"SPLIT MY AWARD WITH WHOM?" A CASE FOR PLAINTIFF INCENTIVE AWARDS AND PLAINTIFF-ATTORNEY FEE SPLITTING IN CLASS ACTION LAWSUITS

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Named plaintiffs are the heart of class action lawsuits—without them, there is no class action. To motivate these individuals to be the face of the class and compensate them for their role in the litigation process, courts typically approve named plaintiff incentive awards when such awards are included in settlement offers. Recently, however, the Eleventh Circuit held that these awards are prohibited under purported Supreme Court precedent from the late 1800s. This decision undermines the future of class actions by removing any incentive individuals may have in taking on the extra work and scrutiny of bringing a class action lawsuit. This Note argues that the circuit split created by the Eleventh Circuit is unsupported by Supreme Court precedent and runs counter to decades of precedent existing in the lower and appellate courts. This Note also proposes a change to the Rules of Professional Conduct—namely, allowing for attorney-client fee splitting in the class action context—to better protect incentive awards from judicial intervention.

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INTRODUCTION

Class actions have a reputation for facilitating low-value claims that result in incredibly high attorneys' fees.[1] However, the latest eyebrow-raising developments in class actions have nothing to do with what the cases are about, or even who is bringing the suit.[2] Rather, today's pressing

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1 *See, e.g.*, John Harrington & Hristina Byrnes, *A Man Sues Himself? A Docket of 25 of the Weirdest, Silliest and Frivolous Lawsuits*, USA TODAY (Feb. 3, 2020, 12:13 PM), https://www.usatoday.com/story/money/2020/02/03/25-really-weird-lawsuits-you-wouldnt-believe-were-ever-filed/41083385 [https://perma.cc/F8ZL-FUV2]; Laura Woods, *Ludicrous Company Lawsuits in the Last Decade*, YAHOO (Sept. 15, 2020), https://www.yahoo.com/video/crazy-lawsuits-ridiculous-payouts-090000559.html [https://perma.cc/YC3A-AFDY]; Kathianne Boniello, *Ridiculous Class-Action Lawsuits Are Costing You Tons of Money*, N.Y. POST (Jan. 17, 2018, 10:09 AM), https://nypost.com/2018/01/06/ridiculous-class-action-lawsuits-are-costing-you-tons-of-money [https://perma.cc/MX97-KMMH].

2 *See* Holly Baker, *Why Class Action Incentive Awards May Be in Jeopardy: Explained*, BLOOMBERG L. (Oct. 18, 2022, 3:30 PM), https://news.bloomberglaw.com/litigation/why-class-action-incentive-awards-may-be-in-jeopardy-explained [https://perma.cc/638H-YPAL]; Carson Lane & Michelle Liguori, *Class-Action Incentive Awards Under Siege?*, ELLIS WINTERS: BEST IN

question is whether or not named class action plaintiffs[3] should receive a larger payout from the settlement fund than the absent class members they represent.[4] Plaintiffs' class action lawyers argue that these awards—known as incentive or service awards—motivate plaintiffs to come forward and to take on the additional work and responsibility of representing similarly situated class members.[5] Incentive awards have long been accepted in practice, but in 2020, the Eleventh Circuit reversed decades of precedent and held that incentive awards are prohibited in *Johnson v. NPAS Solutions, LLC*.[6] Presently, only one panel of the Second Circuit has explicitly endorsed the Eleventh Circuit position, yet still declined to follow it because of binding Second Circuit precedent which required the panel to approve the incentive award.[7] Another Second Circuit panel, however, refused to accept *Johnson*'s reasoning—as did the Ninth, First, and Seventh Circuits.[8]

This Note argues that *Johnson* was wrongly decided and that decades of precedential case law approving incentive awards in class

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CLASS BLOG (July 23, 2021), https://www.elliswinters.com/classactions/class-action-incentive-awards-under-siege [https://perma.cc/9WF4-XEG9].

3 "Named plaintiffs," as used throughout this Note, refers to class representatives who bring the litigation to court, as opposed to absent class members who have no direct role within the litigation proceeding. Hansberry v. Lee, 311 U.S. 32, 43 (1940) (defining named plaintiffs as "members of the class who are present [and] are, by generally recognized rules of law, entitled to stand in judgment for those who are not").

4 *See* Baker, *supra* note 2; Lane & Liguori, *supra* note 2.

5 *See* Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 958 (9th Cir. 2009) (finding that incentive awards "are intended to . . . make up for financial or reputational risk undertaken in bringing the action"); Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1305, 1316, 1323 (2006) (describing named plaintiffs as those who "may have to comply with burdensome or intrusive discovery requests" and take on "risky litigation" and finding that between 1993 and 2002, nearly twenty-eight percent of class action settlements included incentive awards named plaintiffs).

6 975 F.3d 1244, 1263–64 (11th Cir. 2020), *reh'g denied*, 43 F.4th 1138 (2022), *cert. denied*, 143 S. Ct. 1745 (2023); *see* Jonah M. Knobler, *Johnson Stands (For Now): Eleventh Circuit Keeps Its Ban on Class Rep Incentive Awards*, PATTERSON BELKNAP: MISBRANDED (Aug. 18, 2022), https://www.pbwt.com/misbranded/johnson-stands-for-now-eleventh-circuit-keeps-its-ban-on-class-rep-incentive-awards [https://perma.cc/4JC5-PY9L] (describing the *Johnson* decision as sending a "modest tremor through the class-action world"). This is not just a surprise to the general audience following class action litigation, but even the dissent in *Johnson* noted that this was a step away from decades of precedent. *Johnson*, 975 F.3d at 1264 (Martin, J., concurring in part and dissenting in part).

7 *See infra* Section II.D; Fikes Wholesale, Inc. v. HSBC Bank USA, N.A., 62 F.4th 704, 721 (2d Cir. 2023).

8 Moses v. N.Y. Times Co., 79 F.4th 235, 255–56 (2d Cir. 2023); *In re* Apple Inc. Device Performance Litig., 50 F.4th 769, 786–87 (9th Cir. 2022); Murray v. Grocery Delivery E-Servs. U.S.A., Inc., 55 F.4th 340, 353 (1st Cir. 2022); Scott v. Dart, 99 F.4th 1076, 1085 (7th Cir. 2024).

action settlements should stand, thus preserving class action lawsuits.[9] Because the Eleventh Circuit has cast doubt on the acceptance of incentive awards and the Supreme Court denied review in *Johnson*, the lower federal courts have free rein over which path to take, particularly where the appellate courts have yet to set a bright-line rule on them. This suggests a possible future where courts strip named plaintiffs of their incentive awards and named plaintiffs thus have little reason to bring class actions.[10] This Note proposes that discretion to grant incentive awards should be stripped from judges and instead left for attorneys and named plaintiffs to decide after settlement agreements, requiring only court approval.[11]

Incentive awards are both essential to attracting strong representative plaintiffs and fully consistent with the Federal Rules of Civil Procedure (FRCP).[12] This Note, focusing on common fund (rather than fee-shifting) class actions,[13] argues for a change in the ethical rules

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9 *See infra* Parts II–III; *see also Johnson*, 43 F.4th at 1152 (Pryor, J., dissenting) (stating that the *Johnson* decision puts the Eleventh Circuit "at odds with more than 50 years of class action law and decisions from every other federal court in the country").

10 *Johnson*, 975 F.3d at 1264 (Martin, J., concurring in part and dissenting in part); *see, e.g.*, *Fikes Wholesale, Inc.*, 62 F.4th at 721 (expressing theoretical acceptance of the *Johnson* panel's reasoning but declining to follow it because of Second Circuit precedent). A district court in the Tenth Circuit has also recently decided to follow *Johnson*. *See* Cotte v. CVI SGP Acquisition Tr., No. 21-cv-299, 2023 WL 5351018, at *3–4 (D. Utah Aug. 18, 2023).

11 *See infra* Part IV.

12 *See infra* Part III.

13 Common fund class actions are those where attorneys' fees (and incentive awards) are taken out of a common payment fund set up for the class members, whereas fee-shifting class actions are those where attorneys' fees are paid by the losing party. *See* Martha Pacold, Note, *Attorneys' Fees in Class Actions Governed by Fee-Shifting Statutes*, 68 U. CHI. L. REV. 1007, 1007–08 (2001). Courts have different methodologies for calculating fees in both forms of class actions. *Id.* at 1016–17. Fee-shifting arrangements often do not result in a large monetary fund and instead provide for other forms of relief such as declaratory judgments, whereas common fund cases result in a large pool to be split among class members and class counsel. Monique Lapointe, Note, *Attorney's Fees in Common Fund Actions*, 59 FORDHAM L. REV. 843, 864–65 (1991). Fee-shifting class actions are brought under fee-shifting statutes which typically do not mention incentive awards; as a result of the silence, some courts have interpreted fee-shifting statutes to prohibit incentive awards. 5 WILLIAM R. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 17:4 (6th ed. 2024). Other courts have found that to grant such an award would require consent from the defendant because there is no common fund from which to pull the award, and therefore the defendant would have to pay that award directly to the plaintiff. *Id.* Because of these various interpretations and the fact that there is indeed no common fund from which either the attorney fee or the incentive award could be pulled, this Note will only focus on common fund class actions in its proposal recommending that the percentage of the fund awarded to attorneys should be split with the named plaintiff. *See infra* Part IV.

governing attorneys.[14] Specifically, the loosening of rules against attorney fee splitting[15] would allow class counsel to allocate a portion of its fees to lead plaintiffs, thereby avoiding judicial review of the legality of incentive awards.[16]

Part I will briefly discuss the history of Rule 23 of the FRCP—the procedural mechanism for class action lawsuits—as it pertains to the availability of incentive awards.[17] Part II will then describe the recent circuit split on the availability of plaintiff incentive awards.[18] Part II will also chronicle the shifting attitudes and ethics concerns regarding incentive awards beginning in the mid-2000s, with the Eleventh Circuit's decision in *Johnson* as the apex of judicial hostility toward these awards.[19] Finally, Part II will explore the breadth of this developing split through a review of post-*Johnson* cases at both the district and circuit court levels.[20]

Part III will discuss the problems with the *Johnson* decision, the strengths of the other circuit courts' approaches to incentive awards, and the gaps and concerns that continue to exist in those other circuits' approaches.[21] Part IV will then propose that a solution to this burgeoning circuit split is to change the ethics rules governing fee splitting to allow attorneys to split a portion of their fees on the case with named plaintiffs, making the process of determining the size and appropriateness of incentive awards more efficient.[22] Finally, this Note will conclude by illustrating that the *Johnson* decision could be detrimental to future class action litigation if other circuits follow *Johnson* (given the importance of these awards in bringing life to class actions), and will reaffirm that a change in ethics rules could help resolve any such consequences.[23]

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14 *See infra* Part IV.

15 MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 2023).

16 *See infra* Part IV.

17 *See infra* Part I.

18 *See infra* Part II.

19 *See infra* Sections II.B–C.

20 *See infra* Section II.D.

21 *See infra* Part III.

22 *See infra* Part IV.

23 *See infra* Conclusion.

I. BACKGROUND

A. *FRCP Rule 23*

Federal class action lawsuits are brought under Rule 23 of the FRCP.[24] Before the FRCP, the Supreme Court relied on Federal Equity Rules.[25] Rule 48 of the Federal Equity Rules, the first precursor to FRCP Rule 23, governed class action suits.[26] In 1912, Rule 48 was repealed and Rule 38 was enacted in its place, with the continued purpose of providing courts guidance in adjudicating class action suits.[27] The FRCP were promulgated in 1938, with Rule 23 governing the procedure for class actions; the Rule, for the first time, explicitly required adequacy of representation, but in other respects mirrored Equity Rule 38.[28] Significant amendments to Rule 23 were made in 1966—most notably imposing a "binding effect on absent parties" and requiring district courts to certify a class, vouching for the adequacy of the representatives.[29] These amendments serve to further the goal of class actions: giving individuals the space to bring suits on behalf of a larger class where the claims are similar enough that one solution is an adequate remedy for all members, but where the individual claims may have little monetary value on their

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24 FED. R. CIV. P. 23.

25 *See* RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, 42 U.S. (1 How.) lxx (1842) (superseded 1912).

26 *See* Rule 48, RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, 42 U.S. (1 How.) lvi (1842) (superseded 1912) ("Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.").

27 *See* Rule 38, RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, 226 U.S. 649, 659 (1912) (superseded 1938) ("When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.").

28 FED. R. CIV. P. 23(a) (1940) (stating that a representative may bring suit on behalf of the class when they will "fairly insure the adequate representation of all"); John G. Harkins, Jr., *Federal Rule 23—The Early Years*, 39 ARIZ. L. REV. 705, 706 (1997).

29 FED. R. CIV. P. 23(c)(3) (requiring a binding judgment on class members of Rule 23(b)(1) and Rule 23(b)(2) class actions); Andrew Faisman, Note, *The Goals of Class Actions*, 121 COLUM. L. REV. 2157, 2168–69 (2021); FED. R. CIV. P. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action."); Jay Tidmarsh & Tladi Marumo, *Good Representatives, Bad Objectors, and Restitution Settlements*, 48 B.Y.U. L. REV. 2221, 2239 (2023).

own.[30] Previously, under the Federal Equity Rules, there was no such similar intent, as showing the adequacy of representatives was not required and the results were not binding.[31]

Another essential aspect of Rule 23 is found in Rule 23(e), which requires that district courts review settlement proposals for fairness, reasonableness, and adequacy when such an award binds class members.[32] Among the numerous issues courts must consider at a fairness hearing is whether the proposal "treats class members equitably relative to each other."[33] Of note is that the Rule requires *equitable* treatment, but not *equal* treatment.[34] Because equitable treatment is the benchmark, courts evaluate incentive awards in light of whether the payment is justified based on the work of named plaintiffs; if the individual puts in enough effort, they get the reward.[35] Conversely, under an equal treatment requirement, courts would automatically strike down such an award since it would result in unequal payments between class members.[36]

B. *Named Plaintiffs*

Individual claims upon which class actions are based are often small or negative-value claims that are insufficient to motivate injured parties to bring standalone lawsuits.[37] Accordingly, class actions are brought by attorneys who choose named plaintiffs, and occasionally by named plaintiffs themselves who want to sue on behalf of a class.[38] A court cannot

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30 *See* Tidmarsh & Marumo, *supra* note 29, at 2240–41; Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 809 (1985) ("Modern plaintiff class actions follow the same goals, permitting litigation of a suit involving common questions when there are too many plaintiffs for proper joinder. Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.").

31 Tidmarsh & Marumo, *supra* note 29, at 2239–41.

32 FED. R. CIV. P. 23(e).

33 FED. R. CIV. P. 23(e)(2)(D).

34 *Id.*

35 RUBENSTEIN, *supra* note 13, § 17:1.

36 *Id.*

37 *Three-Minute Legal Talks: How Class Action Lawsuits Work*, U. WASH. SCH. L. (Oct. 19, 2023), https://www.law.uw.edu/news-events/news/2023/class-action-lawsuits [https://perma.cc/39VE-NWQQ].

38 Jade Brewster, Note, *A Kick in the Class: Giving Class Members a Voice in Class Action Settlements*, 41 W. ST. U. L. REV. 1, 2 (2013); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 9 (1991).

certify a class if there is no named plaintiff who either has an interest in the matter or suffered an injury similar to the class members they are seeking to represent.[39] Named plaintiffs must fairly and adequately represent the class,[40] act as fiduciaries for absent class members,[41] and have enough knowledge of the underlying controversy to protect the class's interests.[42]

Named plaintiffs must vigorously pursue the interests of the class.[43] Indeed, in cases where class counsel chooses the named plaintiff(s), they often seek those who will embody the collective justice goals of the lawsuit, rather than those who are solely motivated by self-interest.[44] Most notably, named plaintiffs are subject to discovery, participate in settlement negotiations, and may even testify at trial.[45] Additionally, named plaintiffs may play a role in monitoring class counsel and providing the common factual background necessary to bring suit.[46] Regardless of the outcome of the case, these individuals assume the burden of leading the class through the entire litigation process, while absent class members benefit from those efforts without any personal contribution.[47]

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39 5 JAMES WILLIAM MOORE, MOORE'S FEDERAL PRACTICE – CIVIL § 23.21 (3d ed. 2023).

40 FED. R. CIV. P. 23(a)(4).

41 Eubank v. Pella Corp., 753 F.3d 718, 723–24 (7th Cir. 2014).

42 Baffa v. Donaldson, 222 F.3d 52, 61 (2d Cir. 2000); Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 727 (11th Cir. 1987), *superseded by statute*, Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, *as recognized in In re* Vesta Ins. Grp., Inc. Sec. Litig., No. cv-98-ar-1407, 1999 WL 34831474 (N.D. Ala. May 28, 1999).

43 Rattray v. Woodbury County, 614 F.3d 831, 836 (8th Cir. 2010); Monroe v. City of Charlottesville, 579 F.3d 380, 385 (4th Cir. 2009) ("To satisfy Rule 23(a)(4), a class representative must, among other factors, be of a character to vigorously pursue the case.").

44 Stephen Meili, *Collective Justice or Personal Gain? An Empirical Analysis of Consumer Class Action Lawyers and Named Plaintiffs*, 44 AKRON L. REV. 67, 102–03 (2011) (describing what attorneys look for when they choose a named plaintiff from a pool of individuals, such as seeking someone "with a fire in the belly" and someone who does "not have a personal agenda").

45 On the House Syndication, Inc. v. Fed. Express Corp., 203 F.R.D. 452, 455 (S.D. Cal. 2001); Huyer v. Wells Fargo & Co., 314 F.R.D. 621, 629 (S.D. Iowa 2016); Tidmarsh & Marumo, *supra* note 29, at 2230.

46 Charles A. Korsmo & Minor Myers, *Lead Plaintiff Incentives in Aggregate Litigation*, 72 VAND. L. REV. 1923, 1930–31 (2019).

47 *See* Jason Jarvis, Note, *A New Approach to Plaintiff Incentive Fees in Class Action Lawsuits*, 115 NW. U. L. REV. 919, 937 (2020) (citing Robert Jones, Note, *The Ethical Impact of Payments to Named Plaintiffs*, 21 GEO. J. LEGAL ETHICS 781, 787–88 (2008)).

C. *Award Structures*

The monetary awards explicitly discussed in Rule 23(h) are attorneys' fees and nontaxable litigation costs.[48] In common fund cases, attorneys' fees are granted in a majority of successful class actions, through either a lodestar or percentage-based method.[49] The percentage-based method is most often used, as it tends to force attorneys to care about the size and speed of recovery since they get a portion of the total award granted.[50] When a percentage method is used, the percentage typically averages around twenty-five percent, with the Ninth Circuit going as far as considering twenty-five percent as the benchmark for these fees in class action suits.[51]

Conversely, Rule 23 does *not* make specific reference to incentive awards, but judges have interpreted the Rule to allow them.[52] Incentive awards can be traced back to at least 1973, when a district court awarded "active" class members a total of $17,500 for the time spent and expenses accrued in their efforts to litigate the case on behalf of the class.[53] The following year, in *Thornton v. East Texas Motor Freight*, the Sixth Circuit became the first appellate court to explicitly affirm incentive awards as part of the overall class award structure.[54] Throughout the 1980s and

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48 *See* FED. R. CIV. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.").

49 *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 250, 267, 270–71 (2010); *see also* Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV. 1151, 1154 (2021) ("Judges almost always set attorneys' fees in class actions after the cases are over and class counsel has already won recovery for class members."). Lodestar fee recovery is defined as "multiplying the reasonable hours expended by attorneys by a reasonable hourly rate, [and] then using certain factors to adjust the fee award up or down" whereas a percentage-based recovery is based on "multipl[ying] the gross recovery by a fixed percentage to determine the fee award." Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. REV. 937, 945 (2017).

50 Fitzpatrick, *supra* note 49, at 1158.

51 *See id.* at 1167; *see also* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 833 (2010) (citing Staton v. Boeing Co., 327 F.3d 938, 968 (9th Cir. 2003)); Eisenberg & Miller, *supra* note 49, at 248, 260.

52 *See* Eisenberg & Miller, *supra* note 5, at 1311 nn.19–20 (discussing the proliferation of class action plaintiff incentive awards).

53 Bryan v. Pittsburgh Plate Glass Co., 59 F.R.D. 616, 617 (W.D. Pa. 1973), *aff'd*, 494 F.2d 799 (3d Cir. 1974).

54 497 F.2d 416, 420 (6th Cir. 1974) ("We also think there is something to be said for rewarding those drivers who protest and help to bring rights to a group of employees who have been the

1990s, courts developed various tests to determine whether and how much of an incentive award was appropriate, depending on the facts of each case.[55]

Between 1993 and 2002, 27.8% of class action settlements provided for plaintiff incentive awards,[56] revealing a steady growth in the prevalence of incentive awards.[57] Between 1993 and 1995, incentive awards were granted in 20.3% of cases, and between 1995 and 2002, incentive awards were granted in 29.8% of cases, showing an increase of almost 50% between the two periods.[58] Subsequently, between 2006 and 2011, they were granted in 71.3% of all class actions.[59] With the addition of Rule 23(e)(2)(D) in 2018,[60] courts are now required to review incentive awards in light of equitable treatment toward the class as a whole: "because such an award generates a different monetary recovery for the class representative than the recovery of the other class members," the award must be reviewed "to ensure that this differential recovery is justified by the class representative's contribution and hence is equitable."[61] This relates to the equitable versus equal treatment distinction referenced earlier in this Section.[62]

Challenges to incentive awards are typically brought by objectors, who are usually absentee members of the class who go to court in order to challenge some aspect of a class action settlement.[63] Under certain types of class actions, absentee class members must be notified, and thus given a chance to object to the proposed settlement.[64] Objectors often

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victims of discrimination. Such a decision by the District Court can hardly be considered an abuse of discretion . . . .").

55 Eisenberg & Miller, *supra* note 5, at 1311 n.20; *see infra* Section III.B.

56 Eisenberg & Miller, *supra* note 5, at 1323. Breaking that percentage down between state and federal courts shows that state courts granted the awards in 14.9% of cases, as compared to the 31.7% rate in federal courts. *Id.* at 1331.

57 *Id.* at 1311 n.18; RUBENSTEIN, *supra* note 13, § 17:7.

58 Eisenberg & Miller, *supra* note 5, at 1311 n.18.

59 RUBENSTEIN, *supra* note 13, § 17:7.

60 John P. Lavelle, Jr. & Terese M. Schireson, *2018 Amendments to Rule 23: Five Things You Should Know*, MORGAN LEWIS (Nov. 29, 2018), https://www.morganlewis.com/pubs/2018/11/2018-amendments-to-rule-23-five-things-you-should-know [https://perma.cc/8U3N-S3ZU].

61 RUBENSTEIN, *supra* note 13, § 17:1.

62 *See supra* Section I.A.

63 *See, e.g.*, Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1250 (11th Cir. 2020), *reh'g denied*, 43 F.4th 1138 (2022), *cert. denied*, 143 S. Ct. 1745 (2023); Holmes v. Cont'l Can Co., 706 F.2d 1144, 1146–47 (11th Cir. 1983); Hashw v. Dep't Stores Nat'l Bank, 182 F. Supp. 3d 935, 947 n.12 (D. Minn. 2016).

64 FED. R. CIV. P. 23(c)(2); FED. R. CIV. P. 23(e)(5)(A).

lump challenges to incentive awards with objections to attorneys' fees and costs.[65]

II. CIRCUIT SPLIT

A. *Circuit Decisions Pre-*Johnson*: Courts Approving Incentive Awards*

Incentive awards have been approved in almost all circuits, becoming a common feature of class action settlements.[66] However, there is no uniform approach to when the awards are granted or how large an award is warranted; the circuits use a variety of tests and standards.[67]

The Seventh Circuit, for instance, developed a multi-factor test in *Cook v. Niedert*, which examined "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."[68] This approach has been expressly adopted by the Ninth and Eighth Circuits.[69] The Ninth Circuit includes an additional factor that looks at the proportionality of the award vis-à-vis the settlement amount and how many plaintiffs would receive it.[70]

Reputational and financial risks can also be accounted for in determining incentive awards.[71] For example, in *Been v. O.K. Industries, Inc.*—a class action brought on behalf of chicken growers alleging defendant poultry producers had violated federal law—the district court

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65 FED. R. CIV. P. 23(h)(2).

66 Alvarez v. BI Inc., No. 16-2705, 2020 WL 1694294, at *6 (E.D. Pa. Apr. 6, 2020) (noting the common nature of incentive awards); Mariani v. OTG Mgmt., Inc., No. 16-cv-1751, 2018 WL 10468036, at *9 (E.D.N.Y. Sept. 28, 2018) (stating that incentive awards are common in class actions and that courts often grant named plaintiffs "enhanced award[s]").

67 RUBENSTEIN, *supra* note 13, § 17:13; *see, e.g.*, Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998); Staton v. Boeing Co., 327 F.3d 938, 975–77 (9th Cir. 2003).

68 142 F.3d at 1016.

69 *Staton*, 327 F.3d at 977 (adopting the Seventh Circuit multi-factor test); *In re* U.S. Bancorp Litig., 291 F.3d 1035, 1038 (8th Cir. 2002) (same). District courts in other circuits have also turned to the *Cook* factors for guidance. *See, e.g.*, Slipchenko v. Brunel Energy, Inc., No. 11-cv-1465, 2015 WL 338358, at *13 (S.D. Tex. Jan. 23, 2015); Kirven v. Cent. States Health & Life Co. of Omaha, No. 11-2149, 2015 WL 1214086, at *13 (D.S.C. March 23, 2015).

70 *Staton*, 327 F.3d at 977.

71 *Cook*, 142 F.3d at 1016 ("Most significantly, the special master found that, in filing the suit, Cook reasonably feared workplace retaliation.").

approved incentive awards after finding the named plaintiffs undertook substantial risk in bringing the litigation, as exhibited by the defendants terminating the plaintiffs' procurement contracts shortly after the litigation began.[72] Though the plaintiffs' contracts were ultimately reinstated as a result of an injunction, they experienced income loss and were eventually driven out of the poultry growth industry.[73] Another example is *Bredbenner v. Liberty Travel, Inc.*, where the district court awarded incentive awards because the named plaintiffs had risked their reputations and job security to pursue a wage theft class action against a major employer of travel agents.[74] Additionally, some district courts in the Second Circuit have rejected incentive awards where named plaintiffs were unable to prove they incurred personal risks by bringing the lawsuit.[75]

Other circuits take a more flexible approach, determining what award is reasonable based on the efforts named plaintiffs expended in litigating the action, including discovery burdens and other burdens, without delineating any specific test.[76] The Sixth Circuit, for instance, has refused to adopt any particular test, finding that a case-by-case approach is more suitable because some scenarios warrant an absolute denial of any incentive awards, regardless of the plaintiffs' efforts.[77]

At the heart of these decisions, and likewise at the heart of Rule 23, is the idea that monetary incentives are necessary to provide plaintiffs—who individually have only small amounts at stake—with a reason to

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72 No. 02-cv-285, 2011 WL 4478766, at *1, *12 (E.D. Okla. Aug. 16, 2011).

73 *Id.* at *12.

74 No. 09-mf-905, 2011 WL 1344745, at *1, *23 (D.N.J. Apr. 8, 2011).

75 *See, e.g.*, Parker v. Time Warner Ent. Co., 631 F. Supp. 2d 242, 279 (E.D.N.Y. 2009) ("The 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." (quoting Park v. Thomson Corp., 633 F. Supp. 2d 8, 14 (S.D.N.Y. 2009))).

76 *See* Eisenberg & Miller, *supra* note 5, at 1311 n.20; *see also* Huguley v. Gen. Motors Corp., 128 F.R.D. 81, 85 (E.D. Mich. 1989), *aff'd*, 925 F.2d 1464 (6th Cir. 1991) ("The consent decree provides also that an additional group of eighty-eight named potential and anecdotal witnesses and named plaintiffs will receive a one-time distribution of approximately $322,496 . . . . Named plaintiffs and witnesses are entitled to more consideration than class members generally because of the onerous burden of litigation that they have borne. I find this to be entirely fair."); Bogosian v. Gulf Oil Corp., 621 F. Supp. 27, 32 (E.D. Pa. 1985).

77 Hadix v. Johnson, 322 F.3d 895, 898 (6th Cir. 2003) ("Although we think there may be circumstances where incentive awards are appropriate, we need not resolve the difficult issue of detailing precisely when they are appropriate—for this case is clearly not a case where an incentive award is proper.").

expend their time, energy, and privacy to bring a class action lawsuit.[78] The named plaintiffs play a key role because they are the ones who often bear the brunt of providing depositions, attending hearings, and participating in negotiations, as well as taking on public and private scrutiny of the litigation process.[79] These plaintiffs are "an essential ingredient" and "necessary component" of class actions.[80] They "bring[] justice" against "those who would otherwise be hidden from judicial scrutiny."[81] Without them, there is no successful class action.[82]

B. *Shifting Attitudes and Ethical Concerns*

The past thirty years have seen a shift in attitudes, marked by increased public scrutiny of class actions generally.[83] Critics have argued that class actions are a form of legalized blackmail that forces defendants to pay damages they otherwise would have avoided because the individual claims were too small.[84] Other studies have questioned the benefit of these cases; for instance, in so-called "coupon" settlement class actions, only between one and six percent of class members actually redeem the coupons and thus receive the benefit of the class actions, whereas class counsel is paid in cash.[85] In response to this perceived unfairness, the

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78 *See* Amchem Prods. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))).

79 RUBENSTEIN, *supra* note 13, § 17:3.

80 Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998); *In re* TRS Recovery Servs., No. 13-md-2426, 2016 WL 543137, at *9 (D. Me. Feb. 10, 2016).

81 Riley v. City of Norwalk, No. 19-cv-1436, 2020 WL 13535418, at *2 (D. Conn. Oct. 26, 2020).

82 *See In re* Cont'l Ill. Sec. Litig., 962 F.2d 566, 571 (7th Cir. 1992); Steven L. Willborn, *Personal Stake, Rule 23, and Employment Discrimination Class Action*, 22 B.C. L. REV. 1, 1–2 (1980) ("Under Rule 23 . . . a class action without a class representative is like one hand clapping. The concept simply is not contemplated by the Rule.").

83 John H. Beisner, Matthew Shors & Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1444 (2005) (stating that "public disillusionment with class actions has grown" and discussing the growing number of newspaper publications about the "mess" of class actions).

84 *See, e.g.*, Thomas S. Ulen, *The Economics of Class Action Litigation*, *in* THE LAW AND ECONOMICS OF CLASS ACTIONS IN EUROPE: LESSONS FROM AMERICA 75, 80, 86 (Jürgen G. Backhaus, Alberto Cassone & Giovanni B. Ramelloeds eds., 2012).

85 Omri Ben-Shahar, *The Paradox of Access Justice, and Its Application to Mandatory Arbitration*, 83 U. CHI. L. REV. 1755, 1809 (2016) (citing two studies from the early 2000s).

Class Action Fairness Act (CAFA) placed limitations on coupon settlements to ensure fairness, requiring judges to use heightened scrutiny in evaluating these settlements.[86]

With regard to incentive awards specifically, several ethical violations beginning in the early 2000s brought into question their validity. For instance, in 2006, Milberg Weiss Bershad & Shulman, a then-powerful securities class action firm, was criminally indicted for paying kickbacks to named plaintiffs in securities class actions for over two decades.[87] Essentially, as part of this scheme, attorneys at the firm induced these named plaintiffs to maximize attorneys' fees—by paying them to bring lawsuits on behalf of the firm—rather than have them work on maximizing the overall class settlement.[88] Melvyn Weiss, and former partners David Bershad, Steven Shulman, and William Lerach, all served prison sentences for their roles in the kickback scheme.[89] Weiss, Shulman, and Lerach were also disbarred, and the firm eventually disbanded.[90]

Additionally, in 2009, the Ninth Circuit remanded a case to review the incentive awards granted by the district court where the named plaintiffs and defendants agreed to a sliding scale for the incentive payment before any settlement had been reached.[91] The circuit reasoned that such an arrangement created an appearance of impropriety and placed the named plaintiffs in a position of caring more about settling for

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86 28 U.S.C. § 1712.

87 Julie Creswell, *Milberg Weiss Is Charged with Bribery and Fraud*, N.Y. TIMES (May 18, 2006), https://www.nytimes.com/2006/05/18/us/18cnd-legal.html [https://perma.cc/32U9-2MLW].

88 *Id.*; Barry Meier, *Weiss Indicted in Class-Action Kickback Case*, N.Y. TIMES (Sept. 20, 2007), https://www.nytimes.com/2007/09/20/business/20legal.html [https://perma.cc/V4RH-SP7J].

89 Gina Keating, *Ex-Milberg Partner Bershad Gets 6 Months in Prison*, REUTERS (Oct. 27, 2008, 4:04 PM), https://www.reuters.com/article/businesspro-us-milberg-bershad/ex-milberg-partner-bershad-gets-6-months-in-prison-idUSTRE49Q7C920081027 [https://perma.cc/XKW2-K74J]; The Assoc. Press, *2 Sentenced to 6 Months for Role in Kickback Scheme*, N.Y. TIMES (Oct. 27, 2008), https://www.nytimes.com/2008/10/28/business/28legal.html [https://perma.cc/YQX9-ZQWN].

90 Debra Cassens Weiss, *Disbarred Lawyer Melvyn Weiss Hopes to Work as a Mediator*, A.B.A. J. (June 22, 2011, 11:24 AM), https://www.abajournal.com/news/article/disbarred_lawyer_melvyn_weiss_hopes_to_work_as_a_mediator [https://perma.cc/89N4-JTV6]; Jack Newsham, *Former Partner Reaches Confidential Deal With Milberg in $15M Payment Dispute*, N.Y. L.J. (June 11, 2019, 6:37 PM), https://www.law.com/newyorklawjournal/2019/06/11/former-partner-reaches-confidential-deal-with-milberg-in-15m-payment-dispute [https://perma.cc/UJ4Q-AHAQ]; Marianne Regan, *Bill Lerach: Life After Prison*, SAN DIEGO METRO (Oct. 4, 2010), https://www.sandiegometro.com/2010/10/bill-lerach-life-after-prison [https://perma.cc/CN6X-CYJ4]; Jenna Greene, *Mel Weiss, Hero and Villain of Plaintiffs Bar, Dies at 82*, LAW.COM (Feb. 4, 2018, 1:23 AM), https://www.law.com/litigationdaily/2018/02/04/mel-weiss-hero-and-villain-of-plaintiffs-bar-dies-at-82 [https://perma.cc/5YUF-ZPDX].

91 Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 959–61 (9th Cir. 2009).

an amount that would maximize their individual award, rather than going to trial to seek higher amounts for the rest of the class.[92] Subsequently, the Ninth Circuit invalidated incentive awards where class counsel conditioned the awards on acceptance of the settlement and pushed named plaintiffs to agree to the settlement against their wishes if they wanted to receive the additional payment.[93]

It is important to note that when these specific concerns were discovered, steps were taken to mitigate them—whether through congressional actions (CAFA) or through judicial review (imprisoning and disbarring attorneys from Milberg Weiss and striking down incentive awards that would have undermined the class).[94]

C. Johnson v. NPAS Solutions*: The Creation of the Split*

In 2020, the Eleventh Circuit in *Johnson* held, for the first time, that incentive awards were categorically prohibited under two nineteenth-century Supreme Court cases: *Trustees v. Greenough* and *Central Railroad and Banking Co. of Georgia v. Pettus*.[95] *Johnson* is a compelling case not only because of the circuit court's ruling but also because it was the first time that an absentee class member (Jenna Dickenson) successfully argued that incentive awards were prohibited because they "created a conflict of interest between Johnson [the named plaintiff] and the other class members [like her]."[96]

Charles Johnson, the named plaintiff, brought the class action against NPAS Solutions, a medical debt collection company, alleging the company violated the Telephone Consumer Protection Act by calling him and others through an automatic dialing system without receiving express consent to do so.[97] After preliminary discovery, Johnson and NPAS Solutions agreed on a settlement.[98] The district court preliminarily

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92 *Id.*

93 Radcliffe v. Experian Info. Sols. Inc., 715 F.3d 1157, 1164–66 (9th Cir. 2013); Roes v. SFBSC Mgmt., LLC, 944 F.3d 1035, 1056–57 (9th Cir. 2019).

94 *See supra* notes 84–91 and accompanying text.

95 *See* Johnson v. NPAS Sols., LLC, 975 F.3d 1244 (11th Cir. 2020), *reh'g denied*, 43 F.4th 1138 (2022), *cert. denied*, 143 S. Ct. 1745 (2023); Trustees v. Greenough, 105 U.S. 527 (1881); Cent. R.R. & Banking Co. of Ga. v. Pettus, 113 U.S. 116 (1885).

96 *Johnson*, 975 F.3d at 1250.

97 *Id.* at 1249.

98 Johnson v. NPAS Sols., LLC, No. 17-cv-80393, 2017 WL 6060778, at *2 (S.D. Fla. Dec. 4, 2017).

certified the class and approved the settlement, finding it was "fundamentally fair, reasonable, adequate, and in the best interest of the class members."[99] Notice was sent out to class members and Dickenson was the only objector to the proposed settlement, which included a potential $6,000 plaintiff incentive award.[100] The district court overruled her objection and approved the settlement, including the incentive award, again finding the settlement to be fundamentally fair in all respects.[101]

Dickenson appealed the decision and the Eleventh Circuit ruled in her favor, finding that *Greenough* and *Pettus* had been overlooked in modern class action jurisprudence and needed to be revived.[102] Neither case directly implicated class actions. In *Greenough*, the plaintiff (Francis Vose) brought suit on behalf of himself and other bondholders of the Florida Railroad Company against the trustees of the Internal Improvement Fund of Florida, on the grounds that they were misusing funds meant to pay off the company's land bonds.[103] The district court assigned a master[104] to the case, who determined that Vose won on the claims.[105] As part of his recovery, Vose sought "personal services" and expenses such as railroad fares and hotel bills that he incurred over the ten years of litigation, which the master recommended granting.[106] The district court subsequently approved the payment after additional hearings, and an appeal to the U.S. Supreme Court was made to determine the appropriateness of the award.[107]

The Supreme Court distinguished between trustees suing on behalf of other trustees, and creditors suing on behalf of other creditors, stating that trustees can receive such an allowance because they act to enhance

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99 *Id.* at *3–4.

100 Johnson v. NPAS Sols., LLC, No. 17-cv-80393, 2018 U.S. Dist. LEXIS 231002, at *3, *6–7 (S.D. Fla. May 7, 2018).

101 *Id.* at *5–7.

102 *Johnson*, 975 F.3d at 1256; Trustees v. Greenough, 105 U.S. 527 (1881); Cent. R.R. & Banking Co. of Ga. v. Pettus, 113 U.S. 116 (1885). Dickenson also objected to other parts of the settlement agreement unrelated to incentive awards; those objections will not be discussed in this Note.

103 *Id.*; *Greenough*, 105 U.S. at 528–29.

104 A master in the judicial context is defined as: "A parajudicial officer (such as a referee, an auditor, an examiner, or an assessor) specially appointed to help a court with its proceedings. [] A master may take testimony, hear and rule on discovery disputes, enter temporary orders, and handle other pretrial matters, as well as computing interest, valuing annuities, investigating encumbrances on land titles, and the like—usu. with a written report to the court." *Master*, BLACK'S LAW DICTIONARY (11th ed. 2019).

105 *Greenough*, 105 U.S. at 529.

106 *Id.* at 530.

107 *Id.* at 530–31.

the performance of the trust and "induce persons of reliable character and business capacity to accept the office of trustee," while creditors do not act for these purposes.[108] Thus, Vose was not entitled to those extra allowances and to hold otherwise would result in creditors being tempted "to intermeddle in the management of valuable property or funds in which" they are only creditors, with the hopes of seeking a salary.[109] The Supreme Court in *Pettus*, decided just three years after *Greenough*, upheld that standard, stating that while the costs of litigating and reclaiming property are compensable, the costs associated with "personal services and private expenses" are not.[110] *Pettus* also involved a bondholder bringing suit to have his and other bondholders' debts paid off in the resale of a railroad.[111]

The Eleventh Circuit in *Johnson* likened these cases to modern-day class action incentive awards, holding that attorneys' fees and litigation-related expenses are compensable, but named plaintiffs could not "be paid a salary or be reimbursed for [their] personal expenses."[112] Going further, the majority found that incentive awards were also like a bounty or prize because one of the goals of incentive payments is to motivate named plaintiffs to participate in the class action despite the potential costs of the process.[113] The court frowned upon this because, it reasoned, an individual induced into bringing a class action to receive a larger payout (bounty) may compromise the class interest.[114]

Judge Beverly Martin dissented in part from the *Johnson* opinion.[115] Her dissent specifically focused on incentive awards and noted that both policy and precedent worked against the majority's decision.[116] On policy, Judge Martin found that eliminating incentive payments would leave named plaintiffs unable to recover the costs they incur throughout the litigation process, and as a result, many litigants will forego taking the lead on the class action.[117] On precedent, she cited a 1983 Eleventh Circuit

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108 *Id.* at 537–38.

109 *Id.* at 538.

110 Cent. R.R. & Banking Co. of Ga. v. Pettus, 113 U.S. 116, 122 (1885).

111 *Id.* at 118–19.

112 Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1257 (11th Cir. 2020) (likening incentive awards to a salary).

113 *Id.* at 1258 ("If anything, we think that modern-day incentive awards present even more pronounced risks than the salary and expense reimbursements disapproved in *Greenough*.").

114 *Id.*

115 *Id.* at 1264 (Martin, J., concurring in part and dissenting in part).

116 *Id.*

117 *Id.*

decision which itself cited numerous previous cases (across various circuits and districts, including the Eleventh Circuit) to support the proposition that when there is unequal distribution within a settlement fund, proponents of the fund have the burden to prove it is fair.[118] She found that this precedent required district court judges to scrutinize any settlement for fairness and reasonableness—a safeguard in and of itself—and that in the present case, there was no abuse of discretion in granting an incentive award for two reasons.[119] First, because the settlement agreement did not *require* an incentive award but rather allowed the named plaintiff to seek one, the agreement could have still been approved by the district court even without approval of the incentive award.[120] In other words, the settlement was not contingent on the named plaintiff receiving extra money.[121] Second, the class counsel had provided proof of the work done by the named plaintiff in support of their request for an incentive award, meeting the required burden of proving that the award was warranted.[122]

Johnson filed a petition for a writ of certiorari after the original panel decision, and the Supreme Court denied it in 2023.[123]

D. *Post*-Johnson*: Reactions to the Eleventh Circuit's Shift*

Since 2020, there have been several circuit and district court cases addressing *Johnson* and *Greenough*. In 2022, the Ninth Circuit expressly refused to follow *Johnson*'s reasoning, finding that the cornerstone of incentive award evaluations is determining their reasonableness, which should be assessed on a case-by-case basis.[124] Referring to *Greenough*, the court stated that the award there was unreasonable because the "private plaintiff was a creditor who needed no inducement to bring the suit."[125] Similarly, the First Circuit rejected *Greenough* as irrelevant given that it concerned a "creditor's relationships vis-à-vis the trustees, not the other creditors."[126] Responding directly to *Johnson*, the court said that

118 *Id.* (citing Holmes v. Cont'l Can Co., 706 F.2d 1144 (11th Cir. 1983)).

119 *Id.* at 1267–68.

120 *Id.*

121 *Id.*

122 *Id.*

123 Johnson v. Dickenson, 143 S. Ct. 1745 (2023).

124 *In re* Apple Inc. Device Performance Litig., 50 F.4th 769, 785–87 (9th Cir. 2022).

125 *Id.* at 786.

126 Murray v. Grocery Delivery E-Servs. USA, Inc., 55 F.4th 340, 352–53 (1st Cir. 2022).

Greenough was not "sufficiently analogous" to class actions.[127] The court also found that Rule 23(e)'s requirement that any settlement be "fair, reasonable, and adequate" inherently ensures that the settlement approved by a court takes into consideration the adequacy of named plaintiffs and "treats class members equitably relative to each other."[128] Most recently, the Seventh Circuit refused to apply *Greenough* and *Pettus* to modern-day incentive awards, finding that incentive awards were a product of "significant historical development" and consistent with Rule 23(e)'s equity requirements.[129]

Some district courts within the Eleventh Circuit have also expressed doubt over the outcome in *Johnson* but are constrained to follow its precedent. In *In re Johnson & Johnson Aerosol Sunscreen Marketing, Sales Practices and Products Liability Litigation*, for instance, the United States District Court for the Southern District of Florida found that the incentive awards proposed as part of a settlement agreement were "well-deserved" to compensate the named plaintiffs for their role in settlement negotiations and the risk they took by participating in the litigation.[130] However, because it was bound by *Johnson*, the court was forced to reject the award.[131] Other Eleventh Circuit district courts have tried to navigate around *Johnson* by finding that it is not binding on federal courts sitting in diversity and hearing claims arising out of state law because *Johnson* was about a federal law claim.[132] Moreover, in one post-*Johnson* decision where the objector did not challenge the incentive awards, a different Eleventh Circuit panel refused to strike down the awards sua sponte as the issue had not been properly raised on appeal.[133]

One Second Circuit panel—in *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*—however, indicated acceptance of the *Johnson* reasoning,

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127 *Id.* at 352.

128 *Id.* at 353; FED. R. CIV. P. 23(e)(2).

129 Scott v. Dart, 99 F.4th 1076, 1085–88 (7th Cir. 2024).

130 No. 21-md-3015, 2024 WL 3065907, at *8 (S.D. Fla. Feb. 27, 2023).

131 *Id.* ("The incentive awards here are nominal and well-deserved. In no way could they be considered payment of a 'salary.' But this Court is bound by its parent court's decision in *Johnson*.").

132 *See, e.g.*, Mitchell v. Allstate Vehicle & Prop. Ins. Co., No. 21-cv-347, 2023 WL 5004064, at *6 (S.D. Ala. Aug. 3, 2023); Junior v. Infinity Ins. Co., No. 18-cv-1598, 2022 U.S. Dist. LEXIS 154082, at *3–5 (M.D. Fla. Aug. 26, 2022).

133 *In re* Checking Account Overdraft Litig., No. 20-13367, 2022 WL 472057, at *5 n.1 (11th Cir. Feb. 16, 2022) ("The district court approved a $10,000 incentive award for Dasher. Although this Court held in [*Johnson*], that such awards are unlawful, Avery neither objected to Dasher's award before the district court nor properly presented to us any argument that Dasher's award was invalid. Accordingly, we decline to vacate the award.").

while ultimately sticking to circuit precedent.[134] The panel stated that while *Greenough* was a pre-Rule 23 case, the creditors were analogous to present-day named plaintiffs.[135] The court then reasoned that "practice and usage"—meaning, the continued acceptance of incentive awards—"seem to have superseded *Greenough* (if that is possible)" and "even if (as we think) practice and usage cannot undo a Supreme Court holding, *Melito* and *Navient* [two recent Second Circuit cases that upheld plaintiff incentive awards] are precedents that we must follow."[136]

The *Fikes Wholesale* concurrence emphasized agreement with *Johnson*'s interpretation, stating that the opinion was "thorough and well-reasoned."[137] The concurrence further explained that the reason incentive awards were upheld in *Melito*—a 2019 Second Circuit case—was to avoid a potential circuit split with the Eleventh Circuit, which, around that time, had ruled that *Greenough* did *not* "categorically prohibit service awards" in *Muransky v. Godiva Chocolatier, Inc.*[138] That 2019 Eleventh Circuit decision was vacated a year later—the same year that *Johnson* was decided—and now, the concurrence reasoned, the Second Circuit found itself "on the *wrong* side of a circuit split" by sticking to Second Circuit precedent and continuing to grant incentive awards.[139] Notably, the *Fikes Wholesale* majority and concurring opinions were authored by the same judge, Judge Dennis Jacobs, and his concurrence in particular was used by Dickenson in the *Johnson* certiorari petition to push for the Supreme Court to resolve the existing circuit split.[140]

Just a few months after *Fikes Wholesale*, another Second Circuit panel expressly refused to apply *Greenough* and *Pettus* to incentive awards, finding that those cases only apply when an egregiously high

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134 62 F.4th 704, 721 (2d Cir. 2023).

135 *Id.*

136 *Id.* (first citing Melito v. Experian Mktg. Sols., Inc. 923 F.3d 85, 96 (2d Cir. 2019) (approving a settlement that included "incentive bonuses"); then citing Hyland v. Navient Co., 48 F.4th 110, 117, 124 (2d Cir. 2022) (approving a settlement that gave $15,000 to named plaintiffs because they experienced personal attacks and criticism as a result of the litigation, yet maintained the suit for the benefit of the class), *cert. denied*, 143 S. Ct. 1747).

137 *Id.* at 729 (Jacobs, J., concurring).

138 *Id.* (citing 922 F.3d 1175, 1196 (11th Cir. 2019) ("No circuit has applied *Greenough* or *Central Bank*, which were decided well before the adoption of Rule 23, to prohibit incentive awards in the class-action context. We do not view granting a monetary award as an incentive to a named class representatives as categorically improper.")).

139 *Id.* (emphasis added).

140 Supplemental Brief for Respondent, Johnson v. Dickenson, 143 S. Ct. 1745 (2023) (No. 22-389), 2023 WL 2817883, at *1–4.

award is granted, as that would equate to a salary.[141] Citing the almost century and a half that had passed since those decisions were made, the panel noted that there had been no legislative efforts to curb incentive awards, indicating legislative approval of the awards.[142] Similarly, the panel argued that the lack of pushback from the Advisory Committee of the FRCP (by, for example, imposing a blanket prohibition on such awards) revealed that rule-makers saw no problem with incentive awards, so long as they were applied in compliance with the rule.[143]

There is also one instance of a district court in the Tenth Circuit siding with the *Johnson* panel.[144] In that case, the named plaintiffs requested $4,500 in incentive awards per representative and argued that courts in the Tenth Circuit, including the very same district court, had previously used their equitable powers to grant incentive awards and should thus grant them in the present case.[145] The district court found that the Tenth Circuit was "agnostic" about incentive awards because, in the leading case, it refused to decide whether they were per se prohibited.[146] In that case, the objector tried to bring this argument on appeal, but was barred from doing so because it had not been raised in the district court.[147] Turning to the Eleventh Circuit, the district court said *Johnson*'s reasoning provided "the most persuasive examination" of the legality of incentive awards.[148] Borrowing language from *Johnson*, the court stated that incentive awards were granted so frequently because of "inertia and inattention" rather than "sound legal reasoning."[149] Thus, it concluded that the proposed incentive award was inappropriate and denied the request.[150]

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141 Moses v. N.Y. Times Co., 79 F.4th 235, 255–56 (2d Cir. 2023) ("Rather, in CAFA, Congress addressed its reservations concerning settlements where '*unjustified* awards are made to certain plaintiffs at the expense of other class members' who 'receive little or no benefit.' Such unjustified incentive awards—more aptly analogized to a salary—exceed the amount necessary to serve their purpose . . . . But we cannot say that incentive awards are *per se* improper. In sum, we reiterate that neither *Greenough* nor *Pettus* prohibits incentive awards in class actions . . . ." (citations omitted)).

142 *Id.* at 255.

143 *Id.*

144 Cotte v. CVI SGP Acquisition Tr., No. 21-cv-299, 2023 WL 5351018, at *4 (D. Utah Aug. 18, 2023).

145 *Id.* at *3.

146 *Id.* at *4 (citing Chieftain Royalty Co. v. Enervest Energy Inst. Fund XIII-A, L.P., 888 F.3d 455, 467 (10th Cir. 2017)).

147 *Chieftain Royalty Co.*, 888 F.3d at 466–67.

148 *Cotte*, 2023 WL 5351018, at *4.

149 *Id.* (citing Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1259 (11th Cir. 2020)).

150 *Id.*

III. ANALYSIS

A. *The Eleventh Circuit's Erroneous Reasoning*

Ultimately, in deciding *Johnson*, the Eleventh Circuit created a circuit split that now leaves open the question of the future of class action litigation. However, as the First, Seventh, and Ninth Circuits correctly stated, *Johnson*'s logic should not apply today.[151] In basing *Johnson* on nineteenth-century equity court principles, the Eleventh Circuit erred in a number of ways. The decision, for instance, overlooked the goals of Rule 23 and how it addressed some of the issues presented by courts of equity relying on the Federal Equity Rules.[152] Under the Federal Equity Rules, the creditors on behalf of whom Vose sued in *Greenough* were not bound by the results of the case.[153] *Greenough* was essentially a case about equity receivership, equivalent to modern-day corporate restructuring—a situation where one creditor has no reason to consider other creditors' interests, as claims in these cases are based on individual financial stakes in the organization.[154] Rule 23, however, strictly states that a final judgment has a binding effect on *all* class members.[155] Moreover, while Vose was in some ways a representative of the class, he was not a "fiduciary" of the class and thereby had no obligation toward the other class members.[156] In contrast, Rule 23 obligates named plaintiffs to be fiduciaries for their class—they have to adequately represent the class, and the class is bound by the results, meaning that the named plaintiff is, in fact, working on behalf of the class to generate the best outcome for all.[157] In this regard, Rule 23 created a new obligation for named plaintiffs that rendered the *Greenough* Court's concerns moot in relation to class

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151 *See supra* Section II.D.

152 *See supra* Section I.A.

153 *See* Tidmarsh & Marumo, *supra* note 29, at 2239–41.

154 Benjamin Gould, *On the Lawfulness of Awards to Class Action Representatives*, 2023 CARDOZO L. REV. DE NOVO 1, 18.

155 FED. R. CIV. P. 23(c)(3). A small caveat is that class members can opt out of Rule 23(b)(3) class actions and not be bound to the result, but all remaining class members and members of 23(b)(1) and 23(b)(2) suits are bound to the final judgment. *Id.*

156 *See* Tidmarsh & Marumo, *supra* note 29, at 2240.

157 *Id.* at 2240–41, 2240 n.106; FED. R. CIV. P. 23(a)(4); *see also* Eubank v. Pella Corp., 753 F.3d 718, 723 (7th Cir. 2014) ("Class representatives are . . . fiduciaries of the class members . . . ."); *In re* Fine Paper Litig., 632 F.2d 1081, 1086 (3d Cir. 1980) ("After an affirmative determination [to certify a class] is made, the class representative acts as a fiduciary.").

actions.[158] Rule 23 also created an obligation for the courts to certify that the named plaintiffs are indeed acting as fiduciaries and that any settlement is fair, reasonable, and treats class members equitably.[159]

In a similar vein, *Greenough* explicitly held that trustees may be entitled to "personal service" awards to encourage their diligence in the role they took on, so even if *Greenough*'s principles did apply today, its decision about creditors would not apply to named plaintiffs, who are more analogous to trustees than to creditors.[160] First, a trustee must be appointed by the court if the trust does not name a representative.[161] Similarly, named plaintiffs have to be approved by the court.[162] Second, both trustees and named plaintiffs serve a fiduciary duty on behalf of a class that does not have the ability to monitor the representative.[163] Finally, the stated goals for "personal service" awards to trustees are the same as the goals of incentive awards to named plaintiffs: to ensure diligence on behalf of those who take on the role by providing future representatives with an incentive to take on the duties.[164]

Greenough was also about Vose seeking a "salary" for his work on the case, to be paid over the course of ten years; adjusted for inflation, his requested "salary" for his various bills and personal expenses equated to over $1.4 million.[165] Conversely, incentive awards in modern class actions averaged around $14,371 per plaintiff in 2021, and make up, on average, 0.16% of the total class award.[166] This amount inherently differs from a $1.4 million "salary."[167] In fact, decades ago, some circuits even

158 *See* Tidmarsh & Marumo, *supra* note 29, at 2240–41.

159 FED. R. CIV. P. 23(e)(2).

160 Trustees v. Greenough, 105 U.S. 527, 537–38 (1881); Gould, *supra* note 154, at 16.

161 RESTATEMENT (THIRD) OF TRUSTS § 34(2) (AM. L. INST. 2003).

162 Gould, *supra* note 154, at 20.

163 *Id.* at 19–20.

164 *Greenough*, 105 U.S. at 537–38; Gould, *supra* note 154, at 21.

165 Johnson v. NPAS Sols., LLC, 43 F.4th 1138, 1143 (11th Cir. 2022) (Pryor, J., dissenting). The Supreme Court found that this was unacceptable because it would incentivize "parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, 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 538.

166 RUBENSTEIN, *supra* note 13, § 17:8 (relying on data from 2006 to 2011 and adjusting them to 2021 values); Eisenberg & Miller, *supra* note 5, at 1308 (finding incentive awards amounted to 0.16% of the class award based on data collected between 1993 and 2002); *see also* Korsmo & Myers, *supra* note 46, at 1930.

167 *Johnson*, 43 F.4th at 1148 ("The panel majority opinion also failed to wrestle with the fact that Vose sought more than 1.4 million in today's dollars, which exceeds by orders of magnitude both the $6,000 incentive award in this case and average incentive awards in class action settlements.").

distinguished *Greenough* salaries from incentive awards, describing incentive awards as a necessary component that allows plaintiffs to bring forth class action suits in the first place, and developing tests to ensure fairness in those awards.[168]

Additionally, the Eleventh Circuit's claim that *Greenough* and *Pettus* are the relevant precedent on class actions is arguably misleading.[169] The U.S. Supreme Court has not rejected incentive awards over their nearly fifty-year span of existence, despite opportunities to do so.[170] In *China Agritech Inc. v. Resh*, the Court even "acknowledged the practice of incentive awards without criticism," stating that plaintiffs may bring class action suits for multiple reasons, including because the individual claim is too small or because there exists some "attendant financial benefit."[171] The Court then explained in a footnote that the "attendant financial benefit" in question was the incentive award (i.e., the ability of the named plaintiff to receive a portion of the total recovery that went "above and beyond [their] individual claim") and cited *Cook*, where a $25,000 incentive award was granted.[172]

While the Eleventh Circuit acknowledged the existence of this case, it pushed it aside as an acknowledgment, not an endorsement, of the practice of granting incentive awards and stated that the Court's silence on *Greenough* and *Pettus* are indicative of this because the Court would not silently overrule itself.[173] It is unlikely, however, that the Supreme Court would simply "acknowledge" a practice without saying more about it if it believed it went against precedent.[174] As for failing to overrule

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168 *See In re* Cont'l Ill. Sec. Litig., 962 F.2d 566, 571 (7th Cir. 1992); *see also* Granada Invs., Inc. v. DWG Corp., 962 F.2d 1203, 1207–08 (6th Cir. 1992).

169 *See Johnson*, 975 F.3d at 1255–60 (discussing the relevance of *Greenough* and *Pettus* in the class action context).

170 Tidmarsh & Marumo, *supra* note 29, at 2223 ("As a matter of policy, awarding appropriately modest incentive payments has generated almost no judicial, academic, or rulemaking criticism."); *Johnson*, 43 F.4th at 1146–47 (Pryor, J., dissenting) ("[F]ederal courts have had decades to examine Rule 23's authorization of incentive awards in class action settlements . . . . Yet I cannot find a single case before this one in which a court concluded that *Greenough* precludes their approval under Rule 23. The silence concerning *Greenough*'s impact on incentive awards extends to the United States Supreme Court . . . ."); *see* Frank v. Gaos, 586 U.S. 485, 492 (2019) (reviewing a case that included incentive awards); *see also* China Agritech, Inc. v. Resh, 584 U.S. 732, 747 (2018).

171 Tidmarsh & Marumo, *supra* note 29, at 2223 n.11; *China Agritech, Inc.*, 584 U.S. at 747.

172 *China Agritech, Inc.*, 584 U.S. at 747 n.7 (citing Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998)).

173 *See Johnson*, 975 F.3d at 1260.

174 *Id.* at 1267 & n.2 (Martin, J., concurring in part and dissenting in part) (stating that the Supreme Court "did not question the viability of" incentive awards proposed despite making

Greenough and *Pettus*, the Court may have found them inapplicable to modern-day class actions due to the development of Rule 23, and therefore had no reason to bring them up.[175]

B. *Strengths of the Methodologies Imposed by Other Circuits*

The methodologies imposed by other circuits are more in line with modern-day Rule 23 principles.[176] They also better respond to the needs of class action representatives by instilling numerous balancing tests and safeguards to prevent inequitable treatments of named plaintiffs as compared to the absent class members.[177] These practices are based on decades of circuit precedents and judicial and legislative acquiescence to incentive awards.[178] Incentive awards, for instance, are banned in private securities class actions through an act of Congress.[179] If there was a need to restrict these awards in all federal court class actions, such a rule could have also been adopted through federal legislation or via an amendment to Rule 23.[180] *Johnson*, therefore, was a first-of-its-kind decision.

Additionally, other circuits have considerations that focus heavily on substantive fairness and upholding the goals of Rule 23.[181] First, most circuits have held that incentive awards motivate potential named plaintiffs to bring these cases in the first place, despite the risk of reputational harm and additional time spent on discovery and negotiations.[182] Second, incentive awards also inherently reward these

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reference to them in *Frank v. Gaos*, 586 U.S. at 491, and similarly acknowledging their "viability" in *China Agritech, Inc.*, 584 U.S. at 747)); *see also* Bradley Scott Shannon, *Overruled by Implication*, 33 SEATTLE U. L. REV.151, 154 & nn.13–14 (2009) (discussing implicit overruling of prior Supreme Court decisions, through silence or through commentary).

175 *See infra* Section III.A (discussing Rule 23 and how it resolves issues brought up in *Greenough* and *Pettus*); *Johnson*, 43 F.4th at 1147 (Pryor, J., dissenting).

176 *See* Tidmarsh & Marumo, *supra* note 29, at 2240–41; Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 809 (1985) (describing class actions as the preferred vehicle for claims in which joinder among plaintiffs is difficult and individual claims are too small to compel individual lawsuits). *See generally* FED. R. CIV. P. 23(e)(2) (requiring binding settlements that consider "fairn[ess], reasonable[ness], and adequa[cy]" and treat class members equitably).

177 *See supra* Sections I.C, II.A.

178 *See, e.g.*, *China Agritech, Inc.*, 584 U.S. at 747 n.7; *Frank*, 586 U.S. at 491 (mentioning that the settlement included incentive awards, without criticism of the practice).

179 Private Securities Litigation Reform Act (PSLRA) of 1995, 15 U.S.C. § 78u-4(a)(2)(A)(vi).

180 *See Johnson*, 43 F.4th at 1149 (Pryor, J., dissenting).

181 *See supra* Section I.A.

182 *See, e.g.*, RUBENSTEIN, *supra* note 13, § 17:3 & nn.15–18; Eisenberg & Miller, *supra* note 5, at 1315–16.

individuals for that real additional work—not just for taking on the "named plaintiff" title—such that their service and dedication to the class are fairly recognized.[183] While there is some concern with the latter point because it creates the potential for "professional plaintiffs" (i.e., plaintiffs who bring suit solely for the payment), plaintiffs have the burden to prove why they deserve the incentive award and courts may safeguard by reviewing the reasonableness of incentive awards, reducing the likelihood of this concern materializing.[184]

Underlying the various judicial balancing tests courts impose are the basic principles of restitution and unjust enrichment.[185] These principles prevent named plaintiffs from receiving awards that are wholly disproportionate to their efforts.[186] If a plaintiff acts for their own selfish purposes or seeks incentive awards that go beyond the efforts they put into the litigation, those awards will be rejected or reduced because otherwise, the named plaintiffs would be unjustly enriched.[187] At the same time, without the incentive awards, absentee class members may be unjustly enriched through the efforts of named plaintiffs litigating the class action.[188] Rule 23(e)(2)(D)'s equitable treatment requirement encompasses these common law principles—equitable treatment means named plaintiffs will neither benefit from an *unjustified* incentive award nor take on risks and additional efforts without receiving an award for

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183 *See id.* at 1316; Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1264–66 (11th Cir. 2020) (Martin, J., concurring in part and dissenting in part) (citing RUBENSTEIN, *supra* note 13, § 17:2), *reh'g denied*, 43 F.4th 1138 (2022), *cert. denied*, 143 S. Ct. 1745 (2023).

184 *See* Eisenberg & Miller, *supra* note 5, at 1312; RUBENSTEIN, *supra* note 13, § 17:16; *see also supra* Section II.B for a brief discussion of the Ninth Circuit's attempts at preventing professional plaintiffs.

185 *See* Tidmarsh & Marumo, *supra* note 29, at 2226, 2249–50 (discussing the restitution and unjust enrichment as being both the basis for named plaintiff awards, as well as the limitation for potential abuses in granting the awards); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 (AM. L. INST. 2011); RUBENSTEIN, *supra* note 13, § 17:4. For an example of unjust enrichment principles in practice, see *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1221 (S.D. Fla. 2006) ("[I]t would be inequitable for [named plaintiffs] to alone bear the costs and risks they incurred for the benefit of the [c]lass at it would [] impose the full costs of paying lawyers to litigate [the] action on [named plaintiffs].").

186 *See* Tidmarsh & Marumo, *supra* note 29, at 2226, 2249–50.

187 *See id.* at 2249–50. Unjust enrichment would occur where the named plaintiffs receive disproportionate value for their minimal efforts; hence, such an award would be rejected by courts applying fairness and reasonableness principles. *Id.* For instance, Judge Richard Posner rejected incentive awards in part on the basis of unjust enrichment in *Matter of Continental Illinois Securities Litigation*, finding that the named plaintiffs may be entitled to some award for bringing the litigation, but denying an award in the present case because the named plaintiff did minimal work and took on minimal risk. 962 F.2d 566, 571–72 (7th Cir. 1992).

188 *See* RUBENSTEIN, *supra* note 13, § 17:4.

efforts not undertaken by absentee class members who nonetheless benefit from the litigation.[189]

C. *Weaknesses of the Methodologies Imposed by Other Circuits*

Though *Johnson* was wrongly decided, the Eleventh Circuit, and the Second Circuit panel on the *Fikes* case, have valid concerns about the current treatment of incentive awards and the ways in which they are awarded.[190] Rule 23 itself does not make any reference to incentive awards; rather, they are a common law creation that began appearing in the 1970s as additional compensation to named plaintiffs, without direct references to these payments as "incentive awards" until the 1980s.[191] The lack of reference to these awards in the FRCP continues to be an issue because judges, like those on the *Johnson* panel, may see the silence as an indication that such awards should not be granted, even where circuit precedent says otherwise.[192] Because of the lack of any reference to such awards outside of Rule 23's equitable treatment requirements and the often ambiguous nature of the standards circuit courts dictate, there is no exact guiding principle for when and what size awards are truly appropriate.[193] This leaves district court judges with a lot of discretion to choose when a named plaintiff's efforts warrant an additional payment, if at all.[194] Though the existence of various tests is certainly a guiding force for district court judges, judges are still able to use discretion in how they

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189 *Id.*

190 *See* Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1259 (11th Cir. 2020) (pointing to Rule 23's lack of reference to incentive awards), *reh'g denied*, 43 F.4th 1138 (2022), *cert. denied*, 143 S. Ct. 1745 (2023); *see also* Fikes Wholesale, Inc. v. HSBC Bank USA, N.A., 62 F.4th 704, 721 (2d Cir. 2023) ("We have articulated no standard by which district courts can consider the grant of service awards.").

191 *See* RUBENSTEIN, *supra* note 13, § 17:2, § 17:4 & n.1.

192 *See, e.g.*, First State Orthopaedics v. Concentra, Inc., 534 F. Supp. 2d 500, 524 (E.D. Pa. 2007) ("Federal Rule of Civil Procedure 23 contemplates no special treatment for plaintiffs in class action suits, and this Court strongly disapproves of excessive awards of 'incentive' payments to named plaintiffs.").

193 FED. R. CIV. P. 23(e)(2)(D) (stating that in reviewing settlement proposals, district courts must consider, among many factors, whether "the proposal treats class members equitably relative to each other," but not referencing incentive awards specifically); *see also* RUBENSTEIN, *supra* note 13, § 17:18 ("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.").

194 *See* Jarvis, *supra* note 47, at 934–35 (questioning whether *Cook* factors provide more than general guidance because of the vagueness of how the Seventh Circuit applied the factors they laid out).

apply those tests because of the lack of a set standard.[195] Therefore, if a district court has an overly liberal approach because circuit precedent gives them vast discretion, incentive awards will be granted in every case; this may result in what the *Johnson* court sought to prevent—plaintiffs not living up to their fiduciary duties because of the belief that they will be rewarded regardless of the outcome for absentee members.[196] While these settlements can be appealed and the district court's judgment reviewed for abuse of discretion, it is unlikely that each and every award will be appealed and reviewed for appropriateness.

The Rules Advisory Committee has previously noted that it may be "sensible" in certain cases to provide for incentive awards where plaintiffs did "considerable work"; however, when the incentive is too high or where a "formula" is used to determine the award, unfairness may result.[197] There are also concerns about ensuring that named plaintiffs are not induced into settling claims because of an incentive award offered to them too early in the process; where this occurs, lead plaintiffs are no longer adequate and fair representatives of class interests.[198] Most circuits do not explicitly address these issues. Currently, only the Ninth Circuit has barred incentive agreements between attorneys and clients before a settlement is agreed upon, aiming to prevent such inducements.[199]

Moreover, judges will inevitably differ in their views of what constitutes a sufficient level of effort exerted by named plaintiffs in circuits where there is no clear definition of when awards can be granted.[200] "Reasonable" incentive payments are based on specific efforts

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195 *See Fikes Wholesale, Inc.*, 62 F.4th at 721–22. By lack of a set standard, I am referring to the fact that outside of relatively loose guidelines like the *Cook* test, courts are free to consider (or not consider) and balance whatever factors are presented to them on a case-by-case basis. *See supra* Section II.A.

196 *See, e.g.*, Craftwood Lumber Co. v. Interline Brands, Inc., No. 11-cv-4462, 2015 WL 1399367, at *6 (N.D. Ill. Mar. 23, 2015) (stating that named plaintiffs endured hundreds of hours of work and therefore, under *Cook*, were entitled to $25,000, but failing to elaborate on what the named plaintiffs actually did and weighing those hours against the other *Cook* factors); *see also* Staton v. Boeing Co., 327 F.3d 938, 975–78 (9th Cir. 2003).

197 *Rule 23 Subcommittee Report*, *in* ADVISORY COMM. ON CIV. RULES, CIVIL AGENDA BOOK 250 n.6 (2015), https://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf [https://perma.cc/B85Y-REJW].

198 *See* RUBENSTEIN, *supra* note 13, § 17:14.

199 *See* Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 954–55 (9th Cir. 2009).

200 For instance, one district court judge found a $10,000 incentive award to be a reasonable payment to a named plaintiff for spending over 370 hours engaging in "talking to co-workers, assisting class counsel, attending the mediation, and organizing class members to keep them apprised of the status of [the] case." Amaro v. Gerawan Farming Inc., No. 14-cv-147, 2020 WL

of named plaintiffs, but the quantity or quality of that effort is not often defined.[201] Even where they are defined in more concrete terms, there is still some room for ambiguity.[202] This leaves room for judges, like those in *Johnson*, to say that no incentive awards, beyond those covering direct expenditures like the costs of obtaining documents, are ever reasonable. While *Greenough* and *Pettus* were used by settlement objectors for years,[203] the Eleventh Circuit opened a door that other objectors (and courts, at both the district and circuit level) are now rushing through.[204]

6043936, at *10 (E.D. Cal. Oct. 12, 2020). Another district court judge found the same size incentive award appropriate in a case where the plaintiff put in over 40 hours of service because of the stigma he experienced as a result of the lawsuit. Rodriguez v. Kraft Foods Grp., No. 14-cv-1137, 2016 WL 5844378, at *16 (E.D. Cal. Oct. 4, 2016). However, a third district judge found a $10,000 award inappropriate where the named plaintiff put in 59.5 hours of work by being "deposed, work[ing] closely with [class] counsel, assist[ing] in the preparation of pleadings, provid[ing] factual information and assist[ing] in identifying potential witnesses." Valentine v. Rehab. Ctr. of Santa Monica Holding Co., No. 19-cv-01300, 2021 U.S. Dist. LEXIS 243660, at *13–14 (C.D. Cal. Dec. 20, 2021).

201 *See, e.g.*, Fikes Wholesale Inc., v. HSBC Bank USA, N.A., 62 F.4th 704, 721 (2d Cir. 2023) ("We have articulated no standard by which district courts can consider the grant of service awards."); *In re* Apple Inc. Device Performance Litig., 50 F.4th 769, 786–87 (9th Cir. 2022) (describing that incentive awards are appropriate where they are reasonable in light of certain factors, but not defining the scope of reasonableness in more particular terms); Strano v. Kiplinger Wash. Editors, Inc., 646 F. Supp. 3d 909, 912–13 (E.D. Mich. 2022) ("The Sixth Circuit has 'never explicitly passed judgment on the appropriateness of incentive awards' but found that 'there may be circumstances where incentive awards are appropriate.' [However,] the Sixth Circuit has yet to elaborate on which circumstances might warrant an incentive award . . . ." (quoting Hadix v. Johnson, 322 F.3d 895, 897–98 (6th Cir. 2003))).

202 *See, e.g.*, Granillo v. Weatherford U.S., L.P., No. 20-cv-1614, 2023 WL 5985321, at *11 (E.D. Cal. Sept. 14, 2023) (stating that the United States District Court for the Eastern District of California provides incentive awards for named plaintiffs who do at least thirty to forty hours of work, which leaves room for judges to choose which number to use as the benchmark).

203 *See, e.g.*, Muransky v. Godiva Chocolatier, Inc., 922 F.3d 1175, 1196 (11th Cir. 2019); Chieftain Royalty Co. v. Enervest Energy Inst. Fund XIII-A, L.P., 888 F.3d 455, 466–67 (10th Cir. 2018) (refusing to rule on whether incentive awards are appropriate under *Greenough* and *Pettus* because the objector failed to bring the argument in the court below); Melito v. Am. Eagle Outfitters, Inc., No. 14-cv-2440, 2017 U.S. Dist. LEXIS 146343, at *44 n.21 (S.D.N.Y. Sept. 8, 2017).

204 *See Fikes Wholesale, Inc.*, 62 F.4th at 721; Defendant's Reply to Motion for Attorneys' Fees, Costs, and Service Awards at 7–8, *In re* U.S. Off. of Personnel Mgmt. Data Sec. Breach Litig., No. 15-mc-1394 (D.D.C. Sept. 9, 2022), ECF No. 201 (arguing on behalf of the Department of Justice that incentive awards should be reviewed with skepticism at minimum, citing *Johnson* as an example of a categorical ban of incentive awards, and stating that there are other incentives to push plaintiffs to take on the role of named plaintiffs in class actions); Cotte v. CVI SGP Acquisition Tr., No. 21-cv-299, 2023 WL 5351018, at *3–4 (D. Utah Aug. 18, 2023). An objector in the Second Circuit has further argued that the Second Circuit's scorn toward the awards, as indicated in its *Fikes* opinion, should influence district courts to reduce or eliminate service awards. *In re* Payment Card Interchange Fee & Merchant Disc. Antitrust Litig., No. 5-md-1720, 2024 U.S. Dist. LEXIS

Even if no other circuit has explicitly overruled its precedent, there is a newfound skepticism of these awards' validity, and with the lack of any concrete rule providing for incentive awards, it is certainly possible that other circuits will follow suit in the *Johnson* reasoning and bar incentive awards.[205]

IV. PROPOSAL

While incentive awards are not explicitly mentioned in Rule 23, attorneys' fees are.[206] Under Rule 23(h)(3), "reasonable attorney's fees and nontaxable costs" can be awarded, and such awards are reviewed by the district court to determine reasonableness.[207] Because these fees are carefully reviewed and are enshrined in Rule 23,[208] they may provide an opening to a legal pathway through which named plaintiffs may receive an incentive award, circumventing decisions like *Johnson*. More concretely, this may be achieved if incentive awards are taken from attorneys' fees through an agreement between class counsel and the named plaintiff(s). This would circumvent the need for courts to decide whether the incentive awards are explicitly allowed under Supreme Court precedents and Rule 23. This change would also answer the concerns echoed by the Eleventh Circuit regarding fairness and equality principles because the award would not be taken out of the portion of the fund designated to the class. Additionally, it would remove the need for judges to decide whether and how much of an incentive award is appropriate under the facts of the case. This proposal can be seen as creating a fee-splitting arrangement between the attorney and client, but this is a hurdle that can be overcome.

26829, at *6–7 (E.D.N.Y. Feb. 15, 2024). The district court acknowledged the objector's contentions but refused to exercise its discretion to eliminate the incentive award. *Id.* at *7.

205 *See Fikes Wholesale, Inc.*, 62 F.4th at 721; Defendant's Reply to Motion for Attorneys' Fees, Costs, and Service Awards, *supra* note 204, at 7–8 (making the *Johnson* argument before the D.C. Circuit). There is also congressional skepticism, as exhibited by the Private Securities Litigation Reform Act and the Collective Action Fairness Act. *See* Nicholas M. Cassidy, *Class Action Incentive Awards Face an Uncertain Future from the Courts*, A.B.A. (Dec. 17, 2020), https://www.americanbar.org/groups/litigation/resources/newsletters/commercial-business/class-action-incentive-awards-face-uncertain-future-courts [https://perma.cc/Z2SR-GPFK] (noting that there is "increasing scrutiny" over class action incentive awards).

206 *See* FED. R. CIV. P. 23(h)(3).

207 FED. R. CIV. P. 23(h)(3) (citing FED. R. CIV. P. 52(a)).

208 *Id.*

A. *Model Rule 5.4*

Under Rule 5.4 of the American Bar Association's (ABA) Model Rules for Professional Conduct, attorneys are prohibited from splitting their fees with nonattorneys, primarily to safeguard the independent professional judgment of attorneys.[209] While the Model Rules are not binding, all states have adopted some version of them, and most states have their own version of Rule 5.4.[210] The reasoning behind the rule was to ensure that attorneys provide objective legal advice and put their clients' obligations above profit-earning opportunities.[211]

Since its inception, the rule has seen numerous iterations, with states providing space for behaviors that were previously considered unethical.[212] For instance, some states and jurisdictions have modified or are considering modifying their versions of Rule 5.4 to allow for certain exceptions to its various restrictions, such as allowing nonattorney co-ownership of law firms and greater fee-splitting opportunities with

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209 MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 2023). In pertinent part, Rule 5.4(a) prohibits attorney fee splitting with nonattorneys (but makes an exception for some splitting with nonprofits hiring the law firm); Rule 5.4(b) prohibits attorneys from forming partnerships with nonattorneys "if any of the activities of the partnership consist of the practice of law"; and Rule 5.4(d) prohibits attorneys from "practic[ing] with or in the form of a professional corporation or association authorized to practice law for a profit, if[] a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration." *Id.*; *see infra* Section IV.C.

210 *See* JASON SOLOMON, DEBORAH RHODE & ANNIE WANLESS, HOW REFORMING RULE 5.4 WOULD BENEFIT LAWYERS AND CONSUMERS, PROMOTE INNOVATION, AND INCREASE ACCESS TO JUSTICE 2 (2020), https://law.stanford.edu/wp-content/uploads/2020/04/Rule_5.4_Whitepaper_-_Final.pdf [https://perma.cc/4PNE-EJPU] (stating that Rule 5.4's purpose is to "protect the 'professional judgment of a lawyer'"); Matthew Black, *Extra Law Prices: Why MRCP 5.4 Continues to Needlessly Burden Access to Civil Justice for Low- to Moderate-Income Clients*, 25 WASH. & LEE J. C.R. & SOC. JUST. 499, 500 (2019); *see, e.g.*, N.Y. RULES OF PRO. CONDUCT r. 5.4 (N.Y. STATE BAR ASS'N 2021); PA. RULES OF PRO. CONDUCT r. 5.4 (SUP. CT. PA. 2024); N.J. RULES OF PRO. CONDUCT r. 5.4 (SUP. CT. N.J. 2023).

211 CTR. FOR PRO. RESP., AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013 610, 615 (Art Garwin ed., 2013); *see also* Conrad J. Jacoby, *Practice Innovations: Non-Lawyer Ownership of Law Firms—Are Winds of Change Coming for Rule 5.4?*, REUTERS (Mar. 31, 2022, 2:16 PM), https://www.reuters.com/legal/legalindustry/practice-innovations-non-lawyer-ownership-law-firms-are-winds-change-coming-rule-2022-03-31 [https://perma.cc/43NJ-LUTV].

212 Jacoby, *supra* note 211 (describing the evolution of Rule 5.4, including Washington D.C.'s exceptions to fee splitting and California's approval of fee splitting with nonprofit organizations); Bob Ambrogi, *Arizona Is First State to Eliminate Ban on Nonlawyer Ownership of Law Firms*, LAWSITES (Aug. 31, 2020), https://www.lawnext.com/2020/08/arizona-is-first-state-to-eliminate-ban-on-nonlawyer-ownership-of-law-firms.html [https://perma.cc/C4TD-WDQM] (discussing Arizona's elimination of Rule 5.4 in its entirety).

nonprofit organizations that are not owned by attorneys.[213] The ABA itself has encouraged jurisdictions to innovate and find new ways of ensuring fair, adequate, and pervasive representation to make up for disparities in representation.[214]

B. *Examples of Prior Changes to Rule 5.4*

Exceptions to Rule 5.4(a) have been added over the course of the last few decades, showing that they can accommodate to changing beliefs. For instance, Rule 5.4(a) currently makes an exception for nonprofit organizations, which was not originally part of the Rule; this exception was added in 2001.[215] Beginning in 1979, jurisdictions began changing their readings of Rule 5.4(a) and ordering lawyers to share fees with nonprofit organizations bringing public interest lawsuits.[216] Thereafter, the ABA released a Formal Opinion supporting adding an exception to fee splitting for nonprofit organizations, arguing that nonprofits are inherently different from for-profit organizations and are thus not parties to the concerns that would govern fee splitting with companies.[217]

Another example of a change to the rules is found through the Florida Bar's recommendation that attorneys be allowed to share attorneys' fees with nonattorneys in the context of multidisciplinary practice ("MDP") organizations,[218] "subject to certain safeguards that prevent erosion of the core values of the legal profession."[219] While this proposal was ultimately rejected by the ABA's Commission on Multidisciplinary Practice Recommendation in 1999 and 2000, New York

213 Jacoby, *supra* note 211; Ambrogi, *supra* note 212.

214 DON BIVENS, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES (2020), https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/r115resandreport.pdf [https://perma.cc/KL43-XCBS].

215 CTR. FOR PRO. RESP., *supra* note 211, at 640–41.

216 Roy D. Simon, Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L.J. 1069, 1073 (1989).

217 ABA Comm. on Ethics & Pro. Resp., Formal Op. 93-374, at 7 (1993); *see also* CTR. FOR PRO. RESP., *supra* note 211, at 640–41 (discussing that there was a lower risk of concern with fee splitting with nonprofits than there is with fee splitting with for-profit organizations).

218 An MDP is defined as "[a] fee-sharing association of lawyers and nonlawyers in a firm that delivers both legal and nonlegal services." BLACK'S LAW DICTIONARY (12th ed. 2024).

219 CTR. FOR PRO. RESP., *supra* note 211, at 617.

decided to modify its ethics rules to create an exception to the rule.[220] New York's Rule 5.8 states that while there must be a "a strict division between services provided by lawyers and . . . nonlawyers" to ensure that the core values of the legal profession remain uncompromised, there are some instances where lawyers and nonlawyers can contract together, so long as they follow the enumerated guidelines of the Rule.[221]

Relatedly, Washington D.C. has allowed nonlawyer ownership of law firms since 1991.[222] In 2020, Utah relaxed its rules to allow for nonlawyer ownership as well, with such entities needing to register with the state's Office of Legal Services Innovation.[223] Shortly thereafter, Arizona completely abolished its Rule 5.4, eliminating most fee-splitting prohibitions and requiring firms that wish to have nonlawyer partnerships to subject themselves to government regulation.[224] Arizona's system allows for the creation of Alternative Business Structures (ABSs), subject to regulation, which can allow for MDPs.[225] In this regard, the rules are amenable to the ever-changing needs of the industry, yet are also consistent in placing safeguards to protect the legal field from potential abuses by profit-seeking organizations.

C. *Incorporating Incentive Awards into Rule 5.4*

The ABA and states should amend their rules to allow attorneys to split fees with named plaintiffs in class action lawsuits. Historically, a key concern with fee splitting was the role a nonattorney may play in influencing the legal judgment of an attorney over the course of

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220 Laura Noroski, Note, *New York's Controversial Ethics Code Changes: An Attempt to Fit Multidisciplinary Practice Within Existing Ethical Boundaries*, 76 S. CAL. L. REV. 483, 491 (2003); N.Y. RULES OF PRO. CONDUCT r. 5.8 (N.Y. STATE BAR ASS'N 2021) (listing restrictions such as requiring firms to disclose any contractual relationship to clients and prohibiting fee splitting for any referrals made).

221 N.Y. RULES OF PRO. CONDUCT r. 5.8 (N.Y. STATE BAR ASS'N 2021).

222 Conn Kavanaugh, *Nonlawyer Ownership of Law Firms: Coming to a Jurisdiction Near You?*, JD SUPRA (June 3, 2021), https://www.jdsupra.com/legalnews/nonlawyer-ownership-of-law-firms-coming-2760765 [https://perma.cc/SBC4-DPVT]; D.C. RULES PRO. CONDUCT r. 5.4 (D.C. BAR ASS'N 2018).

223 Kavanaugh, *supra* note 222. A list of these organizations is available at the following website: *Authorized Entities*, UTAH OFF. LEGAL SERVS. INNOVATION, https://utahinnovationoffice.org/authorized-entities [https://perma.cc/9F47-NCPT].

224 *In re* Restyle & Amend Rule 31, No. R-20-34, 2020 Ariz. LEXIS 273, at *1, *57–62 (Ariz. Sup. Ct. Aug. 27, 2020).

225 Robert Saavedra Teuton, Note, *One Small Step and a Giant Leap: Comparing Washington, D.C.'s Rule 5.4 with Arizona's Rule 5.4 Abolition*, 65 ARIZ. L. REV. 223, 239–40 (2023).

business.[226] More specifically, there was concern that attorneys' "professional judgment can be impaired by the influence and control of nonlawyers who . . . are not subject to the same ethical mandates regarding independence, conflicts of interest, confidentiality, fees and the other important provisions of the profession's code of conduct."[227] Before the Model Rules, the ABA followed the Model Code of Professional Responsibility, and in 1976, a proposed amendment to the Code would have allowed for some fee splitting, so long as an agreement was made that a nonattorney would not influence an attorney's professional judgment.[228] This amendment was never passed because of a vigorous debate about corporate involvement and its potential influence over attorneys.[229]

Conversely, in the context of class action incentive awards, there would be no fee splitting with corporations or major business players that would adversely affect a client. Rather, the fee splitting would occur *with* the client. Attorneys are already required to act, to the best of their professional ability, to be zealous advocates for their clients, and in class actions, the fees attorneys earn are contingent on a win in the suit.[230] In this regard, attorneys are inherently tied to the success of their clients' claims and splitting fees with the named plaintiffs would not have undue influence over their judgment. And, because attorneys and named plaintiffs maintain a fiduciary duty to the entire class, they are bound by that duty to persist in litigation until an optimal outcome is reached for the entire class.

Moreover, plaintiff incentive awards do not fall into this sphere of concern (abuse by profit-seeking organizations) discussed through the prior rule changes. Rather, they are for the benefit of the clients themselves, uninfluenced by external for-profit sources.[231] Considering the Rules have been amended with specific guidance in place, such as the list of restrictions found in Florida's MDP guidelines and Arizona's

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226 ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-392, at 2 (1995).

227 *Id.*

228 *Id.*

229 *Id.* at 3; *see also* Simon, Jr., *supra* note 216, at 1082–83.

230 Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 DEPAUL L. REV. 347, 347–48 (1998) ("Contingent fees are the nearly universal form of compensation for class counsel. Indeed, in most class action litigation no other form of compensation would be practical." (footnote omitted)).

231 This is because the purpose of the incentive awards is to compensate named plaintiffs for the work they had done throughout the litigation process, not to pay them a salary. *See supra* Sections I.C, III.B.

government regulation scheme for any lawyer-nonlawyer partnerships,[232] states and the ABA could put together the safeguards[233] they believe will prevent potential abuses from attorneys and clients in their fee-splitting arrangements. However, as is, existing concerns about for-profit organizational abuses of attorneys' independent discretion would not apply to the named plaintiffs in class actions. Attorneys' fees in class action suits must meet reasonableness requirements and tend to not exceed twenty-five percent of the total award.[234] These existing safeguards could provide reassurance that attorneys will not be able to seek overly high fees to make up for the portion they would have to give clients in a fee-splitting arrangement.[235] There is also a safeguard through Rule 1.5 of the Model Rules of Professional Conduct, which dictates that attorneys cannot "collect an unreasonable fee" or else they could be subject to disciplinary action.[236] While an argument can be made that attorneys will choose to give clients a small portion of the fee out of selfishness, class action attorneys *need* named plaintiffs in order to bring the suit and would therefore be willing to pay the appropriate fees, reducing the risk of future litigation disputing the amount given to the client.[237]

Another safeguard that exists (and is enforced by district courts) is that attorneys and named plaintiffs cannot decide on a predetermined amount of damages that they would be awarded because this is seen as unfair to the rest of the class and puts the attorney in a position of pushing for specific numbers just to meet client demands.[238] Attorneys and clients could perhaps sign agreements indicating they will not discuss what percentage or amount of the fees will go to the clients until after a

232 CTR. FOR PRO. RESP., *supra* note 211, at 617–18; Ambrogi, *supra* note 212; *see supra* Section IV.B.

233 For instance, there could be a regulatory board overseeing any complaints from former clients who feel like their attorney is not giving them a reasonable amount for the services they provided. Attorneys may also have to provide the clients with a memorandum summarizing pre-rule decisions to show the value of incentive awards previously given for the various services provided by named plaintiffs. A study can be commissioned to evaluate which particular safeguards would be most effective.

234 FED R. CIV. P. 23(h); Fitzpatrick, *supra* note 49, at 1167; *see also* Fitzpatrick, *supra* note 51, at 833; Eisenberg & Miller, *supra* note 49, at 260; Keslar v. Bartu, 201 F.3d 1016, 1017 (8th Cir. 2000); *In re* U.S. Bancorp Litig., 291 F.3d 1035, 1038 (8th Cir. 2002).

235 *In re* Microstrategy, Inc., 172 F. Supp. 2d 778, 789–90 (E.D. Va. 2001) (finding the 27% attorneys' fees figure to be too high and lowering fees to 18%); Loudermilk Servs. v. Marathon Petrol. Co., 623 F. Supp. 2d 713, 725 (S.D. W. Va. 2009) (reducing attorneys' fees because they took an unreasonable proportion out of the class fund).

236 MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS'N 2023).

237 *See supra* Section I.B.

238 *See* Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 959–60 (9th Cir. 2009).

settlement is reached. Such an agreement could also stipulate that the parties agree that the client would receive a reasonable and proportional amount to their efforts to ensure the client is not cheated out of a fair award; this would further help avoid future satellite litigation between attorneys and clients over the award amount.

Furthermore, a handful of district courts have accepted attorney requests to take a portion out of their fees to pay an incentive award to named plaintiffs.[239] Noting that judicial review is required because of the prohibition of fee splitting under Rule 5.4, these courts granted the awards because they represented a small amount of the attorneys' fees and did not cause any of the potential conflicts that Rule 5.4 seeks to prohibit.[240] Furthermore, in Tennessee, Rule 5.4 allows for fee splitting with clients represented in the matter, within the same exception as fee splitting with nonprofits.[241] This indicates that this rule is indeed workable.

CONCLUSION

Modern class action jurisprudence provides a legal space for plaintiff incentive awards that live outside of nineteenth-century equity court principles.[242] The federal rules, prior circuit cases, and even Supreme Court acquiescence point to incentive awards being fully within the norms of class action lawsuits.[243] The importance of these awards for the proliferation of class actions means that it is all the more important that safeguards are put in place to ensure their continued existence, which is

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239 *See, e.g.*, *In re* Cendant Corp., 232 F. Supp. 2d 327, 344 (D.N.J. 2002); *In re* Presidential Life Secs., 857 F. Supp. 331, 337 (S.D.N.Y. 1994). There have also been cases where awards were taken out of the common fund, but the court nonetheless stated that had the award been taken out of attorneys' fees, it would require less scrutiny. *See, e.g.*, Alvarez v. BI Inc., No. 16-2705, 2020 WL 1694294 , at *6 (E.D. Pa. Apr. 6, 2020); Altnor v. Preferred Freezer Servs., 197 F. Supp. 3d 746, 769–70 (E.D. Pa. 2016).

240 *In re* Cendant Corp., 232 F. Supp. 2d at 344 ("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 Secs., 857 F. Supp. at 337 ("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.").

241 TENN. RULES OF PRO. CONDUCT r. 5.4 (TENN. STATE BAR ASS'N 2023).

242 *See supra* Parts III–IV.

243 *See supra* Part III.

currently threatened by the *Johnson* decision.[244] *Johnson* held that incentive awards are prohibited under *Greenough* and *Pettus*—an argument that had previously been rejected by other courts—and other courts are beginning to find the argument at least in part persuasive. But there is a way to ensure that incentive awards continue to be given to named plaintiffs as a reward for their hard work and dedication, and as an incentive for others to step up to bring class action litigation.

Allowing incentive awards to be decided between the named plaintiffs and class counsel would circumvent the need for courts to decide on the validity and amount of the award.[245] This pathway can be created by amending existing ethics rules to allow incentive awards to come directly from the portion of the common fund collected by class counsel.[246] To resolve issues about the possible ethical concerns of such an arrangement, the amendment could require carefully tailored language to allow for attorney-client fee splitting in only the class action context, and further safeguards would be provided by pre-existing court settlement review techniques that are consistently used to ensure the entire proposed class settlement truly is fair.[247]

244 *See supra* Parts III–IV.

245 *See supra* Part IV.

246 *See supra* Part IV.

247 *See supra* Part IV; *supra* Section IV.C.