cases were routine fee-shifting matters." Rubenstein Decl. ¶ 21. He found, further, that "the rates in the Matrix's 8 class action cases are on average 43.98% higher than the rates in its 74 non-class action cases." *Id.* ¶ 22. "[W]hen the proposed rates in this case are plotted against the class action rates in the Fitzpatrick Matrix," Professor Rubenstein found that "the rates in this case are, on average, precisely the same as (only .65% above) the

Matrix's class action rates. What this means is that the *relevant* data that underlie the Matrix actually provide strong empirical evidence *in support of* the rates that Class Counsel propose here." *Id.* ¶ 23.

Professor Rubenstein provides additional "empirical evidence" showing that class counsel's rates "are in line with rates found in fee petitions approved by District of Columbia (and Court of Federal Claims) judges overseeing large fund class actions." *Id.* ¶ 19. He "created a database of approved fee petitions filed in large fund class actions in the District of the District of Columbia and in the Court of Federal Claims (for District of Columbia cases) since 2010, and then delved into those petitions to find the hourly rates that lawyers were billing." *Id.* ¶ 14. He "reviewed the lodestar submissions," "extracted 185 individual hourly rates of partners and associates (partnership-track attorneys)," "obtained the year of admission to the bar for each," and "adjusted all these rates to 2023 dollars." *Id.* This produced a scatterplot showing that "Class Counsel are charging rates roughly comparable to the norm" (just 9.3% above it on average), which in his view is "impressive" given that they "are among the leading class action law and plaintiff-side firms in the United States, and the lawyers who worked on this case possess years of experience, have track records of success, and can be counted among the elite of the profession generally and this area of law specifically." *Id.* ¶ 18. And class counsel's rates are, in Gupta Wessler's case, "rates that [the] firm actually charges to paying clients." Gupta Suppl. Decl. ¶ 5. The government gives no reason why this Court should ignore those rates and the empirical evidence supporting them, and instead use a fee matrix created for settlement purposes in fee-shifting cases against the federal government—"a formula that takes into account only a single factor ([] years since admission to the bar)," which "does not adequately measure [every] attorney's true market value." *See Perdue*, 559 U.S. at 554–55.

To the contrary, even in the fee-shifting context, the Federal Circuit has held that "it would be an abuse of discretion for a court to blindly use [a fee] matrix without considering all the relevant facts and circumstances." *Biery v. United States*, 818 F.3d 704, 714 (Fed. Cir. 2016). That makes sense.

When sophisticated clients shop for legal services, they look for more than just the year a lawyer passed the bar. They also consider credentials, skill level, quality of work, relevant experience, track record, and so on. It is only fitting that the rates would reflect these other variables.

In any event, even if rates from the Fitzpatrick Matrix were used, the requested fee award would still be fully justified. If the Court were to conduct a lodestar cross-check using these rates, it would show that the multiplier would still be just 5.53. *See* Gupta Supp. Decl. ¶ 6. That "is still well within the range of multipliers that resulted from previous percentage-method fee awards," and "still does not suggest there will be any windfall here: the risk this case would yield nothing far outstrips even the adjusted multiplier." Fitzpatrick Supp. Decl. ¶ 7.

4. Lodestar cross-check. Finally, the government vaguely states (at 8) that the Court "may wish" to conduct a lodestar cross-check. But the government addresses none of the points made in our motion or in Professor Fitzpatrick's declaration, which identify the problems when courts rely on lodestar calculations for common-fund fees. *See* Mot. 25–27, 35–37. If anything, the government's quibbles only underscore these problems, suggesting that the Court and counsel perform additional (and unnecessary) work to address details that have little bearing on the appropriateness of the fee. *See* Fitzpatrick Supp. Decl. ¶ 3 ("The ink that has already been spilled over class counsel's hourly rates shows why a focus on the lodestar defeats one of the principal virtues of the percentage method for setting attorneys' fees in class actions.").

But again, even if the Court were to apply a lodestar cross-check, it would simply confirm the reasonableness of the requested fee here. As explained in the motion (at 37), a multiplier of up to four is the "norm." *Health Republic Ins. Co. v. United States*, 58 F.4th 1365, 1375 (Fed. Cir. 2023); *see also In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 102 (D.D.C. 2013) (Friedman, J.) ("Multiples ranging up to four are frequently awarded in common fund cases when the lodestar method is applied." (cleaned up)); *Kane Cnty. v. United States*, 145 Fed. Cl. 15, 20 (2019) (approving a

multiplier of 6.13 and collecting cases approving or referencing multipliers between 5.39 and 19.6); *Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628, 630 (9th Cir. 2020) (approving a 10.15 multiplier). A higher multiplier may be justified by the circumstances of a "particular case," including "the risk of nonpayment," the lack of significant "object[ion] to the award," and whether the notice indicated an "agreement by the class to a specified percentage." *Health Republic*, 58 F.4th at 1375–77.

The motion explains why each of these factors is present here, and the government does not contend otherwise. *See* Mot. 35–39. The government does not deny that the risks of suing the federal judiciary in this case were sky high, while the results achieved are exceptional. Gov. Resp. 2 (agreeing that the relief here is "extraordinary"). Although the government suggests (at 9) that the requested fee could be "to the detriment of class members," it does not explain what is unfair about an arrangement in which class members (1) owe no legal fees in the event that they do not prevail, (2) receive eight years of high-quality representation in a complex, risky, and novel class action, and (3) ultimately share in a $125 million settlement that (at a minimum) makes them whole up to $350, while paying less than 20% of that total in fees. Class members themselves apparently saw no unfairness in that arrangement. They were informed that, "[b]y participating in the Class, you agree to pay Class Counsel up to 30 percent of the total recovery in attorneys' fees and expenses with the total amount to be determined by the Court." ECF Nos. 43-1 & 44. And each named plaintiff signed a retainer agreement with class counsel providing for a contingency fee of up to 33% of the common fund. Gupta Decl. ¶ 65. This is evidence of "the market value for class counsel's services" and "certainly supports a fee award [at a smaller percentage]." *Black Farmers*, 953 F. Supp. 2d at 99–100. In fact, only one class member has objected to a fee award of 19.1%—an objection to which we now turn.

B. Mr. Isaacson's fee objection. Like the government, Mr. Isaacson urges the Court to calculate class counsel's lodestar using the Fitzpatrick Matrix (an argument that is no more

persuasive in his filing than in the government's). *See* Isaacson Obj. 13. But his principal contention is far more ambitious. He takes the position that fees in a class action should be presumptively limited to class counsel's lodestar—a position that is not the law in any circuit. For support, he cites the Supreme Court's decision in *Perdue* (which interprets language in a fee-shifting statute) and several 19th-century cases that predate Rule 23. *Id.* at 9–11. As courts have recognized in rejecting this argument and approving other settlements to which Mr. Isaacson has objected, "the *Perdue* presumption against a lodestar enhancement does not apply when a court awards fees from a common fund created after a [class-action] settlement" and no fee-shifting statute is available. *In re BioScrip, Inc. Sec. Litig.*, 273 F. Supp. 3d 474, 478–89 (S.D.N.Y. 2017) (Nathan, J.) (cleaned up); *see Fresno Cnty. Emps.' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.*, 925 F.3d 63, 67–72 (2d Cir. 2019) (rejecting same argument by Isaacson). Every circuit to have addressed the question has held that "Supreme Court precedent requiring the use of the lodestar method in statutory fee-shifting cases" and "restricting the use of multipliers in statutory fee-shifting cases does not apply to common-fund cases." *Home Depot*, 931 F.3d at 1085; *see Fresno Cnty.*, 925 F.3d at 67–72; *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 564–65 (7th Cir. 1994); *Staton v. Boeing Co.*, 327 F.3d 938, 967–69 (9th Cir. 2003).

Mr. Isaacson does not cite or acknowledge any of these cases (not even the ones in which he was an objector). Nor does he cite or acknowledge the Federal Circuit's decision earlier this year reaffirming that the "percentage-of-the-fund method" is a permissible way to set fees in a common-fund class action. *Health Republic*, 58 F.4th at 1371. Nor does he have anything to say about the reasons *why* courts overwhelmingly turned away from the lodestar method in favor of the percentage approach, detailed by the D.C. Circuit in *Shalala* and by Professor Fitzpatrick in his original declaration. *See* Mot. 26. As this Court has noted, the percentage approach replicates the market, is easy to apply, and "helps to align more closely the interests of the attorneys with the interests of the parties by discouraging inflation of attorney hours and promoting efficient

prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system." *Black Farmers*, 953 F. Supp. 2d at 88. As against these virtues, Mr. Isaacson identifies no countervailing considerations—or any benefits at all—in favor of his preferred approach.

And his approach is quite wrong. The market for plaintiff-side services rewards results, not hours. Even if that weren't so, and plaintiffs paid their counsel by the hour, there would quite naturally be a stiff premium on the hourly rate for any arrangement in which the client (1) would not have to pay anything in legal fees in the event of a loss, (2) would never owe more than a modest percentage of their recovery in the case, and (3) would make no payments along the way.

Mr. Isaacson has no rebuttal to any of these points. He simply asserts, without support, that no multiplier at all would be warranted because the case "was obviously an easy one to litigate" and "an easy one to settle" and the results are "remarkably mediocre." Isaacson Obj. 3, 9–14. The evidence in the record, however, shows the opposite. Professor Fitzpatrick—an expert not only on class actions, but on litigation against the federal government—has set forth his view that this case was exceptionally difficult to litigate, resulting in a remarkable recovery for the class. *See* Fitzpatrick Decl. ¶¶ 20–21. And the class representatives—themselves experts on class-action settlements and litigation against the federal government (including the esoteric area of user-fee jurisprudence)—testified to the same. *See* Burbank Decl. ¶¶ 3, 5, 7–8; Rossman Decl. ¶¶ 1–2, 4–5.[3]

[3] Elsewhere, Mr. Isaacson declares that a fee of 5% of the common fund would be "wholly appropriate here" because that was what the Supreme Court found reasonable 140 years ago in *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885). Isaacson Obj. 12. Yet he does not grapple with the governing framework for assessing a reasonable fee under the percentage approach, or with the data showing that, even if this case were really just a "run-of-the-mill settlement," *id.* at 3, a fee of 19.1% of the common fund would be a "run-of-the-mill" percentage—indeed, a *lower*-than-average percentage—for a settlement of this size. *See* Mot. 33; Fitzpatrick Decl. ¶ 19.

In fact, even if the lodestar method were used to determine the fee in this case, as opposed to the percentage-of-the-fund approach, the record would still fully support the fee request. Using class counsel's current rates would compensate them for the years-long *delay* in payment. Using their actual rates would reflect the *quality* of their work. And applying a multiplier of under four would account for the high *risk* of nonpayment in this litigation and be fully consistent with the language in the class notice, the retainers with the named representatives, and the paucity of objections. The only difference would be that the court would have to sift through class counsel's time records and examine them line by line—a waste of judicial resources that is not required even if the Court were to conduct a lodestar cross-check. *See* Mot. 36; *Black Farmers*, 953 F. Supp. 2d at 101 n.8; *contra* Isaacson Obj. 12 (complaining that the lodestar is "inadequately documented").

III. The proposed service awards are reasonable. Finally, Mr. Isaacson objects to the requested $10,000 payments for the National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice. Courts in the D.C. and Federal Circuits routinely award such payments—known variously as service, incentive, or case-contribution awards—to class representatives. *See, e.g., Keepseagle v. Perdue*, 856 F.3d 1039, 1056 (D.C. Cir. 2017); *Cobell v. Jewell*, 802 F.3d 12, 24–25 (D.C. Cir. 2015); *Mercier v. United States*, 156 Fed. Cl. 580, 590 (2021). And courts have specifically approved of service awards for organizations where, as here, they have "provided in-house counsel" who aided in the prosecution of the case and "direct[ed] class counsel in settling the case." *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002).

Mr. Isaacson asks this Court to depart from settled practice and conclude that *all* service awards are categorically barred on the basis of two 19th-century cases, *see Trustees v. Greenough*, 105 U.S. 527 (1882); *Pettus*, 113 U.S. 116 (1885), both of which predate the modern class action. But "neither *Greenough* nor *Pettus* prohibits incentive awards in class actions," and an "overwhelming majority"

of circuits "have concluded that district courts are permitted to grant incentive awards." *Moses v. N.Y. Times Co.*, 79 F.4th 235, 256 (2d Cir. 2023).[4]

Mr. Isaacson does not acknowledge this contrary authority—even though much of it comes from recent appeals in which he has unsuccessfully pressed this issue. Nor does he acknowledge the Supreme Court's recent recognition that, in a typical class action, "[t]he class representative might receive a share of class recovery above and beyond her individual claim"—for example, through a "$25,000 incentive award." *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 n.7 (2018). Because it discusses incentive awards in Rule 23 class actions, *China Agritech*—not *Greenough* or *Pettus*—is the more relevant source for guidance on the Supreme Court's view of incentive awards. And it is consistent with the prevailing view that, as the Supreme Court put it, "[t]he plaintiff who" does the work "to lead the class" may get an "attendant financial benefit." *Id.* at 1810–11.

Even if this Court were free to set aside all modern practice and precedent, this case wouldn't present the abstract legal question that Mr. Isaacson is trying to tee up under the 19th-century cases. *Greenough* allowed a bondholder, whose suit benefited others, to recover his "reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit," but held that he couldn't recover a large annual salary for his "personal services" or recoup all of his "private expenses." 105 U.S. at 537; *see Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1257 (11th Cir. 2020) (drawing this same line). Because the requested payments here fall on the right side of this

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[4] *Accord Hyland v. Navient Corp.*, 48 F.4th 110, 123–24 (2d Cir. 2022); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785–86 (9th Cir. 2022); *Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 353 (1st Cir. 2022); *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019); *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017); *Pelzer v. Vassalle*, 655 F. App'x 352, 361 (6th Cir. 2016); *Tennille v. W. Union Co.*, 785 F.3d 422, 434–35 (10th Cir. 2015); *Berry v. Schulman*, 807 F.3d 600, 613–14 (4th Cir. 2015); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) (en banc); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001).

line—that is, because they cover time by "counsel" "incurred in the fair prosecution of the suit"—this case doesn't present a suitable vehicle for a crusade against service awards.

Although Isaacson makes sweeping legal arguments about service awards in general, he is silent on the evidence supporting the requested awards in this case—evidence that would *fully justify the exact same awards* if relabeled as attorneys' fees. As the class representatives explained in their declarations, the market value of the in-house attorney time incurred by each organization greatly exceeded the $10,000 in claimed service awards. *See* Rossman Decl. ¶ 3; Burbank Decl. ¶ 6; Brooks Decl. ¶ 2. Over seven years, experienced lawyers at each organization "performed invaluable work" that could otherwise have been performed by "outside counsel hired by each organization at far greater expense." Gupta Supp. Decl. ¶ 7. "The requested awards here are thus entirely unlike typical incentive awards: They are not for the personal services or private expenses of an individual class representative nor do they reflect any sort of personal 'salary' or 'bounty.' They instead reflect a bargain price for work that was actually performed by experienced in-house counsel and that was necessary to carry out the prosecution of this suit." *Id.*[5] Put differently: If the National Veterans Legal Services Program had hired an outside law firm to perform the same work, and had sought payment from the common fund for that work, there would be no question that it would be compensable. Indeed, it would have been compensable in full, at market rates, even if this were a

[5] Mr. Isaacson makes two other points, both belied by the evidence. *First*, he contends (at 16) that the named plaintiffs had all the incentive they needed because they had "substantial claims of their own." But the claims were for much less than the value of the in-house attorney time they expended over seven years. *See* ECF Nos. 28, 29, 30. *Second*, he complains (at 17) that the plaintiffs haven't documented their request. But, again, he ignores the fact that each organization submitted a declaration indicating that the amount of attorney time it incurred greatly exceeded $10,000 at market rates. *See* Rossman Decl. ¶ 3; Burbank Decl. ¶ 6; Brooks Decl. ¶ 2.

garden-variety statutory fee-shifting case.[6] Mr. Isaacson has no explanation for why the non-profit class representatives here should be denied a more modest payment to compensate them for their substantial contributions to this groundbreaking litigation over the past seven years.

CONCLUSION

This Court should grant the motion and enter the proposed order. In addition to approving the settlement, the Court should award 20% of the settlement fund to cover attorneys' fees, notice and settlement costs, litigation expenses, and service awards. Specifically, the Court should (1) award $10,000 to each of the three class representatives, (2) award $29,654.98 to class counsel to reimburse litigation expenses, (3) order that $1,077,000 of the common fund be set aside to cover notice and settlement-administration costs, and (4) award the remainder (19.1% of the settlement fund, or $23,863,345.02) to class counsel as attorneys' fees.

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[6] *See, e.g.*, *Kay v. Ehrler*, 499 U.S. 432, 436 n.7 (1991) (observing that, under 42 U.S.C. § 1988, "Congress intended organizations to receive an attorney's fee even when they represented themselves"); *Blum v. Stenson*, 465 U.S. 886 (1984) (holding that, under section 1988, a non-profit legal services organization is entitled to an attorneys' fee based on prevailing market rates rather than its own in-house cost in providing the service); *Raney v. Fed. Bureau of Prisons*, 222 F.3d 927, 929 (Fed. Cir. 2000) (en banc) (holding that time spent on litigation by a labor union's in-house staff counsel should be compensated at market rates under a fee-shifting statute); *PPG Indus., Inc. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1569 (Fed. Cir. 1988) (awarding attorneys' fees by statute for time spent on litigation by in-house counsel).

Respectfully submitted,

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October 3, 2023

Counsel for Plaintiffs National Veterans Legal Services Program, National Consumer Law Center, Alliance for Justice, and the Class

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2023, I electronically filed this reply and related documents through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Deepak Gupta
Deepak Gupta

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

National Veterans Legal Services Program v. United States of America

No. 16-745

SUPPLEMENTAL DECLARATION OF BRIAN T. FITZPATRICK

1. I filed a declaration in support of class counsel's fee request on August 28, 2023. I am submitting this supplemental declaration to respond to the questions about class counsel's lodestar calculation raised by the Department of Justice and an objector.

2. Let me begin by noting that the Department of Justice does not dispute that the percentage method is the appropriate method for calculating the attorneys' fee in this matter. Nor does the Department, or any objector, seriously refute my conclusion that an award of fees equal to approximately 19% of the cash settlement in this case is more than reasonable in light of the empirical studies and research on economic incentives in class-action litigation—especially given the novelty, complexity, duration, and risk of this seven-year litigation against the federal judiciary; the indisputably outstanding results obtained for the class; and the high quality and creativity of class counsel's legal work. As I explain below, even if class counsel's lodestar were adjusted in the ways suggested by the Department and the objector, it would not transform the *below-average* fee percentage requested here into a "windfall." Hence, the discussion of the lodestar and how it is calculated is an unnecessary sideshow.

3. The ink that has already been spilled over class counsel's hourly rates shows why a focus on the lodestar defeats one of the principal virtues of the percentage method for setting attorneys' fees in class actions. As I noted in my opening declaration, one of the many reasons that the lodestar method fell out favor in common-fund class actions to the benefit of the percentage

method is that the percentage method does not require courts to review attorney time records. To the extent that courts use a lodestar crosscheck with the percentage method—and most courts do *not, see* Fitzpatrick Decl. ¶ 22—courts try to prevent the administrative headache of the lodestar method from reappearing. They do so by treating any crosscheck as a quick, back-of-the-envelope calculation simply to ensure class counsel is not obtaining a so-called "windfall" with the percentage method. But the difference between a "windfall" and a non-"windfall" will not turn on minutiae concerning methods for calculating hours or rates. This is why the crosscheck can be done on the back of an envelope.

4. The Department and the objector question whether, in the event that a lodestar crosscheck is deemed necessary, the so-called "Fitzpatrick Matrix" must be used to calculate class counsel's lodestar. The answer is no. I developed the Fitzpatrick Matrix—pro bono—at the request of the Department—specifically, for the Civil Division of the U.S. Attorney's Office for the District of Columbia—based on the Department's desire to utilize my expertise in the empirical study of attorneys' fees. As the explanatory notes to the Matrix on the Department's website explicitly state, "the [M]atrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover 'reasonable' attorney's fees." *See* The Fitzpatrick Matrix, https://www.justice.gov/usao-dc/page/file/1504361/download, Explanatory Note 2. The fee sought here is not a fee that will be paid by the government pursuant to a fee-shifting statute. It is a fee that will be paid by the class pursuant to the common law of unjust enrichment. By its own terms, the Matrix is therefore irrelevant to this fee request.

5. Moreover, even in statutory fee-shifting cases, the Matrix—again, by its own terms—is not one-size-fits-all. The Matrix is a settlement tool, designed "to minimize fee disputes" with the Department. *Id.* at Explanatory Note 10. In particular, the Matrix contemplates

that parties will use non-Matrix rates when warranted; the Department simply agreed not to oppose any fee-shifting request based on the rates in the Matrix. *See id* at Explanatory Note 3 ("For matters in which a prevailing party agrees to payment pursuant to this fee matrix, the United States Attorney's Office will not request that a prevailing party offer the additional evidence that the law otherwise requires."). Class counsel's hourly rates fall above those in the Matrix. Nothing about the Matrix precludes that.

6. Indeed, to contend otherwise misconceives how the Matrix was created. The Matrix was created using a trove of data from all manner of complex cases and all manner of lawyers; the data includes individual employment-discrimination cases, FOIA cases, and Fair Debt Collection Practices Act cases, among many others. The numbers in the Matrix fall in the *middle* of this data. It was produced by least-squares regression; that is, the numbers in the Matrix minimize the distance between the data above them and the data below them. *See id.* at Explanatory Note 10. For example, the trove of data used to produce the Matrix included hourly rates that ranged from $100 to $1250 (and those rates were from several years ago). *See id.* at Explanatory Note 8. Above-average lawyers commanded rates at the high end of the range and below-average lawyers at the low end. Class counsel here include some of the best class action lawyers not just in the District of Columbia, but in the entire United States of America. It is not surprising that their rates fall at the high end of the range. What is surprising is that class counsel's rates do not exceed the range altogether given that the range was drawn from data from several years ago. In other words, if anything, the class is getting a bargain for lawyers of this caliber.

7. Finally, even if class counsel's lodestar were recalculated using the Fitzpatrick Matrix, the adjusted lodestar multiplier would still only be 5.53 (based on a total adjusted lodestar of $4,311,685.34, as explained in the supplemental declaration from class counsel). As I

demonstrated in my opening declaration, this is still well within the range of multipliers that resulted from previous percentage-method fee awards, and, for the reasons I stated there, still does not suggest there will be any windfall here: the risk this case would yield nothing far outstrips even the adjusted multiplier**.** *See* Fitzpatrick Decl. ¶ 27. The same would be true if the lodestar were adjusted in other ways suggested by the Department and the objector—for example, if class counsel's historical rather than current rates were (mistakenly) used or if the estimated future time were (mistakenly) excluded. In neither case would the multiplier fall outside a reasonable range consistent with comparable past awards nor exceed the risk of non-recovery presented by this lawsuit. Indeed, even if all of these adjustments were (mistakenly) made simultaneously the multiplier would still be within a reasonable range.

8. In short, none of the questions raised about class counsel's lodestar calculation would change anything in the end in any event. That is, after all, why it is called the percentage method.

October 1, 2023

Brian T. Fitzpatrick

Nashville, TN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLICANCE FOR JUSTICE, for themselves and all others similarly situated,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 16-745-PLF

DECLARATION OF WILLIAM B. RUBENSTEIN IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES

1. I am the Bruce Bromley Professor of Law at Harvard Law School and have been recognized as a leading national expert on class action law and practice. Class Counsel[1] seek a fee approximately 19% of the $125 million common fund generated by their efforts.[2] As part of their submission in support of that request, Class Counsel provided the Court with their lodestar

[1] By order dated January 24, 2017, Chief Judge Huvelle certified a class and ordered "that Gupta Wessler PLLC and Motley Rice LLC are appointed as co-lead class counsel." Order, *Nat'l Veterans Legal Services Program v. United States of America*, No. 1:16-cv-0745-ESH (D.D.C. Jan. 24, 2017), ECF No. 32 at 1. I used the shorthand "Class Counsel" to refer to these "co-lead class counsel" throughout this Declaration.

[2] Plaintiffs' Motion for Final Approval of Class Settlement and For Attorneys' Fees, Costs, and Service Awards, *Nat'l Veterans Legal Services Program v. United States of America*, No. 1:16-cv-0745-PLF (D.D.C. Aug. 28, 2023), ECF No. 158.

information (hourly billing rates and total hours).[3] In response, the Defendant has, *inter alia,* [a] noted that Class Counsel's hourly rates are higher than those found in the U.S. Attorney's Office Fitzpatrick Matrix and [b] accordingly stated that "the Court may wish to inquire as to the basis for counsels' rates, and determine whether a reduction in line with prevailing market rates pursuant to the Fitzpatrick Matrix rate is appropriate."[4] Class Counsel have retained me to address this issue. After setting forth my qualifications to serve as an expert (Part I, *infra*), I provide the Court with empirical data which would enable it to find that Class Counsel's proposed billing rates are reasonable. Specifically:

- ***Class Counsel's proposed billing rates are consistent with those utilized in large class action cases in this District*** (Part II, *infra*). My research assistants compiled a database consisting of hourly rates contained in all available court-approved fee petitions in this District (and D.C.-based Court of Federal Claims matters) since 2010 in cases with settlement funds greater than $100 million (185 data points from 6 cases). The billing rates Class Counsel propose for partners and partnership-track attorneys here are slightly (9.3%) above the rates in the comparison set. This is impressive in that the lead lawyers in this case are among the most successful class action lawyers in the country, with one (Deepak Gupta) achieving that status at a remarkably early point in his career. Their rates are appropriately at the high end of the comparison set.

- ***Data from large class actions cases are more appropriate comparators than blended matrix rates***. (Part III, *infra*). The Defendant directs the Court to rates found in the Fitzpatrick Matrix. Professor Fitzpatrick created the Matrix by collecting rates from 84 separate cases and then generating a single blended rate for each year of an attorney's experience. My research assistants and I delved into the data underlying the Fitzpatrick Matrix – all of which is available on-line – and found that only 8 of the 84 cases are class actions and many of the remaining 76 are routine fee-shifting matters.

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[3] Declaration of Deepak Gupta, *Nat'l Veterans Legal Services Program v. United States of America*, No. 1:16-cv-0745-PLF (D.D.C. Aug. 28, 2023), ECF No. 158-5 at 22-23 [hereinafter "Gupta Dec."]; Declaration of Meghan S.B. Oliver, *Nat'l Veterans Legal Services Program v. United States of America*, No. 1:16-cv-0745-PLF (D.D.C. Aug. 28, 2023), ECF No. 158-6 at 5-6.

[4] Defendant's Response to Plaintiffs' Motion for Final Approval of Class Settlement and Attorneys' Fees, Costs, and Service Awards, *Nat'l Veterans Legal Services Program v. United States of America*, No. 1:16-cv-0745-PLF (D.D.C. Aug. 28, 2023), ECF No. 159 at 7 [hereinafter Def. Br.].

> The 8 class action cases had, on average, more than 12 times as many docket entries as the non-class action cases. Most importantly, the hourly rates in the Matrix's 8 class action cases were roughly 44% higher than the hourly rates in its non-class action cases. Indeed, the rates Class Counsel propose here are nearly identical to – on average .65% higher than – the rates in the Matrix's 8 class action cases. A matrix generated by blending rates across a diverse set of cases may serve efficiency goals in high volume situations, where repeat-playing attorneys undertake relatively similar work case-to-case. The United States Attorney's Office (USAO) itself explains the purpose of the Matrix in these terms, offering that if prevailing litigants utilize Matrix rates, the USAO – as the paying party – will not contest those rates; Matrix rates serve as timesaving, litigation-avoiding safe harbors. That blended rates serve that function does not mean they are therefore the prevailing rates in the community for the services rendered in a particular case: as the Matrix's own underlying data show, its blended rates are not a good proxy for the rates class action lawyers in this District bill – and courts in this District approve – in class action cases.

2. In sum, data from commensurate cases provide strong empirical support for the conclusion that the hourly rates Class Counsel propose are within the normal range and these data are better points of comparison than Matrix rates blended from a database consisting almost entirely of smaller and more mundane fee-shifting matters.

I.
BACKGROUND AND QUALIFICATIONS[5]

3. I am the Bruce Bromley Professor of Law at Harvard Law School. I graduated from Yale College, *magna cum laude*, in 1982 and from Harvard Law School, *magna cum laude*, in 1986. I clerked for the Hon. Stanley Sporkin in the U.S. District Court for the District of Columbia following my graduation from law school. Before joining the Harvard faculty as a tenured professor in 2007, I was a law professor at the UCLA School of Law for a decade, and an adjunct faculty member at Harvard, Yale, and Stanford Law Schools while a public interest lawyer during the preceding decade. I am admitted to practice law in the Commonwealth of

[5] My full c.v. is attached as Exhibit A.

Massachusetts, the State of California, the Commonwealth of Pennsylvania (inactive), the District of Columbia (inactive), the U.S. Supreme Court, six U.S. Courts of Appeals, and four U.S. District Courts.

4. My principal area of scholarship is complex civil litigation, with a special emphasis on class action law. I am the author, co-author, or editor of five books and more than a dozen scholarly articles, as well as many shorter publications (a fuller bibliography appears in my appended c.v.). Much of this work concerns various aspects of class action law. Since 2008, I have been the sole author of the leading national treatise on class action law, *Newberg on Class Actions*. Between 2008 and 2017, I re-wrote the entire multi-volume treatise from scratch as its Fifth Edition and, subsequently, produced the treatise's Sixth Edition – *Newberg and Rubenstein on Class Actions* – which was published in 2022. As part of this effort, I wrote and published a 692-page volume (volume 5 of the Sixth Edition) on attorney's fees, costs, and incentive awards; this is the most sustained scholarly treatment of class action attorney's fees and has been cited in numerous federal court fee decisions. For five years (2007–2011), I published a regular column entitled "Expert's Corner" in the publication *Class Action Attorney Fee Digest*. My work has been excerpted in casebooks on complex litigation, as noted on my c.v.

5. My expertise in complex litigation has been recognized by judges, scholars, and lawyers in private practice throughout the country for whom I regularly provide consulting advice and educational training programs. Since 2010, the Judicial Panel on Multidistrict Litigation (JPML) has annually invited me to give a presentation on the current state of class action law at its MDL Transferee Judges Conference, and I have often spoken on the topic of attorney's fees to the MDL judges. The Federal Judicial Center invited me to participate as a panelist (on the topic

of class action settlement approval) at its March 2018 judicial workshop celebrating the 50th anniversary of the JPML, *Managing Multidistrict and Other Complex Litigation Workshop*. The Second Circuit invited me to moderate a panel on class action law at the 2015 Second Circuit/Federal Judicial Center Mid-Winter Workshop. The American Law Institute selected me to serve as an Adviser on a Restatement-like project developing the *Principles of the Law of Aggregate Litigation*. In 2007, I was the co-chair of the Class Action Subcommittee of the Mass Torts Committee of the ABA's Litigation Section. I am on the Advisory Board of the publication *Class Action Law Monitor*. I have often presented continuing legal education programs on class action law at law firms and conferences.

6. My teaching focuses on procedure and complex litigation. I regularly teach the basic civil procedure course to first-year law students, and I have taught a variety of advanced courses on complex litigation, remedies, and federal litigation. I have received honors for my teaching activities, including: the Albert M. Sacks-Paul A. Freund Award for Teaching Excellence, as the best teacher at Harvard Law School during the 2011–2012 school year; the Rutter Award for Excellence in Teaching, as the best teacher at UCLA School of Law during the 2001–2002 school year; and the John Bingham Hurlbut Award for Excellence in Teaching, as the best teacher at Stanford Law School during the 1996–1997 school year.

7. My academic work on class action law follows a significant career as a litigator. For nearly eight years, I worked as a staff attorney and project director at the national office of the American Civil Liberties Union (ACLU) in New York City. In those capacities, I litigated dozens of cases on behalf of plaintiffs pursuing civil rights matters in state and federal courts throughout the United States. I also oversaw and coordinated hundreds of additional cases being litigated by

ACLU affiliates and cooperating attorneys in courts around the country. I therefore have personally initiated and pursued complex litigation, including class actions.

8. I have been retained as an expert witness in more than 100 cases and as an expert consultant in about another 30 or so cases. These cases have been in state and federal courts throughout the United States; most have been class actions and other complex matters, and many have been MDL proceedings. I have been retained to testify as an expert witness on issues ranging from the propriety of class certification, to the reasonableness of settlements and fees, to the preclusive effect of class action judgments. I have been retained by counsel for plaintiffs, for defendants, and for objectors.

9. Courts have appointed me to serve as an expert in complex fee matters:

- In 2015, the United States Court of Appeals for the Second Circuit appointed me to argue for affirmance of a district court order that significantly reduced class counsel's fee request in a large, complex securities class action, a task I completed successfully when the Circuit summarily affirmed the decision on appeal.[6]

- In 2017, the United States District Court for the Eastern District of Pennsylvania appointed me to serve as an expert witness on certain attorney's fees issues in the National Football League (NFL) Players' Concussion Injury Litigation (MDL 2323). In my final report to the Court, I recommended, *inter alia*, that the Court should cap individual retainer agreements at 22%, a recommendation that the Court adopted.[7]

- In 2018, the United States District Court for the Northern District of Ohio appointed me to serve as an expert consultant to the Court on complex class action and common benefit fees issues in the National Prescription Opiate Litigation (MDL 2804).

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[6] *See In re IndyMac Mortg.-Backed Sec. Litig.*, 94 F. Supp. 3d 517 (S.D.N.Y. 2015), *aff'd sub nom. DeValerio v. Olinski*, 673 F. App'x 87 (2d Cir. 2016).

[7] *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2018 WL 1658808, at *1 (E.D. Pa. Apr. 5, 2018) ("I adopt the conclusions of Professor Rubenstein and order that IRPAs' fees be capped at 22% plus reasonable costs.").

- The United States District Courts for the Southern District of New York and the Eastern District of Pennsylvania have both appointed me to serve as a mediator to resolve complex matters in class action cases, including fee issues.

10. Courts have often relied on my expert witness testimony in fee matters.[8]

11. I have been retained in this case to provide an opinion concerning the issues set forth in the first paragraph, above. I am being compensated for providing this expert opinion. I was paid a flat fee in advance of rendering my opinion, so my compensation is in no way contingent upon the content of my opinion.

12. In analyzing these issues, I have discussed the case with the counsel who retained me. I have also reviewed documents from this litigation, including all of the documents posted at

[8] *See, e.g.*, *In re Genetically Modified Rice Litig.*, 764 F.3d 864, 872 (8th Cir. 2014); *Benson v. DoubleDown Interactive, LLC*, No. 18-CV-0525-RSL, 2023 WL 3761929, at *2 (W.D. Wash. June 1, 2023); *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-MD-2836, 2022 WL 18108387, at *7 (E.D. Va. Nov. 8, 2022); *Reed v. Light & Wonder, Inc.*, No. 18-CV-565-RSL, 2022 WL 3348217, at *1-2 (W.D. Wash. Aug. 12, 2022); *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, No. 12-CV-0256 (LAK), 2021 WL 2453972 (S.D.N.Y. June 15, 2021); *In re Facebook Biometric Info. Priv. Litig.*, 522 F. Supp. 3d 617 (N.D. Cal. 2021); *Kater v. Churchill Downs Inc.*, No. 15-CV-00612-RSL, 2021 WL 511203, at *1-*2 (W.D. Wash. Feb. 11, 2021); *Wilson v. Playtika Ltd.*, No. 18-CV-5277-RSL, 2021 WL 512230, at *1-*2 (W.D. Wash. Feb. 11, 2021); *Wilson v. Huuuge, Inc.*, No. 18-CV-5276-RSL, 2021 WL 512229, at *1-*2 (W.D. Wash. Feb. 11, 2021); *Amador v. Baca*, No. 210CV01649SVWJEM, 2020 WL 5628938, at *13 (C.D. Cal. Aug. 11, 2020); *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *10 (S.D. Ill. Dec. 16, 2018); *Krakauer v. Dish Network, L.L.C.*, No. 1:14-CV-333, 2018 WL 6305785, at *5 (M.D.N.C. Dec. 3, 2018); *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2018 WL 1658808, at *4 (E.D. Pa. Apr. 5, 2018); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2017 WL 3175924, at *3 (N.D. Cal. July 21, 2017); *Aranda v. Caribbean Cruise Line, Inc.*, No. 1:12-cv-04069, 2017 WL 1369741, at *5 (N.D. Ill. Apr. 10, 2017), *aff'd sub nom. Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792 (7th Cir. 2018); *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *9 (S.D.N.Y. Sept. 2, 2015); *Asghari v. Volkswagen Grp. of Am., Inc.*, No. 13-CV-02529 MMM, 2015 WL 12732462, at *44 (C.D. Cal. May 29, 2015); *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-md-2591-JWL, 2015 WL 2165341, at *5 (D. Kan. May 8, 2015); *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172 (C.D. Cal. 2010); *Commonwealth Care All v. Astrazeneca Pharm. L.P.*, No. CIV.A. 05-0269 BLS 2, 2013 WL 6268236, at *2 (Mass. Super. Aug. 5, 2013).

the case website,[9] the full docket of the case on PACER, as well as all of the publicly available documents associated with the Fitzpatrick Matrix.[10] Finally, I have reviewed the case law and scholarship relevant to the issues herein.[11]

II.
EVIDENCE SUPPORTING THE REASONABLENESS OF THE HOURLY RATES CLASS COUNSEL EMPLOY

13. The *Manual for Complex Litigation* states:

> What constitutes a reasonable hourly rate varies according to geographic area and the attorney's experience, reputation, practice, qualifications, and customary charge. The rate should reflect what the attorney would normally command in the relevant marketplace.[12]

Applying these principles, this section analyzes the rates Class Counsel propose for their partners and partnership-track attorneys.

14. My research assistants and I created a database of approved fee petitions filed in large fund class actions in the District of the District of Columbia and in the Court of Federal

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[9] PACER Fees Class Action, Court Documents link, available at https://www.pacerfeesclassaction.com/Docs.aspx.

[10] United States Department of Justice, U.S. Attorneys, District of Columbia, Divisions, Civil Division, Attorney's Fees (encompassing links to the Fitzpatrick Matrix, 2013-2023; Supporting Materials; Declaration of Brian T. Fitzpatrick; Declaration Exhibit A; Declaration Exhibit B Declaration Exhibit C; Former Attorney's Fees Matrices, available at https://www.justice.gov/usao-dc/civil-division.

[11] I am also a class member in this case, so I have followed the case with interest.

[12] *Manual for Complex Litigation (Fourth)*, § 14.122 (2004) (citing *Blum v. Stenson*, 465 U.S. 886, 895 (1984) ("'[R]easonable fees' . . . are to be calculated according to the prevailing market rates in the relevant community . . . ."); *Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973)).

Claims (for District of Columbia cases) since 2010,[13] and then delved into those petitions to find the hourly rates that lawyers were billing. Specifically, we searched for all class actions [a] approved by courts in this District or in the Court of Federal Claims using District of Columbia rates [b] with settlement values of $100 million or more and [c] with fee petitions providing hourly rate data available on PACER (Westlaw or Bloomberg). Using this approach, we identified 6 applicable cases, listed in Table 1, below; no case meeting these criteria was excluded and in none of these 6 cases did the courts disprove counsel's hourly rates. The Court will recognize the names of many of these cases as the large, well-known class actions in this District.

TABLE 1
D.C. BASED LARGE FUND CLASS ACTIONS

Case Name	Forum (Fee Year)	Settlement Amount
Cobell v. Salazar	D.D.C. (2011)	$1.512 billion
Haggart v. US	Fed. Cl. (2020)	$110 million
In re Fannie Mae	D.D.C. (2013)	$153 million
Keepseagle v. Vilsack	D.D.C. (2011)	$760 million
Kifafi v. Hilton	D.D.C. (2012)	$146.75 million
Mercier v. US	Fed. Cl. (2021)	$160 million

[13] I undertake this form of hourly rate analysis regularly and typically utilize a shorter time frame. However, there are fewer large class action cases in the District of Columbia than other Districts where class actions often arise (N.D. Cal. and S.D.N.Y. in particular), so we were required to go further back in time. In doing so, however, we captured most of the major class actions that this District has hosted across the past decade or so.

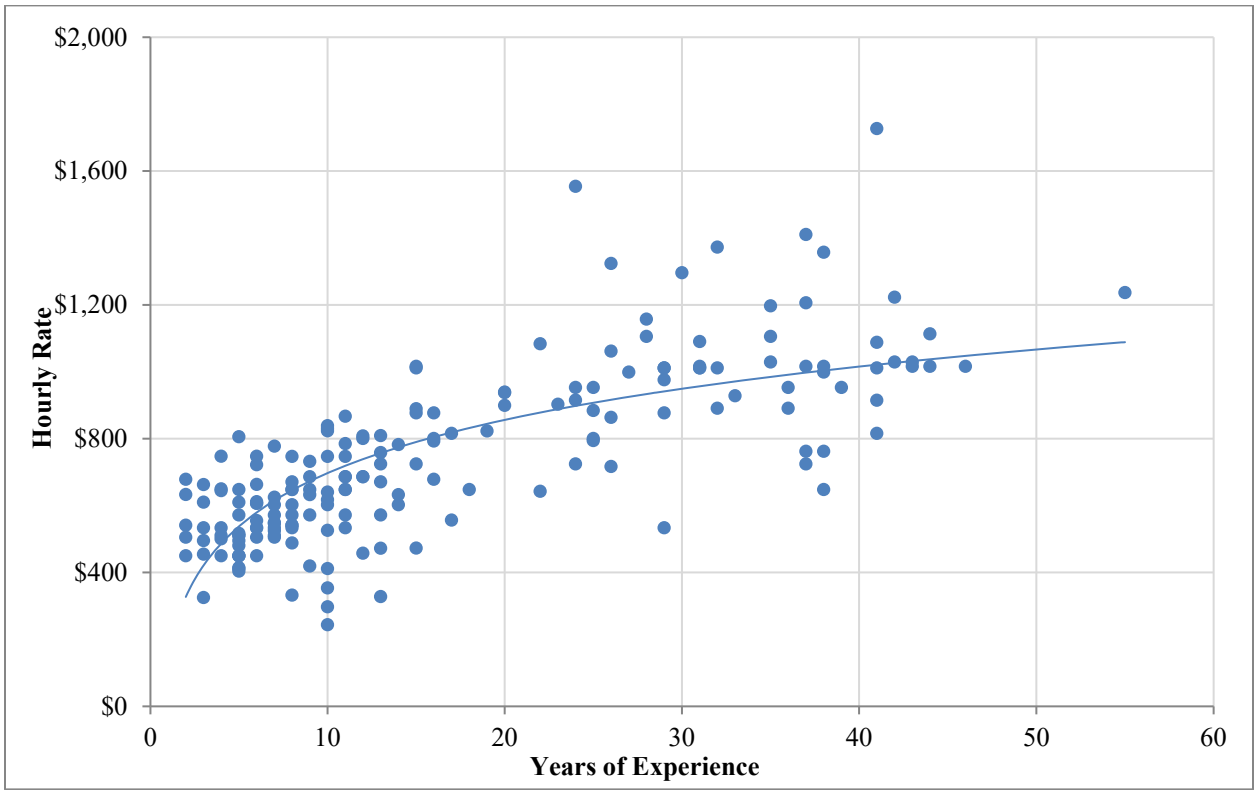
My team reviewed the lodestar submissions in each of the 6 cases and extracted 185 individual hourly rates of partners and associates (partnership-track attorneys) to employ in our analysis.[14] We adjusted all these rates to 2023 dollars using the U.S. Bureau of Labor Statistics' Producer Price Index-Office of Lawyers (PPI-OL) index.[15] We also obtained the year of admission to the bar for each of the 185 identified attorneys.

15. Once each timekeeper's experience level had been identified and all of the dollar amounts had been set to 2023 levels, we plotted the rates, with the x-axis representing the number of years since the timekeeper was admitted to the bar and the y-axis representing the timekeeper's hourly rate. The resulting scatter plot, set forth below in Graph 1, provides a snapshot of hourly rates utilized in fee petitions in large fund D.C.-based class actions, with the blue line sketching the trend of rates across experience levels.

[14] We also included one lawyer designated as "counsel," but we did not include lawyers referred to as contract or staff attorneys. The latter types of attorneys are typically paid in ways unrelated to their years of experience.

[15] This price database can be accessed here: https://www.bls.gov/ppi/databases/. To specifically access the PPI-OL, first click on "One Screen" in the "Industry Data" row below "PPI Databases." Then select "541110 Offices of lawyers" as the industry and "541110541110 Offices of lawyers" as the product.

GRAPH 1
HOURLY RATES IN D.C. LARGE FUND CLASS ACTIONS

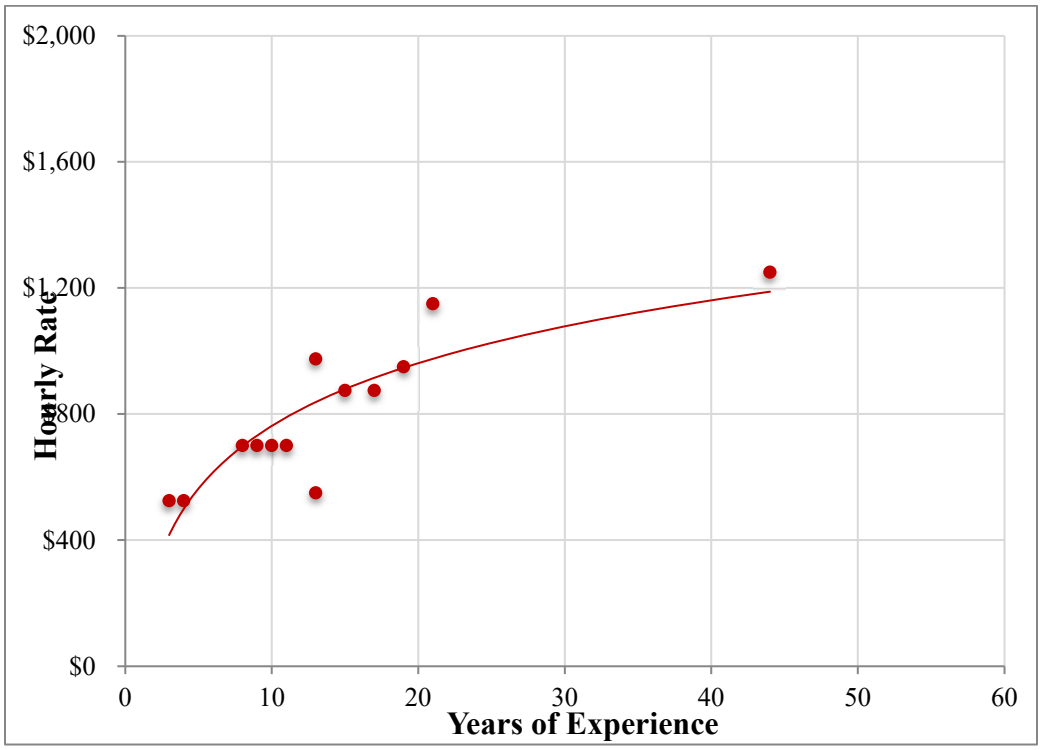


16. We next plotted the rates employed by Class Counsel in their lodestar submission. Specifically, for each of the 13 partnership-track lawyers (partners and associates) in their lodestar, Class Counsel's fee petition supplied a name and proposed hourly rate;[16] my team then found the

[16] Class Counsel utilize their rates as of 2023 for all time spent on the litigation. This approach comports with Supreme Court precedent authorizing the use of current rates as "an appropriate adjustment for delay in payment." *Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989). The Defendant suggests something errant in this approach, noting that *Jenkins* was a [a] protracted [b] fee-shifting case. Def. Br. at 4-5 ("However, a significant number of those cases, including *Missouri v. Jenkins*, dealt specifically with fee shifting under 42 U.S.C. § 1988 in protracted civil rights litigation. This case cannot be compared to those cases . . ."). But this case surely hits the "protracted" mark, as it will be close to 8 years (from the filing of the initial complaint in the spring of 2016 until any final approval will vest here) during which Class Counsel have not been paid; and courts regularly accept current hourly rates in lodestar cross-check submissions in common

year of law school graduation each such timekeeper.[17] We plotted these rates onto the same type of x-y axis that we had employed for the comparison set. The resulting scatter plot, set forth below in Graph 2, provides a snapshot of Class Counsel's rates, with the red line sketching the trend of the rates across experience levels.

GRAPH 2
CLASS COUNSEL'S PROPOSED HOURLY RATES

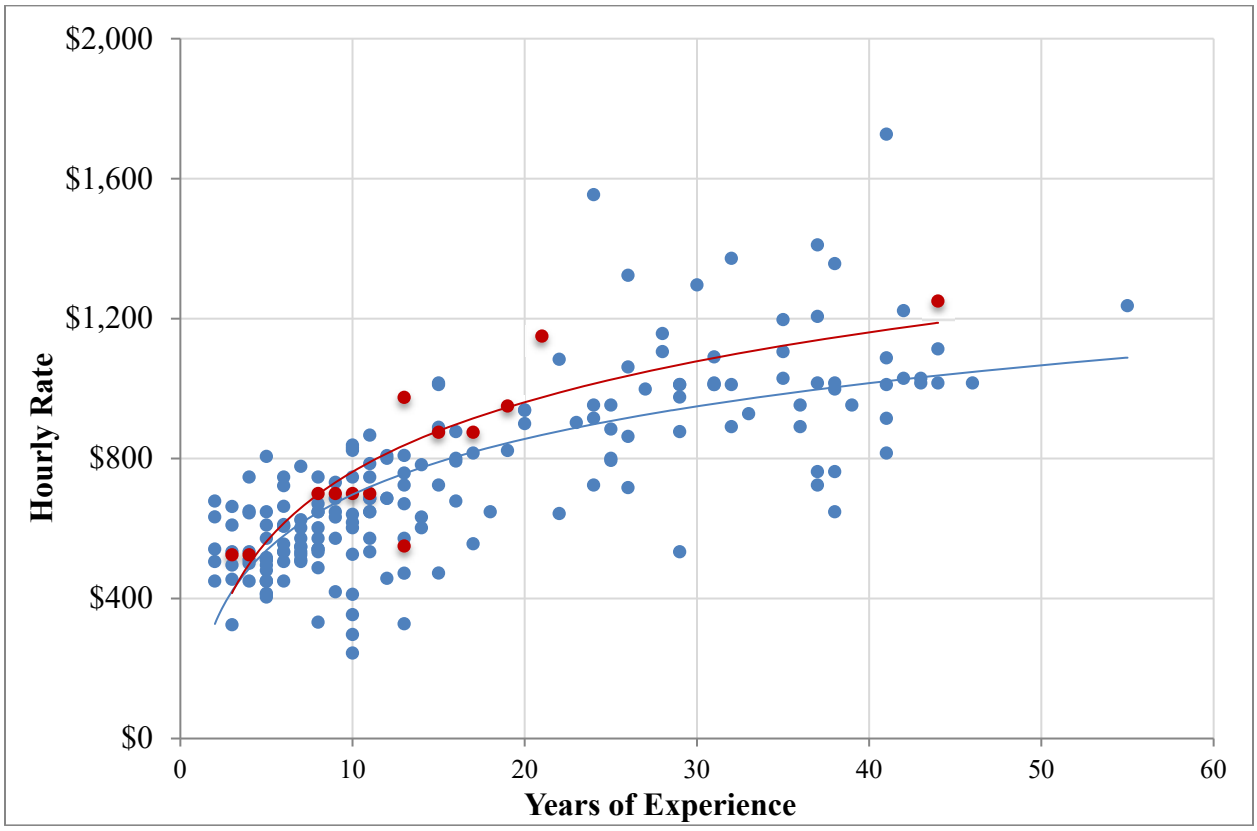


fund cases, not just fee-shifting matters. Indeed, I am unaware of any precedent holding that *Jenkins* applies only in fee-shifting matters, nor should it, as *Jenkins*'s reasoning (that counsel have not been paid for years) applies no differently when the client is paying than it does when fees are shifted to the adversary.

[17] We employed the year of law school graduation for the present lawyers, as a number of them were admitted to the bar a year or two later but gained relevant experience during federal clerkships; graduation data was also more readily available for these lawyers than the comparison set. As explained below, *see* note 19, *infra,* this choice did not meaningful alter the comparison. The Fitzpatrick Matrix similarly uses year of law school graduation as its measure of experience. Declaration of Brian T. Fitzpatrick at 6, available at https://www.justice.gov/usao-dc/page/file/1504381/download [hereinafter Fitzpatrick Dec.].

17. Finally, we aggregated Graphs 1 and 2 onto a single scatterplot, Graph 3, with District of Columbia rates in blue and Class Counsel's proposed rates in red.

GRAPH 3
CLASS COUNSEL'S PROPOSED HOURLY RATES COMPARED TO HOURLY RATES IN D.C. LARGE FUND CLASS ACTIONS



18. As is visually evident in Graph 3, the two trend lines track one another closely. When the differences between the trend lines are compared,[18] Class Counsel's trend line is on average 9.3% above the trend line for rates in fee petitions approved in other large fund class

[18] We compared the distance between the two trend lines at the 13 points for which Class Counsel have a timekeeper and took the average of those 13 comparisons.

actions.[19] That Class Counsel are charging rates roughly comparable to the norm in the present case is impressive. These firms are among the leading class action law and plaintiff-side firms in the United States, and the lawyers who worked on this case possess years of experience, have track records of success, and can be counted among the elite of the profession generally and this area of law specifically. Given that the comparison set is also composed of large fund cases, those adjectives likely apply to many of the lawyers in that set as well. And indeed, Class Counsel's proposed rates are quite close to the comparison set at most experience levels, with Class Counsel proposing hourly rates for the newest attorneys at levels less than 10% above the norm. It is Class Counsel's leading lawyers whose rates are slightly higher than the 9.3% average: Gupta, with just over two decades of experience, has accomplished more than most lawyers do in a lifetime, as noted in his Declaration;[20] while Narwold, with 44 years of experience, has participated in as many class actions as any active lawyer in the United States. As the Court can see, these two (highest red) dots alone draw the red trendline upward – but appropriately so.

[19] If we use only the year of admission for Class Counsel's lawyers, rather than their year of graduation from law school, the trend line is 12.8%, rather than 9.3%, above the comparison trend line). This difference is immaterial for purposes of this comparison and does not alter my opinion.

[20] Gupta Dec. at ¶ 46 ("I am the founding principal of Gupta Wessler LLP, a boutique law firm that focuses on Supreme Court, appellate, and complex litigation on behalf of plaintiffs and public-interest clients. I am also a Lecturer on Law at Harvard Law School, where I teach the Harvard Supreme Court Litigation Clinic and regularly teach courses on the American civil-justice system. I am a public member of the American Law Institute and an elected member of the Administrative Conference of the United States . . . I have led high-stakes litigation before the U.S. Supreme Court, all thirteen federal circuits, and numerous state and federal courts nationwide. I have also testified before the U.S. Senate, the U.S. House of Representatives, and the Presidential Commission on the Supreme Court. Much of my advocacy has focused on ensuring access to justice for consumers, workers, and communities injured by corporate or governmental wrongdoing.").

19. In sum, this empirical evidence demonstrates that the rates Class Counsel employ in their lodestar submission are in line with rates found in fee petitions approved by District of Columbia (and Court of Federal Claims) judges overseeing large fund class actions over the past 13 years.

III.
RATES FROM CLASS ACTION CASES ARE MORE APPROPRIATE COMPARATORS THAN THE FITZPATRIC MATRIX's BLENDED RATES

20. The Defendant's brief points out that the rates Class Counsel bill are generally higher, in some cases significantly so, than the rates found in the Fitzpatrick Matrix.[21] In my opinion, rates from class action cases are more appropriate comparators for Class Counsel's rates than the blended rates set forth in the Matrix for four reasons.

21. *First,* after generating a data base of rates drawn from 84 recent fee petitions in this District, Professor Fitzpatrick created the Matrix by assigning a single rate to each level of experience; each rate is therefore blended from the rates found in the 84 separate cases. But when I reviewed the entire PACER docket in each of Professor Fitzpatrick's 84 cases, I found that only 8 were class action cases and that many of the remaining 74 cases were routine fee-shifting matters.[22] One crude reflection of this is the number of docket entries per case: in the 74 non-

[21] Def. Br. at 5-6.

[22] Two cases in Professor Fitzpatrick's database were Fair Labor Standards Act (FLSA) cases. I remove those cases from the rest of my analysis because it is difficult to characterize them as either class action or non-class action matters. *See* 7 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* §§ 24:36 to 24:38 6th ed. & Supp. Dec. 2023) (examining on-going judicial debate about the difference between FLSA "certification" and Rule 23 class certification) [hereinafter "*Newberg and Rubenstein on Class Actions*"]. However, when we included the 2 FLSA cases as either class suits or non-class suits, they had no material effect on the conclusions that follow.

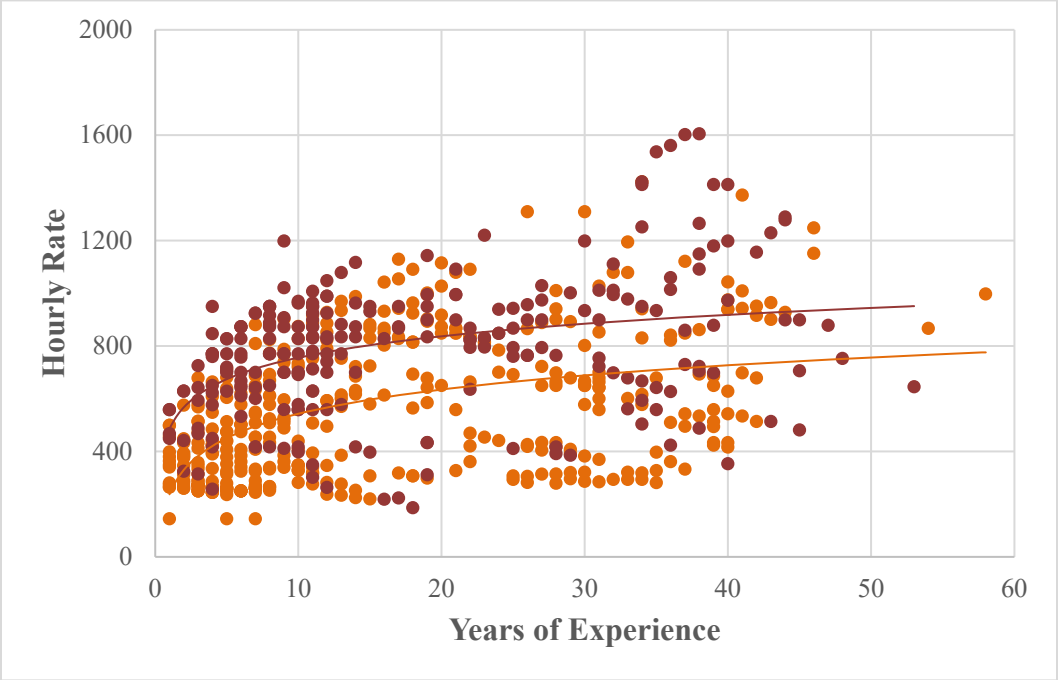
class action cases, the mean is 100 entries per case, with the median case having 54 entries, and more than 70% of those (54 out of 74) having fewer than 100 docket entries; for instance, more than 10% of the cases (8 out of 74) are simple Freedom of Information Act (FOIA) appeals, averaging about 42 docket entries each. By contrast, the average number of docket entries in the 8 class action cases is 1,207, with the median at 884.[23] Although Professor Fitzpatrick labels the Matrix rates as appropriate for "complex federal litigation,"[24] my own review of the dockets for the cases that comprise the Matrix suggests that most lack the level of novelty and complexity found in most class action cases, including this one.

22. *Second*, using the same scatterplot approach described in Part II, my research assistants compared the rates in the Matrix's 74 non-class action cases (396 data points) to the rates in its 8 class action cases (242 data points). What we found (when comparing the distance between the trendlines at the 242 points for which there were class action rates) was that the rates in the Matrix's 8 class action cases are on average 43.98% higher than the rates in its 74 non-class action cases. This scatterplot is set forth below as Graph 4, with the class action rates in red and the non-class action rates in orange.

[23] The 2 middle cases of the 8 class action matters have 850 and 918 docket entries and 884 is the midpoint of those 2.

[24] Fitzpatrick Dec. at 3 ("The cases included in the data set used to generate the hourly rate matrix constitute complex federal litigation, which caselaw establishes as encompassing a broad range of matters tried in federal court.").

GRAPH 4
MATRIX CLASS ACTION RATES COMPARED TO MATRIX NON-CLASS RATES



23. *Third,* then, when the proposed rates in this case are plotted against the class action rates in the Fitzpatrick Matrix, the rates in this case are, on average, precisely the same as (only .65% above) the Matrix's class action rates. What this means is that the *relevant* data that underlie the Matrix actually provide strong empirical evidence *in support of* the rates that Class Counsel propose here.

24. *Fourth,* using the blended Matrix rates as a point of comparison – as the Defendant's Brief implies is appropriate – confuses both the content and purpose of the Matrix.

- *Blended content*. A rate matrix reflects something like Esperanto content, blending rates from diverse cases into one flat spreadsheet. Such blended rates might be a good tool for high-volume, repeat-player situations where the differences across cases are relatively immaterial and the same attorneys often re-appear. Using a matrix approach

saves the fee-petitioning lawyers, their adversaries, and the courts, significant work.[25] But as the Matrix's own data show, in class action cases, blended matrix rates have little correlation with the actual hourly rates courts normally approve.

- *Litigation-avoidance goal.* Consistent with its blended nature, the stated goal of the Matrix is to pretermit the need for rate-related litigation across a run of cases. Specifically, the United States Attorney's Office – the party that will be *paying* the fees – explains that "[f]or matters in which a prevailing party agrees to payment pursuant to this fee matrix, [it] will not request that a prevailing party offer the additional evidence that the law otherwise requires."[26] In other words, the Matrix is an offer, in an adversarial situation, by one side to the other of a litigation safe harbor; as such, it is something of a compromise, like any dispute resolution offer.

25. Given this context, it becomes clear that proffering the Matrix as a litigation safe harbor is quite different than deploying the Matrix as evidence, which is what the Defendant attempts to do here. The Defendant's brief implies that the Matrix provides the right billing rates for this case, in other words, that these rates are those used "in the community for similar services."[27] But the Defendant makes no attempt to show that – other than to note that some courts have preferred the Fitzpatrick Matrix to other matrices or fee approaches in other cases – while

[25] This is particularly true when the matrix is updated regularly and carefully constructed, which the Fitzpatrick Matrix is, as compared to the prior *Laffey* Matrix. While I have long been a critic of the *Laffey* Matrix, *see* 5 *Newberg and Rubenstein on Class Actions* § 15:43; William B. Rubenstein, *Reasonable Rates: Time To Reload The (Laffey) Matrix,* 2 Class Action Attorney Fee Digest 47 (February 2008), available at https://billrubenstein.com/wp-content/uploads/2019/08/Rubenstein_Feb08_column.pdf, Professor Fitzpatrick's rebooting of the matrix provides an empirical basis more recent, robust, and thorough than the now 40-year old data upon which the original *Laffey* Matrix was based.

[26] U.S. Attorney's Office for the District of Columbia, Civil Division, The Fitzpatrick Matrix, Explanatory Notes, at 2 (Note 3), available at https://www.justice.gov/usao-dc/page/file/1504396/download. *See also id.*, at 1 (Note 1) ("This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared to assist with resolving requests for attorney's fees . . .").

[27] *Id.* (citing *Eley v. District of Columbia*, 793 F.3d 97, 104 (D.C. Cir. 2015) (quoting *Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995) (requiring "evidence that [the] 'requested rates are in line with those prevailing in the community for similar services'")).

nonetheless alleging that Class Counsel's rates are "above-market" and that the Matrix represents "prevailing market rates."[28] It is one thing for a party on the hook for fees to publish fee levels it pledges not to contest, but a different thing entirely for that party to assert that these blended safe harbor rates are "prevailing market rates" in all cases. Given the Defendant's general self-interest,[29] the blended safe harbor rates are entitled to no special deference in *litigated* rate disputes but should be put to the same test as any other proposal: do they accurately reflect prevailing rates in the community for services similar to those provided *in this case*. As shown in Part I and by the Matrix's own data, the Matrix's blended rates clearly do not reflect prevailing rates in this community for class action practitioners.

26. In sum, the blended rates in the Fitzpatrick Matrix may serve as a helpful means for avoiding rate disputes in high volume situations, where repeat-playing attorneys undertake relatively similar work case-to-case. But, as the rates found in the Matrix's 8 class action cases demonstrate, the blended rates are not a good reference point for class action cases.

* * *

[28] Def. Br. at 6-7.

[29] 5 *Newberg and Rubenstein on Class Actions*, at § 15:43 ("[I]t is particularly peculiar that courts often rely on the version of the matrix produced by the U.S. Attorney's Office for the District of Columbia, as that that office is not a neutral purveyor of the matrix: given that the government is typically the defendant in fee-shifting cases and, thus, generally the party responsible for paying the fees, it is self-interested and has an incentive to present low hourly rates. Not surprisingly, therefore, the rates calculated by the USAO are typically well below market rates in most parts of the country.").

27. I have testified that:

- Data drawn from comparable class actions in this District – in my own dataset and in the 8 class action cases in the Fitzpatrick Matrix database – provide strong support for the conclusion that the hourly billing rates Class Counsel employ in their lodestar cross-check are reasonable.

- Rates drawn from class actions are better points of comparison for Class Counsel's billing rates in this case than are blended rates drawn from a matrix, which is meant to serve as a means for avoiding rate disputes in repeat, high volume, cookie-cutter litigation.

October 2, 2023 William B. Rubenstein

EXHIBIT A

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ACADEMIC EMPLOYMENT

HARVARD LAW SCHOOL, CAMBRIDGE MA

Bruce Bromley Professor of Law	2018-present
Sidley Austin Professor of Law	2011-2018
Professor of Law	2007-2011
Bruce Bromley Visiting Professor of Law	2006-2007
Visiting Professor of Law	2003-2004, 2005-2006
Lecturer in Law	1990-1996

Courses: Civil Procedure; Class Action Law; Remedies
Awards: 2012 Albert M. Sacks-Paul A. Freund Award for Teaching Excellence
Membership: American Law Institute; American Bar Foundation Fellow

UCLA SCHOOL OF LAW, LOS ANGELES CA

Professor of Law	2002-2007
Acting Professor of Law	1997-2002

Courses: Civil Procedure; Complex Litigation; Remedies
Awards: 2002 Rutter Award for Excellence in Teaching
Top 20 California Lawyers Under 40, *Calif. Law Business* (2000)

STANFORD LAW SCHOOL, STANFORD CA

Acting Associate Professor of Law	1995-1997

Courses: Civil Procedure; Federal Litigation
Awards: 1997 John Bingham Hurlbut Award for Excellence in Teaching

YALE LAW SCHOOL, NEW HAVEN CT

Lecturer in Law	1994, 1995

BENJAMIN N. CARDOZO SCHOOL OF LAW, NEW YORK NY

Visiting Professor	Summer 2005

LITIGATION-RELATED EMPLOYMENT

AMERICAN CIVIL LIBERTIES UNION, NATIONAL OFFICE, NEW YORK NY

Project Director and Staff Counsel	1987-1995

-Litigated impact cases in federal and state courts throughout the United States.
-Supervised a staff of attorneys at the national office, oversaw work of ACLU attorneys around the country and coordinated work with private cooperating counsel nationwide.
-Significant experience in complex litigation practice and procedural issues; appellate litigation; litigation coordination, planning and oversight.

HON. STANLEY SPORKIN, U.S. DISTRICT COURT, WASHINGTON DC

Law Clerk	1986-87

PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON DC

Intern	Summer 1985

EDUCATION

HARVARD LAW SCHOOL, CAMBRIDGE MA
J.D., 1986, *magna cum laude*

YALE COLLEGE, NEW HAVEN CT
B.A., 1982, *magna cum laude*
Editor-in-Chief, YALE DAILY NEWS

SELECTED COMPLEX LITIGATION EXPERIENCE

Professional Service and Highlighted Activities

◊ *Author,* NEWBERG AND RUBENSTEIN ON CLASS ACTIONS (6th ed. 2022); NEWBERG ON CLASS ACTIONS (sole author since 2008, sole author of entirely re-written Fifth Edition (2011-2019))

◊ *Speaker,* Judicial Panel on Multidistrict Litigation, Multidistrict Litigation (MDL) Transferee Judges Conference, Palm Beach, Florida (provided presentation to MDL judges on recent developments in class action law and related topics (2010, 2011, 2013-2019)

◊ *Panelist,* Federal Judicial Center, *Managing Multidistrict Litigation and Other Complex Litigation Workshop* (for federal judges) (March 15, 2018)

◊ *Amicus curiae,* authored *amicus* brief on proper approach to incentive awards in class action lawsuits in conjunction with motion for rehearing *en banc* in the United States Court of Appeals for the Eleventh Circuit (*Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020))

◊ *Amicus curiae,* authored *amicus* brief in United States Supreme Court on proper approach to *cy pres* award in class action lawsuits (*Frank v. Gaos*, 139 S. Ct. 1041 (2019))

◊ *Amicus curiae,* authored *amicus* brief in California Supreme Court on proper approach to attorney's fees in common fund cases (*Laffitte v. Robert Half Int'l Inc.*, 376 P.3d 672, 687 (Cal. 2016) (noting reliance on *amicus* brief))

◊ *Amicus curiae,* authored *amicus* brief in the United States Supreme Court filed on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011))

◊ *Adviser,* American Law Institute, *Project on the Principles of the Law of Aggregate Litigation*, Philadelphia, Pennsylvania

◊ *Advisory Board, Class Action Law Monitor* (Strafford Publications), 2008-

◊ *Co-Chair,* ABA Litigation Section, Mass Torts Committee, Class Action Sub-Committee, 2007

◊ *Planning Committee,* American Bar Association, Annual National Institute on Class Actions Conference, 2006, 2007

◊ "*Expert's Corner*" (Monthly Column), *Class Action Attorney Fee Digest,* 2007-2011

Judicial Appointments

◊ *Co-Mediator.* Appointed by the United States District Court for the Eastern District of Pennsylvania to help mediate a complex attorney's fees issue (*In re National Football League Players' Concussion Injury Litigation*, Civil Action No. 2:12-md-02323 (E.D. Pa. June-September 2022))

◊ *Meditator.* Appointed by the United States District Court for the Southern District of New York to mediate a set of complex issues in civil rights class action (*Grottano v. City of New York*, Civil Action No. 15-cv-9242 (RMB) (May 2020-January 2021))

◊ *Expert consultant.* Appointed by the United States District Court for the Northern District of Ohio, and Special Master, as an expert consultant on class certification and attorney's fees issues in complex multidistrict litigation (*National Prescription Opiate Litigation,* MDL 2804, Civil Action No. 1:17-md-2804 (N.D. Ohio Aug. 13, 2018; June 29, 2019; March 10, 2020))

◊ *Expert witness.* Appointed by the United States District Court for the Eastern District of Pennsylvania as an expert witness on attorney's fees in complex litigation, with result that the Court adopted recommendations (*In re National Football League Players' Concussion Injury Litigation*, 2018 WL 1658808 (E.D. Pa. April 5, 2018))

◊ *Appellate counsel.* Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom.*, *DeValerio v. Olinski*, 673 F. App'x 87, 90 (2d Cir. 2016))

Expert Witness

◊ Submitted expert witness declarations concerning reasonableness of – and proper approach to – attorney's fees in context of issue class action judgment (*James, et al., v. PacifiCorp, et al.,* Civil Action No. 20CV33885 (Oregon Circuit Court, Multnomah Cty. 2023))

◊ Retained as an expert witness concerning reasonableness of attorney's fee request (*In re Wells Fargo & Company Securities Litigation*, Case No. 1:20-cv-04494-GHW (S.D.N.Y. 2023))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*In re Facebook, Inc. Consumer Privacy User Profile Litigation,* Civil Action No. 3:18-cv-02843-VC (N.D. Cal. 2023))

◊ Submitted expert witness declaration concerning constitutionality of proposed procedures for resolving aggregate claims within a bankruptcy proceeding (*In re PG&E Corporation and Pacific Gas and Electric Company,* Bankruptcy Case No. 19-30088 (N.D. Cal. Bankrpt. 2023))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Health Republic Insurance Company v. United States,* Civil Action No. 1:16-cv-0259C (Ct. Fed. Cl. 2023))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Benson, et al. v. DoubleDown Interactive, LLC, et al.,* Civil Action No. 2:18-cv-00525 (W.D. Wash. 2023))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fees request (*In re Twitter Inc. Securities Litigation,* Case No. 4:16-cv-05314 (N.D. Cal. October 13, 2022))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Ferrando v. Zynga Inc.,* Civil Action No. 2:22-cv-00214 (W.D. Wash. 2022))

◊ Submitted an expert witness declaration concerning reasonableness of proposed settlement in nationwide securities class action, in light of competing litigation (*In re Lyft, Inc. Securities Litigation,* Case No. 4:19-cv-02690 (N.D. Cal. August 19, 2022))

◊ Submitted an expert witness declaration concerning reasonableness of common benefit attorney's fee request (*In re: Zetia (Ezetimibe) Antitrust Litigation*, MDL No. 2836, 2:18-md-2836 (E.D. Va. July 12, 2022))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Reed v. Scientific Games Corp.,* Civil Action No. 2:18-cv-00565 (W.D. Wash. 2022))

◊ Submitted an expert witness declaration concerning reasonableness of proposed settlement in nationwide securities class action, in light of competing litigation (*In re Micro Focus International PLC Securities Litigation,* Master File No. 1:18-cv-06763 (S.D.N.Y., May 4, 2022))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Americredit Financial Services, Inc., d/b/a/ GM Financial v. Bell,* No. 15SL-AC24506-01 (Twenty-First Judicial Circuit Court, St. Louis County, Missouri, March 13, 2022))

◊ Submitted an expert witness declaration concerning reasonableness of common benefit attorney's fee request (*In re: Marjory Stoneman Douglas High School Shooting FTCA Litigation*, Case No. 0:18-cv-62758 (S.D. Fla. February 7, 2022))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*City of Westland Police & Fire Ret. Sys. v. MetLife, Inc*., No. 12-CV-0256 (LAK), 2021 WL 2453972(S.D.N.Y. June 15, 2021))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Kater v. Churchill Downs,* Civil Action No. 2:15-cv-00612 (W.D. Wash. 2020))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Wilson v. Playtika, LTD,* Civil Action No. 3:18-cv-05277 (W.D. Wash. 2020))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Wilson v. Huuuge,* Civil Action No. 3:18-cv-005276 (W.D. Wash. 2020))

◊ Submitted expert witness declarations and testified at fairness hearing concerning (1) reasonableness of attorney's fee request and (2) empirical data confirming robustness of class claims rate (*In re*

Facebook Biometric Information Privacy Litigation, Civil Action No. 3:15-cv-03747-JD (N.D. Cal. (2020))

◊ Retained as an expert witness on issues regarding the Lead Plaintiff/Lead Counsel provisions of the Private Securities Litigation Reform Act of 1995 (PSLRA) (*In re Apple Inc. Securities Litigation.,* Civil Action No. 4:19-cv-02033-YGR (N.D. Cal. (2020))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Amador v. Baca*, Civil Action No. 2:10-cv-01649 (C.D. Cal. February 9, 2020))

◊ Submitted an expert witness declaration concerning reasonableness of class action settlement (*In re: Columbia Gas Cases*, Civil Action No. 1877CV01343G (Mass. Super. Ct., Essex County, February 6, 2020))

◊ Submitted an expert witness declaration, and reply declaration, concerning reasonableness of attorney's fee request (*Hartman v. Pompeo*, Civil Action No. 1:77-cv-02019 (D.D.C. October 10, 2019; February 28, 2020))

◊ Submitted an expert witness declaration concerning reasonableness of common benefit attorney's fee request (*In re: Generic Pharmaceuticals Pricing Antitrust Litigation*, MDL No. 2724, 16-MD-2724 (E.D. Pa. May 15, 2019))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, relied upon by court in awarding fees (*Hale v. State Farm Mut. Auto. Ins. Co*., 2018 WL 6606079 (S.D. Ill. Dec. 16, 2018))

◊ Submitted expert witness affidavit and testified at fairness hearing concerning second phase fee issues in common fund class action (*Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.,* Case No. 217-2010-CV-00294 (New Hampshire Superior Court, Merrimack County (2018))

◊ Submitted expert witness report – and rebutted opposing expert – concerning class certification issues for proposed class action within a bankruptcy proceeding (*In re Think Finance,* Case No. 17-33964 (N.D. Tex. Bankrpt. 2018))

◊ Submitted expert witness declaration concerning specific fee issues raised by Court at fairness hearing and second declaration in response to report of Special Master (*In re Anthem, Inc. Data Breach Litigation,* Case No. 15-MD-02617-LHK (N.D. Cal. 2018))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request following plaintiffs' verdict at trial in consumer class action (*Krakauer v. Dish Network, L.L.C.,* Civil Action No. 1:14-cv-00333 (M.D.N.C. 2018))

◊ Submitted three expert witness declarations and deposed by/testified in front of Special Master in investigation concerning attorney's fee issues (*Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*, Civ. Action No. 1:11-cv-10230 (D. Mass. 2017-18))

◊ Retained as an expert witness on issues regarding the preclusive effect of a class action judgment on later cases (*Sanchez v. Allianz Life Insurance Co. of N. Amer.,* Case No. BC594715 (California Superior

Court, Los Angeles County (2018))

◊ Retained as an expert witness and submitted report explaining meaning of the denial of a motion to dismiss in American procedure to foreign tribunals (*In re Qualcomm Antitrust Matter,* declaration submitted to tribunals in Korea and Taiwan (2017))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 3.0-liter settlement, referenced by court in awarding fees (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 3175924 (N.D. Cal. July 21, 2017))

◊ Retained as an expert witness concerning impracticability of joinder in antitrust class action (*In re Celebrex (Celecoxib) Antitrust Litigation,* Civ. Action No. 2-14-cv-00361 (E.D. Va. (2017))

◊ Submitted an expert witness declaration and deposed concerning impracticability of joinder in antitrust class action (*In re Modafinil Antitrust Litigation,* Civ. Action No. 2-06-cv-01797 (E.D. Pa. (2017))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 2.0-liter settlement (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 1047834 (N.D. Cal., March 17, 2017))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Aranda v. Caribbean Cruise Line, Inc.,* 2017 WL 1368741 (N.D. Ill., April 10, 2017))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*McKinney v. United States Postal Service*, Civil Action No. 1:11-cv-00631 (D.D.C. (2016))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Geancopoulos v. Philip Morris USA Inc.,* Civil Action No. 98-6002-BLS1 (Mass. Superior Court, Suffolk County))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Gates v. United Healthcare Insurance Company,* Case No. 11 Civ. 3487 (S.D.N.Y. 2015))

◊ Retained as an expert trial witness on class action procedures and deposed prior to trial in matter that settled before trial (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*In re High-Tech Employee Antitrust Litig*., 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015))

◊ Retained as an expert witness concerning adequacy of putative class representatives in securities class action (*Medoff v. CVS Caremark Corp.,* Case No. 1:09-cv-00554 (D.R.I. (2015))

◊ Submitted an expert witness declaration concerning reasonableness of proposed class action settlement, settlement class certification, attorney's fees, and incentive awards (*Fitzgerald Farms, LLC v. Chespeake Operating, L.L.C.,* Case No. CJ-2010-38, Dist. Ct., Beaver County, Oklahoma (2015))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Asghari v. Volkswagen Grp. of Am., Inc*., 2015 WL 12732462 (C.D. Cal. May 29, 2015))

◊ Submitted an expert witness declaration concerning propriety of severing individual cases from class action and resulting statute of repose ramifications (*In re: American International Group, Inc. 2008 Securities Litigation,* 08-CV-4772-LTS-DCF (S.D.N.Y. (2015))

◊ Retained by Fortune Global 100 Corporation as an expert witness on fee matter that settled before testimony (2015)

◊ Submitted an expert witness declaration and testified at Special Master proceeding concerning reasonableness of attorney's fee allocation in sealed fee mediation (2014-2015)

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*In re: Hyundai and Kia Fuel Economy Litigation,* MDL 13-02424 (C.D. Cal. (2014))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Ammari Electronics v. Pacific Bell Directory*, Case No. RG0522096, California Superior Court, Alameda County (2014))

◊ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc.,* Case No. CGC-10-497839, California Superior Court, San Francisco County (2014))

◊ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Credit Suisse Securities (USA) LLC,* Case No. CGC-10-497840, California Superior Court, San Francisco County (2014))

◊ Retained as expert witness on proper level of common benefit fee in MDL (*In re Neurontin Marketing and Sales Practice Litigation,* Civil Action No. 04-10981, MDL 1629 (D. Mass. (2014))

◊ Submitted an expert witness declaration concerning Rule 23(g) selection of competing counsel, referenced by court in deciding issue (*White v. Experian Information Solutions, Inc.,* 993 F. Supp. 2d

1154 (C.D. Cal. (2014))

◊ Submitted an expert witness declaration concerning proper approach to attorney's fees under California law in a statutory fee-shifting case (*Perrin v. Nabors Well Services Co.,* Case No. 1220037974, Judicial Arbitration and Mediation Services (JAMS) (2013))

◊ Submitted an expert witness declaration concerning fairness and adequacy of proposed nationwide class action settlement (*Verdejo v. Vanguard Piping Systems,* Case No. BC448383, California Superior Court, Los Angeles County (2013))

◊ Retained as an expert witness regarding fairness, adequacy, and reasonableness of proposed nationwide consumer class action settlement (*Herke v. Merck,* No. 2:09-cv-07218, MDL Docket No. 1657 (*In re Vioxx Products Liability Litigation*) (E. D. La. (2013))

◊ Retained as an expert witness concerning ascertainability requirement for class certification and related issues (*Henderson v. Acxiom Risk Mitigation, Inc.,* Case No. 3:12-cv-00589-REP (E.D. Va. (2013))

◊ Submitted an expert witness declaration concerning reasonableness of class action settlement and performing analysis of Anet expected value@ of settlement benefits, relied on by court in approving settlement (*In re Navistar Diesel Engine Products Liab. Litig.*, 2013 WL 10545508 (N.D. Ill. July 3, 2013))

◊ Submitted an expert witness declaration concerning reasonableness of class action settlement and attorney's fee request (*Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013))

◊ Submitted an expert witness declaration concerning propriety of preliminary settlement approval in nationwide consumer class action settlement (*Anaya v. Quicktrim, LLC,* Case No. CIVVS 120177, California Superior Court, San Bernardino County (2012))

◊ Submitted expert witness affidavit concerning fee issues in common fund class action (*Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.,* Case No. 217-2010-CV-00294, New Hampshire Superior Court, Merrimack County (2012))

◊ Submitted expert witness declaration and deposed concerning class certification issues in nationwide fraud class action, relied upon by the court in affirming class certification order (*CVS Caremark Corp. v. Lauriello,* 175 So. 3d 596, 609-10 (Ala. 2014))

◊ Submitted expert witness declaration in securities class action concerning value of proxy disclosures achieved through settlement and appropriate level for fee award (*Rational Strategies Fund v. Jhung,* Case No. BC 460783, California Superior Court, Los Angeles County (2012))

◊ Submitted an expert witness report and deposed concerning legal malpractice in the defense of a class action lawsuit (*KB Home v. K&L Gates, LLP,* Case No. BC484090, California Superior Court, Los Angeles County (2011))

◊ Retained as expert witness on choice of law issues implicated by proposed nationwide class certification (*Simon v. Metropolitan Property and Cas. Co.,* Case No. CIV-2008-1008-W (W.D. Ok. (2011))

◊ Retained, deposed, and testified in court as expert witness in fee-related dispute (*Blue, et al. v. Hill*,Case No. 3:10-CV-02269-O-BK (N.D. Tex. (2011))

◊ Retained as an expert witness in fee-related dispute (*Furth v. Furth*, Case No. C11-00071-DMR (N.D. Cal. (2011))

◊ Submitted expert witness declaration concerning interim fee application in complex environmental class action (*DeLeo v. Bouchard Transportation,* Civil Action No. PLCV2004-01166-B, Massachusetts Superior Court (2010))

◊ Retained as an expert witness on common benefit fee issues in MDL proceeding in federal court (*In re Vioxx Products Liability Litigation*, MDL Docket No. 1657 (E.D. La. (2010))

◊ Submitted expert witness declaration concerning fee application in securities case, referenced by court in awarding fee (*In re AMICAS, Inc. Shareholder Litigation,* 27 Mass. L. Rptr. 568 (Mass. Sup. Ct. (2010))

◊ Submitted an expert witness declaration concerning fee entitlement and enhancement in non-common fund class action settlement, relied upon by the court in awarding fees (*Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172-74 (C.D. Cal. 2010))

◊ Submitted an expert witness declaration concerning class action fee allocation among attorneys (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

◊ Submitted an expert witness declaration concerning settlement approval and fee application in wage and hour class action settlement (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

◊ Submitted an expert witness declaration concerning objectors' entitlement to attorney's fees (*Rodriguez v. West Publishing Corp.,* Case No. CV-05-3222 (C.D. Cal. (2010))

◊ Submitted an expert witness declaration concerning fairness of settlement provisions and processes, relied upon by the Ninth Circuit in reversing district court's approval of class action settlement (*Radcliffe v. Experian Inform. Solutions Inc.*, 715 F.3d 1157, 1166 (9th Cir. 2013))

◊ Submitted an expert witness declaration concerning attorney's fees in class action fee dispute, relied upon by the court in deciding fee issue (*Ellis v. Toshiba America Information Systems, Inc.*, 218 Cal. App. 4th 853, 871, 160 Cal. Rptr. 3d 557, 573 (2d Dist. 2013))

◊ Submitted an expert witness declaration concerning common benefit fee in MDL proceeding in federal court (*In re Genetically Modified Rice Litigation*, MDL Docket No. 1811 (E.D. Mo. (2009))

◊ Submitted an expert witness declaration concerning settlement approval and fee application in national MDL class action proceeding (*In re Wal-Mart Wage and Hour Employment Practices Litigation*, MDL Docket No.1735 (D. Nev. (2009))

◊ Submitted an expert witness declaration concerning fee application in national MDL class action proceeding, referenced by court in awarding fees (*In re Dept. of Veterans Affairs (VA) Data Theft Litigation*, 653 F. Supp.2d 58 (D.D.C. (2009))

◊ Submitted an expert witness declaration concerning common benefit fee in mass tort MDL proceeding in federal court (*In re Kugel Mesh Products Liability Litigation*, MDL Docket No. 1842 (D. R.I. (2009))

◊ Submitted an expert witness declaration and supplemental declaration concerning common benefit fee in consolidated mass tort proceedings in state court (*In re All Kugel Mesh Individual Cases*, Master Docket No. PC-2008-9999, Superior Court, State of Rhode Island (2009))

◊ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Warner v. Experian Information Solutions, Inc.*, Case No. BC362599, California Superior Court, Los Angeles County (2009))

◊ Submitted an expert witness declaration concerning process for selecting lead counsel in complex MDL antitrust class action (*In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869 (D. D.C. (2008))

◊ Retained, deposed, and testified in court as expert witness on procedural issues in complex class action (*Hoffman v. American Express*, Case No. 2001-022881, California Superior Court, Alameda County (2008))

◊ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Salsgiver v. Yahoo! Inc.*, Case No. BC367430, California Superior Court, Los Angeles County (2008))

◊ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Voight v. Cisco Systems, Inc.*, Case No. 106CV075705, California Superior Court, Santa Clara County (2008))

◊ Retained and deposed as expert witness on fee issues in attorney fee dispute (*Stock v. Hafif,* Case No. KC034700, California Superior Court, Los Angeles County (2008))

◊ Submitted an expert witness declaration concerning fee application in consumer class action (*Nicholas v. Progressive Direct*, Civil Action No. 06-141-DLB (E.D. Ky. (2008))

◊ Submitted expert witness declaration concerning procedural aspects of national class action arbitration (*Johnson v. Gruma Corp.,* JAMS Arbitration No. 1220026252 (2007))

◊ Submitted expert witness declaration concerning fee application in securities case (*Drulias v. ADE Corp.,* Civil Action No. 06-11033 PBS (D. Mass. (2007))

◊ Submitted expert witness declaration concerning use of expert witness on complex litigation matters in criminal trial (*U.S. v. Gallion, et al*., No. 07-39 (E. D. Ky. (2007))

◊ Retained as expert witness on fees matters (*Heger v. Attorneys' Title Guaranty Fund, Inc.,* No. 03-L-398, Illinois Circuit Court, Lake County, IL (2007))

◊ Retained as expert witness on certification in statewide insurance class action (*Wagner v. Travelers Property Casualty of America*, No. 06CV338, Colorado District Court, Boulder County, CO (2007))

◊ Testified as expert witness concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corporate Derivative Litigation*, Case No. 01098905, California Superior Court, Santa Barbara Cty, CA (2006))

◊ Submitted expert witness declaration concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corp. Corporate Derivative Litigation*, Case No. CV-03-11 RSWL (C.D. Cal. (2006))

◊ Retained as expert witness as to certification of class action (*Canova v. Imperial Irrigation District*, Case No. L-01273, California Superior Court, Imperial Cty, CA (2005))

◊ Retained as expert witness as to certification of nationwide class action (*Enriquez v. Edward D. Jones & Co.,* Missouri Circuit Court, St. Louis, MO (2005))

◊ Submitted expert witness declaration on procedural aspects of international contract litigation filed in court in Korea (*Estate of Wakefield v. Bishop Han & Jooan Methodist Church* (2002))

◊ Submitted expert witness declaration as to contested factual matters in case involving access to a public forum (*Cimarron Alliance Foundation v. The City of Oklahoma City,* Case No. Civ. 2001-1827-C (W.D. Ok. (2002))

◊ Submitted expert witness declaration concerning reasonableness of class certification, settlement, and fees (*Baird v. Thomson Elec. Co.*, Case No. 00-L-000761, Cir. Ct., Mad. Cty, IL (2001))

Expert Consultant

◊ Retained as a consulting expert in complex MDL/class action concerning attorney's fees issues (2023)

◊ Retained as an expert in confidential matter pending in international arbitration forum concerning litigation financing issues in complex litigation (2022-2023)

◊ Retained as an expert in matter pending in several federal courts concerning attorney's fees in class action setting (2022-2023)

◊ Retained as an expert witness on class action issues in complex mass tort MDL (*In re Roundup Products Liability Litigation,* Civil Action No. 3:16-md-02741-VC (N.D. Cal. (2020))

◊ Provided expert consulting services to Harvard Law School Predatory Lending and Consumer Protection Clinic concerning complex class action issues in bankruptcy (*In re: ITT Educational Services Inc.,* Case No. 16-07207-JMC-7A (Bank. S.D. Ind. 2020))

◊ Provided expert consulting services to law firm concerning complex federal procedural and bankruptcy issues (*Homaidan v. Navient Solutions, LLC*, Adv. Proc. No. 17-1085 (Bank. E.D.N.Y 2020))

◊ Provided expert consulting services to the ACLU on multi-district litigation issues arising out of various challenges to President Trump's travel ban and related policies (*In re American Civil Liberties Union Freedom of Information Act Requests Regarding Executive Order 13769*, Case Pending No. 28, Judicial Panel on Multidistrict Litigation (2017); *Darweesh v. Trump*, Case No. 1:17-cv-00480-CBA-LB (E.D.N.Y. (2017))

◊ Provided expert consulting services to law firm regarding billing practices and fee allocation issues in nationwide class action (2016)

◊ Provided expert consulting services to law firm regarding fee allocation issues in nationwide class action (2016)

◊ Provided expert consulting services to the ACLU of Southern California on class action and procedural issues arising out of challenges to municipality's treatment of homeless persons with disabilities (*Glover v. City of Laguna Beach*, Case No. 8:15-cv-01332-AG-DFM (C.D. Cal. (2016))

◊ Retained as an expert consultant on class certification issues (*In re: Facebook, Inc., IPO Securities and Derivative Litigation*, No. 1:12-md-2389 (S.D.N.Y. 2015))

◊ Provided expert consulting services to lead class counsel on class certification issues in nationwide class action (2015)

◊ Retained by a Fortune 100 Company as an expert consultant on class certification issues

◊ Retained as an expert consultant on class action and procedure related issues (*Lange et al v. WPX Energy Rocky Mountain LLC*, Case No. 2:13-cv-00074-ABJ (D. Wy. (2013))

◊ Retained as an expert consultant on class action and procedure related issues (*Flo & Eddie, Inc., v. Sirius XM Radio, Inc.*, Case No. CV 13-5693 (C.D. Cal. (2013))

◊ Served as an expert consultant on substantive and procedural issues in challenge to legality of credit card late and over-time fees (*In Re Late Fee and Over-Limit Fee Litigation*, 528 F.Supp.2d 953 (N.D. Cal. 2007), *aff'd*, 741 F.3d 1022 (9th Cir. 2014))

◊ Retained as an expert on Class Action Fairness Act (CAFA) removal issues and successfully briefed and argued remand motion based on local controversy exception (*Trevino, et al. v. Cummins, et al.*, No. 2:13-cv-00192-JAK-MRW (C. D. Cal. (2013))

◊ Retained as an expert consultant on class action related issues by consortium of business groups (*In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179 (E.D. La. (2012))

◊ Provided presentation on class certification issues in nationwide medical monitoring classes (*In re: National Football League Players' Concussion Injury Litigation,* MDL No. 2323, Case No. 2:12-md-02323-AB (E.D. Pa. (2012))

◊ Retained as an expert consultant on class action related issues in mutli-state MDL consumer class action

(*In re Sony Corp. SXRD Rear Projection Television Marketing, Sales Practices & Prod. Liability Litig.*, MDL No. 2102 (S.D. N.Y. (2009))

◊ Retained as an expert consultant on class action certification, manageability, and related issues in mutli-state MDL consumer class action (*In re Teflon Prod. Liability Litig.*, MDL No. 1733 (S.D. Iowa (2008))

◊ Retained as an expert consultant/co-counsel on certification, manageability, and related issues in nationwide anti-trust class action (*Brantley v. NBC Universal*, No.- CV07-06101 (C.D. Cal. (2008))

◊ Retained as an expert consultant on class action issues in complex multi-jurisdictional construction dispute (*Antenucci, et al., v. Washington Assoc. Residential Partner, LLP, et al.,* Civil No. 8-04194 (E.D. Pa. (2008))

◊ Retained as an expert consultant on complex litigation issues in multi-jurisdictional class action litigation (*McGreevey v. Montana Power Company*, No. 08-35137, U.S. Court of Appeals for the Ninth Circuit (2008))

◊ Retained as an expert consultant on class action and attorney fee issues in nationwide consumer class action (*Figueroa v. Sharper Image*, 517 F.Supp.2d 1292 (S.D. Fla. 2007))

◊ Retained as an expert consultant on attorney's fees issue in complex class action case (*Natural Gas Anti-Trust Cases Coordinated Proceedings*, D049206, California Court of Appeals, Fourth District (2007))

◊ Retained as an expert consultant on remedies and procedural matters in complex class action (*Sunscreen Cases*, JCCP No. 4352, California Superior Court, Los Angeles County (2006))

◊ Retained as an expert consultant on complex preclusion questions in petition for review to California Supreme Court (*Mooney v. Caspari,* Supreme Court of California (2006))

◊ Retained as an expert consultant on attorney fee issues in complex common fund case (*In Re DietDrugs (Phen/Fen) Products Liability Litigation* (E. D. Pa. (2006))

◊ Retained as an expert consultant on procedural matters in series of complex construction lien cases (*In re Venetian Lien Litigation*, Supreme Court of the State of Nevada (2005-2006))

◊ Served as an expert consultant on class certification issues in countywide class action (*Beauchamp v. Los Angeles Cty. Metropolitan Transp. Authority*, (C.D. Cal. 2004))

◊ Served as an expert consultant on class certification issues in state-wide class action (*Williams v. State of California*, Case No. 312-236, Cal. Superior Court, San Francisco)

◊ Served as an exert consultant on procedural aspects of complex welfare litigation (*Allen v. Anderson*, 199 F.3d 1331 (9th Cir. 1999))

Ethics Opinions

◊ Retained to provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2017))

◊ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2013))

◊ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2011))

◊ Provided expert opinion on issues of professional ethics in implicated by nationwide class action practice (*In re Professional Responsibility Inquiries* (2010))

◊ Provided expert opinion on issues of professional ethics implicated by complex litigation matter (*In re Professional Responsibility Inquiries* (2010))

◊ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2007))

Publications on Class Actions & Procedure

◊ NEWBERG AND RUBENSTEIN ON CLASS ACTIONS (6th ed. 2022); NEWBERG ON CLASS ACTIONS (sole author since 2008, sole author of entirely re-written Fifth Edition (2011-2019)

◊ *Deconstitutionalizing Personal Jurisdiction: A Separation of Powers Approach*, Harvard Public Law Working Paper No. 20-34, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715068.

◊ *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEXAS L. REV.73 (2020) (with Francis E. McGovern)

◊ *Profit for Costs*, 63 DEPAUL L. REV. 587 (2014) (with Morris A. Ratner)

◊ *Procedure and Society: An Essay for Steve Yeazell*, 61 U.C.L.A. REV. DISC. 136 (2013)

◊ *Supreme Court Round-Up – Part II*, 5 CLASS ACTION ATTORNEY FEE DIGEST 331 (September 2011)

◊ *Supreme Court Round-Up – Part I*, 5 CLASS ACTION ATTORNEY FEE DIGEST 263 (July-August 2011)

◊ *Class Action Fee Award* Procedures, 5 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2011)

◊ *Benefits of Class Action Lawsuits*, 4 CLASS ACTION ATTORNEY FEE DIGEST 423 (November 2010)

◊ *Contingent Fees for Representing the Government: Developments in California Law*, 4 CLASS ACTION ATTORNEY FEE DIGEST 335 (September 2010)

◊ *Supreme Court Roundup*, 4 CLASS ACTION ATTORNEY FEE DIGEST 251 (July 2010)

◊ *SCOTUS Okays Performance Enhancements in Federal Fee Shifting Cases – At Least In Principle*, 4 CLASS ACTION ATTORNEY FEE DIGEST 135 (April 2010)

◊ *The Puzzling Persistence of the AMega-Fund@ Concept*, 4 CLASS ACTION ATTORNEY FEE DIGEST 39 (February 2010)

◊ *2009: Class Action Fee Awards Go Out With A Bang, Not A Whimper*, 3 CLASS ACTION ATTORNEY FEE DIGEST 483 (December 2009)

◊ *Privatizing Government Litigation: Do Campaign Contributors Have An Inside Track?*, 3 CLASS ACTION ATTORNEY FEE DIGEST 407 (October 2009)

◊ *Supreme Court Preview*, 3 CLASS ACTION ATTORNEY FEE DIGEST 307 (August 2009)

◊ *Supreme Court Roundup*, 3 CLASS ACTION ATTORNEY FEE DIGEST 259 (July 2009)

◊ *What We Now Know About How Lead Plaintiffs Select Lead Counsel (And Hence Who Gets Attorney's Fees!) in Securities Cases*, 3 CLASS ACTION ATTORNEY FEE DIGEST 219 (June 2009)

◊ *Beware Of Ex Ante Incentive Award Agreements*, 3 CLASS ACTION ATTORNEY FEE DIGEST 175 (May 2009)

◊ *On What a "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATTORNEY FEE DIGEST 87 (March 2009)

◊ *2009: Emerging Issues in Class Action Fee Awards*, 3 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2009)

◊ *2008: The Year in Class Action Fee Awards*, 2 CLASS ACTION ATTORNEY FEE DIGEST 465 (December 2008)

◊ *The Largest Fee Award – Ever!*, 2 CLASS ACTION ATTORNEY FEE DIGEST 337 (September 2008)

◊ *Why Are Fee Reductions Always 50%?: On The Imprecision of Sanctions for Imprecise Fee Submissions*, 2 CLASS ACTION ATTORNEY FEE DIGEST 295 (August 2008)

◊ *Supreme Court Round-Up,* 2 CLASS ACTION ATTORNEY FEE DIGEST 257 (July 2008)

◊ *Fee-Shifting For Wrongful Removals: A Developing Trend?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 177 (May 2008)

◊ *You Cut, I Choose: (Two Recent Decisions About) Allocating Fees Among Class Counsel*, 2 CLASS ACTION ATTORNEY FEE DIGEST 137 (April 2008)

◊ *Why The Percentage Method?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 93 (March 2008)

◊ *Reasonable Rates: Time To Reload The (*Laffey*) Matrix,* 2 CLASS ACTION ATTORNEY FEE DIGEST 47 (February 2008)

◊ *The "Lodestar Percentage" A New Concept For Fee Decisions?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2008)

◊ *Class Action Practice Today: An Overview, in* ABA SECTION OF LITIGATION, CLASS ACTIONS TODAY 4 (2008)

◊ *Shedding Light on Outcomes in Class Actions*, *in* CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20-59 (Joseph W. Doherty, Robert T. Reville, and Laura Zakaras eds. 2008) (with Nicholas M. Pace)

◊ *Finality in Class Action Litigation: Lessons From Habeas,* 82 N.Y.U. L. REV. 791 (2007)

◊ *The American Law Institute's New Approach to Class Action Objectors' Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 347 (November 2007)

◊ *The American Law Institute's New Approach to Class Action Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 307 (October 2007)

◊ *"The Lawyers Got More Than The Class Did!": Is It Necessarily Problematic When Attorneys Fees Exceed Class Compensation?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 233 (August 2007)

◊ *Supreme Court Round-Up,* 1 CLASS ACTION ATTORNEY FEE DIGEST 201 (July 2007)

◊ *On The Difference Between Winning and Getting Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 163 (June 2007)

◊ *Divvying Up The Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 127 (May 2007)

◊ *On Plaintiff Incentive Payments,* 1 CLASS ACTION ATTORNEY FEE DIGEST 95 (April 2007)

◊ *Percentage of What?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 63 (March 2007)

◊ *Lodestar v. Percentage: The Partial Success Wrinkle,* 1 CLASS ACTION ATTORNEY FEE DIGEST 31 (February 2007) (with Alan Hirsch)

◊ *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435 (2006) (excerpted in THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 447-449 (Richard A. Nagareda ed., 2009))

◊ *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709 (2006)

◊ *What a "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV. 2129(2004) (excerpted

in COMPLEX LITIGATION 63-72 (Kevin R. Johnson, Catherine A. Rogers & John Valery White eds., 2009)).

◊ *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002) (selected for the Stanford/Yale Junior Faculty Forum, June 2001)

◊ *A Transactional Model of Adjudication*, 89 GEORGETOWN L.J. 371 (2000)

◊ *The Myth of Superiority*, 16 CONSTITUTIONAL COMMENTARY 599 (1999)

◊ *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997) *(*excerpted in COMPLEX LITIGATION 120-123 (1998))

Selected Presentations

◊ *Class Action Law Update,* MDL Transferee Judges Conference, Palm Beach, Florida, October 24, 2023 (scheduled)

◊ *Opioid Litigation: What's New and What Does it Mean for Future Litigation?,* RAND Institute for Civil Justice and RAND Kenneth R. Feinberg Center for Catastrophic Risk Management and Compensation, RAND Corporation, October 22, 2020

◊ *The Opioid Crisis: Where Do We Go From Here?"* Clifford Symposium 2020, DePaul University College of Law, Chicago, Illinois, May 28-29, 2020)

◊ *Class Action Law Update,* MDL Transferee Judges Conference, Palm Beach, Florida, October 30, 2019

◊ *Class Action Law Update,* MDL Transferee Judges Conference, Palm Beach, Florida, October 31, 2018

◊ *Attorneys' Fees Issues,* MDL Transferee Judges Conference, Palm Beach, Florida, October 30, 2018

◊ *Panelist,* Federal Judicial Center, Managing Multidistrict Litigation and Other Complex Litigation Workshop (for federal judges) (March 15, 2018)

◊ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 1, 2017

◊ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2016

◊ *Judicial Power and its Limits in Multidistrict Litigation,* American Law Institute, Young Scholars Medal Conference, *The Future of Aggregate Litigation*, New York University School of Law, New York, New York, April 12, 2016

◊ *Class Action Update & Attorneys' Fees Issues Checklist,* MDL Transferee Judges Conference, Palm Beach, Florida, October 28, 2015

◊ *Class Action Law,* 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop, Tucson, Arizona,

January 26, 2015

◊ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2014

◊ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2013

◊ *Class Action Remedies,* ABA 2013 National Institute on Class Actions, Boston, Massachusetts, October 23, 2013

◊ *The Public Life of the Private Law: The Logic and Experience of Mass Litigation – Conference in Honor of Richard Nagareda,* Vanderbilt Law School, Nashville, Tennessee, September 27-28, 2013

◊ *Brave New World: The Changing Face of Litigation and Law Firm Finance*, Clifford Symposium 2013, DePaul University College of Law, Chicago, Illinois, April 18-19, 2013

◊ *Twenty-First Century Litigation: Pathologies and Possibilities: A Symposium in Honor of Stephen Yeazell,* UCLA Law Review, UCLA School of Law, Los Angeles, California, January 24-25, 2013

◊ *Litigation's Mirror: The Procedural Consequences of Social Relationships,* Sidley Austin Professor of Law Chair Talk, Harvard Law School, Cambridge, Massachusetts, October 17, 2012

◊ *Alternative Litigation Funding (ALF) in the Class Action Context – Some Initial Thoughts*, Alternative Litigation Funding: A Roundtable Discussion Among Experts, George Washington University Law School, Washington, D.C., May 2, 2012

◊ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Brooklyn Law School Faculty Workshop, Brooklyn, New York, April 2, 2012

◊ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Loyola Law School Faculty Workshop, Los Angeles, California, February 2, 2012

◊ *Recent Developments in Class Action Law and Impact on MDL Cases,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2011

◊ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 26, 2010

◊ *A General Theory of the Class Suit*, University of Houston Law Center Colloquium, Houston, Texas, February 3, 2010

◊ *Unpacking The "Rigorous Analysis" Standard,* ALI-ABA 12th Annual National Institute on Class Actions, New York, New York, November 7, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of California (Boalt Hall) School of Law Civil Justice Workshop, Berkeley, California, February 28, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of Pennsylvania Law Review Symposium, Philadelphia, Pennsylvania, Dec. 1, 2007

◊ *Current CAFA Consequences: Has Class Action Practice Changed?,* ALI-ABA 11th Annual National Institute on Class Actions, Chicago, Illinois, October 17, 2007

◊ *Using Law Professors as Expert Witnesses in Class Action Lawsuits,* ALI-ABA 10th Annual National Institute on Class Actions, San Diego, California, October 6, 2006

◊ *Three Models for Transnational Class Actions*, Globalization of Class Action Panel, International Law Association 2006 Conference, Toronto, Canada, June 6, 2006

◊ *Why Create Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, UMKC Law Review Symposium, Kansas City, Missouri, April 7, 2006

◊ *Marks, Bonds, and Labels: Three New Proposals for Private Oversight of Class Action Settlements*, UCLA Law Review Symposium, Los Angeles, California, January 26, 2006

◊ Class Action Fairness Act, Arnold & Porter, Los Angeles, California, December 6, 2005

◊ ALI-ABA 9th Annual National Institute on Class Actions, Chicago, Illinois, September 23, 2005

◊ Class Action Fairness Act, UCLA Alumni Assoc., Los Angeles, California, September 9, 2005

◊ Class Action Fairness Act, Thelen Reid & Priest, Los Angeles, California, May 12, 2005

◊ Class Action Fairness Act, Sidley Austin, Los Angeles, California, May 10, 2005

◊ Class Action Fairness Act, Munger, Tolles & Olson, Los Angeles, California, April 28, 2005

◊ Class Action Fairness Act, Akin Gump Strauss Hauer Feld, Century City, CA, April 20, 2005

SELECTED OTHER LITIGATION EXPERIENCE

United States Supreme Court

◊ Served as *amicus curiae* and authored *amicus* brief on proper approach to *cy pres* award in class action lawsuits (*Frank v. Gaos*, No. 17-961, October Term 2018)

◊ Co-counsel on petition for writ of *certiorari* concerning application of the voluntary cessation doctrine to government defendants (*Rosebrock v. Hoffman*, 135 S. Ct.1893 (2015))

◊ Authored *amicus* brief filed on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011)

◊ Co-counsel in constitutional challenge to display of Christian cross on federal land in California's Mojave preserve (*Salazar v. Buono*, 130 S. Ct. 1803 (2010))

◊ Co-authored *amicus* brief filed on behalf of constitutional law professors arguing against constitutionality of Texas criminal law (*Lawrence v. Texas*, 539 U.S. 558 (2003))

◊ Co-authored *amicus* brief on scope of *Miranda* (*Illinois v. Perkins*, 496 U.S. 292 (1990))

Attorney's Fees

◊ Appointed by the United States District Court for the Eastern District of Pennsylvania as an expert witness on attorney's fees in complex litigation, with result that the Court adopted recommendations (*In re National Football League Players' Concussion Injury Litigation*, 2018 WL 1658808 (E.D.Pa. April 5, 2018))

◊ Appointed by the United States District Court for the Northern District of Ohio as an expert consultant on common benefit attorney's fees issues in complex multidistrict litigation, with result that the Court adopted recommendations (*In re: Nat'l Prescription Opiate Litig*., No. 1:17-MD-2804, 2020 WL 8675733 (N.D. Ohio June 3, 2020))

◊ Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom*., *DeValerio v. Olinski*, 673 F. App'x 87, 90 (2d Cir. 2016)).

◊ Co-counsel in appeal of common benefit fees decision arising out of mass tort MDL (*In re Roundup Prod. Liab. Litig.,* Civil Action No. 21-16228, 2022 WL 16646693 (9th Cir, 2022))

◊ Served as *amicus curiae* and co-authored *amicus* brief on proper approach to attorney's fees in common fund cases (*Laffitte v. Robert Half Int'l Inc*., 1 Cal. 5th 480, 504, 376 P.3d 672, 687 (2016))

Consumer Class Action

◊ Co-counsel in challenge to antenna-related design defect in Apple's iPhone4 (*Dydyk v. Apple Inc.*, 5:10-cv-02897-HRL, U.S. Dist. Court, N.D. Cal.) (complaint filed June 30, 2010)

◊ Co-class counsel in $8.5 million nationwide class action settlement challenging privacy concerns raised by Google's Buzz social networking program (*In re Google Buzz Privacy Litigation,* 5:10-cv-00672-JW, U.S. Dist. Court, N.D. Cal.) (amended final judgment June 2, 2011)

Disability

◊ Co-counsel in successful ADA challenge ($500,000 jury verdict) to the denial of health care in emergency room (*Howe v. Hull*, 874 F. Supp. 779, 873 F. Supp 72 (N.D. Ohio 1994))

Employment

◊ Co-counsel in challenges to scope of family benefit programs (*Ross v. Denver Dept. of Health*, 883 P.2d 516 (Colo. App. 1994)); *(Phillips v. Wisc. Personnel Com'n*, 482 N.W.2d 121 (Wisc. 1992))

Equal Protection

◊ Co-counsel in (state court phases of) successful challenge to constitutionality of a Colorado ballot initiative, Amendment 2 (*Evans v. Romer*, 882 P.2d 1335 (Colo. 1994))

◊ Co-counsel (and *amici*) in challenges to rules barring military service by gay people (*Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (*en banc*))

◊ Co-counsel in challenge to the constitutionality of the Attorney General of Georgia' firing of staff attorney (*Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997))

Fair Housing

◊ Co-counsel in successful Fair Housing Act case on behalf of group home (*Hogar Agua y Vida En el Desierto v. Suarez-Medina*, 36 F.3d 177 (1st Cir. 1994))

Family Law

◊ Co-counsel in challenge to constitutionality of Florida law limiting adoption (*Cox v. Florida Dept. of Health and Rehab. Srvcs.*, 656 So.2d 902 (Fla. 1995))

◊ Co-authored *amicus* brief in successful challenge to Hawaii ban on same-sex marriages (*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993))

First Amendment

◊ Co-counsel in successful challenge to constitutionality of Alabama law barring state funding foruniversity student groups (*GLBA v. Sessions*, 930 F.Supp. 1492 (M.D. Ala. 1996))

◊ Co-counsel in successful challenge to content restrictions on grants for AIDS education materials (*Gay Men's Health Crisis v. Sullivan*, 792 F.Supp. 278 (S.D.N.Y. 1992))

Landlord / Tenant

◊ Lead counsel in successful challenge to rent control regulation (*Braschi v. Stahl Associates Co.*, 544 N.E.2d 49 (N.Y. 1989))

Police

◊ Co-counsel in case challenging DEA brutality (*Anderson v. Branen*, 27 F.3d 29 (2d Cir. 1994))

Prison Conditions

◊ Co-counsel in appeal of class certification decision in damages class action arising out of conditions in St. Louis City Jail, *Cody, et al v. City of St. Louis,* Civil Action No. 22-2348 (8th Cir. 2023) (pending)

Racial Equality

◊ Co-authored *amicus* brief for constitutional law professors challenging constitutionality of Proposition 209 *(Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997))

SELECTED OTHER PUBLICATIONS

Editorials

◊ *Follow the Leaders*, NEW YORK TIMES, March 15, 2005

◊ *Play It Straight*, NEW YORK TIMES, October 16, 2004

◊ *Hiding Behind the Constitution*, NEW YORK TIMES, March 20, 2004

◊ *Toward More Perfect Unions,* NEW YORK TIMES, November 20, 2003 (with Brad Sears)

◊ *Don't Ask, Don't Tell, Don't Believe It*, NEW YORK TIMES, July 20, 1993

◊ *AIDS: Illness and Injustice*, WASH. POST, July 26, 1992 (with Nan D. Hunter)

BAR ADMISSIONS

◊ Massachusetts (2008)
◊ California (2004)
◊ District of Columbia (1987) (inactive)
◊ Pennsylvania (1986) (inactive)

◊ U.S. Supreme Court (1993)

◊ U.S. Court of Appeals for the First Circuit (2010)
◊ U.S. Court of Appeals for the Second Circuit (2015)
◊ U.S. Court of Appeals for the Fifth Circuit (1989)
◊ U.S. Court of Appeals for the Ninth Circuit (2004)
◊ U.S. Court of Appeals for the Eleventh Circuit (1993)
◊ U.S. Court of Appeals for the D.C. Circuit (1993)

◊ U.S. District Courts for the Central District of California (2004)
◊ U.S. District Court for the District of the District of Columbia (1989)
◊ U.S. District Court for the District of Massachusetts (2010)
◊ U.S. District Court for the Northern District of California (2010)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated, *Plaintiffs*, v. UNITED STATES OF AMERICA, *Defendant*.	Case No. 16-745

SUPPLEMENTAL DECLARATION OF DEEPAK GUPTA

I, Deepak Gupta, declare as follows:

1. This supplemental declaration addresses three points made in the government's response to our motion for final approval—all of which focus exclusively on the calculation of the lodestar for our work in this case (a calculation that, for reasons explained in the motion, is not the basis of class counsel's request for attorneys' fees). I also briefly address the evidentiary basis for the requested service awards for the three class representatives.

2. *First*, the government correctly notes that the lodestar includes an estimate for work that had not yet been performed when the number was calculated—$400,000 for my firm's projected future work and $500,000 for Motley Rice's projected future work—and asserts that there has been "little, if any, explanation for these estimates." Gov. Resp. 4. As we explained in the motion (at 37–38 n.3), however, those estimates include the time that we projected we would have to spend "responding to inquiries from class members about legal issues, damages calculations, and the mechanics of the settlement; responding to potential objections and filing any replies in support of the settlement; preparing for and participating in the fairness hearing; handling any appeal;

assisting class members during the settlement-administration process and ensuring that it is carried out properly; and addressing any unanticipated issues that may arise." Further, Meghan Oliver of Motley Rice stated in her declaration accompanying the motion that her firm expected "to spend roughly an additional 750 hours over the next six months, or roughly $500,000 in lodestar," a figure that was "based on the nature of the work" and that was extrapolated from "time spent on these tasks since notice was sent in July." Oliver Decl. ¶ 9. In other words, Motley Rice calculated its estimate by taking its average monthly lodestar for responding to inquiries in July and August and multiplying that number by six to account for six additional months of similar work.

3. Since we calculated our lodestar, the reasonableness of our projected totals for future work have only been further confirmed. My firm has already spent more than 100 hours working on the case since then (yielding a lodestar of more than $100,000 at our current billing rates). That includes time spent editing and finalizing the motion for final approval (which was not included in the original total because it occurred after the calculations had been run), and time spent evaluating and responding to the government and the objectors. We expect to spend additional time preparing for the upcoming fairness hearing and assisting class members with any legal questions they might have. And while only three class members out of hundreds of thousands have come forward to object, the possibility of an appeal is very real given that one of the objectors (Eric Alan Isaacson) touts himself on his website as "a prominent appellate litigator," *see* https://www.ericalanisaacson.com/appellate-practice/, and has been described by courts as a "professional objector[] who threaten[s] to delay resolution of class action cases unless they receive extra compensation," *Muransky v. Godiva Chocolatier, Inc.*, 2016 WL 11601079, at *3 (S.D. Fla. 2016). Were there an appeal, it could easily require an additional $200,000 or more of lodestar. Given this possibility, and given the work we have already performed since calculating our lodestar as well as the unusual size and complexity of this settlement's administration, it continues to be my

belief that my firm's estimate of $400,000 in future lodestar is reasonable and, indeed, conservative. And given that Motley Rice's estimated future lodestar was based on an extrapolation from representative data, I remain convinced that their projection of $500,000 is equally reasonable.

4. *Second*, the government suggests that our firm's rates should be adjusted downward because we are a small firm and the market for legal services "generally accepts higher rates from attorneys at firms with more than 100 lawyers than from those at smaller firms—presumably because of their greater resources and investments, such as attorneys, librarians, researchers, support staff, information technology, and litigation services." Gov. Resp. 5. To the extent the government is suggesting that attorneys of equal experience, skill, and reputation are compensated more highly by the market *solely* because they work at a large law firm (such as DLA Piper, with approximately 3,800 lawyers), that has not been my experience. Some of the nation's best advocates, who command high hourly rates, work at small law firms with far fewer than "100 lawyers" (such as Clement & Murphy PLLC, with 13 lawyers). *Contra* Gov. Resp. 5. And all other factors being equal, large law firms' "greater resources and investments" in staff, technology, and the like create economies of scale that, if anything, should allow them to charge their clients *lower* hourly rates. Likewise, having more attorneys and more staff to devote extra hours to a case does not in any way allow large law firms to charge their clients higher hourly rates for those additional hours. Again, in my experience, the opposite is true. In reality, large law firms frequently end up charging lower hourly rates to their corporate clients (who often have leverage of their own). *See, e.g.*, Lisa Ryan, *BigLaw Will Discount Deep To Keep Big Clients Happy*, Law360 (Aug. 5, 2014), https://perma.cc/Z2YQ-BWVH; Jennifer Smith, *On Sale: The $1,150-Per-Hour Lawyer: Lawyer Fees Keep Growing, But Don't Believe Them. Clients Are Demanding, and Getting, Discounts*, Wall St. J. (Apr. 3, 2013), https://perma.cc/TSW8-Q346.

5. *Third*, the government suggests that our billing rates are higher than the market would bear, and that the Court should "inquire as to the basis for [those] rates" and determine whether to instead use rates contained in a fee matrix prepared by our expert Brian Fitzpatrick at the request of the Department of Justice for purposes of settling fee disputes in statutory fee-shifting cases against the federal government. Gov. Resp. 7. To be clear, the rates we have quoted are rates that our firm *actually charges* to paying clients. So, by definition, these are rates that the market will bear. Moreover, as Mr. Fitzpatrick explains in his supplemental declaration, his fee matrix is wholly irrelevant here for numerous reasons—among others, that it is designed for ordinary statutory fee-shifting cases; that it is a settlement matrix that sets a floor, not a ceiling; and that it uses data from garden-variety litigation, such as individual employment-discrimination cases. Nevertheless, I have recalculated our original lodestar using the hourly rates from this matrix, and they are as follows:

Name	Title	Total Hours	Year	Fitzpatrick Matrix Rate	Total Matrix Lodestar
Deepak Gupta	Principal	1497.5	2002	742	$1,111,145.00
Jonathan E. Taylor	Principal	1519	2010	664	$1,008,616.00
Rachel Bloomekatz	Principal	5.73	2008	687	$3,936.51
Peter Romer-Friedman	Principal	3.00	2006	707	$2,121.00
Daniel Wilf-Townsend	Associate	12.60	2015	598	$7,534.80
Joshua Matz	Associate	6.40	2012	638	$4,083.20
Neil Sawhney	Associate	3.30	2014	612	$2,019.60
Robert Friedman	Associate	2.60	2013	625	$1,625.00
Stephanie Garlock	Paralegal	27.55	-	220	$6061.00
Mahek Ahmad	Paralegal	52.75	-	220	$11,605.00
Rana Thabata	Paralegal	24.62	-	220	$5,416.40
Nabila Abdallah	Paralegal	17.57	-	220	$3,865.40
Total Past Lodestar					$2,168,028.91

6. As this chart shows, my firm's total lodestar for past work, when recalculated using the Fitzpatrick matrix, would be $2,168,028.91. As Ms. Oliver explains in her supplemental

declaration, her firm's total lodestar for past work, when recalculated using the Fitzpatrick matrix, would be $1,480,645.35. These figures would result in a corresponding reduction to the projected future lodestar for our two firms. Specifically, my firm's projected future lodestar would become $265,113.92 using the Fitzpatrick matrix ($400,000 x $2,168,028.91/$3,271,090.25), while Motley Rice's projected future lodestar would become $397,897.16 ($500,00 x $1,480,645.35/$1,860,588). Add it all up, and our total adjusted lodestar would be $4,311,685.34, which produces a multiplier of 5.53.

7. One final point bears mention. Mr. Isaacson challenges the propriety of awarding $10,000 per class representative for their contributions to this case. But he does not grapple with the evidentiary basis for that request. Throughout the seven years of this litigation, experienced in-house lawyers at the National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice 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. As the declarations of Renée Burbank, Stuart Rossman, and Rakim Brooks explain, the market value of the attorney time incurred by each of the three organizations over seven years greatly exceeded $10,000 at market rates. The requested awards here are thus entirely unlike typical incentive awards: They are not for the personal services or private expenses of an individual class representative nor do they reflect any sort of personal "salary" or "bounty." They instead reflect a bargain price for work that was actually performed by experienced in-house counsel and that was necessary to carry out the prosecution of this suit.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed in Washington, DC, on October 3, 2023.

/s/ Deepak Gupta
Deepak Gupta

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 1:16-cv-00745-PLF

DECLARATION OF MEGHAN S.B. OLIVER

I, Meghan S.B. Oliver, declare as follows:

1. I am a member of the law firm of Motley Rice LLC ("Motley Rice"). I submit this declaration in further support of Class Counsel's application for an award of attorneys' fees in connection with services rendered in the above-captioned class action. I have personal knowledge of the matters set forth herein, based upon my active participation in all pertinent aspects of this Litigation, my review of the firm's litigation files, and consultation with other Motley Rice personnel who worked on this case. I could and would testify competently to matters set forth herein if called upon to do so.

2. The government has suggested that the U.S. Attorney's Office's "Fitzpatrick Matrix" would be a better measure of the market rates for our attorneys' work than our actual billing rates. For all the reasons explained by Professor Fitzpatrick himself in his supplemental declaration, we do not agree that the Matrix is relevant here. But we have nevertheless recalculated our lodestar using the Matrix. Below is a revised summary lodestar chart which lists (1) the name

of each timekeeper in my firm who devoted more than 20 hours to the case; (2) their title or position (e.g, member, associate, paralegal); (3) the total number of hours they worked on the case from its inception through and including August 17, 2023; (4) their current hourly rate; (5) their rate according to the Fitzpatrick Matrix; (6) their lodestar (at their current rates); and (7) their lodestar using the Fitzpatrick rates:

Name	Title	Total Hours	Current Rate	Total Lodestar	Fitzpatrick Rate	Fitzpatrick Lodestar
Narwold, William	Member	714.75	$1,250	$893,437.50	$807	$576,803.25
Oliver, Meghan	Member	570.45	$950	$541,927.50	$726	$414,146.70
Tinkler, William	Associate	139.15	$550	$76,532.50	$664	$92,395.60
Loper, Charlotte	Associate	348.40	$525	$182,910.00	$536	$186,742.40
Bobbitt, Ebony	Associate	86.90	$525	$45,622.50	$520	$45,188.00
Rublee, Laura	Staff Attorney	184.20	$500	$92,100.00	$807	$148,649.40
Janelle, Alice	Legal Secretary	48.60	$380	$18,468.00	$220	$10,692.00
Shaarda, Lynn	Paralegal	27.40	$350	$9,590.00	$220	$6,028.00
TOTAL				$1,847,830.50		$1,480,645.35

3. In addition to this lodestar, at the time that we filed the Motion for Final Approval of Class Settlement and for Attorneys' Fees, Costs, and Service Awards we also estimated $500,000 for Motley Rice's projected future work. The reasonableness of that conservative estimate has only been further confirmed since we filed the motion. Motley Rice has already incurred more than $60,000 worth of additional lodestar since filing the motion, even when calculated using Fitzpatrick Matrix rates. Since filing, we have spent additional time responding to class-member inquiries (*e.g., When can I expect to receive a check? Am I a class member? I've moved several*

times; how will I get my check? Etc.). Since we sent notice of the settlement this summer, Motley Rice has responded to roughly 300 email inquiries and calls from class members, many of which included multiple contacts with the individuals, and contacts to KCC.[1] We expect to continue to receive inquiries from class members over the coming months.

4. Since the payment notification functionality went live on the website, we have received over 800 payment notifications, including over 460 notifications from individuals that someone else paid on their behalf, and over 400 notifications from individuals or entities that they paid someone else's PACER fees ("payer notifications"). We have not yet processed those notifications, but are pleased that we have not received any disputes in response to payer notifications submitted. In the coming weeks and months we will work with KCC to process those notifications.

5. Since filing our final approval motion, we have continued to address data issues, including most recently, conferring with the government on discrepancies between the data provided by the government in 2017 and the data provided by the government in 2023. We expect there are likely to be additional data issues and questions as notifications are processed, and KCC begins to calculate settlement shares and issue checks. Based on our experience with past class-action settlements, we also expect to see a substantial uptick in class-member contacts after checks are issued.

[1] My initial declaration relied on a dated version of KCC's not-to-exceed estimate, and incorrectly stated that KCC's original not-to-exceed estimate was $977,000. ECF 158-6. The correct estimate should have been $1,002,000. That number now has been revised further based on unforeseen data complexities and administration issues. *See* Declaration of Gio Santiago at ¶ 4 (Oct. 2, 2023).

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed in Mount Pleasant, SC, on October 3, 2023. */s/ Meghan S.B. Oliver*
Meghan S. B. Oliver

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745-PLF

PLAINTIFFS' NOTICE OF FILING OF ALL OBJECTIONS RECEIVED TO DATE

On the eve of the fairness hearing, Objector Eric Alan Isaacson has filed a seven-page "written statement" with several new procedural objections to the final-approval process. Among other things, he complains that documents—including the Court's orders, the plaintiffs' reply and supporting material, and others' objections—were "not served on [him] by the Court or by any party." But the Court's orders and the reply are available on the public docket, are posted (for free) on the PACER Fees Class Action website, and were emailed via CM-ECF to anyone who filed a notice of appearance. To ensure full transparency, this notice attaches all objections of which the settling parties have been made aware, timely or untimely, filed by the following individuals: Aaron Greenspan, Alexander Jiggets, Geoffrey Miller, Don Kozich, and Eric Alan Isaacson. To ensure free access, each objection is also being posted on the PACER Fees Class Action website.

Respectfully submitted,

/s/ Deepak Gupta
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October 11, 2023

Counsel for Plaintiffs National Veterans Legal Services Program, National Consumer Law Center, Alliance for Justice, and the Class

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2023, I electronically filed this notice through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Deepak Gupta
Deepak Gupta

Gupta / Wessler

Deepak Gupta <deepak@guptawessler.com>

Objection to PACER Class Action Settlement

Aaron Greenspan <aarong@thinkcomputer.com> Thu, Sep 14, 2023 at 12:33 AM
To: DCD_PACERFeesSettlement@dcd.uscourts.gov
Cc: Deepak Gupta <deepak@guptawessler.com>, Brenda Gonzalez Horowitz <brenda.gonzalez.horowitz@usdoj.gov>

Civil Action No. 16-745-PLF: Objection to Proposed Settlement in National Veterans Legal Services Program, et al. v. United States of America

To The Parties and the Court:

I hereby object to the class-action settlement on behalf of myself as an individual, Think Computer Corporation, and the now closed Think Computer Foundation (the "Think entities"). I realize that I am a day late (as it is still September 13th here in California where I am writing from). I apologize. I'd point out that the Court and the parties took something on the order of seven years to reach this point in the litigation, and then gave barely any notice to object to the proposed settlement. Then you scheduled your deadline three days **before** the corporate tax deadline of September 15th for those with an extension. Three days after would have been much easier to comply with.

Through my company, I run PlainSite (https://www.plainsite.org). PlainSite hosts over 15 million federal and state legal dockets, as well as various other government materials. Not every document that should be available is—because of the unlawful PACER fee structure, which somehow still persists today even as the courts have acknowledged its unlawfulness and pledged to move away from it at some unspecified date, which at this rate will likely outlast my lifetime.

As referenced in ECF No. 158-5 at 3 (paragraph 8), which I only became aware of this evening, I was the plaintiff in one of the only lawsuits—if not the only lawsuit—to ever challenge the PACER fee structure, prior to this one. Generally, my objection to the settlement in this action is that I and the Think entities, which have each amassed significant PACER fees over the years in order to serve the public (see https://www.plainsite.org/about/jointventure.html), should not have had to pay a single penny to the federal government for fees that were unlawfully charged in the first place. Accordingly, all of that money should be refunded in full, and the Administrative Office of the United States Courts should reimburse class counsel's attorney's fees and costs separately from any settlement fund.

I am not naive. I realize that different statutes authorize various types of relief, subject to certain limits, etc. I realize that the Little Tucker Act has a $10,000 statutory limit.

I don't care. Not because I don't care about the rule of law, but because I am incensed.

For years the judiciary has scammed the American public with this obscene scheme, and that is separate and apart from the fact that the judiciary is presently controlled by partisan hacks who wear robes for a living, as recently proven beyond a shadow of a doubt by ProPublica's investigative reporting. See https://www.propublica.org/topics/courts. Put simply, it is clearer than ever that the courts and the Judicial Conference are run by corrupt judges. That's "judges," plural, starting with the Chief Justice. See https://www.nytimes.com/2023/01/31/us/john-roberts-jane-sullivan-roberts.html. To insist (for years) on various legal limitations and restrictions when victims of the judiciary's elaborate scam seek relief (and to be clear, this is not the only or even the largest elaborate scam perpetrated on the public by the courts)—but to have tossed all of that aside as the judiciary carried out the scam for years under the color of law in the first place—is manifestly unjust. Surely, the parties want to move on and counsel would like to proceed onward to more exciting cases. I'm sorry, but none of that matters to me. I want my money—stolen by the courts—back. All of it. And I want the Administrative Office staff and the judges who approved this held accountable, by name, starting with Michel Ishakian.

After more than a decade of observing our justice system through PlainSite, I have lost track of the number of cases where judges, sadly having little to no understanding of modern technology, have made the wrong decision because they were not properly informed and frankly didn't care to be. This case is no different. The settlement here ignores the fundamental fact, which did arise in the plaintiffs' briefing, that the marginal cost of document transmission for PACER is **zero**. By zero, I mean $0.00. Whatever up-front costs CM/ECF and PACER required to develop, those were fully funded ages ago. The E-Government Act of 2002 specifically mandates that the courts cannot charge beyond their marginal cost, and since their marginal cost is zero, that means **they cannot charge**. As I recall, Senator Lieberman even weighed in himself to say so. Yet this went ignored.

I will not belabor this point further, especially since I fear that my objection will not even be considered. Suffice it to say that the plaintiffs are 100% right, the government is 100% wrong, and a settlement that takes $23 million, or any amount,

out of the victims' pool for attorney's fees, when the courts themselves are behind a scam of this magnitude, is completely unjust. PACER, to this day, continues to charge $0.10 per page for error messages. It continues to charge for judicial opinions that have been improperly coded (which is most of them). Any judge who has had anything to do with approving this outrage should be required to pay victims out of their government salaries personally, judicial immunity be damned.

I see what you are all doing, I see what you have done, and I do not approve. I object.

Aaron Greenspan
San Francisco, California

Aaron Greenspan
President & CEO
Think Computer Corporation

telephone +1 415 670 9350
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e-mail aarong@thinkcomputer.com
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From: ALEXANDER JIGGETTS
To: DCD PACER Fees Settlement
Subject: Oppose settlement
Date: Tuesday, September 26, 2023 11:04:15 PM

CAUTION - EXTERNAL:

I Alexander Jiggetts oppose the settlement for I am the first person to complain about Pacer Fees and I petitioned in the United States District Court for Maryland and with the Administrative office of the courts about overcharging persons for Pacer and it should be with not a fee I should at least get one million for telling what is going on these attorneys who are getting at least $25,000,000 million took over what I was doing and wanted to give me $350 so I told them.not to email me or call me I represent myself in this issue and I did not enter into a client privilege with them so they just want make cash and be in everyone's business.
Please email me about this matter.
With much respect to this court they just want to have access to my 137 cases that I filed and have rights to my cases with not paying for my name and likeness I did business with the United States government when I was going through some rough things I did not do business with these attorneys abd corporations that download the cases and sell them for billions with not asking the persons who filed the cases and name and likeness they use do they want any compensation that is all they want is to sell persons cases that is what they want I have warned companies about selling persons cases and not giving them nothing a cases is mot for profit when someone uses it is to a note when filing a case but these attorneys and business sell persons cases to billionaires while the lower case get nothing.
I oppose the settlement because I need something for what I done.
Also those attorneys assigned to the case are harrassers.
Alexander Jiggetts
Jiggettsalexander@aol.com
410-596-8404
9/26/2023

Geoffrey Miller
216 SE Atlantic Drive
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August 8, 2023

Honorable Paul L. Friedman
United States District Court for the District of Columbia
333 Constitution Avenue, NW
Washington, D.C. 20001
DCD_PACERFeesSettlement@dcd.uscourts.gov

In re: Civil Action No. 16-745-PLF: Objection to Proposed Settlement in National Veterans Legal Services Program, et. al. v. United States of America

Dear Judge Friedman:

I am a member of the class in the above-referenced action (Account ID 1033281). I write to object to the proposed settlement.

I have no problem with the total cash compensation or with the proposed maximum of 20% of the common fund for attorney fees, expenses, representative plaintiff awards and claims administration. I do object, however, to the proposed plan of allocation.

As I understand it, each class member will receive a minimum payment from the net settlement fund equal to the lesser of $350 or the total amount paid in PACER fees by that class member during the class period. The remainder of the fund will be allocated pro rata to class members who paid more than $350 in PACER fees.

This formula for distribution discriminates between two subparts of the class otherwise identically situated: class members who paid $350 or less in PACER fees and class members who paid more than $350 in fees. The former will receive the full amount of the fees; the latter will receive some (presumably significantly lower) percentage of their fees.

This discrimination between larger and smaller claimants cannot be justified on grounds of administrative necessity. In other cases, processing of small claims can be infeasible because of the administrative costs of making small distributions. This is not the case here because the

settlement contemplates that small claimants will be paid in full – even if they have only a few dollars or pennies in charges.

Nor can the discrimination be justified on the ground that small claimants are unlikely to file claim forms. As I understand this settlement, claim forms will not be required because the defendant has the necessary information on class members and the amounts of their claims.

The rationale for discriminating between larger and smaller claims seems based, rather, on a wish to favor smaller users or a sense of what is likely to receive a positive reception in the public eye. Neither of these is a valid basis for favoring one set of litigants over another when both are identically situated in all respects other than the size of their claims.

The class action is designed to conserve on litigation costs and provide access to justice for people with small claims. The proposed plan of allocation has nothing to do with these objectives because all class members have received access to justice and a more equal plan of distribution would have no impact on litigation costs.

Plaintiffs' counsel faced a conflict of interest as soon as they began to negotiate a settlement that discriminated between class members based on the size of their claims. Interclass conflicts can be tolerated when there are valid reasons for proceeding – but here it appears that there was no reason to structure the settlement this way other than an intention to distribute the benefits of the settlement on a basis other than legal entitlement. Redistribution of wealth may be admirable from an ethical perspective, but is not a valid reason for the court to approve a settlement that invidiously discriminates between class members otherwise identically situated.

The 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.

I do not know the size of the overcharges I have incurred through my use of PACER during the class period, and therefore do not know whether I am in the favored or disfavored part of the class. Even if I fall in the favored category, I believe I have standing to object to the settlement. Rule 23(e)(5)(A) provides that "*any class member* may object to the proposal if it requires court approval under this subdivision (e)." There is no requirement that a class member must be harmed by the provision of a settlement to which the class member objects. If there were such a bar, and if I fall in the favored group, then I request that this objection be treated as that of a friend of the court.

In light of the foregoing, I request that this Court consider sending the proposed settlement back to the parties with instructions to work towards a negotiated resolution that does not invidiously discriminate between larger and smaller claimants.

Sincerely,

Geoffrey Miller

Cc: Gupta Wessler PLLC
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM , et al

Plaintiffs

v.

UNITED STATES OF AMERICA

Defendant(s)

CASE NO. 1:16-cv-00745-PLF
J: Paul L. Friedman

DON KOZICH, Individually
Plaintiff-Class Member,
v.
UNITED STATES OF AMERICA
Defendant(s)

PLAINTIFF-CLASS MEMBER DON KOZICH'S VERIFIED OBJECTIONS TO SETTLEMENT AND MOTION TO APPEAR TELEPHONICALLY OR BY ZOOM

Pursuant to Fed.R.Civ.P. 24 and LCvR 7(j), and 28 USC § 1331 and 1346(a), the Plaintiff-Class Member Don Kozich submits his Verified Objections to Settlement and Motion to Appear Telephonically or by ZOOM, and under penalty of perjury, declares that he has read the Motion, and that the facts stated in it are true, and in support of this motion states,

I. KOZICH'S EXHIBITS (Exhibit "____")

For this Verified Motion, Kozich relies on the attached Exhibits.

II. STANDING

The complaint and any pending settlement are limited in scope and appear to address only some but not all of those PACER users who have **paid** excessive PACER user fees but do not address all of those PACER users who have paid excessive PACER fees or those PACER users who have **not** paid or are delinquent in the payment of excessive user fees or have been cut-off from utilizing PACER and their account put into illegal collection, or all.

Kozich is before this court because he is a Class Member but is not listed as a class member by the Defendant because the Defendant with its blinders on purposely never listed Kozich as a class member because the Defendant allegedly could not find where Kozich ever paid PACER fees (Exhibit "D", pg 8). But Kozich paid PACER fees (Exhibit "A"). Kozich believes the Defendant purposely never listed Kozich as a class member that paid excessive PACER fees because doing so would open a Pandora's box and makes the Defendant liable for untold additional millions of dollars in excessive fees that unidentified class members have paid.

Additionally besides paying excessive PACER fees for copy costs, Kozich also paid excessive fees in searching Federal Cases outside of the Southern District of Florida. PACER charged Kozich excessive fees because he was searching cases throughout the country, i.e. Washington, Oregon, California, etc., having to do with federally subsidized Low Income Housing Tax Credit (LIHTC) apartment communities.

For the quarter FY 2010 PACER had a Net Profit of $26,611,517 (Exhibit E) and for the period 4/21/10-5/31/18 (a total of 37 quarters) had a Net Profit of $984,626.129 (37 X $26,611,517). The Settlement of $125,000,000 is a mere drop in the bucket compared to PACER's $981,626,120 net profit for charging excessive user fees. Moreover, with the $125,000,000 Settlement the Defendant just received a slap on the wrist. The compound interest alone on the $984,626,129 in net profits received by PACER for charging excessive user fees that the Defendant earned far exceed the $125,000,000 settlement.

As it now stands the $125,000,000 Settlement is one-sided. It is refunding only those persons who paid more than $350 in excessive PACER fees but is not paying those persons who paid less than $350 in excessive PACER fees. The settlement only benefits the large corporations, large law offices and large non-profits that spent large amounts paying excessive PACER fees but does nothing for the small or medium size corporation, law firm or non-profit. The old bur still true adage comes into play, "Large Corporations control the world." i.e. Microsoft, Monsanto, Apple, Amazon, eBay, etc. Kozich has not seen an accounting of how much money the Defendant should refund to persons who paid less than $350 in excessive PACER fees or for that matter what is the time frame or quarters that the Defendant has been charging excessive PACER fees. Kozich is certain the time frame far exceeds 37 quarters.

The Settlement should be much higher to include those who paid less than $350 in excessive Pacer fees and to act as a deterrent and the Defendant should be paying

interest and penalties for knowingly charging excessive fees which monies should go to the users. Otherwise the Defendant will knowingly just continue to charge excessive user fees.

Therefore, Kozich has standing to object to the settlement as Plaintiff and a Class Member in this case.

III. RELIEF SOUGHT

Kozich is before this court as a Limited Class Member and Amicus:

a. As a class member because he utilized PACER and paid excessive PACER user fees (Exhibit "A").

b. As a limited class member because PACER closed Kozich's account and put it into collection because he had an outstanding balance of $354.60 plus $94.26 in illegal collection fees for a total of $448.86 (Exhibit "B") owed to PACER resulting from PACER overcharging excessive fees, and not allowing free looks and copy and paste to pro se persons while allowing attorneys free looks and free copy and paste.

A. Pursuant to LCvR 7(o):

1. **The Nature of Kozich's interest:** The complaint and any pending settlement are limited in scope and appear to **address only some but not all** of those PACER users who paid PACER excessive user fees but do not address **all** of those PACER users who have paid excessive PACER user fees or have **not** paid or are delinquent in the payment of excessive user

fees or have been cut-off from utilizing PACER and their account put into collection, or all.

2. **Reason(s) Why Kozich's And Similarly Situated Persons' Position are Not Adequately Represented by a Party:** The complaint and any pending settlement are limited in scope and appear to **address only some but not all** of those PACER users who paid excessive PACER user fees and do not address those PACER users who have **not** paid or are delinquent in the payment of excessive PACER user fees or have been cut-off from utilizing PACER and their account put into collection, or all
3. **Reason(s) Why the Matters Asserted Are Relevant to the Disposition of the Case:** The case cannot be fully and fairly adjudicated without including those PACER users who have paid and those who have **not** paid or are delinquent in the payment of excessive user fees or have been cut-off from utilizing PACER and their account put into collection, or all
4. **Statement of Position of Each Party As to the Amicus:** All parties are opposed to the Amicus. The Plaintiffs because it requires the Plaintiffs to open the class to PACER users who have paid and those who have **not** paid or are delinquent in the payment of excessive user fees or have been cut-off from utilizing PACER and their account put into collection, or all. The Defendant naturally because opening the class to include users who have paid and those who have **not** paid the excessive PACER user fees opens

the Defendant to higher damages.

B. Motion to Appear Telephonically or by ZOOM:

1. Kozich is before this court pro se and IFP, and resides in Fort Lauderdale, FL.
2. Kozich requests telephonic appearance or ZOOM to explain, clarify and answer any questions that the court may have regarding the facts and circumstance surrounding PACER fees.

C. Motion to Deem date of Service to be Date of Filing:

Because he does not have access to ECF, Kozich also requests that with all of his filings, that the court deem the date of service to be the date of filling.

IV. ARGUMENT

The complaint and any pending settlement are limited in scope and appear to address only some but not all of those PACER users who have **paid** excessive PACER user fees but do not address all of those PACER users who have paid excessive PACER fees or those PACER users who have **not** paid or are delinquent in the payment of excessive user fees or have been cut-off from utilizing PACER and their account put into illegal collection, or all.

For the quarter FY 2010 PACER had a Net Profit of $26,611,517 (Exhibit E) and for the period 4/21/10-5/31/18 (a total of 37 quarters) had a Net Profit of $984,626.129 (37 X $26,611,517). The Settlement of $125,000,000 is a mere drop in the bucket compared to PACER's $981,626,120 net profit for charging excessive user

fees. Moreover, with the $125,000,000 Settlement the Defendant just received a slap on the wrist. The compound interest alone on the $984,626,129 in net profits received by PACER for charging excessive user fees that the Defendant earned far exceed the $125,000,000 settlement.

As it now stands the $125,000,000 Settlement is one-sided. It is refunding only those persons who paid more than $350 in excessive PACER fees but is not paying those persons who paid less than $350 in excessive PACER fees. The settlement only benefits the large corporations, large law offices and large non-profits that spent large amounts paying excessive PACER fees but does nothing for the small or medium size corporation, law firm or non-profit. The old bur still true adage comes into play, "Large Corporations control the world." i.e. Microsoft, Monsanto, Apple, Amazon, eBay, etc. Kozich has not seen an accounting of how much money the Defendant should refund to persons who paid less than $350 in excessive PACER fees or for that matter what is the time frame or quarters that the Defendant has been charging excessive PACER fees. Kozich is certain that the time frame for PACER charging excessive fees far exceeds 37 quarters.

The Settlement should be much higher to include those who paid less than $350 in PACER excessive fees and to act as a deterrent and the Defendant should be paying interest and penalties for knowingly charging excessive fees which monies should go to the users. Otherwise the Defendant will knowingly just continue to charge excessive user fees.

Kozich also objects to the settlement because the Defendant has purposely not included as a class member or disclosed all persons, such as Kozich, who paid excessive PACER fees so as to evade reimbursing millions of dollars in excessive PACER fees.

Motley Rice LLC relied on the Defendant to identify Class Members which is like having a fox watch the henhouse. Naturally the Defendant is going to minimize its liability and provide a list of Class Members that will produce the least amount of liability.

Kozich requests the Court deny or set aside the settlement, reopen the case and require that the Defendant include as a class member and disclose all persons, including Kozich, who paid excessive PACER fees and disclose the total amount that PACER charged in excessive fees and the time frame or quarters that it charged excessive fees. .

PRESERVATION OF CLAIMS, DEFENSES, COUNTERCLAIMS AND RESERVATION OF RIGHTS

With the filing of this Motion, Kozich does not waive any claims, defenses or counterclaims which may be available to him and reserves all rights and privileges available to him.

V. CONCLUSION

WHEREFORE, Kozich respectfully requests an order of court,

1. Granting his Verified Objection to the Settlement, deny or set aside the settlement, reopen the case and require that the Defendant disclose all persons, including Kozich, who paid PACER excessive fees and disclose the total amount it charged in excessive fees and the time frame or quarters that PACER charged excessive fees.

2. That the court deem the date of service of Kozich's papers to be the date of filling.

3. That the court grant Kozich's Motion to Appear telephonically or by ZOOM.

4. Or such further and other relief deemed just and equitable.

VERIFICATION DECLARATION

I DECLARE under penalty of perjury that the statements made in this motion are true and correct to the best of my knowledge.

/S/ Don Kozich
Don Kozich, Plaintiff-Class Member

I HEREBY CERTIFY that the foregoing was filed with the court on 10/6/23.

/S/ Don Kozich
Don Kozich, Plaintiff-Class Member
PO Box 2032
Fort Lauderdale, FL 33303
954.709.0537
dtkctr@gmail.com

Case Administrator
202.354.3174
202.354.3190

dcd_intake@dcd.uscourts.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel or parties of record in accordance with the Service List attached.

/S/ Don Kozich
Don Kozich, Plaintiff-Class Member

David R. Stone
Chief, PACER Support Branch

(800) 676-6856
FAX: (210) 301-6441

PACER SERVICE CENTER
P.O. Box 780549
San Antonio, TX 78278-0549

01/25/2023

To: Don Kozich
Don Kozich
Pob 2032
Ft. Lauderdale, FL 33303

Account number: 2792766

Subject: Receipt of Payment

This letter is to confirm that payment in the amount of $38.80 was received at the PACER Service Center on 08/08/2009 and applied to account 2792766.

Thank you for making a payment on this account[1]. If you have any questions, please call the PACER Service Center at (800) 676-6856 and a representative will assist you.

Thank you,

PACER Service Center

---

[1]Per the *Guide to Judiciary Policies and Procedures* Chapter VII Part C.Para 2.1.8; "...the receipt of an instrument other than cash does not itself discharge the payer's debt or obligation to pay. Only when the instrument has been cleared by the depositary is payment actually complete. Therefore, checks or instruments which are rejected or returned unpaid by the depository will require certain action by the court." Additional fees may also apply.

Ex A
1/3

David R. Stone
Chief, PACER Support Branch

(800) 676-6856
FAX: (210) 301-6441

PACER SERVICE CENTER
P.O. Box 780549
San Antonio, TX 78278-0549

01/25/2023

To: Don Kozich
Don Kozich
Pob 2032
Ft. Lauderdale, FL 33303

Account number: 2792766

Subject: Receipt of Payment

This letter is to confirm that payment in the amount of $13.36 was received at the PACER Service Center on 10/29/2009 and applied to account 2792766.

Thank you for making a payment on this account[1]. If you have any questions, please call the PACER Service Center at (800) 676-6856 and a representative will assist you.

Thank you,

PACER Service Center

---

[1]Per the *Guide to Judiciary Policies and Procedures* Chapter VII Part C.Para 2.1.8; "...the receipt of an instrument other than cash does not itself discharge the payer's debt or obligation to pay. Only when the instrument has been cleared by the depositary is payment actually complete. Therefore, checks or instruments which are rejected or returned unpaid by the depository will require certain action by the court." Additional fees may also apply.

David R. Stone
Chief, PACER Support Branch

(800) 676-6856
FAX: (210) 301-6441

PACER SERVICE CENTER
P.O. Box 780549
San Antonio, TX 78278-0549

01/25/2023

To: Don Kozich
Don Kozich
Pob 2032
Ft. Lauderdale, FL 33303

Account number: 2792766

Subject: Receipt of Payment

This letter is to confirm that payment in the amount of $21.92 was received at the PACER Service Center on 02/04/2010 and applied to account 2792766.

Thank you for making a payment on this account[1]. If you have any questions, please call the PACER Service Center at (800) 676-6856 and a representative will assist you.

Thank you,

PACER Service Center

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[1]Per the *Guide to Judiciary Policies and Procedures* Chapter VII Part C.Para 2.1.8; "...the receipt of an instrument other than cash does not itself discharge the payer's debt or obligation to pay. Only when the instrument has been cleared by the depositary is payment actually complete. Therefore, checks or instruments which are rejected or returned unpaid by the depository will require certain action by the court." Additional fees may also apply.

Ex A
3/3

PACER
Public Access to Court Electronic Records

INVOICE

Invoice Date: 10/07/2015
Usage From: 07/01/2015 to: 09/30/2015

Account Summary

Pages:	1,803
Rate:	$0.10
Subtotal:	$180.30
Audio Files:	0
Rate:	$2.40
Subtotal:	$0.00
Current Billed Usage:	$180.30
Previous Balance:	$174.30
Current Balance:	**$354.60**

Total Amount Due: → $354.60

Account #:	2792766
Invoice #:	2792766-Q32015
Due Date:	11/09/2015
Amount Due:	$354.60

NextGen CM/ECF

In August, the Kansas District and Alaska Bankruptcy courts implemented the next generation (NextGen) CM/ECF system. Throughout fall 2015, several other courts plan to convert to the new system. monitor your court's website for additional information. To learn more about NextGen CM/ECF, and how it may affect you and your firm/office, visit the NextGen information page at pacer.gov/nextgen.

- **NextGen Help** (pacer.gov/nextgen): Provides general information about NextGen conversion
- **Electronic Learning Modules** (pacer.gov/ecfcbt/cso/index.html): Provides user training for new NextGen features
- **NextGen CM/ECF FAQs** (pacer.gov/psc/hfaq.html): Answers common NextGen-related questions

Contact Us

San Antonio: (210) 301-6440
Toll Free: (800) 676-6856
Hours: 8 am - 6 pm CT M-F
pacer@psc.uscourts.gov

See pacer.gov/billing for detailed billing transactions, instructions for disputing transactions, FAQs, and more.

It's quick and easy to pay your bill online with a credit card. Visit the **Manage My Account** section of the PACER Service Center website at pacer.gov.

The PACER Federal Tax ID is:
74-2747938

Questions about the invoice?
Visit **pacer.gov/billing**

Please detach the coupon below and return with your payment. ***Thank you!***

PACER
Public Access to Court Electronic Records

Account #	Due Date	Amount Due
2792766	11/09/2015	$354.60

Do not send cash. Make checks or money orders drawn on a U.S. Bank in U.S. dollars payable to: PACER Service Center. Include your account ID on the check or money order.

Visit pacer.gov for address changes.

Don Kozich
Don Kozich
619 No. Andrews Avenue, #408
Ft. Lauderdale, FL 33311

PACER Service Center
P.O. Box 71364
Philadelphia, PA 19176-1364

Ex B 1/1

Gmail

don kozich <dtkctr@gmail.com>

PACER Fees Class Action

2 messages

Rublee, Laura <lrublee@motleyrice.com> Mon, Sep 11, 2023 at 3:37 PM
To: "dtkctr@gmail.com" <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Mr. Kozich,

Thank you for speaking with me today. I understand that you have not received a notice of the settlement of this matter. If you would like the claims administrator to check to see if you are a member of the class, please send your PACER account number and the associated email address to pacerlitigation@motleyrice.com. It would also be useful to include the mailing addresses, both current and present.

Information about the settlement, as well as a link to the email address I just provided, can be found at https://www.pacerfeesclassaction.com/Home.aspx. As I explained, class members do not have to file a claim. If the Court approves the proposed Settlement and Plan of Allocation, checks will be automatically sent to class members based on PACER billing records of the Administrative Office of the United States Courts.

As we discussed, we cannot help you with your individual complaint that PACER cut off access to your account for non-payment or with reopening your PACER account. The class action focused only on the excessiveness of the fees, which is the difference in the amount of the fees collected and the actual cost of running the PACER system, that affected all class members, i.e., those who paid PACER fees during the class period.

Regards,

Laura Rublee

Laura Rublee Attorney at Law

28 Bridgeside Blvd., Mt. Pleasant, SC 29464

o. 843.216.9192

lrublee@motleyrice.com

MotleyRice
ATTORNEYS AT LAW

Exc 1/3

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don kozich <dtkctr@gmail.com> Mon, Sep 11, 2023 at 9:50 PM
To: "Rublee, Laura" <lrublee@motleyrice.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

--------- Forwarded message ---------

From: **Rublee, Laura** <lrublee@motleyrice.com>
Date: Mon, Sep 11, 2023 at 3:37 PM
Subject: PACER Fees Class Action
To: dtkctr@gmail.com <dtkctr@gmail.com>

Mr. Kozich,

Thank you for speaking with me today. I understand that you have not received a notice of the settlement of this matter. If you would like the claims administrator to check to see if you are a member of the class, please send your PACER account number and the associated email address to pacerlitigation@motleyrice.com. It would also be useful to include the mailing addresses, both current and present.

Information about the settlement, as well as a link to the email address I just provided, can be found at https://www.pacerfeesclassaction.com/Home.aspx. As I explained, class members do not have to file a claim. If the Court approves the proposed Settlement and Plan of Allocation, checks will be automatically sent to class members based on PACER billing records of the Administrative Office of the United States Courts.

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Regards,

Laura Rublee

Laura Rublee Attorney-at-Law

28 Bridgeside Blvd., Mt. Pleasant, SC 29464

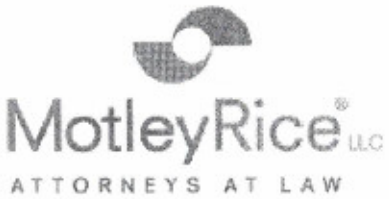
o. 843.216.9192

lrublee@motleyrice.com

Please see attached for my PACER billing.
My current mail address is: POB 2032, Fort Lauderdale, FL 33303
My current residence address is: 4537 Poinciana St., Fort Lauderdale, FL 33308
My phine number is: 9547090537
My email address is: dtkctr@gmail.com
I appreciate your prompt attention to this matter.
Thanks
Don Kozich

[Quoted text hidden]

3 attachments



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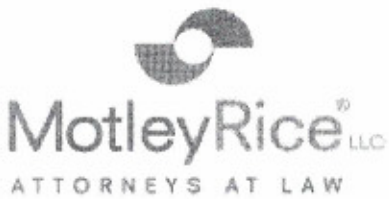

image001.png
5K

230911 PACER FEES $354.60 TO MOTLEY-RICE.pdf
215K

Ex C
2/3

Gmail

don kozich <dtkctr@gmail.com>

PACER ACCOUNT

12 messages

don kozich <dtkctr@gmail.com> Mon, Sep 11, 2023 at 9:55 PM
To: pacerlitigation@motleyrice.com

Thank you for speaking with me today. I understand that you have not received a notice of the settlement of this matter. If you would like the claims administrator to check to see if you are a member of the class, please send your PACER account number and the associated email address to pacerlitigation@motleyrice.com. It would also be useful to include the mailing addresses, both current and present.

Please see attached for my PACER billing.
My current mail address is: POB 2032, Fort Lauderdale, FL 33303
My current residence address is: 4537 Poinciana St., Fort Lauderdale, FL 33308
My phone number is: 9547090537
My email address is: dtkctr@gmail.com
I appreciate your prompt attention to this matter.
Thanks
Don Kozich

230911 PACER FEES $354.60 TO MOTLEY-RICE.pdf
215K

Rublee, Laura <lrublee@motleyrice.com> Thu, Sep 14, 2023 at 9:55 AM
To: don kozich <dtkctr@gmail.com>, PACER Litigation <pacerlitigation@motleyrice.com>

Dear Mr. Kozich,

I received your voicemail this morning and am following up. I had forwarded your information to the claims administrator. They searched by name, address and account number, but you are not showing up in the data as a member of the class.

Please let me know if you have any additional questions.

Regards,

Laura Rublee

Laura Rublee Attorney at Law

28 Bridgeside Blvd., Mt. Pleasant, SC 29464

Ex B
1/12

MotleyRice LLC
ATTORNEYS AT LAW

o. 843.216.9192

lrublee@motleyrice.com

From: don kozich <dtkctr@gmail.com>
Sent: Monday, September 11, 2023 9:56 PM
To: PACER Litigation <pacerlitigation@motleyrice.com>
Subject: PACER ACCOUNT

CAUTION:EXTERNAL

[Quoted text hidden]

don kozich <dtkctr@gmail.com> Thu, Sep 14, 2023 at 10:14 AM
To: "Rublee, Laura" <lrublee@motleyrice.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Laura,
Why am I not showing up as a member of the class?
I paid PACER previous billings.
I want to submit a claim. How do I accomplish submitting a claim?
Please let me know what you find out.
Thanks
Don Kozich

[Quoted text hidden]

Ex D 2/12

2 attachments

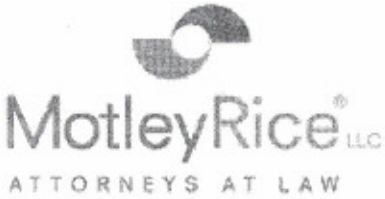

image001.png
5K

image001.png
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Rublee, Laura <lrublee@motleyrice.com> Fri, Sep 15, 2023 at 5:02 PM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Dear Mr. Kozich,

I wanted to let you know that we are following up with the administrator and we will get back to you as soon as possible.

Regards,

Laura

MotleyRice LLC
ATTORNEYS AT LAW

Laura Rublee Attorney at Law

28 Bridgeside Blvd., Mt. Pleasant, SC 29464

o. 843.216.9192

lrublee@motleyrice.com

Ex D 3/12

From: don kozich <dtkctr@gmail.com>
Sent: Thursday, September 14, 2023 10:15 AM
To: Rublee, Laura <lrublee@motleyrice.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>
Subject: Re: PACER ACCOUNT

CAUTION:EXTERNAL

[Quoted text hidden]
[Quoted text hidden]

Rublee, Laura <lrublee@motleyrice.com> Tue, Sep 19, 2023 at 11:35 AM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Dear Mr. Zorich,

We are continuing to look into this matter, but hope that you can provide us with some additional information about your PACER account history. Can you call me at your earliest convenience? My direct number is 843-216-9192.

Thank you.

[Quoted text hidden]
[Quoted text hidden]

Rublee, Laura <lrublee@motleyrice.com> Tue, Sep 19, 2023 at 11:50 AM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Mr. Kozich, I am so sorry that I misspelled your name! In any event, I would appreciate a call.

[Quoted text hidden]
[Quoted text hidden]

---

don kozich <dtkctr@gmail.com> Fri, Sep 22, 2023 at 7:04 AM
To: "Rublee, Laura" <lrublee@motleyrice.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

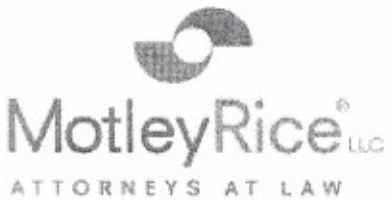
Laura,
What is the status of your checking on my account and payment with PACER?
Thanks
Don Kozich
[Quoted text hidden]

Ex D
4/12

4 attachments

image001.png
5K

image001.png
5K



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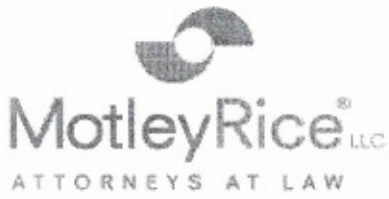

image001.png
5K

Rublee, Laura <lrublee@motleyrice.com> Fri, Sep 22, 2023 at 8:38 AM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Dear Mr. Kozich,

We are still looking into your account and why you are not included in the class member data, but we must work with the government to get answers to your questions and, unfortunately, getting answers will take some time.

[Quoted text hidden]
[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]
[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]

Laura Rublee Attorney at Law

28 Bridgeside Blvd., Mt. Pleasant, SC 29464

Ex D 5/12

o. 843.216.9192

lrublee@motleyrice.com

From: don kozich <dtkctr@gmail.com>
Sent: Monday, September 11, 2023 9:56 PM
To: PACER Litigation <pacerlitigation@motleyrice.com>
Subject: PACER ACCOUNT

CAUTION:EXTERNAL

Thank you for speaking with me today. I understand that you have not received a notice of the settlement of this matter. If you would like the claims administrator to check to see if you are a member of the class, please send your PACER account number and the associated email address to pacerlitigation@motleyrice.com. It would also be useful to include the mailing addresses, both current and present.

Please see attached for my PACER billing.
My current mail address is: POB 2032, Fort Lauderdale, FL 33303
My current residence address is: 4537 Poinciana St., Fort Lauderdale, FL 33308
My phone number is: 9547090537
My email address is: dtkctr@gmail.com
I appreciate your prompt attention to this matter.
Thanks
Don Kozich

E. D 6/12

Confidential & Privileged

Unless otherwise indicated or obvious from its nature, the information contained in this communication is attorney-client privileged and confidential information/work product. This communication is intended for the use of the individual or entity named above. If the reader of this communication is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies--electronic, paper or otherwise--which you may have of this communication.

[Quoted text hidden]

---

don kozich <dtkctr@gmail.com> Thu, Sep 28, 2023 at 8:10 AM
To: "Rublee, Laura" <lrublee@motleyrice.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Laura,
What is the status of your checking on my account and payment with PACER?
Do I need to file my objection to the settlement?
Thanks
Don Kozich
[Quoted text hidden]

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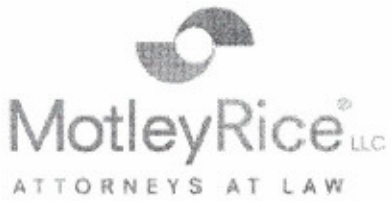
2 attachments



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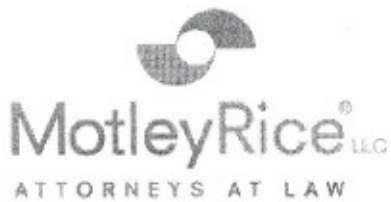
5K



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Rublee, Laura <lrublee@motleyrice.com> Thu, Sep 28, 2023 at 9:15 AM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Dear Mr. Kozich,

7/12

We have heard from the government after asking about your account. We were concerned because you had received notice of the class action in 2017, but you were not in the 2023 class member data. The data provided by the government used for sending notices in 2017 had been pulled from the government's billing records using "billed amount" as a parameter. Not all those who received a notice of this class action in 2017 had actually paid PACER fees; they had just been billed for PACER fees. The 2023 data, on the other hand, were pulled from the billing records using "paid amount" as a parameter, so only those who had paid PACER fees were included in that data. As you are aware, class members are those who actually paid PACER fees during the class period. The claims administrator could not locate you in the 2023 data because you had not actually paid PACER fees during the class period. This also explains why you had not received notice of the settlement.

Please let me know if you have any questions.

[Quoted text hidden]
[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]
[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]

Laura Rublee Attorney at Law

28 Bridgeside Blvd., Mt. Pleasant, SC 29464

o. 843.216.9192

lrublee@motleyrice.com

From: Rublee, Laura <lrublee@motleyrice.com>
Sent: Tuesday, September 19, 2023 11:36 AM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>
Subject: RE: PACER ACCOUNT

Dear Mr. Zonich,

We are continuing to look into this matter, but hope that you can provide us with some additional information about your PACER account history. Can you call me at your earliest convenience? My direct number is 843-216-9192.

Thank you.

Laura

Laura Rublee Attorney at Law

28 Bridgeside Blvd., Mt. Pleasant, SC 29464

o. 843.216.9192

lrublee@motleyrice.com

From: Rublee, Laura <lrublee@motleyrice.com>
Sent: Friday, September 15, 2023 5:02 PM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>
Subject: RE: PACER ACCOUNT

Dear Mr. Kozich,

I wanted to let you know that we are following up with the administrator and we will get back to you as soon as possible.

Regards,

Laura

Ex D 9/12

Laura Rublee Attorney at Law

[Quoted text hidden]

o. 843.216.9192

lrublee@motleyrice.com

[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

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don kozich <dtkctr@gmail.com> Thu, Sep 28, 2023 at 10:04 AM
To: "Rublee, Laura" <lrublee@motleyrice.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Laura
The government is wrong, I paid PACER fees.
Therefore I will file my objections to the settlement.
Please provide the name and address of the court to where I file my objections and the email address of all persons to be served?
Thanks
Don Kozich

[Quoted text hidden]

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2 attachments

MotleyRice LLC
ATTORNEYS AT LAW

image001.png
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image001.png
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EvD 10/12

MotleyRice LLC
ATTORNEYS AT LAW

Rublee, Laura <lrublee@motleyrice.com> Thu, Sep 28, 2023 at 10:24 AM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Mr. Kozich,

Please see the attached notice of the settlement which contains the information you have requested.

Laura

MotleyRice LLC
ATTORNEYS AT LAW

Laura Rublee Attorney at Law

28 Bridgeside Blvd., Mt. Pleasant, SC 29464

o. 843.216.9192

lrublee@motleyrice.com

From: don kozich <dtkctr@gmail.com>
Sent: Thursday, September 28, 2023 10:05 AM
To: Rublee, Laura <lrublee@motleyrice.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>
Subject: Re: PACER ACCOUNT

Ex D
11 R2

CAUTION:EXTERNAL

Laura

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[Quoted text hidden]

[Quoted text hidden]
[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]

Laura Rublee Attorney at Law

[Quoted text hidden]

o. 843.216.9192

lrublee@motleyrice.com

[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

PACER Fees Class Action Notice.pdf
191K

Ex D
12/12

Public Access and Records Management Division

AVAILABLE RESOURCES:

Summary of Resources QTRLY Rprt

		FY 2010 Actuals YB
1	PACER Fee Revenue - Prior Year Carry Forward (OXEEPAC)	$ 34,381,874
2	PACER Fee Revenue - Current Year Receipts (OXEEPAC)	$ 102,511,199
3	Print Fee Revenue - Prior Year Carry Forward (OXEEPAP)	$ 516,534
4	Print Fee Revenue - Current Year Receipts (OXEEPAP)	$ 187,118
5	**Total Available Resources**	**$ 137,596,725**
6	***PROGRAM REQUIREMENTS:***	
7	**Public Access Services and Applications**	
8	EPA Program (OXEEPAX)	$ 18,768,552
9	EPA Technology Infrastructure & Applications (OXEPTAX)	$ -
10	EPA Replication (OXEPARX)	$ -
11	**Public Access Services and Applications**	$ 18,768,552
12	**Case Management/Electronic Case Files System**	
13	Development and Implementation (OXEECFP)	$ 3,695,078
14	Operations and Maintenance (OXEECFO)	$ 15,536,212
15	CM/ECF Futures (OXECMFD)	$ 3,211,403
16	Appellete Operational Forum (OXEAOPX)changed from OXEACAX	$ 144,749
17	District Operational Forum (OXEDCAX)	$ 674,729
18	Bankruptcy Operational Forum (OXEBCAX)	$ 492,912
19	**Subtotal, Case Management/Electronic Case Files System**	**$ 23,755,083**
20	**Electronic Bankruptcy Noticing:**	
21	Electronic Bankruptcy Noticing (OXEBNCO)	$ 9,662,400
22	**Subtotal, Electronic Bankruptcy Noticing**	**$ 9,662,400**
23	**Telecommunications (PACER-Net & DCN)**	
24	PACER-Net (OXENETV)	$ 10,337,076
25	DCN and Security Services (OXENETV)	$ 13,847,748
26	PACER-Net & DCN (OXDPANV)	$ -

Ex E 1 1/2

27	Security Services (OXDSECV)	$ -
28	**Subtotal, Telecommunications (PACER-Net & DCN)**	**$ 24,184,824**
29	**Court Allotments**	
30	Court Staffing Additives(OXEEPAA)	$ 228,373
31	Court Allotments (OXEEPAA) [incl. in program areas prior to FY 09]	$ 1,291,335
32	CM/ECF Court Allotments (OXEECFA)	$ 7,605,585
33	Courts/AO Exchange Program (OXEXCEX)	$ 303,527
34	**Subtotal, Court Allotments**	**$ 9,428,820**
35	**Total Program Requirements**	**$ 85,799,679**
36	***Congressional Priorities:***	
37	**Victim Notification (Violent Crime Control Act)**	
38	Violent Crime Control Act Notification (OXJVCCD & OXJVCCO)	$ 332,876
39	**Subtotal, Victim Notification (Violent Crime Control Act)**	**$ 332,876**
40	**Web-based Juror Services**	
41	Web Based E-Juror Services O&M (OXEJMEO)	$ -
42	**Subtotal, Web-based Juror Services**	**$ -**
43	**Courtroom Technology (OXHCRTO-3000)**	
44	Courtroom Technology (OXHCRTO-3000)	$ 24,731,665
45	**Subtotal, Courtroom Technology Program**	**$ 24,731,665**
46	**State of Mississippi (OXEMSPX)**	
47	State of Mississippi (OXEMSPX)	$ 120,988
48	**Subtotal, Mississippi State Courts**	**$ 120,988**
49	**Total Congressional Priorities**	**$ 25,185,529**
50	**Total Program & Congressional Priorities**	$ 110,985,208
51	**Total EPA Carry Forward (Revenue less Disbursement)**	**$ 26,611,517**
52	PACER FEE (OXEEPAC) Carry Forward	$ 26,051,473
53	PRINT FEE (OXEEPAP) Carry Forward	$ -
54	**Total EPA Carry Forward**	**$ 26,051,473**
55	Total Print Fee Revenue	$ 703,652
56	Disbursed in (OXEEPAA) Allotments	$ 143,608
57	PRINT FEE (OXEEPAP) Carry Forward	$ 560,044

Ex B 2/2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	Civil No. 16-745-PLF OBJECTION OF ERIC ALAN ISAACSON TO PROPOSED SETTLEMENT IN *NATIONAL VETERANS LEGAL SERVICES PROGRAM, ET AL. V. UNITED STATES OF AMERICA*

OBJECTION OF ERIC ALAN ISAACSON TO PROPOSED SETTLEMENT IN *NATIONAL VETERANS LEGAL SERVICES PROGRAM, ET AL. V. UNITED STATES OF AMERICA*

As set forth in his accompanying declaration, Eric Alan Isaacson is a Class Member who would be bound by the Proposed Settlement of this matter. As set forth in his declaration, Isaacson opened his own PACER Account (No. 4166698) in March of 2016. He has paid quarterly PACER bills ever since. Isaacson's class-period PACER billings totaled $3,823.50. He has received reimbursement for only $171.80 of that amount. Thus, Isaacson's unreimbursed Class Period PACER expenditures come to $3,651.70. Isaacson expects no further reimbursements for those Class Period PACER charges.

For reasons set forth below, Isaacson respectfully objects to the Proposed Settlement and to the proposed attorney's fees and incentive awards.

I. INTRODUCTION

Rule 23(e)(2) permits the District Court to approve the Proposed Settlement "only on finding that it is fair, reasonable, and adequate after considering whether," among other things, "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." Fed.R.Civ.P. 23(e)(2)(C). The Court also must consider whether "the proposal treats class members equitably relative to each other." Fed.R.Civ.P. 23(e)(2)(D).

Here the Settlement is objectionable because it treats Class Members inequitably, allocating far too much to a pro rata distribution on the basis of institutional PACER users and law firms whose Class Period PACER expenditures were reimbursed by their clients, from class-action settlement funds. *See infra* at 4-9. It also is inequitable because it allocates $10,000 apiece to the Named Plaintiffs as special bonuses in this, a Little Tucker Act case in which the Court's jurisdiction is limited to claims for $10,000 or less. *See* 28 U.S.C. §1346(a)(2). The special payments are, moreover, prohibited by decisions of the Supreme Court, sitting in equity, which hold that the equitable common-fund doctrine permits representative plaintiffs to recover their reasonable litigation expenses from a common-fund recovery, but which flatly prohibit any payment compensating litigants for their service as class representatives.

"Since the decisions in *Trustees v. Greenough,* 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v.* Pettus, 113 U.S. 116 (1885), [the Supreme] 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 any additional payment to compensate representative plaintiffs for their own "personal services" on behalf of a class is both "decidedly objectionable" and "illegally made." *Greenough,* 105 U.S. at 537-38. A representative plaintiff's "claim to be compensated, out of the fund ... for his personal services" the Supreme Court "rejected as

unsupported by reason or authority." *Pettus,* 113 U.S. at 122. "Supreme Court precedent prohibits incentive awards."[1] *See infra* at 14-17.

Even more problematic, the Settlement allocates far too much to Class Counsel as attorney's fees. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. ... The result is what matters." *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983). But here Class Counsel have achieved a remarkably mediocre result. "According to class counsel, the absolute maximum possible recoverable damages here following the Federal Circuit's decision were around $500 million." DE158-4¶20 (Fitzpatrick decl.). Their fee expert, Brian Fitzpatrick, concludes that "the class is recovering 25% of what they might have received at trial had everything gone their way." DE158-4:13¶20 (Fitzpatrick decl.). That is exactly what large-stakes class actions can be expected to settle for without regard to the merits of the underlying claims. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions,* 43 Stan. L.Rev. 497, 500 (1991)(finding that securities class actions "settled at an apparent 'going rate' of approximately one quarter of the potential damages"). It is, in the end, a run-of-the-mill settlement that does not justify the award of attorney's fees that Class Counsel seeks. It appears likely, quite frankly, that Class Counsel have sacrificed the Class's interests in order to obtain clearly extravagant attorney's fees for themselves of nearly four times their claimed lodestar—which lodestar is itself inadequately documented and unsupported. Their claimed billing rates far exceed those that their own expert has found should prevail in complex federal cases like this. *See infra* at 9-14.

[1] *Johnson v. NPAS Sols., LLC,* 975 F.3d 1244, 1255 (11th Cir.2020), *reh'g denied,* 43 F.4th 1138 (11th Cir.2022); *accord, e.g., In re Equifax Inc. Customer Data Sec. 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)("such service awards are foreclosed by Supreme Court precedent"); *cf. Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 721 (2d Cir.2023)("Service awards are likely impermissible under Supreme Court precedent.").

II. THE SETTLEMENT IS NOT FAIR, REASONABLE, AND ADEQUATE

Named Plaintiffs have not demonstrated by a preponderance of the evidence that Rule 23's requirements are satisfied. First and foremost, they have failed to demonstrate that the Proposed Settlement is fair, reasonable, and adequate as required by Fed.R.Civ.P. 23(e)(2). They have not shown that relief provided for the class is adequate, taking into account the method of distributing relief to the class, and the request for Class Counsel to be compensated at nearly four times their reasonable hourly rates, Fed.R.Civ.P. 23(e)(2)(C)(ii), (iii), and they certainly have not shown that the proposal treats class members equitably relative to one another. Fed.R.Civ.P. 23(e)(D).

A. The Settlement Allocates Far Too Much Too Large PACER Users, Including Institutional Users Such as the Named Plaintiffs, Large Law Firms That Have Been Reimbursed by Their Clients, and Class-Action Lawyers Who Have Been Reimbursed from Class-Action Settlement Funds

Named Plaintiffs concede that they pushed for a purely pro-rata allocation among members, under which Class Members who spent the most on PACER during the Class Period would take the lion's share of the Settlement proceeds. But the largest users include large law firms, which themselves suffered no injury because they long ago passed most of the PACER charges that they paid on to their clients. The largest users also likely include plaintiffs-side class-action firms (like those representing Named Plaintiffs in this very action), which generally are reimbursed for PACER expenses when class actions settle. To the extent that the funds in this case are allocated to such class members, they constitute a windfall—at the expense of class members, such as Isaacson, whose Class Period PACER expenses were, in greatest part, neither passed on to clients nor otherwise reimbursed.

The Named Plaintiffs have purported to litigate this case in the interest of the little user. Their Complaint demanded compliance with Congress' intent that court documents "be 'freely available to the greatest extent possible.'" DE1:1 (quoting S.Rep. 107–174, 107th Cong., 2d Sess. 23 (2002)). They said that excessive PACER fees had "inhibited public understanding of the courts and thwarted equal access to justice," asserting that "the AO has further compounded these harms by discouraging fee waivers, even for *pro se* litigants," and "by hiring private collection lawyers

to sue people who cannot afford to pay the fees." DE1:1-2; *see also* DE1:11¶23; DE1:12¶25. Plaintiff National Consumer Law Center said it "seeks to achieve consumer justice and economic security for low-income and other disadvantaged Americans." DE1: 3¶2.

Yet when it came time to negotiate a settlement, the Named Plaintiffs abandoned such users—and the public interest—by advocating a purely pro-rata distribution of settlement funds that would favor large institutional users such as themselves, and that provides windfalls to large law firms that long ago passed their PACER charges on to paying clients, and to plaintiffs-side class-action lawyers (such as those representing the Named Plaintiffs) who have been fully reimbursed from settlement funds in other cases. Class Counsel concedes that in settlement negotiations with the government, Named Plaintiffs

> argued that funds should be distributed pro rata to class members, while the government vigorously insisted that any settlement include a large minimum amount per class member, which it maintained was in keeping with the AO's longstanding policy and statutory authority to "distinguish between classes of persons" in setting PACER fees—including providing waivers—"to avoid unreasonable burdens and to promote public access to such information," 28 U.S.C. §1913 note.

DE158-5:10¶28 (Gupta decl.); *see also* DE158:23[ECFp31] ("plaintiffs and class counsel vigorously advocated for a pro-rata approach").

The government was right. Named Plaintiffs' advocacy for pro-rata distribution was grossly inappropriate. The "blend" reached as a compromise allocates far too much to a pro rata distribution that unfairly advantages large users and law firms that already have been reimbursed—and who accordingly receive inequitable windfalls under the Settlement.

The pro-rata portion of the distribution is calculated to produce unfair windfalls. Many law firms, particularly the larger ones, pass the PACER charges that they incur on to their clients and are reimbursed for them on thirty-day billing cycles.[2] Class-action lawyers have to wait a little

[2] *See Hallmark v. Cohen & Slamowitz, LLP,* 378 F. Supp. 3d 222, 236 (W.D.N.Y. 2019)(holding PACER fees are among "those ordinarily charged to clients"); *Godson v. Eltman, Eltman, & Cooper, P.C.,* 328 F.R.D. 35, 68 (W.D.N.Y. 2018)(holding PACER fees are among "those ordinarily charged to clients"); *Decastro v. City of New York,* No. 16-cv-3850 (RA), 2017 WL

longer—but they typically are reimbursed for PACER charges when class actions settle.[3] And we know that the great majority of class actions settle.[4] Indeed, Class Counsel's own fee expert

4386372, at *10 (S.D.N.Y. Sept. 30, 2017)(no contest that PACER fees are among the "out-of-pocket expenses ordinarily charged to clients").

[3] *See, e.g., Ciapessoni v. United States,* 145 Fed. Cl. 564, 565 (2019); *Godson v. Eltman, Eltman, & Cooper, P.C.,* 328 F.R.D. 35, 67 (W.D.N.Y. 2018); *In re Broadwing, Inc. ERISA Litig.,* 252 F.R.D. 369, 382 (S.D. Ohio 2006); *Lusk v. Five Guys Enterprises LLC*, No. 1:17-CV-0762 JLT EPG, 2023 WL 4134656, at *30 (E.D. Cal. June 22, 2023); *Stechert v. Travelers Home & Marine Ins. Co.,* No. CV 17-0784-KSM, 2022 WL 2304306, at *15 (E.D. Pa. June 27, 2022); *In re Wawa, Inc. Data Sec. Litig.,* No. CV 19-6019, 2022 WL 1173179, at *12 (E.D. Pa. Apr. 20, 2022); *Yanez v. HL Welding, Inc.,* No. 20CV1789-MDD, 2022 WL 788703, at *13 (S.D. Cal. Mar. 15, 2022); *Karl v. Zimmer Biomet Holdings, Inc.,* No. C 18-04176 WHA, 2022 WL 658970, at *6 (N.D. Cal. Mar. 4, 2022); *Curry v. Money One Fed. Credit Union,* No. CV DKC 19-3467, 2021 WL 5839432, at *6 (D. Md. Dec. 9, 2021); *Kudatsky v. Tyler Techs., Inc.,* No. C 19-07647 WHA, 2021 WL 5356724, at *5 (N.D. Cal. Nov. 17, 2021); *Espinal v. Victor's Cafe 52nd St., Inc.,* No. 16-CV-8057 (VEC), 2019 WL 5425475, at *5 (S.D.N.Y. Oct. 23, 2019); *Ott v. Mortg. Invs. Corp. of Ohio, Inc.,* No. 3:14-CV-00645-ST, 2016 WL 54678, at *6 (D. Or. Jan. 5, 2016); *City of Omaha Police & Fire Ret. Sys. v. LHC Grp.,* No. CIV. 6:12-1609, 2015 WL 965696, at *11 (W.D. La. Mar. 3, 2015); *Jenkins v. Trustmark Nat. Bank,* 300 F.R.D. 291, 310 (S.D. Miss. 2014); *Hargrove v. Ryla Teleservices, Inc.,* No. 2:11CV344, 2013 WL 1897027, at *7 (E.D. Va. Apr. 12, 2013), *report and recommendation adopted,* 2013 WL 1897110 (E.D. Va. May 3, 2013); *Beard v. Dominion Homes Fin. Servs., Inc.,* No. C2 06 137, 2009 WL 10710409, at *7 (S.D. Ohio June 3, 2009); *In re Kirby Inland Marine, L.P.,* No. CIVA 04-611-SCR, 2008 WL 4642616, at *4 (M.D. La. Oct. 16, 2008), aff'd sub nom. In re Kirby Inland Marine LP, 333 F.App'x 872 (5th Cir.2009); *Rankin v. Rots,* No. 02-CV-71045, 2006 WL 1791377, at *3 (E.D. Mich. June 27, 2006); *Jordan v. Michigan Conf. of Teamsters Welfare Fund,* No. 96-73113, 2000 WL 33321350, at *6 (E.D. Mich. Sept. 28, 2000).

[4] *See* Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (Federal Judicial Center, 2005)(according to a 2005 study, certified class actions settled ninety percent of the time); *Redman v. RadioShack Corp.,* 768 F.3d 622, 638 (7th Cir.2014)(noting, in connection with the settlement of a consumer class action, that "very few class actions are tried"); *West v. Prudential Sec., Inc.,* 282 F.3d 935, 937 (7th Cir.2002)("very few securities class actions are litigated to conclusion"); *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 52 (2d Cir.2000)("'there appears to be no appreciable risk of non-recovery" in securities class actions, because 'virtually all cases are settle[]'")(quoting Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions,* 43 Stan.L.Rev. 497, 578 (1991)); *In re Copley Pharm., Inc.,* 161 F.R.D. 456, 466 (D.Wyo.1995)("most class actions settle and few go to trial"); *see also* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions,* 43 Stan. L.Rev. 497, 578 (Feb.1991)(arguing that a multiplier designed to address the contingency factor in securities class actions is unnecessary since "there appears to be no appreciable risk of nonrecovery, for virtually all cases are settled"). "When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the

concedes that "the typical class action settles in only three years." DE158-4:14¶21 (Fitzpatrick decl.). So class-action law firms, like those representing the Named Plaintiffs in this matter, generally receive full reimbursement for their PACER expenditures when the class actions they litigate quite predictably settle.

What this means is that many, if not most, of the class members with the largest Class Period PACER expenditures have already been wholly compensated for all or most of what they spent on PACER. That is a powerful reason for this Court to endorse what Named Plaintiffs report was the government's position: that small users should receive full reimbursement. *See* DE158:21-22. Class Counsel Deepak Gupta explains:

> plaintiffs argued that funds should be distributed pro rata to class members, while the government vigorously insisted that any settlement include a large minimum amount per class member, which it maintained was in keeping with the AO's longstanding policy and statutory authority to "distinguish between classes of persons" in setting PACER fees—including providing waivers— "to avoid unreasonable burdens and to promote public access to such information," 28 U.S.C. § 1913 note.

DE158-5:10¶28.

The government was correct. Public access to court records is critical to American Democracy. Small-scale users should be fully compensated. No significant portion of the Settlement fund should be allocated to the pro-rata distribution advocated by the Named Plaintiffs.

Including large claimants in a pro-rata distribution is problematic, moreover, because the Class cannot be defined to include any entities with claims totaling more than $10,000. Doing so would violate the Little Tucker Act. The Settlement's allocation appears to include, and to distribute Settlement funds to, entities whose claims exceed the Tucker Act's $10,000 jurisdictional limit. "District courts have jurisdiction under the Little Tucker Act to hear claims 'against the United States, ***not exceeding*** $10,000[.]'" *Nat'l Veterans Legal Servs. Program v.*

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company, even if the betting odds are good." *Kohen v. Pacific Inv. Mgmt. Co. LLC,* 571 F.3d 672, 678 (7th Cir.2009).

United States, 968 F.3d 1340, 1347 (Fed.Cir.2020)(emphasis added)(quoting *Corr v. Metro. Washington Airports Auth.,* 702 F.3d 1334, 1336 (Fed.Cir.2012)(quoting 28 U.S.C. §1346(a)(2))).

If Isaacson, as a start-up solo-practitioner who paid PACER fees for less than three years of the eight-year class period, paid $3,823.50 in PACER fees, then many users—particularly institutional users, large law firms, and plaintiffs-side class-action firms—must have run up Class Period PACE bills totaling tens and even hundreds of thousands of dollars. This Court lacks jurisdiction to include them, and their claims, in the Class to whom the Settlement will be distributed. For by now "the question is settled—district courts lose their Little Tucker Act jurisdiction once the amount claimed accrues to more than $10,000, even though jurisdiction was previously proper in the district court." *Simanonok v. Simanonok,* 918 F.2d 947, 950-51 (Fed.Cir.1990). The Federal Circuit has held "the amount of a claim against the United States for back pay is 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." *Smith v. Orr,* 855 F.2d 1544, 1553 (Fed.Cir.1988)(following *Chabal v. Reagan,* 822 F.2d 349 (3d Cir.1987); *see Simanonok,* 918 F.2d at 950-51; *see also Shaw v. Gwatney,* 795 F.2d 1351 (8th Cir.1986); *Goble v. Marsh,* 684 F.2d 12 (D.C.Cir.1982)). Clearly, then, Class Members whose claims exceed $10,000 are beyond this Court's Little Tucker Act jurisdiction.

"In a class action such as this, jurisdiction thereunder turns, not upon the aggregate amount of the claims [of all] the members of the class, but upon the amounts claimed individually by those members." *March v. United States,* 506 F.2d 1306, 1309 n.1 (D.C.Cir.1974); *see Kester v. Campbell,* 652 F.2d 13, 15 (9th Cir.1981); *Pennsylvania v. National Association of Flood Insurers,* 520 F.2d 11, 25 (3d Cir.1975). Yet Little Tucker Act jurisdiction ultimately covers a class action only if, and to the extent that, "the individual claim of each class member does not exceed $10,000.00." *Kester v. Campbell,* 652 F.2d 13, 15 (9th Cir.1981).

There is one way, of course, to preserve Little Tucker Act jurisdiction with respect to Class Members whose individual claims exceed $10,000. It is well established that "a plaintiff may pursue such a claim in a district court if the plaintiff waives his right to recover the amount

exceeding $10,000." *Smith v. Orr,* 855 F.2d 1544, 1552–53 (Fed. Cir.1988). That can be accomplished by abandoning the notion that large claimants have the right to a pro-rata distribution based on large claims that would place them beyond the jurisdictional limitation. No portion of the Settlement fund should be allocated on the basis of Class Members' PACER expenditures after the first $10,000 they paid during the Class Period. The first distribution should be capped at a much higher level than $350 apiece, and any pro-rata distribution of remaining funds should be based on Class Members' expenditures ***up to*** $10,000 apiece, thereby waiving Class Members' larger claims in order both to preserve Tucker Act jurisdiction, and also to achieve a more equitable distribution of the Settlement Fund.

B. The Attorney's Fees Sought Are Grossly Excessive

Class Counsel's expert, Professor Brian Fitzpatrick, says "that the fee request is more than reasonable." DE158-4:5¶8 (Fitzpatrick decl.).

It is, in fact, several times what the Supreme Court's precedents hold is a reasonable attorney's fee to fully compensate class plaintiffs' counsel in contingent class-action litigation that settles. For while the Supreme Court holds that class counsel ordinarily are adequately compensated with an unenhanced lodestar award, *see Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 546 (2010), Class Counsel here ask for roughly ***four times*** that amount. And while the Supreme Court has never approved a common-fund fee award exceeding ten percent of the common fund, Class Counsel in this case demand twice that. It appears that the driving concern in this settlement is Class Counsel's desire to capture an extravagant fee.

The Supreme Court holds that attorney's fees may be awarded from a common fund or equitable fund based either on the attorney's fees reasonably incurred and billed, *see Trustees v. Greenough,* 105 U.S. 527, 530-31, 537-38 (1882), or as a modest percentage of the fund, *see Central RR & Banking Co. v. Pettus,* 113 U.S. 116, 128 (1885)(cutting fee award from 10% to 5%). At ***four times*** Class Counsel's claimed hourly rates, and more than twice the percentage supported by Supreme Court common-fund precedents, the attorney's fee award sought by Class Counsel is clearly excessive.

Class Counsel claim a lodestar of $6,031,678.25. DE158-5:22-23¶¶63-64 (Gupta decl.). Supreme Court precedent mandates "a strong presumption that the lodestar is sufficient," without any enhancement, to compensate plaintiffs' counsel when a contested class action settles. *Perdue,* 559 U.S. at 546 (2010); *see Haggart v. Woodley,* 809 F.3d 1336, 1355 n.19 (Fed.Cir.2016). Even in common-fund cases, such as this, "[t]here is a 'strong presumption' that the lodestar figure represents a reasonable fee." *Fischel v. Equitable Life Assur. Soc'y,* 307 F.3d 997, 1007 (9th Cir.2002)(citation omitted). "Because of [that] 'strong presumption that the lodestar is sufficient,' a multiplier is warranted only in 'rare and exceptional circumstances.'" *Chambers v. Whirlpool Corp.,* 980 F.3d 645, 665 (9th Cir.2020)(quoting *Perdue,* 559 U.S. at 546-52, and reversing a 1.68 lodestar multiplier).

"There is a 'strong presumption' that the lodestar figure represents a reasonable attorney's fee, [*Perdue,* 559 U.S. at 546], because '"the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee."'" *Heller v. District of Columbia,* 832 F. Supp. 2d 32, 37 (D.D.C. 2011)(quoting *Perdue,* 559 U.S. at 543(quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 566 (1986)). "[T]he burden of proving that an enhancement is necessary must be borne by the fee applicant, *Perdue,* 559 U.S. at 553, who "must produce 'specific evidence'" supporting the enhancement. *Perdue,* 559 U.S. at 553. And, as *Perdue* itself emphasizes, "factors subsumed in the lodestar calculation cannot be used as a ground for increasing an award above the lodestar." *Perdue,* 559 U.S. at 546.

Class Counsel have not demonstrated by a preponderance of the evidence that they are entitled to nearly four times their claimed lodestar. Acting as a fiduciary to the Class, this Court should not grant such an extravagant award.

Class Counsel contend that such a windfall is justified if only the attorney's fee is awarded as a percentage of the $125 million megafund settlement. After all, they say, they only want 19% of the fund. Yet the Supreme Court has never approved a percent-of-fund common-fund fee award exceeding ten percent of the fund.

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

In *United States v. Equitable Trust Co.,* 283 U.S. 738 (1931), the Supreme Court rejected the notion that counsel whose efforts secure a fund may receive more than necessary to compensate them adequately for their time. The Second Circuit already had rejected the district court's conclusion that counsel were entitled to a quarter to a third of the fund, cutting the attorney's fee award to just $100,000 (about 15% of the fund) and warning that "[t]he allowance is a payment for legal services, not a speculative interest in a lawsuit." *Barnett v. Equitable Trust Co.*, 34 F.2d 916, 919 (2d Cir.1929)(Learned Hand). The attorneys then complained to the Supreme Court that "from a percentage standpoint, the allowance of $100,000 is but slightly over fifteen per cent," and that "never yet have counsel been cut down to such a low percentage in any contested case taken upon a contingent basis."[5] But the Supreme Court found even "the allowance of $100,000 unreasonably high, and that to bring it within the standard of reasonableness it should be reduced to $50,000," which was about $7^1/_2$% of the fund. *Equitable Trust,* 283 U.S. at 746. Those are old decisions, to be sure. But the Supreme Court's common-fund precedents remain controlling authority. *See, e.g., Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980)(applying common-fund doctrine rooted in *Greenough* and *Pettus*); *Haggart v. Woodley,* 809 F.3d 1336, 1352 (Fed.Cir.2016)(favorably citing *Greenough* and *Pettus*).

And with the development of computerized research, automated document review, and digital storage and retrieval of documents, the difficulty and expense of litigation has surely fallen.

[5] Brief for Respondents to Whom Allowances Were Made, *United States v. Equitable Trust,* 283 U.S. 738 [Oct. Term 1929 No. 530], at 55-56 (filed April 16, 1930).

Given the tremendous economies of scale afforded by the class-action device in recovering the $125 million megafund in this case, the five percent of the fund found reasonable in *Pettus* would be wholly appropriate here too. Its reasonableness is, moreover, confirmed by a cross-check against Class Counsel's claimed lodestar. For five percent of the megafund is $6,250,000, and Class Counsel's claimed lodestar is only $6,031,678.25. DE158-5:22-23¶¶63-64 (Gupta decl.). A five-percent award gives Class Counsel something more than their lodestar which, according to *Perdue,* is presumptively sufficient to compensate them for their work on a settling contingent-fee class action.

Of course, that assumes that Class Counsel's lodestar is proper. It is not. Their lodestar is inadequately documented. Class Counsel submitted a summary declaration, giving total hours and billing rates, with no further itemization or explanation of the hours billed, or of the basis for the billing rates. That is not enough to support Class Counsel's purported lodestar.[6] Were appropriate deductions made, their lodestar would be much lower, and the multiplier for their requested fee award doubtless would exceed four.

The claimed lodestar amount is plainly excessive. Class Counsel's paid expert on fees, Professor Brian Fitzpatrick, has developed a matrix of reasonable "Hourly Rates ($) for Legal Fees for Complex Federal Litigation in the District of Columbia." *See* Isaacson Decl. Ex.D

[6] *Wojtkowski v. Cade,* 725 F.2d 127, 130 (1st Cir.1984)("The affidavit here was little more than a tally of hours and tasks relative to the case as a whole."); *McDonald v. Pension Plan,* 450 F.3d 91, 96 (2d Cir.2006)("In order to calculate the reasonable hours expended, the prevailing party's fee application must be supported by contemporaneous time records."); *Cadena v. Pacesetter Corp.,* 224 F.3d 1203, 1215 (10th Cir.2000)("'[I]f [prevailing parties] intend to seek attorney's fees ... [their attorneys] must keep meticulous, contemporaneous time records [.]"); *Harper v. City of Chicago Heights,* 223 F.3d 593, 605 (7th Cir.2000 ("[I]t is within a district court's power to reduce a fee award because the petition was not supported by contemporaneous time records."); In re Olson, 884 F.2d 1415, 1428 (D.C.Cir.1989 (disallowing entries that failed to identify the subject of a meeting, conference, or phone call and requiring contemporaneous records proving the reasonableness of hours and rates); *Grendel's Den v. Larkin,* 749 F.2d 945, 952 (1st Cir.1984)("in cases involving fee applications ... the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award, or in egregious cases, disallowance"); *Savin ex rel. Savin v. Sec'y of Health & Hum. Servs.,* 85 Fed.Cl. 313, 317 & n.5 (2008).

[https://www.justice.gov/usao-dc/page/file/1189846/download]. Professor Fitzpatrick says his "Fitzpatrick Matrix" is based on research that "allowed us to determine the real hourly rates charged in the market" in complex federal litigation lilke this case. *See* Isaacson Decl. Ex.E. The highest reasonable 2021 billing rate for a lawyer with 35+ years' experience, according to Professor Fitzpatrick's official matrix, is $736 an hour. *See id.* Yet in this case, Class Counsel's lodestar is built on billing rates that grossly exceed what Fitzpatrick deemed reasonable for complex litigation in the District of Columbia. A 2002 Georgetown graduate, Deepak Gupta's time is billed at $1150 an hour, while 2010 Harvard graduate Jonathan E. Taylor's time is billed at $975 an hour—well over the rates deemed reasonable for complex litigation in the District of Columbia. DE158-5:22¶63. Turning to the Motley Rice lawyers, we find William Narwold billing at $1250 an hour, and Meghan Oliver at $950 an hour. DE158-5:5¶12.

Class Counsel have offered adequate justifications neither for their billing rates, nor for the hours claimed. Not even their own expert, Professor Brian Fitzpatrick, has opined that they are reasonable.

Neither have Class Counsel demonstrated that they should be entitled to any multiplier of their inadequately documented lodestar, or to a percentage fee of more than the five percent that the Supreme Court applied to a common-fund fee application in *Pettus,* which would more than adequately compensate them for their efforts.

Class Counsel's fee expert urges a dramatic upward departure from the attorney's fees supported by Supreme Court precedents—based on his own survey of nonprecedential published, and even unpublished district court rulings. Fitzpatrick ignores the fact that "[i]n the vast majority of cases, Class counsel appears before the court to request a big percentage of the settlement fund, cooperative settling Defendants offer no opposition, and class members rarely oppose the request." *In re Quantum Health Res., Inc.,* 962 F. Supp. 1254, 1256 (C.D. Cal. 1997). "The situation is a fundamental conflict of interest and is inherently collusive. The lack of opposition to a proposed fee award gives a court the sometimes false impression of reasonableness, and the court might simply approve a request for fees without adequate inquiry or comment." *In re Quantum Health*

Res., Inc., 962 F. Supp. 1254, 1256 (C.D. Cal. 1997)(footnote omitted). Fitzpatrick's survey thus is of minimal value.

Factors cited by Class Counsel and their expert do not justify the large fee. The case, though somewhat novel, was obviously an easy one to litigate. The central contest was on an issue of statutory construction. After the Federal Circuit clarified the law, *see National Veterans Legal Servs. Program v. United States,* 968 F.3d 1340, 1349 (Fed.Cir.2020), the case was an easy one to settle. And that, of course, eliminated any risk of nonpayment that Class Counsel might have faced had they taken the case to trial.

Named Plaintiffs and Class Counsel together seek "an award of attorneys' fees, settlement-administration and notice costs, litigation expenses, and service awards for the three class representatives in a total amount equal to 20% of the $125 million common fund." DE158:4[ECFp13]. Their motion also seeks "an award of $10,000 per class representative to compensate them for their time working on the case and the responsibility that they have shouldered" while Class counsel seeks "$23,863,345.02 in attorneys' fees," or nearly four times their claimed lodestar. DE158:4[ECFp13].

This Court should not award an attorney's fee amounting to more than Class Counsel's unenhanced lodestar recalculated at the rates set forth in their own fee expert's "Fitzpatrick Matrix."

C. The $10,000 Apiece Service Awards Named Plaintiffs Seek are Inequitable and Unlawful

The Supreme Court's foundational common-fund class-action precedents hold that payments compensating litigants for their service as class representatives are inequitable and illegal. *See Trustees v. Greenough,* 105 U.S. 527, 537 (1882); *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116, 122 (1885). The Eleventh Circuit thus soundly holds that "Supreme Court precedent prohibits incentive awards."[7] And the Second Circuit recently conceded: "Service

[7] *Johnson v. NPAS Sols., LLC,* 975 F.3d 1244, 1255 (11th Cir.2020), *reh'g denied,* 43 F.4th 1138 (11th Cir.2022); *accord, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.,* 999 F.3d 1247,

awards are likely impermissible under Supreme Court precedent." *Fikes Wholesale v. HSBC Bank USA,* 62 F.4th 704, 721 (2d Cir.2023).

So "any service award in a class action is at best dubious under *Greenough*." *Fikes Wholesale,* 62 F.4th at 723; *see also id.* at 729 (Jacobs, Cir.J., concurring). The Second Circuit nonetheless chooses to follow its own decisions sustaining incentive awards—rather than the Supreme Court's decisions banning them:

> But practice and usage seem to have superseded Greenough (if that is possible). *See 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). And even if (as we think) practice and usage cannot undo a Supreme Court holding, *Melito* and *Navient* are precedents that we must follow.

Fikes Wholesale, 62 F.4th at 721.

Supreme Court precedent cannot be superseded by lower courts' contrary practice and usage. Lower courts are not at liberty to reject Supreme Court precedents as obsolescent. In fact, "the strength of the case for adhering to such decisions grows in proportion to their 'antiquity.'" *Gamble v. United States,* 139 S.Ct. 1960, 1969 (2019)(citing *Montejo v. Louisiana,* 556 U.S. 778, 792 (2009). Even if a Supreme Court precedent was "'unsound when decided'" and even if it over time becomes so "'inconsistent with later decisions'" as to stand upon "'increasingly wobbly, moth-eaten foundations,'" it remains the Supreme Court's "prerogative alone to overrule one of its precedents."[8] The Supreme Court holds: "If a precedent of this Court has direct application in a

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1257 (11th Cir.2021)("such awards are prohibited"); *Medical & Chiropractic Clinic, Inc. v. Oppenheim,* 981 F.3d 983, 994 n.4 (11th Cir.2020)("such service awards are foreclosed by Supreme Court precedent").

[8] *State Oil Co. v. Khan,* 522 U.S. 3, 9, 20 (1997)(quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir.1996)(Posner, J.)); *accord, e.g., Payne v. Taslimi,* 998 F.3d 648, 654 (4th Cir.2021); *Acorda Therapeutics Inc. v. Mylan Pharms. Inc.,* 817 F.3d 755, 770 (Fed.Cir.2016)(O'Malley, Cir.J., concurring).

case," as *Greenough* does here, a lower court "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989); *accord, e.g., Mallory v. Norfolk S. Ry. Co.,* 143 S. Ct. 2028, 2038 (2023).

But even if *Greenough* and *Pettus* do not altogether bar incentive awards, such payments are appropriate only when actually necessary. The Ninth Circuit in *In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 786 (9th Cir.2022), for example, construed *Greenough* not as a decision that prohibits incentive awards in general, but as one that prohibits incentive awards unless they are necessary to induce the named plaintiffs to pursue the case:

> While private plaintiffs who recover a common fund are entitled to "an extra reward," they are limited to "that which is deemed 'reasonable' under the circumstances." *Id. Greenough,* for example, prohibited recovery for the plaintiff's "personal services and private expenses" because the private plaintiff was a creditor who needed no inducement to bring suit. *Greenough,* 105 U.S. at 537.

In re Apple Inc. Device Performance Litig., 50 F.4th 769, 786 (9th Cir.2022).

The Seventh Circuit similarly holds that incentive awards are appropriate only when "'necessary to induce an individual to participate in the suit.'"[9]

But here, as in *Greenough,* the Named Plaintiffs had substantial claims of their own, and they clearly "needed no inducement to bring suit." *Apple Device,* 50 F.4th at 786. This Court has recognized that they already had "dual incentives to reduce PACER fees, both for themselves and for the constituents that they represent." DE33:14. Named Plaintiffs presented their missions as

[9] *Camp Drug Store v. Cochran Wholesale Pharmaceutical,* 897 F.3d 825, 834 (7th Cir.2018)(citation omitted); *see also In re Synthroid Mktg. Litig.,* 264 F.3d 712, 722 (7th Cir.2001)("Incentive awards are justified when necessary to induce individuals to become named representatives."); *Montgomery v. Aetna Plywood, Inc.,* 231 F.3d 399, 410 (7th Cir.2000)("Incentive awards are appropriate if compensation would be necessary to induce an individual to become a named plaintiff in the suit.").

nonprofits as their motivations to pursue this litigation. They never needed special $10,000 payments to induce them to file suit.

Finally, anyone who seeks an incentive award must document their time on the case. As the Sixth Circuit has held:

> The settlement agreement provides for incentive awards of up to $10,000 per individual named plaintiff .... Class counsel argues in conclusory terms that the awards compensate the named plaintiffs for their time spent on the case. To ensure that these amounts are not in fact a bounty, however, counsel must provide the district court with specific documentation—in the manner of attorney time sheets—of the time actually spent on the case by each recipient of an award.

Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299, 311 (6th Cir.2016). "Otherwise the district court has no basis for knowing whether the awards are in fact 'a disincentive for the [named] class members to care about the adequacy of relief afforded unnamed class members[.]'" *Id.* (quoting *In re Dry Max Pampers Litig.,* 724 F.3d 713, 722 (6th Cir.2013)(emphasis in original).

Named Plaintiffs neither kept, nor presented, the required documentation. *See, e.g.,* DE158:2¶2 (Rossman decl.)("our organization did not keep formal time records"). That is another reason that the payments should be denied.

III. CONCLUSION

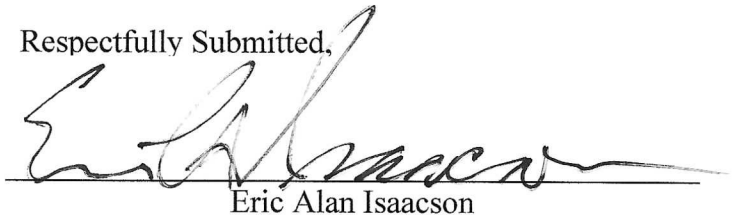
Although Named Plaintiffs insist that they "'enjoy a presumption of fairness afforded by [this] court's preliminary fairness determination,'" DE158:18[ECFp26] (quoting *Ciapessoni v. United States,* 145 Fed. Cl. 685, 688 (2019)), and also that any settlement "reached in arm's length negotiations between experienced, capable counsel after meaningful discovery" similarly enjoys a "'presumption of fairness, adequacy, and reasonableness,'" DE158:19-20 (quoting *Kinard v. E. Capitol Fam. Rental, L.P.,* 331 F.R.D. 206, 215 (D.D.C.2019)), Rule 23 neither authorizes nor permits any such presumptions. In fact, "Rule 23(e)(2) assumes that a class action settlement is invalid." *Briseno v. Henderson,* 998 F.3d 1014, 1030 (9th Cir.2021).

The Settling Parties have not carried their burden of demonstrating by a preponderance of the evidence that this one is fair, reasonable, and adequate. It is not. Named Plaintiffs seek to

allocate far too much of the Settlement fund to their lawyers, as attorney's fees, and to themselves in special $10,000 incentive awards, and with a further pro-rata distribution that favors large users and that awards windfalls to large law firms and to class-action plaintiffs' counsel.

DATED: September 12, 2023

Respectfully Submitted,



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DECLARATION OF ERIC ALAN ISAACSON

I, Eric Alan Isaacson, declare and state as follows:

1. I am over the age of eighteen, make this declaration based on my personal knowledge and, if called as a witness, would testify competently as to the facts stated herein.

2. I make this declaration in support of my objection to approval of the proposed class-action settlement, award of attorney's fees, and of service awards, in *National Veterans Legal Services Program, et al. v. United States of America,* Civil No. 16-745-PLF, which is pending in the United States District Court for the District of Columbia.

3. A 1982 baccalaureate graduate of Ohio University, I hold a 1985 J.D. with high honors from the Duke University School of Law, and in May of 2022 I graduated from the Harvard Divinity School with a Master of Religion and Public Life.

4. Continuing my graduate studies, I recently enrolled in the Harvard Extension School, where am working toward a Master of Liberal Arts in Extension Studies in the field of History.

5. I have been a member in good standing of the bar of the State of California (No. 120584) since 1985.

6. I was a founding partner of the law firm of Robbins, Geller, Rudman & Dowd LLP (f.k.a. Lerach Coughlin Stoia Geller Rudman & Robbins LLP), where I practiced law from May 1, 2004 to March 15, 2016.

7. Since March of 2016, I have practiced law from the LAW OFFICE OF ERIC ALAN ISAACSON, 6580 Avenida Mirola, La Jolla, CA 92037.

8. I am informed and believe I am a member of the Class who would be bound by the proposed Settlement in this matter because I paid PACER bills during the Class Period, and I received an email notice of the Class Action Settlement.

9. In March of 2016, I opened my own PACER account (No. 4166698), for which I have paid quarterly the PACER bills ever since.

10. A true and correct of copy my short-form curriculum vita is attached as Exhibit A hereto.

11. A true and correct copy of the email Class Notice that I received concerning this matter is attached as Exhibit B hereto.

12. My Class Period PACER billings under that account totaled $3,823.50, as evidenced by invoices and emails attached as Exhibit C hereto.

13. Attached as Exhibit D hereto is a true and correct copy of "The Fitzpatrick Matrix," a document "prepared by Brian Fitzpatrick, the Milton R. Underwood Chair in Free Enterprise and Professor of Law at Vanderbilt Law School, with the help of his students," and "Published by the U.S. Attorney's Office for the District of Columbia, Civil Division," that I downloaded today from https://www.justice.gov/usao-dc/page/file/1189846/download, and for which I have prepared the following bitly link: https://bit.ly/USAOfitz

14. Attached as Exhibit E hereto is a true and correct copy of *Fee matrix developed by Professor Brian Fitzpatrick and Brooke Levy '22 adopted by Federal Court*," Feb.7, 2023, that I downloaded today from https://law.vanderbilt.edu/news/fee-matrix-developed-by-professor-brian-fitzpatrick-and-brooke-levy-22-adopted-by-federal-court/ and for which I have prepared the following bitly link: https://bit.ly/463kPjs

15. I have received reimbursement (from a client) for only $171.80 of the foregoing $3,823.50 Class Period PACER expenditures. Thus, my total unreimbursed Class Period PACER expenditures come to $3,651.70.

16. I seldom seek reimbursement from clients for my PACER expenditures, and I have not had occasion to seek reimbursement for any of my Class Period PACER expenditures from the settlement fund in any court proceeding.

17. I do not expect to seek or receive any further reimbursement of my remaining $3,651.70 in unreimbursed Class Period PACER expenditures.

18. A substantial portion of my Class Period PACER expenditures reflect research in connection with my own personal scholarship in matters of law and economics.

19. A substantial portion of my legal practice during the Class Period was devoted to pro bono matters in which I incurred and paid expenses for documents downloaded from PACER for which I did not seek, and never will seek, reimbursement. These included, for example:

- *EEOC v. R.G. & G.R. Harris Funeral Homes,* 884 F.3d 560 (6th Cir.2018) – Briefed for amicus curiae Unitarian Universalist Association, supporting the EEOC and defending a transgender employee's right not to be subjected to religiously motivated workplace discrimination. (Amicus brief filed April 28, 2017);
- *Janus v. AFSCME, Council 31,* 585 U.S. __, 138 S.Ct. 2584 (June 27, 2018) – Counsel of Record for amici curiae Faith in Public Life, religious organizations, and faith leaders supporting respondent labor union and the need for labor-union fair-share agency fees. (Amicus brief filed January 19, 2018);
- *Voice of the Ex-offender v. Louisiana,* 249 So.3d 857 (La.Ct.App. 1st Cir.2018), *cert. denied,* 255 So.3d 575 (La.2018)(Chief Justice Johnson dissenting) – Co-counsel for amici curiae of historians Walter C. Stern, et al., supporting the right of released ex-offenders to vote. (Amicus brief filed February 21, 2018).

20. I object to the proposed Settlement in *National Veterans Legal Services Program, et al. v. United States of America,* Civil No. 16-745-PLF, and in particular to the requested attorney's fee award, and the requested service awards, for reasons stated in the Objection of Eric Alan Isaacson that this declaration accompanies.

21. I have pressed objections in other class actions, but have always done so with the objective of improving the quality of class-action settlements and of developing what I regard as sound principles of law.

22. Both during the Class Period and after I have sought, with some success, to improve class-action practice in the United States. *See, e.g., Moses v. New York Times Co*., No. 21-2556-CV, __F.4th__, 2023 WL 5281138, at *1 (2d Cir. Aug. 17, 2023)("we agree with Isaacson that the

district court exceeded its discretion when it approved the settlement based on the wrong legal standard in contravention of Rule 23(e)"); *Murray v. Grocery Delivery E-Servs. USA Inc.,* 55 F.4th 340, 342 (1st Cir.2022)("we vacate [settlement] approval because the absence of separate settlement counsel for distinct groups of class members makes it too difficult to determine whether the settlement treated class members equitably"); *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244, 1248 (11th Cir.2020)("We find that, in approving the settlement here, the district court repeated several errors that, while clear to us, have become commonplace in everyday class-action practice. ... [I]t handled the class-action settlement here in pretty much exactly the same way that hundreds of courts before it have handled similar settlements. But familiarity breeds inattention, and it falls to us to correct the errors in the case before us."); *Muransky v. Godiva Chocolatier, Inc.,* 979 F.3d 917 (11th Cir.2020)(en banc)(sustaining objection that a representative plaintiff who suffered no injury lacked Article III standing to represent and compromise the interests of the class); *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.,* 888 F.3d 455, 458 (10th Cir.2017) (reversing $17.3 million class-action attorney's fee award).

23. None of my objections to class-action settlements or attorney's fee awards have been found to be frivolous, and none have been made for improper purposes.

24. I have never pressed an objection in order to extract a payment in return for the objection's withdrawal, or for the dismissal of any resulting appeal.

25. I will not accept any payment in return for withdrawing my objection in this case, for foregoing an appeal, or for dismissing any appeal.

26. I am, moreover, willing to be bound by a court order absolutely prohibiting any such payment in this case.

27. I desire to be heard at the October 12, 2023, Final Approval Hearing in the above-captioned matter, either in person or remotely by means of telephone or video conferencing.

I declare under penalty of perjury pursuant to the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on September 12, 2023, at La Jolla, California.

Eric Alan Isaacson

Eric Alan Isaacson
Law Office of Eric Alan Isaacson
6580 Avenida Mirola
La Jolla, CA 92037-6231
(858)263-9581
ericalanisaacson@icloud.com

EXHIBIT A

ERIC ALAN ISAACSON

LAW OFFICE OF ERIC ALAN ISAACSON – https://www.ericalanisaacson.com
6580 Avenida Mirola, La Jolla, CA 92037-6231
ericalanisaacson@icloud.com, eri628@g.harvard.edu
(858) 263-9581

EDUCATION:

- Harvard Extension School, working toward a Master of Liberal Arts (ALM) in Extension Studies, field of History
- Harvard Divinity School, M.R.P.L. 2022
- Duke University School of Law, J.D. with high honors, 1985; Order of the Coif; *Duke Law Journal* (Member 1983-1984 & Note Editor 1984-1985); Research Assistant to Prof. William A. Reppy, Jr. (summer 1983)
- Ohio University, A.B. with high honor, 1982

PROFESSIONAL EMPLOYMENT:

- Law Office of Eric Alan Isaacson (March 16, 2016 to present); Robbins Geller Rudman & Dowd LLP, f.k.a. Lerach Coughlin Stoia Geller Rudman & Robbins LLP (founding partner, May 1, 2004 to March 15, 2016)
- Milberg Weiss Bershad Hynes & Lerach LLP (partner, January 1994 through April 2004; associate, November 1989 through December 1993); • O'Melveny & Myers, Los Angeles (associate, 1986-1989)
- U.S. Court of Appeals for the Ninth Circuit (law clerk to Hon. J. Clifford Wallace, 1985-1986)

BAR ADMISSIONS:

California (1985); Supreme Court of the United States (1995); also admitted to practice before the U.S. Courts of Appeals for the First through Eleventh Circuits, Federal Circuit, and D.C. Circuit, and before all federal district courts in California and Oklahoma

SELECTED PUBLICATIONS:

- *A Real-World Perspective on Withdrawal of Objections to Class-Action Settlements and Attorneys' Fee Awards: Reflections on the Proposed Revisions to Federal Rule of Civil Procedure 23(e)(5),* 10 ELON L. REV. 35 (2018) [https://bit.ly/3fKYLB8]
- *The Roberts Court and Securities Class Actions: Reaffirming* Basic *Principles,* 48 AKRON L. REV. 923 (2015) [https://bit.ly/33mWZRJ]
- *Free Exercise for Whom? – Could the Religious-Liberty Principle that Catholics Established in* Perez v. Sharp *Also Protect Same-Sex Couples' Right to Marry?,* 92 U. DET. MERCY L. REV. 29 (2015) [https://bit.ly/3fJnZjs]
- Goodridge *Lights A Nation's Way to Civic Equality,* BOSTON BAR J., Nov. 15, 2013 [https://bit.ly/33qHiZS]
- *Are Same-Sex Marriages Really a Threat to Religious Liberty?,* 8 STANFORD J. CIV. RTS. & CIV. LIBERTIES 123 (2012) [https://bit.ly/2Vr3Fu5]
- *Assaulting America's Mainstream Values: Hans Zeiger's* Get Off My Honor: The Assault on the Boy Scouts of America, 5 PIERCE L. REV. 433 (2007) [https://bit.ly/3q3P3P8]
- *Traditional Values, or a New Tradition of Prejudice? The Boy Scouts of America vs. the Unitarian Universalist Association of Congregations,* 17 GEO. MASON U. CIV. RTS. L.J. 1 (2006) [https://bit.ly/3li1yTI]

- (with Patrick J. Coughlin & Joseph D. Daley) *What's Brewing in* Dura v. Broudo*? The Plaintiffs' Attorneys Review the Supreme Court's Opinion and its Import for Securities-Fraud Litigation,* 37 LOYOLA U. CHICAGO L. J. 1 (2005) [https://bit.ly/3lhnf6u]
- (with William S. Lerach) *Pleading Scienter Under Section 21D(b)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness and the Private Securities Litigation Reform Act of 1995*, 33 SAN DIEGO L. REV. 893 (1996) [https://bit.ly/3wLmgBY]
- *The Flag Burning Issue: A Legal Analysis and Comment,* 23 LOYOLA L.A. L. REV. 535 (1990) [https://bit.ly/3qkKYX8]

VOLUNTEER SERVICE:

- Skinner House Books, Editorial Board member, June 2016 to present;
- American Constitution Society, San Diego Lawyer Chapter, Steering Committee Member ,January 2008 to August 2009, and Board Member, August 2009 to present
- First Unitarian Universalist Church of San Diego, youth leader, September 2019 to June 2020; children's religious-education leader, September 2004 to June 2019; delegate to Unitarian Universalist Association General Assemblies of 2019, 2018, 2017, 2015, 2014 & 2009; Worship Welcome Team, member, May 2008 to May 2011

SELECTED PRO BONO *AMICUS CURIAE* BRIEFS:

- *Janus v. AFSCME, Council 31,* 138 S.Ct. 2448 (2018), brief for *amici curiae* Faith in Public Life, *et al.*, supporting public employees' labor-union fair-share agency fees [http://bit.ly/2KohwKr]
- *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560 (6th Cir. 2018), brief for *amicus curiae* Unitarian Universalist Association, supporting transgender employee's right not to be subjected to religiously motivated workplace discrimination [http://bit.ly/2yKxm0z]
- *Obergefell v. Hodges,* 576 U.S. 644 (2015), brief for *amici curiae* California Council of Churches, *et al.*, supporting same-sex couples' right to marry [https://bit.ly/34KqJJL]
- *Hollingsworth v. Perry,* 570 U.S. 693 (2013), brief for *amici curiae* California Council of Churches, *et al.*, supporting same-sex couples' right to marry [https://bit.ly/2HNQr79]
- *Pickup v. Brown,* 740 F.3d 1208 (9th Cir. 2014), brief for *amici curiae* California Faith for Equality, *et al.*, supporting California legislation barring healthcare professionals from subjecting minors to "Sexual Orientation Change Efforts" [https://bit.ly/2HCINwD]
- *Log Cabin Republicans v. United States,* 658 F.3d 1162 (9th Cir. 2011), brief for *amici curiae* Forum on the Military Chaplaincy, *et al.*, supporting the Log Cabin Republicans' challenge to "Don't Ask Don't Tell" [https://bit.ly/3mCXiiS]
- *Perry v. Brown,* 52 Cal. 4th 1116, 265 P.3d 1002 (2011), brief for *amici* California Faith for Equality, *et al.*, on questions certified to the California Supreme Court [https://bit.ly/2JkT6pu]
- *Perry v. Brown,* 671 F.3d 1052 (9th Cir. 2012), brief for *amici curiae* California Faith for Equality, et al., supporting same-sex couples' challenge to California Proposition 8's ban on same-sex marriages [https://bit.ly/37OtnQu]
- *Perry v. Schwarzenegger,* 704 F.Supp.2d 921 (N.D. Cal. 2010), brief for *amici curiae* Unitarian Universalist Legislative Ministry California, *et al.* [https://bit.ly/3mwYQuD]
- *Strauss v. Horton,* 46 Cal. 4th 364, 377-78, 207 P.3d 48, 93 Cal. Rptr. 3d 591 (2009), brief for *amici curiae* California Council of Churches, *et al.,* opposing California's Proposition 8 [https://bit.ly/3mtYpRE]

- *In re Marriage Cases,* 43 Cal.4th 757, 183 P.3d 384, 76 Cal.Rptr.3d 683 (2008), on team filing *amicus curiae* brief for the Unitarian Universalist Association, *et al.*, supporting the right of same-sex couples to marry [https://bit.ly/2VdpcpL]
- *In re Marriage Cases,* 49 Cal.Rptr.3d 675 (Cal. App. 1st Dist. 2006), on team filing *amicus curiae* brief for the General Synod of the United Church of Christ, *et al.*, supporting the right of same-sex couples to marry [https://bit.ly/3miFMR6]

AWARDS:

- American Constitution Society San Diego Lawyer Chapter's third annual *Roberto Alvarez Award*, January 29, 2014
- San Diego Democrats for Equality *Eleanor Roosevelt Award for Community Service,* November 17, 2012
- Unitarian Universalist Association *President's Annual Award for Volunteer Service*, June 28, 2009 [https://bit.ly/3GzRT6K]

EXHIBIT B

From: **PACER Fees Class Action Administrator** donotreply@pacerfeesclassaction.com
Subject: PACER Fees – Notice of Class Action Settlement
Date: July 6, 2023 at 8:34 PM
To: ericalanisaacson@icloud.com

Account ID: 10176234
PIN: 328319

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and May 31, 2018, a proposed class action settlement may affect your rights.

Nonprofit groups filed this lawsuit against the United States, claiming that the government has unlawfully charged users of PACER (the Public Access to Court Electronic Records system) more than necessary to cover the cost of providing public access to federal court records. The lawsuit, *National Veterans Legal Services Program, et al. v. United States*, Case No. 1:16-cv-00745-PLF, is pending in the U.S. District Court for the District of Columbia. This notice is to inform you that the parties have decided to settle the case for $125,000,000. This amount is referred to as the common fund. The settlement has been preliminarily approved by the Court.

Why am I receiving this notice? You are receiving this notice because you may have first paid PACER fees between April 22, 2016 and May 31, 2018. This notice explains that the parties have entered into a proposed class action settlement that may affect you. You may have legal rights and options that you may exercise before the Court decides to grant final approval to the settlement.

What is this lawsuit about? The lawsuit alleges that federal courts have been charging unlawfully excessive PACER fees. It alleges that Congress has authorized the federal courts to charge PACER fees only to the extent necessary to cover the costs of providing public access to federal court records, and that the fees for use of PACER exceed its costs. The lawsuit further alleges that the excess PACER fees have been used to pay for projects unrelated to PACER. The government denies these claims and contends that the fees are lawful. The parties have agreed to settle.

Who represents me? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC to represent the Class as Class Counsel. You do not have to pay Class Counsel or anyone else to participate. Class Counsel's fees and expenses will be deducted from the common fund. By participating in the Class, you agree to pay Class Counsel up to 30 percent of the total recovery in attorneys' fees and expenses with the total amount to be determined by the Court. You may hire your own attorney, if you wish, at your own expense.

What are my options?

OPTION 1. Do nothing. Stay in the settlement. By doing nothing, you remain part of this class action settlement. If you are an accountholder and directly paid your own PACER fees, you do not have to do anything further to receive money from the settlement. You will be legally bound by all orders and judgments of this Court, and will automatically receive a check for your share of the common fund assuming the Court grants final approval of the settlement. By doing nothing you give up any rights to sue the United States government separately about the same claims in this lawsuit. If someone directly paid PACER fees on your behalf, you should direct your payment to that individual or entity at www.pacerfeesclassaction.com no later than Tuesday, September 5th, 2023. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds.

OPTION 2. Exclude yourself from the settlement. Alternatively, you have the right to not be part of this settlement by excluding yourself or "opting out" of the settlement and Class. If you exclude yourself, you cannot get any money from the settlement, but you will keep your right to separately sue the United States government over the legal issues in this case. If you do not wish to stay in the Class, you must request exclusion in one of the following ways:

1. Send an "Exclusion Request" in the form of a letter sent by mail, stating that you want to be excluded from *National Veterans Legal Services Program, et al. v. United States,* Case No. 1:16-cv-00745-PLF. Be sure to include your name, address, telephone number, email address, and signature. You must mail your Exclusion Request, **postmarked by Sunday, August 20th, 2023** to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.
2. Complete and submit online the Exclusion Request form found here by Sunday, August 20th, 2023.
3. Send an "Exclusion Request" Form, available here, by mail. You must mail your Exclusion Request form, **postmarked by Sunday, August 20th, 2023** to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.

If you choose to exclude yourself from the lawsuit, you should decide soon whether to pursue your own case because your claims may be subject to a statute of limitations which sets a deadline for filing the lawsuit within a certain period of time.

OPTION 3. Stay in the Class and object or go to a hearing. If you paid PACER fees and do not opt out of the settlement, you may object to any aspect of the proposed settlement. Your written objection must be **sent by Tuesday, September 12th, 2023** and submitted as set out in the *Notice of Proposed Class Action Settlement* referred to below. You also may request in writing to appear at the Fairness Hearing on Thursday, October 12th, 2023

request in writing to appear at the Fairness Hearing on Thursday, October 12th, 2023.

How do I get more information? This is only a summary of the proposed settlement. For a more detailed *Notice of Proposed Class Action Settlement*, additional information on the lawsuit and proposed settlement, and a copy of the Settlement Agreement, visit www.pacerfeesclassaction.com, call 866-952-1928, or write to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.

EXHIBIT C

PACER
Public Access to Court Electronic Records

INVOICE

Invoice Date: 04/07/2016

Usage From: 01/01/2016 to: 03/31/2016

Account Summary

Pages:	958
Rate:	$0.10
Subtotal:	$95.80
Audio Files:	0
Rate:	$2.40
Subtotal:	$0.00
Current Billed Usage:	$95.80
Previous Balance:	$0.00
Current Balance:	**$95.80**

Account #:	4166698
Invoice #:	4166698-Q12016
Due Date:	05/10/2016
Amount Due:	$95.80

Total Amount Due: $95.80

PACER Website, Manage My Account Updates

Over the past few months, PACER has made some updates to create a more helpful and efficient experience for users. The following list provides details on the improvements:

- **BrowseAloud:** This screen reader program is available on pacer.gov, the PACER Case Locator (PCL), and the Case Search Sign In page. It assists users with a wide range of needs by reading website text out loud.
- **Setting a Default in Manage My Account:** Users no longer need to select an icon (P, F, or A) to designate a default or autobilling method of payment. Instead, two new links (Set autobill and Set default) make the selection simpler and easier.
- **Checking E-File Status:** This link (under the Maintenance tab in Manage My Account) now automatically provides a list of the courts in which you have registered instead of requiring the user to select from a drop-down list.

Contact Us

San Antonio: (210) 301-6440
Toll Free: (800) 676-6856
Hours: 8 am - 6 pm CT M-F
pacer@psc.uscourts.gov

See pacer.gov/billing for detailed billing transactions, instructions for disputing transactions, FAQs, and more.

It's quick and easy to pay your bill online with a credit card. Visit the **Manage My Account** section of the PACER Service Center website at pacer.gov.

The PACER Federal Tax ID is:
74-2747938

Questions about the invoice?
Visit **pacer.gov/billing**

Please detach the coupon below and return with your payment. ***Thank you!***

PACER
Public Access to Court Electronic Records

Account #	Due Date	Amount Due
4166698	05/10/2016	Auto Bill

Do not send cash. Make checks or money orders drawn on a U.S. Bank in U.S. dollars payable to: PACER Service Center. Include your account ID on the check or money order.

This account is registered for automatic billing. The total amount due, $95.80, will be charged to the credit card on file up to 7 days before the due date. Charges will appear on your credit card statement as: PACER 800-676-6856 IR.

Visit pacer.gov for address changes.

Law Office of Eric Alan Isaacson
Eric Alan Isaacson
6580 Avenida Mirola
La Jolla, CA 92037

PACER Service Center
P.O. Box 71364
Philadelphia, PA 19176-1364

PACER
Public Access to Court Electronic Records

INVOICE

Invoice Date: 07/05/2016
Usage From: 04/01/2016 to: 06/30/2016

Account Summary

Pages:	4,751
Rate:	$0.10
Subtotal:	$475.10
Audio Files:	0
Rate:	$2.40
Subtotal:	$0.00
Current Billed Usage:	$475.10
Previous Balance:	$0.00
Current Balance:	**$475.10**

Total Amount Due: $475.10

Account #:	4166698
Invoice #:	4166698-Q22016
Due Date:	08/10/2016
Amount Due:	$475.10

Contact Us

San Antonio: (210) 301-6440
Toll Free: (800) 676-6856
Hours: 8 am - 6 pm CT M-F
pacer@psc.uscourts.gov

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Preparing for NextGen CM/ECF

Over the past year, several appellate, district, and bankruptcy courts throughout the country have implemented the next generation (NextGen) CM/ECF system. While most courts have not yet set a date for when they will switch to NextGen, you can begin preparing now by upgrading your PACER account. To learn more, visit the NextGen information page at pacer.gov/nextgen.

- **NextGen Help** (pacer.gov/nextgen): Provides general information about NextGen conversion
- **Electronic Learning Modules** (pacer.gov/ecfcbt/cso/index.html): Provides user training for new NextGen features
- **NextGen CM/ECF FAQs** (pacer.gov/psc/hfaq.html): Answers common NextGen-related questions

Please detach the coupon below and return with your payment. ***Thank you!***

PACER
Public Access to Court Electronic Records

Account #	Due Date	Amount Due
4166698	08/10/2016	Auto Bill

Do not send cash. Make checks or money orders drawn on a U.S. Bank in U.S. dollars payable to: PACER Service Center. Include your account ID on the check or money order.

This account is registered for automatic billing. The total amount due, $475.10, will be charged to the credit card on file up to 7 days before the due date. Charges will appear on your credit card statement as: PACER 800-676-6856 IR.

Visit pacer.gov for address changes.

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PACER
Public Access to Court Electronic Records

INVOICE

Invoice Date: 10/05/2016
Usage From: 07/01/2016 to: 09/30/2016

Account Summary

Pages:	8,937
Rate:	$0.10
Subtotal:	$893.70
Audio Files:	0
Rate:	$2.40
Subtotal:	$0.00
Current Billed Usage:	$893.70
Previous Balance:	$0.00
Current Balance:	**$893.70**

Total Amount Due: $893.70

Account #:	4166698
Invoice #:	4166698-Q32016
Due Date:	11/10/2016
Amount Due:	$893.70

Contact Us

San Antonio: (210) 301-6440
Toll Free: (800) 676-6856
Hours: 8 am - 6 pm CT M-F
pacer@psc.uscourts.gov

See pacer.gov/billing for detailed billing transactions, instructions for disputing transactions, FAQs, and more.

It's quick and easy to pay your bill online with a credit card. Visit the **Manage My Account** section of the PACER Service Center website at pacer.gov.

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Questions about the invoice?
Visit **pacer.gov/billing**

Preparing for NextGen CM/ECF

In recent months, as more courts throughout the country have implemented the next generation (NextGen) CM/ECF system, some users have encountered issues that can affect account access and registration. The resources listed below can help you avoid many of these issues, creating a smooth transition when your court converts. Check your court's website for updates on when it will implement NextGen.

- **NextGen Help** (pacer.gov/nextgen): Provides general information about NextGen conversion
- **Electronic Learning Modules** (pacer.gov/ecfcbt/cso/index.html): Provides user training for new NextGen features
- **NextGen CM/ECF FAQs** (pacer.gov/psc/hfaq.html): Answers common NextGen-related questions
- **Court Links** (pacer.gov/psco/cgi-bin/links.pl): Shows which courts have converted

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Public Access to Court Electronic Records

Account #	Due Date	Amount Due
4166698	11/10/2016	Auto Bill

Do not send cash. Make checks or money orders drawn on a U.S. Bank in U.S. dollars payable to: PACER Service Center. Include your account ID on the check or money order.

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La Jolla, CA 92037

PACER Service Center
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Philadelphia, PA 19176-1364

PACER
Public Access to Court Electronic Records

INVOICE

Invoice Date: 01/09/2017
Usage From: 10/01/2016 to: 12/31/2016

Account Summary

Pages:	3,794
Rate:	$0.10
Subtotal:	$379.40
Audio Files:	0
Rate:	$2.40
Subtotal:	$0.00
Current Billed Usage:	$379.40
Previous Balance:	$0.00
Current Balance:	**$379.40**

Account #:	4166698
Invoice #:	4166698-Q42016
Due Date:	02/10/2017
Amount Due:	$379.40

Total Amount Due: $379.40

Preparing for NextGen CM/ECF

In recent months, as more courts throughout the country have implemented the next generation (NextGen) CM/ECF system, some users have encountered issues that can affect account access and registration. The resources listed below can help you avoid many of these issues, creating a smooth transition when your court converts. Check your court's website for updates on when it will implement NextGen.

- **NextGen Help** (pacer.gov/nextgen): Provides general information about NextGen conversion
- **Electronic Learning Modules** (pacer.gov/ecfcbt/cso/index.html): Provides user training for new NextGen features
- **NextGen CM/ECF FAQs** (pacer.gov/psc/hfaq.html): Answers common NextGen-related questions
- **Court Links** (pacer.gov/psco/cgi-bin/links.pl): Shows which courts have converted

Contact Us

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PACER
Public Access to Court Electronic Records

Account #	Due Date	Amount Due
4166698	02/10/2017	Auto Bill

Do not send cash. Make checks or money orders drawn on a U.S. Bank in U.S. dollars payable to: PACER Service Center. Include your account ID on the check or money order.

This account is registered for automatic billing. The total amount due, $379.40, will be charged to the credit card on file up to 7 days before the due date. Charges will appear on your credit card statement as: PACER 800-676-6856 IR.

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La Jolla, CA 92037

PACER
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INVOICE

Invoice Date: 04/05/2017
Usage From: 01/01/2017 to: 03/31/2017

Account Summary

Pages:	3,607
Rate:	$0.10
Subtotal:	$360.70
Audio Files:	0
Rate:	$2.40
Subtotal:	$0.00
Current Billed Usage:	$360.70
Previous Balance:	$0.00
Current Balance:	**$360.70**

Account #:	4166698
Invoice #:	4166698-Q12017
Due Date:	05/10/2017
Amount Due:	$360.70

Total Amount Due: $360.70

Eighth Circuit Converts to NextGen

In January, the Eighth Circuit Court of Appeals implemented the next generation (NextGen) CM/ECF system. To date, a total of 10 courts have converted, and more courts will follow in the coming months. See the following websites for what to do when your court announces it will make the transition.

- **NextGen Help** (pacer.gov/nextgen): Provides general information about NextGen conversion
- **Electronic Learning Modules** (pacer.gov/ecfcbt/cso/index.html): Provides user training for new NextGen features
- **NextGen CM/ECF FAQs** (pacer.gov/psc/hfaq.html): Answers common NextGen-related questions
- **Court Links** (pacer.gov/psco/cgi-bin/links.pl): Shows which courts have converted

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PACER
Public Access to Court Electronic Records

Account #	Due Date	Amount Due
4166698	05/10/2017	Auto Bill

Do not send cash. Make checks or money orders drawn on a U.S. Bank in U.S. dollars payable to: PACER Service Center. Include your account ID on the check or money order.

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Law Office of Eric Alan Isaacson
Eric Alan Isaacson
6580 Avenida Mirola
La Jolla, CA 92037

PACER Service Center
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Philadelphia, PA 19176-1364

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INVOICE

Invoice Date: 07/06/2017
Usage From: 04/01/2017 to: 06/30/2017

Account Summary

Pages:	6,447
Rate:	$0.10
Subtotal:	$644.70
Audio Files:	0
Rate:	$2.40
Subtotal:	$0.00
Current Billed Usage:	$644.70
Previous Balance:	$0.00
Current Balance:	**$644.70**

Total Amount Due: $644.70

Account #:	4166698
Invoice #:	4166698-Q22017
Due Date:	08/10/2017
Amount Due:	$644.70

Tenth Circuit Converts to NextGen

In May, the Tenth Circuit Court of Appeals implemented the next generation (NextGen) CM/ECF system. To date, a total of 11 courts have converted, and more courts will follow in the coming months. See the following websites for what to do when your court announces it will make the transition.

- **NextGen Help** (pacer.gov/nextgen): Provides general information about NextGen conversion
- **Electronic Learning Modules** (pacer.gov/ecfcbt/cso/index.html): Provides user training for new NextGen features
- **NextGen CM/ECF FAQs** (pacer.gov/psc/hfaq.html): Answers common NextGen-related questions
- **Court Links** (pacer.gov/psco/cgi-bin/links.pl): Shows which courts have converted

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Account #	Due Date	Amount Due
4166698	08/10/2017	Auto Bill

Do not send cash. Make checks or money orders drawn on a U.S. Bank in U.S. dollars payable to: PACER Service Center. Include your account ID on the check or money order.

This account is registered for automatic billing. The total amount due, $644.70, will be charged to the credit card on file up to 7 days before the due date.
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From: do_not_reply@psc.uscourts.gov
Subject: 4166698 October 2017 PACER Quarterly Invoice
Date: October 14, 2017 at 4:40 AM
To: ericalanisaacson@icloud.com

PACER
PUBLIC ACCESS TO COURT ELECTRONIC RECORDS
UNITED STATES COURTS

Account Number:	4166698
Account Contact:	Eric Alan Isaacson
Balance Due:	$288.70
Due Date:	11/09/2017
	This account is registered for automatic billing. The tot amount due, $288.70, will be charged to the credit car on file up to 7 days before the due date. Charges will appear on your credit card statement as: PACER 800-676-6856 IR.

To access the statement:

- Log in to Manage My Account.
- From the **Usage** tab, select **View Quarterly Invoice/Statement of Account**.

Go to Billing for detailed billing transactions, instructions on disputing charges, FAQs, and more.

NOTE: *Please do not reply to this message. If you have questions or comments, please email them to PACER or call us at (800) 676-6856.*

From: do_not_reply@psc.uscourts.gov
Subject: 4166698 January 2018 PACER Quarterly Invoice
Date: January 13, 2018 at 1:48 AM
To: ericalanisaacson@icloud.com

D

PACER
PUBLIC ACCESS TO COURT ELECTRONIC RECORDS
UNITED STATES COURTS

Account Number:	4166698
Account Contact:	Eric Alan Isaacson
Balance Due:	$280.60
Due Date:	02/09/2018
	This account is registered for automatic billing. The tot amount due, $280.60, will be charged to the credit car on file up to 7 days before the due date. Charges will appear on your credit card statement as: PACER 800-676-6856 IR.

To access the statement:

- Log in to Manage My Account.
- From the **Usage** tab, select **View Quarterly Invoice/Statement of Account**.

Go to Billing for detailed billing transactions, instructions on disputing charges, FAQs, and more.

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From: do_not_reply@psc.uscourts.gov
Subject: 4166698 April 2018 PACER Quarterly Invoice
Date: April 14, 2018 at 1:44 AM
To: ericalanisaacson@icloud.com

D

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UNITED STATES COURTS

Account Number:	4166698
Account Contact:	Eric Alan Isaacson
Balance Due:	$404.80
Due Date:	05/10/2018
	This account is registered for automatic billing. The tot amount due, $404.80, will be charged to the credit car on file up to 7 days before the due date. Charges will appear on your credit card statement as: PACER 800-676-6856 IR.

To access the statement:

- Log in to Manage My Account.
- From the **Usage** tab, select **View Quarterly Invoice/Statement of Account**.

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EXHIBIT D

THE FITZPATRICK MATRIX

Hourly Rates ($) for Legal Fees for Complex Federal Litigation in the District of Columbia

Years Exp. / Billing Yr.	2013	2014	2015	2016	2017	2018	2019	2020	2021
35+	535	563	591	619	647	675	703	731	736
34	534	562	590	618	646	674	702	729	734
33	532	560	588	616	644	672	700	728	733
32	530	558	586	614	642	670	698	726	730
31	527	555	583	611	639	667	695	723	728
30	524	552	580	608	636	664	692	720	725
29	521	549	577	605	633	661	689	717	721
28	517	545	573	601	629	657	685	713	717
27	512	540	568	596	624	652	680	708	713
26	508	536	564	592	620	648	676	704	708
25	502	530	558	586	614	642	670	698	703
24	497	525	553	581	609	637	665	693	697
23	491	519	547	575	603	630	658	686	691
22	484	512	540	568	596	624	652	680	684
21	477	505	533	561	589	617	645	673	677
20	470	498	526	553	581	609	637	665	670
19	462	490	518	546	574	602	630	658	662
18	453	481	509	537	565	593	621	649	653
17	445	473	500	528	556	584	612	640	645
16	435	463	491	519	547	575	603	631	635
15	426	454	482	510	538	566	593	621	626
14	416	443	471	499	527	555	583	611	615
13	405	433	461	489	517	545	573	601	605
12	394	422	450	478	506	534	562	590	594
11	382	410	438	466	494	522	550	578	582
10	371	399	427	455	483	510	538	566	570
9	358	386	414	442	470	498	526	554	558
8	345	373	401	429	457	485	513	541	545
7	332	360	388	416	444	472	500	528	532
6	319	347	375	403	431	458	486	514	518
5	305	332	360	388	416	444	472	500	504
4	290	318	346	374	402	430	458	486	489
3	275	303	331	359	387	415	443	471	474
2	260	287	315	343	371	399	427	455	458
1	244	272	300	328	356	384	412	439	442
0	227	255	283	311	339	367	395	423	426
P*	130	140	150	160	169	179	189	199	200

* = Paralegals/Law Clerks

Published by the U.S. Attorney's Office for the District of Columbia, Civil Division

Explanatory Notes

1. This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared to assist with resolving requests for attorney's fees in complex civil cases in District of Columbia federal courts handled by the Civil Division of the United States Attorney's Office for the District of Columbia. It has been developed to provide "a reliable assessment of fees charged for complex federal litigation in the District [of Columbia]," as the United States Court of Appeals for the District of Columbia Circuit urged. *DL v. District of Columbia*, 924 F.3d 585, 595 (D.C. Cir. 2019). The matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, nor has it been adopted by other Department of Justice components.

2. The matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees. *E.g.,* 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412(b). A "reasonable fee" is a fee that is sufficient to attract an adequate supply of capable counsel for meritorious cases. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). The matrix is not intended for use in cases in which the hourly rate is limited by statute. *E.g.*, 28 U.S.C. § 2412(d).

3. For matters in which a prevailing party agrees to payment pursuant to this fee matrix, the United States Attorney's Office will not request that a prevailing party offer the additional evidence that the law otherwise requires. *See, e.g., Eley v. District of Columbia*, 793 F.3d 97, 104 (D.C. Cir. 2015) (quoting *Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995) (requiring "evidence that [the] 'requested rates are in line with those prevailing in the community for similar services'")).

4. The years in the column on the left refer to an attorney's years of experience practicing law. Normally, an attorney's experience will be calculated based on the number of years since an attorney graduated from law school. If the year of law school graduation is unavailable, the year of bar passage should be used instead. Thus, an attorney who graduated from law school in the same year as the work for which compensation is sought has 0 years of experience. For all work beginning on January 1 of the calendar year following graduation (or bar admission), the attorney will have 1 year of experience. (For example, an attorney who graduated from law school on May 30 will have 0 years of experience until December 31 of that same calendar year. As of January 1, all work charged will be computed as performed by an attorney with 1 year of experience.) Adjustments may be necessary if an attorney did not follow a typical career progression or was effectively performing law clerk work. *See, e.g., EPIC v. Dep't of Homeland Sec.*, 999 F. Supp. 2d 61, 70-71 (D.D.C. 2013) (attorney not admitted to bar compensated at "Paralegals & Law Clerks" rate).

5. The data for this matrix was gathered from the dockets of cases litigated in the U.S. District Court for the District of Columbia using the following search in Bloomberg Law: keywords ("motion n/5 fees AND attorney!" under "Dockets Only") + filing type ("brief," "motion," or "order") + date ("May 31, 2013 – May 31, 2020" under "Entries (Docket Key Only)"). This returned a list of 781 cases. Of those, cases were excluded if there was no motion for fees filed, the motions for fees lacked necessary information, or the motions involved fees not based on hourly rates, involved rates explicitly or implicitly based on an existing fee matrix, involved rates explicitly or implicitly subject to statutory fee caps (e.g., cases subject to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)), or used lower rates prescribed by case law (*e.g.*, *Eley*, 793 F.3d at 105 (Individuals with Disabilities in Education Act

cases)). After these excisions, 86 cases, many of which included data for multiple billers (and 2 of which only provided hourly rate data for paralegals), remained.

6. The cases used to generate this matrix constitute complex federal litigation—which caselaw establishes as encompassing a broad range of matters tried in federal court. *E.g.*, *Reed v. District of Columbia*, 843 F.3d 517, 527-29 (D.C. Cir. 2016) (Tatel, J., concurring) (noting that cases arising under the Freedom of Information Act, Title VII, the Americans with Disabilities Act, Constitutional Amendments, antitrust statutes, and others have been deemed complex, and even "relatively small" cases can constitute complex federal litigation, as they too require "specialized legal skills" and can involve "complex organizations," such as "large companies"); *Miller v. Holzmann*, 575 F. Supp. 2d 2, 14-16, 17 (D.D.C. 2008) (prevailing market rates for complex federal litigation should be determined by looking to "a diverse range of cases"). That the attorneys handling these cases asked the court to award the specified rates itself demonstrates that the rates were "'adequate to attract competent counsel, [while] not produc[ing] windfalls to attorneys.'" *West v. Potter*, 717 F.3d 1030, 1033 (D.C. Cir. 2013) (quoting *Blum v. Stenson*, 465 U.S. 886, 897 (1984)). As a consequence, the resulting analysis yields the "prevailing market rate[] in the relevant community" for complex litigation undertaken in federal courts in the District of Columbia. *See Blum*, 465 U.S. at 895.

7. From these 86 complex federal cases, the following information was recorded for 2013 and beyond: hourly rate, the calendar year the rate was charged, and the number of years the lawyer was out of law school when the rate was charged (or, if law school graduation year was unavailable, years since bar passage), as defined above. If the graduation or bar passage year was not stated in a motion or its exhibits, then the lawyer's biography was researched on the internet. Although preexisting fee matrices for the District of Columbia provide for mid-year rate changes, very few lawyers in the data submitted rates that changed within a calendar year. For this reason, the matrix was modeled using one rate for each calendar year. On the occasions when a lawyer expressed an hourly rate as a range or indicated the rate had increased during the year, the midpoint of the two rates was recorded for that lawyer-year.

8. The matrix of attorney rates is based on 675 lawyer-year data points (one data point for each year in which a lawyer charged an hourly rate) from 419 unique lawyers from 84 unique cases. The lawyer-year data points spanned from years 2013 to 2020, from $100 to $1250, and from less than one year of experience to 58 years.

9. Paralegal/law clerk rates were also recorded. The following titles in the fee motions were included in the paralegal/law clerk data: law clerk, legal assistant, paralegal, senior legal assistant, senior paralegal, and student clerk. The paralegal/law clerk row is based on 108 paralegal-year data points from 42 unique cases. They spanned from 2013 to 2019 and from $60 to $290. (It is unclear how many unique persons are in the 108 data points because paralegals were not always identified by name.)

10. The matrix was created with separate regressions for the lawyer data and the paralegal data. For the paralegal data, simple linear least-squares regression was used with the dependent variable hourly rate and the independent variable the year the rate was charged subtracted from 2013; years were

combined into one variable and subtracted from 2013 rather than modeled as separate indicator variables to constrain annual inflation to a constant, positive number. The resulting regression formula was rate = 129.8789 + 9.902107 * (year-2013). For the lawyer data, least-squares regression was used with the dependent variable hourly rate and independent variables the year the rate was charged and the number of years of experience of the lawyer when the rate was charged. The year the rate was charged was subtracted from 2013 and modeled linearly as with the paralegal data. The number of years out of law school (or since year of bar passage) was modeled with both linear and squared terms, as is common in labor economics to account for non-linear wage growth (e.g., faster growth earlier in one's career than at the end of one's career). *See, e.g.*, Jacob Mincer, *Schooling, Experience, and Earnings* (1974). The resulting regression formula was rate = 227.319 + 16.54492 * experience - 0.2216217 * experience ^ 2 + 27.97634 * (year-2013). Regressions were also run with log transformed rates and with a random-effect model (to account for several lawyers appearing more than once in the data), but both alternatives resulted in mostly lower rates than those reflected here; in order to minimize fee disputes, these models were therefore rejected in favor of the more generous untransformed, fixed-effect model. Rates from one case comprised 20% of the data; the regression was also run without that case, but the resulting rates were mostly lower and therefore rejected, again to minimize fee disputes.

11. The data collected for this matrix runs through 2020. To generate rates in 2021, an inflation adjustment (rounded to the nearest whole dollar) was added. The United States Attorney's Office determined that, because courts and many parties have employed the legal services index of the Consumer Price Index to adjust attorney hourly rates for inflation, this matrix will do likewise. *E.g.*, *Salazar v. District of Columbia*, 809 F.3d 58, 64-65 (D.C. Cir. 2015); *Eley*, 793 F.3d at 101-02; *DL*, 924 F.3d at 589-90.

12. This matrix was researched and prepared by Brian Fitzpatrick, the Milton R. Underwood Chair in Free Enterprise and Professor of Law at Vanderbilt Law School, with the help of his students.

EXHIBIT E

Recent News (/news)

Ingrid Brunk Testifies to European Central Bank at ECB Legal Conference 2023 (https://law.vanderbilt.edu/news/ingrid-brunk-testifies-to-european-central-bank-at-ecb-legal-conference-2023/)

James F. Blumstein Files Amicus Brief in Robinson v. Ardoin

Fee matrix developed by Professor Brian Fitzpatrick and Brooke Levy '22 adopted by Federal Court

Feb 7, 2023

The Chief Judge of the U.S. District Court for the District of Columbia, Beryl A. Howell, ordered a plaintiff to recalculate and resubmit her claim for attorneys' fees using the so-called "Fitzpatrick Matrix (https://law.vanderbilt.edu/files/publications/usao_matrix_2015_-_2020.pdf)" on Jan. 23, marking the successful launch of a new tool developed for the Department

(https://law.vanderbilt.edu/news/james-f-blumstein-files-amicus-brief-in-robinson-v-ardoin/)

First Amendment Clinics Advocate for Right to Access Government Social Media Accounts
(https://law.vanderbilt.edu/news/first-amendment-clinics-advocate-for-right-to-access-government-social-media-accounts/)

A Novel Approach to Teaching Technology Law
(https://law.vanderbilt.edu/news/a-novel-approach-to-teaching-technology-law/)

Vanderbilt Law Students and Graduates Secure 39 Clerkships in the 2022-23 Academic Year
(https://law.vanderbilt.edu/news/vanderbilt-law-students-and-graduates-secure-39-clerkships-in-the-2022-23-academic-year/)

of Justice by complex litigation expert Brian Fitzpatrick (https://law.vanderbilt.edu/bio/brian-fitzpatrick), who holds the Milton R. Underwood Chair in Free Enterprise at Vanderbilt Law School.

Brian Fitzpatrick

Fitzpatrick has published research on attorney compensation and fee awards throughout his career and often provided expert-witness testimony in cases where fee awards are at issue. In 2020, Peter C. Pfaffenroth of the U.S. Attorney's Office for the District of Columbia asked him to take on a daunting task for which Pfaffenroth believed Fitzpatrick was uniquely qualified: Update the venerable Laffey Matrix (http://www.laffeymatrix.com/), a chart that successful federal litigants had used to calculate and claim reimbursement for their legal fees in the District of Columbia since 1983.

"If you sue the federal government and win, you may be able to file a claim to be reimbursed for your attorneys' fees," Fitzpatrick explains. "But the matrix they were using to calculate these fee awards was 40 years old. Most law firms weren't even

Publications

Vanderbilt Law Review
(http://www.vanderbiltlawreview.org/)

Journal of Transnational Law
(http://www.vanderbilt.edu/jotl/)

Environmental Law & Policy Annual Review (ELPAR)
(/academics/academic-programs/environmental-law/environmental-law-policy-annual-review/index.php)

Journal of Entertainment & Technology Law
(http://jetlaw.org/)

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using computers in 1983 when the Laffey Matrix was developed, but for years it and another matrix from the 1980s were the only games in town for calculating fee awards. I was asked to develop an updated matrix that reflected modern realities."

Fitzpatrick volunteered to do the work pro bono if the DOJ would fund a research assistant. He hired **Brooke Levy '22**, to conduct a comprehensive audit of recent fee petitions in the D.C. District Court.

"Brooke went into the federal courts' electronic docketing system and examined every fee petition filed between 2013 and 2020. In cases where lawyers put in the hourly rates they actually charged the client for their work, we pulled that out and put it in a spreadsheet," he said. "That allowed us to determine the real hourly rates charged in the market."

Fitzpatrick presented the updated matrix to the Department of Justice in late 2021. The chart, which provides fees for attorneys according to their years of experience as well as hourly rates for law clerks and paralegals, was promptly dubbed the "Fitzpatrick Matrix" by DOJ staff.

"My goal was to develop a reliable assessment of fees charged for complex federal litigation that both plaintiffs and judges could use to evaluate fee claims," he said.

The advantage of having a modern, objective tool to calculate attorney's fees is clear in the order (https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2019cv00989/206139/68/) Chief Judge Howell handed down, in which she ordered a plaintiff to use the Fitzpatrick Matrix to calculate the attorneys' fees she was owed. The plaintiff had filed a claim for fees of approximately $415,000, but according to Judge Howell's calculations, "reasonable fees" at the hourly rates set forth in the Fitzpatrick Matrix indicated a fee award of approximately $245,000.

Attorneys representing the government wrote in a court filing that the Fitzpatrick Matrix is "accurate and reliable," noting that since the DOJ adopted it, "disputes about hourly rates have been minimized, both in settlement discussions and in fee

petitions."

Fitzpatrick hopes his new matrix will streamline the process for such claims in the future. "The matrix provides objective criteria for determining attorneys' fees based on prevailing rates and the attorneys' experience, so it should simplify the process for filing claims and require less judicial review," he said.

While the Fitzpatrick Matrix can be adjusted upward for inflation, Fitzpatrick recommends that it be more comprehensively updated every five years. "We shouldn't wait another 40 years to update this tool," he said.

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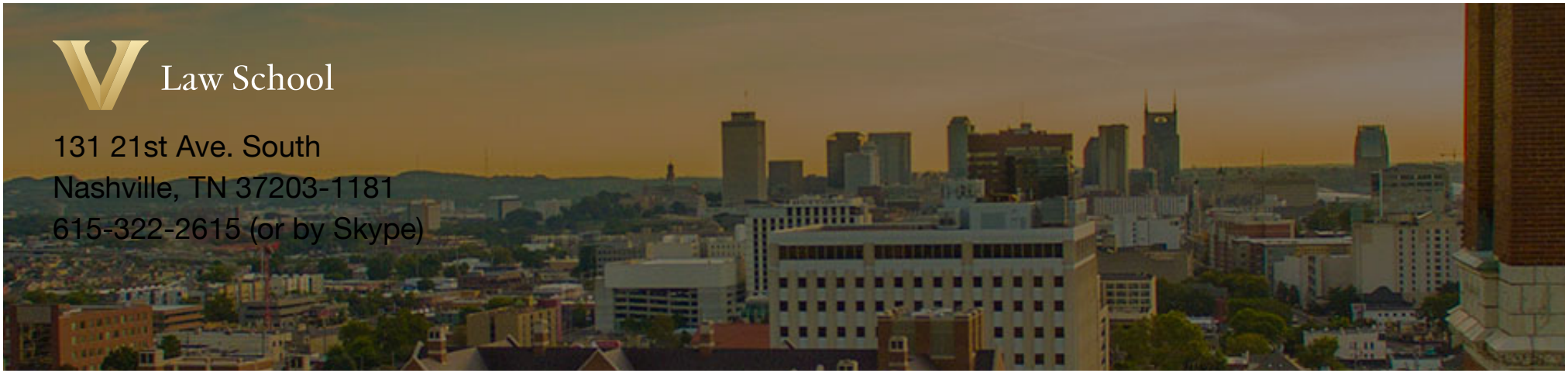

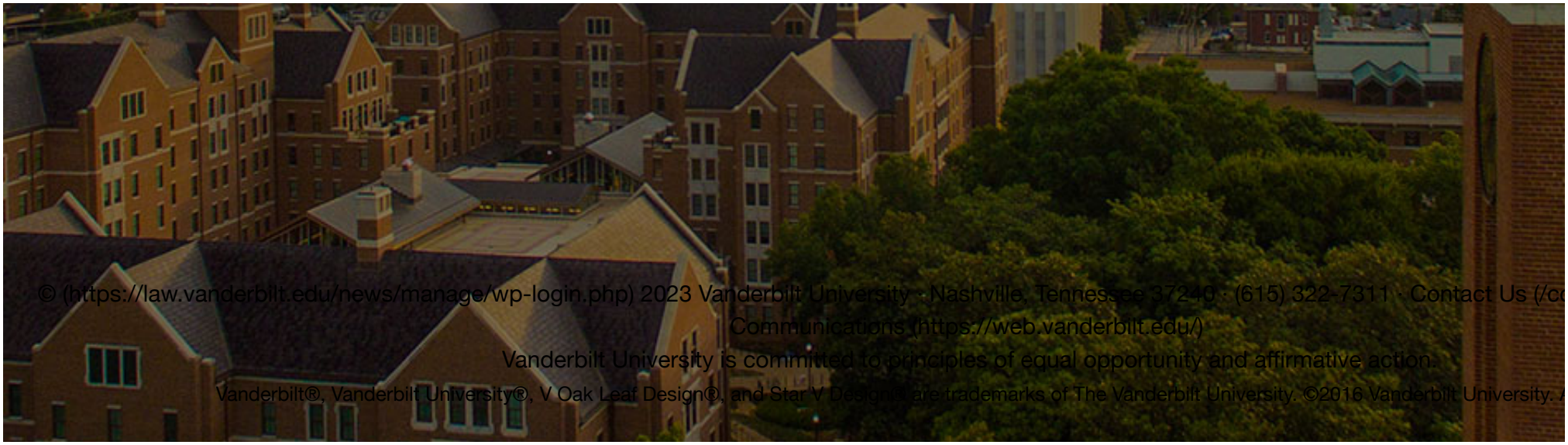

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	Civil No. 16-745-PLF STATEMENT OF ERIC ALAN ISAACSON OF INTENT TO APPEAR IN PERSON AT THE OCTOBER 12, 2023, FINAL-APPROVAL HEARING IN *NATIONAL VETERANS LEGAL SERVICES PROGRAM, ET AL. V. UNITED STATES OF AMERICA*

WRITTEN STATEMENT OF ERIC ALAN ISAACSON
OF INTENT TO APPEAR IN PERSON AT THE OCTOBER 12, 2023,
FINAL-APPROVAL HEARING IN
NATIONAL VETERANS LEGAL SERVICES PROGRAM, ET AL.
V. UNITED STATES OF AMERICA

I am a class member in the above-captioned action who on September 12, 2023, timely served and submitted my Objection of Eric Alan Isaacson to Proposed Settlement in *National Veterans Legal Services Program, et al. v. United States of America.*

On October 3, 2023, Class Counsel filed, but did not serve on me, Plaintiffs' Reply in Support of Motion for Final Approval of Class Settlement and for Fees, Costs and Service Awards. DE160. Class Counsel's reply states that I have said I "intend[] to appear remotely" at the October 12, 2023, hearing. DE160:2. That is not accurate. The Objection and Declaration that I submitted on September 12, 2023, states that "I desire to be heard at the October 12, 2023, Final Approval

Hearing in the above-captioned matter, either in person or remotely by means of telephone or video conference." DE160:22¶27.

This Court's Order Setting Settlement Hearing Procedures, DE162, which was filed on October 4, 2023, but was not served on me by the Court or by any party, makes clear that I will need to appear at the hearing in person. That Order states that "[d]ue to technology constraints, those participating virtually will not be able to present any exhibits or demonstratives to the Court or view any that are physically displayed in the courtroom during the hearing." DE162:2¶1. That Order further states that "[i]f a Class Member has submitted a written statement and wishes to be heard at the Settlement Hearing, the Class Member shall be allocated ten minutes to make their presentation," DE162:2¶2.b.i., while any Class Member who "has not submitted a written statement but wishes to be heard at the Settlement Hearing," will be allocated only "five minutes to make their presentation." DE162:3¶2.ii.

I am accordingly submitting this written statement, and am hereby give notice that I will be appearing in person. In addition to expanding on the points made in the Objection and supporting Declaration that I submitted on September 12, 2023, I intend to make the following points:

I will object that class members, such as myself, who submitted timely objections have not been served by the Court or by the Settling Parties with Plaintiffs' Reply in Support of Motion for Final Approval of Class Settlement and for Fees, Costs and Service Awards, DE160, or with this Court's orders changing the location of the Final Approval Hearing, DE161, and imposing limitations and additional requirements on those who seek to participate in that hearing. DE162.

I will further object that class members' objections and supporting documentation have not, to date, been placed on the District Court's docket as part of the public record in this case. Although I timely served and submitted my Objection and supporting Declaration as directed in the class notice, both sending it both by email and by U.S. Postal Service Express Mail addressed to the Honorable Paul L. Friedman, my Objection has never been filed on the District Court's

public PACER-accessible docket for this case. Neither have the objections of any other class members.

In my decades of legal practice connected with class actions and their settlement, I have never before witnessed a case in which the settling parties arranged with the court to keep class members' objections off the public record. This is a gross violation of the First Amendment and common-law rights of public access to court records. "[I]n class actions—where by definition 'some members of the public are also parties to the [case]'—the standards for denying public access to the record 'should be applied ... with particular strictness.'" *Shane Grp., Inc. v. Blue Cross Blue Shield,* 825 F.3d 299, 305 (6th Cir.2016)(quoting *In re Cendant Corp.,* 260 F.3d 183, 194 (3d Cir. 2001)). It also amounts to a denial of due process, obviously impairing objecting class members' ability to seek appellate review.

I also will object to Class Counsel's submission of supplemental expert declarations supporting their fee application as a violation of Rule 23(h), which required them to file their fee motion with supporting affidavits and evidence well before the deadline for class members to file objections. *See* Fed.R.Civ.P. 23(h); *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244, 1252 (11th Cir. 2020); *Redman v. RadioShack Corp.,* 768 F.3d 622, 638 (7th Cir. 2014); *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-95 (9th Cir.2010). This breach implicates fundamental due-process concerns. *See Lawler v. Johnson,* 253 So.3d 939, 948-51 (Ala. 2017).

The Declaration of William Rubenstein, DE160-2, was submitted on October 3, 2023, well after both the August 28, 2023, deadline this Court set for Class Counsel's attorney's fee application, and weeks after the September 12, 2023, deadline for filing objections. Although I had submitted a timely objection, to which Professor Rubenstein's declaration responds, the Rubenstein declaration was not even served on me. Rubenstein's new declaration provides foundational evidence for Class Counsel's fee request long after the relevant deadlines: "I provide the Court with empirical data which would enable it to find that Class Counsel's proposed billing rates are reasonable." DE160-2:¶1.

Rubenstein's analysis not only comes too late, it is plainly unreliable.

Deconstructing Fitzpatrick's Matrix, Professor Rubenstein says that "[t]he 8 class actions" the Fitzpatrick Matrix includes "had, on average, more than 12 times as many docket entries as the non-class action cases." DE160-2:2¶1. He fails to observe that this makes them a poor comparison for this case, in which the docket entries totaled only 141 with the filing of the Settling Parties' proposed Settlement on October 11, 2022. DE141. According to Rubenstein, the great majority of the cases in the Fitzpatrick Matrix are inapposite, because "in the 74 non-class action cases, the mean" number of docket entries "is 100 entries per case." DE160-2:15-16¶21. "By contrast," Rubenstein says, "the average number of docket entries in the 8 class action cases is 1,207, with the median at 884." DE160-2:16¶21. It should be clear, however, that this case—with around 160 docket entries—is much closer to the relatively simple cases that Rubenstein contends warrant lower attorney's fees, than it is to the class actions that Rubenstein contends warranted higher fees.

"Most importantly," Rubenstein adds, the hourly rates in the Matrix's 8 class action cases were roughly 44% higher than the hourly rates in its non-class action cases." DE160-2. Rubenstein does not, however, explain why class members should have to pay so much more. If anything, Rubenstein's presentation suggests that class-action lawyers are systematically overpaid. Yet Rubenstein contends that Class Counsel in this case should receive nearly ten percent more than do counsel in other, genuinely complex, large-fund class actions: "Class Counsel's trend line is on average 9.3% above the trend line for rates in fee petitions approved in other large fund class actions." DE160-2:13-14¶18.

The cases that Rubenstein selects as comparators are obviously inapposite. In *Cobdell v. Salazar,* for example, the district court conducted a full bench trial, and the Final Order Approving Settlement was docket entry 3850. *Cobell v. Jewell,* 234 F. Supp. 3d 126, 130 (D.D.C. 2017), *aff'd sub nom. Cobell v. Zinke,* 741 F.App'x 811 (D.C. Cir. 2018). In *Mercier v United States,* Fed.Cl. No. 1:12-cv-00920, moreover, the plaintiffs' lawyers achieved a far better result than the meagre 25% recovery in this case: "The Gross Settlement Fund of $160,000,000, according to Plaintiffs' damages expert, represents slightly more than 65% of the maximum amount Plaintiffs could have recovered if they had prevailed at trial." *Mercier v. United States,* 156 Fed.Cl. 580, 584 (2021).

Plaintiffs' expert in *Mercier,* Brian T. Fitzpatrick, recommended a 30% fee award, but the Court of Claims concluded that was far too much: "An award of 30% ... yields a windfall to counsel, is not necessary to attract competent counsel to similar cases, and would necessarily be at the expense of the class members." *Mercier v. United States,* 156 Fed. Cl. 580, 592 (2021). The Court of Claims explained that "[t]he fees class counsel requests are approximately 4.4 times the estimated lodestar amount ($10,831,372)." *Id.* That was simply too much. *See id.* Thus, even the cases relied on by Professor Rubenstein demonstrate that the percentage fee award sought by Class Counsel in this case, producing a multiplier of four or 5.5 times their lodestar, amounts to an impermissible windfall.

The Supplemental Declaration of Brian T. Fitzpatrick, DE160-1, also was submitted on October 3, 2023, well after both the August 28, 2023, deadline this Court set for Class Counsel's attorney's fee application, and the September 12, 2023, deadline for submitting objections. Although I had submitted a timely objection, to which Professor Fitzpatrick's supplemental declaration responds, his supplemental declaration was not even served on me.

Remarkably, the untimely declaration signed by Professor Rubenstein attacks the reliability of Professor Fitzpatrick's methodology in constructing the Fitzpatrick Matrix, implicitly suggesting that Professor Fitzpatrick fits his conclusions to the desires of those who pay him. *See, e.g.,* DE160-2:19¶25&n.29. That is a practice with which Professor Rubenstein is very familiar. His treatise on class actions not so long ago recognized that incentive awards were created of "whole cloth," and that "incentive awards threaten to generate a conflict between the representative's own interests and those of the class she purports to represent." 5 William B. Rubenstein, *Newberg on Class Actions* §17:1 at 492 (5th ed. 2015). The Eleventh Circuit naturally quoted Rubenstein's treatise to strike down incentive awards as contrary to law: ""Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards.'" *Johnson v. NPAS Sols., LLC,* 975 F.3d 1244, 1259 (11th Cir. 2020)(quoting Rubenstein, *supra,* § 17:4.). But the class-action plaintiffs' lawyers who frequently pay him to submit favorable declarations complained, and Professor Rubenstein swiftly changed his tune—

submitting an amicus brief supporting en banc rehearing in *Johnson v. NPAS Solutions* that in effect repudiated his own treatise. Professor Rubenstein then rewrote the treatise to suit their ends. Compare 5 William B. Rubenstein, *Newberg on Class Actions* §17:1 at 492 (5th ed. 2015), attached as Exhibit A hereto, which is sensibly hostile to incentive awards, with Professor Rubenstein's amicus brief in *Johnson v. NPAS Solutions,* attached as Exhibit B hereto, and with the newly minted Sixth Edition of Rubenstein's treatise, now arguing for incentive awards.

In a similar vein, I doubt that Professor Fitzpatrick has ever come across a class-action plaintiffs' attorney's fee application that he would characterize as excessive. His position is well known. In one of his law-review articles, Fitzpatrick argues that "class action lawyers not only do not make too much, but actually make too little. Indeed, I argue that in perhaps the most common class action—the so-called 'small stakes' class action—it is hard to see, as a theoretical matter, why the lawyers should not receive everything and leave nothing for class members at all." Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?,* 158 U.Pa.L.Rev. 2043, 2044 (2010). Professor Fitzpatrick explains:

> I assert that we should not be concerned about compensating class members in small-stakes class actions and, instead, should be concerned only with fully incentivizing class action lawyers to bring as many cost-justified actions as possible. That is, the deterrence-insurance theory of civil litigation suggests that the optimal award of fees to class action lawyers in small-stakes actions is 100% of judgments. It is for this reason that I believe class action lawyers are not only not making too much, but, rather, making too little—far too little.

Fitzpatrick, *Do Class Action Lawyers Make Too Little?,* 158 U.Pa.L.Rev. at 2047. Professor Fitzpatrick writes that "even if judges cannot award 100% of settlements to class action lawyers due to political or legal constraints," he believes "they should award fee percentages as high as they can." Fitpatrick, *Do Class Action Lawyers Make Too Little?,* 158 U.Pa.L.Rev. at 2048.

With that, I respectfully submit, the Fitzpatrick and Rubenstein declarations should be rejected as biased, unreliable, and at odds with Rule 23 principles. To place reliance on their conclusions would be to breach this Court's fiduciary duty to the Class.

I also wish to express concerns about this Court's October 4, 2023, Order Setting Settlement Hearing Procedures, which was not served on me, but which I have downloaded from PACER. First, I note that the Order is structured to have settlement approval presented first, with objectors given only a brief opportunity to speak, with only the parties, and not the objectors, then given an opportunity to address attorney's fees. *See* DE162:2-3. This suggests that the Court regards settlement approval as a *fait accompli*. The assumption that objecting class members need not be heard on the subject of attorney's fees also ignores the fact that 2018 amendments to Rule 23(e) make the consideration of attorney's fees a critical element to be considered in connection with whether to approve a settlement in the first place. The current Rule 23(e)(2) says the Court may approve a class-action settlement "only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether … (C) the relief provided for the class is adequate, taking into account … (iii) the terms of any proposed award of attorney's fees, including timing of payment." Fed.R.Civ.P. 23(e)(2)(C)(iii). Considering attorney's fees only after considering settlement approval, and excluding objectors from commenting in the portion of the hearing concerning attorney's fees, is inconsistent with Rule 23 itself, as well as with principles of fundamental due process.

Also of concern, the schedule in the October 4 Order appears to give objectors no opportunity to cross examine Class Counsel's expert witnesses, Professors Fitzpatrick and Rubenstein. If their opinions are not tested by cross examination, their declarations not only should be discounted as unreliable, they should be stricken as untested and inadmissible hearsay.

On whole, it does not appear that the proceedings are structured to comply with the due-process requirement that objectors receive a full opportunity to be heard. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811-12 (1985).

DATED: October 11, 2023

Respectfully submitted,

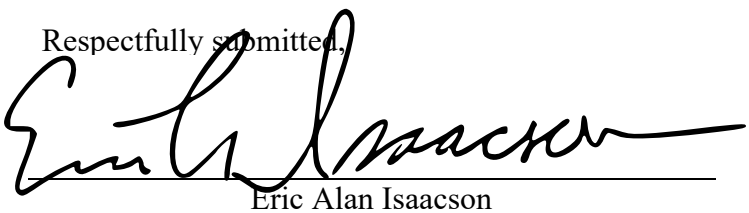

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EXHIBIT A

NEWBERG
ON CLASS ACTIONS

FIFTH EDITION

Volume 5
Chapters 15 to 17

William B. Rubenstein
Sidley Austin Professor of Law
Harvard Law School

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I continue to be blessed by the assistance of remarkable Harvard Law students, without whom this Treatise endeavor would not be possible. Three graduating students—Todd Logan, Rachel Miller-Ziegler, and Shiyu (Vic) Xu, all Harvard Law School Class of 2015, a veritable "dream team" of research assistants—spent much of the spring of their 3L year helping me finish this volume, each contributing unique talents. Three rising 3Ls—Ephraim McDowell, Albert Rivero, and Ben Schwartz, all Harvard Law School Class of 2016 —continued to help in numerous ways throughout their 2L year. And two 1Ls—John Bailey and Mengjie Zou, Harvard Law School Class of 2017—spent portions of their 1L spring and summer helping me put the finishing touches on this volume. If all that were not blessing enough, Kyle Dandelet, Harvard Law School Class of 2010, came out of retirement to assist with the editing of Volume 5. Numerous other students undertook research and writing that is acknowledged throughout the volume.

Harvard Law School continues to support my scholarship with funding for research assistants and summer writing. I am grateful for that support, as well as for the continuing intellectual companionship of so many of my colleagues, but especially that of my Dean, Martha Minow, and colleagues Noah Feldman, Jerry Frug, and John Goldberg. Carol Bateson provides great support.

I remain grateful to my father, and to my friends Peter Eliasberg and Seana Shiffrin, who—without complaint—hear far more about class action law than life should require.

William B. Rubenstein
Cambridge, Massachusetts
July 2015

Chapter 17

Incentive Awards*

*Professor Rubenstein thanks Shiyu (Vic) Xu, Harvard Law School Class of 2015; Ephraim McDowell, Harvard Law School Class of 2016; and John Bailey and Mengjie Zou, Harvard Law School Class of 2017, for their help in editing this unit.

§ 17:1 Incentive awards—Generally

A class action lawsuit is a form of representative litigation—one or a few class members file suit on behalf of a class of absent class members and pursue the class's claims in the aggregate.[1] At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class.[2] Most courts call that payment an "incentive award," though some courts label it a "service award" or "case contribution award."[3] The names capture the sense that the payments aim to compensate class representatives for their service to the class and simultaneously serve to incentivize them to perform this function. Empirical evidence shows that incentive awards are now paid in most class suits and average between $10–15,000 per class representative.[4]

Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards. The judiciary has created these awards out of whole cloth, yet both judges—and Congress—have expressed concerns about them. The concerns center on the fact that incentive awards have the potential to interfere with a class representative's ability to perform her job adequately. That job is to safeguard the interests of the absent class members. But with the promise of a significant award upon settlement of a class suit, the representative might prioritize securing that payment over serving the class. Thus, incentive awards threaten to generate a conflict between the representative's own interests and those of the class she purports to represent.

Accordingly, the propriety of incentive awards to named

[Section 17:1]

[1]Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members . . .").

[2]Other class members may also be eligible for such awards. *See* Rubenstein, 5 **Newberg on Class Actions** § 17:6 (5th ed.).

[3]For a discussion of the history and nomenclature of incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:2 (5th ed.).

[4]For a discussion of empirical data on the frequency and size incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** §§ 17:7 to § 17:8 (5th ed.).

plaintiffs has been rigorously debated[5] and the law concerning incentive awards is surprisingly nuanced. The following sections of the Treatise attempt to untangle the issues. They proceed to cover the following issues:

- the history and nomenclature of incentive awards;[6]
- the rational for incentive awards;[7]
- the legal basis for incentive awards;[8]
- the source of incentive awards;[9]
- the eligibility requirements for incentive awards;[10]
- the frequency[11] and size of incentive awards;[12]
- the judicial review process, including the timing of the motion;[13] the burden of proof;[14] documentation requirements;[15] standards by which courts assess proposed awards;[16] and disfavored practices with regard to incentive awards, including conditional incentive awards,[17] percentage-based incentive awards,[18] *ex ante* incentive awards agreements,[19] and excessive incentive awards;[20]
- the Private Securities Litigation Reform Act of 1995

[5]Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003) (quoting **Newberg on Class Actions**).

Lane v. Page, 862 F. Supp. 2d 1182, 1237, Fed. Sec. L. Rep. (CCH) P 96834 (D.N.M. 2012) (quoting **Newberg on Class Actions**).

Robles v. Brake Masters Systems, Inc., 2011 WL 9717448, *6 (D.N.M. 2011) (quoting **Newberg on Class Actions**).

Estep v. Blackwell, 2006 WL 3469569, *6 (S.D. Ohio 2006) (quoting **Newberg on Class Actions**).

[6]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:2 (5th ed.).

[7]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[8]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[9]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:5 (5th ed.).

[10]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:6 (5th ed.).

[11]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:7 (5th ed.).

[12]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:8 (5th ed.).

[13]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:10 (5th ed.).

[14]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:11 (5th ed.).

[15]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:12 (5th ed.).

[16]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:13 (5th ed.).

[17]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:15 (5th ed.).

[18]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:16 (5th ed.).

[19]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:17 (5th ed.).

[20]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:18 (5th ed.).

(PSLRA)'s approach to incentive awards;[21]
- the availability of incentive awards for objectors;[22] and
- the process for appellate review of incentive awards.[23]

§ 17:2 History and nomenclature of incentive awards

Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards. The judiciary has created these awards out of whole cloth. The threads initially appear in the reported case law in the late 1980s:[1] a 1987 decision of a federal court in Philadelphia appears to be the first to employ the term "incentive award."[2] That court stated the following:

> In addition to the petition for attorneys fees, plaintiffs counsel have requested that the court award incentive payments to the named plaintiffs, in this litigation in excess of their recovery as class plaintiffs in recognition of their role as private attorneys general in this litigation. Counsel has indicated that the named plaintiffs . . . have helped to effectuate the policies underlying the federal securities laws by instituting this litigation, by monitoring the progress of the litigation and undertaking the other responsibilities attendant upon serving as class representatives. Plaintiffs brought to the attention of counsel the existence of facts which culminated in this law suit and have sought through counsel and obtained substantial compensation for the alleged injuries suffered as a result of the alleged wrongful acts of the defendants. Plaintiffs' counsel have provided numerous citations in this district, in this circuit and elsewhere, in which substantial incentive pay-

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[21]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:19 (5th ed.).

[22]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:20 (5th ed.).

[23]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:21 (5th ed.).

[Section 17:2]

[1]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1310–11 (2006) ("Courts once tended to limit incentive awards to cases where the representative plaintiff had provided special services to the class—for example, providing financial or logistical support to the litigation or acting as an expert consultant. Beginning around 1990, however, awards for representative plaintiffs began to find readier acceptance . . . By the turn of the century, some considered these awards to be 'routine.'" (footnotes omitted) (quoting Ingram v. The Coca-Cola Co., 200 F.R.D. 685, 694 (N.D. Ga. 2001))).

[2]Re Continental/Midlantic Shareholders Litigation, 1987 WL 16678 (E.D. Pa. 1987).

ments to named plaintiffs in securities class action cases have been made. I believe that such payments are appropriate in this case as well, and will award $10,000.00 payments to both named plaintiffs.[3]

This passage is remarkable in three regards. *First*, as noted, it is the first reference to incentive awards in the reported case law, yet the court states that counsel had provided "numerous citations . . . in which substantial incentive payments to named plaintiffs in securities class action cases have been made." This implies that a practice of incentive awards pre-dated courts' references to such awards. There are, in fact, smatterings of earlier cases providing special awards to plaintiffs without labeling them incentive awards.[4] *Second*, the $10,000 payment in 1987, when adjusted to 2002 dollars to accord with an empirical study on point, shows the award to be about $15,830, which the empirical study reports is almost precisely the average incentive award 15 years later.[5] *Third*, although labeling the payment an "incentive award," the rationale that the court employs speaks more to compensation than incentive, suggesting that the class representatives are being paid for their service to the class, not so as to ensure that class members will step forward in the future.

Perhaps for that reason, some courts refer to the awards as "service awards."[6] The first appearance of this term oc-

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[3]Re Continental/Midlantic Shareholders Litigation, 1987 WL 16678, *4 (E.D. Pa. 1987).

[4]*See, e.g.,* Bryan v. Pittsburgh Plate Glass Co. (PPG Industries, Inc.), 59 F.R.D. 616, 617, 6 Fair Empl. Prac. Cas. (BNA) 925, 6 Empl. Prac. Dec. (CCH) P 8935 (W.D. Pa. 1973), judgment aff'd, 494 F.2d 799, 7 Fair Empl. Prac. Cas. (BNA) 822, 7 Empl. Prac. Dec. (CCH) P 9269 (3d Cir. 1974) (approving settlement that provided "special awards in the aggregate amount of $17,500 to those members of the plaintiff class who were most active in the prosecution of this case and who devoted substantial time and expense on behalf of the class").

[5]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1308 (2006) (reporting average award per class representative is $15,992 in inflation adjusted 2002 dollars).

For a discussion of how the magnitude of incentive awards has varied over time, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:8 (5th ed.).

[6]Viafara v. MCIZ Corp., 2014 WL 1777438, *16 (S.D.N.Y. 2014) ("Ser-

curs around 2002[7] and there are about 250 uses of it in federal case law thereafter,[8] though only one by an appellate court.[9] By contrast, about 1,000 district and appellate decisions employ the term "incentive award."[10] The courts appear to utilize the terms interchangeably.

Other courts refer to incentive awards as "case contribution awards."[11] The first case utilizing this term in the reported case law is a 2003 decision of the United States District Court for the Northern District of California. Therein, the court stated that:

> In order to compensate Class Representatives for their time and efforts with respect to this Action, the Class Representatives . . . hereby are awarded Case Contribution Compensation in the amount of $2,000 each, to be paid from the Settlement Fund.[12]

No court employed the case contribution locution again for

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vice awards are common in class action cases and serve to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs.").

[7]In re Sorbates Direct Purchaser Antitrust Litigation, 2002 WL 31655191, *3 (N.D. Cal. 2002) ("Service awards to Class Representatives Nutri-Shield, Inc., Ohio Chemical Services, Inc., Chem/Serv, Inc., Universal Preservachem, Inc., Kraft Chemical Company Nutrishield etc. in the amount of $7,500 each shall be paid from the Settlement Funds.").

[8]A Westlaw search in the federal courts database for <adv: "service award!" /p ("class representative!" or "named plaintiff!")> returned 258 cases on June 1, 2015.

[9]Rodriguez v. National City Bank, 726 F.3d 372, 375, 86 Fed. R. Serv. 3d 414 (3d Cir. 2013) (noting that "the [settlement] agreement provided a service award of $7,500 to each of the named plaintiffs, $200 to each class payee, $75,000 to two organizations that would provide counseling and other services to the settlement class, and $2,100,000 in attorneys' fees").

[10]A Westlaw search in the federal courts database for <adv: "incentive award!" /p ("class representative!" or "named plaintiff!")> returned 930 cases on June 1, 2015.

[11]Joseph v. Bureau of Nat. Affairs, Inc., 2014 WL 5471125, *4 (E.D. Va. 2014) ("The Court finds that Case Contribution Awards of $5,000.00 each to Class Representatives . . . are just and reasonable, and fairly account for their contributions to the pursuit of this Action on behalf of the Settlement Class.").

[12]In re Providian Financial Corp., 2003 WL 22005019, *3 (N.D. Cal. 2003).

three years[13] and indeed that form is less often utilized than the phrase "incentive award." There are about 40 reported cases using a "case contribution" phrase[14] (again compared to close to 1,000 cases employing the term "incentive award") and no appellate court decisions utilizing that term. The courts appear to utilize the terms "incentive awards" and "case contribution awards" interchangeably, with no apparent difference in courts' treatment of the concept based on the utilization of one term or the other.

§ 17:3 Rationale for incentive awards

At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class.[1] Most courts call that payment an "incentive award," though some courts label it a "service award" or "case contribution award."[2] The names capture the sense that the payments aim to compensate class representatives for their service to the class and simultaneously serve to incentivize them to perform this function. Incentive awards for class representatives seem problematic because they appear to treat the class representative differently than the other members of the class. This is a problem for class action law because, generally speaking, a class representative is not entitled to be treated differently than any other class member in the settlement of the class suit.[3] As the Ninth Circuit explained in the context of a settlement that awarded

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[13]In re Westar Energy, Inc. Erisa Litigation, 2006 WL 6909134, *4 (D. Kan. 2006) ("Each of the Named Plaintiffs is also awarded $1,000.00 for their case contribution.").

In re ADC Telecommunications ERISA Litigation, 2006 WL 6617080, *3 (D. Minn. 2006) (preliminarily approving proposed class action settlement that proposed "payment of the Named Plaintiffs' Case Contribution Compensation").

[14]A Westlaw search in the federal courts database for <adv: "case contribution" /p ("class representative!" or "named plaintiff!")> returned 39 cases on June 1, 2015.

[Section 17:3]

[1]Other class members may also be eligible for such awards. *See* Rubenstein, 5 **Newberg on Class Actions** § 17:6 (5th ed.).

[2]For a discussion of the history and nomenclature of incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:2 (5th ed.).

[3]Indeed, a class can only be certified if the class representative's claims are typical of those of the rest of the class. Fed. R. Civ. P. 23(a)(3).

some present plaintiffs more money than most absent class members:

> [S]pecial rewards for [class] counsel's individual clients are not permissible when the case is pursued as a class action. . . . [W]hen a person joins in bringing an action as a class action he has disclaimed any right to a preferred position in the settlement. Were that not the case, there would be considerable danger of individuals bringing cases as class actions principally to increase their own leverage to attain a remunerative settlement for themselves and then trading on that leverage in the course of negotiations.[4]

Courts fear that a class representative can be induced by a special payment to sell out the class's interests.[5] Such payments are therefore suspect and the suspicion is sometimes policed by ensuring that the class representative's remuneration from the settlement is the same as that of other class

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[4]Staton v. Boeing Co., 327 F.3d 938, 976, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) (citation omitted) (internal quotation marks omitted).

[5]In re Dry Max Pampers Litigation, 724 F.3d 713, 722, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013) ("[W]e 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.'" (quoting Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003))).

Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003) ("Yet applications for incentive awards are scrutinized carefully by courts who sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain." (citing **Newberg on Class Actions**))).

In re U.S. Bioscience Securities Litigation, 155 F.R.D. 116, 120 (E.D. Pa. 1994) (characterizing class representatives as "fiduciaries" of absent class members and stating that "[t]his fiduciary status introduces concerns about whether the payment of any 'awards' can be reconciled with the punctilio of fairness the fiduciary owes to the beneficiary").

Weseley v. Spear, Leeds & Kellogg, 711 F. Supp. 713, 720, Fed. Sec. L. Rep. (CCH) P 94403 (E.D.N.Y. 1989) ("A class representative is a fiduciary to the class. If class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard.").

Women's Committee For Equal Employment Opportunity (WC=EO) v. National Broadcasting Co., 76 F.R.D. 173, 180, 19 Fair Empl. Prac. Cas. (BNA) 1703, 15 Empl. Prac. Dec. (CCH) P 7832, 24 Fed. R. Serv. 2d 359 (S.D.N.Y. 1977) ("[W]hen representative plaintiffs make what amounts to a separate peace with defendants, grave problems of collusion are raised.").

members.[6]

Given this emphasis, it is somewhat surprising that incentive awards have proliferated. The Sixth Circuit has observed that "to the extent that incentive awards are common, they are like dandelions on an unmowed lawn—present more by inattention than by design."[7] Yet courts have, in fact, given some attention to the rationale for incentive awards, noting that they work "[1] to compensate class representatives for work done on behalf of the class, [2] to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, [3] to recognize their willingness to act as a private attorney general."[8] Many courts have also noted a fourth rationale for incentive payments: that such payments do precisely what their name hopes they will—incentivize class members to step forward on behalf of the class. Courts regularly reference these four rationales behind incentive awards.

Compensation. Most courts state that an incentive award to the class representatives is meant to compensate those entities for the service that they provided to the class.[9] Generally, these services are the time and effort the class representatives invest in the case. Class representatives

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[6]Lane v. Page, 862 F. Supp. 2d 1182, 1238, Fed. Sec. L. Rep. (CCH) P 96834 (D.N.M. 2012) ("Courts 'have denied preferential allocation on the grounds that the named plaintiff may be tempted to settle an action to the detriment of the class or come to expect a 'bounty' for bringing suit.' " (quoting **Newberg on Class Actions**)).

Robles v. Brake Masters Systems, Inc., 2011 WL 9717448, *8 (D.N.M. 2011) (quoting **Newberg on Class Actions**) (same).

[7]In re Dry Max Pampers Litigation, 724 F.3d 713, 722, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013).

[8]Rodriguez v. West Publishing Corp., 563 F.3d 948, 958–59, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) (numbers added).

See also Sullivan v. DB Investments, Inc., 667 F.3d 273, 333, 2011-2 Trade Cas. (CCH) ¶ 77736, 81 Fed. R. Serv. 2d 580 (3d Cir. 2011) ("The purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation and to reward the public service of contributing to the enforcement of mandatory laws." (citations omitted) (internal quotation marks omitted)).

[9]**First Circuit (District Court)**

Nilsen v. York County, 400 F. Supp. 2d 265 (D. Me. 2005) (approving "incentive awards to compensate the three class representatives and

seventeen class member who spent time working with class counsel to achieve the settlement").

Second Circuit (District Court)

In re American Intern. Group, Inc. Securities Litigation, 2012 WL 345509, *6 (S.D.N.Y. 2012) ("Courts . . . routinely award . . . costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." (citation omitted) (internal quotation marks omitted)).

Third Circuit (District Court)

In re Schering-Plough Corp. Enhance Securities Litigation, 2013 WL 5505744, *37 (D.N.J. 2013), appeal dismissed, (3rd Circ. 13-4328) (Apr. 17, 2014) ("Reasonable payments to compensate class representatives for the time and effort devoted by them have been approved.").

Seidman v. American Mobile Systems, 965 F. Supp. 612, 626 (E.D. Pa. 1997) ("The Court will compensate the class representatives for the time they spent on matters connected to the litigation in this case.").

Pozzi v. Smith, 952 F. Supp. 218, 227, Fed. Sec. L. Rep. (CCH) P 99422 (E.D. Pa. 1997) (awarding class representative fee of $1,600 to compensate the class representative for her actual time and expenses).

Lake v. First Nationwide Bank, 900 F. Supp. 726, 737 (E.D. Pa. 1995) (awarding class representative fee of $500 to both class representatives to compensate them for their actual time and expenses).

Fifth Circuit (District Court)

Burford v. Cargill, Inc., 2012 WL 5471985, *6 (W.D. La. 2012) ("[T]he Court finds that each named Plaintiff is entitled to an enhancement award to compensate him or her for the time and effort expended in representing the settlement class during this action.").

Humphrey v. United Way of Texas Gulf Coast, 802 F. Supp. 2d 847, 868, 52 Employee Benefits Cas. (BNA) 1427 (S.D. Tex. 2011) ("Incentive awards are discretionary and 'are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes to recognize their willingness to act as private attorney general.' " (quoting Rodriguez v. West Publishing Corp., 563 F.3d 948, 959, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009))).

Sixth Circuit (District Court)

Swigart v. Fifth Third Bank, 2014 WL 3447947, *7 (S.D. Ohio 2014) ("The modest class representative award requests of $10,000 to each of the two Class Representatives have been tailored to compensate each Class Representative in proportion to his or her time and effort in prosecuting the claims asserted in this action.").

Seventh Circuit

Eubank v. Pella Corp., 753 F.3d 718, 723, 88 Fed. R. Serv. 3d 920 (7th Cir. 2014) (reversing the settlement approval but noting that the

lower court "awarded [named plaintiffs] compensation (an 'incentive award,' as it is called) for their services to the class of either $5,000 or $10,000, depending on their role in the case. Saltzman, being the lead class representative, was slated to be a $10,000 recipient").

Eighth Circuit (District Court)

In re Zurn Pex Plumbing Products Liability Litigation, 2013 WL 716460, *2 (D. Minn. 2013) ("Service award payments are regularly made to compensate class representatives for their help to a class.").

Sauby v. City of Fargo, 2009 WL 2168942, *3 (D.N.D. 2009) ("Incentive awards serve to compensate class representatives for work done on behalf of the class.").

Ninth Circuit

In re Online DVD-Rental Antitrust Litigation, 779 F.3d 934, 943, 2015-1 Trade Cas. (CCH) ¶ 79083 (9th Cir. 2015) ("[I]ncentive awards that are intended to compensate class representatives for work undertaken on behalf of a class 'are fairly typical in class action cases.' " (quoting Rodriguez v. West Publishing Corp., 563 F.3d 948, 959, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009))).

Rodriguez v. West Publishing Corp., 563 F.3d 948, 958–59, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) (stating that incentive awards are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general").

Tenth Circuit (District Court)

Chieftain Royalty Co. v. Laredo Petroleum, Inc., 2015 WL 2254606, *4 (W.D. Okla. 2015) ("Case contribution awards are meant to 'compensate class representatives for their work on behalf of the class, which has benefited from their representation.' " (quoting In re Marsh ERISA Litigation, 265 F.R.D. 128, 150 (S.D.N.Y. 2010))).

Eleventh Circuit (District Court)

Burrows v. Purchasing Power, LLC, 2013 WL 10167232, *4 (S.D. Fla. 2013) ("[T]he Court finds that the Class Representative is not being treated differently than the Settlement Class members. Although the Class Representative seeks an incentive award, the incentive award is not to compensate the Class Representatives for damages but to reward him for his efforts on behalf of the Settlement Class.").

Morefield v. NoteWorld, LLC, 2012 WL 1355573, *4 (S.D. Ga. 2012) ("Service awards compensate class representatives for services provided and risks incurred during the class action litigation on behalf of other class members.").

District of Columbia Circuit (District Court)

Cobell v. Jewell, 29 F. Supp. 3d 18, 25 (D.D.C. 2014) ("[A]n incentive award is 'intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willing-

perform certain functions that arise in most cases, such as monitoring class counsel, being deposed by opposing counsel, keeping informed of the progress of the litigation, and serving as a client for purposes of approving any proposed settlement with the defendant.[10] Class representatives sometimes

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ness to act as a private attorney general.' " (quoting Rodriguez v. West Publishing Corp., 563 F.3d 948, 958–59, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009))).

[10]Lilly v. Jamba Juice Company, 2015 WL 2062858, *7 (N.D. Cal. 2015) (Granting incentive award because: "Named Plaintiffs have been substantially involved in the course of the litigation spanning two years. Plaintiff Lilly and Plaintiff Cox invested considerable time in the litigation and prepared for and gave deposition testimony. Plaintiff Cox took time off from work to participate in the litigation. Plaintiffs have also taken efforts to protect the interests of the class by discussing acceptable settlement terms with counsel.") (citations omitted).

Boyd v. Coventry Health Care Inc., 299 F.R.D. 451, 469, 58 Employee Benefits Cas. (BNA) 2084 (D. Md. 2014) ("In the final approval motion, Plaintiffs represent that this award is justified because each Named Plaintiff spent a considerable amount of time over the past four years contributing to the litigation and benefiting the class by reviewing the relevant documents; staying apprised of developments in the case and making themselves available to class counsel; providing class counsel extensive information and materials regarding their Plan investments; responding to Defendants' document requests; and reviewing and ultimately approving the terms of the settlement.").

Singleton v. Domino's Pizza, LLC, 976 F. Supp. 2d 665, 691 (D. Md. 2013) ("In the final approval motion, Plaintiffs represent that this award is justified because both Named Plaintiffs spent a considerable amount of time 'meeting and communicating with counsel, reviewing pleadings and correspondence, gathering documents' and participating in the mediation, all done in furtherance of the interests of the Settlement Classes.").

Heekin v. Anthem, Inc., 2012 WL 5878032, *1 (S.D. Ind. 2012), appeal dismissed, (7th Cir. 12-3786, 12-3871)(May 17, 2013) (approving award because class representatives "committed considerable time and effort over the seven years of litigation" and "[b]oth have conferred and participated with Class Counsel to make key litigation decisions, traveled to Indianapolis to attend hearings, and reviewed the Settlement to ensure it was a fair recovery for the Class") (citation omitted).

Been v. O.K. Industries, Inc., 2011 WL 4478766, *12 (E.D. Okla. 2011), report and recommendation adopted, 2011 WL 4475291 (E.D. Okla. 2011) ("The Court finds . . . that the five Class Representatives devoted substantial time and energy representing the interests of the Class . . . [Class Representative] testified that, for the nine years of litigation, each of the Class Representatives was actively involved in this case, including communicating with Class Counsel, communicating with Class Members, giving depositions, attending and representing the Class in settlement conferences, assisting with preparation for and attending trial, testifying

serve additional functions specific to the particular case.[11] In some cases, particularly securities cases litigated under the PSLRA which approach incentive awards in a distinct fashion,[12] courts have compensated class representatives directly for these services, for instance on an hourly basis,[13] but more

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or being available to testify at trial, and continuously reviewing and commenting on copies of the filings made by the parties in this Court and in the Tenth Circuit.").

[11]In re Zurn Pex Plumbing Products Liability Litigation, 2013 WL 716460, *2 (D. Minn. 2013) ("The service payments sought under the settlement reflect the efforts by the class representatives to gather and communicate information to counsel and act as the public face of the litigation. The class representatives opened their homes up to inspection and testing, some of them more than once. Each assisted with the investigation and preparation of these suits, gathered documents for production, and helped class counsel.").

Burford v. Cargill, Inc., 2012 WL 5471985, *6 (W.D. La. 2012) ("Here, each plaintiff initially participated in telephone conferences with counsel, completed an intake questionnaire, discussed the questionnaire responses with counsel, and signed a contract of representation. As the litigation continued and as part of the discovery process, each plaintiff was required to fill out a detailed questionnaire regarding their use of Cargill feed and damages. To answer the two questions, plaintiffs were generally required to go through years of their business records. They were also required to produce hundreds of pages of records ranging from milk production records to tax returns. Therefore, the record supports enhancement awards in this case as all of the named Plaintiffs have provided valuable services to the class.") (citations omitted).

[12]For a discussion, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:19 (5th ed.).

[13]Ontiveros v. Zamora, 303 F.R.D. 356, 366 (E.D. Cal. 2014) ("The court finds that a downward departure from the award proposed by parties from $73.80 per hour to $50 per hour fairly compensates the named plaintiff for his time and incorporates an extra incentive to participate in litigation. Multiplying that rate by the 271 hours the named plaintiff spent on litigation, the court finds he would be entitled to an award of $13,550.").

In re Stock Exchanges Options Trading Antitrust Litigation, 2006 WL 3498590, *13 (S.D.N.Y. 2006) ("The Court will award these named plaintiffs $100 per hour they sat in deposition; those that did not even sit for deposition will receive no incentive . . .").

Seidman v. American Mobile Systems, 965 F. Supp. 612, 626 (E.D. Pa. 1997) ("Pursuant to the Court's request, class representative Frank Seidman has furnished the Court with an adequate accounting that the time he spent working on matters related to this litigation is approximately thirty-two hours. Based on the time records and the representations made by counsel as to the activities undertaken by Frank

often courts simply acknowledge these functions as serving as the basis for the incentive award.

Risks. Courts often premise incentive awards on the risks that the class representatives undertook in stepping forward to represent the class.[14] These risks are at least two-fold: in some circumstances, the class representative could be liable for the costs of the suit,[15] while in other circumstances, a class representative might face retaliation.[16] Where the risks are specific and substantial, courts may increase the incen-

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Seidman on behalf of the class, the Court shall award him a class representative fee totaling $1280 (32 hours at a rate of $40.00 per hour) from the D & T settlement fund as compensation for the actual time which he spent on this litigation.").

[14]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 235-36 (10th Cir. 2009) ("[A] class representative may be entitled to an award for personal risk incurred or additional effort and expertise provided for the benefit of the class.").

Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 430, 2007-1 Trade Cas. (CCH) ¶ 75542 (2d Cir. 2007) ("The Court noted that incentive awards were related to the individual's personal risk and additional efforts to benefit the lawsuit.").

[15]Espenscheid v. DirectSat USA, LLC, 688 F.3d 872, 876–77, 19 Wage & Hour Cas. 2d (BNA) 798, 162 Lab. Cas. (CCH) P 36058 (7th Cir. 2012) ("And a class action plaintiff assumes a risk; should the suit fail, he may find himself liable for the defendant's costs or even, if the suit is held to have been frivolous, for the defendant's attorneys' fees. The incentive reward is designed to compensate him for bearing these risks, as well as for as any time he spent sitting for depositions and otherwise participating in the litigation as any plaintiff must do. The plaintiff's duties are not onerous and the risk of incurring liability is small; a defendant is unlikely to seek a judgment against an individual of modest means (and how often are wealthy people the named plaintiffs in class action suits?). The incentive award therefore usually is modest—the median award is only $4,000 per class representative.") (citations omitted).

Fraley v. Facebook, Inc., 966 F. Supp. 2d 939, 947 n.13, 86 Fed. R. Serv. 3d 572 (N.D. Cal. 2013), appeal dismissed, (9th Circ. 13-17097)(Dec. 3, 2013) (finding incentive payments justified because, *inter alia*, "[t]he named plaintiffs here also at least theoretically were at risk of an attorney fee award being entered against them if Facebook prevailed, under the fee-shifting provisions of Civil Code § 3344").

[16]DeLeon v. Wells Fargo Bank, N.A., 2015 WL 2255394, *7 (S.D.N.Y. 2015) (approving $15,000 service award and noting that it, *inter alia*, "recognizes the risks that the named-Plaintiff faced by participating in a lawsuit against her former employer").

Parker v. Jekyll and Hyde Entertainment Holdings, L.L.C., 2010 WL 532960, *1 (S.D.N.Y. 2010) (approving $15,000 enhancement awards because, *inter alia*, "[A]s employees suing their current or former

tive award accordingly.[17]

Private attorneys general. Courts have often stated that class representatives perform a public function and may be rewarded accordingly. That function is to ensure enforcement of certain laws. As explained elsewhere in the Treatise,[18] one of the functions of the class action is to incentivize private parties to enforce certain laws such that the government is not required to undertake all law enforcement alone. Class action lawyers are often, therefore, labelled "private attorneys general."[19] But since class counsel need class representatives to pursue a class suit, courts have also dubbed the latter with the same moniker[20]—and acknowledged their public service through provision of an incentive

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employer, the plaintiffs face the risk of retaliation. The current employees risk termination or some other adverse employment action, while former employees put in jeopardy their ability to depend on the employer for references in connection with future employment. The enhancement awards provide an incentive to seek enforcement of the law despite these dangers.").

Frank v. Eastman Kodak Co., 228 F.R.D. 174, 187 (W.D. N.Y. 2005) (recognizing that service awards are "particularly appropriate in the employment context" given the risk of retaliation by a current or former employer).

In re Southern Ohio Correctional Facility, 175 F.R.D. 270, 276 (S.D. Ohio 1997), order rev'd on other grounds, 24 Fed. Appx. 520 (6th Cir. 2001) (noting in prison inmate case that "incentive awards are also justified upon the grounds that the class representatives have . . . assumed the risk of retaliation and/or threats by acting as leaders in an unpopular lawsuit").

[17]Been v. O.K. Industries, Inc., 2011 WL 4478766, *12–13 (E.D. Okla. 2011), report and recommendation adopted, 2011 WL 4475291 (E.D. Okla. 2011) (describing specific forms of retaliation class representatives suffered and justifying $100,000 award in part on this basis).

[18]*See* Rubenstein, 1 **Newberg on Class Actions** § 1:8 (5th ed.).

[19]Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 566, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 109 Fair Empl. Prac. Cas. (BNA) 1, 93 Empl. Prac. Dec. (CCH) P 43877 (2010) ("The upshot is that the plaintiffs' attorneys did what the child advocate could not do: They initiated this lawsuit. They thereby assumed the role of 'a "private attorney general'" by filling an enforcement void in the State's own legal system, a function 'that Congress considered of the highest priority.'" (quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263, 1 Empl. Prac. Dec. (CCH) P 9834 (1968) (per curiam))).

See generally, William B. Rubenstein, On What A "Private Attorney General" Is—And Why it Matters, 57 Vand. L. Rev. 2129 (2004).

[20]U.S. Parole Commission v. Geraghty, 445 U.S. 388, 100 S. Ct. 1202,

award.[21]

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63 L. Ed. 2d 479, 29 Fed. R. Serv. 2d 20 (1980) ("[T]he Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the Rules are met. This 'right' is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement.").

Cameron-Grant v. Maxim Healthcare Services, Inc., 347 F.3d 1240, 1246, 9 Wage & Hour Cas. 2d (BNA) 1, 149 Lab. Cas. (CCH) P 34781, 57 Fed. R. Serv. 3d 69 (11th Cir. 2003) ("In essence, the named plaintiff who seeks to represent a class under Rule 23 acts in a role that is analogous to the private attorney general.") (internal quotation marks omitted).

Cf. Fox v. Vice, 131 S. Ct. 2205, 2213, 180 L. Ed. 2d 45, 94 Empl. Prac. Dec. (CCH) P 44197 (2011) (noting, in non-class suit that "[w]hen a plaintiff succeeds in remedying a civil rights violation . . . he serves 'as a "private attorney general," vindicating a policy that Congress considered of the highest priority' " (quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263, 1 Empl. Prac. Dec. (CCH) P 9834 (1968) (per curiam))).

Cf. Fogerty v. Fantasy, Inc., 510 U.S. 517, 524, 114 S. Ct. 1023, 127 L. Ed. 2d 455, 29 U.S.P.Q.2d 1881 (1994) (noting, in non-class suit that "[o]ftentimes, in the civil rights context, impecunious 'private attorney general' plaintiffs can ill afford to litigate their claims against defendants with more resources").

See generally, Daniel J. Meltzer, Deterring Constitutional Violations By Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 Colum. L. Rev. 247 (1988).

[21]In re Linerboard Antitrust Litigation, 2004-1 Trade Cas. (CCH) ¶ 74458, 2004 WL 1221350, *18 (E.D. Pa. 2004), order amended, 2004 WL 1240775 (E.D. Pa. 2004) (noting that incentive payments were "particularly appropriate in this case because there was no preceding governmental action alleging a conspiracy").

In re Cendant Corp., Derivative Action Litigation, 232 F. Supp. 2d 327, 344 (D.N.J. 2002) (stating that incentive "awards are granted to reward the public service performed by lead plaintiffs in contributing to the vitality and enforcement of securities laws").

In re Plastic Tableware Antitrust Litigation, 1995-2 Trade Cas. (CCH) ¶ 71192, 1995 WL 723175, *2 (E.D. Pa. 1995) (noting that class representative incentive payments "may also be treated as a reward for public service").

In re U.S. Bioscience Securities Litigation, 155 F.R.D. 116, 121 (E.D. Pa. 1994) ("In securities class actions, incentive payments are also thought to encourage the enforcement of federal securities laws.").

In re SmithKline Beckman Corp. Securities Litigation, 751 F. Supp. 525, 535, Fed. Sec. L. Rep. (CCH) P 95,686 (E.D. Pa. 1990) ("[T]he Court agrees that special awards to the class representatives are appropriate. First, they have rendered a public service by contributing to the vitality of the federal Securities Acts. Private litigation aids effective enforcement of the securities laws because private plaintiffs prosecute violations that

Incentives. Courts have held that incentive awards are justified as a means for encouraging class members to step forward to represent the class. The Seventh Circuit stated in 1998 that: "[b]ecause a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit."[22] Courts in nearly every circuit have embraced the argument, often directly citing the Seventh Circuit's locution.[23] Typically, courts will simply identify this purpose

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might otherwise go undetected due to the SEC's limited resources." (citation omitted) (internal quotation marks omitted).

[22]Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998).

[23]**First Circuit (District Court)**

Baptista v. Mutual of Omaha Ins. Co., 859 F. Supp. 2d 236, 244 (D.R.I. 2012) ("An incentive award to a named plaintiff 'can be appropriate to encourage or induce an individual to participate' in a class action." (quoting In re Puerto Rican Cabotage Antitrust Litigation, 815 F. Supp. 2d 448 (D.P.R. 2011))).

In re Puerto Rican Cabotage Antitrust Litigation, 815 F. Supp. 2d 448, 468 (D.P.R. 2011) (" 'Because a named plaintiff is an essential ingredient of any class action, an incentive award can be appropriate to encourage or induce an individual to participate in the suit.' " (quoting In re Compact Disc Minimum Advertised Price Antitrust Litigation, 292 F. Supp. 2d 184, 189, 2004-1 Trade Cas. (CCH) ¶ 74293 (D. Me. 2003))).

Fourth Circuit (District Court)

Smith v. Toyota Motor Credit Corp., 2014 WL 4953751, *1 n.5 (D. Md. 2014) (" 'Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.' " (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Boyd v. Coventry Health Care Inc., 299 F.R.D. 451, 468, 58 Employee Benefits Cas. (BNA) 2084 (D. Md. 2014) ("Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Fifth Circuit (District Court)

Humphrey v. United Way of Texas Gulf Coast, 802 F. Supp. 2d 847, 869, 52 Employee Benefits Cas. (BNA) 1427 (S.D. Tex. 2011) ("Moreover, '[b]ecause a named plaintiff is an essential ingredient of any class action an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.' " (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Sixth Circuit

In re Dry Max Pampers Litigation, 724 F.3d 713, 723, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013) (Cole, J., dissenting) ("Where claims are

in approving an incentive award. Occasionally, however, a court will attend to the full meaning of the Seventh Circuit's

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worth very little, as in this case, even a recovery in the full amount may not be enough to induce anyone to serve as a named plaintiff.").

Bickel v. Sheriff of Whitley County, 2015 WL 1402018, *7 (N.D. Ind. 2015) ("Incentive awards are justified when necessary to induce individuals to become named representatives." (quoting In re Synthroid Marketing Litigation, 264 F.3d 712, 722, 2001-2 Trade Cas. (CCH) ¶ 73407, 51 Fed. R. Serv. 3d 736 (7th Cir. 2001))).

Seventh Circuit

In re Synthroid Marketing Litigation, 264 F.3d 712, 722, 2001-2 Trade Cas. (CCH) ¶ 73407, 51 Fed. R. Serv. 3d 736 (7th Cir. 2001) ("Incentive awards are justified when necessary to induce individuals to become named representatives.").

Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 410 (7th Cir. 2000) ("Incentive awards are appropriate if compensation would be necessary to induce an individual to become a named plaintiff in the suit.").

Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998) ("Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.").

Eighth Circuit (District Court)

Sauby v. City of Fargo, 2009 WL 2168942, *1 (D.N.D. 2009) ("Incentive awards are not intended to 'compensate' plaintiffs, but instead serve to encourage people with legitimate claims to pursue the action on behalf of others similarly situated.").

Ninth Circuit (District Court)

Barbosa v. MediCredit, Inc., 2015 WL 1966911, *9 (C.D. Cal. 2015) ("An incentive award is appropriate 'if it is necessary to induce an individual to participate in the suit.' " (quoting In re Cellphone Fee Termination Cases, 186 Cal. App. 4th 1380, 1394, 113 Cal. Rptr. 3d 510 (1st Dist. 2010), as modified, (July 27, 2010))).

In re Toys R Us-Delaware, Inc.—Fair and Accurate Credit Transactions Act (FACTA) Litigation, 295 F.R.D. 438, 470, 87 Fed. R. Serv. 3d 968 (C.D. Cal. 2014) ("[I]t is well-established that the court may grant a modest incentive award to class representatives, both as an inducement to participate in the suit and as compensation for time spent in litigation activities, including depositions.").

Tenth Circuit

UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 235 (10th Cir. 2009) (" 'Incentive awards [to class representatives] are justified when necessary to induce individuals to become named representatives,' but there is no need for such an award 'if at least one [class member] would have stepped forward without the lure of an incentive award.' " (quoting In re Synthroid Marketing Litigation, 264 F.3d 712, 722–23, 2001-2 Trade Cas. (CCH) ¶ 73407, 51 Fed. R. Serv. 3d 736 (7th Cir. 2001))).

statement—that an award is appropriate *if* it is necessary to induce an individual to serve as a class representative—and in so doing, the court will scrutinize whether the incentive award truly induced the class representative's service.[24]

Incentive awards surely make it look as if the class representatives are being treated differently than other class members, but the justifications for the awards help illuminate the fact that the class representatives are not similarly situated to other class members. They have typically done something the absent class members have not—

O'Brien v. Airport Concessions, Inc., 2015 WL 232191, *6 (D. Colo. 2015) ("The Court agrees that some award would be necessary to incentivize a plaintiff to come forward on behalf of the class in this case, and that the class has benefitted from his actions.").

Fankhouser v. XTO Energy, Inc., 2012 WL 4867715, *3 (W.D. Okla. 2012) ("Counsel also seek incentive awards for the named class representatives . . . Such awards 'are justified when necessary to induce individuals to become named representatives,' but there is no need for such an award 'if at least one [class member] would have stepped forward without the lure of an 'incentive award.' " (quoting In re Synthroid Marketing Litigation, 264 F.3d 712, 722–23, 2001-2 Trade Cas. (CCH) ¶ 73407, 51 Fed. R. Serv. 3d 736 (7th Cir. 2001))).

In re Motor Fuel Temperature Sales Practices Litigation, 271 F.R.D. 263, 293 (D. Kan. 2010) ("Courts have found that incentive awards to class representatives are justified if necessary to induce individuals to become named representatives, or to compensate them for personal risk incurred or additional effort and expertise provided for the benefit of the class.").

Droegemueller v. Petroleum Development Corp., 2009 WL 961539, *5 (D. Colo. 2009) ("Numerous courts have recognized that incentive awards are an efficient and productive way of encouraging members of a class to become class representatives, and in rewarding individual efforts taken on behalf of the class.").

[24]Fouks v. Red Wing Hotel Corp., 2013 WL 6169209, *2 (D. Minn. 2013) ("Plaintiffs quote, but fail to satisfy, the prerequisite expressed in those cases that 'an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.' . . . Here, Plaintiffs have put forth no evidence or argument that persuades the Court that they required any enticement beyond their potential statutory recovery to bring this case, or that their actions in prosecuting it are deserving of a reward." (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Kinder v. Dearborn Federal Sav. Bank, 2013 WL 879301, *3 (E.D. Mich. 2013) ("[Plaintiff] has not provided evidence of these or any other factors the court should consider with respect to an incentive award. Moreover, in light of [plaintiff's] pursuit of several of these types of cases, the court finds that no additional incentive is necessary beyond the $100 in statutory damages already awarded.").

stepped forward and worked on behalf of the class—and thus to award them only the same recovery as the other class members risks disadvantaging the class representatives by treating these dissimilarly-situated individuals as if they were similarly-situated to other class members. In other words, incentive awards may be necessary to ensure that class representatives are treated equally to other class members, rewarded both for the value of their claims (like all other class members) but also for their unique service to the class.[25]

While the central cost of incentive awards is the risk that the class representative's interests will diverge from or conflict with those of the class, courts have addressed a host of other problems that arise in the implementation of incentive awards. These are discussed elsewhere in this unit of the Treatise.[26]

§ 17:4 Legal basis for incentive awards

It might be most apt to leave this section of the Treatise blank as Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards. The judiciary has created these awards out of whole cloth. In doing so, courts have explained the rationale for incentive awards, as discussed in the preceding section;[1] but few courts have paused to consider the legal authority for incentive awards. The Sixth Circuit's observation that "to the extent that incentive awards are common, they are like dandelions on an unmowed lawn—present more by inattention than by design"[2] therefore accurately describes the judiciary's attention to the legal basis

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[25]In re AOL Time Warner ERISA Litigation, 2007 WL 3145111, *4 (S.D.N.Y. 2007).

See also Silberblatt v. Morgan Stanley, 524 F. Supp. 2d 425, 435 (S.D.N.Y. 2007) ("A balance must be struck so that a class representative does not view his prospect for rewards as materially different from other members of the class, yet is not disadvantaged by his service in pursuing worthy claims.").

[26]*See* Rubenstein, 5 **Newberg on Class Actions** §§ 17:14 to 17:18 (5th ed.).

[Section 17:4]

[1]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[2]In re Dry Max Pampers Litigation, 724 F.3d 713, 722, 86 Fed. R.

for making incentive awards.

There are only a few scattered references in the reported case law to the legal basis for incentive awards, with no court addressing the question head on. The few references that exist suggest that courts generally treat incentive awards as somewhat analogous to attorney's fee awards. In common fund cases, the presence of a fund under the court's supervision serves as both the source of the award and, in a sense, as the source of authority for an award.[3] In fee-shifting cases, courts must look to the underlying statute for authority to tax a defendant for an incentive award.[4] Because no statutes do authorize such awards, incentive awards are rare in fee-shifting cases, absent a defendant's agreement to pay such awards.

On the common fund side, restitution supports a *fee* award: if the class representative alone is responsible for paying for class counsel's services, the other class members will be unjustly enriched by virtue of receiving the benefit of their services without paying for them; or, if class counsel is not compensated, they will not have realized the fair value of their services.[5] The argument for an incentive award proceeds by analogy: if the class representative provides a service to the class without the class paying for it, the class members will be unjustly enriched by virtue of receiving these services for free, and/or the class representatives are not realizing the full value of their services.[6] This analogy is not quite right, however. The basic rule of unjust enrich-

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Serv. 3d 216 (6th Cir. 2013).

[3]For a discussion of common fund fee awards, *see* Rubenstein, 5 **Newberg on Class Actions** §§ 15:53 to 15:107 (5th ed.).

[4]For a discussion of statutory fee-shifting, *see* Rubenstein, 5 **Newberg on Class Actions** §§ 15:25 to 15:52 (5th ed.).

[5]For a discussion of the rationale for common fund fee awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 15:53 (5th ed.).

[6]In re Linerboard Antitrust Litigation, 2004-1 Trade Cas. (CCH) ¶ 74458, 2004 WL 1221350, *18 (E.D. Pa. 2004), order amended, 2004 WL 1240775 (E.D. Pa. 2004) ("Like the attorneys in this case, the class representatives have conferred benefits on all other class members and they deserve to be compensated accordingly.").

In re Plastic Tableware Antitrust Litigation, 1995-2 Trade Cas. (CCH) ¶ 71192, 1995 WL 723175, *2 (E.D. Pa. 1995) ("Payments to class representatives may be considered a form of restitutionary relief within the discretion of the trial court. They may also be treated as a reward for

ment is that a person's unsought provision of services generates no entitlement to payment; the common fund fee award is an exception to that rule but an exception typically justified by the fact that class counsel are providing professional (legal) services to the class.[7] Because the class representative is not providing professional services, her situation is best captured not by the exception for attorney's fees but by Judge Posner's summary of the basic rule of unjust enrichment: "If you dive into a lake and save a drowning person, you are entitled to no fee."[8]

A few courts have considered the possibility that incentive payments to the class representatives might be conceptualized as a "cost" or "expense" of the lawsuit that class counsel are entitled to pass on to the class.[9] The Seventh Circuit has speculated that: "Since without a named plaintiff there can be no class action, such compensation as may be necessary to induce [the class representative] to participate in the suit

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public service and for the conferring of a benefit on the entire class." (citation omitted)).

Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1313 (2006) ("From a doctrinal perspective, incentive awards have been justified as a form of restitution for a benefit conferred on others." (citing Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 571 (7th Cir. 1992), as amended on denial of reh'g, (May 22, 1992))).

[7]Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 571 (7th Cir. 1992), as amended on denial of reh'g, (May 22, 1992) (distinguishing right to fees from right to incentive awards in noting that "the law of restitution (excepting salvage in admiralty) generally confines the right to restitution to professionals, such as doctors and lawyers" (citing 2 George E. Palmer, The Law of Restitution, ch. 10 (1978))).

In re U.S. Bioscience Securities Litigation, 155 F.R.D. 116, 122 (E.D. Pa. 1994) ("We agree with Judge Posner that we cannot equate these investors with professionals 'such as doctors and lawyers.' The value of doctors' and lawyers' contributions are subject to readily available and objective benchmarks of reasonableness that the market supplies a court. No such objective referent exists for 10b-5 heroes. They are therefore not entitled to fees for lay service considerably less dangerous than diving into a lake to save a drowning victim." (discussing Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 571 (7th Cir. 1992), as amended on denial of reh'g, (May 22, 1992))).

[8]Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 571 (7th Cir. 1992), as amended on denial of reh'g, (May 22, 1992).

[9]For a discussion of recoverable costs in class action cases, *see* Rubenstein, 5 **Newberg on Class Actions** §§ 16:1 to 16:11 (5th ed.).

could be thought the equivalent of the lawyers' nonlegal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable."[10] The Ninth Circuit suggested that any active class members' actual expenses might be compensated as costs and/or that services rendered to class counsel might be re-paid by class counsel.[11] But the Sixth Circuit, in a decision interpreting the word "expenses" in a settlement agreement, stated:

> Incentive awards, moreover, do not fit comfortably within the commonly accepted meaning of "expenses." Webster's Third New International Dictionary (1981) defines an expense as, alternatively, "something that is expended in order to secure a benefit or bring about a result;" "the financial burden involved typically in a course of action or manner of living;" "the charges that are incurred by an employee in connection with the performance of his duties and that typically include transportation, meals, and lodging while traveling;" "an item of outlay incurred in the operation of a business enterprise allocable to and chargeable against revenue for a specific period;" and "loss, injury, or detriment as the necessary price of something gained or as the inevitable result or penalty of an action." The idea common to these definitions is that of a pecuniary cost or necessary price.
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> Under the facts of this case, at least, incentive awards bestowed on class representatives as a matter of grace after the

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[10]Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 571 (7th Cir. 1992), as amended on denial of reh'g, (May 22, 1992); *see also* Tiffany v. Hometown Buffet, Inc., 2005 WL 991982, *3 (N.D. Cal. 2005) (holding potential incentive payments not part of amount-in-controversy for jurisdictional purposes because jurisdictional inquiry looks only at "claims for special and general damages, attorneys' fees and punitive damages" and incentive payments "do not fall within any of these four categories" but "are more analogous to costs, which are excluded from the calculation of the amount in controversy" (citing Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 571 (7th Cir. 1992), as amended on denial of reh'g, (May 22, 1992) (incentive payments to the class representative "could be thought the equivalent of the lawyers' nonlegal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable"))).

[11]Staton v. Boeing Co., 327 F.3d 938, 977, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) (stating, in the context of denying incentive payments to group of non-class representatives, that "class members can certainly be repaid from any cost allotment for their substantiated litigation expenses, and identifiable services rendered to the class directly under the supervision of class counsel can be reimbursed as well from the fees awarded to the attorneys").

> completion of the representatives' services do not constitute the "necessary price" of such services. Neither do the awards cover pecuniary costs. The district court justified the awards not on the basis of any monetary expenditures made by the named plaintiffs, but on the basis of these plaintiffs' non-pecuniary risks and their long-time leadership roles and communication functions. At oral argument, similarly, plaintiffs' counsel pointed to the valuable public service these men were said to have provided in lowering the risk of a recurrence of rioting at the Southern Ohio Correctional Facility. It does not seem to us that rewarding such a service with a cash payment can properly be equated with the reimbursement of "expenses" in any traditional sense of the word.[12]

Each of these three circuit decisions only touched upon the topic of incentive awards and none generated a legal basis supporting—or rejecting—incentive awards in common fund cases.

On the fee-shifting side, at least one court has held that there is no statutory basis for such an award (under Nevada fee-shifting law);[13] there are, however, scattered reports of defendants being ordered to pay incentive awards in fee-shifting cases.[14] More often, defendants may agree to pay such awards in settling fee-shifting cases and courts have

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[12]In re Southern Ohio Correctional Facility, 24 Fed. Appx. 520, 528-29 (6th Cir. 2001).

[13]Sobel v. Hertz Corp., 53 F. Supp. 3d 1319, 1332 (D. Nev. 2014) (finding incentive awards appropriate but finding no authority to shift cost to defendant under applicable state statute, which provided for equitable relief and for the prevailing party to recover "reasonable attorney's fees and costs," since that provision "most assuredly does not encompass the requested incentive awards," but granting request "to be paid out of the common fund").

[14]Karraker v. Rent-A-Center, Inc., 492 F.3d 896, 899–900, 19 A.D. Cas. (BNA) 737 (7th Cir. 2007) (noting, in context of ascertaining prevailing party status for purposes of fee-shifting entitlement, that court approved $5,000 incentive award to named plaintiff and because "there is no settlement fund . . . the $5,000 is a direct payment from [defendant] to [plaintiff]").

Sauby v. City of Fargo, 2009 WL 2168942, *4 (D.N.D. 2009) ("It is neither improper for the class representatives to receive an award of a different amount as compared to other class members, nor does the Court find it would be improper to require the City to bear the burden of paying the incentive awards. The City's request for a pro rata reduction in each class member's refund improperly shifts the burden and unduly complicates the settlement. Consequently, the Court finds the City is to pay the incentive award from the $1.5 million common fund, with no correspond-

then approved the payments in providing general approval to the settlement itself;[15] consistently, when the settlement agreement does not so provide, courts have rejected requests for incentive awards on that basis.[16] Summarizing this situation, the Sixth Circuit stated in 2003:

> [I]ncentive awards are usually viewed as extensions of the common-fund doctrine, a doctrine that holds that a litigant who recovers a common fund for the benefit of persons other than himself is entitled to recover some of his litigation expenses from the fund as a whole . . . Without a common fund, however, there is no place from which to draw an incentive award. Unsurprisingly, we are unable to find any case where a claim for an incentive award that is not authorized in a settlement agreement has been granted in the absence of a common fund.
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> Here there is neither authorization in the consent decree for this incentive award nor a common fund from which it could be drawn. As a result, it is plainly inappropriate to grant an incentive award . . . Forcing the defendants to pay the incentive award is certainly an additional expenditure, and it is

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ing reduction of the refunds to be provided to participating class members." (citations omitted)).

[15]Equal Rights Center v. Washington Metropolitan Area Transit Authority, 573 F. Supp. 2d 205, 210 (D.D.C. 2008) (reporting that defendant agreed to pay incentive awards (of $5,000 to named plaintiffs and $1,000 to class members who were deposed but not named in the complaint) as part of settlement agreement in fee-shifting case brought under 42 U.S.C. § 1983).

Bynum v. District of Columbia, 412 F. Supp. 2d 73, 80–81 (D.D.C. 2006) (reporting that defendant agreed to pay incentive awards (totaling $200,000) as part of settlement agreement in fee-shifting case brought under 42 U.S.C. § 1983).

FitFitzgerald v. City of Los Angeles, 2003 WL 25471424, *1–2 (C.D. Cal. 2003) (reporting that defendant agreed to pay incentive awards ($3,500 to named plaintiff and $3,500 to declarant for the damages class) as part of settlement agreement in fee-shifting case brought under 42 U.S.C. § 1983).

[16]In re Southern Ohio Correctional Facility, 24 Fed. Appx. 520, 522, 529 n.4 (6th Cir. 2001) (reversing award of incentive payments by defendant in non-common fund case because settlement agreement did not provide for them).

Estep v. Blackwell, 2006 WL 3469569, *7 (S.D. Ohio 2006) (denying incentive award because, in absence of common fund, payment would have to come from defendant and settlement agreement did not provide for defendant to make such a payment).

therefore impermissible.[17]

Given that incentive awards are relatively common in class action practice, their legal basis is surprisingly thin. However, as most class suits settle, the parties typically agree to pay the class representatives some incentive award. The only adversarial challenge to this would come from objectors. Absent class members are generally unlikely to object to such awards because even if they were successful, the money would simply remain in the common fund to be distributed to the class and the single member's share of it would be negligible.[18] These dynamics have created few occasions in which courts have been required to consider seriously the legal basis for paying the class representatives from the class's recovery.

§ 17:5 Source of incentive awards

As discussed in the preceding section of the Treatise,[1] the legal basis for incentive awards may vary depending on the fee structure of a class action. In common fund cases, fees are paid out of the common fund; in fee-shifting cases, fees are paid by the defendant. So too incentive awards, though occasionally courts have implied that incentive awards may be paid out of the attorney's fees or re-paid as recoverable costs.

Common fund. Courts have generally approved incentive awards that are withdrawn from the common fund at the conclusion of the common fund case. Taking incentive awards from the common fund means that the class members are paying the incentive awards.[2] This is consistent with one legal theory loosely underlying such awards, discussed in

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[17]Hadix v. Johnson, 322 F.3d 895, 897–99, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003).

[18]*Cf.* Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 573–74 (7th Cir. 1992), as amended on denial of reh'g, (May 22, 1992) (discussing the awarding of attorney's fees and noting that "[n]o class member objected either—but why should he have? His gain from a reduction, even a large reduction, in the fees awarded the lawyers would be minuscule. So the lawyers had no opponent in the district court and they have none here.").

[Section 17:5]

[1]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[2]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157,

the prior section:[3] that class members would be unjustly enriched if they were able to secure the services of the class representatives at no cost.

Defendant. If a case does not create a common fund, the defendant may be required by a fee-shifting statute to pay a prevailing party's legal fees;[4] if such a case settles, the defendant will typically agree to pay class counsel's legal fees as part of the settlement. In such settlements, a defendant will often agree to pay the class representatives an incentive award, subject to court approval. In the absence of such an agreement, counsel would have to petition the court to order the defendant to pay the incentive awards. As discussed in the prior section of the Treatise,[5] there is no statutory basis for such an award and courts have rejected awards on that basis, although there are a few scattered reports of defendants being ordered to pay incentive awards in fee-shifting cases.

Attorney's fees. In some rare cases, courts have alluded to the idea that incentive awards may be are paid by class counsel out of their fees and expenses.[6] However, if counsel give a portion of their fees to their clients, the payment

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1163 (9th Cir. 2013) ("In cases where the class receives a monetary settlement, the [incentive] awards are often taken from the class's recovery.").

Shane Group, Inc. v. Blue Cross Blue Shield of Michigan, 2015-1 Trade Cas. (CCH) ¶ 79151, 2015 WL 1498888, *18 (E.D. Mich. 2015) ("Payment of incentive awards to class representatives is a reasonable use of settlement funds." (citing Moulton v. U.S. Steel Corp., 581 F.3d 344, 351, 74 Fed. R. Serv. 3d 918 (6th Cir. 2009))).

[3]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[4]For a discussion of fee-shifting statutes, *see* Rubenstein, 5 **Newberg on Class Actions** §§ 15:25 to 15:52 (5th ed.).

[5]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[6]In re Southern Ohio Correctional Facility, 24 Fed. Appx. 520, 532 n.4(6th Cir. 2001) (reversing a district court's approval of an incentive award and noting that court's "conclusion is in no way affected by the district court's stipulation that the incentive awards were to be deducted from the approximately $1.659 million already set aside for attorney fees and expenses").

In re Cendant Corp., Derivative Action Litigation, 232 F. Supp. 2d 327, 344 (D.N.J. 2002) ("Lead Counsel seeks permission to make an incentive payment . . . out of the proposed attorneys' fees . . . An incentive payment to come from the attorneys' fees awarded to plaintiff's counsel need not be subject to intensive scrutiny, as the interests of the corporation, the public, and the defendants are not directly affected.").

would likely violate the ethical prohibition on a lawyer sharing a fee with a non-lawyer,[7] as well as the prohibition on a lawyer going into business with her client.[8] It would also create bad policy.[9]

In re Presidential Life Securities, 857 F. Supp. 331, 337 (S.D.N.Y. 1994) ("Plaintiffs' counsels' request for permission to make incentive payments of $2,000 each to five of the individual class representatives is approved as set forth in the order. The matter of payments of incentives to the individual plaintiffs who acted as class representatives need not be subjected to intense scrutiny inasmuch as these funds will come out of the attorney's fees awarded to plaintiffs' counsel. The interests of the class, of the public, and of the defendant are not directly affected.").

Cf. In re UnumProvident Corp. Derivative Litigation, 2010 WL 289179, *7 (E.D. Tenn. 2010) (noting, in shareholder derivative suit, that requested incentive awards "would be paid out of the attorney's fees and expenses awarded to Plaintiffs' counsel," but discussing problems with that approach and then holding that "these considerations suggest that it is generally best for incentive awards to be paid out of a common fund or by defendants, rather than by plaintiffs' counsel").

[7]Model Rules of Professional Conduct (ABA), Rule 5.4(a) ("A lawyer or law firm shall not share legal fees with a nonlawyer . . .").

Campbell v. Fireside Thrift Co., 2004 WL 49708, *11 (Cal. App. 1st Dist. 2004), unpublished/noncitable (holding that "funding the incentive award by offsetting it against Class Counsel's fees would constitute sharing fees with a non-lawyer, which is prohibited by rule 1-320 of the State Bar Rules of Professional Conduct").

But see In re UnumProvident Corp. Derivative Litigation, 2010 WL 289179, *8 (E.D. Tenn. 2010) (finding incentive award paid from attorney's fees inappropriate despite concluding that "there is no ethical concern" with such an arrangement because the "Tennessee Rules of Professional Conduct prohibit lawyers from sharing fees with nonlawyers except, *inter alia*, 'a lawyer may share a court-awarded fee with a client represented in the matter for which the fee was awarded' " (quoting Tenn. Sup. Ct. R. 8, RPC 5.4(a)(4))).

In re Presidential Life Securities, 857 F. Supp. 331, 337 (S.D.N.Y. 1994) (noting that when incentive awards were to be paid out of counsel's fees, the "sole reason for seeking judicial approval appears to be Code of Professional Responsibility DR 3-102 which bars splitting of legal fees with non-lawyers with exceptions not pertinent here" but approving award).

[8]Model Rules of Professional Conduct (ABA), Rule 1.8(a) ("A lawyer shall not enter into a business transaction with a client . . .").

[9]In re UnumProvident Corp. Derivative Litigation, 2010 WL 289179, *8 (E.D. Tenn. 2010) ("The scarcity of incentive awards paid from counsel's fees may be indicative of their problematic nature. Because the incentive award will come directly from attorney's fees, Plaintiffs' counsel is asking for the opportunity to pay the named plaintiffs. This puts Plaintiffs'

Expense. To the extent that the incentive award is conceptualized as a litigation cost or expense, as a few courts have suggested,[10] then it could be recovered from the fund or the defendant according to any applicable costs provision.[11] That said, few courts regard such payments as recoverable costs.

§ 17:6 Eligibility for incentive awards

At the conclusion of a class action, the class representatives are eligible for incentive awards in recognition of their service to the class. The rationales for incentive awards, discussed in a preceding section,[1] are that the recipient should be compensated for the work she undertook for the class, for the risks she took in doing so, and for stepping forward to serve as a sort of "private attorney general." The tests courts apply in determining whether or not to approve a proposed incentive award, described in the succeeding section,[2] similarly focus on the services that the applicant

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counsel in an unusual position, seeking to convince a court they should pay money. While the amount of money here ($10,000 total) is small relative to the total attorney's fees, it is still an expenditure, and therefore their own financial interest conflicts with the named plaintiffs. Plaintiffs' counsel has the most information about what involvement the named plaintiffs had; yet their description of the named plaintiffs' activities is skimpy. Furthermore, Defendants have no motivation to challenge Plaintiffs' counsel's assertions. In addition, paying plaintiffs could lead to professional plaintiffs. These considerations suggest that it is generally best for incentive awards to be paid out of a common fund or by defendants, rather than by plaintiffs' counsel.").

Campbell v. Fireside Thrift Co., 2004 WL 49708, *12 (Cal. App. 1st Dist. 2004), unpublished/noncitable ("[I]t also appears to us to present at least a potential conflict of interest for class counsel to negotiate the payment of an incentive award out of their own fees, because of the resulting divergence between their own interests, those of the class representative, and those of the class as a whole.").

[10]The expense rationale for an award is discussed in the preceding section of the Treatise. *See* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[11]For a discussion of the recovery of nontaxable costs in class actions, *see* Rubenstein, 5 **Newberg on Class Actions** §§ 16:5 to 16:10 (5th ed.).

[Section 17:6]

[1]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[2]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:13 (5th ed.).

provided to the class.[3] Occasionally, these tests are framed in terms of whether the "class representative" provided these services to the class,[4] but the rationale—that a class member should be rewarded for her service to the class—can apply to a wider group of class members.

Thus, lawyers have sought incentive awards for at least four types of class members:

- *Class representatives* are those plaintiffs whom class counsel proposes, and a court appoints, to represent the class. These class representatives serve as the formal "client" on behalf of the class. As such, they are the class members most likely to undertake the tasks that justify an incentive award and hence are the primary beneficiaries of such awards.
- *Named plaintiffs* are those plaintiffs identified individually in the complaint, on whose behalf the case is initially lodged as a putative class action. Class counsel need not put forward all named plaintiffs, or only named plaintiffs, as proposed class representatives. And even if class counsel does propose that all of the named plaintiffs serve as class representatives, a court might approve some but not others. In many cases, however, the class representatives proposed by class counsel and approved by the court will be precisely (and only) those plaintiffs named in the complaint, meaning the two concepts will overlap completely. For that reason, courts often utilize the terms interchangeably, though in some circumstances, the two are not synonymous. Specifically, in some cases, a named plaintiff will not serve as a formal class representative, but by virtue of having

[3] *See, e.g.,* Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998) (directing courts to consider "[1] the actions the plaintiff has taken to protect the interests of the class, [2] the degree to which the class has benefitted from those actions, and [3] the amount of time and effort the plaintiff expended in pursuing the litigation").

[4] *See, e.g.,* Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995) (stating that in reviewing a proposed incentive award, a court should consider: "1) the risk to *the class representative* in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the *class representative*; 3) the amount of time and effort spent by the *class representative*; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the *class representative* as a result of the litigation") (emphasis added).

been named in the complaint, she may have undertaken some of the tasks that would make her eligible for an incentive award.[5]

- *Other class members* who are neither class representatives nor named plaintiffs might be eligible for incentive awards if they meaningfully participated in the litigation and conferred a benefit on the class. Typically, such awards may be paid to class members who, for example, were deposed by the defendant.[6] While any

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[5]In re TFT-LCD (Flat Panel) Antitrust Litigation, 2013-1 Trade Cas. (CCH) ¶ 78318, 2013 WL 1365900, *17 (N.D. Cal. 2013), appeal dismissed, (9th Circ. 13-15929) (July 12, 2013) and appeal dismissed, (9th Circ. 13-15915) (June 12, 2014) and appeal dismissed, (9th Circ. 13-15916, 13-15930) (June 13, 2014) and appeal dismissed, (9th Circ. 13-15917) (June 13, 2014) ("The Court approves incentive awards of $15,000 to each of the 40 court-appointed class representatives, and $7,500 for each of eight additional named plaintiffs. The Court recognizes the contribution these class representatives and named plaintiffs made to this litigation and finds the amounts requested are reasonable in light of these contributions.").

Cf. Shames v. Hertz Corp., 2012-2 Trade Cas. (CCH) ¶ 78120, 2012 WL 5392159, *22 (S.D. Cal. 2012), appeal dismissed, (9th Circ. 12-57247) (Jan. 23, 2013) and appeal dismissed, (9th Circ. 12-57211, 12-57026) (July 16, 2013) and appeal dismissed, (9th Cir 12-27205) (Sept. 20, 2013) (approving incentive award for class representative but noting that second individual, "though a named plaintiff, has not been put forth as a class representative and does not seek an incentive award").

But see Mancini v. Ticketmaster, 2013 WL 3995269, *2 (C.D. Cal. 2013), appeal dismissed, (9th Cir. 13-56536) (Oct. 4, 2013) (denying incentive award to named plaintiffs who were not approved class representatives and finding the named plaintiffs' argument that they, like the class representatives, also "incurred risks of liability for defendants' costs, had little to personally gain from the litigation, and remained involved for many years, including producing documents, appearing for deposition and submitting declarations," unpersuasive).

[6]Shaw v. Interthinx, Inc., 2015 WL 1867861, *4 (D. Colo. 2015) (granting incentive awards where the "[n]amed Plaintiffs and Class Counsel request approval of $10,000 incentive awards to each of the five Named Plaintiffs and $2,500 incentive awards to each of the two Deposed Opt-in Plaintiffs—representing *in toto* less than 1% of the maximum value of the common fund, or .1667% for each Named Plaintiff and .04167% for each Deposed Opt-in Plaintiff").

Camp v. Progressive Corp., 2004 WL 2149079, *7 (E.D. La. 2004) (awarding $2,500 to non-representative class members who gave a deposition, and $1,000 to non-representative class members who were not deposed but who assisted in the preparation of discovery responses, in class action to recover unpaid wages under the FLSA).

class member may therefore be eligible for an incentive award based on her work on behalf of the class, courts are hesitant to provide awards to large groups of plaintiffs, even if active in the litigation, beyond the core group identified as class representatives (or named plaintiffs).[7]

- *Objectors.* Counsel who object to a class settlement might also seek an incentive award for the class member on whose behalf they lodged the objection. Specifically, any class member who does not opt out of the class may object to a proposed settlement or attorney fee award at the conclusion of the class suit.[8] In doing so, an objector may provide a service to the class and therefore be eligible for an incentive award. Objector incentive awards are considered in a separate section at the end of this unit of the Treatise.[9]

§ 17:7 Frequency of incentive awards

There are several studies that provide some limited empirical evidence concerning the frequency and size of incentive awards. One study, conducted by the Federal Judicial Center ("FJC"), examined class action terminations in four districts in the early 1990s, with some passing references to incentive awards.[1] The most comprehensive published study of incentive awards looked at 374 opinions in

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[7]*See, e.g.,* Staton v. Boeing Co., 327 F.3d 938, 976, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) (denying higher awards to "[t]he two hundred-odd IIRs who were not class representatives" partly because they "were not essential to the litigation, although they may have been helpful to it").

[8]The objection process is discussed in detail elsewhere in the Treatise. *See* Rubenstein, 4 **Newberg on Class Actions** §§ 13:20 to 13:37 (5th ed.).

[9]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:20 (5th ed.).

[Section 17:7]

[1]Thomas E. Willging, Laural L. Hooper and Robert J. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rule (1996). A report on that study is published elsewhere. *See* Thomas E. Willging, Laural L. Hooper and Robert J. Niemic, An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 101 (1996).

class action settlements published from 1993-2002.[2] The Treatise author's own database contains information on incentive awards in nearly 1,200 class actions resolved between 2006–2011.[3] These studies provide data on the frequency with which courts approve incentive awards.

The FJC study from the early 1990s reported that a "substantial minority of all certified, settled class actions in which the court approved a settlement included designated awards to the named class representatives."[4] Specifically, courts granted incentive awards in the four federal districts in 26% (E.D. Pa.), 46% (S.D. Fla.), 40% (N.D. Ill.), and 37% (N.D. Cal.) of all cases, for a total of awards in 44 of 126 cases, or 34.9%.[5] The comprehensive 10 year study found that 27.8% (104) of all 374 cases involved incentive awards.[6] The 1993–2002 study further broke down incentive award frequency by case type. The data show that incentive awards were most frequently granted in consumer credit (59.1%) and commercial cases (57.1%) and least frequently granted in mass tort (7.1%) and corporate cases (4.2%), while no awards were granted in six tax refund cases.[7]

The Treatise author's own data base suggests a remarkable shift in the frequency of class actions culminating in incentive awards, as presented in Table 1, below.

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[2]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303 (2006).

[3]William B. Rubenstein and Rajat Krishna, *Class Action Incentive Awards: A Comprehensive Empirical Study* (draft on file with author).

[4]Thomas E. Willging, Laural L. Hooper and Robert J. Niemic, An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 101 (1996).

[5]Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rule* 120 fig.16 (1996).

[6]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1320 (2006).

[7]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1323 tbl.2 (2006).

Table 1
Empirical Data on Frequency of Incentive Awards

Awards Granted	1993–2002 Study[8]	2006–2011 Study[9]
Antitrust	35%	79.4%
Civil Rights	10.5%	94.6%
Consumer	33.3%	93.4%
Employment- Discrimination	46.2%	75.0%
Employment—Wages/Benefits	23.1%	87.8%
Securities	24.5%	38.7%
TOTAL (all case types including types not included above)	27.8%	71.3%

The more recent data suggest four interesting trends. *First*, while the 1993–2002 study found courts providing incentive awards in 27.8% of all cases, the 2006–2011 data show courts providing incentive awards in 71.3% of all cases. The frequency with which incentive awards are awarded therefore appears to have increased by 156% in recent years, with awards being provided in almost three quarters of all cases. *Second,* the increase occurs across case types, as set forth in Table 1, below. *Third,* securities cases remain those with the lowest percentage of award grants, which is consistent with the statutory framework of the PSLRA.[10] Nonetheless, it appears that some form of remuneration is paid to class representatives in about a third of securities cases. *Fourth*, while incentive awards have proliferated, they appear to have simultaneously become more modest; the size of incentive awards is discussed in the succeeding section of the

[8]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1323 tbl.2 (2006).

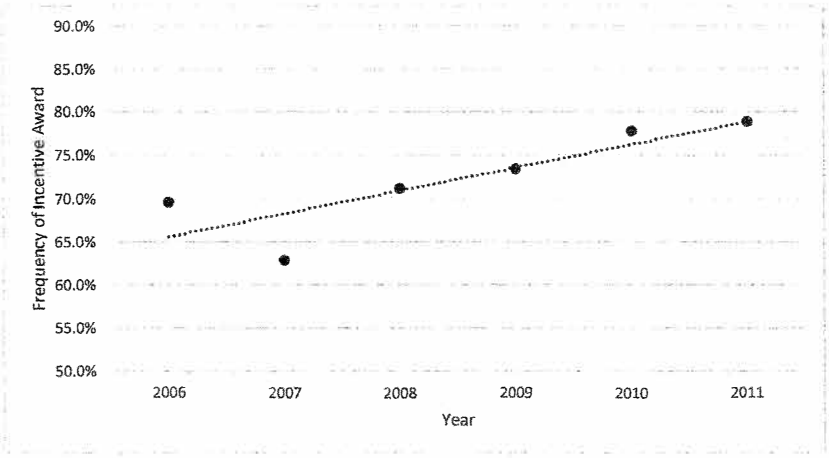
[9]William B. Rubenstein and Rajat Krishna, *Class Action Incentive Awards: A Comprehensive Empirical Study* (draft on file with author).

[10]For a discussion of incentive awards under the PSLRA, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:19 (5th ed.).

Treatise.[11]

The increased prevalence of incentive awards in our study was is so stunning, that we broke the data down among each of the six years of the study (2006–2011). Doing so demonstrated that the frequency of incentive awards increased across those years (but for a blip in the second year). Therefore, our conclusion that courts approved incentive awards in 71.3% of all cases between 2006–2011 masks the facts that courts approved awards in 69.6% and 62.8% of cases in the first two years (2006–2007) but in nearly 80% of all cases (78.6%) by 2011. These data are shown in Graph 1, below.

Graph 1
Empirical Data on Frequency of Incentive Awards—2006–2011[12]



[11] *See* Rubenstein, 5 **Newberg on Class Actions** § 17:8 (5th ed.).

[12] William B. Rubenstein and Rajat Krishna, *Class Action Incentive Awards: A Comprehensive Empirical Study* (draft on file with author).

The increased frequency with which courts have provided incentive awards may be attributable to a combination of several factors. The earlier study went back to 1993, which was about when incentive awards began,[13] so it is not surprising that the practice would have been sparser in those years. As the practice increased, it is quite likely that class counsel sought incentive awards more often, not that courts *sua sponte* offered them more often. However, the dramatic change over time also suggests that courts showed little resistance to the increasing requests for such awards. Neither study provides data on the frequency with which requested awards are approved, rejected, or reduced; but the case law contains far more cases routinely approving awards than outright rejecting them.[14]

These newer data provide strong support for the conclusion that incentive awards are a quite common part of class action practice today.

§ 17:8 Size of incentive awards

There are several studies that provide some limited empirical evidence concerning the frequency and size of incentive awards. One study, conducted by the Federal Judicial Center ("FJC"), examined class action terminations in four districts in the early 1990s, with some passing references to incentive awards.[1] The most comprehensive published study of incentive awards themselves looked at 374

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[13]On the history of incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:2 (5th ed.).

[14]*See, e.g.,* In re Dry Max Pampers Litigation, 724 F.3d 713, 717, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013) ("The district court entered its 'Final Approval Order and Final Judgment' later that afternoon [of the fairness hearing]. With the exception of a few typographical changes, the order was a verbatim copy of a proposed order [including incentive award provisions] that the parties had submitted to the court before the hearing. The order was conclusory, for the most part merely reciting the requirements of Rule 23 in stating that they were met. About Greenberg's objections, the order had nothing to say.").

[Section 17:8]

[1]Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rule* (1996). A report on that study is published elsewhere. *See* Thomas E. Willging, Laural L. Hooper and Robert J. Niemic, An Empirical Analysis of Rule 23 to Address the

opinions in class action settlements published from 1993–2002.[2] The author's own database contains information on incentive awards in approximately 1,200 class actions resolved between 2006–2011.[3] The studies provide data on the size of incentive awards.

The size of incentive awards can be viewed at the case level (total amount of incentive awards approved in the case) or at the individual level (amount per class representative), with data available on both average and median sizes. The FJC study from the early 1990s reported that the "median amounts of all awards to class representatives in the four districts were $7500 in E.D. Pa. and N.D. Ill., $12,000 in S.D. Fla., and $17,000 in N.D. Cal. . . . The median award per representative in three courts was under $3000 and in N.D. Cal. was $7560."[4] The data from the two more recent studies appear in Table 1 below.

Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 101 (1996).

[2]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303 (2006).

[3]William B. Rubenstein and Rajat Krishna, *Class Action Incentive Awards: A Comprehensive Empirical Study* (draft on file with author).

[4]Thomas E. Willging, Laural L. Hooper and Robert J. Niemic, An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 101 (1996). The larger version of this study shows these numbers to be $2,500 (E.D. Pa.), $2,583 (S.D. Fla.), $2,964 (N.D. Ill.). Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rule* 121 (1996) (fig. 18).

Table 1
Empirical Data on Size of Incentive Awards

	1993–2002 Study[5] In 2002 $	2006–2011 Study[6] In 2002 $	2006–2011 Study[7] In 2011 $
Median Total Incentive Award	$18,191	$8,398	$10,500
Median per Plaintiff	$4,357	$4,199	$5,250
Mean Total Incentive Award	$128,803	$26,326	$32,915
Mean per Plaintiff	$15,992	$9,355	$11,697

The two studies show that the average award per plaintiff ranged from $9,355 (in 2002 dollars) in one study to $15,992 (in 2002 dollars) in the other, while the median award per plaintiff in both studies, adjusted to 2002 dollars, fell right between $4,000–$4,500. Both studies therefore show much higher means than medians, suggesting there are some cases in the study with extremely high rewards (driving the average much higher than the median).

This conclusion is supported by data from the 1993–2002 study that breaks down incentive award size by case type. The data show that the mean incentive award per representative was largest in employment discrimination cases ($69,850.20) and smallest in consumer credit cases ($1,326.30).[8] The employment discrimination numbers are far higher than the mean or median numbers, likely because the named plaintiffs in these cases are being rewarded for the risks of retaliation that they faced, as well as for their more routine services provided to the class.

It is difficult to draw any conclusions about trends—the

[5]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 U.C.L.A. L. Rev. 1303, 1346, 1348 (2006).

[6]William B. Rubenstein and Rajat Krishna, *Class Action Incentive Awards: A Comprehensive Empirical Study* (draft on file with author).

[7]William B. Rubenstein and Rajat Krishna, *Class Action Incentive Awards: A Comprehensive Empirical Study* (draft on file with author).

[8]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 U.C.L.A. L. Rev. 1303, 1333 tbl.5 (2006).

later study (from 2006–2011) had a slightly lower median award per plaintiff than the earlier data (1993–2002), and the later data also showed a 42% decrease in the mean award per plaintiff when all the data is adjusted to 2002 dollars (from $15,992 to $9,355). It is plausible that this decrease reflects a growing judicial unease with the practice of incentive awards and greater attention to their size. However, as discussed in the preceding section of the Treatise,[9] awards are far more common today than they were 15 years ago, suggesting that perhaps the proliferation of awards has simultaneously tempered their magnitude.

While the size of incentive awards vary from case to case, they may also vary within one case. As discussed in a succeeding section,[10] courts employ multifactor tests in reviewing proposed incentive awards; these factors focus the court on issues related to the class representatives' work on the case and the risks they encountered undertaking that work. Two class representatives within the same case might have undertaken different levels of work or encountered different levels of risk, hence justifying different levels of incentive awards.[11]

§ 17:9 Judicial review—Generally

As Rule 23 does not explicitly authorize incentive awards for class representatives, there is neither a rule-based process for seeking judicial approval nor a rule-based standard governing the court's decision. Yet, as the awards are made in conjunction with a class action settlement—typically from the class's funds[1] and to the class's representatives[2]—there is no doubt that a court must approve of the disbursement.

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[9]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:7 (5th ed.).

[10]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:13 (5th ed.).

[11]Silberblatt v. Morgan Stanley, 524 F. Supp. 2d 425, 435 (S.D.N.Y. 2007) ("A differential payment may be appropriate in order to make the class representative whole. The representative plaintiff may have lost wages, vacation time or commissions from sales because of time spent at depositions or other proceedings. A class representative who has been exposed to a demonstrable risk of employer retaliation or whose future employability has been impaired may be worthy of receiving an additional payment, lest others be dissuaded.") (citations omitted).

[Section 17:9]

[1]For a discussion of the source of incentive awards, *see* Rubenstein, 5

Five sets of issues arise in the judicial review process:

- When is a motion seeking approval of incentive awards brought forward?[3]
- What is the burden of proof the movant must meet to justify an incentive award?[4]
- What documentation is required?[5]
- What standards do courts apply in assessing the reasonableness of a proposed award?[6]
- What practices are disfavored?[7]

§ 17:10 Judicial review—Timing of motion

Incentive awards arise at the time of a proposed settlement of a class action. The parties typically include a provision for incentive awards in the negotiated settlement agreement. A court thus reviews the proposed award in conjunction with its preliminary review of the proposed settlement.[1] If preliminary approval is granted, notice of the proposed settlement is sent to the class and should include information about any proposed incentive award. The notice should specify the amount that class counsel intend to seek for the class representatives so that the class has that information when reviewing the settlement.[2] Class members have the opportunity to object to the proposed settlement, including the proposed incentive awards, both in writing and at the fairness hearing.[3] Class counsel will then move for final approval of the settlement and their fees, typically folding

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Newberg on Class Actions § 17:5 (5th ed.).

[2]For a discussion of who is eligible to receive an incentive award, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:6 (5th ed.).

[3]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:10 (5th ed.).

[4]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:11 (5th ed.).

[5]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:12 (5th ed.).

[6]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:13 (5th ed.).

[7]*See* Rubenstein, 5 **Newberg on Class Actions** §§ 17:14 to 17:18 (5th ed.).

[Section 17:10]

[1]For a discussion of the preliminary approval process, *see* Rubenstein, 4 **Newberg on Class Actions** §§ 13:10 to 13:19 (5th ed.).

[2]For a discussion of the content of settlement and fee notice, *see* Rubenstein, 3 **Newberg on Class Actions** §§ 8:13 to 8:25 (5th ed.).

[3]For a discussion of the objection process, *see* Rubenstein, 4 **Newberg**

into those motions a request for final approval of the incentive award.[4] Following the fairness hearing, the court's decision granting or rejecting final approval of the settlement and fees typically also reviews the propriety of the proposed awards.

One interesting aspect of this process not discussed in the case law concerns when the class representatives should learn that class counsel and the defendant have negotiated a provision proposing incentive awards and the amount of the proposed awards. The class representative serves a particular function at the moment of a settlement proposal: she is asked to stand in for the absent class members and serve as a representative "client" assessing whether the relief obtained for the class is sufficient. Courts have accordingly expressed concern that the promise of a significant incentive award could persuade the class representative to agree to a settlement not otherwise beneficial to the class.[5] Even though the class representative's claim, like everyone else's, would be compromised at the level of the weak settlement, the size of the incentive award likely so dwarfs the marginal loss from the poor settlement to her personally that she has more reason to embrace the settlement than to resist it. A conflict of interest therefore exists.

Courts have expressed these concerns in policing the *availability* and *size* of incentive awards,[6] but they have not focused on the possibility of addressing the concerns through *process* requirements. When it comes to attorney's fees, it is generally accepted that class counsel and the defendant should not negotiate fees until the settlement terms themselves are in place. The goal of this approach is to ensure

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on Class Actions §§ 13:20 to 13:37 (5th ed.).

[4]For a discussion of the final approval process, *see* Rubenstein, 4 **Newberg on Class Actions** §§ 13:39 to 13:61 (5th ed.).

[5]Lane v. Page, 862 F. Supp. 2d 1182, 1238, Fed. Sec. L. Rep. (CCH) P 96834 (D.N.M. 2012) ("Courts 'have denied preferential allocation on the grounds that the named plaintiff may be tempted to settle an action to the detriment of the class or come to expect a 'bounty' for bringing suit.' " (quoting **Newberg on Class Actions**)).

The Treatise's coverage of the rationale supporting incentive awards examines these concerns in more detail. *See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[6]For a discussion of excessive incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:18 (5th ed.).

that a huge fee offer will not tempt class counsel to settle the class claims on the cheap. With fee discussions forestalled until a later time, they pose less of a threat to the purity of the settlement process. By analogy, the courts could insist that incentive awards not be discussed with (or dangled over) the class representatives until after class counsel has solicited their reactions to the proposed class settlement.[7]

§ 17:11 Judicial review—Burden of proof

The party seeking approval of an incentive award bears the burden of proving that the proposed recipients, typically the class representatives, deserve an award and that the proposed level of the award is reasonable. At least three circuits have held that judicial review of incentive awards is searching:

- The Sixth Circuit has held that "applications for incentive awards are *scrutinized carefully* by courts who sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain."[1] A number of courts have employed this "scrutinized carefully" language when reviewing proposed incentive awards.[2]
- The Ninth Circuit has held that "district courts must be

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[7] *See, e.g.*, Lee v. Enterprise Leasing Co.-West, 2015 WL 2345540, *11 (D. Nev. 2015) ("The Court finds that the requested incentive awards are reasonable and appropriate. Importantly, the incentive awards were negotiated after the parties agreed to a settlement to benefit the entire class, so they will not impact the recovery available to other class members.").

[Section 17:11]

[1] Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003) (emphasis added) (citing **Newberg on Class Actions**).

[2] Arnett v. Bank of America, N.A., 2014 WL 4672458, *11 (D. Or. 2014) ("Although incentive awards are fairly typical in class action cases, they should be scrutinized carefully to ensure that they do not undermine the adequacy of the class representatives." (citation omitted) (internal quotation marks omitted))).

Gascho v. Global Fitness Holdings, LLC, 2014 WL 1350509, *26 (S.D. Ohio 2014), report and recommendation adopted, 2014 WL 3543819 (S.D. Ohio 2014) (" '[A]pplications for incentive awards are scrutinized carefully by courts who sensibly fear that incentive awards may lead

vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives."[3] District courts in the Ninth Circuit have often reiterated this standard in reviewing incentive awards.[4]

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named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain.' ") (quoting Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003)).

Dickerson v. Cable Communications, Inc., 2013 WL 6178460, *4 (D. Or. 2013) ("Although incentive awards are fairly typical in class action cases, they should be scrutinized carefully to ensure that they do not undermine the adequacy of the class representatives." (citation omitted) (internal quotation marks omitted)).

Lane v. Page, 862 F. Supp. 2d 1182, 1237, Fed. Sec. L. Rep. (CCH) P 96834 (D.N.M. 2012) (" '[A]pplications for incentive awards are scrutinized carefully by courts who sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain.' " (quoting Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003))).

Robles v. Brake Masters Systems, Inc., 2011 WL 9717448, *6 (D.N.M. 2011) (same).

Silberblatt v. Morgan Stanley, 524 F. Supp. 2d 425, 435 (S.D.N.Y. 2007) ("Payments to class representatives, while not foreclosed, should be closely scrutinized.").

Varacallo v. Massachusetts Mut. Life Ins. Co., 226 F.R.D. 207, 257 (D.N.J. 2005) (holding that because incentive awards would be paid from the common fund and thereby deplete class members' recoveries, "this Court carefully reviews this request to ensure its fairness to the Class").

[3]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013) (emphasis added).

[4]Chavez v. Lumber Liquidators, Inc., 2015 WL 2174168, *4 (N.D. Cal. 2015) ("The Ninth Circuit requires district courts to be 'vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives.' " (quoting Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013))).

Bellinghausen v. Tractor Supply Company, 306 F.R.D. 245, 266 (N.D. Cal. 2015) ("The Ninth Circuit has emphasized that 'district courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives.' " (quoting Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013))).

Miller v. Ghirardelli Chocolate Company, 2015 WL 758094, *7 (N.D. Cal. 2015) (same).

Boring v. Bed Bath & Beyond of California Limited Liability Company, 2014 WL 2967474, *3 (N.D. Cal. 2014) ("[D]istrict courts must

- The Eleventh Circuit, in a case unrelated to incentive awards, stated that "[w]hen a settlement explicitly provides for preferential treatment for the named plaintiffs in a class action, a *substantial burden* falls upon the proponents of the settlement to demonstrate and document its fairness"[5] and that "*careful scrutiny* by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of absent class members."[6]

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be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives." (quoting Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013)).

Custom LED, LLC v. eBay, Inc, 2014 WL 2916871, *9 (N.D. Cal. 2014) (same).

Cordy v. USS-POSCO Industries, 2014 WL 1724311, *2 (N.D. Cal. 2014) (same).

Wallace v. Countrywide Home Loans, Inc., 22 Wage & Hour Cas. 2d (BNA) 849, 2014 WL 5819870, *4 (C.D. Cal. 2014) (same).

Khanna v. Intercon Sec. Systems, Inc., 2014 WL 1379861, *10 (E.D. Cal. 2014), order corrected, 2015 WL 925707 (E.D. Cal. 2015) (same).

Steinfeld v. Discover Financial Services, 2014 WL 1309692, *2 (N.D. Cal. 2014) (same).

Ritchie v. Van Ru Credit Corp., 2014 WL 956131, *4 (D. Ariz. 2014), subsequent determination, 2014 WL 3955268 (D. Ariz. 2014) (same).

Keirsey v. eBay, Inc, 2014 WL 644738, *1 (N.D. Cal. 2014) (same).

Walsh v. Kindred Healthcare, 2013 WL 6623224, *3 (N.D. Cal. 2013) (same).

Davis v. Cole Haan, Inc., 2013 WL 5718452, *3 (N.D. Cal. 2013) (same).

Wolph v. Acer America Corporation, 2013 WL 5718440, *6 (N.D. Cal. 2013) (same).

Johnson v. General Mills, Inc., 2013 WL 3213832, *7 (C.D. Cal. 2013) ("The Ninth Circuit has recently cautioned that 'district courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives.' " (quoting Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013)).

[5]Holmes v. Continental Can Co., 706 F.2d 1144, 1147, 31 Fair Empl. Prac. Cas. (BNA) 1707, 32 Empl. Prac. Dec. (CCH) P 33668, 36 Fed. R. Serv. 2d 817 (11th Cir. 1983) (emphasis added).

Cohen v. Resolution Trust Corp., 61 F.3d 725, 728 (9th Cir. 1995), opinion vacated, appeal dismissed, 72 F.3d 686 (9th Cir. 1996) (same).

[6]Holmes v. Continental Can Co., 706 F.2d 1144, 1147, 31 Fair Empl. Prac. Cas. (BNA) 1707, 32 Empl. Prac. Dec. (CCH) P 33668, 36 Fed. R. Serv. 2d 817 (11th Cir. 1983) (emphasis added) (internal quotation marks

Courts have also cited this standard when reviewing proposed incentive awards.[7]

This heightened judicial scrutiny toward incentive awards[8] is appropriately consistent with the manner in which courts review class counsel's fee petition, as the court acts in a fiduciary capacity for absent class members during the settlement and fee review process.[9]

A few courts have implied that less scrutiny is required if the proposed incentive award is being paid out of the attorney's fees rather than the common fund.[10] However, as

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omitted).

[7]Johnson v. General Mills, Inc., 2013 WL 3213832, *7 (C.D. Cal. 2013) (reviewing a proposed incentive award and stating that " 'when a settlement explicitly provides for preferential treatment for the named plaintiffs in a class action, a substantial burden falls upon the proponents of the settlement to demonstrate and document its fairness.' " (quoting Holmes v. Continental Can Co., 706 F.2d 1144, 1147, 31 Fair Empl. Prac. Cas. (BNA) 1707, 32 Empl. Prac. Dec. (CCH) P 33668, 36 Fed. R. Serv. 2d 817 (11th Cir. 1983))).

Estep v. Blackwell, 2006 WL 3469569, *6 (S.D. Ohio 2006) (same).

Carnegie v. Mutual Sav. Life Ins. Co., 2004 WL 3715446, *23 (N.D. Ala. 2004) (reviewing a proposed incentive award and stating that "[t]he Eleventh Circuit holds that 'a disparate distribution favoring the named plaintiffs requires careful judicial scrutiny into whether the settlement allocation is fair to the absent members of the class,' and that 'a substantial burden falls upon the proponents of the settlement to demonstrate and document its fairness' " (quoting Holmes v. Continental Can Co., 706 F.2d 1144, 1147, 1148, 31 Fair Empl. Prac. Cas. (BNA) 1707, 32 Empl. Prac. Dec. (CCH) P 33668, 36 Fed. R. Serv. 2d 817 (11th Cir. 1983))).

[8]In re Herald, Primeo, and Thema Securities Litigation, 2011 WL 4351492, *9 (S.D.N.Y. 2011) ("While incentive awards are not prohibited, they are appropriately subject to heightened judicial scrutiny at the preliminary approval stage.").

[9]*See* Rubenstein, 4 **Newberg on Class Actions** § 13:40 (5th ed.).

[10]In re Cendant Corp., Derivative Action Litigation, 232 F. Supp. 2d 327, 344 (D.N.J. 2002) ("An incentive payment to come from the attorneys' fees awarded to plaintiff's counsel need not be subject to intensive scrutiny, as the interests of the corporation, the public, and the defendants are not directly affected.").

In re Presidential Life Securities, 857 F. Supp. 331, 337 (S.D.N.Y. 1994) ("The matter of payments of incentives to the individual plaintiffs who acted as class representatives need not be subjected to intense scrutiny inasmuch as these funds will come out of the attorney's fees awarded to plaintiffs' counsel. The interests of the class, of the public, and of the defendant are not directly affected.").

discussed elsewhere in the Treatise,[11] the practice of paying incentive awards from the attorney's fees is both rare and problematic.

The succeeding sections survey the documentation courts require,[12] the standards they impose,[13] and the practices they disfavor[14]—all of which imply meaningful judicial review. In fact, there are still many settlements in which courts simply rubber stamp approval papers submitted by the parties without sufficient attention to these payments. The fact that the payments are coming from the common fund and consequently reducing the class members' recoveries accordingly triggers the court's fiduciary duties. However, the magnitude of the incentive awards so pales in comparison to the magnitude of attorney's fees that courts likely pay less attention to them than they otherwise might precisely for that reason.

§ 17:12 Judicial review—Documentation requirement

The party seeking approval of an incentive award bears the burden of proving that the proposed recipients, typically the class representatives, deserve an award and that the proposed level of the award is reasonable. As discussed elsewhere in the Treatise,[1] incentive awards are premised on the rationale that their recipients have either provided valuable service to the class and/or faced substantial risks in stepping forward to represent the class.[2] Whether the class representatives in a particular case hit this mark is a ques-

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[11]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:5 (5th ed.).

[12]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:12 (5th ed.).

[13]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:13 (5th ed.).

[14]*See* Rubenstein, 5 **Newberg on Class Actions** §§ 17:14 to 17:18 (5th ed.).

[Section 17:12]

[1]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[2]Courts have articulated two other rationales for incentive awards: to incentivize class members to step forward to represent the class, and to recognize their service as private attorneys general. *See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.). The latter of these rationales raises few questions of fact, as the goal is achieved, to a great extent, by the provision of the service itself. At least one court, for example, approved a (reduced) incentive award in recognition of this service, even where the class representatives did very little work for the class. Michel v.

tion of fact. Accordingly, most courts require factual support for any proposed incentive award.[3] Typically, facts relevant

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WM Healthcare Solutions, Inc., 2014 WL 497031, *11 (S.D. Ohio 2014) (rejecting a $10,000 incentive award because "the named Plaintiffs' involvement in this case was minimal and their expense in pursuing it negligible, if any" but holding that a $3,000 incentive award was appropriate because "fair class action settlement . . . would not [have been] possible were it not for the willingness of the Class Representatives to participate in this suit" and therefore "for class actions to be effectively litigated, at least one plaintiff must be [encouraged] to take on the role of class representative"). The former rationale—to incentivize class members to step forward in the first place—is sometimes framed as a factual question. *See, e.g.*, Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998) ("Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate *if it is necessary* to *induce* an individual to participate in the suit.") (emphasis added). Nonetheless, courts only occasionally scrutinize whether the incentive award truly induced the class representative's service. *See, e.g.*, Fouks v. Red Wing Hotel Corp., 2013 WL 6169209, *2 (D. Minn. 2013) ("Plaintiffs quote, but fail to satisfy, the prerequisite expressed in those cases that 'an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.' . . . Here, Plaintiffs have put forth no evidence or argument that persuades the Court that they required any enticement beyond their potential statutory recovery to bring this case, or that their actions in prosecuting it are deserving of a reward." (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))); Kinder v. Dearborn Federal Sav. Bank, 2013 WL 879301, *3 (E.D. Mich. 2013) ("Kinder has not provided evidence of [any] factors the court should consider with respect to an incentive award. Moreover, in light of Kinder's pursuit of several of these types of cases, the court finds that no additional incentive is necessary beyond the $100 in statutory damages already awarded.").

[3]Bellinghausen v. Tractor Supply Company, 306 F.R.D. 245, 266 (N.D. Cal. 2015) ("A class representative must justify an incentive award through 'evidence demonstrating the quality of plaintiff's representative service,' such as 'substantial efforts taken as class representative to justify the discrepancy between [his] award and those of the unnamed plaintiffs.' " (quoting Alberto v. GMRI, Inc., 252 F.R.D. 652, 669 (E.D. Cal. 2008))).

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, 991 F. Supp. 2d 437, 448–49, 2014-1 Trade Cas. (CCH) ¶ 78644 (E.D.N.Y. 2014) (finding that the declarations of corporate officers were not enough to justify incentive awards and noting that "Class Counsel are expected to provide, at a minimum, documentation setting forth the approximate value of each Class Plaintiff's claim and each one's proposed incentive award").

In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Litigation, 851 F. Supp. 2d 1040, 1090 (S.D. Tex. 2012) ("For the court to approve the incentive awards—even if they are nominal, and even if the defendant does not object—there must be some evidence in the record

to the incentive award determination are demonstrated in affidavits submitted by class counsel and/or the class representatives, through which these persons testify to the particular services performed, the risks encountered, and any other facts pertinent to the award. Courts may also receive this evidence by live testimony at the fairness hearing.[4] While courts have frequently noted the supporting documentation in approving incentive awards,[5] they regularly reject awards where the relevant facts are not suf-

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demonstrating that the representative plaintiffs were involved. Absent such evidence, the court lacks an adequate basis to approve the incentive awards.").

But see In re Southeastern Milk Antitrust Litigation, 2013 WL 2155387, *8 n.9 (E.D. Tenn. 2013) (granting incentive awards even though "[n]o affidavits or other documentation have been submitted in support of the incentive award request" because "[c]lass representatives . . . have clearly been extensively involved in the litigation, settlement discussions and court proceedings and have committed substantial time to the case as confirmed by the Court's own observations").

[4]For a discussion of the fairness hearing process, *see* Rubenstein, 4 **Newberg on Class Actions** § 13:42 (5th ed.).

[5]**First Circuit (District Court)**

In re Prudential Insurance Company of America SGLI/VGLI Contract Litigation, 2014 WL 6968424, *7 (D. Mass. 2014) (granting incentive awards "[b]ased on the declarations of Class Counsel and the Representative Plaintiffs submitted in support of final settlement approval, [showing that] the Representative Plaintiffs have actively participated and assisted Class Counsel in this litigation for the substantial benefit of the Settlement Class despite facing significant personal limitations and sacrifices, including being deposed on deeply personal matters relating to the loss of a loved one").

Third Circuit (District Court)

In re General Instrument Securities Litigation, 209 F. Supp. 2d 423, 435, Fed. Sec. L. Rep. (CCH) P 91667 (E.D. Pa. 2001) ("I therefore conclude that upon submission of affidavits attesting to the fact that time and effort were spent by the designated class representatives pursuing this litigation and providing a general description of same, this Court will approve incentive awards.").

Seidman v. American Mobile Systems, 965 F. Supp. 612, 626 (E.D. Pa. 1997) (rejecting an incentive award for one proposed representative due to lack of documentation but approving an award for another because he "has furnished the Court with an adequate accounting that the time he spent working on matters related to this litigation is approximately thirty-two hours" and "[b]ased on the time records and the representations made by counsel as to the activities undertaken by [the representative] on behalf of the class, the Court shall award him a class representative fee totaling

$1280 . . . from the D & T settlement fund as compensation for the actual time which he spent on this litigation").

Sixth Circuit (District Court)

Cf. In re Southeastern Milk Antitrust Litigation, 2013 WL 2155387, *8 n.9 (E.D. Tenn. 2013) (granting incentive awards even though "[n]o affidavits or other documentation have been submitted in support of the incentive award request" because the "[c]lass representatives . . . have clearly been extensively involved in the litigation, settlement discussions and court proceedings and have committed substantial time to the case as confirmed by the Court's own observations").

Seventh Circuit (District Court)

In re Southwest Airlines Voucher Litigation, 2013 WL 4510197, *11 (N.D. Ill. 2013), appeal dismissed, (7th Circ. 13-3542)(Jan. 3, 2014) (granting incentive awards based on the record and "class counsel report" showing that the plaintiffs had been active participants throughout the litigation).

Eighth Circuit (District Court)

Albright v. Bi-State Development Agency of Missouri-Illinois Metropolitan Dist., 2013 WL 4855304, *1 (E.D. Mo. 2013) ("Plaintiffs have also presented evidence regarding the contributions made by the named class representatives to the action, and the time commitment involved. The Court does not believe that such incentive payments should be granted simply as a matter of course. In light of the evidence presented in this case, however, the Court shall also approve an incentive award of $2,500.00 to each of the class representatives, based on their contributions to the case.").

Ninth Circuit (District Court)

R.H. v. Premera Blue Cross, 2014 WL 3867617, *3 n.3 (W.D. Wash. 2014) (granting preliminary approval for a settlement that included incentive awards and stating "[t]he court will accept counsel's declaration representing the time and effort undertaken by class representatives on preliminary approval. However, the court expects that the class representatives will provide declarations to the court detailing the time and effort they dedicated in support of the motion for incentive awards" (citation omitted)).

District of Columbia Circuit (District Court)

In re Lorazepam & Clorazepate Antitrust Litigation, 2003-2 Trade Cas. (CCH) ¶ 74134, 2003 WL 22037741, *10–11 (D.D.C. 2003) ("This Court has previously determined that incentive awards to named plaintiffs are not uncommon in class action litigation, particularly where a common fund has been created for the benefit of the entire class . . . Through their affidavits and the Petition for Incentives, Counsel has sufficiently explained that the named Plaintiffs 'ultimately played a role in achieving the $35,000,000 settlement.' . . . For the foregoing reasons, the Court will approve [incentive awards] in the amount of $20,000 to each of the four named Plaintiffs." (citation omitted)).

ficiently documented.[6] Courts may also provide preliminary

[6] **Second Circuit (District Court)**

In re Nassau County Strip Search Cases, 12 F. Supp. 3d 485, 503 (E.D.N.Y. 2014) (denying incentive awards because, *inter alia*, of "the absence of any information from movants concerning the concomitant costs or consequences, if any, to those class members who were deposed or testified at trial, thereby precluding an appropriate evaluation of their services").

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, 991 F. Supp. 2d 437, 448–49, 2014-1 Trade Cas. (CCH) ¶ 78644 (E.D.N.Y. 2014) (finding that the declarations of corporate officers were not enough to justify incentive awards and noting that "Class Counsel are expected to provide, at a minimum, documentation setting forth the approximate value of each Class Plaintiff's claim and each one's proposed incentive award").

Third Circuit (District Court)

In re General Instrument Securities Litigation, 209 F. Supp. 2d 423, 434–35, Fed. Sec. L. Rep. (CCH) P 91667 (E.D. Pa. 2001) ("I conclude that it is fair and appropriate to compensate these class representatives for time spent on matters connected with this litigation. The record, however, lacks any evidentiary support for the fact that these four representatives expended time and effort which would justify the incentive awards. Counsel for plaintiffs represented to this Court at the fairness hearing that these four individuals are worthy of such an award. No affidavits in support, however, have been submitted. I therefore conclude that upon submission of affidavits attesting to the fact that time and effort were spent by the designated class representatives pursuing this litigation and providing a general description of same, this Court will approve incentive awards. The attached Order will provide deadlines by which such submissions shall result.").

Seidman v. American Mobile Systems, 965 F. Supp. 612, 626 (E.D. Pa. 1997) (noting that the court "will compensate the class representatives for the time they spent on matters connected to the litigation" but denying an incentive award to one representative because she "has not provided the Court with any documentation as to the time which she spent on matters related to this litigation").

Fourth Circuit (District Court)

Jones v. Dominion Resources Services, Inc., 601 F. Supp. 2d 756, 768 (S.D. W. Va. 2009) (reducing proposed incentive awards because "the court has received no evidence of the class representatives' participation in this case" and the record "does not indicate that the class representatives were deposed or produced any personal documents").

Fifth Circuit (District Court)

Humphrey v. United Way of Texas Gulf Coast, 802 F. Supp. 2d 847, 869, 52 Employee Benefits Cas. (BNA) 1427 (S.D. Tex. 2011) (denying incentive award because, *inter alia,* "[w]hile Plaintiff has requested an incentive award of $10,000, significantly she has not provided any details

nor documentary support demonstrating the nature of her contribution, the hours she put in, the time consulting with counsel, time spent in discovery proceedings, or what information she provided to counsel").

Sixth Circuit (District Court)

Bessey v. Packerland Plainwell, Inc., 2007 WL 3173972, *5 (W.D. Mich. 2007) ("[U]p to this point the plaintiffs have not pointed to any specific factual or legal reasons why each class representative should receive $250 above and beyond what he or she will receive in damages under the settlement . . . [T]he record does not at this point justify the proposed extra payments.").

Seventh Circuit

Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 410 (7th Cir. 2000) (affirming the district court's denial of an incentive award where counsel failed to make any serious argument in favor of such an award and where it did not appear that the lead plaintiff "had to devote an inordinate amount of time to the case or that . . . he suffered or risked any retaliation [from the defendant]").

Eighth Circuit (District Court)

Fouks v. Red Wing Hotel Corp., 2013 WL 6169209, *3 (D. Minn. 2013) (reducing proposed incentive awards to class representatives because there was "simply no evidence before the Court that the Plaintiffs faced any risks or burdens in undertaking this litigation, or that there exist any other factors that would justify the amount they seek, whether styled as an incentive award or reimbursement").

Ninth Circuit (District Court)

Davis v. Cole Haan, Inc., 2013 WL 5718452, *3 (N.D. Cal. 2013) ("Here, without any declaration from the named representatives, or any substantive description of the time devoted and work expended on this case by the named representatives, the Court finds the request for incentive payments to be woefully inadequate. Moreover, although Plaintiffs argue that they risked being held liable for Cole Haan's costs in the event of a defense judgment, there is no declaration attesting that the named representatives would have been held personally responsible, as opposed to counsel, for the costs. Therefore, the Court denies the motion for incentive payments. Again, this Order is without prejudice to a renewed motion upon a proper showing.").

Tenth Circuit (District Court)

Robles v. Brake Masters Systems, Inc., 2011 WL 9717448, *11–13 (D.N.M. 2011) (denying an incentive award because, *inter alia*, the plaintiff "offer[ed] no argument or evidence . . . that other class representative were not forthcoming, and that an incentive award is justified for bringing a representative forward").

Eleventh Circuit (District Court)

Grassick v. Avatar Properties, Inc., 2008 WL 5099942, *3 (M.D. Fla. 2008) ("The parties also have failed to establish that the proposed $10,000.00 incentive payment to [the plaintiff] is appropriate. While some

approval to a settlement that includes proposed incentive awards absent documentation, but direct counsel to submit the documentation before the final approval stage.[7]

§ 17:13 Judicial review—Standards of assessment

The party seeking approval of an incentive award bears the burden of proving that the proposed recipients, typically the class representatives, deserve an award and that the proposed level of the award is reasonable. In the absence of any reference to incentive awards in Rule 23, courts have fashioned different tests for their review of proposed incentive awards. The Seventh Circuit articulated a three-part

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courts have approved payments to class representatives to compensate them for costs they incurred during the litigation, there is no showing that [the plaintiff] has incurred any costs.").

[7]Torchia v. W.W. Grainger, Inc., 2014 WL 3966292, *11 n.3 (E.D. Cal. 2014) (preliminarily approving an incentive award but requiring the plaintiff to "provide evidence to support her request for the incentive award" prior to the fairness hearing, including "the number of hours expended, broken down by task").

Chesbro v. Best Buy Stores, L.P., 2014 WL 793362, *4 n.5 (W.D. Wash. 2014) (preliminarily approving an incentive award despite not having "any evidence of the amount of hours [the plaintiff] . . . devoted to the case," but noting that "[t]he court expects that counsel will provide evidence of the amount of time [the plaintiff] invested in this case prior to any fairness hearing").

Michel v. WM Healthcare Solutions, Inc., 2014 WL 497031, *3 (S.D. Ohio 2014) (explaining that the court had, at the preliminary approval stage, "reminded counsel that incentive awards were subject to court approval and that the named Plaintiffs would be expected to provide specific evidence demonstrating their involvement in the case in order to justify the incentive award").

Alberto v. GMRI, Inc., 252 F.R.D. 652, 669 (E.D. Cal. 2008) (requiring that "[o]n or before the date of the fairness hearing, the parties should present or be prepared to present evidence of the named plaintiff's substantial efforts taken as class representative to justify the discrepancy between her award and those of the unnamed plaintiffs" (footnote omitted)).

In re HP Power Plug and Graphic Card Litigation, 2008 WL 2697192, *1, 3 (N.D. Cal. 2008), as corrected, (July 8, 2008) (granting incentive awards only after "plaintiffs' counsel submitted a declaration in support of incentive awards . . . assert[ing] that plaintiffs spoke to counsel in advance of filing their complaint, actively participated in reviewing the pleadings and were kept informed regarding the status of the case" after initially failing to approve the awards due to lack of supporting documentation for the request).

test in a 1998 decision,[1] and the two other circuits that have directly addressed the question—the Eighth[2] and the Ninth[3]—have each cited that test affirmatively. That said, district courts in the Ninth Circuit tend to employ a five-factor test originally set forth in a 1995 decision of the Northern District of California,[4] while courts in New York tend to employ a six-factor test.[5] As no one test has emerged

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[Section 17:13]

[1]Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998) ("In deciding whether such an [incentive] award is warranted, relevant factors include [1] the actions the plaintiff has taken to protect the interests of the class, [2] the degree to which the class has benefitted from those actions, and [3] the amount of time and effort the plaintiff expended in pursuing the litigation.").

[2]In re U.S. Bancorp Litigation, 291 F.3d 1035, 1038 (8th Cir. 2002) (approving $2,000 awards to five representative plaintiffs and citing to the Seventh Circuit's three-factor test from *Cook* in determining these awards to be "appropriate").

[3]Staton v. Boeing Co., 327 F.3d 938, 977, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) ("[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments. The district court must evaluate their awards individually, using 'relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation.' " (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

[4]Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995) (noting the five factors as: "1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation").

[5]In re AOL Time Warner ERISA Litigation, 2007 WL 3145111, *2 (S.D.N.Y. 2007) (noting the six factors as: 1) the personal risk (if any) incurred by the named plaintiff in becoming and continuing as a litigant; 2) the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise); 3) any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim; 4) the ultimate recovery; 5) the sums awarded in similar cases; and 6) the named plaintiff's requested sum in comparison to each class member's estimated *pro rata* share of the monetary judgment or settlement).

as particularly salient,[6] the different tests that courts have employed can be broken down by circuit, as in the accompanying footnote.[7]

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[6]Roberts v. Texaco, Inc., 979 F. Supp. 185, 201–02, 86 Fair Empl. Prac. Cas. (BNA) 1678 (S.D.N.Y. 1997) ("No meaningful guidelines of broad applicability are discernible from the reported decisions as to the appropriate measure for an [incentive] award, the focus being on special circumstances.").

[7]**Second Circuit (District Court)**

Sanchez v. JMP Ventures, L.L.C., 2015 WL 539506, *5 (S.D.N.Y. 2015) ("Here, [the named plaintiff] requests a service award of $10,000, to be paid from the settlement fund. [The named plaintiff] discussed the case with class counsel and was deposed, but he did not attend mediation or the fairness hearing. We have no doubt that his assistance to class counsel was useful, and for this and his willingness to accept what risks are attendant with being a named plaintiff, we believe he should receive some service award. However, under the facts presented, and in light of the total amount of the settlement fund and the large number of class members to receive payments from that fund, we reduce the amount of the service award to Sanchez to $5,000." (citation omitted)).

In re AOL Time Warner ERISA Litigation, 2007 WL 3145111, *2 (S.D.N.Y. 2007) (noting six relevant factors in adjudicating named plaintiffs' requests for incentive awards: 1) the personal risk (if any) incurred by the named plaintiff in becoming and continuing as a litigant; 2) the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise); 3) any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim; 4) the ultimate recovery; 5) the sums awarded in similar cases; and 6) the named plaintiff's requested sum in comparison to each class member's estimated *pro rata* share of the monetary judgment or settlement).

Third Circuit (District Court)

Fry v. Hayt, Hayt & Landau, 198 F.R.D. 461, 473 (E.D. Pa. 2000) ("[T]o be entitled to an incentive award, plaintiff must show: (1) the risks that the named plaintiff undertook in commencing class action; (2) any additional burdens assumed by named plaintiffs but not unnamed class members; and (3) the benefits generated to class members through named plaintiff's efforts.").

Fourth Circuit (District Court)

Kirven v. Central States Health & Life Co. of Omaha, 2015 WL 1314086, *13 (D.S.C. 2015) ("To determine whether an incentive payment is warranted, the court should consider the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.").

Smith v. Toyota Motor Credit Corp., 2014 WL 4953751. *1 (D. Md. 2014) ("To determine whether an incentive payment is warranted, the

The widely employed Seventh Circuit test considers three

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court should consider 'the actions the plaintiff[s] [have] taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff[s] expended in pursuing the litigation.' " (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Decohen v. Abbasi, LLC, 299 F.R.D. 469, 483 (D. Md. 2014) ("To determine whether an incentive payment is warranted, the court should consider 'the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.' " (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Fifth Circuit (District Court)

Slipchenko v. Brunel Energy, Inc., 2015 WL 338358, *13 (S.D. Tex. 2015) ("In deciding whether an incentive award is warranted, courts look to: (1) the actions the plaintiff has taken to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; and (3) the amount of time and effort the plaintiff expended in pursuing the litigation." (internal quotation marks omitted)).

In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Litigation, 851 F. Supp. 2d 1040, 1089 (S.D. Tex. 2012) (same).

Sixth Circuit (District Court)

Kinder v. Dearborn Federal Sav. Bank, 2013 WL 879301, *3 (E.D. Mich. 2013) ("In deciding whether such an award is warranted, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." (internal quotation marks omitted)).

In re UnumProvident Corp. Derivative Litigation, 2010 WL 289179, *9 (E.D. Tenn. 2010) ("District courts in the Sixth Circuit have considered the following factors in determining the propriety of incentive awards in class action cases: (1) the action taken by the Class Representatives to protect the interest of Class Members and others and whether these actions resulted in a substantial benefit to Class Members; (2) whether the Class Representatives assumed substantial direct and indirect financial risk; and (3) the amount of time and effort spent by the Class Representatives pursuing the litigation." (citing Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250 (S.D. Ohio 1991))).

In re Southern Ohio Correctional Facility, 175 F.R.D. 270, 275–76 (S.D. Ohio 1997), order rev'd on other grounds, 24 Fed. Appx. 520 (6th Cir. 2001) ("Courts look to a number of factors in deciding whether to grant named plaintiffs incentive awards. Courts in this circuit assess the following factors: (1) whether the actions of the named plaintiffs protected the interests of the class members and have inured to the substantial benefit of the class members; (2) whether the named plaintiffs have assumed substantial indirect or direct financial risk; and (3) the amount of time and effort expended by the named plaintiffs in pursuing the class action

litigation. Additional criteria courts may consider in determining whether to approve an incentive award include: (1) the risk to the class representative in commencing the suit; (2) the notoriety and personal difficulties encountered by the class representative; (3) the duration of the litigation; (4) the extent of class representative's personal involvement in discovery; (5) the class representative's personal benefit (or lack thereof) purely in his capacity as a member of the class; and (6) the social benefit derived from the suit." (citations omitted)).

Seventh Circuit

Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998) ("In deciding whether such an [incentive] award is warranted, relevant factors include [1] the actions the plaintiff has taken to protect the interests of the class, [2] the degree to which the class has benefitted from those actions, and [3] the amount of time and effort the plaintiff expended in pursuing the litigation.").

Spicer v. Chicago Bd. Options Exchange, Inc., 844 F. Supp. 1226, 1266 (N.D. Ill. 1993) ("In considering this petition [for incentive awards], we have reviewed the following factors: (1) the actions taken by the class representatives to protect the interests of class members and others; (2) whether those actions resulted in substantial benefit to the class members; and (3) the amount of time and effort spent by the class representatives in pursuing the litigation.").

Eighth Circuit

In re U.S. Bancorp Litigation, 291 F.3d 1035, 1038 (8th Cir. 2002) (approving $2,000 awards to five representative plaintiffs and citing to the Seventh Circuit's three-factor test from *Cook* in determining these awards to be "appropriate").

Ninth Circuit

Staton v. Boeing Co., 327 F.3d 938, 977, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) ("[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments. The district court must evaluate their awards individually, using 'relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation.' " (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Wren v. RGIS Inventory Specialists, 2011 WL 1230826, *32 (N.D. Cal. 2011), order supplemented, 2011 WL 1838562 (N.D. Cal. 2011) ("When considering a request for an incentive payment, the court must evaluate each request individually, taking into account the following factors: (1) the actions the plaintiff has taken to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; (3) the duration of the litigation and the amount of time and effort the plaintiff expended in pursing it; and (4) the risks to the plaintiff in commencing the litigation, including reasonable fears of workplace retali-

factors:

1) the actions the plaintiff has taken to protect the interests of the class;
2) the degree to which the class has benefitted from those actions; and
3) the amount of time and effort the plaintiff expended in pursuing the litigation.[8]

The five-factor test widely used in California directs courts to consider:

1) the risk to the class representative in commencing suit, both financial and otherwise;
2) the notoriety and personal difficulties encountered by the class representative;
3) the amount of time and effort spent by the class representative;
4) the duration of the litigation; and

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ation, personal difficulties, and financial risks. Additionally, to ensure that an incentive payment is not excessive, the court must balance the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment." (citations omitted) (internal quotation marks omitted)).

Tenth Circuit (District Court)

O'Brien v. Airport Concessions, Inc., 2015 WL 232191, *6 (D. Colo. 2015) ("In deciding whether such an award is warranted, 'relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.' " (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Shaw v. Interthinx, Inc., 2015 WL 1867861, *8 (D. Colo. 2015) ("[I]ncentive awards are an efficient and productive way to encourage members of a class to become class representatives, and to reward the efforts they make on behalf of the class. The factors to consider in determining an incentive award include: (1) the actions that the class representative took to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; and (3) the amount of time and effort the class representative expended in pursuing the litigation." (citation omitted) (internal quotation marks omitted)).

District of Columbia Circuit (District Court)

Kifafi v. Hilton Hotels Retirement Plan, 999 F. Supp. 2d 88, 105, 57 Employee Benefits Cas. (BNA) 1941 (D.D.C. 2013) (same).

In re Lorazepam & Clorazepate Antitrust Litigation, 2003-2 Trade Cas. (CCH) ¶ 74134, 2003 WL 22037741, *10 (D.D.C. 2003) (same).

[8]Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998).

5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.[9]

The six-factor test widely used in New York directs courts to consider:

1) the personal risk (if any) incurred by the named plaintiff in becoming and continuing as a litigant;
2) the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise);
3) any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim, and of course;
4) the ultimate recovery;
5) the sums awarded in similar cases; and
6) the named plaintiff's requested sum in comparison to each class member's estimated *pro rata* share of the monetary judgment or settlement.[10]

What the tests have in common is that they tend to track the rationales for incentive awards, discussed in a prior section,[11] which primarily focus on compensating class representatives for their service to the class and for the risks they took in stepping forward to represent the class. Some of the factors also attempt to guard against disfavored practices such as awards that are larger than normal and/or extravagant compared to each class member's recovery. These disfavored practices are the subject of the succeeding sections.[12]

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[9]Wren v. RGIS Inventory Specialists, 2011 WL 1230826, *32 n.11 (N.D. Cal. 2011), order supplemented, 2011 WL 1838562 (N.D. Cal. 2011) ("In assessing the reasonableness of an inventive award, several district courts in the Ninth Circuit have applied the five-factor test set forth in *Van Vranken* . . ." (citing Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995))).

[10]In re AOL Time Warner ERISA Litigation, 2007 WL 3145111, *2 (S.D.N.Y. 2007).

[11]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[12]*See* Rubenstein, 5 **Newberg on Class Actions** §§ 17:14 to 17:18 (5th ed.).

§ 17:14 Judicial review—Disfavored practices—Generally

As the legal basis for incentive awards is uncertain,[1] and as such payments tend to be made with the class's money, courts have been somewhat careful in policing certain incentive award practices. The Ninth Circuit, for example, has emphasized that trial courts "must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives."[2] A series of disfavored practices has emerged and can be enumerated as follows:

- awarding incentive payments only to those class representatives who agree to support a settlement;[3]
- contracting in advance to pay incentive awards to class representatives;[4]
- measuring incentive payments as a percentage of the class's recovery;[5] and

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[Section 17:14]

[1]For a discussion, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[2]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013); *see also* Chavez v. Lumber Liquidators, Inc., 2015 WL 2174168, *4 (N.D. Cal. 2015) ("The Ninth Circuit requires district courts to be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives. Among other things, the concern about incentive awards and the class representative's adequacy is that, when presented with a potential settlement, the class representative may be more concerned with maximizing those incentives than with judging the adequacy of the settlement as it applies to class members at large. This is particularly salient when the incentive award is disproportionate to the class's recovery, because the disproportionality may eliminate[ ] a critical check on the fairness of the settlement for the class as a whole. In an extreme case, the conditional incentive award may be so large in relation to the judgment or settlement that if awarded it would significantly diminish the amount of damages received by the class. In such circumstances, a class representative would then have a clear conflict of interest." (citations omitted) (internal quotation marks omitted)).

[3]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:15 (5th ed.).

[4]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:16 (5th ed.).

[5]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:17 (5th ed.).

- overpaying class representatives.[6]

As noted, these topics are each addressed in succeeding sections.

§ 17:15 Judicial review—Disfavored practices—Conditional awards

As the legal basis for incentive awards is uncertain,[1] and as such payments tend to be made with the class's money, courts have been somewhat careful in policing certain incentive award practices. One of those disfavored practices is a settlement agreement that purports to reward those class representatives who agree to support the proposed settlement but not those who oppose it. The Ninth Circuit has labeled these "conditional incentive awards," because "the awards were conditioned on the class representatives' support for the settlement."[2] At least two circuits—the Seventh[3] and the Ninth[4]—have prohibited such provisions.

To appreciate the problem with conditional incentive awards, it is important to review the function of the class

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[6]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:18 (5th ed.).

[Section 17:15]

[1]For a discussion, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[2]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1161 (9th Cir. 2013).

[3]Eubank v. Pella Corp., 753 F.3d 718, 723, 88 Fed. R. Serv. 3d 920 (7th Cir. 2014) ("Although the judge rightly made incentive awards to the class representatives who had opposed the settlement as well as to those who had approved it, the settlement agreement itself had provided for incentive awards only to the representatives who supported the settlement. This created a conflict of interest: any class representative who opposed the settlement would expect to find himself without any compensation for his services as representative.").

[4]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013) ("[T]he incentive awards here corrupt the settlement by undermining the adequacy of the class representatives and class counsel. In approving the settlement agreement, the district court misapprehended the scope of our prior precedents. We once again reiterate that district courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives. The conditional incentive awards in this settlement run afoul of our precedents by making the settling class representatives inadequate representatives of the class.").

representative in a class action. A class action is a form of representative litigation in which one or a few members of a class litigate the claims of all of the members of the class in the aggregate.[5] Class counsel are centrally charged with safeguarding the absent class members' interests,[6] but counsel's interests and those of the class members may diverge. The class representative serves as a stand-in "client" for the whole class, monitoring the progress of the litigation and ensuring class counsel do not compromise the class's interests for their own.[7] These principles may be more ideal than practical in that most class representatives lack the expertise and resources to perform this function well.[8] Nonetheless, the principles are carefully safeguarded in the class setting.

From this perspective, conditional incentive agreements that reward only those class representatives who support a proposed settlement are problematic. When a settlement is proposed, the class representative's role is to review the proposal and to inform class counsel of her views on it. A class representative who disagrees with the terms of the settlement and so informs class counsel provides a valuable ser-

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[5]Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members . . .").

[6]Fed. R. Civ. P. 23(g)(4) ("*Duty of Class Counsel*. Class counsel must fairly and adequately represent the interests of the class.").

[7]*See* Rubenstein, 1 **Newberg on Class Actions** § 3:52 (5th ed.) ("In theory, the role played by the class representative in a class action is akin to the role played by an individual client in an individual case—the client tends to seek out the attorney, hire and monitor the attorney, and be the person charged with making the critical decisions about the case's goals, including, most importantly, the settlement decision. Put simply, an individual client is the principal and the attorney is her agent." (footnote omitted)).

[8]*See* Rubenstein, 1 **Newberg on Class Actions** § 3:52 (5th ed.) ("Class representatives rarely serve any of these functions in class suits: in small claims cases they have so little at stake that it would be irrational for them to take more than a tangential interest, while in all cases, including larger claim cases, class representatives generally lack the legal acumen to make key decisions about complex class action litigation, much less to monitor savvy class counsel. It has long been understood that class counsel control class actions, perhaps even selecting the class representatives themselves, thereby reversing, not inscribing, the standard attorney/client relationship. Put simply, class action attorneys are the real principals and the class representative/clients their agents." (footnote omitted)).

vice to the class regardless of whether or not her objections are ultimately validated. *First*, that class representative has exercised her own independent judgment and provided an opinion about the settlement to class counsel, providing information or insight class counsel themselves may not have considered. *Second*, that class representative speaks from a position that class counsel does not—that of the client class—and thus has provided information from a unique perspective. *Third*, that class representative has discharged precisely the duty the law seeks from her: to operate as a monitor or check on class counsel by stating her own independent opinions to class counsel and the court. Given how much class action law generally laments the absence of a meaningful check on class counsel by class representatives, those class representatives who do find the independence and voice to challenge class counsel should be applauded, not punished. A structural provision in a settlement agreement that has the effect of squelching class representatives' ability to adequately represent the class by voicing their concerns is, simply, not in the class's best interests.

The Ninth Circuit embraced these principles in a 2013 decision condemning conditional incentive awards.[9] The case was an action against credit reporting agencies under the Fair Credit Reporting Act (and its state law counterpart) for the manner in which they treated debts that had been discharged in bankruptcy. The parties initially reached an injunctive settlement and later negotiated a proposed monetary settlement. The settlement agreement provided for incentive awards, stating:

> On or before October 19, 2009, Proposed 23(b)(3) Settlement Class Counsel shall file an application or applications to the Court for an incentive award, to each of the Named Plaintiffs

[9]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157 (9th Cir. 2013). The Treatise's author testified as an expert witness in opposition to conditional incentive awards in the case. *See* Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1166 (9th Cir. 2013) ("Professor William Rubenstein, a class-action expert, testified before the district court that in his experience such provisions are 'not common' and that his research revealed 'not one' settlement agreement that 'contain[ed] a restriction on an incentive award like the one here that permits incentive awards be sought only for those representatives in support of the settlement.' "). The preceding paragraph is taken from Professor Rubenstein's testimony in the matter.

> serving as class representatives ***in support of the Settlement***, and each such award not to exceed $5,000.00.[10]

Class counsel also informed a plaintiff that he would "'not be entitled to anything' and that he would 'jeopardize the $5,000 [incentive award he] would receive [under the settlement]' if he did not support the settlement,"[11] and class counsel "also told the district court that they had told other plaintiffs that they 'don't see a way for people who don't support the settlement to receive an incentive award.' "[12]

Several of the class representatives objected to the settlement, believing the compensation inadequate; settling class counsel did not seek incentive awards for these class representatives as they were not representatives serving "in support of the Settlement." These representatives therefore also objected to the incentive clause itself, arguing it created a conflict of interest between themselves and the class and between class counsel and the class. The trial court rejected their argument, but the Ninth Circuit reversed. The Ninth Circuit held that the conditional incentive awards "themselves are sufficient to invalidate this settlement,"[13] reasoning that:

> With the prospect of receiving $5,000 incentive awards only if they supported the settlement, Settling Plaintiffs had very different interests than the rest of the class . . . [T]he conditional incentive awards changed the motivations for the class representatives. Instead of being solely concerned about the adequacy of the settlement for the absent class members, the class representatives now had a $5,000 incentive to support the settlement regardless of its fairness and a promise of no reward if they opposed the settlement. The conditional incentive awards removed a critical check on the fairness of the class-action settlement, which rests on the unbiased judgment of class representatives similarly situated to absent class

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[10]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1162 (9th Cir. 2013) (emphasis added).

[11]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013).

[12]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164–65 (9th Cir. 2013).

[13]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1165 (9th Cir. 2013).

members.[14]

Because of the conflict between the class representatives' interests and those of the class, the Ninth Circuit held that the conditional incentive awards rendered the class representatives inadequate under Rule 23(a)(4).[15] Moreover, the Ninth Circuit held that the "class representatives' lack of adequacy—based on the conditional incentive awards—also made class counsel inadequate to represent the class."[16]

The Seventh Circuit reached a similar conclusion the following year, stating:

> Although the judge rightly made incentive awards to the class representatives who had opposed the settlement as well as to those who had approved it, the settlement agreement itself had provided for incentive awards only to the representatives who supported the settlement. This created a conflict of interest: any class representative who opposed the settlement would expect to find himself without any compensation for his services as representative.[17]

In sum, two separate circuits have found that conditional incentive awards generate a conflict of interest between class representatives and class counsel, on the one hand, and class representatives and the class, on the other. Such conditional incentive awards thereby render the class representatives and class counsel inadequate, dooming class certification and requiring the rejection of any settlement containing such terms.

§ 17:16 Judicial review—Disfavored practices—Percentage-based awards

As the legal basis for incentive awards is uncertain,[1] and

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[14]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1165 (9th Cir. 2013).

[15]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1165 (9th Cir. 2013).

[16]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1167 (9th Cir. 2013).

[17]Eubank v. Pella Corp., 753 F.3d 718, 723, 88 Fed. R. Serv. 3d 920 (7th Cir. 2014).

[Section 17:16]

[1]For a discussion, *see* Rubenstein, 5 **Newberg on Class Actions**

as such payments tend to be made with the class's money, courts have been somewhat careful in policing certain incentive award practices. One of those disfavored practices is percentage-based incentive awards. When counsel seek, and courts approve, incentive awards, they almost always do so in specific dollar amounts. Often, courts will assess whether the requested dollar-amount award is appropriate by identifying the percentage of the class's recovery that the award represents. If the percentage seems appropriate, courts approve the award;[2] if it is too high, they either reject

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§ 17:4 (5th ed.).

[2]**Second Circuit (District Court)**

Sanz v. Johny Utah 51 LLC, 2015 WL 1808935, *1 (S.D.N.Y. 2015) (approving incentive awards of $1,000 to three representatives and noting that "the combined payments represent less than one percent of the overall settlement").

Chambery v. Tuxedo Junction Inc., 2014 WL 3725157, *11 (W.D. N.Y. 2014) (approving proposed "enhancement payments" ($10,700) as "reasonable" and noting that this amount constituted "approximately five percent of the total settlement fund").

Gay v. Tri-Wire Engineering Solutions, Inc., 2014 WL 28640, *13–14 (E.D.N.Y. 2014) (approving $7,500 service award and noting that this figure constituted 4% of the total settlement).

Velez v. Novartis Pharmaceuticals Corp., 2010 WL 4877852, *8, 24–27 (S.D.N.Y. 2010) (approving $3,775,000 in service award payments and noting that this represented "only approximately 2.4 percent of the entire monetary award of $152.5 million (or approximately 2.1 percent of the entire value of the settlement of $175 million)" and acknowledging award was "significant . . . but in the overall context of the settlement . . . but a pittance").

Third Circuit (District Court)

Johnson v. Community Bank, N.A., 2013 WL 6185607, *6 (M.D. Pa. 2013) (approving total service awards of $10,000 and recognizing this sum as reasonable given that it comprised 0.4% of total $2.5 million settlement fund).

Sullivan v. DB Investments, Inc., 2008 WL 8747721, *37 (D.N.J. 2008) (approving incentive award and noting that it represented 0.0007% of settlement fund).

Fourth Circuit (District Court)

Kirven v. Central States Health & Life Co. of Omaha, 2015 WL 1314086, *14 (D.S.C. 2015) (approving incentive award of $7,563.27 and noting this figure constituted "approximately 0.015% of the gross settlement").

DeWitt v. Darlington County, S.C., 2013 WL 6408371, *15 (D.S.C. 2013) (approving service award of $7,500 and recognizing this amount

comprised 3.33% of gross amount of the settlement in the case, with largest proposed amount for lead plaintiff ($2,500) constituting 1.11% of gross settlement amount).

Fifth Circuit (District Court)

Jenkins v. Trustmark Nat. Bank, 300 F.R.D. 291, 306 (S.D. Miss. 2014) (approving seven service awards of $5,000 each in part due to recognition that this aggregate sum constituted "less than one percent of the Settlement Fund").

Sixth Circuit (District Court)

Shane Group, Inc. v. Blue Cross Blue Shield of Michigan, 2015-1 Trade Cas. (CCH) ¶ 79151, 2015 WL 1498888, *18–19 (E.D. Mich. 2015) (granting $165,000 in incentive awards and noting that these awards were "reasonable" as they constituted 0.55% of settlement fund).

In re Cardizem CD Antitrust Litigation, 218 F.R.D. 508, 535, 2003-2 Trade Cas. (CCH) ¶ 74205 (E.D. Mich. 2003) (approving incentive awards of $160,000 and recognizing these awards to equal just 0.002% of settlement fund).

Seventh Circuit (District Court)

Beesley v. International Paper Company, 2014 WL 375432, *4 (S.D. Ill. 2014) (approving seven incentive awards (six of $25,000 and one of $15,000) and noting that "the total award for all of the Named Plaintiffs represents just 0.55 percent of the total Settlement Fund" and that "awards of less than one percent of the fund are well within the ranges that are typically awarded in comparable cases").

In re Lawnmower Engine Horsepower Marketing & Sales Practices Litigation, 733 F. Supp. 2d 997, 1016 (E.D. Wis. 2010) (approving incentive awards of $1,000 to each of the 132 class representatives based in part because "the $132,000 total award is only a tiny percentage (0.12%) of the class's overall recovery [of $110.7 million]").

Eighth Circuit (District Court)

Sauby v. City of Fargo, 2009 WL 2168942, *3 (D.N.D. 2009) (approving incentive awards totaling $15,000 and noting that this sum constituted only 0.01% of the maximum class recovery).

Ninth Circuit (District Court)

Horn v. Bank of America, N.A., 2014 WL 1455917, *7–8 (S.D. Cal. 2014) (approving incentive awards collectively amounting to $50,000 in part because this aggregate figure would constitute "a mere fraction of one percent of the most conservative estimated value of the Settlement").

Williams v. Centerplate, Inc., 2013 WL 4525428, *7 (S.D. Cal. 2013) (approving $5,000 incentive awards for each of three plaintiffs and recognizing this figure as "reasonable" as it comprised "around 2.3% of the common fund").

Cicero v. DirecTV, Inc., 2010 WL 2991486, *7 (C.D. Cal. 2010) (approving two incentive awards totaling $12,500 in part because of court's recognition that this sum constituted "less than one percent of the Settlement").

or reduce the award.[3] This method is similar to a percentage cross-check that a court might utilize in assessing the validity of a lodestar-based fee award.[4] There are therefore many court decisions that discuss incentive awards in percentage terms.

However, there are very, very few cases in which class counsel have sought, and courts have approved, incentive awards that are actually measured as a percentage of the common fund recovery.[5] Percentage-based incentive awards

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Hopson v. Hanesbrands Inc., 2009 WL 928133, *10 (N.D. Cal. 2009) (approving incentive award of $5,000, constituting approximately 1.25% of the settlement amount, and noting that although this was higher than that awarded in other cases, the award was justified under the particular circumstances of the case).

Tenth Circuit (District Court)

Chieftain Royalty Co. v. Laredo Petroleum, Inc., 2015 WL 2254606, *1 (W.D. Okla. 2015) (approving "case contribution award" and recognizing this award as comprising 1% of total settlement amount).

Shaw v. Interthinx, Inc., 2015 WL 1867861, *8 (D. Colo. 2015) (approving multiple $10,000 incentive awards and noting that the total sum would represent "less than 1% of the maximum value of the common fund").

Eleventh Circuit (District Court)

Carnegie v. Mutual Sav. Life Ins. Co., 2004 WL 3715446, *24 (N.D. Ala. 2004) (approving incentive awards aggregating $10,000, which the court noted constituted "two-tenths of one percent of the total settlement amount").

District of Columbia Circuit (District Court)

In re Lorazepam & Clorazepate Antitrust Litigation, 205 F.R.D. 369, 400, 2002-1 Trade Cas. (CCH) ¶ 73649 (D.D.C. 2002) (approving six separate incentive awards (three worth $25,000 and three worth $10,000) and noting that this aggregate sum represented approximately 0.3% of each class's recovery).

[3]A succeeding section of the Treatise discussing courts' rejection of excessive awards contains a list of cases rejecting awards on the basis that they constitute too great a portion of the class's recovery. *See* Rubenstein, 5 **Newberg on Class Actions** § 17:18 (5th ed.).

[4]For a discussion of the percentage cross-check in lodestar fee cases, *see* Rubenstein, 5 **Newberg on Class Actions** § 15:52 (5th ed.).

[5]Chieftain Royalty Co. v. Laredo Petroleum, Inc., 2015 WL 2254606, *4 (W.D. Okla. 2015) ("Class Representative is hereby awarded a Case Contribution Award of one percent (1%) of the $6,651,997.95 Settlement Amount.").

Allapattah Services, Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006) ("[T]he Class Representatives are seeking 1.5% of

are disfavored, if not altogether forbidden.

Percentage-based incentive awards may appear appropriate in that they seem to align the class representative's interests with those of the class: the more money the class makes, the higher the percentage award.[6] However, on closer examination, percentage-based incentive awards are problematic. *First*, such awards may skew the class representatives' incentives by encouraging them to hold out for greater recovery (and hence a higher incentive award) when in fact the class's interests would be best served by a settlement. *Second,* relatedly, percentage awards privilege monetary recoveries over other remedies, such as injunctive relief, creating a potential conflict between the interests of the class representative and the class.[7] *Third*, paying the class representatives a portion of the settlement amount

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the common benefit received by the Class as an incentive award. The basis for the 1.5% request comes from the fact that Class Counsel have reduced their fee from 33 and 1/3% to 31 and 1/3%, and the Class Representatives have sought to maintain their request within the scope of that reduction.").

Freebird, Inc. v. Cimarex Energy Co., 46 Kan. App. 2d 631, 264 P.3d 500, 511 (2011) (affirming district court's award of incentive award equal to "1% of the common fund" ($34,500)).

[6]Freebird, Inc. v. Cimarex Energy Co., 46 Kan. App. 2d 631, 264 P.3d 500, 511 (2011) ("[W]e can find no reason to automatically deny incentive awards that are based upon a percentage of the common fund. We do not consider such awards as antithetical to the interests of the class. To the contrary, the class representative remains aligned with the interests of the class as a whole; the larger the class recovery, the larger the incentive award.").

[7]Rodriguez v. West Publishing Corp., 563 F.3d 948, 959–60, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) (noting that *ex ante* incentive agreements between class counsel and class representatives, which tied the requested award to the size of the settlement, "made the contracting class representatives' interests actually different from the class's interests[;]" specifically, "[b]y tying their compensation—in advance—to a sliding scale based on the amount recovered, the incentive agreements disjoined the contingency financial interests of the contracting representatives from the class," because (given a cap on the percentage recovery) "once the threshold cash settlement was met, the agreements created a disincentive to go to trial; going to trial would put their $75,000 at risk in return for only a marginal individual gain even if the verdict were significantly greater than the settlement" and because the "agreements also gave the contracting representatives an interest in a monetary settlement, as distinguished from other remedies, that set them apart from other members of the class").

untethers the award from the services that the representatives provided to the class and the risks they took in doing so. It is true that a court could provide a higher percentage when the service and risks were greater, but scaling those rewards according to the size of the common fund is at best a rough proxy in that the services and risks are not necessarily directly related to the size of the settlement. Thus, *fourth,* percentage awards threaten to be excessive.[8] *Fifth*, paying the class representatives a portion of the settlement fund is simply unseemly: it gives the appearance that the representative is either a professional plaintiff,[9] or a bounty hunter, not a servant for the class.[10]

In a leading decision on incentive awards, the Ninth Circuit held that an agreement between class counsel and the class representatives at the outset of the case that tied the amount class counsel would seek as an incentive award to the class's recovery created a conflict of interest between the class representatives and the class, rendering those class representatives inadequate to represent the class.[11] The decision does not isolate the issue of rewarding class representatives with a percentage-based incentive fee, but its concerns about scaling the incentive award to the class's recovery are pertinent.[12]

In short, class counsel rarely seek incentive awards in per-

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[8]*Cf.* Freebird, Inc. v. Cimarex Energy Co., 46 Kan. App. 2d 631, 264 P.3d 500, 511 (2011) (rejecting defendant's argument that the percentage approach "provides a disproportionate recovery to that of other class members" but performing "lodestar" type cross-check to confirm reasonableness of proposed percentage incentive award).

[9]*But see* Freebird, Inc. v. Cimarex Energy Co., 46 Kan. App. 2d 631, 264 P.3d 500, 511 (2011) (rejecting defendant's argument that percentage approach "encourages individuals to become professional plaintiffs").

[10]In this sense, the class representative's service, and reward, are distinct from the statutorily based reward structure in *qui tam* cases, where a relator is paid a percentage of the government's recovery for her whistle-blower activities. *See* 31 U.S.C.A. § 3730 (setting forth False Claims Act's *qui tam* provisions).

[11]Rodriguez v. West Publishing Corp., 563 F.3d 948, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009). For a discussion of this case and the concerns it posed, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:17 (5th ed.).

[12]Rodriguez v. West Publishing Corp., 563 F.3d 948, 959, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) (noting that incentive agreements tying any potential award to the ultimate recovery

centage terms. Although courts may check a flat award for excessiveness by reference to the percentage of the fund it represents, courts rarely award incentive payments in percentage terms and strongly disfavor such an approach.

§ 17:17 Judicial review—Disfavored practices—*Ex ante* incentive award agreements

As the legal basis for incentive awards is uncertain,[1] and as such payments tend to be made with the class's money, courts have been somewhat careful in policing certain incentive award practices. One of those disfavored practices is an *ex ante* agreement between putative class counsel and putative class representatives containing certain assurances with regard to incentive awards.

The facts of the primary precedent on point[2] are instructive: in 2005, lawyers in California brought an antitrust class action against West Publishing Company alleging that it had engaged in anti-competitive practices with regard to its bar preparation course, BAR/BRI. As may be evident, the class consisted almost exclusively of lawyers.[3] Some of those lawyers/clients shopped for class action counsel to represent them in suing BAR/BRI. In so doing, they appear to have negotiated, up front, for the lawyers to promise to pursue incentive agreements on their behalf at the conclusion of the case. In particular, the putative class representatives negotiated an agreement with putative class counsel whereby counsel promised to seek a higher award for them as the class's recovery increased, up to a certain

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"put counsel and the contracting class representatives into a conflict from day one").

[Section 17:17]

[1]For a discussion, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[2]Rodriguez v. West Publishing Corp., 563 F.3d 948, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

[3]The class consisted of "those who purchased a BAR/BRI course between August 1, 1997 and July 31, 2006." Rodriguez v. West Publishing Corp., 563 F.3d 948, 954, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009). The class would also have included persons who paid for the bar preparation course but either did not sit for the bar, did not pass the bar, or were not admitted to the bar.

cap.[4] This agreement was not revealed to the court at either the class certification stage or the settlement stage, but it came to light after several objectors protested the size of the proposed incentive awards.[5] Without apparently realizing the consequences of their actions, class counsel at that point revealed that they were contractually obligated to seek that level of award. The district court ultimately approved the settlement, but held that the agreements were inappropriate and contrary to public policy for a number of reasons:

> [1] they obligate class counsel to request an arbitrary award not reflective of the amount of work done, or the risks undertaken, or the time spent on the litigation; [2] they create at least the appearance of impropriety; [3] they violate the California Rules of Professional Conduct prohibiting fee-sharing with clients and among lawyers; and [4] they encourage figurehead cases and bounty payments by potential class counsel. [5] The court found it particularly problematic that the incentive agreements correlated the incentive request solely to the settlement or litigated recovery, as the effect was to make the contracting class representatives' interests actually different from the class's interests in settling a case instead of trying it to verdict, seeking injunctive relief, and insisting on compensation greater than $10 million. [6] It further observed that the parties' failure to disclose their agreement to the court, and to the class, violated the contracting representatives' fiduciary duties to the class and duty of candor to the court.[6]

The Ninth Circuit affirmed the settlement's approval because it found that two independently-represented class

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[4]Rodriguez v. West Publishing Corp., 563 F.3d 948, 957, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) ("The incentive agreements obligated class counsel to seek payment . . . in an amount that slid with the end settlement or verdict amount: if the amount were greater than or equal to $500,000, class counsel would seek a $10,000 award for each of them; if it were $1.5 million or more, counsel would seek a $25,000 award; if it were $5 million or more, counsel would seek $50,000; and if it were $10 million or more, counsel would seek $75,000.").

[5]Rodriguez v. West Publishing Corp., 563 F.3d 948, 959, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) (noting that "the incentive agreements came to the fore when Objectors pounced on them in opposing class counsel's motion for incentive awards to the class representatives"). The Treatise's author was an expert witness regarding a fee request that was later filed by some of these objectors' lawyers.

[6]Rodriguez v. West Publishing Corp., 563 F.3d 948, 959, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

representatives did not suffer under the weight of the incentive agreements.[7] However, the Ninth Circuit did agree with the district court that the *ex ante* incentive agreements were contrary to public policy, discussing a host of problems with respect to the agreements:

- *Class representatives suffer conflict of interest.* The Ninth Circuit noted the fact that the agreements "tied the promised request to the ultimate recovery . . . put class counsel and the contracting class representatives into a conflict position from day one."[8] The court found that "[b]y tying their compensation—in advance—to a sliding scale based on the amount recovered, the incentive agreements disjoined the contingency financial interests of the contracting representatives from the class. As the district court observed, once the threshold cash settlement was met, the agreements created a disincentive to go to trial; going to trial would put their $75,000 at risk in return for only a marginal individual gain even if the verdict were significantly greater than the settlement. The agreements also gave the contracting representatives an interest in a monetary settlement, as distinguished from other remedies, that set them apart from other members of the class."[9]
- *Class counsel suffer conflict of interest.* The Ninth Circuit found that class counsel's simultaneous representation of parties with conflicting interests (the class representatives and the class) "implicate California ethics rules that prohibit representation of clients with

[7]Rodriguez v. West Publishing Corp., 563 F.3d 948, 961, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) ("[W]e do not believe the district court was required to reject the settlement for inadequate representation. Only five of the seven class representatives had an incentive agreement. 'The adequacy-of-representation requirement is satisfied as long as one of the class representatives is an adequate class representative.' . . . Accordingly, we conclude that the presence of conflicted representatives was harmless." (citation omitted) (quoting Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1162 n.2, 17 I.E.R. Cas. (BNA) 796, 143 Lab. Cas. (CCH) P 10958, 50 Fed. R. Serv. 3d 511 (9th Cir. 2001), for additional opinion, see, 7 Fed. Appx. 753 (9th Cir. 2001))).

[8]Rodriguez v. West Publishing Corp., 563 F.3d 948, 959, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

[9]Rodriguez v. West Publishing Corp., 563 F.3d 948, 959–60, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

conflicting interests."[10]

- *Class counsel's entitlement to a fee is plausibly barred.* The Ninth Circuit, again relying on California ethics principles, noted that, "[s]imultaneous representation of clients with conflicting interests (and without written informed consent) is an automatic ethics violation in California and grounds for disqualification" and that under California law, "[a]n attorney cannot recover fees for such conflicting representation."[11]
- *Lack of transparency.* The Ninth Circuit further noted that such agreements must be disclosed at the class certification stage of the lawsuit "where it [is] plainly relevant" because "the district court would certainly have considered its effect in determining whether the conflicted plaintiffs . . . could adequately represent the class. The conflict might have been waived, or otherwise contained, but the point is that uncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the adequacy inquiry."[12]
- *Excessiveness.* Referencing an earlier decision concerning the potential excessiveness of incentive awards, the Ninth Circuit stated that "excess incentive awards may put the class representative in a conflict with the class and present a 'considerable danger of individuals bringing cases as class actions principally to increase their own leverage to attain a remunerative settlement for themselves and then trading on that leverage in the course of negotiations.' The danger is exacerbated if the named plaintiffs have an advance guarantee that a request for a relatively large incentive award will be made that is untethered to any service or value they

[10]Rodriguez v. West Publishing Corp., 563 F.3d 948, 960, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

[11]Rodriguez v. West Publishing Corp., 563 F.3d 948, 967–68, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) (quoting Image Technical Service, Inc. v. Eastman Kodak Co., 136 F.3d 1354, 1358, 1998-1 Trade Cas. (CCH) ¶ 72067 (9th Cir. 1998)) (internal quotation marks omitted).

[12]Rodriguez v. West Publishing Corp., 563 F.3d 948, 959, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

will provide to the class."[13]

- *Class Action Abuse.* The Ninth Circuit also stated that "agreements of this sort infect the class action environment with the troubling appearance of shopping plaintiffships. If allowed, ex ante incentive agreements could tempt potential plaintiffs to sell their lawsuits to attorneys who are the highest bidders, and vice-versa."[14]

Summarizing its decision, the Ninth Circuit stated:

> We conclude that incentive agreements, entered into as part of five named plaintiffs' retainer agreement with counsel, created conflicts among them (later certified as class representatives), their counsel (later certified as class counsel), and the rest of the class. It was inappropriate not to disclose these agreements at the class certification stage, because an ex ante incentive agreement is relevant to whether a named plaintiff who is party to one can adequately represent the class.[15]

While there are a variety of moving parts in the *Rodriguez* case, the decision is fairly damning of *ex ante* incentive agreements, *per se*. It is true that much of the court's concern stemmed from the content of the particular agreement—the sliding scale arrangement and the conflicts it created—but counsel's commitment *ex ante* to seek an incentive award for a putative class representative understandably troubled the court: such an award largely turns on the work the representative undertakes and the risks she faces, neither of which can be fully known *ex ante*. A commitment to seek some of the class's money from a potential recovery to serve these purposes therefore creates a conflict between the proposed class representative and the putative class, as well as between contracting class counsel and the putative class. It would thus not be too much of a stretch to read *Rodriguez* as condemning any *ex ante* agreement that counsel would make to pursue an incentive award. At the least, *Rodriguez* stands for the proposition that such an agreement would

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[13]Rodriguez v. West Publishing Corp., 563 F.3d 948, 960, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) (quoting Staton v. Boeing Co., 327 F.3d 938, 976–77, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003)).

[14]Rodriguez v. West Publishing Corp., 563 F.3d 948, 960, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

[15]Rodriguez v. West Publishing Corp., 563 F.3d 948, 968, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

have to be disclosed at the class certification stage and the settlement stage of the lawsuit; any lack of transparency about such an agreement would consequently threaten to undermine certification and settlement as well.

§ 17:18 Judicial review—Disfavored practices—Excessive awards

As the legal basis for incentive awards is uncertain,[1] and as such payments tend to be made with the class's money, courts have been somewhat careful in policing certain incentive award practices. One of those practices is excessive incentive awards.

As discussed in a previous section of the Treatise,[2] a primary risk of incentive awards is that they skew the class representative's interests so as to conflict with those of the class she purports to serve. As most class suits are for small amounts of money, a hypothetical case might encompass claims worth $250 per class member with a settlement value of say, $100 per class member. If a settlement is proposed that returns a $20 voucher to each class member, but the class representative is promised a $15,000 incentive award if the settlement is approved, she may forgo resisting the questionable settlement on behalf of the class as she stands to profit so handsomely should it be approved.[3] Courts have therefore long attempted to ensure that the size of potential

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[Section 17:18]

[1]For a discussion, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[2]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[3]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1163 (9th Cir. 2013) (noting that in an earlier case, the court had "reversed the district court's approval of a class-action settlement because the settlement provided for disproportionately large payments to class representatives" and explaining that such a settlement "magnified the risks associated with incentive awards because the awards there were much larger than the payments to individual class members, 'eliminat-[ing] a critical check on the fairness of the settlement for the class as a whole' " (quoting Staton v. Boeing Co., 327 F.3d 938, 977, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003))).

Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003) ("[A]pplications for incentive awards are scrutinized carefully by courts who sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to com-

incentive awards are not excessive, lest the class representative's interests so significantly diverge from those of the class that she ceases to be an adequate representative of the class under Rule 23(a)(4).[4]

The Sixth Circuit explained this rationale in a case involving allegations that a certain diaper caused baby rash.[5] After a study disproved the link between the diaper and the rash, the parties settled for some minor forms of relief,[6] while the named class representatives were promised $1,000 "per af-

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promise the interest of the class for personal gain." (quoting **Newberg on Class Actions**)).

Sanz v. Johny Utah 51 LLC, 2015 WL 1808935, *1 (S.D.N.Y. 2015) ("Before awarding an incentive payment . . . a court must ensure that the named plaintiffs, as fiduciaries to the class, have not been tempted to receive high incentive awards in exchange for accepting suboptimal settlements for absent class members." (internal quotation marks omitted)).

Partridge v. Shea Mortg. Inc., 2008 WL 5384542, *1 (N.D. Cal. 2008) (denying plaintiffs' motion for an incentive payment in the amount of $15,000 because the plaintiff had not established any of the five factors tending to support incentive payments, and expressing concern that incentive payments might induce class representatives to accept settlements that serve their personal interests rather than the best possible result for the class as a whole).

Weseley v. Spear, Leeds & Kellogg, 711 F. Supp. 713, 720, Fed. Sec. L. Rep. (CCH) P 94403 (E.D.N.Y. 1989) ("If class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard.").

[4]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1161 (9th Cir. 2013) ("Moreover, the conditional incentive awards significantly exceeded in amount what absent class members could expect to get upon settlement approval. Because these circumstances created a patent divergence of interests between the named representatives and the class, we conclude that the class representatives and class counsel did not adequately represent the absent class members, and for this reason the district court should not have approved the class-action settlement.").

[5]In re Dry Max Pampers Litigation, 724 F.3d 713, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013).

[6]In re Dry Max Pampers Litigation, 724 F.3d 713, 716, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013) ("P & G agreed to reinstate, for one year, a refund program that P & G had already made available to its customers from July 2010 to December 2010. The program limits refunds to one box per household, and requires consumers to provide an original receipt and UPC code clipped from a Pampers box. P & G also agreed, for a period of two years, to add to its Pampers box-label a single sentence suggesting that consumers 'consult Pampers.com or call 1-800-Pampers' for 'more in-

fected child" and class counsel was to receive $2.73 million in attorney's fees.[7] The district court approved the settlement with seemingly little review[8] and the Sixth Circuit reversed. The Sixth Circuit explicitly took no position on the propriety of incentive payments in general, but characterized such payments to the class representatives and the payment to the class members as "two separate settlement agreements folded into one,"[9] with the former being so great that the class representatives had "no interest in vigorously prosecuting the [interests of] unnamed class members."[10] Summarizing its position, the court stated:

> The propriety of incentive payments is arguably at its height when the award represents a fraction of a class representative's likely damages; for in that case the class representative is left to recover the remainder of his damages by means of the same mechanisms that unnamed class members must re-

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formation on common diapering questions such as choosing the right Pampers product for your baby, preventing diaper leaks, diaper rash, and potty training[.]' P & G similarly agreed, for a period of two years, to add to the Pampers website some rudimentary information about diaper rash (*e.g.*, '[d]iaper rash is usually easily treated and improves within a few days after starting treatment') and a suggestion to '[s]ee your child's doctor' if certain severe symptoms develop (*e.g.*, 'pus or weeping discharge'), along with two links to other websites. P & G also agreed to contribute $300,000 to a pediatric resident training program—the recipient program is not identified in the agreement—and $100,000 to the American Academy of Pediatrics to fund a program 'in the area of skin health.' ").

[7]In re Dry Max Pampers Litigation, 724 F.3d 713, 716, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013).

[8]In re Dry Max Pampers Litigation, 724 F.3d 713, 717, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013) ("The district court entered its 'Final Approval Order and Final Judgment' later that afternoon [of the fairness hearing]. With the exception of a few typographical changes, the order was a verbatim copy of a proposed order that the parties had submitted to the court before the hearing. The order was conclusory, for the most part merely reciting the requirements of Rule 23 in stating that they were met. About [a class member's] objections, the order had nothing to say.").

[9]In re Dry Max Pampers Litigation, 724 F.3d 713, 722, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013); *see also* Women's Committee For Equal Employment Opportunity (WC=EO) v. National Broadcasting Co., 76 F.R.D. 173, 180, 19 Fair Empl. Prac. Cas. (BNA) 1703, 15 Empl. Prac. Dec. (CCH) P 7832, 24 Fed. R. Serv. 2d 359 (S.D.N.Y. 1977) ("[W]hen representative plaintiffs make what amounts to a separate peace with defendants, grave problems of collusion are raised.").

[10]In re Dry Max Pampers Litigation, 724 F.3d 713, 722, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013) (internal quotation marks omitted).

> cover theirs. The members' incentives are thus aligned. But we should be most dubious of incentive payments when they make the class representatives whole, or (as here) even more than whole; for in that case the class representatives have no reason to care whether the mechanisms available to unnamed class members can provide adequate relief.
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> This case falls into the latter scenario. The $1000-per-child payments provided a *disincentive* for the class members to care about the adequacy of relief afforded unnamed class members, and instead encouraged the class representatives to compromise the interest of the class for personal gain. The result is the settlement agreement in this case. The named plaintiffs are inadequate representatives under Rule 23(a)(4), and the district court abused its discretion in finding the contrary.[11]

The Sixth Circuit's concern in the *Pampers* case was one of proportionality, comparing the size of the incentive award to the size of each class member's individual reward. The Ninth Circuit has expressed concern, as well, about the number of persons receiving such special payment and the relationship of the total amount of special payments to the total settlement in the case.[12]

Courts have found incentive payments to be excessive in four sets of circumstances:

- when the raw number seems too high;[13]
- when the amount sought is disproportionate to the contributions of the named plaintiffs;[14]
- when the amount of the incentive award is far greater than the amount of compensation each individual class

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[11]In re Dry Max Pampers Litigation, 724 F.3d 713, 722, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013) (citation omitted) (internal quotation marks omitted).

[12]Staton v. Boeing Co., 327 F.3d 938, 977, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) ("[T]he different orders of magnitude in the present case concerning the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment—here up to $50,000, with an average of more than $30,000—are obvious.").

[13]In re Southern Ohio Correctional Facility, 175 F.R.D. 270, 277 (S.D. Ohio 1997), order rev'd on other grounds, 24 Fed. Appx. 520 (6th Cir. 2001) (declining to approve a proposed incentive award of $25,000 for prison inmate plaintiffs because, *inter alia*, "the requested $25,000 is extremely disproportionate to the amount an inmate can earn otherwise").

[14]**First Circuit (District Court)**

In re Puerto Rican Cabotage Antitrust Litigation, 815 F. Supp. 2d 448, 469 (D.P.R. 2011) ("While the Court notes the named plaintiffs' involvement in advancing the present litigation, the Court finds that the amount of the incentive award requested is excessive and unreasonable. The Class Representatives did not undertake substantial risk or suffer notoriety or personal hardships by acting as a named plaintiff. There is no indication that [the Class Representatives] assumed a risk or inconvenience not shared by the other class members which is of such magnitude to merit an incentive award, and Plaintiffs do not provide specific evidence of the purported risk's magnitude." (footnote omitted) (international quotation marks omitted)).

Second Circuit (District Court)

Weseley v. Spear, Leeds & Kellogg, 711 F. Supp. 713, 720, Fed. Sec. L. Rep. (CCH) P 94403 (E.D.N.Y. 1989) (rejecting request for $5,000 incentive award because although plaintiff "took time away from his practice to respond to defendant's document request and to be deposed[,] [b]eyond these normal obligations of class representation . . . he did not perform any extraordinary services to the class").

Third Circuit (District Court)

In re Laidlaw Securities Litigation, 1992 WL 236899, *3 (E.D. Pa. 1992) ("Plaintiffs' counsel also request that the court grant an incentive award of $10,000, to be paid out of plaintiffs' counsel's awarded fees, to the lead plaintiff, Donald Singleton. This award would be paid to Mr. Singleton in addition to the payment he would receive out of the settlement fund as a class member. The court perceives no reason for treating Mr. Singleton any differently from other members of the class. There is no indication that Mr. Singleton, by acting as the named class representative, has assumed a risk or inconvenience not shared by the other class members which is of such magnitude to merit the award of an additional $10,000. Therefore, the request to grant an incentive award to the named class representative is denied.").

Ninth Circuit (District Court)

Krzesniak v. Cendant Corp., 2008 WL 4291539, *1 (N.D. Cal. 2008) ("As to the amount of the incentive award, the Court finds it excessive. First, the Court notes that Plaintiff does not specify the amount of time and effort he spent on this case. Second, in arguing that $15,000 is at the modest end of the incentive award spectrum, he cites to cases that are clearly distinguishable. In [a prior case] the court awarded $20,000 to each of two named plaintiffs, finding that each plaintiff 'spent in excess of 500 hours' time at counsels' request' in the litigation. Here, there is no evidence before the Court that Plaintiff himself spent anywhere near this amount of time on the present case." (quoting Bogosian v. Gulf Oil Corp., 621 F. Supp. 27, 32, 1985-1 Trade Cas. (CCH) ¶ 66510 (E.D. Pa. 1985))).

In re Heritage Bond Litigation, 2005 WL 1594403, *18 (C.D. Cal. 2005) (approving incentive awards to named plaintiffs but reducing the requested sums because, *inter alia*, "no declaration submitted accurately quantifies how Lead Plaintiffs spent their time during this litigation,"

member is entitled to receive; and,[15]

"[t]he Court is only presented with blanket statements as to how Class Representatives participated in this action," and "there is no showing that Lead Plaintiffs' participation placed them at risk of damaged reputation or retaliation").

Tenth Circuit (District Court)

In re Sprint Corp. ERISA Litigation, 443 F. Supp. 2d 1249, 1271, 39 Employee Benefits Cas. (BNA) 2810 (D. Kan. 2006) ("As to plaintiffs' request for an award of $15,000 to each of the named plaintiffs . . . the court simply cannot find that such an award is reasonable. The court certainly recognizes that the time these individuals devoted to this lawsuit inured to the common benefit of the class and, to that end, the court believes they are entitled to some type of incentive award above and beyond what the typical class member is receiving. They have performed an important service to the class and the burden of this commitment deserves to be recognized through an award. But, although the aggregate value of the settlement is significant, no class member stands to gain more than $1,000 on an average, per-plaintiff basis. The named plaintiffs devoted approximately 80 hours, on average, to this lawsuit. The court believes that an award of $5,000 adequately compensates each of them for their time.").

[15] **Second Circuit (District Court)**

In re AOL Time Warner ERISA Litigation, 2007 WL 3145111, *3 n.10 (S.D.N.Y. 2007) (noting that "the Court concludes that the requested $20,000 per-plaintiff fee would be excessive, especially in light of the indirect, and much smaller, monetary relief accruing to the more than 65,000 absent class members" and stating that the "Court has taken proportionality into account . . . [as] the primary justification offered for the reduction of the incentive award").

Sheppard v. Consolidated Edison Co. of New York, Inc., 2002 WL 2003206, *6 (E.D.N.Y. 2002) ("Although these reasons support an award of incentive payments, I decline to award incentive payments in the extraordinarily high amounts requested. Once again, I find that the amounts sought as incentive awards are grossly disproportionate to the compensation to be paid to the absent class members the plaintiffs seek to represent. In my view, appropriate incentive awards here are one-sixth of the proposed maximum amounts . . .").

Ninth Circuit

Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1161, 1165 (9th Cir. 2013) (holding that the "incentive awards significantly exceeded in amount what absent class members could expect to get upon settlement approval" thereby creating a "patent divergence of interests between the named representatives and the class" and stating that "[t]here is a serious question whether class representatives could be expected to fairly evaluate whether awards ranging from $26 to $750 is a fair settlement value when they would receive $5,000 incentive awards").

Staton v. Boeing Co., 327 F.3d 938, 946, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) ("Finally, the decree sets up a two-tiered structure for the

- when the aggregate amount of incentive awards constitutes too great a portion of the class's full recovery.[16]

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distribution of monetary damages, awarding each class representative and certain other identified class members an amount of damages on average sixteen times greater than the amount each unnamed class member would receive. At least one person not a member of the class was provided a damages award. The record before us does not reveal sufficient justification either for the large differential in the amounts of damage awards or for the payment of damages to a nonmember of the class. On this ground as well, the district court abused its discretion in approving the settlement.").

Chavez v. Lumber Liquidators, Inc., 2015 WL 2174168, *4 (N.D. Cal. 2015) (denying preliminary approval of the settlement because "[t]he $10,000 currently earmarked for [the class representative] is more than 7 percent of the total settlement fund, more than 15 percent of the total amount of the common fund earmarked for the class, and more than 37 times the $269 average net recovery of the unnamed class members").

Wallace v. Countrywide Home Loans, Inc., 22 Wage & Hour Cas. 2d (BNA) 849, 2014 WL 5819870, *4 (C.D. Cal. 2014) (reducing requested incentive awards from $50,000 to $1,500 for each named plaintiff because "individual class members are entitled to receive no more than $1,500 under the settlement," and noting that "[a]n incentive award 33 times greater than the maximum possible recovery of other individual class members creates a 'significant disparity,' " particularly as the named plaintiffs did not appear to have suffered "any particular risks or hardships caused by their participation in this litigation").

Tenth Circuit (District Court)

In re Sprint Corp. ERISA Litigation, 443 F. Supp. 2d 1249, 1271, 39 Employee Benefits Cas. (BNA) 2810 (D. Kan. 2006) (reducing requested incentive awards from $15,000 to $5,000 for each named plaintiff, despite multi-million dollar settlement amount, because, *inter alia*, no individual class member stood to recover more than $1,000 from the settlement).

[16]**Second Circuit (District Court)**

Ramirez v. Ricoh Americas Corp., 2015 WL 413305, *5 (S.D.N.Y. 2015) ("The fact that the plaintiff requests $20,000, or 5.71% of the settlement fund, as his service award, and there is absent from the motion record any evidence of the reaction of putative class members to the settlement, are of concern to the Court. The Court finds that this factor does not militate in favor of granting the plaintiff's motion.").

Gortat v. Capala Bros., 949 F. Supp. 2d 374, 378, 22 Wage & Hour Cas. 2d (BNA) 1407 (E.D.N.Y. 2013), aff'd, 568 Fed. Appx. 78, 22 Wage & Hour Cas. 2d (BNA) 1420 (2d Cir. 2014) (declining to grant incentive awards that would have constituted 61.74% of the total award granted to all plaintiffs, calling this amount "breathtaking" and explaining that it would have been "an exercise of discretion inexcusably abused").

Sheppard v. Consolidated Edison Co. of New York, Inc., 2002 WL 2003206, *6 (E.D.N.Y. 2002) ("In awarding these payments as part of a

Among these practices, perhaps the starkest and surely

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settlement, a court must ensure that the named plaintiffs, as fiduciaries to the class, have not been tempted to receive high incentive awards in exchange for accepting suboptimal settlements for absent class members. A particularly suspect arrangement exists where the incentive payments are greatly disproportionate to the recovery set aside for absent class members . . .").

Dornberger v. Metropolitan Life Ins. Co., 203 F.R.D. 118, 125 (S.D.N.Y. 2001) (approving incentive awards because, *inter alia*, "these incentive awards are small in relation to the $13 million . . . fund from which the awards will be made").

Ninth Circuit

Staton v. Boeing Co., 327 F.3d 938, 948, 978, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) (striking settlement and denying incentive awards because, *inter alia*, the named plaintiffs constituted "less than two percent of the class" but would have received "more than half the monetary award").

Chavez v. Lumber Liquidators, Inc., 2015 WL 2174168, *4 (N.D. Cal. 2015) (denying preliminary approval of settlement because "[t]he $10,000 currently earmarked for [the class representative] is more than 7 percent of the total settlement fund, more than 15 percent of the total amount of the common fund earmarked for the class, and more than 37 times the $269 average net recovery of the unnamed class members").

Bellinghausen v. Tractor Supply Company, 306 F.R.D. 245, 266 (N.D. Cal. 2015) (denying a $15,000 award in part because this would have constituted "2 percent of the gross settlement funds, which is higher than what other courts have found to be acceptable").

Ontiveros v. Zamora, 2014 WL 3057506, *9 (E.D. Cal. 2014) ("An incentive award consisting of one percent of the common fund is unusually high, and some courts have been reticent to approve incentive awards that constituted an even smaller portion of the common fund.").

Daniels v. Aeropostale West, Inc., 22 Wage & Hour Cas. 2d (BNA) 1276, 2014 WL 2215708, *7 (N.D. Cal. 2014) (denying $5,000 incentive award because the request was "excessive" considering that the total proposed settlement amount was $8,645.61).

Ko v. Natura Pet Products, Inc., 2012 WL 3945541, *15 (N.D. Cal. 2012), appeal dismissed, (9th Cir. 12-17296)(Apr. 24, 2013) (reducing incentive award to $5,000 because the requested sum of $20,000 would have been "excessive under the circumstances" as it would have constituted "approximately 1% percent [sic] of the gross settlement amount").

Sandoval v. Tharaldson Employee Management, Inc., 2010 WL 2486346, *10 (C.D. Cal. 2010) (reducing incentive award to $7,500 because this figure constituted "1% of the gross settlement" and noting that the requested sum of $12,500 would have been "excessive under the circumstances").

Krzesniak v. Cendant Corp., 2008 WL 4291539, *2 (N.D. Cal. 2008) (reducing incentive award from $15,000 to $1,500 and noting that approved incentive awards in three other cases represented 0.001%, 0.007%,

the most beguiling is the relationship between the incentive award amount and each class member's individual recovery. The problem is that most class actions are for small amounts of money, on the one hand, while incentive awards are meant to compensate class representatives for their service to the class and for the risks that they encountered in providing that service, on the other. However, there is no obvious connection between the size of each class member's individual claims and the appropriate compensation for the named plaintiff's services. The Ninth Circuit noted in one case that "[t]here is a serious question whether class representatives could be expected to fairly evaluate whether awards ranging from $26 to $750 is a fair settlement value when they would receive $5,000 incentive awards."[17] The proposed incentive award was anywhere from 192 to 6 times greater than a class member's recovery. The former number surely serves the Ninth Circuit's point, but does the latter? Moreover, even when the proposed $5,000 incentive award is almost 200 times greater than a class member's recovery, if the class representatives have invested significant amounts of time and, for example, faced retaliation or other risks for their efforts, $5,000 does not seem that extravagant a payment.

It is completely understandable that courts would worry about this disparity and a positive development that they in fact do. But there is an aspect of the disparity that is built into the very nature of the endeavor: in class suits, the claims will almost invariably be small in nature, yet the class representatives most worthy of an award will typically be those who worked the hardest and suffered most.

§ 17:19 Incentive awards in securities class actions under the PSLRA

The Private Securities Litigation Reform Act of 1995 ("PSLRA") appears to prohibit incentive awards to class

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and 0.003% of total payments to class members while $15,000 in the present case would have represented 0.052% of the total payments).

[17]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1165 (9th Cir. 2013).

representatives in securities class actions,[1] though the actual practices under the PSLRA are more nuanced.[2] With the PSLRA, Congress aimed to transfer control of securities class actions from small-stakes clients (who Congress believed to be controlled by class counsel) to large institutional investors (who Congress thought might better monitor and control class counsel). Imposing limitations on incentive awards was part of that effort, though many critics have noted that if Congress' aim was to encourage institutional involvement, its crackdown on incentive payments may have been counterproductive.[3]

The PSLRA appears to bar incentive awards in two interconnected sections. *First*, 15 U.S.C. § 78u-4(a)(2)(A) requires a plaintiff seeking to serve as a class representative to file a sworn certification with her complaint in which she avers to a series of items, including that she "will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's *pro rata* share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)." *Second,* 15 U.S.C. § 78u-4(a)(4) states:

The share of any final judgment or of any settlement that is

[Section 17:19]

[1]*See* 15 U.S.C.A. § 78u-4(a)(2)(A)(vi), (4) (2010).

[2]In re Enron Corp. Securities, Derivative & "ERISA" Litigation, 2008 WL 2714176, *1 (S.D. Tex. 2008) ("There is a rigorous debate whether it is proper in class actions generally to approve an incentive award to named plaintiffs because these class representatives take risks and perform services that benefit the class." (citing **Newberg on Class Actions**)).

[3]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1347 (2006) ("A flat rule such as the PSLRA's ban on payments to class representatives not only is not clearly supported but may be counterproductive. The large-scale investors that Congress hoped to have serve as class representatives after the PSLRA may be the investors most sensitive to recovering their opportunity and other costs if they do serve. Therefore, to the extent these sought-after representatives are discouraged from serving by the anti-incentive-award rule, the rule may compete with the perhaps more important goal of securing sophisticated and large representative plaintiffs.").

See generally Richard A. Nagareda, Restitution, Rent Extraction, and Class Representatives: Implications of Incentive Awards, 53 UCLA L. Rev. 1483 (2006).

awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class.

Most,[4] though not all,[5] courts have read these provisions as barring incentive awards.

The peculiar aspect of these provisions is that although they appear to bar incentive awards, they simultaneously

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[4]In re Schering-Plough Corp. Enhance Securities Litigation, 2013 WL 5505744, *37 (D.N.J. 2013), appeal dismissed, (3rd Circ. 13-4328)(Apr. 17, 2014) ("Although the PSLRA specifically prohibits incentive awards or 'bonuses' to Lead Plaintiffs . . .").

Ray v. Lundstrom, Fed. Sec. L. Rep. (CCH) P 97083, 2012 WL 5458425, *3 (D. Neb. 2012) ("Although the PSLRA does not permit incentive awards . . .").

Robles v. Brake Masters Systems, Inc., 2011 WL 9717448, *17 (D.N.M. 2011) ("Congress has expressed hostility to incentive awards in the [PSLRA] which precludes incentive awards in securities-fraud litigation.").

In re TVIA Inc. Securities Litigation, 2008 WL 2693811, *2 (N.D. Cal. 2008) ("[T]his court has itself previously found that in light of the text of § 78u-4(a)(4), and the clear intention to eliminate financial incentives, bonuses and bounties for serving as lead plaintiff, incentive awards and compensatory awards falling outside the costs and expenses specified by the PSLRA are inconsistent with the express goals of § 78u-4(a) (4)." (citing In re ESS Technology, Inc. Securities Litigation, 2007 WL 3231729, *4 (N.D. Cal. 2007))).

Smith v. Dominion Bridge Corp., Fed. Sec. L. Rep. (CCH) P 94205, 2007 WL 1101272, *12 (E.D. Pa. 2007) ("The district courts that have awarded incentive awards or requested amounts without requiring any explanation or detailing of the alleged costs in cases where PSLRA clearly applies, appear to be ignoring the clear language of PSLRA.").

Swack v. Credit Suisse First Boston, LLC, Fed. Sec. L. Rep. (CCH) P 94106, 2006 WL 2987053, *5 (D. Mass. 2006) ("I find that a representative plaintiff is only entitled under the PSLRA to an award of 'reasonable costs and expenses' over and above his or her pro rata share of the recovery, and not to a traditional 'compensation' or 'incentive' award. The representative plaintiff's significant stake in the outcome of the litigation is assumed to be sufficient incentive to remain involved in the litigation and to incur such expenses in the first place.").

[5]In re Heritage Bond Litigation, 2005 WL 1594403, *17 (C.D. Cal. 2005) (stating that "[i]t is within this Court's discretion to award incentive fees to named class representatives in a class action suit" and proceeding to do so).

permit named plaintiffs to be reimbursed for "reasonable costs and expenses (including lost wages) . . ."[6] Courts therefore regularly award representative plaintiffs monies under these sections,[7] and such awards are similar to service or incentive awards in regular class suits. Where the courts have split somewhat, however, is in how much documentation they require.[8] Some courts require little documentation and hence appear to treat the reimbursement provision as

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[6]*See* 15 U.S.C.A. § 78u-4(a)(4).

[7]In re Schering-Plough Corp. Enhance Securities Litigation, 2013 WL 5505744, *37 (D.N.J. 2013), appeal dismissed, (3rd Circ. 13-4328)(Apr. 17, 2014) ("Reasonable payments to compensate class representatives for the time and effort devoted by them have been approved.").

In re American Intern. Group, Inc. Securities Litigation, 2012 WL 345509, *6 (S.D.N.Y. 2012) ("Courts in this Circuit routinely award . . . costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." (internal quotation marks omitted)).

In re Giant Interactive Group, Inc. Securities Litigation, 279 F.R.D. 151, 166 (S.D.N.Y. 2011) (awarding incentive awards to four named plaintiffs and stating that "the Court finds that the lead plaintiffs devoted substantial effort and time to this case, including reviewing filings, producing documents, and travelling to be deposed, making these requests for awards reasonable").

In re Marsh & McLennan Companies, Inc. Securities Litigation, 2009 WL 5178546, *21 (S.D.N.Y. 2009) (awarding a combined $214,657 to two institutional lead plaintiffs).

In re American Business Financial Services Inc. Noteholders Ltigiation, Fed. Sec. L. Rep. (CCH) P 95015, 2008 WL 4974782, *19 (E.D. Pa. 2008) (awarding costs and expenses to lead plaintiffs).

Hicks v. Stanley, Fed. Sec. L. Rep. (CCH) P 93,579, 2005 WL 2757792, *10 (S.D.N.Y. 2005) ("Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place.").

In re WorldCom, Inc. ERISA Litigation, 33 Employee Benefits Cas. (BNA) 2291, 59 Fed. R. Serv. 3d 1170 (S.D.N.Y. 2004), order clarified, 2004 WL 2922083 (S.D.N.Y. 2004) (awarding $5,000 to each of the three named plaintiffs because they had "performed an important service to the class and the burden of this commitment deserves to be recognized through an award from the common fund").

[8]In re Enron Corp. Securities, Derivative & "ERISA" Litigation, 2008 WL 2714176, *2 (S.D. Tex. 2008) (noting the "split between courts which have read the [PSLRA] narrowly and strictly limited reimburse-

quite similar to a flat incentive award.[9] Other courts require

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ment to actual costs and expenses incurred, many only when proven with detailed evidence, and other courts that have granted lead plaintiffs incentive awards to encourage high quality monitoring and not insisted that alleged costs and expenses to be detailed or even limited to 'costs and expenses directly relating to representation of the class" (footnote omitted) (internal quotation marks omitted)).

[9]In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litigation, 364 F. Supp. 2d 980, 1000, Fed. Sec. L. Rep. (CCH) P 93239 (D. Minn. 2005) ("Lead plaintiffs here have fully discharged their PSLRA obligations and have been actively involved throughout the litigation. These individuals communicated with counsel throughout the litigation, reviewed counsels' submissions, indicated a willingness to appear at trial, and were kept informed of the settlement negotiations, all to effectuate the policies underlying the federal securities laws. The court, therefore, awards the $100,000 collectively to the lead plaintiff group to be distributed among the eight lead plaintiffs in a manner that plaintiffs' co-lead counsel shall determine in their discretion.").

Hicks v. Stanley, Fed. Sec. L. Rep. (CCH) P 93,579, 2005 WL 2757792, *10 (S.D.N.Y. 2005) ("Finally, the court approves the reimbursement of expenses to lead plaintiff Nicholson pursuant to plaintiff's motion. Nicholson spent considerable time discharging his responsibilities as lead plaintiff and class representative. The PSLRA permits lead plaintiffs to recover reasonable costs and expenses related to their representation of the class. Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." (citation omitted)).

Denney v. Jenkens & Gilchrist, 230 F.R.D. 317, 355, R.I.C.O. Bus. Disp. Guide (CCH) P 10837 (S.D.N.Y. 2005), aff'd in part, vacated in part, remanded, 443 F.3d 253, R.I.C.O. Bus. Disp. Guide (CCH) P 11050 (2d Cir. 2006) ("In granting compensatory awards to the representative plaintiff in PSLRA class actions, courts consider the circumstances, including personal risks incurred by the plaintiff in becoming a lead plaintiff, the time and effort expended by that plaintiff in prosecuting the litigation, any other burdens sustained by the plaintiff in lending himself or herself to prosecuting the claim, and the ultimate recovery.").

In re WorldCom, Inc. ERISA Litigation, 33 Employee Benefits Cas. (BNA) 2291, 59 Fed. R. Serv. 3d 1170 (S.D.N.Y. 2004), order clarified on other grounds, 2004 WL 2922083 (S.D.N.Y. 2004) (awarding the three named plaintiffs $5,000 each because "the three plaintiffs have been intimately involved in every step of the litigation. The named plaintiffs have performed an important service to the class and the burden of this commitment deserves to be recognized through an award from the common fund.").

In re Infospace, Inc., 330 F. Supp. 2d 1203, 1216 (W.D. Wash. 2004) ("Lead Plaintiffs Amir Heshmatpour and Ronald Wyles on behalf of

clear proof of expenses[10] and hence read the provision more

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Coastline Corporation Ltd. have requested reimbursement of their costs and expenses. A court may award 'reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative serving on behalf of the class.' Amir Heshmatpour requests $5,000, and Ronald Wyles requests $6,600. The Court finds these amounts to be reasonable." (quoting 15 U.S.C.A. § 78U-4(a)(4))).

[10]In re TVIA Inc. Securities Litigation, 2008 WL 2693811, *2 (N.D. Cal. 2008) (finding "no evidence in the conclusory statements provided in [lead plaintiff's] declaration that the compensation he seeks is reimbursement for costs, expenses or lost wages, reasonable or otherwise, as required by the text of § 78u-4(a)(4)" and thus declining to award the requested $15,000 compensation).

Smith v. Dominion Bridge Corp., Fed. Sec. L. Rep. (CCH) P 94205, 2007 WL 1101272, *12 (E.D. Pa. 2007) ("The class representative failed to provide this court with any evidence of actual expenses incurred, lost wages, lost vacation time, or lost business opportunities. I conclude that the class representative has failed to demonstrate that he has incurred any 'reasonable costs and expenses' that can be awarded under PSLRA. Thus, the court will not award [named plaintiff] anything beyond his pro rata share of the settlement fund.").

In Re Ntl, Inc. Securities Litigation, 2007 WL 623808, *10 (S.D.N.Y. 2007) ("Lead Plaintiffs have signed certifications pursuant to the PSLRA, but their affidavits fail to explain how they determined their asserted hourly 'lost wages.' Without a better explanation for claims of $200–800 per hour of 'lost wages,' the Court should decline to award such amounts." (citation omitted)).

In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation, 2007 WL 313474, *25 (S.D.N.Y. 2007) ("Although [the lead plaintiff] claims to have spent time during her work day performing her duties as lead plaintiff, she nevertheless fails to claim any actual expenses incurred, or wages or business opportunities she lost, as a result of acting as lead plaintiff. Under the PLSRA, it is simply not enough . . . to assert that she took time out of her workday and that her time is conservatively valued at $500 per hour. Accordingly, the Court declines to award reimbursement to [lead plaintiff].").

Swack v. Credit Suisse First Boston, LLC, Fed. Sec. L. Rep. (CCH) P 94106, 2006 WL 2987053, *5 (D. Mass. 2006) ("Since Congress specifically chose to limit recovery in PSLRA cases to reasonable costs and expenses (including lost wages) directly relating to the representation of the class, . . . I find that a representative plaintiff must provide the court with meaningful evidence demonstrating his or her actual costs and expenses (including lost wages) directly relating to the representation of the class . . ." (internal quotation marks omitted)).

Abrams v. Van Kampen Funds, Inc., Fed. Sec. L. Rep. (CCH) P 93,648, 2006 WL 163023, *4 (N.D. Ill. 2006) ("Lead plaintiffs do not contend that any portion of the requested amount represents any actual expenses that either has incurred. They do not claim that they missed any

narrowly. In particular, courts are more accepting of familiar nontaxable costs (such as documented travel expenses and fax, photocopy, and telephone charges)[11] but are more skeptical of lost wages or business opportunities, as the latter are often particularly difficult to document.[12]

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work or other earning opportunity in order to participate in the litigation. Under the PSLRA, lead plaintiffs cannot be awarded additional compensation. The request for a compensatory award will be denied.").

In re KeySpan Corp. Securities Litigation, Fed. Sec. L. Rep. (CCH) P 93534, 2005 WL 3093399, *21 (E.D.N.Y. 2005) ("Counsel fail to provide *any* basis for determining what reasonable costs and expenses were incurred [by lead plaintiffs]. Counsel have not shown how the time expended by the Class Representative and Lead Plaintiffs resulted in actual losses, whether in the form of diminishment in wages, lost sales commissions, missed business opportunities, use of leave or vacation time or actual expenses incurred. Without any proof or detail in this regard, I recommend that Class Representative and Lead Plaintiffs not be awarded any payment beyond their *pro rata* share of the settlement.").

In re AMF Bowling, 334 F. Supp. 2d 462, 470 (S.D.N.Y. 2004) (finding no congressional intent for undocumented reimbursements under the PSLRA and denying requested reimbursements to class representatives in part because of the lack of such documentation).

[11]For a discussion of what constitute nontaxable costs, *see* Rubenstein, 5 **Newberg on Class Actions** § 16:5 (5th ed.).

[12]In re Genta Securities Litigation, 70 Fed. R. Serv. 3d 931 (D.N.J. 2008) ("This Court accepts [lead plaintiff's] assertion that he incurred $5250 in costs from travel expenses, fax and photocopy expenses, and telephone charges. However, [lead plaintiff] has not submitted any evidence showing that he lost wages or business opportunities due to the time he spent working on the instant litigation. Although [lead plaintiff] estimated that he spent 222.36 hours performing duties related to this action, and established his discounted billing rate as $225 per hour, [he] has failed to show that his contributions to this action foreclosed him from obtaining business opportunities or earning wages.").

Smith v. Dominion Bridge Corp., Fed. Sec. L. Rep. (CCH) P 94205, 2007 WL 1101272, *12 (E.D. Pa. 2007) ("The class representative failed to provide this court with any evidence of actual expenses incurred, lost wages, lost vacation time, or lost business opportunities. I conclude that the class representative has failed to demonstrate that he has incurred any 'reasonable costs and expenses' that can be awarded under PSLRA. Thus, the court will not award [named plaintiff] anything beyond his pro rata share of the settlement fund.").

In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation, 2007 WL 313474, *25 (S.D.N.Y. 2007) ("Although [the lead plaintiff] claims to have spent time during her work day performing her duties as lead plaintiff, she nevertheless fails to claim any actual expenses incurred, or wages or business opportunities she lost, as a result of acting as lead

Thus, while Congress sought to limit incentive awards in class suits when it enacted the PSLRA, it did allow some payments to be made to class representatives, and courts have awarded such payments. Empirical data on incentive awards, described elsewhere in the Treatise,[13] nonetheless demonstrate that class representatives are least likely to get incentive awards in securities suits than in any other type of case. One study of cases resolved between 1993–2002 (which therefore straddles the enactment of the PSLRA) reported that courts granted incentive awards in 27.8% of all cases but 24.5% of securities cases.[14] A later study of cases resolved between 2006–2011 reported that courts granted incentive awards in 71.3% of all cases but in only 38.7% of securities cases.[15] To be clear, these data are not differentiating between cases in which counsel never applied for awards and those in which the court rejected an award, so the source of the lower award rate is unclear. Yet its existence is not.

The peculiarity about this state of affairs is that in enacting the PSLRA, Congress explicitly wanted class representatives to seize control of securities cases from class counsel. To accomplish that end, it sought to engage institutional investors in the endeavor by holding that the largest shareholder could be named the lead plaintiff in the case and authorized to hire lead counsel. Yet Congress provided very little incentive for those institutions to undertake that work and, in curtailing incentive awards, it destroyed one of the few incentives that did exist. Moreover, as Professor Nagareda argued some years ago, if the point of incentive awards is to reward *quality monitoring*, it seems particularly odd to limit awards in the very cases in which the goal is to

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plaintiff. Under the PLRSA, it is simply not enough . . . to assert that she took time out of her workday and that her time is conservatively valued at $500 per hour. Accordingly, the Court declines to award reimbursement to [lead plaintiff].").

[13]*See* Rubenstein, 5 **Newberg on Class Actions** §§ 17:7 to 17:8 (5th ed.).

[14]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1323 tbl.2 (2006).

[15]William B. Rubenstein and Rajat Krishna, *Class Action Incentive Awards: A Comprehensive Empirical Study* (draft on file with author).

encourage quality monitors:[16]

> The PSLRA hinders the practical achievement of its own ideals for class representatives by confining incentive awards to restitution and rejecting complementary notions of reward. By limiting awards to "reasonable costs and expenses," the PSLRA seeks to fight the proverbial last war—to respond to perceived abuses in the pre-PSLRA era rather than to design a legal framework for awards under the changed arrangements for lead plaintiffs promoted by the PSLRA itself. When it comes to service as a PSLRA lead plaintiff, one substantial sticking point for many institutional investors appears to be precisely the prospect of merely gaining restitution for their efforts, without the possibility of reward beyond their pro rata share of any class-wide recovery. This result is ironic, to say the least, when the law consciously seeks to induce high-quality monitoring from persons who devote their professional lives to seeking big financial rewards, not just restitution for the costs and expenses of their efforts.[17]

In short, the PSLRA sends a mixed message: it aims to encourage large stake holders to intervene and seize control of such cases while insisting that they not be compensated in the normal manner for doing so.

§ 17:20 Incentive awards for objectors

As discussed in a prior section,[1] class members who provide a service to the class are eligible to apply for an incentive award from the court. Typically, it is the class representative or named plaintiff who is the applicant, as these

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[16]Richard A. Nagareda, Restitution, Rent Extraction, and Class Representatives: Implications of Incentive Awards, 53 UCLA L. Rev. 1483, 1491 (2006) ("The embrace of high-quality monitoring as a public policy goal and the experience with institutional investors in the post-PSLRA period, together, highlight the anomaly of awards confined to 'reasonable costs and expenses.' In this context, the law wants high-quality monitoring to occur but has encountered obstacles in achieving that goal. If anything, the logic behind installing institutional investors as lead plaintiffs supports a more—not less—wide-ranging inquiry for incentive awards in securities litigation.").

[17]Richard A. Nagareda, Restitution, Rent Extraction, and Class Representatives: Implications of Incentive Awards, 53 UCLA L. Rev. 1483, 1491 (2006).

[Section 17:20]

[1]For a discussion of eligibility for incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:6 (5th ed.).

parties undertake special functions on behalf of absent class members, sometimes face unique risks in stepping forward to represent the class, and generally serve an important function in enabling a class action by their service to the class.[2] Class members who object to a proposed settlement or fee award and are in some way successful in reshaping the settlement similarly serve an important function in class action practice: because the class representative and class counsel are largely unmonitored agents of the class, those class members who take the time to scrutinize proposed settlements and provide their reactions to the court may assist the court in undertaking its oversight function and serve the class accordingly.[3] Counsel who represent objectors have therefore sought incentive awards on behalf of their objector clients.

Three issues are presented by such proposals: *first,* whether objectors are entitled to seek incentive awards; *second,* if they are, what are the circumstances in which courts should provide such awards; and *third,* if awards are provided, what amount is appropriate.

Eligibility. The answer to the first question seems clear: an objector is necessarily a class member and if that class member provides a service to the class, she stands in a similar position to the class representative entitled to an award and should therefore be similarly entitled. Many courts have so held either directly,[4] or indirectly by entertaining objector incentive award petitions, while few courts have held that objectors are never entitled to seek an award.[5] At least one

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[2]For a discussion of these rationale that underlie incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[3]In re Cardinal Health, Inc. Securities Litigation, 550 F. Supp. 2d 751, 753, Fed. Sec. L. Rep. (CCH) P 94714 (S.D. Ohio 2008) (noting that objectors can "add value to the class-action settlement process by: (1) transforming the fairness hearing into a truly adversarial proceeding; (2) supplying the Court with both precedent and argument to gauge the reasonableness of the settlement and lead counsel's fee request; and (3) preventing collusion between lead plaintiff and defendants").

[4]Hartless v. Clorox Co., 273 F.R.D. 630, 647 (S.D. Cal. 2011), aff'd in part, 473 Fed. Appx. 716 (9th Cir. 2012) (recognizing that incentive awards for objectors are "sometimes available . . . if the objection confers a significant benefit to the class").

[5]Rose v. Bank of America Corp., 2015 WL 2379562, *3 (N.D. Cal.

court has entertained a request from a *pro se* objector.[6] Occasionally, class representatives who later become objectors receive incentive awards, but in granting those awards, the courts have not isolated their service as objectors as independently warranting an award.[7] At least one court has denied an objector incentive award in a PSLRA case on the grounds that incentive awards are barred by that statute.[8]

Standard of review. Courts generally will approve an

2015) ("Without a legal or factual argument, the Objectors plainly request an incentive award of $2,000 each 'for stepping out to protect and serve the class.' In the absence of legal authority that would allow for such an award to an objector, coupled with the complete lack of an explanation as to why such an award would be justified, this request is denied." (citation omitted)).

In re Celexa and Lexapro Marketing and Sales Practices Litigation, 2014 WL 4446464, *10 (D. Mass. 2014) (denying objector's request for a $10,000 incentive award because the objector "invoke[d] no authority for her request for an incentive award to a plaintiff who is not a class representative").

In re classmates.com Consol. Litigation, 2012 WL 3854501, *8–9 (W.D. Wash. 2012) (declining to award an incentive award because "[t]he court is aware of no authority authorizing a 'service award' to an objector" and noting that "[i]f there were such authority, the court assumes that it would treat a participation award to an objector similarly to a participation award to a class representative" but finding that the "objections did not contribute significantly to obtaining any benefit for the class").

[6]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 237-38 (10th Cir. 2009) (entertaining a request for an incentive award but rejecting objector's "invitation to apply to his pro se request for an incentive award the same standards applicable to an objector's request for an attorney fee" because the pro se objector's "position is not parallel to that of an objector seeking payment for his attorney fees").

[7]Martin v. Foster Wheeler Energy Corp., 2008 WL 906472, *9 (M.D. Pa. 2008) (granting incentive awards to two class representatives who later became objectors "for their work as Class Representatives from the inception of the litigation").

Lazy Oil Co. v. Wotco Corp., 95 F. Supp. 2d 290, 292 (W.D. Pa. 1997), aff'd, 166 F.3d 581, 1999-1 Trade Cas. (CCH) ¶ 72420, 42 Fed. R. Serv. 3d 669 (3d Cir. 1999) (granting incentive award to a class representative for his service to the class before he became an objector, but finding that his efforts opposing the settlement "have not enured to the benefit of class members").

[8]In re Enron Corp. Securities, Derivative & "ERISA" Litigation, 2008 WL 4178151, *8 (S.D. Tex. 2008) (denying incentive award for services as class representatives and objectors because "such incentive awards are contrary to the policy behind the PSLRA").

award for an objector if she can prove that her objections "conferred a benefit on the class."[9] Thus, for example, an "objector whose arguments result in a reduction of attorney-fee and expense awards provides a benefit to the class."[10] However, courts—understandably skeptical of repeat objectors who recycle formulaic objections—tend to be dismissive of many objectors' contentions about their achievements.[11] As the Tenth Circuit has stated, "because the court is charged with protecting the interests of the class, general, garden-variety objections usually are not helpful to the court, nor do they benefit the class."[12] This position is consistent with the manner in which courts approach requests for fees from objectors' counsel.[13] Thus, absent evidence that objectors' work benefited the class or put them at risk, courts

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For a discussion of the PSLRA's approach to incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:19 (5th ed.).

[9]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 233, 236 (10th Cir. 2009) (affirming the district court's denial of an incentive award to an objector "on the ground that his efforts did not benefit the class").

Dewey v. Volkswagen of America, 909 F. Supp. 2d 373, 398–99 (D.N.J. 2012), aff'd, 558 Fed. Appx. 191 (3d Cir. 2014), cert. denied, 135 S. Ct. 231, 190 L. Ed. 2d 135 (2014) ("In deciding whether an objector deserves an incentive award, courts have considered whether: (1) the objector's particular efforts conferred a benefit on the class; (2) the objector incurred personal risk; and/or (3) the objector was substantively involved in the litigation.").

[10]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 236 (10th Cir. 2009).

[11]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 236-37 (10th Cir. 2009) (affirming decision denying incentive award to pro se objector, noting that the lower court had concluded that the "objections did not confer a benefit on the class" because they were "general in nature, largely unsupported by specific citation to the record or to supporting caselaw, and lacking in meaningful analysis" and because "[the objector] had not identified any argument unique to his presentation" and "had not point[ed] to any argument of his that was both asserted in greater detail than other objectors and adopted in substance by the Special Master" (internal quotation marks omitted)).

[12]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 237 (10th Cir. 2009).

[13]*See, e.g.*, Rodriguez v. Disner, 688 F.3d 645, 658–59, 2012-2 Trade Cas. (CCH) ¶ 78006 (9th Cir. 2012) ("Nor is it error to deny fees to objectors whose work is duplicative, or who merely echo each others' arguments and confer no unique benefit to the class."). For a discussion of

deny awards.[14]

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objectors' entitlement to fees, *see* Rubenstein, 5 **Newberg on Class Actions** § 15:60 (5th ed.).

[14]McDonough v. Toys R Us, Inc., 2015-1 Trade Cas. (CCH) ¶ 79040, 2015 WL 263562, *30 (E.D. Pa. 2015) (granting one objector an incentive award of $1,000 because "[a]lthough [the objector] did not participate in discovery, nor was he deposed, his objection provided a significant benefit to the class" but denying incentive awards to two other objectors because "they have not demonstrated that their objections provided a benefit to the class").

Gascho v. Global Fitness Holdings, LLC, 2014 WL 3543819, *6 (S.D. Ohio 2014) (denying attorney's fees and incentive awards to objectors because they "have not provided any benefit to the Class").

Fraley v. Facebook, Inc., 2014 WL 806072, *1–2 (N.D. Cal. 2014) (denying both attorney's fees and incentive award to objector because his objections did not "contribute materially to the proceeding").

In re classmates.com Consol. Litigation, 2012 WL 3854501, *8–9 (W.D. Wash. 2012) (denying an incentive award because "[t]he court is aware of no authority authorizing a 'service award' to an objector" and noting that "[i]f there were such authority, the court assumes that it would treat a participation award to an objector similarly to a participation award to a class representative" but finding that the "objections did not contribute significantly to obtaining any benefit for the class").

Hartless v. Clorox Co., 273 F.R.D. 630, 647 (S.D. Cal. 2011), aff'd in part, 473 Fed. Appx. 716 (9th Cir. 2012) (denying objector's request for incentive award because, *inter alia*, her objections "did not confer a benefit on the class or add anything to this decision").

Parker v. Time Warner Entertainment Co., L.P., 631 F. Supp. 2d 242, 279 (E.D.N.Y. 2009) (denying incentive awards to objectors because "[t]here is no indication that the [objectors] themselves were put at risk or inconvenienced in any meaningful way by lending their names to the objections pursued by their counsel").

Perez v. Asurion Corp., 2007 WL 2591174, *1 (S.D. Fla. 2007) (denying incentive award to objector because there was no evidence that the objector "spent a considerable amount of time assisting with the prosecution of this case").

In re Educational Testing Service Praxis Principles of Learning and Teaching, Grades 7–12 Litigation, 447 F. Supp. 2d 612, 634, 213 Ed. Law Rep. 493 (E.D. La. 2006) (denying incentive awards to objectors because only one of the seven objections offered was meritorious, the court would have recognized that the attorney's fee award was too high even absent that objection, and the "objectors' other objections added nothing to the litigation and, if anything, only prolonged it").

In re Excess Value Ins. Coverage Litigation, 598 F. Supp. 2d 380, 393 (S.D.N.Y. 2005) (denying objectors' request for incentive rewards because "the Class received relatively little Settlement Value and Objectors' efforts have not been shown appreciably to have benefitted the Class" and "the Court needed little or no assistance from the Objectors").

Amount. Objector incentive awards are modest. Class representatives tend to serve the class for years, undertake a series of tasks in that function, and face specific risks. Empirical evidence shows that incentive awards for those class representatives average between $10,000–$15,000 per class representative.[15] By contrast, objectors tend to do little more than file a single pleading at the conclusion of the case, possibly appear at the fairness hearing, and plausibly pursue an appeal if the objection is denied.[16] Their service is far more limited than that of the class representative and—despite arguments to the contrary[17]—it is unlikely they would face significant risks by making an objection. Courts

[15]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1307–08 (2006) (reporting that incentive awards are granted in 28% of class suits and that the average award per class representative is about $16,000, with the median award per class representative being closer to $4,000).

[16]Lonardo v. Travelers Indem. Co., 706 F. Supp. 2d 766, 813 (N.D. Ohio 2010), on reconsideration in part, (July 21, 2010) ("The Court held that the named class representatives in this case were entitled to a $5,000 incentive award because each submitted an affidavit describing his extensive involvement in the litigation and assistance to Class Counsel. In contrast, there is no evidence that [the objector] devoted substantial time or effort to this case. He correctly notes that he 'voluntarily involved himself in a case impacting over 400,000 class members,' but does not describe any further involvement with this litigation. Based on that nominal contribution, he is entitled to the nominal sum of $500.00 as an incentive award." (citation omitted)).

[17]Dewey v. Volkswagen of America, 909 F. Supp. 2d 373, 399 (D.N.J. 2012), aff'd, 558 Fed. Appx. 191 (3d Cir. 2014), cert. denied, 135 S. Ct. 231, 190 L. Ed. 2d 135 (2014) (reporting objectors' argument that "in challenging the approval of the settlement, they incurred a substantial personal risk by: (1) exposing themselves to the risk of harassing discovery and private investigation from the plaintiffs' attorneys, and (2) posting an appeal bond of $25,000" (citation omitted) (internal quotation marks omitted)).

Park v. Thomson Corp., 633 F. Supp. 2d 8, 14, 2009-2 Trade Cas. (CCH) ¶ 76775 (S.D.N.Y. 2009) (reporting objectors' argument that they were entitled to an award "because they faced the risk of a Rule 11 sanctions motion threatened by Plaintiffs' counsel" but rejecting this argument because "Rule 11 sanctions are a risk borne by all litigants").

In re Apple Inc. Securities Litigation, Fed. Sec. L. Rep. (CCH) P 96312, 2011 WL 1877988, *4 (N.D. Cal. 2011) (reporting objector's argument that he had "exposed himself to the risk of harassing discovery and quite likely faced private investigation from the plaintiffs' attorneys").

have therefore awarded small sums to successful objectors —$500 in two cases,[18] $1,000 in two others,[19] $1,500 in one[20]—noting that "[t]he amount of the incentive award is related to the personal risk incurred by the individual or any additional effort expended by the individual for the benefit of the lawsuit."[21]

In sum, while objectors are entitled to seek incentive awards, courts are quite wary of providing such awards and do so only in the rare circumstance where the objector's work substantially served the class's interest, and even then only in nominal sums.

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[18]Dewey v. Volkswagen of America, 909 F. Supp. 2d 373, 400 (D.N.J. 2012), aff'd, 558 Fed. Appx. 191 (3d Cir. 2014), cert. denied, 135 S. Ct. 231, 190 L. Ed. 2d 135 (2014) (awarding objectors $500 incentive payments because of "the[ir] willingness to serve as objectors so that their counsel could pursue a legal challenge that ultimately provided a certain benefit to like car owners and lessees warrants some incentive award").

Lonardo v. Travelers Indem. Co., 706 F. Supp. 2d 766, 813 (N.D. Ohio 2010), on reconsideration in part, (July 21, 2010) (awarding objector a "nominal sum" of $500 for his "nominal contribution" to the case).

[19]McDonough v. Toys R Us, Inc., 2015-1 Trade Cas. (CCH) ¶ 79040, 2015 WL 263562, *30 (E.D. Pa. 2015) (granting one objector an incentive award of $1,000 because "[a]lthough [the objector] did not participate in discovery, nor was he deposed, his objection provided a significant benefit to the class" but denying incentive awards to two other objectors because "they have not demonstrated that their objections provided a benefit to the class").

In re Apple Inc. Securities Litigation, Fed. Sec. L. Rep. (CCH) P 96312, 2011 WL 1877988, *5 (N.D. Cal. 2011) (finding that an incentive payment of $1,000 would "fairly . . . compensate [the objector] for [his] contributions to this litigation").

[20]Sobel v. Hertz Corp., 53 F. Supp. 3d 1319, 1334 n.13 (D. Nev. 2014) (finding that the objectors' work "did contribute to the value of the resulting settlement" as even opponents noted that "the Court did reference the Objectors arguments and briefing in deciding to reject the failed settlement").

[21]Park v. Thomson Corp., 633 F. Supp. 2d 8, 14, 2009-2 Trade Cas. (CCH) ¶ 76775 (S.D.N.Y. 2009) (quoting Fears v. Wilhelmina Model Agency, Inc., 2005-1 Trade Cas. (CCH) ¶ 74783, 2005 WL 1041134, *3 (S.D.N.Y. 2005), aff'd in part, vacated in part, remanded, 473 F.3d 423, 2007-1 Trade Cas. (CCH) ¶ 75542 (2d Cir. 2007)).

§ 17:21 Appellate review of incentive awards

Appellate courts review a district court's award or denial of an incentive award under an abuse of discretion standard.[1] In adopting this standard (in a case involving a *pro se* objector's right to an incentive award), the Tenth Circuit gave three reasons justifying its use: *first*, that the Circuit reviews attorney fee awards in class actions using an abuse of discretion standard;[2] *second*, that "the district court's familiarity with the parties and the proceedings supports an

[Section 17:21]

[1]**Second Circuit**

Lobur v. Parker, 378 Fed. Appx. 63, 65 (2d Cir. 2010) ("We review a district court's grant or denial of incentive awards for the abuse of discretion.").

Silverberg v. People's Bank, 23 Fed. Appx. 46, 48 (2d Cir. 2001) ("The abuse-of-discretion standard of review also applies to the grant or denial of incentive awards for class representatives.").

Sixth Circuit

Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003) ("Although this circuit has never addressed the issue, we agree with the circuit courts that have concluded that a district court's denial of an incentive award should be reviewed for an abuse of discretion.").

Seventh Circuit

Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 408 (7th Cir. 2000) ("Class counsel challenges several aspects of the district court's decisions regarding attorneys' fees, costs, and the requested incentive award for the lead plaintiff. . . . We review the district court's decisions respecting these matters for abuse of discretion, except where counsel challenges the methodology employed by the district court, in which case our review becomes plenary.").

Ninth Circuit

In re Mego Financial Corp. Securities Litigation, 213 F.3d 454, 463, Fed. Sec. L. Rep. (CCH) P 90977, 46 Fed. R. Serv. 3d 883 (9th Cir. 2000), as amended, (June 19, 2000) ("[T]he district court did not abuse its discretion in awarding attorney's fees to Class Counsel and in awarding an incentive award to the Class Representatives.").

Tenth Circuit

UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 234-35 (10th Cir. 2009) (applying and explaining the circuit's adoption of an abuse of discretion standard).

[2]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 235 (10th Cir. 2009).

abuse-of-discretion standard";[3] and *third*, because incentive awards arise in common fund cases and such cases are equitable in nature, appellate courts "review the district court's exercise of its equitable powers for abuse of discretion."[4]

A district court abuses its discretion when it has "based its decision on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling."[5] Appellate courts that utilize the abuse of discretion standard uphold trial court findings of fact unless they are clearly erroneous, while they review the trial court's legal analysis *de novo*.[6]

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[3]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 235 (10th Cir. 2009); *see also* Case v. Unified School Dist. No. 233, Johnson County, Kan., 157 F.3d 1243, 1249, 129 Ed. Law Rep. 1003 (10th Cir. 1998) ("We customarily defer to the District Court's judgment [regarding an attorney's fee award] because an appellate court is not well suited to assess the course of litigation and the quality of counsel." (internal quotation marks omitted)).

[4]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 235 (10th Cir. 2009) (internal quotation marks omitted)).

[5]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 235 (10th Cir. 2009) (internal quotation marks omitted)).

[6]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 235 (10th Cir. 2009).

EXHIBIT B

No. 18-12344

In the United States Court of Appeals for the Eleventh Circuit

CHARLES T. JOHNSON,
on behalf of himself and others similarly situated,
Plaintiff–Appellee,
JENNA DICKENSON,
Interested Party–Appellant,

v.

NPAS SOLUTIONS, LLC,
Defendant–Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION OF PROFESSOR WILLIAM B. RUBENSTEIN FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING *EN BANC*

Martin N. Buchanan
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San Diego, CA 92101
Telephone: (619) 238-2426
Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, *amicus* provides the following Certificate of Interested Persons and Corporate Disclosure Statement.

- Buchanan, Martin N. – Counsel for *Amicus Curiae*
- Davidson, James L. – Counsel for Plaintiff-Appellee
- Davis, John W. – Counsel for Appellant Jenna Dickenson
- Debevoise & Plimpton LLP – Counsel for Defendant-Appellee
- Dickenson, Jenna – Appellant
- Ehren, Michael L. – Counsel for Defendant-Appellee
- Goldberg, Martin B. – Counsel for Defendant-Appellee
- Greenwald Davidson Radbil PLLC – Counsel for Plaintiff-Appellee
- Greenwald, Michael L. – Counsel for Plaintiff-Appellee
- Heinz, Noah S. – Counsel for Plaintiff-Appellee
- Hopkins, Honorable James M. – Magistrate Judge
- Isaacson, Eric Alan – Counsel for Appellant Jenna Dickenson
- Issacharoff, Samuel – Counsel for Plaintiff-Appellee
- Johnson, Charles T. – Plaintiff-Appellee

- Johnson, Jesse S. – Counsel for Plaintiff-Appellee
- Keller, Ashley C. – Counsel for Plaintiff-Appellee
- Keller Lenkner LLC – Counsel for Plaintiff-Appellee
- Lash, Alan David – Counsel for Defendant-Appellee
- Lash & Goldberg LLP – Counsel for Defendant-Appellee
- Law Office of John W. Davis – Counsel for Appellant Jenna Dickenson
- Lenkner, Travis D. – Counsel for Plaintiff-Appellee
- Monaghan, Maura K. – Counsel for Defendant-Appellee
- NPAS Solutions, LLC – Defendant-Appellee
- Nutley, C. Benjamin – Counsel for Appellant Jenna Dickenson
- Postman, Warren D. – Counsel for Plaintiff-Appellee
- Radbil, Aaron D. – Counsel for Plaintiff-Appellee
- Rosenberg, Honorable Robin L. – District Court Judge
- Rubenstein, William B. – *Amicus Curiae*
- Stahl, Jacob W. – Counsel for Defendant-Appellee
- Van Wey, Lorelei Jane – Counsel for Defendant-Appellee

1. NPAS Solutions, LLC is wholly owned by National Patient Accounts Services, Inc., which is wholly owned by Parallon Business Solutions, LLC. The ultimate parent of Parallon Business Solutions, LLC is HCA Healthcare, Inc., a publicly traded company.

2. No publicly held corporation owns 10% or more of NPAS Solutions' stock.

Dated: October 29, 2020

Respectfully submitted,

/s/ *Martin N. Buchanan*
Martin N. Buchanan
Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF REHEARING *EN BANC*

Pursuant to Federal Rule of Appellate Procedure 29(b)(3) and Eleventh Circuit Rule 29-3, Professor William B. Rubenstein respectfully requests leave to file the accompanying *amicus curiae* brief in support of rehearing *en banc* in this matter. In support of this request and in demonstration of good cause, *amicus* states as follows:

1. *Amicus* is the Bruce Bromley Professor of Law at Harvard Law School and (since 2008) the sole author of *Newberg on Class Actions*, the leading treatise on class action law in the United States.

2. Professor Rubenstein respectfully submits this brief for three independent reasons. *First*, Professor Rubenstein believes the Panel decision to be of exceptional importance because the vast majority of class action settlements involve incentive awards and they have been approved in every other Circuit in the country. *Second,* the Panel's critical decision cites to and relies on the *Newberg* treatise. The Panel's discussion of Professor Rubenstein's work could be read to suggest that he opposes the practice of incentive awards. Professor Rubenstein seeks to ensure that the record accurately reflects his position on incentive awards. *Third*, *amicus* addresses issues not covered in the briefing to

date by examining (a) the facts underlying *Greenough*; (b) the relevance of Congress's approach to incentive awards in the securities field; and (c) the effect of recent changes to Rule 23 on judicial review of incentive awards.

CONCLUSION

For these reasons, *amicus* respectfully requests leave to file his *amicus curiae* brief in support of rehearing *en banc*.

Dated: October 29, 2020

Respectfully submitted,

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Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this motion was prepared in 14-point Century Schoolbook, a proportionally spaced typeface, using Microsoft Word 2016. *See* Fed. R. App. P. 27(d)(1), 32(g)(1); 11th Cir. R. 29-1. This motion complies with the type-volume limitation of Rule 27(d)(2) because it contains 261 words, excluding the parts exempted under Rule 32(f).

/s/ *Martin N. Buchanan*
Martin N. Buchanan

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2020, a true and correct copy of this motion was served via the Court's CM/ECF system on all counsel of record.

/s/ *Martin N. Buchanan*
Martin N. Buchanan

No. 18-12344

In the United States Court of Appeals for the Eleventh Circuit

CHARLES T. JOHNSON,
on behalf of himself and others similarly situated,
Plaintiff–Appellee,
JENNA DICKENSON,
Interested Party–Appellant,

v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF PROFESSOR WILLIAM B. RUBENSTEIN AS *AMICUS CURIAE* IN SUPPORT OF REHEARING *EN BANC*

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Counsel for Amicus Curiae

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- Greenwald Davidson Radbil PLLC – Counsel for Plaintiff-Appellee
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- Rosenberg, Honorable Robin L. – District Court Judge
- Rubenstein, William B. – *Amicus Curiae*
- Stahl, Jacob W. – Counsel for Defendant-Appellee
- Van Wey, Lorelei Jane – Counsel for Defendant-Appellee

1. NPAS Solutions, LLC is wholly owned by National Patient Accounts Services, Inc., which is wholly owned by Parallon Business Solutions, LLC. The ultimate parent of Parallon Business Solutions, LLC is HCA Healthcare, Inc., a publicly traded company.

2. No publicly held corporation owns 10% or more of NPAS Solutions' stock.

Dated: October 29, 2020

Respectfully submitted,

/s/ *Martin N. Buchanan*
Martin N. Buchanan
Counsel for Amicus Curiae

RULE 35-5(C) STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance: Whether the common practice of awarding incentive payments to named plaintiffs to compensate them for their efforts protecting absent class members' interests is *per se* unlawful.

Dated: October 29, 2020

Respectfully submitted,

/s/ *Martin N. Buchanan*
Martin N. Buchanan
Counsel for Amicus Curiae

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[*]

Amicus curiae Professor William Rubenstein is the Bruce Bromley Professor of Law at Harvard Law School and the author of *Newberg on Class Actions*, the leading American class action law treatise. In 2015, Professor Rubenstein wrote treatise Chapter 17, a 98-page treatment of incentive awards. This review encompassed a range of issues including new empirical evidence about incentive awards.

Amicus respectfully submits this brief for three reasons. *First*, *amicus* believes the Panel's categorical rejection of incentive awards to be of exceptional importance because most class actions involve such awards and because they have been approved in every other Circuit. *Second,* as the Panel's decision relies on the *Newberg* treatise, *amicus* seeks to ensure that the record accurately reflects his position. *Third*, *amicus* addresses issues not covered in the briefing to date by examining (a) the facts underlying *Greenough*; (b) the relevance of Congress's approach to incentive awards in the securities field; and (c)

[*] This brief was not authored in whole or in part by counsel for any party. No party, party's counsel, or person—other than *amicus curiae* or his counsel—contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

the effect of recent changes to Rule 23 on judicial review of incentive awards.

Under Federal Rule of Appellate Procedure 29(b)(2), *amicus* may file this brief only by leave of court. By the accompanying motion, *amicus* has so moved.

STATEMENT OF THE ISSUE WARRANTING *EN BANC* REVIEW

Plaintiff-Appellee Johnson's petition demonstrates that the Panel's decision is of exceptional importance warranting *en banc* review because it misapplies applicable Supreme Court and Eleventh Circuit precedent, conflicts with the holding of every other Circuit on this question, and, in categorically barring incentive awards, affects every class action in this Circuit.

This brief adds three points: the Panel's decision (1) fails on its own terms (as a matter of equity) because it never compared the ***facts*** in *Greenough* to those in this case or in class actions generally; (2) fails to account for Congress's approach to incentive awards in the Private Securities Litigation Reform Act of 1995, an approach which undermines its holding; and (3) fails to acknowledge 2018 congressionally approved changes to Rule 23 that explicitly require a

court reviewing a proposed settlement to ensure "the proposal treats class members *equitably* relative to each other." Fed. R. Civ. P. 23(e)(2)(D) (emphasis added). That amendment squarely places review of incentive awards within Rule 23's settlement approval provision going forward and hence renders the Panel's decision—even if permitted to stand—irrelevant to current class action practice. The Panel stated that "if either the Rules Committee or Congress doesn't like the result we've reached, they are free to amend Rule 23 or to provide for incentive awards by statute," *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1260 (11th Cir. 2020), but it appeared unaware of the actions of Congress and the Rules Committee directly on point.

ARGUMENT

The Panel's prohibition on incentive awards is an issue of exceptional importance, but its decision failed to consider the applicable facts and relevant aspects of federal law and Rule 23.

I. The Panel's decision fails as a matter of equity.

The Panel found *Greenough* controlling without a full review of the case's facts. Those show that Vose, the active litigant, sought attorney's fees and expenses amounting to $53,938.30 and an additional $49,628.35 for himself. *See Trustees v. Greenough*, 105 U.S. 527, 530

(1881). Specifically, Vose sought payment of "an allowance of $2,500 a year for ten years of personal services," *id.,* plus $9,625 in interest, as well as another $15,003.35 for "railroad fares and hotel bills." *Id.*

Those numbers are staggering: inflation calculators suggest that $1 in 1881 is worth $26.49 in 2019 dollars.[1] Thus, Vose sought a "salary" of $66,225 per year for 10 years,[2] plus interest—or a total of $917,216—as well as $397,439 for hotel bills and travel expenses. This amounts to roughly $1.31 million current dollars. It was also equivalent to (92% of) his attorney's fees and expenses.

Is it any wonder that equity balked?

Here the named plaintiff seeks $6,000 in total (0.46% of what Vose sought), none of it a yearly salary of any kind, and all of it amounting to about 1.3% of what the attorneys seek. Any true ***equitable*** analysis

[1] *See Consumer Price Index, 1800-*, Federal Reserve Bank of Minneapolis (last visited Oct. 25, 2020), https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator/consumer-price-index-1800-.

[2] This $66,225 number is perfectly confirmed by the fact that Vose's $2,500 annual salary constituted 25% of the 1881 Supreme Court justice salary of $10,000, while 25% of a current justice's salary ($265,000) is $66,400. *See Judicial Salaries: Supreme Court Justices,* Federal Judicial Center (last visited Oct. 26, 2020), https://www.fjc.gov/history/judges/judicial-salaries-supreme-court-justices.

would find *Greenough* inapposite on the numbers alone. *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 167 (1939) ("As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility.").

Even if the Panel's decision is read as one of type not degree—limiting "salaries" and "personal expenses" regardless of their level—this factual review nonetheless undermines its logic. Vose truly sought a salary—a fixed regular payment, *see Salary*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/salary (last visited Oct. 27, 2020)—while this incentive award ($6,000) and the typical incentive awards are never a fixed regular payment and they hardly amount to a salary. Professor Rubenstein's empirical analysis shows the average incentive award to be $11,697 in 2011 dollars (or $13,299 in 2019 dollars).[3] *See* 5 William B. Rubenstein, *Newberg on Class Actions* § 17:8 (5th ed., June 2020 update) [hereinafter *Newberg on Class Actions*]. These facts undermine the Panel's declaration that,

[3] *See Inflation Calculator*, Federal Reserve Bank of Minneapolis (last visited Oct. 25, 2020), https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator.

"It seems to us that the modern-day incentive award for a class representative is ***roughly*** analogous to a salary." *Johnson*, 975 F.3d at 1257 (emphasis added). Far too much rides on the word "roughly" for that analogy to land.

Nor is *Greenough's* objection to the category of Vose's request labelled "personal expenses" particularly apposite—again, those payments were for $397,439 in hotel bills and travel expenses, amounts the Court might rightly have found extravagant and hence "personal." The modest level of the typical modern incentive award belies any sense that the representative is dining out at the class's expense.

These facts render *Greenough's* concern—that it "would present too great a temptation to parties to intermeddle in the management of valuable . . . funds . . . if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid," *Greenough*, 105 U.S. at 1157—inapplicable to the modern incentive award and render nonsensical the Panel's conclusion "that modern-day incentive awards present even more pronounced risks than the salary and expense reimbursements disapproved in *Greenough*," *Johnson*, 975 F.3d at 1258.

* * *

These objector's counsel proffered this same *Greenough* argument to the Second Circuit, but that Court rejected it on the grounds that *Greenough's* facts were inapposite. *See Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir.), *cert. denied sub nom. Bowes v. Melito*, 140 S. Ct. 677 (2019). The Panel declared itself "unpersuaded by the Second Circuit's position," *Johnson*, 975 F.3d at 1258 n.8, but this review has demonstrated that the Second Circuit got it right and the Panel's conflicting conclusion should be reviewed (and reversed) *en banc*.

II. The Panel's decision fails to account for Congress's approach to incentive awards in an analogous setting.

Far closer in context and time than *Greenough*, is Congress's 1995 approach to incentive awards in the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §§ 78u-4 et seq.

With the PSLRA, Congress aimed to transfer control of securities class actions from small-stakes clients to large institutional investors. Limiting excess payments to named plaintiffs was a critical part of that effort. The PSLRA contains several provisions on point. *First*, the PSLRA requires a putative lead plaintiff to aver that it "will not accept any payment for serving as a representative party on behalf of a class

beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)." 15 U.S.C. § 78u-4(a)(2)(A)(vi). *Second*, the Act states that the representative's fund allocation "shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class." 15 U.S.C. § 78u-4(a)(4). *Third*, the Act explicitly does ***not*** "limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." *Id.; see also* S. Rep. No. 104-98, at 10 (1995) (explaining that "service as the lead plaintiff may require court appearances or other duties involving time away from work").

These provisions demonstrate three pertinent points:

1. Congress sees incentive awards as a question of fair settlement allocation, not attorney's fees.
2. Congress is aware of incentive awards, knows how to limit them when it wants to do so, and has limited them only in securities cases.
3. Even while limiting incentive awards, Congress acknowledges and permits repayment for lead plaintiffs' efforts.

These points undermine the Panel's decision. The majority declined to analyze the incentive award in terms of intra-class equity, as the dissent would have; failed to appreciate that Congress has limited incentive awards only in securities cases; and failed to acknowledge Congress's approval of repayment of expenses, even when otherwise limiting incentive payments.

The PSLRA post-dates *Greenough* by 114 years, and, as a law about modern class action practice, is far closer in context than the trust law at issue in *Greenough*. The Panel should have considered its relevance before holding that *Greenough* categorically bars incentive awards in today's class action.

III. The Panel's decision fails to account for relevant 2018 amendments to Rule 23.

Quoting Professor Rubenstein's treatise, the Panel held that Rule 23 has nothing to say about incentive awards:

> [The] argument [in support of the incentive award] implies that Rule 23 has something to say about incentive awards, and thus has some bearing on the continuing vitality of *Greenough* and *Pettus*. But it doesn't—and so it doesn't: "Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards." The fact that Rule 23 post-dates *Greenough* and *Pettus*, therefore, is irrelevant.

Johnson, 975 F.3d at 1259 (quoting *Newberg on Class Actions* § 17:4) (footnote omitted).

Professor Rubenstein wrote that sentence in 2015. Congress subsequently approved amendments to Rule 23 that render the sentence out of date.[4]

Prior to December 1, 2018, Rule 23(e) directed a court reviewing a settlement agreement to ensure that the agreement was "fair, reasonable, and adequate." That was the entire standard, although each Circuit developed factors pertinent to that review. Congress approved amendments to Rule 23(e) in late 2018 that codified elements of the Circuit tests. *See* Fed. R. Civ. P. 23(e)(2), advisory committee's note to 2018 amendment ("The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.").

One of the new Rule 23 prongs requires a Court reviewing a settlement to ensure that the proposal "treats class members *equitably*

[4] Regardless, the fact that Rule 23 did not mention incentive awards explicitly hardly dictates the Panel's conclusion that the Rule was therefore "irrelevant" in making an equitable evaluation of incentive awards. *See infra* Section III.

relative to each other." Fed. R. Civ. P. 23(e)(2)(D) (emphasis added). The Advisory Committee noted that this prong "calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others." Fed. R. Civ. P. 23(e)(2), advisory committee's note to 2018 amendment.

New Rule 23(e)(2)(D) should now govern review of incentive awards. An incentive award constitutes an extra allocation of the settlement fund to the class representative and a court asked to approve a settlement agreement encompassing such an allocation would need to ensure that it nonetheless "treats class members *equitably* relative to each other."

The facts of this case are exemplary. The parties' settlement established a fund (Doc. 37-1 at Pg. 17 ¶5.1), stated how the fund would be allocated (¶5.2), and noted that the "class plaintiff" would seek "an incentive payment (in addition to any pro rata distribution he may receive [from the fund])." (¶6.2). Counsel then sought settlement approval, including of the incentive award, under Rule 23(e) (Docs. 38, 43).

The objector challenged the incentive award, alleging that it exceeded the amounts recovered by the other class members (Doc. 42 at Pg. 15), then argued to the Panel that the incentive award was a "settlement allocation[] that treat[s] the named plaintiffs better than absent class members," App. Br. at 52, and that "the [d]isparity in this case between [the representative's] $6,000 bonus and the relief obtained for the rest of the class . . . casts doubt on . . . the adequacy of the Settlement," *id.* at 53; *see also id.* at 57 (characterizing award as a "disproportionate payment").

Thus, although counsel lodged the request for judicial approval of the incentive award with their fee petition (Doc. 44 at Pgs. 15–16), they were not seeking a fee award governed by Rule 23(h). They were seeking judicial approval of their settlement agreement allocating extra money to the representative—and Rule 23(e)'s settlement approval provisions govern review of that request.

When an incentive award is properly scrutinized as a question of intra-class equity, its fairness comes into focus. Class representatives and absent class members are differently situated with regard to the litigation, as their titles suggest. A court can—indeed should—take

account of that fact in reviewing a proposed settlement. As Professor Rubenstein explains in the *Newberg* treatise:

> Incentive awards surely make it look as if the class representatives are being treated differently than other class members, but . . . [they] are not similarly situated to other class members. They have typically done something the absent class members have not—stepped forward and worked on behalf of the class—and thus to award them only the same recovery as the other class members risks disadvantaging the class representatives by treating these dissimilarly-situated individuals as if they were similarly-situated . . . . In other words, incentive awards may be necessary to ensure that class representatives are treated equally to other class members, rewarded both for the value of their claims (like all other class members) but also for their unique service to the class.

5 *Newberg on Class Actions* § 17:3.

That is not to say that all incentive awards are equitable—an excessive award, such as that sought in *Greenough*, would surely be inequitable. *See id.* at § 17:18. But it is to say that Congress has now given judges the explicit authority to scrutinize the equity of incentive awards through the lens of Rule 23(e).

Thus, even if the Court were inclined to leave in place the Panel's reasoning as to this pre-2018 settlement, the full Circuit should clarify the inapplicability of the holding to judicial review of settlements after December 1, 2018.

CONCLUSION

For these reasons, the Court should grant the petition for rehearing *en banc*.

Dated: October 29, 2020

Respectfully submitted,

/s/ *Martin N. Buchanan*

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this brief was prepared in 14-point Century Schoolbook, a proportionally spaced typeface, using Microsoft Word 2016. *See* Fed. R. App. 29(a)(4), 32(g)(1). This brief complies with the type-volume limitation of Eleventh Circuit Rule 29-3 because it contains 2,594 words, excluding the parts exempted under Rule 32(f). *See* Fed. R. App. 29(b)(4).

/s/ *Martin N. Buchanan*
Martin N. Buchanan

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2020, a true and correct copy of this brief was served via the Court's CM/ECF system on all counsel of record.

/s/ *Martin N. Buchanan*
Martin N. Buchanan

CERTIFICATE OF SUBMISSION AND SERVICE
AND REQUEST FOR INCLUSION ON THE PUBLIC RECORD

I hereby certify that, on October 11, 2023, I am submitting and serving the foregoing WRITTEN STATEMENT OF ERIC ALAN ISAACSON OF INTENT TO APPEAR IN PERSON AT THE OCTOBER 12, 2023, FINAL- APPROVAL HEARING *IN NATIONAL VETERANS LEGAL SERVICES PROGRAM, ET AL. V. UNITED STATES OF AMERICA* by emailing it to the following email addresses provided for objectors' submissions in the official long-form Class-Action Settlement Notice in this matter:

DCDPACERFeesSettlement@dcd.uscourts.gov
The Honorable Paul L. Friedman
United States District Court for the District of Columbia 333 Constitution Avenue, NW,
Washington, DC 20001

deepak@guptawessler.com
Gupta Wessler PLLC
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brenda.gonzalez.horowitz@usdoj.gov
Brenda Gonzáles Horowitz
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601 D Street, N.W.
Washington, DC 20530

I further respectfully request that both the forgoing duly served and submitted WRITTEN STATEMENT OF ERIC ALAN ISAACSON OF INTENT TO APPEAR IN PERSON AT THE OCTOBER 12, 2023, FINAL- APPROVAL HEARING *IN NATIONAL VETERANS LEGAL SERVICES PROGRAM, ET AL. V. UNITED STATES OF AMERICA* and my previously served and submitted September 12, 2023, OBJECTION OF ERIC ALAN ISAACSON) TO PROPOSED SETTLEMENT IN *NATIONAL VETERANS LEGAL SERVICES) PROGRAM, ET*

AL. V. UNITED STATES OF) AMERICA, be included in the publicly available PACER-accessible district-court docket in the foregoing matter.

/s/ Eric Alan Isaacson
Eric Alan Isaacson
(pro se)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 1:16-cv-00745-PLF

NOTICE OF SUBMISSION OF PAYMENT NOTIFICATION FORMS

At yesterday's hearing, the Court asked class counsel to file four forms used by the class administrator: (1) the form used to allow PACER accountholders to notify the administrator that an entity paid PACER fees on their behalf, (2) the form used to allow payers to notify the administrator that they paid PACER fees on an accountholder's behalf, (3) the notification sent to accountholders informing them that an individual or entity claimed to pay PACER fees on their behalf; and (4) the form used to allow PACER accountholders to dispute the payment notification.

These forms are attached as exhibits. By way of background, this Court's preliminary-approval order, issued in May 2023, required the plaintiffs to modify the PACER Fees Class Action website to "allow accountholders to notify the Administrator that an entity paid PACER fees on their behalf, and. . . allow payers to notify the Administrator that they paid PACER fees on an accountholder's behalf." ECF 153 at 5. Individuals or entities were required to submit these Payment Notification Forms within sixty days of the dissemination of email notice. That deadline was subsequently extended to October 5, 2023.

Exhibit 1 is the form template used by PACER accountholders to notify the class administrator that someone paid fees on their behalf. For example, if an individual attorney is listed as the accountholder on a PACER account but the PACER fees were in fact paid by a law firm, the attorney could notify the administrator that the law firm paid the fees associated with the account. To date, the administrator has received 464 accountholder notifications.

Exhibit 2 is the form template used by payers to notify the administrator that they paid PACER fees on behalf of accountholders. For example, if a law firm paid the PACER fees for each of its attorney accountholders, it could notify the administrator that it did so. This form requires the payers to include the time period for which they paid the fees (to account, for example, for accountholders who may have changed jobs but kept the same PACER number). To date, the administrator has received 409 payer notifications.

Exhibit 3 is the email used to notify the accountholder that a payer submitted a notification informing the administrator that it paid fees on behalf of the accountholder and providing the accountholder an opportunity to dispute the notification.

Exhibit 4 is the form template used by PACER accountholders to dispute the payment notification. To date, the administrator has not received any such disputes.

Dated: October 13, 2023

Respectfully Submitted,

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Counsel for Plaintiffs National Veterans Legal Services Program, National Consumer Law Center, Alliance for Justice, and the Class

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2023, I electronically filed this notice through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ William H. Narwold
William H. Narwold

EXHIBIT 1

Case No. 1:16-cv-00745-PLF

KCC

Home | Class Notice | Court Documents | Frequently Asked Questions | Payment Notification/Dispute | Address Update

PACER National Veterans Legal Services Program, et al. v. United States II

Payment Notification Form

Account Holder Information

First Name

Last Name

*Firm Name

*Primary Address

Primary Address Continued

*City

*State — Select

*Zip

*Country — UNITED STATES

*Telephone Number

*Email

*Pacer Account Number

☐ If you have an Old Pacer Account Number that is in the format of two letters by 4 digits, check this box.

Time period during which the account was held (quarters) (e.g., first quarter 2012 through third quarter 2013)

*From (Quarter) — Select

*(Year) — Select

*To (Quarter) — Select

*(Year) — Select

Payer Information

*Please choose from one of the options:

○ My PACER fees are paid by one payer during the class action period. (second quarter 2010 through second quarter 2018)

○ My PACER fees are paid by multiple payers during the class action period. (second quarter 2010 through second quarter 2018)

Certification

* ☐ By checking this box, I declare that the information supplied in this Payment Notification Form is true and correct to the best of my knowledge.

Agree and Submit

*Required

EXHIBIT 2

Case No. 1:16-cv-00745-PLF

PACER National Veterans Legal Services Program, et al. v. United States II

Payment Notification Form

Payer Information

First Name

Last Name

*Firm Name

*Telephone Number

*Email

*Pacer Account Number

☐ If you have an Old Pacer Account Number that is in the format of two letters by 4 digits, check this box.

*Description

*Upload Proof of Payment (e.g., credit card statements, canceled checks, payment receipts)

Maximum allowed uploaded files: 5
Maximum file size: 10 MB
Allowed file types: .jpg, .jpeg, .tif, .tiff, .gif, .png, .pdf

Choose File No file chosen

Choose File No file chosen

Choose File No file chosen

Choose File No file chosen

Choose File No file chosen

Certification

* ☐ By checking this box, I declare that the information supplied in this Payment Notification Form is true and correct to the best of my knowledge.

Agree and Submit

*Required

EXHIBIT 3

Case No. 1:16-cv-00745-PLF

Subject: PACER Fees - Payment Notification

According to PACER billing records reflecting account-holder information, you are associated with a PACER account that paid PACER fees during the class period.

On or about July 6, 2023, the Claims Administrator sent you notice via email informing you that the parties in *National Veterans Legal Services Program, et al. v. United States*, have reached a settlement for $125,000,000. As explained in the notice, there may be circumstances where an individual or entity paid PACER fees on an account holder's behalf. In those instances, the payer is the class member, not the account holder.

The Claims Administrator has been informed by an entity or individual that they paid PACER fees on your behalf and is thus the proper recipient of any settlement check associated with your PACER account (<Account Number>). If you believe this is incorrect, please visit <Dispute Link> to fill out and submit a Dispute Notification Form. The Dispute Notification Form will ask you for the Payment Notification Form (PNF) number. The PNF number is <PNF Number>. You must submit the Dispute Notification Form within ten days of receipt of this email. By not submitting a Dispute Notification Form you confirm that another entity or individual paid PACER fees on your behalf and waive all rights to contest entitlement to any settlement funds associated with your PACER account now or at any time in the future.

If you have any questions, please contact class counsel at pacerlitigation@motleyrice.com or 800-934-2792.

EXHIBIT 4

Case No. 1:16-cv-00745-PLF

KCC

PACER National Veterans Legal Services Program, et al. v. United States II

Dispute Form

Account Holder Information

First Name

Last Name

*Firm Name

*Primary Address

Primary Address Continued

*City

*State — Select

*Zip

*Country — UNITED STATES

*Telephone Number

*Email

Pacer Account Number — 3469807

*Payment Notification Form Number

*Payment Period

*From (Quarter) — Select

*(Year) — Select

*To (Quarter) — Select

*(Year) — Select

*Upload Proof of Payment (e.g., credit card statements, canceled checks, payment receipts)

Maximum allowed uploaded files: 5
Maximum file size: 10 MB
Allowed file types: .jpg, .jpeg, .tif, .tiff, .gif, .png, .pdf

Choose File No file chosen

Choose File No file chosen

Choose File No file chosen

Choose File No file chosen

Choose File No file chosen

Certification

* ☐ **By checking this box, I declare that the information supplied in this Dispute Form is true and correct to the best of my knowledge.**

Agree and Submit

*Required

ORIGINAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	Civil No. 16-745-PLF NOTICE OF APPEAL OF CLASS MEMBER AND OBJECTOR ERIC ALAN ISAACSON

Notice is hereby given that Eric Alan Isaacson, a Class Member and Objector in the above-named case, hereby appeals to the United States Court of Appeals for the Federal Circuit from the OPINION (DE169), and the FINAL JUDGMENT AND ORDER ON FINAL APPROVAL OF CLASS SETTLEMENT, ATTORNEY'S FEES, COSTS, AND SERVICE AWARDS (DE170), that were entered March 20, 2024, as well as from any prior rulings, opinions, or orders that merge therein.

DATED: April 17, 2024

Respectfully Submitted,

Eric Alan Isaacson

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the United States that the foregoing statement that on April 17, 2024, I served my Notice of Appeal from the OPINION (DE169), and the FINAL JUDGMENT AND ORDER ON FINAL APPROVAL OF CLASS SETTLEMENT, ATTORNEY'S FEES, COSTS, AND SERVICE AWARDS (DE170), by placing true and correct copies of said Notice in sealed envelopes, placed in the US mail with first-class postage prepaid, addressed to each of the following:

The Honorable Paul L. Friedman
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Eric Alan Isaacson
(pro se)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * * * * * * * * * * * * * * *

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al., Plaintiffs,	)	Civil Action No. 16-745
vs.	)	
UNITED STATES OF AMERICA,	)	October 12, 2023 10:12 a.m.
Defendant.	)	Washington, D.C.

* * * * * * * * * * * * * * * * * *

TRANSCRIPT OF SETTLEMENT HEARING
BEFORE THE HONORABLE PAUL L. FRIEDMAN,
UNITED STATES DISTRICT COURT SENIOR JUDGE

APPEARANCES:

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(Appearances Continued)

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ALSO PRESENT: WILLIAM MEYERS, General Counsel,
Administration Office of the Courts

RENEE BURBANK, Director of Litigation
National Veterans Legal Services Program

STUART ROSSMAN, Director of Litigation
National Consumer Law Center

DON KOZICH, Objector

Court Reporter: Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter
U.S. Courthouse

This hearing was held via videoconference and/or telephonically and is, therefore, subject to the limitations associated with audio difficulties while using technology, i.e., static interference, etc.

Proceedings reported by machine shorthand.
Transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE COURTROOM DEPUTY: This is Civil Action 16-745, National Veterans Legal Services Program, et al. versus the United States.

Counsel, please step forward to the podium and state your appearances for the record.

MR. GUPTA: Good morning, Your Honor. Deepak Gupta, class counsel for the plaintiffs.

THE COURT: Good morning.

Anybody else at counsel table?

MR. NARWOLD: Good morning, Your Honor. Bill Narwold from Motley Rice, also for the class.

Meghan Oliver --

THE COURT: Let me just say this. Since we have people on Zoom, the only way they can hear you is if you speak from a microphone.

THE COURTROOM DEPUTY: Counsel, would you please approach the podium.

MR. NARWOLD: Good morning, Your Honor. Bill Narwold, Motley Rice, also on behalf of the plaintiffs.

MS. OLIVER: Meghan Oliver, also with Motley Rice, on behalf of the plaintiffs.

MR. TAYLOR: Good morning, Your Honor. Jonathan Taylor, Gupta Wessler, also appearing for the plaintiffs.

MS. GONZALEZ HOROWITZ: Good morning, Your Honor. Assistant U.S. Attorney Brenda Gonzalez Horowitz; and with me I have William Meyers, General Counsel of the Administration Office of the Courts, on behalf of the United States.

THE COURT: Good morning to all of you.

MR. ISAACSON: Good morning.

THE COURT: Yes, sir.

MR. ISAACSON: May it please the Court.

Good morning. I am Eric Allan Isaacson. I am an objector. I will be speaking after their presentations. Thank you, Your Honor.

THE COURT: Thank you. Good morning.

All right. So just to set the stage, this case, National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice versus the United States of America, which I always refer to as the "Pacer case," was originally handled by my now retired -- and I must say quite happily retired colleague, Judge Huvelle. Judge Ellen Segal Huvelle had this case from its inception in 2016 until she retired, then I took the case over.

She considered the arguments of counsel about what services, shall we say, were properly payable through Pacer fees and what were not. The Pacer fees are fees that are

charged, as I understand it, to law firms and lawyers and to others who want to get, through the courts and the court system, information about cases in which they are not counsel. If you are counsel, you are notified automatically.

Now, all of this, of course, is a great thing because when I started as a judge everything was on paper and there was nothing electronic. Then we put all of the civil stuff on electronic filing, accessed it electronically. As Mr. Meyers will recall, if he has been around long enough, criminal was a little harder because of concerns about security for defendants and witnesses; but, eventually, we wound up having all civil and all criminal electronic filings; orders accessible electronically. You can sit in your office and be notified if you are counsel in a case about what is happening in your case. If it's not your case, and you are interested, you go on Pacer and you pay a fee.

Now, the only problem with the system is that it used to be if you didn't get to the courthouse by 4:00 or 4:30 you couldn't file. Now, if it's 11:59 p.m. you are still timely, which makes law clerks' work harder and makes lawyers' work harder. That's an aside.

As I recall, there are seven categories of things that Pacer fees are ultimately used for. When this was

before Judge Huvelle, she considered arguments from the plaintiffs and arguments from the government, the Administrative Office of the Courts, represented by the Justice Department; and she rejected both arguments. She found a middle ground and concluded that there were a great many things that the Administrative Office of the Courts was charging users for, but there were some things -- that were legitimate, but there were some things that were not.

She wrote an opinion, 291 F. Supp. 3d. 123, in which she explained her reasoning under the relevant statutes and legislative history, and the case then went to the federal circuit.

In reading their opinion, at 968 Fed 3d. 1340, as I understand it, the parties essentially made the same arguments they had made to Judge Huvelle in the federal Circuit, rejected both sides' arguments; agreed with Judge Huvelle, finding a middle ground. And like any district judge, I am sure she was delighted to read the first paragraph of the opinion in which the Circuit said: We conclude that the district court got it just right. As I tell my friends in the D.C. Circuit, they don't say that often enough.

As to the seven categories -- and you-all can correct me if I am wrong on any of this; I just thought it would be useful to try to, on the record, sort of set the

stage. I guess there were six categories.

As to the six categories, Judge Huvelle and the Circuit -- well, the first category is funding the operation of Pacer itself, and that was clearly fundable through the fees; then there were six additional categories. She said that funding the case management and electronic case filing system, which I just talked about, CM/ECF, was legitimate use of the fees; the electronic bankruptcy noticing, called EBM, was legitimate. There was a study called the "State of Mississippi Study," she said no; it was wrong to use the fees for that. Violent Crime Control Act notification system, she and the Circuit both said no. Web-based juror services, E-juror; again, no. And finally, courtroom technology, as I read it, you can correct me if I'm wrong, the Circuit said mostly no, but there were a few exceptions.

They explained the reasoning and why they thought she was right and concluded that Pacer fees, under the statute, are limited to the amount needed to cover expenses incurred and services providing public access to federal court electronic docketing information; and then they sent it back. They affirmed, and sent it back to Judge Huvelle for further proceedings consistent with their opinion.

That's where I come in and that's where you came in. Because after a lot of -- as I read it -- a lot of effort -- not to prejudge anything, arm's length

negotiation, a settlement agreement was reached which sets up, what would seem to me, to be kind of a complicated system but a necessary system to reach all of the users over the relevant years. And so, on remand, there was a lot less for me to do than might have been the case. After all was said and done, there was a settlement agreement concluded and filed.

Having reviewed that in the filings that you provided with it, I, on May 8, 2023, entered an order granting plaintiffs' revised motion for preliminary approval of class settlement and, then, the process to get us to today, the yin, including the notices sent out; and I am sure there will be some discussion of the adequacy of those notices and whether everybody was properly attempted to be reached and in all of the other things that you need to do to get where we are. And since then there have been numerous filings by the parties, briefs, affidavits, or declarations, and by some objectors as well.

So in scheduling the settlement hearing in Docket No. 112, in my order of October 4, 2023 -- I have earlier orders, too -- but it essentially set up how we were going to do this, and that people -- certain people could appear and speak if they wanted to virtually, and people here could speak in person. There would also be a public line for anybody who wanted to hear what goes on in these proceedings

but not participate.

Essentially, what I had set forth in this order was that we would start with the parties, the plaintiffs' class counsel in the United States, having up to 20 minutes to make opening remarks; and then I would hear from objectors. And anyone who had submitted a written statement and wants to be heard can have ten minutes to talk, and anybody who has not written a submitted written statement can have five minutes to talk if they're here. Counsel will have time to respond to those objections and to make a closing statement.

Then we, separately, will have an argument on attorney's fees, with each side getting 15 minutes to present their positions and to answer questions from me.

So unless anybody has anything preliminarily or procedurally you want to say before we dive into it, I guess we can start with the openings.

MR. GUPTA: Good morning, Your Honor.

I am Deepak Gupta, class counsel in this matter. It is an honor to be here to present this historic class action settlement for the Court's consideration at the final approval stage.

I just want to start by thanking the Court and the court staff for the work that went into arranging this hearing, thoughtfully, and for ensuring that the class

representatives, as well as class members, can appear and be heard today, both in person and remotely. We do have a couple of folks remotely on Zoom.

Before we begin, I would just like to recognize the people who are here in the courtroom this morning and remotely as well, without whom we never would have gotten to this point.

With me at counsel table, my colleague John Taylor from the Gupta Wessler firm, who was there from the very beginning and every step of this case. My colleagues Bill Narwold and Meghan Oliver from the Motley Rice firm, with whom we worked hand in glove; and Charlotte Loper as well from the Motley Rice firm.

If the Court has questions about the mechanics of notice or class administration, claims administration, my colleagues from Motley Rice, particularly Meghan Oliver, are here to answer those.

We also have four people here from the class representatives, both in the courtroom and via Zoom, that I would like to thank for their service in this case and introduce to the Court and indicate who will be speaking here today.

In the courtroom we have Jake Faleschini.

THE COURT: Say that more into the microphone, please.

MR. GUPTA: Jake Faleschini, he is the director of justice programs at the Alliance for Justice, and he is going to say a few words on behalf of AFJ in support of the settlement. Also in the courtroom we have Ryan Kelly, who is a staff attorney with the National Veterans Legal Services Program.

And via Zoom we're joined by Renee Burbank. She is the litigation director at the National Veterans Legal Services Program. She's sorry she couldn't be here in person today. She has plenty of experience with class actions; is actually a published expert on illegal exaction claims, of all things. She, too, will speak briefly in support of the settlement.

And finally, last but not least, Stuart Rossman is also joining us via Zoom from Boston; he is the litigation director of the National Consumer Law Center. He also happens to be a leading expert on class actions and class action settlements. He will say a few words this morning in support of the settlement. We will try to keep all of those statements brief.

So just a few words on the process first. Those who are unfamiliar with class actions might wonder why we have a big hearing when a case is settled. What is there to talk about? The case is over. The parties have agreed to settle it.

But a class action settlement like this one binds hundreds of thousands of people. People who haven't been necessarily participating in the litigation. And so it's essential to the process that the Court ensure for itself that the settlement is fair, that we allow people to have notice and an opportunity to be heard. And I think it's important not just that the settlement is fair, it's important that the public that will be bound understands that it's fair and that they have had a say in the matter if they want one.

So as the Court is well aware and, Judge Friedman, as you discussed earlier, we go through kind of a three-step process.

First, preliminary approval, which as you have mentioned, you have already done that.

Then the Court directs reasonable notice to all class members who would be bound; that, too, has already occurred here. We have given individual notice to about 500,000 people and publication notice as well.

The third step is where we are now, final approval. We have this hearing, we have objections, a public fairness hearing, and the Court considers whether the settlement meets the criteria spelled out in Rule 23.

We think we have extensively briefed all of the factors that the Court considers under Rule 23, so I am not

going to belabor them here unless the Court has questions. We believe it's clear that the class representatives and class counsel have vigorously represented the class throughout this long and hard-fought litigation.

We believe the settlement is the product of an informed arm's length negotiation; that the settlement relief provided to the class is adequate and, indeed, exceptional, particularly given the costs, risks and delays of potential further litigation which could well have occurred on remand for many more years; and that the settlement treats class members equitably relative to each other. Of course, the plaintiffs and class counsel support the settlement.

I do want to say a few words, if I may, about the unusual nature of this litigation because I think it does bear on the analysis.

Pacer fees have long been the subject of widespread criticism because they thwart equal access to justice and inhibit public understanding of the courts. But until this case was filed, folks who care about this issue just did not see litigation as a realistic path to reform. As I noted in my declaration in support of the final approval portion, I have actually been aware of and focusing on these issues surrounding Pacer fees for a long time, going back two decades to my time as a staff lawyer at the

Public Citizen Litigation Group which works on transparency issues.

Despite much controversy and criticism, though, it was always assumed that a case like this could never be brought. First, because the judiciary has statutory authority to charge at least some fees. So no litigation on its own, just within the four corners of the litigation, was ever going to bring down the Pacer-fee paywall and result in a completely free Pacer system.

Second, a few lawyers with the necessary experience in complex litigation, one might say, would be crazy enough to sue the federal judiciary and spend substantial time and money over many years on an endeavor with little hope of payment.

Third, even if you could show that the fees were unlawful and excessive and obtain qualified counsel, it was still assumed that this was all beyond the reach of litigation because the judiciary is exempt from the Administrative Procedure Act and so injunctive relief would not be possible. Previous litigation had been dismissed for lack of jurisdiction. It was hard to know how there would be an alternative basis for jurisdiction, a cause of action, and a waiver of sovereign immunity.

So that is, in part, why this case is so unusual.

In the history of American litigation, this case

and this settlement are unique. This is the first-ever certified class action against the judiciary for monetary relief and the first settlement of such a case.

When we filed this case seven years ago seeking to hold the judiciary accountable for overcharging people for access to court records, I doubt that anyone in Vegas would have given us good odds. We were mounting a head-on legal challenge to a fee schedule that was set by the Judicial Conference of the United States, presided over by the Chief Justice. We were asking that the judiciary fork over millions of dollars to people who paid the fees.

But I think it is a testament to our judicial institutions that we could bring this case at all, a case against the federal court system in the federal court system, and that we were not laughed out of court. I am not sure if there is another nation on earth whose judicial institutions would have been as fair-minded and as open about such litigation.

It was not easy. It was risky. The Administrative Office was not used to facing litigation or discovery, and the Justice Department put up a strong fight. But we never felt and our clients never felt that our arguments were being ignored and rejected by the courts because of the identity of the defendant. To the contrary, judges at the trial level and the appellate level heard our

arguments, gave them fair consideration, and we think ruled effectively in our favor every step of the way.

I think you are right, Judge Friedman. Judge Huvelle chartered a middle path. She found liability and so did the federal circuit, unanimously. We defeated the government's motion to dismiss. We obtained certification of nationwide class in a case against the judiciary. Through discovery, we were able to shine a light on how the Administrative Office of the U.S. Courts had been using Pacer fees; bringing new facts to life and spurring action in the legislature. And that discovery, in turn, led to Judge Huvelle's unprecedented decision which, yes, it didn't give us everything that we asked for when we swung for the fences, but it did hold that the AO had violated the law by using Pacer fees to fund certain activities. Within months, the AO announced that those activities would no longer be funded with Pacer fees.

When we went up on appeal, we were able to muster extensive amicus support from retired federal judges, numerous media organizations, technology companies, libraries, civil rights groups. And the suit also garnered widespread media coverage that brought public awareness to these efforts.

Before long, the AO announced that it was doubling the $15 quarterly fee waiver, eliminating Pacer fees for

approximately 75 percent of Pacer users.

As you mentioned, we secured what we think is a landmark federal circuit opinion unanimously affirming this Court's summary judgment ruling holding that the judiciary had unlawfully overcharged people.

I think it's worth noting another thing that the federal circuit said besides that Judge Huvelle got it just right. The federal circuit also acknowledged the important First Amendment stakes here. It acknowledged that, as it put it, quote: "If large swaths of the public cannot afford the fees required to access court records, it will diminish the public's ability to participate and then serve as a check upon the judicial process," which is an essential component in our structure of self-government.

So a few words about the settlement itself.

After more than seven years, we now have a landmark settlement under which the government must reimburse the vast majority of Pacer users in full; 100 cents on the dollar for past Pacer charges. The settlement creates a common fund of $125 million from which each class member will be automatically reimbursed up to $350 for any Pacer fees paid in the eight-year class period. And the remainder, those who paid over 350, will receive their pro rata share of any remaining funds.

This is notable because, unlike most class

actions -- almost every class action I have been involved in -- there is no claims process; the money is distributed automatically to class members. By any measure, we think this litigation has been an extraordinary achievement and we think more so given the odds that were stacked against it. It has also sparked widespread public interest in the need to reform Pacer fees and has jump-started legislative action that continues until this day.

Following the federal circuit's decision, the House of Representatives passed a bipartisan bill, which is not something that happens --

THE COURT: It must have been a few years ago.

MR. GUPTA: It was a few years ago, but it did.

It passed just a few years ago. Even in these times, it passed a bipartisan bill to eliminate Pacer fees, and it really is truly a bipartisan effort; and the measure advanced out of the Senate Judiciary Committee.

The Judicial Conference, too, now supports legislation providing for free Pacer access to noncommercial users. If Congress were to enact such legislation, it would produce an outcome that the plaintiffs had no way of achieving through litigation alone given the jurisdictional limitations.

Now, as I mentioned earlier, the purpose of a hearing like this is to hear from class members; and not

just the class representatives, but class members who pay may be opposed to the settlement and who wish to be heard. No case is perfect. Every settlement is a compromise. And of course, there are always things you wish you could accomplish. We wish we could have brought down the Pacer-fee paywall entirely, but we couldn't because of the jurisdictional limitations.

In any case of this size, with hundreds of thousands of class members, one anticipates at least some substantial number of objections, but this isn't just any class.

This is a class that comprises every federal court litigator. It includes law firms of all stripes, including the world's largest law firms; it includes journalists and media organizations; it includes sophisticated data companies with a lot of money at stake; and it includes a whole lot of pro se litigants. This is a class of rabble-rousers.

In the wake of the settlement, we saw not just extensive press coverage and public interest but, also, many inquiries from individual class members. Since the settlement, class counsel has responded to over 300 class member calls and emails.

THE COURT: Say that again. I didn't --

MR. GUPTA: 300.

THE COURT: 300 what?

MR. GUPTA: 300 class member calls and emails. Many of those communications involved multiple communications back and forth. They came from all manner of class members.

The class administrator KCC has received approximately 250 calls through its automated telephone line. So the objections here, I think, really are the story of the dog that didn't bark. None of the many organizations --

THE COURT: So they were all, these calls, to class counsel and to KCC?

MR. GUPTA: Correct.

THE COURT: Out of that number or that number plus, how many objections were actually filed?

MR. GUPTA: There were five objections that were actually filed, all of them pro se. One we may discuss later by someone we believe is not a class member, and I think only two that are appearing today. I may be wrong about that, we'll see.

THE COURT: One of the things -- and this may not be the appropriate time.

I think, in reading your papers, in addition to the five objections, you also mentioned something like 34 attempts to opt out, some of which may have come too late.

So at some point I hope you will address that or someone will address that.

MR. GUPTA: Yes.

Ms. Oliver has the statistics on that. I think that number is correct. I think that's the number of valid opt-outs. We are happy to discuss that.

But the point I am making is that there is a dog that didn't bark; no transparency groups, no law firms, no data companies, no groups that represent underrepresented litigants; none of them have come forward. I think that's a measure of the universal support for the settlement.

Of course, we want to hear from those objectors, and they have the right to speak today; and that's an important part of the process.

THE COURT: I have read all of the objections that have been filed thoroughly, including what Mr. Isaacson filed last night.

MR. GUPTA: But first, if I may, Your Honor, I would like to turn things over to the class representatives to just say a few words.

THE COURT: Sure.

MR. GUPTA: We can start with Jake Faleschini from the Alliance for Justice.

MR. FALESCHINI: Good morning, Your Honor.

THE COURT: Mr. Faleschini, good morning.

MR. FALESCHINI: Good morning.

My name is Jake Faleschini. I am the program director for the justice team at --

THE COURT: Could you spell your last name for the court reporter.

MR. FALESCHINI: Absolutely. It's F-A-L-E-S-C-H-I-N-I.

THE COURT: Thank you.

MR. FALESCHINI: I am with the Alliance for Justice.

I am happy to say that AFJ supports the proposed class action settlement and the accompanying requests for fees, costs, and service awards. AFJ is proud to have brought this case.

The Alliance for Justice is a national organization and alliance of approximately 150 public interest member organizations that share a commitment to an equitable, just, and free society.

Among other things, AFJ works to ensure that the federal judiciary advances core constitutional values and preserves unfettered access to justice for all Americans.

Our organization and many of our member organizations regularly use Pacer to access court documents for research on how court cases impact the issues that we care most about.

When the courts charge exorbitant fees for access to these documents, it puts our organizations at a disadvantage vis-à-vis more wealthy interests. In practice, it gatekeeps access to important information, public information, and it limits our collective ability to inform the public about those happenings.

AFJ served as a named plaintiff in this class action since its filing in April 2016, a period of more than seven years. For much of that time until his departure for a position at the U.S. Senate last year, AFJ's legal director, Daniel Goldberg, oversaw this litigation on AFJ's behalf. Among other things, Mr. Goldberg received updates on motion practices and court rulings from class counsel, reviewed draft pleadings, consulted on strategy, and provided a declaration in support of class certification on AFJ's behalf.

I understand that counsel will seek a service award for AFJ of $10,000. We conservatively estimate that the value of the attorney time incurred by AFJ over the seven-year life of this case exceeds that amount when calculated at market rates.

Thank you, Your Honor.

THE COURT: Thank you.

MR. GUPTA: Next, Your Honor, if she's available by Zoom, Renee Burbank from the National Veterans Legal

Services Program would like to speak.

THE COURT: Yes. Ms. Burbank.

MS. BURBANK: Good morning.

I am on Zoom. Can you hear me?

THE COURT: We can hear you. Thank you.

MS. BURBANK: Thank you, Your Honor.

As the attorney just said, my name is Renee Burbank; spelled B-U-R-B-A-N-K. I am the director of litigation at National Veterans Legal Services Program, also known as NVLSP.

We're a national nonprofit veterans service organization and we represent all manner of active-duty personnel and veterans when they are seeking benefits from the federal government due to their service and disabilities incurred or made worse through their service.

As an organization, NVLSP represents thousands of veterans every year in court cases, including class actions and individual representation; and we provide education and research on the state of the law to advocates all over the country.

Veterans overall, however, largely proceed pro se without attorney representation when they go to the courts to obtain benefits from the government. And in order to understand the state of the law, access to federal public dockets is critical. Specifically for NVLSP, we spend many

hours every year researching the law all over the country and what is happening with veterans' benefits and other Department of Defense-related activities that affect the benefits and recognition that our military and veterans have earned.

As you have already been apprised by Alliance for Justice, we strongly support the settlement and the fees and costs that reflect the complexity and unique nature of this litigation.

NVLSP, as one of the named plaintiffs in this class action, has spent a considerable amount of time and effort on this case, understanding the filings as they were being drafted, and providing input prior to class certification, and to also understand and be able to tell others about the status of the Pacer litigation. Because NVLSP is the first-named plaintiff, we have also received some of those inquiries; we forward them to class counsel when we receive them. But we did get some information or, rather, inquiry from individual class members wanting to know about this important case.

The time that we have spent, the approximate amount of billing rates that we would have for the time incurred that NVLSP has spent is reflected in my declaration previously filed with the Court. And I think that that declaration, as well as Attorney Gupta's explanation today,

adequately and accurately explains why the settlement is appropriate in this case. NVLSP agrees with that assessment, and we support the settlement.

Thank you, Your Honor.

THE COURT: Thank you very much, Ms. Burbank.

MR. GUPTA: And finally, Your Honor, Stuart Rossman, the litigation director of the National Consumer Law Center is also with us.

MR. ROSSMAN: Thank you very much, Your Honor. I hope you can hear me.

THE COURT: Yes.

MR. ROSSMAN: I just want to thank you for allowing me to appear from Boston by Zoom. It's a pleasure to be able to appear before the Court in support of the settlement in this particular case.

As it has already been stated, the National Consumer Law Center has been a named class representative in this case from its inception.

National Consumer Law Center is a 54-year-old organization, originally partnered with the Legal Services Corporation where we served as the national support center on behalf of legal services in the area of consumer law. Since 1995, we have been a private nonprofit 501(c)(3) organization.

We represent the interests of low-income consumers

in the areas of consumer finance, affordable home ownership and access to utilities. As such, there are two areas in which NCLC is highly dependent on access to the federal court records through the Pacer system. NCLC is the publisher of a 22-set -- volume set of consumer law manuals which rely heavily on federal law, specifically on federal consumer laws, which, obviously, are updated on an annual basis. At this point we're digital, so they're being uploaded on a daily basis. And as an organization, we make heavy use of Pacer ourselves in order to be able to maintain our materials.

Beyond that, however, working with our primary finance, which is not the direct service for consumers [sic] but the lead services organizations that represent them, legal services and public interest organizations, all rely upon access to Pacer in order to provide representation to their clients under the statutes like the Fair Lending Act, the Fair Credit Reporting Act, Fair Debt Collection Practices Act, Economic Opportunity Act -- I can go on.

Virtually all of the consumer laws in the United States are based upon federal statutes that were enacted from 1968 to the present.

So, therefore, having access to Pacer, these are nonprofit public-interest organizations and legal services organizations that have limited resources and, therefore,

the effort that was put into this case by the attorneys who brought the litigation has direct impact not only on my own organization but the groups that we serve as a national service organization with national resources for legal services organizations.

I do want to comment as well in terms of the service award that is being requested on behalf of National Consumer Law Center. I have been involved in this case since its inception seven and a half years ago. I must say that I outlasted the judge on the case but I am, in fact, going to be retiring at the end of December of this year --

THE COURT: At the end of when? When are you retiring?

MR. ROSSMAN: At the end of December.

THE COURT: So you would love me to approve the settlement and approve it before you retire?

MR. ROSSMAN: You know, I would be more than happy. But since anything that you approve is going to be going to my organization, whatever we receive we would greatly appreciate it.

I am looking forward to retirement. My wife retired two years ago and every morning she reminds me how good retirement is.

THE COURT: You know, I have been a senior judge for some time; and what you just said, I hear that at home a

lot.

MR. ROSSMAN: Yes. There are some vacations and trips that we have not been able to do, along with spending some time with my grandchildren which is something that -- actually, what I really want to do is *The New York Times* crossword puzzle the day after --

THE COURT: My wife prefers Friday and Saturday because they're the hardest.

MR. ROSSMAN: I agree, Your Honor. It is a great motivation (indiscernible).

In any event, I have not only reviewed the pleadings in this case. I filed a declaration to the Court to support class certification. We provided discovery in this case. I have gone back and checked my time records on it. I have spent more than 250 [sic] hours working on this case over the last seven and a half years. And at my current billing rate in Massachusetts, that would well exceed the amount of the service award that is being requested on behalf of the National Consumer Law Center.

I am happy to be able to respond to any questions you have about the work that we have done in this case.

I will just finish by saying that over the last 25 years as the NCLC litigation director, I have been of counsel or co-counsel in over 150 class action cases. It's an unusual situation for me to be a client. It's been an

eye-opening experience for me. I suspect it's been an eye-opening experience for my counsel whom I have challenged on occasions during the course of the last seven and a half years. But I think they have done an outstanding job in terms of the work that they have done in this case as well as the outcome it has achieved. We are highly satisfied and we completely endorse the settlement going forward.

So I thank you very much for the time that you have given me to speak, Your Honor, and I am happy to answer any questions that you have.

THE COURT: Thank you very much, Mr. Rossman.

Mr. Gupta.

MR. GUPTA: That's all we have for our opening representation. Thank you.

THE COURT: Then I will hear from the government.

MS. GONZALEZ HOROWITZ: Good morning, Your Honor.

Thank you for an opportunity to have the parties and the class members appear before the Court today to discuss the settlement approval in this, I think, as Mr. Gupta called it, a landmark class action case.

Your Honor, you are aware that your task today is to determine whether the proposed settlement is fair, reasonable, and adequate for the class members.

You need not decide that settlement is perfect or that it's even the best possible. Stated another way, the

Court must examine whether the interests of the class are better served by the settlement than by further litigation.

In evaluating that, the Court should determine whether the settlement is adequate and reasonable and not whether a better settlement is conceivable.

As demonstrated by both parties' filings in the evidence and information that's been provided to you, this settlement is an outstanding result; I think, as Mr. Gupta called it, landmark for the class members and more than meets the legal requirements for final approval.

This Court is well aware of the general principle that settlement is always favored, especially in class actions, where the avoidance of formal litigation can save valuable time and resources; the same is certainly true here. As Mr. Gupta said, no settlement is perfect.

The United States concurs with plaintiffs that this Court should grant final approval. The settlement proposal was negotiated at arm's length, the relief provided for the class is more than adequate, and the proposal treats class members equitably relative to each other. Although the parties address these factors extensively in their filings, I would like to take a moment to address these today.

First, although I was not personally involved in the mediation and negotiation phase of this litigation, the

record before the Court amply demonstrates that the settlement proposal was negotiated at arm's length.

As noted in the parties' filings, the parties appeared before an experienced mediator with both parties recognizing the litigation risk in moving forward.

The government vigorously defended this action from its inception, as the Court mentioned earlier today in its opening remarks and as Mr. Gupta discussed when giving some of the procedural history and background of this case.

The Court and, later, the federal circuit upheld certain electronic public access expenditures, while finding that the Administrative Office of the Courts exceeded its statutory authority as to others. This has been a hard-fought litigation for a significant period of time. The parties engaged in informal discovery prior to settlement discussions and, thus, were well informed.

As other judges in this district have noted, in the absence of any evidence or collusion or coercion on the part of the parties, the Court has no reason to doubt that the settlement was the product of legitimate negotiation on both sides; and the Court certainly has no reason to doubt that here.

Second, the settlement provides for a common fund of 125 million, and will provide a full recovery of up to $350 to each class member for fees paid during the class

period, with the remaining funds to be distributed on a pro rata basis to those class members who paid more than $350 in fees during the class period. This relief is more than adequate especially considering some of the risks to the class which I will address momentarily.

There is nothing inequitable about the plan of allocation and distributing payments pro rata with a guaranteed payment up to a certain amount in a common fund case such as this one is not unusual.

As reflected in the parties' filings, the allocation plan was the result of a compromise between the parties and supports the Administrative Office's long-standing policy of access to judicial records.

This principle is even more forceful here where the E-Government Act allows for differentiation between individuals. Consistent with the statutory notes articulated in 28 U.S.C. Section 1913, the statute permits electronic public access fees to, quote: "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."

As one of the objectors recognizes, differentiation between class members can be permissible when it is justified; and in this instance, it is certainly

justified considering the Administrative Office's interest in ensuring public access especially to individual and smaller users.

The settlement distribution will ensure that the average Pacer user receives full compensation up to $350 which, for many users, will result in a full compensation of all fees paid. In other words, the settlement is consistent with congressional intent.

Moreover, efforts taken by the judiciary to ensure that public access fees do not create unnecessary barriers or burdens to the public have resulted in an allocation of the vast majority of Pacer maintenance costs to the system's largest users, which are typically commercial entities that re-sell Pacer data for profit. That comes from the report of the proceedings of the Judicial Conference of the United States in September of 2019.

To address the concerns lodged by objectors that the settlement either favors small users or institutional ones which I think, as the parties have noted, are diametrically opposed objections or does not favor institutional users enough, the settlement is a marriage of the parties' litigating positions which, in the end, is the hallmark of compromise. The settlement need not be perfect but, rather, reasonable.

Finally, Your Honor, I want to address the terms

of the settlement in relation to the strength of plaintiffs' case. It is the government's position that absent a settlement, the class would have faced significant difficulty in demonstrating that the Administrative Office would not have used the funds on otherwise permitted categories. This was a position that the government took at all stages of the litigation; and as with any litigation, of course, there are risks to both sides if the case were to proceed. But especially here, the results achieved are extraordinary when compared to the difficulties the class may have if the litigation were to move forward. That, of course, is without even considering the time, expense, burden, and resources that the parties and, of course, the Court, in turn, would expend if the case were to proceed to additional discovery on damages and later to trial. These factors only further counsel in favor of approval of the settlement agreement.

Because the Court has a lot of time at the end of the hearing to discuss plaintiffs' motion for attorney's fees, service awards, and costs, I will not address that here other than to say that the government, in its response to plaintiffs' motion, raised some questions in general principles for this Court to consider in determining the ultimate award.

In sum, Your Honor, we concur with plaintiffs in

the class that the Court should approve the settlement. Thank you.

THE COURT: Thank you.

So it seems to me now, under the schedule I've set, at some point I want to hear from Ms. Oliver about the opt-out question. But I think at this point I will hear from Mr. Isaacson who is here and has filed a number of things; one a while ago and one last night.

He is here in person to speak to his objections. I am happy to hear from him. Later I will hear from other people if they want to be heard.

So good morning, sir.

MR. ISAACSON: Good morning, Your Honor.

May it please the Court.

I am Eric Alan Isaacson, a member of the class to be bound by the settlement. I filed a timely objection on September 12 and in response to this Court's order regarding the hearing. And preceding the hearing, I filed a written statement that indicated my intent to appear here in person, not remotely, as Mr. Gupta's filing stated. Also, to address some of the filings that they did, I think that they were after the fact and late when it comes to the requirements of Rule 23.

I think that the primary fairness problem with this settlement -- well, I think there are two serious

fairness problems with the settlement. Rule 23 asks whether the settlement treats class members equitably with respect to one another.

The big problem is that, as Mr. Gupta says, this class includes the world's largest law firms. The world's largest law firms are very sophisticated and they did not file an objection. They didn't file an objection because they know that they got fully reimbursed for their Pacer expenses years ago. They bill in 30-day cycles. They pay Pacer bills, and the clients then reimburse them for the Pacer bills. Class counsel in class actions that almost always settlement, almost always produce a settlement fund from which the class action law firms are fully reimbursed for their Pacer expenses.

You have got a class that includes a lot of very large Pacer users that spent a lot on Pacer; they got fully reimbursed for it. And you have got a claims process -- well, it's not a claims process. They brag that there are going to be no claims made, which means they are not even asking people: Have you been reimbursed for your Pacer expenses?

THE COURT: So at this point, I take it, is that when the big law firms bill their clients quarterly or whenever they bill, they included -- they say: In doing legal research for you on this matter, we used Pacer, and it

cost X dollars, and we're billing you for that.

MR. ISAACSON: Yes, Your Honor. That would be my understanding.

I worked in a large law firm for about three years at the beginning of my career. I worked at large plaintiffs' class action firms for the majority of my career. My understanding is that the law firms that are going to be some of the biggest claimants are going to receive the biggest payments over the pro rata distribution part of this settlement -- have already been fully compensated.

Now, one way to address that was the government's position that you had to have a large minimum payment. You have got a large minimum payment and they ended up getting negotiated down to $350. If it's a large minimum payment, double that or three times that, you are still dealing with people getting the minimum payment who are members of the public, who are not in a class that have been reimbursed for this stuff; that would be one way to deal with it. The settlement is unfair if it does not have a larger minimum payment and does not ask large claimants or large payees: Have you been reimbursed? I think it treats class members inequitably relative to one another.

I think it's very ironic that the government, in the settlement negotiations regarding the allocation of the

funds, did a better job advocating for the public interest and for the interest of class members who haven't been reimbursed than did class counsel.

There may have been arm's length negotiations in the settlement process with respect to the total amount of the settlement. But when it comes to the allocation of the funds, the government's position was preferable to the plaintiffs' class action lawyers; I think that's most unfortunate.

It is, I think, not coincidental that plaintiffs' class action firms like themselves benefit from a low minimum amount and high allocation to the pro rata distribution.

I think that the $10,000 service awards are problematic, I think, according to Supreme Court authority, Supreme Court opinion; I addressed that in my papers.

With respect to the settlement adequacy as amended in 2018, Federal Rule of Civil Procedure 23 requires the Court, in evaluating adequacy of the settlement to consider, and I quote: "The terms of any proposed award of attorney's fees." That's Rule 23(e)(2)(C)(iii).

THE COURT: Hold on one second.

Which part of 23?

MR. ISAACSON: Rule 23(e), which deals with settlement approval in class actions.

THE COURT: Right.

MR. ISAACSON: Subsection (2), Subsection (C), Subsection (iii).

THE COURT: So it says that: If the proposed class -- only in finding it's fair, reasonable, and adequate after considering the following. And (C)(iii) basically says --

MR. ISAACSON: Which I think --

THE COURT: -- that the class represented class counsel -- I'm sorry, that the relief provided for the class is adequate taking into account the terms of any proposed award of attorney's fees including timing of payment.

So essentially, as you read this, there are two questions on attorney's fees: One is, are they entitled to attorney's fees? And secondly, how much?

MR. ISAACSON: Yes, Your Honor.

THE COURT: And this says that in determining adequacy I have to consider both of those?

MR. ISAACSON: Yes, Your Honor.

In considering adequacy of the settlement, you need to consider that. The reason is because in class actions there is a tendency for class action lawyers to settle cases on terms that guarantee themselves large attorney's fee awards; in this case, four or five and a half times their reasonable hourly billing rates if you look at

their lodestar -- their claimed lodestar, and compare it to the fee award that they're asking for.

This is a case where class counsel has come in and said: We have got a quarter of the damages in this case -- because it's apparently a $500 million case according to their expert Professor Fitzpatrick -- we have got a quarter of the damages in this case, give us four times our billing rates. I don't think that's appropriate, Your Honor.

I think that it's going to be necessary, if you want to approve the settlement, to dramatically reduce the attorney's fees that they're requesting.

Now, they didn't document their lodestar; that's a problem. I think that's designed, quite frankly, to force the Court to choose to do a percentage award rather than a lodestar award. I don't think that it's ethical for class counsel to do that. I think they need to provide the data that would be necessary for the Court to make the choice. And all of the circuits except for the District of Columbia Circuit and the Eleventh Circuit have held that that is a choice for the Court to make.

THE COURT: Choice between what?

MR. ISAACSON: Between lodestar award and percentage of the fund award.

THE COURT: What about the federal circuit?

MR. ISAACSON: The federal circuit I think

indicates that you can choose between the two, you have discretion. But it is not something that they can force.

I think the recent *Health Care Republic* [sic] case strongly indicates you ought to do a lodestar cross-check.

THE COURT: A lodestar cross-check is different from a lodestar. In other words, as I understand it -- we are going to talk about this more later.

As I understand it, there are cases in which you apply the lodestar. We used to call it -- I forget what it used to be called, the U.S. Attorney's matrix, the D.C. Attorney General's matrix, the Laffey Matrix. We have all of these things in this court which applies to certain kinds of cases and in certain cases. Then there are the common fund cases which, I believe -- and we will talk more about this later. The case law seems to suggest that a percentage of the fund is more normal than the lodestar, but there is then the discussion of a separate thing called the lodestar cross-check. So there is the lodestar versus the percentage of the fund, and then there is: When you do a percentage of the fund do you also do a lodestar cross-check, and is that something judges have the discretion to do or not do to satisfy themselves or to do a, for lack of a better word, cross-check, or is it something that some courts require be done?

I don't want to -- you can continue talk about

this. I will let you talk later this morning when we get to the separate discussion of attorney's fees; I will let you get up again and talk some more about that in response to what counsel says.

In my mind at least, there is a vast difference between a lodestar and lodestar cross-check; they serve different functions.

MR. ISAACSON: Your Honor, my understanding is the Court is supposed to act as a fiduciary for the class.

THE COURT: I agree.

MR. ISAACSON: If we go back to the earliest common fund cases, the Supreme Court in *Greenough* says the Court needs to act with a zealous regard for the rights of the class. And you need to -- in evaluating whether to do a percentage award and the amount of the percentage award, consider whether it's going to cause a windfall to class counsel, which I think, in this case, it does because they are saying: We recovered one quarter of the damages in this case, give us four times our claimed lodestar. Which they haven't really documented, and they haven't documented the fees. They end up having supplemental submission from both Fitzpatrick and Rubenstein supporting their fee application on reply. I think that's inappropriate because Rule 23(h) says that they're supposed to put in the supporting documentation in connection with the motion. I think it's

unfair and improper to put it in on reply both because, ordinarily, you don't get to introduce additional evidence on reply and because Rule 23(h) required them to file that stuff before the objections were due.

I think it's also important to realize that even if a judge is not going to go through line by line in their lodestar submissions and billing submissions, even if class members, for the most part, aren't going to be sophisticated enough to go through line by line, if those filings and that evidence is made a part of their public record that other folks may do it.

In the *State Street* securities fraud litigation there was settlement in the District of Massachusetts. A reporter for the Boston Globe went through the fee applications after the district judge had approved the attorney's fees and said: Hey, there is a guy that gets paid a lot of money but didn't do anything. What's up? Said: Hey, there are folks who billed time and they are being compensated more than once for it, more than one law firm they were working for at the same time for the same fees. It's important for transparency that they have a complete filing of the information.

Now, in this case, I think a fee award of five percent would more than cover their claimed lodestar and would be more than adequate and would address the concerns

that I have got.

When it comes to presumptions with respect to fees, the *Health Republic* case says that you can't presume that the fee application is appropriate. You have got to be very critical of it.

The Supreme Court in *Perdue* said it's presumptively sufficient for class counsel to get an unenhanced lodestar award that presumptively covers the costs and risks of class action litigation and that if they want more than that they need to demonstrate with clear evidence why they need to get more than that.

THE COURT: Okay.

MR. ISAACSON: In this case, I think that goes to fairness of the settlement.

Now, if I am going to be able to address the fee issues after they speak about fees --

THE COURT: Yes.

MR. ISAACSON: -- I will wait for that.

Thank you very much, Your Honor.

THE COURT: Thank you very much, Mr. Isaacson.

Are there any other objectors in the courtroom or on Zoom who want to be heard? Any objectors?

I see someone.

MR. KOZICH: Yes, Your Honor.

THE COURT: Mr. Kozich, yes, sir. Mr. Kozich has

filed a written objection which I have read. I will hear from you, Mr. Kozich.

MR. KOZICH: Thank you, Your Honor.

One of the persons who spoke said there were 500,000 users who were actually entitled to some sort of reimbursement for their Pacer fees; and they never had an accounting of who is going to receive what money from the settlement.

Now, one of the other attorneys that I know is a class member -- but I am not a class member because -- basically saying that I didn't pay Pacer fees in a time that is a class period.

I remember that I did pay Pacer fees during that time but I was only able to find invoices that I submitted to the Court. The Pacer people tried to do a check on me, they couldn't find my account at all. So I don't know if Pacer purposely lost my account or whatever. I am claiming that I am a class member and I would like to present my argument now.

Now the --

THE COURT: Are you objecting to aspects of the settlement or are you objecting to the fact that you are not being included in the class and getting your fair share, or both?

MR. KOZICH: Both, Your Honor.

THE COURT: Okay. Go ahead.

MR. KOZICH: Okay. The government entered into it in December of 2002. It mandates that Pacer cannot charge beyond the margins -- marginal cost of document production or transmission. Transmission time is at the speed of light, so at 186,000 miles per second; therefore, transmission time is much less than one second and certainly less than one cent per page to transmit. All of that money, the pennies that it cost to transmit, they already had the documents, they're just transmitting the documents, it's proper to pay Pacer.

The defendant instituted excessive Pacer fees. I only have two documents; one from August 18th of 2014, and one from April 1st, 2017, which is charging ten cents per page for excessive fees. So the period of time to then come back before 4/21/10 [sic] because they're charging excessive fees back then too.

Ten cents per page is what Office Depot charged before COVID. It includes costs of copier, toner, drums, paper, electricity, copies. Pacer did not incur any of these costs, only the cost of transmission, because the document is already there.

The lawsuit was filed in 2016. Class period is from April the 10th, 2010, through May 31st of 2018. This period is why we cut off so -- just a short period of time

at any time before April the 10th or after May 31st of 2018, when Pacer was charging ten cents a page.

Who picked the period? I don't know who picked the period. Pacer users who pay less than $50 in excessive Pacer fees -- I didn't pay my Pacer fee, but you see $250 because I am a disabled veteran. And I was looking for issues regarding the housing tax credit properties. I had an issue with the Broward County Housing Authority. I was researching records of California, Oregon, Washington, and all over the country, actually, for help with my case. So I didn't pay the Pacer fees because I couldn't afford it, the high fees. Pacer cut me off from using Pacer, and I am still cut off from Pacer. I guess Pacer could waive the fees; they haven't done that.

And then for the quarter ending for the year ending 2010, Pacer had a net profit of 26,611,000.15 as part of my filing of 163, Exhibit E, extrapolating a period, which is a period of 37 quarters; basically at a net profit for 2010, $984,626,129.

If you take over the settlement, there is still a net profit of $859,626,129 [sic]. Net profit. It's not supposed to be making a profit, they're supposed to be dealing at cost. That money should be distributed to the users who pay the excessive fees so that they can be made whole. They are not being made whole by the settlement.

I presented evidence that I owed $354.67 in Pacer excessive fees for the period July 1st, 2015, through September 30th, 2015. My account number is 2792766.

I remind the Court that Pacer couldn't find my account. So I don't know what they did with it; they lost it or something.

I am opposed to the settlement because people are not being made whole. It's the big large law firms, big corporations, and the big nonprofits that are making most of the money because the small guy who you see incur fees is not going to be made whole and maybe deserves to be made whole by the settlement.

I am opposed to the settlement. I would like to know how -- who the money is going to go to before the Court reaches a settlement on the amount that's being distributed. I think the nonprofits and big corporations is taking a big chunk of the money, and the small guy is not being made whole. Thank you, Judge.

THE COURT: Thank you very much, Mr. Kozich.

Are there any other objectors in the courtroom or on Zoom that want to be heard?

I don't hear anybody speaking up.

As I understand it, and as I have -- I have read all of the objections. In addition to Mr. Isaacson and Mr. Kozich, there are only three other objectors: Geoffrey

Miller, Alexander Jiggets, and Aaron Greenspan. I have read their objections, and none of them are here on Zoom or otherwise. None of them indicated that they wanted to be heard today.

So I would suggest that maybe a logical thing to do is to now hear responses to the objections. You don't need to use the full time, use whatever time you need, the same for the government, and then we'll take a break. Then I will hear from Ms. Oliver on opt-outs and from whoever is going to speak about attorney's fees. I think we should deal with the objections, both the written ones and those who spoke today to support their written submissions.

Mr. Gupta.

MR. GUPTA: Thank you, Your Honor.

I will try to be brief but, of course, I want to be sure I answer any questions the Court has.

THE COURT: Yes.

MR. GUPTA: I do think we have tried to adequately brief the responses to the objections. I can discuss Mr. Isaacson's objection first.

We thought it was interesting that you had two sort of diametrically opposed objections. You had Mr. Miller's objection. The complaint there is, we are favoring the small users by compromising with this minimum distribution. Mr. Miller's complaint was: We're favoring

the little guy over the big guy.

Mr. Isaacson's complaint, as I understand it, is precisely the opposite. He is saying: You are favoring the big guy over the little guy. I suppose maybe that's a measure of the fact that it's a compromise and we met somewhere in between with the two positions.

I find Mr. Isaacson's objection, in particular, a little difficult to understand because what he is saying is, in his words, is grossly inappropriate was that we advocated for a pro rata distribution of the funds; that was our position in the negotiations with the government.

As we say in our reply brief, the Supreme Court has said that a pro rata distribution is the typical measure of fairness, both in modern class actions and in equity. Fair treatment -- the Supreme Court said in *Ortiz* -- is assured by the straightforward pro rata distribution of proceeds from litigation amongst the class. It's hard to understand how our advocacy for a pro rata distribution somehow ill-served the class or how this structure discriminates against the small users on whose behalf we brought this case.

If you look at the class representatives, you can see that the whole point of this case was about access to justice for the little guys, as it were.

Mr. Isaacson points out that large law firms often

will seek reimbursement from their clients for expenses like Pacer fees. This is something we gave considerable thought to, both in bringing the case and also in settling the case.

I just wanted to draw the Court's attention to a footnote in our reply brief because it can get missed; a footnote at page 5. We actually found a case. It's a case from the Northern District of Illinois where a similar kind of objection was made to a class action settlement; the idea being that: You have this settlement with respect to certain charges but, then, there might be a dispute with other people, a matter with other people who reimburse those charges.

What the law has always said here -- and this is a long-standing legal principle that is true in Tucker Act cases as well -- is that the claim is held by the person who was subject to the illegal government charge; in that case, that would be the person who paid the Pacer fees. Any downstream issues with respect to reimbursement by other people is a matter between those people and those other people.

That said, because we expected this issue to occur and because we heard about it in the notice period -- I think, actually, you may recall, Judge Friedman, we mentioned this issue to you before final approval as a potential issue. We have actually worked with the class

administrator. There is a form on the website that allows people to indicate whether or not they paid Pacer fees for somebody else or whether they are being reimbursed.

THE COURT: Say that again.

MR. GUPTA: There is a form on the website that allows people to indicate whether they paid Pacer fees for someone else. The attempt there is to try to -- to the extent possible -- resolve those questions so that they don't become a problem in administering the settlement.

THE COURT: Is the way it works -- if you get information through this form, what do you do with the information?

MR. GUPTA: I think Ms. Oliver, who is our liaison in cases, is in a much better position to address this.

I just -- I do want to emphasize, though, I think this is a question now -- we're turning to a question of how we're administering the settlement but not -- the certain fairness question in this process.

THE COURT: Wait. Before I turn to Ms. Oliver, I think what I heard you say is that there is a case law --

MR. GUPTA: Yes.

THE COURT: -- that says that -- in terms of not -- settlement of the class action, that if you -- to paraphrase: If you are to be reimbursed by some third party, not a member of the class --

MR. GUPTA: Right.

THE COURT: -- it doesn't disqualify you from getting the pro rata; it's between you and those other people.

MR. GUPTA: Correct. As a legal matter, that's the answer to Mr. Isaacson's question.

THE COURT: That's the legal answer.

MR. GUPTA: That's the legal answer.

But we didn't kind of want to stop there because we know that this is a real-world issue. What Ms. Oliver is now going to tell you about is how we have tried to resolve this as a real-world problem.

THE COURT: Come to the microphone, Ms. Oliver. Thank you.

MS. OLIVER: So there were two forms on the website: One was a payment notification form and the other was an accountholder notification form. They do two things. The payment notification form allowed the actual payer of the fees to get onto the website and submit information notifying the administrator that they paid Pacer fees on behalf of someone else. That can be any scenario. That can be an employer paying for an employee's Pacer fees; it can be a client who actually paid -- they were passed through the law firm to the client; that can be any particular scenario. There are not limitations on the website as far

as who can submit those notifications.

There is also a form that allows accountholders to notify the administrator that somebody else paid their Pacer fees for them. And although they were the user, somebody else paid the Pacer fees.

Once those notifications were submitted -- once the payment notifications, so somebody notifying the administrator that they paid Pacer fees on somebody else's behalf -- once those were submitted to the administrator, the administrator then sent an email to the accountholder associated with that account, that was the subject of the notification saying: Hey, we have received a notification; somebody has told us that they paid Pacer fees for your account. If you would like to dispute this, you have this long to dispute it; and you can submit this information, we'll then process the information.

Through that process, we have received zero disputes. We have received hundreds of notifications. We have received 409 of the payment notifications, and zero disputes to any of those 409 payment notifications.

THE COURT: Thank you.

MR. GUPTA: So that is really all I wanted to say about Mr. Isaacson's fairness objection.

Unless the Court has questions.

I would like to turn to one other issue that he

has raised because it's a legal question.

THE COURT: That he has raised.

MR. GUPTA: That he has raised.

He has objected to the service awards for the class representatives. And the reason I want to mention --

THE COURT: Now, the service awards are the kind of things that the three who spoke earlier on behalf of the named plaintiffs were talking about.

MR. GUPTA: Right.

THE COURT: Which is, as I understand it, their incentive for participating in the -- being up front and being the named plaintiffs, and all of that. But in addition, they all spoke to the amount of time they, in fact, actually spent, their institutions actually spent --

MR. GUPTA: Right.

THE COURT: So if you viewed it as a pure incentive -- and you can tell me whether I have got the concepts right -- that might be sufficient under the case law.

But in addition, they say here: Even if we had to prove that if I were billing what my ordinary rate is or, as counsel, if I don't have an ordinary rate, the number of hours I spent, it would have added up to more than 10,000 anyway, no matter how you slice it.

MR. GUPTA: That's right. That's right.

You have got it exactly right. Maybe you have just taken the words out of my mouth.

The reason we're teeing this up is that Mr. Isaacson has made this objection in many, many class action settlements. And the legal argument rests on this Supreme Court case from 1882, the *Greenough* case. It drew this distinction between the expenses that occurred kind of in the fair prosecution of the case, which can be things like attorney time, and something else which was disapproved which was -- I mean, this is a case before class actions; but you had a bondholder who asked for, basically, a personal salary for having handled a case that benefited a lot of people. And the Supreme Court said no, you can't have that.

So Mr. Greenough's [sic] legal argument is that the modern-day incentive award or case contribution award for class representatives, in his view, is impermissible under that case law. We think he is wrong. Virtually every court that has addressed the question has disagreed with him, but he has gotten some courts to agree.

What we're saying is: This case does not even tee up that legal question because even if you were to accept the distinction that he is drawing, we fall on the correct side of the line. In other words, even if 1882, if you want to think about it that way, the time that these class

representatives' lawyers have spent on this case more than justifies these modest service awards. So that's the only reason I wanted to tee that up.

I don't want to be presumptuous, but if the Court is going to approve the settlement and write an order, I think it would be helpful to point out that we fall on the correct side of that line.

I won't address the attorney's fees issues because I think you said we will address that later.

THE COURT: No. We will talk about that.

MR. GUPTA: Just on the issue with Mr. Kozich. We have spent a fair bit of time with the class administrator and with the government's counsel to get to the bottom of this. It's not the case that Mr. Kozich's account hasn't been found. His account has been found. He does, in fact, have a Pacer account and has long had one.

It's just the case that during the class period he did not pay any Pacer fees and, therefore, there is nothing to reimburse. I do have some sympathy for him. He said he is a disabled veteran who is trying to use court records to solve problems that he has. It sounds like he is exactly the sort of person on whose behalf the case was brought. It so happens that if he didn't pay fees during the Pacer fee [sic] he does not have a claim that is compensable here.

That is really all I wanted to say, if the Court

has questions.

THE COURT: I have one question about something he said which may not apply to him but might apply to others; I would like a response. It's actually on page 3 of his filing, Docket No. 163.

He says: The settlement refunds only those persons who paid more than $350 in excessive Pacer fees but is paying zero to those to people who paid less than 350. His argument, as I read it, is -- putting aside whether he qualifies. His argument, as I read it, is: If I paid $351 over time, I would get $350.

If you paid $100, you get zero.

MR. GUPTA: And that is just factually incorrect. It's a misreading of the settlement.

I would point you to page 6 of the settlement agreement, paragraph 19, which explains how the first distribution works.

It says, in the first distribution: The administrator allocates to each class member a minimum payment amount equal to the lesser of $350 or the total amount paid in Pacer fees by that class member for the use of Pacer during the class period. So it's either 350 or the lesser. If you pay $100 or even $1, you are going to get that back.

Then, once you do the pro rata distribution, if

you paid 151, you are going to get that $1 back as well. I think that is just a misunderstanding.

THE COURT: Okay. I just wanted to clarify.

Let me see if the government has anything they would like to say in response.

Mr. Narwold?

MR. GUPTA: Yes. Would the Court like to hear about any of the other objectors? I do think we have addressed them in our papers.

THE COURT: I don't have any specific questions.

I have read the papers and I have read your responses, and they're standing on their papers.

MR. GUPTA: Thank you.

THE COURT: I will evaluate what they have had to say in view of your responses.

MR. GUPTA: Thank you.

MS. GONZALEZ HOROWITZ: Your Honor, I don't really have much to add beyond what's already been put into the record.

We did address this issue of the concern about compensating smaller users in my opening remarks to the Court and how that is consistent with the text of the statute, so I would refer the Court back to that.

As to Mr. Kozich, we concur with class counsel. We did some further research as to Mr. Kozich's account. It

is true that he has had an account for many years; however, he did not actually pay any fees during the relevant class period. He has incurred fees during that time. At multiple points he has been granted the fee waiver which is now -- which was $15 at the time; that has now increased to 30.

He has -- I believe he mentioned on the call that he has approximately $354 in an outstanding balance but that has not been paid. And so under the very terms of the class definition, he would not fall as a member of the class. So unless the Court has any other questions for me, we agree with the statements by class counsel as to the responses to the objections.

THE COURT: Good. Thank you very much.

Why don't we take 15 minutes or so. No more than 15 minutes.

I think the logical way to proceed, unless you disagree, is to hear from Ms. Oliver on the opt-outs for the 34 people who say they are trying to opt out at this state and, then, to hear from counsel on legal fees and Mr. Isaacson on legal fees. Thank you.

(Whereupon, a recess was taken.)

THE COURT: So I have one follow-up question from earlier. I am not sure whether it's for Mr. Gupta or Ms. Oliver, or both.

It has to do with this question of -- the fact

that some -- let's suppose I am a partner at a law firm and I send out my bills and I include the hours, the hourly rate, and all that stuff; but I also include all of the costs and expenses. And a portion of it is for the work I did for finding stuff on Pacer. I am charging my client for it, my client has paid for it.

A couple of questions. One, as I understand it, your argument is -- the legal argument is: It doesn't matter.

The practical answer is that there were notices that were sent out and an administrator received -- sent emails to accountholders, and no one had -- there were a lot of notices sent out; the response was that there were no disputes.

A couple of questions.

One, are these forms or things that were sent out somewhere in the record here? Are they exhibits or were they exhibits in prior filings? If so, where are they?

Secondly, what did you or the administrators -- I guess you said that what the administrator did when they got the forms was to reach out by email. Was anything else done or done with responses?

So those are the practical questions.

The Rule 23 question is -- you say it's not -- it doesn't matter as a matter of law. But doesn't it --

explain to me why it does or does not affect my evaluation of whether the settlement agreement is fair?

So the first few questions are kind of practical. Please help me; explain this to me a little further.

The second one is: My job is to decide all of the Rule 23 issues. Doesn't this affect fair and adequate?

MR. GUPTA: I think -- so first of all, I will just say: I think the way you recounted it sounds to me exactly right. Ms. Oliver can address your practical questions, and then I am happy to speak to the Rule 23 question.

THE COURT: Okay.

MS. OLIVER: So on the practical questions, we -- you mentioned these notices that were sent out. So there were hundreds of thousands of actual notices, court-approved notices that were sent out. This was a different process from that.

So there were notification forms on the website. We have not filed those notification forms with the substance of those notification forms with the Court, but we can do so.

THE COURT: I would just like to see them just for my own --

MS. OLIVER: Once those notifications were submitted, in the case of an individual notifying the

administrator that they had paid Pacer fees on someone else's -- on an accountholder's behalf, then the administrator sent an email and there was no other attempt to contact. It was by way of email to the accountholder saying: Someone has filed a notification letting us know that they paid Pacer fees on your behalf. If you would like to dispute this, here is the process for doing so. We have not filed the substance of that email either, but we can also do that.

THE COURT: Okay. Thank you.

MS. OLIVER: And I think --

THE COURT: Nobody had any disputes.

MS. OLIVER: There were no disputes filed as part of that process.

THE COURT: You said something like about 400 came back.

MS. OLIVER: So we had -- there were 409 of the payment notifications filed. So that's where someone said: I paid Pacer fees on behalf of somebody else. And then there were 464 accountholder notifications where an accountholder notified the administrator that somebody else had paid their Pacer fees and identifying the payor.

THE COURT: Okay. Got it. Thank you.

So you file that stuff, and I will at least see what I have got.

MS. OLIVER: We will.

THE COURT: Now the question is: Does all of this or how does all of this affect fairness and adequacy under the rules?

MR. GUPTA: Your Honor, I think what you said earlier is right. That, as a legal matter, any sort of potential claim that somebody might have for reimbursement against somebody who paid the fees is a matter of law and equity between those people; and that's what the cases we have been able to find where this comes up in a class action context have said.

THE COURT: You mentioned a footnote in your brief. Is that the only reference in the briefs to this question?

MR. GUPTA: That is the only reference. We have raised this in response to an objection by Mr. Isaacson.

There is a Northern District of Illinois -- I will point out we were actually surprised we were able to find a case precisely on this point; it's a relatively esoteric point.

The broader point is one that is well supported in the law; not just in the Tucker Act context but in all sorts of contexts, including an antitrust case that's going back 100 years where you have all sorts of complex payment streams. The question is: What do you do about some

unreasonable charge that was assessed against one person but then it was reimbursed by another person who has the claim?

And the general rule is that there is not a kind of passing-off defense, that it's the person who paid the charge that possesses the claim. That's certainly true under the Little Tucker Act.

THE COURT: On the broader point, is there specific case law you would point us to or anything in Wright & Miller, Professor Rubenstein or in anybody else's treatise on class actions?

MR. GUPTA: Well, I guess I would just point you -- the point that Mr. Isaacson is making about fairness is that he is saying, as I mentioned earlier, that he thinks it was wrong for us to advocate for a pro rata distribution.

In fact, the case law says exactly the opposite, right? I think *Ortiz* is really probably the best case on this.

THE COURT: Which case?

MR. GUPTA: *Ortiz versus Fibreboard*, the Supreme Court's decision.

THE COURT: So it's basically a subset of that point.

MR. GUPTA: That's right.

THE COURT: If you are settling a big class action, I suppose the only other way you would even think

about doing it would be having some classes, and this class is treated that way and that class is treated that way.

MR. GUPTA: Right.

What is weird about his point is that he is saying that we're favoring the big folks. But, in fact, the parties bent over backwards to engage in a settlement structure that has this minimum distribution. So the little guy is -- we are ensuring that the little guy is getting paid. I think that's the principal point I would make. I think it's hard to say that this is an unfair settlement for that reason.

One last point which is: There are a lot of really big users in this class who are not law firms, they are data companies, they aggregate the date, and they don't have this reimbursement issue, so it's important that they get to be able to recoup what they have paid. Thank you.

THE COURT: Does the government have anything to add on this point?

MS. GONZALEZ HOROWITZ: No, Your Honor. I don't think we have anything to add.

MR. KOZICH: Your Honor.

THE COURT: Yes, sir.

MR. KOZICH: Can I chime in?

THE COURT: On what?

Very briefly. What do you want to talk about,

what we have just been talking about?

MR. KOZICH: Well, it's related. The Department of Justice said that, basically, I have paid Pacer fees. I am not part of the class action. I apologize. I thought that the settlement was saying that the people paid less than 350 are not getting paid; I misread it. I read it again. You are correct.

My point is that I would like the Pacer people to go in and reopen my account so I can use Pacer. I will pay the $4 and some cents that I owe that's a requirement; but I would like the Pacer people to reopen my account if we can do that.

THE COURT: All right. Well, maybe before the hearing is over, the government can tell you who to talk to or who to email, or something like that. Okay?

MR. KOZICH: Okay.

THE COURT: So back to where we were.

I said, before the break, that I was going to ask Ms. Oliver to explain the 34 objectors [sic] and what, if anything, we do about that at this point, and then we'll move on to the attorney's fees questions.

MS. OLIVER: Before I get to the opt-outs --

THE COURT: The opt-outs, I misspoke. The opt-outs.

MS. OLIVER: Mr. Gupta had mentioned the numerous

class member contacts that we have been handling. This is our internal log (indicating) of those contacts, emails, and phone calls. I have handled a number of them. I have reviewed a number of drafts that Ms. Loper and another lawyer back at our office have handled; so we have been personally handling them. There is no call center and there are no customer service representatives, though, some days, boy, I wish there were because we've spent a lot of time on those.

Opt-outs. In 2023, there have been 33 timely opt-outs. I believe the number in the filings was 34. We identified a duplicate entry in there, so it's really 33; the same person with the same claim ID, there were two of those received. 16 additional were untimely. When I say "untimely," I don't mean they filed 12 hours later; they filed two days late. They all had an opportunity to opt out in 2017.

THE COURT: Well, they had an opportunity to opt out in 2017. And then, pursuant to the notice that was sent out, they had a new opportunity to opt out, right?

MS. OLIVER: We did not -- so the new class period --

THE COURT: I see.

MS. OLIVER: They had an opportunity to opt out in 2023. But everybody who was a part of the earlier certified

class from April 21, 2010, through April 21, 2016, had an opportunity to opt out in 2017. They were not given another opportunity to opt out in 2023.

There were ten individuals in 2023 who attempted to opt out, they received the incorrect notice.

THE COURT: That's in addition to the ones you have just been talking about?

MS. OLIVER: So there were 33 that were timely and, then, there were 16 that were not timely. Within the 16, 10 of those individuals received the incorrect notice that told them they had an opportunity to opt out. All 10 of those -- three of them were actually federal government employees. So the 7 who were not federal government employees and received the incorrect notice were then sent a corrective notice saying: We goofed, you got the wrong notice. You had an opportunity to opt out in 2017; you no longer have an opportunity to opt out.

THE COURT: Okay.

MS. OLIVER: And then there were an additional 6 individuals who received the correct notice in 2023 from the get-go. And they tried -- they sent in -- so because they were part of that earlier 2017 group, the website would not let them do it in 2023. They sent in paper forms trying to opt out, but they already had an opportunity to opt out in 2017. So all of the so-called invalid or late opt-outs in

2023 had an opportunity to opt out in 2017.

THE COURT: So the bottom line is those that were filed -- it's because the settlement created a new subclass or new time period --

MS. OLIVER: That's right.

THE COURT: -- an additional time period.

MS. OLIVER: That's right.

THE COURT: So with respect to the people that got in because of the new time period, they were considered timely, and they opted out.

MS. OLIVER: Yes. And there were 33 of those.

THE COURT: Right.

With respect to the others, either because they misunderstood from the get-go or because they were inadvertently misled, they were ultimately not allowed to opt out because they missed their opportunity.

MS. OLIVER: Correct.

THE COURT: And that explains the whole thing.

MS. OLIVER: Yes. I hope so.

THE COURT: It did.

MS. OLIVER: Thank you.

THE COURT: So let's move on to the attorney's fees question which is -- everybody agrees that class counsel is entitled to attorney's fees.

The issues, as I understand them, are: One,

lodestar versus percentage with the subset of percentage of -- percentage with lodestar cross-check. And the other question is: How much?

So I think those are the questions.

MR. GUPTA: I am happy to start, Your Honor, but please jump in if I can help out.

So I think, as you said earlier, there are two approaches; there is the percentage approach and the lodestar approach. The lodestar approach is generally used outside of common fund class actions the federal circuit has recognized; it's used in garden variety fee shifting cases where there is a statutory fee and it comes out of the defendant's pocket.

The percentage approach is the prevailing approach in common fund class actions. So courts in common fund class actions overwhelmingly prefer the percentage of the fund approach. For reasons that you recognized in your Black farmers case, the reason that courts have gravitated to the percentage approach is that it helps align the interests of the lawyers more closely with those of the parties by discouraging the inflation of attorney hours and promoting efficient prosecution and resolution of litigation which benefits the litigants and the judicial system.

So I don't take the government to be quarrelling with the notion that the percentage approach is the

appropriate approach here. I actually don't take them to be quarrelling even with the percentage that we have proposed. There is one objector, Mr. Isaacson, who does quarrel with all of that; we can get into that.

I thought it might be helpful -- just in talking about the percentage -- to give you some background here because this is an unusual class action in which there was actually a negotiation between the two parties about the percentage.

First, the retainer agreements with the class representatives provide for an attorney fee of 33 percent.

THE COURT: It's contingent.

MR. GUPTA: Correct. Correct.

THE COURT: So, again, if there was no success --

MR. GUPTA: Correct.

THE COURT: -- even with that retainer agreement, they get zero.

MR. GUPTA: Exactly. That is the standard kind of contingency fee arrangement in plaintiffs' class action litigation and other kinds of contingency litigation. So that's -- paragraph 65 of my declaration mentions that.

Then the notice that was sent out to class members said: By participating in this class action, you agree to compensate counsel at 30 percent of the recovery. That's ECF 43-1 and 44.

So we're going from 33 percent down to 30 percent. Then, as I mentioned, we have this unusual negotiation with the government. In the mind run of class actions -- and Mr. Narwold or Ms. Oliver can speak to this, they have done many, many class actions -- you don't have a cap of this kind, it's just left to the discretion of the Court. But here --

THE COURT: Even a common fund?

MR. GUPTA: Yes. The cap is unusual even in a common fund fee where there is already -- before this comes to you in arm's length negotiation about what that cap is, we agreed with the government to cap any fee and expenses at 20 percent of the common fund; and then, now what we're requesting is a fee of 19.1 percent.

The upshot of all of that is that the percentage that we're requesting is well below the standard one-third recovery and is even below the average for settlements of this range. Professor Fitzpatrick goes into this in some detail in his declaration, and you will see this at paragraph 19 of his declaration. For settlements that are within the range of 70 million to 175 million, this percentage is below even the average within that range.

Then, as you heard, the government -- this is also, in our experience, quite unusual in a class action. The defendant is coming to you and saying: This is an

outstanding result for the class members; this is a landmark settlement.

So we think this is a humbly, I would say, better than average class action and a better than average class action settlement. Even if you are looking at the average run-of-the-mill class action settlement, the fee that we're requesting is well below the average.

Then I think that raises this question of lodestar cross-check. There has been a lot of ink that's been spilt about precisely how one does the cross-check. I think I was saying to my friend from the government in the hallway during the break, I think you actually have helped us out. They pointed out some things that we had not provided the Court with that would -- if you choose to do a lodestar cross-check, and it's entirely within the Court's discretion -- that would aid the Court's process in performing that lodestar cross-check and, hopefully, getting some comfort that this is a reasonable fee. Whether you are looking at it just from a straight percentage standpoint or whether you are looking at it based on the multiplier in the case. So you have the discretion to do that. I hope that we have given you the tools necessary that, if you choose to do that --

THE COURT: You will provide additional tools you say?

MR. GUPTA: No, no. I think we have.

THE COURT: I thought you said she had suggested there were some things she should --

MR. GUPTA: Let me try to say this a little more clearly.

What I am saying is that the government's filing, their response, raised a number of questions and issues that were exclusively trained on the question of how one would do the lodestar calculation. Now, we could have just taken the position that: Look, all of that is irrelevant because the correct way to do this is it's a percentage fee and our percentage fee is reasonable. That is our frontline position.

But we didn't stop there. We also provided information and expert reports that I hope show the Court that: Even if one were to do the cross-check route, that the percentage fee that we're requesting is well within the range of reasonableness.

I am happy to answer any questions the Court may have about either the percentage approach or the cross-check but, hopefully, that's a helpful kind of orientation.

THE COURT: As I understand it, the D.C. Circuit may or may not have set out some factors. The federal circuit -- maybe the D.C. Circuit has and the federal circuits are slightly different, but they are pretty

comparable.

MR. GUPTA: They are pretty similar. And honestly, they are pretty similar across the circuits. We organized our brief around the federal circuit's factors in the *Health Republic* case.

THE COURT: Do you think, as you read federal circuit's -- not this decision, I don't think.

MR. GUPTA: The *Health Republic* case?

THE COURT: Do you think that that decision requires a lodestar cross-check?

MR. GUPTA: I don't think that it does. And in fact --

THE COURT: There is some language that suggests it's a little stronger than a recommendation. I can't find it right now.

MR. GUPTA: The court says: We are not deciding that question; that's Footnote 2 of the decision.

It was an unusual case because the class notice in that case said: We will do a lodestar cross-check; and then they didn't.

So in one sense, it's a very easy case. The holding of the case is: When you say you are going to do something, you need to do something. Right?

THE COURT: Because that's what the class relied upon when they got the notice.

MR. GUPTA: Right. And I think, also, there were some judicial eyebrows raised because they said they would do this cross-check and, then, the fee was 18 or 19 times the hourly rates. But the holding -- the holding is one that is inapplicable here, which is: If you say you are going to do it, you have got to do it.

Now, the court said it wasn't deciding the question of whether a lodestar cross-check was required. But in Footnote 2 of the decision -- I just want to be candid about this. The court points out why a cross-check might be warranted. And I can see why it was warranted on the facts of that case. So the federal circuit hasn't decided the question.

But if you were to write an opinion that's like your Black farmers' decision that says: Look, the percentage requested here is reasonable; but, in addition, a lodestar cross-check would only confirm that result. I think that is something that would probably be greeted well by the federal circuit given the language in this decision.

THE COURT: What are the most -- what are the common fund settlement decisions of the courts that are most comparable to the situation we're facing here. Don't feel like you have to say "Black farmers."

MR. GUPTA: Well, which aspect of this situation, if I may ask?

THE COURT: Well, I guess only than the Swedish Hospital and Health -- whatever it's called -- in the federal circuit, in my own decision in Black farmers, are there other cases that you say, "Aha! This one is really a lot like what we're facing here" for whatever reasons?

MR. GUPTA: I mean, you named the ones that I would point to. And I would say on *Health Republic* I hope I have persuaded you that it's actually super different.

THE COURT: Which one?

MR. GUPTA: The *Health Republic* case is very, very different from this one. Right? I think those are the cases that I would point you to.

We also cite a number of Court of Federal Claims cases in our submission; the *Moore* case, the *King County* case, *Quimby* case. The reason we cite those is it -- in effect, when you are a federal district court in the Little Tucker Act case, you are kind of sitting as the Court of Federal Claims, so we think those are analogous. They are also cases involving large claims against the federal government, so I think they're analogous.

THE COURT: Helpful. Thank you.

I will hear from the government.

MR. GUPTA: Thank you.

MS. GONZALEZ HOROWITZ: Just so it's clear on the record, Mr. Gupta did say to me out in the hallway that, you

know, "I think I helped you." And for the record, my response was, "I know."

Your Honor, I am happy to answer any questions you may have. I think we do agree, as a general principle, that the D.C. Circuit case law appears to be pretty clear that the percentage of the fund method is the preferred approach in a common fund case such as this one; that's from the Swedish hospital case.

We have talked at length about the *Health Republic* case. I think, like this Court identified, it perhaps suggested strongly that not just in situations where it is required in a class notice to conduct a lodestar cross-check, but the Court, as a general matter, may conduct the cross-check anyway just to assure itself that the amount that is requested is reasonable. Because, ultimately, that is well within the Court's decision, is to determine what is the reasonableness of the fee.

The government had raised some concerns in its filing about the initial submission that plaintiffs made with respect to the justification and the declarations about the lodestar. I think some of those concerns have been remedied by the documentation that was supplied on reply. Ultimately, it's within this Court's discretion to conduct a cross-check. But plaintiffs have now provided the Court with some additional information, not just about their

lodestar at the rates at which they have requested but, also, their lodestar at the Fitzpatrick matrix rates which the government had noted for the Court essentially has been considered by other judges in this district as a baseline in federal complex litigation. And, of course, as we recognized in our filing, those cases were not class action cases but they are cases that talk extensively about the going market rates in this district and what complex federal litigation looks like. I am referring there to the *Brackett versus Mayorkas* decision by Chief Judge Boasberg and, also, the *J.T.* decision that we cited in our brief by former Chief Judge Howell.

Unless the Court has any questions -- actually, I would also point the Court to one additional case that I think I don't believe I heard class counsel mention but I think would be analogous; it is a Court of Federal Claims case. But that would be the *Mercier versus United States*, and that's 156 Federal Claims, Fed Claim 580. It's from 2021.

THE COURT: I do have one or two questions.

In your initial filing, as I understand your position, you agree: Percentage of the common fund in the common funds case, not lodestar. And you think that lodestar cross-check is at least a good idea and, possibly, D.C. Circuit has suggested it should be done -- or the

federal circuit?

MS. GONZALEZ HOROWITZ: Just to clarify, the federal circuit, I think, has perhaps stated a stronger emphasis on the cross-check than the D.C. Circuit has.

I think the D.C. Circuit was perhaps a little less convinced in the Swedish hospital case but, certainly, the decision from the federal circuit is from earlier this year, so I think that would be persuasive to the Court's analysis. But, ultimately, the circuit case law in this District holds that it's within the Court's discretion to conduct the cross-check.

THE COURT: Now, I was going to say the $64 million question but, really, the $23 million question is, in your initial filing, you argue that the 19.1 percent, or whatever it is, that leads to about a $23 million award is too much. You didn't tell me what you thought was appropriate.

So my two questions are: In view of subsequent filings, do you still think that that is too much in this case. If so, where does the government come out in terms of a dollar amount or percentage amount?

MS. GONZALEZ HOROWITZ: So I want to be clear, Your Honor, we didn't oppose plaintiffs' request for 23.8 million. I didn't read our filing to mean that we believed that the 19.1 percent was inappropriate or that it

should be reduced. Ultimately, that is well within the Court's discretion as to what to award. We are not taking a position on whether the 23.8 is reasonable.

We believe that there were some holes in the filing that have been addressed by plaintiffs, by class counsel, on reply about how it is that they came to that lodestar and whether the -- taking aside whether the 19.1 is reasonable, I think everyone agrees the case law, in this District at least, has suggested that anything from 15 to 45 percent in a common fund case may be appropriate and, of course, that's always depending on the circumstances of the particular case.

Ultimately, if the Court found that 19.1 here, which is slightly below the threshold that the parties had negotiated in the settlement agreement, is appropriate, we wanted to ensure that the Court had sufficient information in the record to base its decision in awarding the full amount of fees. And I think that plaintiffs have done some of the legwork on the back end to address those concerns.

So I just want to be clear. We're not specifically advocating for a reduction, but we had some concerns about how that amount was calculated.

Certainly, we also pointed to the case law about the multiplier. In this case I think, again, the D.C. Circuit has suggested that it can be between 2 to 4

percent depending on which lodestar the Court is working off of; the ranges here can be slightly higher. Of course, there has been some case law in the federal circuit that has suggested that perhaps it should be on the lower end, closer to the 2 percent. Again, that is within the Court's discretion to determine.

THE COURT: Okay. Thank you for clarifying your position. Actually, it's not a clarification. I think that it's -- your position is about, because the plaintiffs have filed more supporting documentation for what they're requesting. Thank you.

MS. GONZALEZ HOROWITZ: Thank you.

THE COURT: So I will hear from Mr. Isaacson.

Mr. Isaacson, you already made some points with respect to attorney's fees earlier so why don't we -- please try not to say the same things you have already said; I have heard it, we took notes on it. We have a transcript we are going to look at. Whatever additional points you want to make about attorney's fees and/or responses to what has been said.

MR. ISAACSON: Absolutely, Your Honor.

One of the things that was said was that there were retainer agreements signed for one-third of the recovery, 33 percent. The retainer agreements do not bind the class and they do not bind this Court.

THE COURT: Correct.

MR. ISAACSON: There was a statement that an earlier class notice said: You agree to 30 [sic] percent if you don't opt out. I did not agree to 30 percent.

I saw that notice and I said to myself: If they try to enforce that, I am objecting because that is wrong; that is not enforceable. It was grossly inappropriate.

They sent a new notice that supersedes that older notice saying I can appear to object to the attorney's fees. So the notion that there is some kind of binding effect of that first notice is --

THE COURT: I don't think there is a binding effect on me of anything.

MR. ISAACSON: Pardon me?

THE COURT: I don't think there is a binding effect on me of anything.

MR. ISAACSON: That's true.

THE COURT: You have pointed out and we have all read Rule 23(e). You have specifically pointed out the subpart that talks about how fees are a part of fair and adequate.

MR. ISAACSON: Absolutely, Your Honor.

They say that the standard is one-third. Well, that's in personal injury cases. Personal injury cases are extremely labor intensive; they don't have the economy scale

the big class actions do. One-third is not the appropriate reference.

On the question of whether *Health Republic* requires a consideration of the lodestar, I think it does. I think lodestar needs to be considered in determining a reasonable percentage, quite frankly. It's more appropriate to take the lodestar amount up front to determine the percentage than it is to try to bring it in at the end as merely a cross-check.

Now, there are judges like former Chief Judge Vaughn Walker of the Northern District of California who wrote an article saying that judges have an ethical duty to consider the lodestar. I think it was published in the *Georgetown Journal of Legal Ethics*; there was a co-author whose name escapes me at the moment.

The Swedish hospital case was mentioned, that's a D.C. Circuit case which says that: In common fund cases, attorney's fees must be awarded as a percentage of the fund. The Eleventh Circuit also has held that in a case called Camden I Associates -- *Camden I Condominium Association,* pardon me. They are the only two circuits that have held that, and their holdings are in conflict with Supreme Court authority.

THE COURT: Which Supreme Court authority in particular?

MR. ISAACSON: The foundational decision established in the common fund doctrine, *Greenough* -- *Trustees versus Greenough*; the same one that I rely on with respect to incentive awards.

In that case, the court established the common fund doctrine, saying that the class representative could receive compensation from the common fund reimbursing him for his actual outlays incurred. There was no percentage in that case.

The later cases, the Eleventh Circuit in *Camden I Condominium Association*, the D.C. Circuit in Swedish hospital -- and I think they both rely on a district court case called *Mashburn*; it might have been out of the District of Alabama. They all say that *Greenough* was a percent fund case. It wasn't. I mean, the trend toward the percent of fund misrepresents the foundational decisions of the Supreme Court. The first one was not percent of fund. The second one, *Pettus*, that was percent of fund. The lower courts awarded 10 percent. The Supreme Court said that's excessive and cut it to 5 percent.

There are cases, I think, from the '20s and '30s where the Supreme Court deals with common fund or equitable fund fee awards. I don't believe it has ever approved of a common fund fee award or equitable fund fee award that exceeded 10 percent. So the notion that there is a

benchmark of 25 percent or a much higher amount is at odds, again, with the Supreme Court decisions.

The *Mercier* case was mentioned. I think *Mercier* is quite relevant; I mean, it's one of the cases Rubenstein included in his comparators when he deconstructed Fitzpatrick's matrix. That's a case where there was a 65 percent recovery, not 25 percent like in this case. Fitzpatrick was the expert witness in that case and recommended a 30 percent fee award that amounted to a multiplier of 4.4. The Court said, no, that's way too much; that's a windfall. I think you need to consider the lodestar in setting the amount of the fee.

I think that a reasonable amount of the fee in this case -- 5 percent will more than cover their claimed lodestar. 10 percent would be more than double their lodestar; a multiplier of two. 20 percent is way too much.

I also want to note that another case that's often cited as a percent of fund case, the Supreme Court's decision in *Boeing versus Van Gemert,* a 1978 decision. The fees in that case ultimately were awarded on the lodestar basis; they were not awarded as a percentage of the fund.

I spent many years with plaintiffs' class action firms where, quite frankly, the firm management regarded percent of fund fee awards as the way to get paid the most money as quickly as possible. If you look at a single case

and focus only on one case and imagine that is the only case that a law firm is ever going to try then, yeah, it makes sense to think that they're going to try to maximize the recovery in that one case so that they can get a larger -- a percentage of a larger amount; that's not how the Court -- how law firms run their practice. They have a portfolio of cases.

In the class action practice, the assumption is that the defendants are going to settle quickly for a fraction of the damages; you can put minimum work in for a fraction of the damages settlement; and based on the minimal hours put in, your percent of fund award will amount to a large multiplier. That's how you get paid the most. That is not something that maximizes the interests of classes and recoveries and it, quite frankly, in the long run, does not align the interest of the classes with the interests of counsel.

THE COURT: Okay. Are you almost done?

MR. ISAACSON: I am almost done.

I would also note that when they talk about their projected lodestar for any appeal in the matter, to the extent that an appeal is focusing on attorney's fees, they're not entitled to recover for their work -- applying for or defending attorney's fees in a common fund case.

Because Professor Rubenstein and Professor

Fitzpatrick are not here to be cross-examined and because I think that their opinions submitted in this case are, with respect to the later ones, untimely and unreliable, I respectfully move to strike them. I move to strike them as hearsay; they are out-of-court statements to be taken for the truth or falsity of the matters asserted --

THE COURT: I am not sure whether an objector has standing to move to strike. If you want me to disregard them for the reasons you have --

MR. ISAACSON: I respectfully request you disregard them, Your Honor. Thank you very much.

THE COURT: Thank you, Mr. Isaacson.

Mr. Gupta.

MR. GUPTA: I will try to be brief because it's been a long day, but I do want to make sure that I answer any questions you have.

I would just emphasize at the outset that I hope I wasn't misunderstood earlier. I was not at all suggesting that anything that I was reciting was binding on the Court with respect to those agreements. I think the Court has absolute discretion and, in fact, a duty to assure itself that the absence --

THE COURT: Somebody said -- I don't know whether it was Mr. Isaacson or one of the parties -- I have fiduciary obligations.

MR. GUPTA: Yes. The Court acts as a fiduciary on behalf of the absent class members. And your role here is important because there might not otherwise be adversarial presentation. And the danger with a class action is that lawyers are going to sell out their clients in exchange for red carpet treatment on attorney's fees, and courts have to be on guard against that. Now, we don't think this is remotely a case of that kind.

You heard what the government said about the quality of settlement, the risks involved. We're proud of this case. But I also think that the Court's duty here is important. I think, just as I mentioned earlier there was a kind of dog that didn't bark, the dog that didn't bark here is you have very sophisticated players in this very, very large class that are paying the fee -- that are going to pay the fee that we're asking and none of them are here objecting. I think that's notable.

The argument that Mr. Isaacson is making about how courts should handle attorney fee applications in reliance on this 1882 case, *Trustees versus Greenough,* is one that, as far as we can tell, has been rejected by every one of the federal circuits, including in many cases in which he has been an objector which he doesn't acknowledge in his objection.

If you want to read one of those cases, I might

recommend a district court case from a few years back by Judge Ali Nathan in New York; it's the *Bioscrip* case that is cited on page 12.

THE COURT: I mean, without prejudging anything, she's one of the smartest judges I know in the whole country.

MR. GUPTA: Yes. It won't surprise you to know that it's a pretty darn scholarly opinion and it rejects these arguments, as I have said, as have many other circuits.

THE COURT: What's the cite? I'm sorry.

MR. GUPTA: That is 273 F. Supp. 3d 474. You can take a look at page 478 to -89.

What she explains is that Mr. Isaacson's argument that there is a presumption against lodestar enhancement in fee shifting cases, that just doesn't apply in the common fund context. The common fund context is quite different.

So I think that that set of arguments has been roundly rejected. I can't prevent Mr. Isaacson from taking an appeal. And I don't have -- as I did with the service awards, I don't have a kind of factual argument that will take that issue off the table because his attack is a categorical attack on the way things are done. He is entitled to make that argument, and I hope he has had a fair hearing. I don't really have anything else to add unless

the Court has questions.

I thank the government for pointing out some holes in our filing and causing us to file the things we filed in reply. I hope that gives the Court the tools it needs to decide this request. Thank you.

MS. GONZALEZ HOROWITZ: Nothing further by the government.

THE COURT: Well, it seems to me that I have everything I need except for the few things that Ms. Oliver is going to file to edify me about what's going on on the administrative side of things.

I know what my responsibilities are. I think that the filings from both sides in the presentations from counsel this morning, as well as from Mr. Isaacson and Mr. Kozich, have been very, very helpful. I don't think I need anything more than what I already have, other than those few little educational informative things. I will try to get to this as soon as I can. It's an important case.

Again, I have to decide whether it's fair and accurate, how significant it is, and the contributions made by counsel and everything.

You know, this tool of Pacer and electronic filing, as I said at the beginning, has revolutionized the federal courts in the practice of law. What we're talking about here is very, very important to a lot of people and

institutions. It involves a lot of money. But everyone has to be appreciative of whoever developed these technologies, the Administrative Office of the Courts for -- Congress and the Administrative Office of the Courts for making the court system more accessible to the public and to lawyers and to everybody through electronic filings and through Pacer.

The AO has done a terrific job and the leadership of the Chief Justices -- I guess it started with Justice Rehnquist and Justice Roberts -- the directors of the Administrative Office, among others, and their staffs.

I know that our lives are a lot easier; lawyers' lives are certainly a lot easier. We need to put this in the perspective of: We have come a long way, not just since quill pens. But, frankly -- this is a digression. It's late in the morning.

When I was clerking back here in the old building for Judge Aubrey Robinson, we heard motions hearings. Now we have an individual calendar system; you know who your judge is from the beginning of the case, unless she retires and dumps things on other judges.

We had a master calendar system. You would look at the docket and you may have seen five, six, seven different judges in a case. On Wednesdays somebody from the clerk's office would come up with these piles of files -- some of you may go back that far -- with these piles of

motions and say: Here are the civil motions for Friday. There might be 30 of them, nothing is electronic; it's all like this (indicating). Judge Robinson would say: Okay, you take half, I will take half. Let's start reading -- Judges only had one clerk in those days -- let's start reading; we'll talk on Thursday afternoon. They may still do it that way in the Eastern District of Virginia; I have argued there. They decide most things from the bench there. They probably think that we can decide from the bench here more frequently, too, but we don't do that so much anymore. So times have really changed. That having been said, I am not going to decide this from the bench. Thank you, all, very much.

THE COURTROOM DEPUTY: This court is adjourned.

(Whereupon, the proceeding concludes, 12:49 p.m.)

* * * * *

CERTIFICATE

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

This certificate shall be considered null and void if the transcript is disassembled and/or photocopied in any manner by any party without authorization of the signatory below.

Dated this 15th day of May, 2024.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

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