RECORD NO. 18-12344

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

JENNA DICKENSON,
Interested Party–Appellant,

v.

NPAS SOLUTIONS, LLC,
Defendant–Appellee

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

PLAINTIFF–APPELLEE CHARLES T. JOHNSON'S PETITION FOR REHEARING EN BANC

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Johnson v. NPAS Solutions, LLC, No. 18-12344

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for Appellee Charles T. Johnson hereby certifies that the following is a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case on appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

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- Isaacson, Eric Alan – Counsel for Appellant Jenna Dickenson

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- Postman, Warren D. – Counsel for Plaintiff-Appellee
- Radbil, Aaron D. – Counsel for Plaintiff-Appellee
- Rosenberg, Honorable Robin L. – District Court Judge
- Stahl, Jacob W. – Counsel for Defendant-Appellee
- Van Wey, Lorelei Jane – Counsel for Defendant-Appellee

1. NPAS Solutions, LLC is wholly owned by National Patient Accounts Services, Inc., which is wholly owned by Parallon Business Solutions, LLC. The ultimate parent of Parallon Business Solutions, LLC is HCA Healthcare, Inc., a publicly-traded company.

2. No publicly held corporation owns 10% or more of NPAS Solutions' stock.

Dated: October 22, 2020

Respectfully submitted,

/s/ *Michael L. Greenwald*
Michael L. Greenwald

Counsel for Plaintiff–Appellee
Charles T. Johnson

RULE 35 STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance: Whether the common practice of awarding incentive payments to named plaintiffs to compensate them for their efforts protecting absent class members' interests is *per se* unlawful.

I further express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this circuit: *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983); *Carter v. Forjas Taurus, S.A.*, 701 F. App'x 759, 763 (11th Cir. 2017); *Poertner v. Gillette Co.*, 618 F. App'x 624 (11th Cir. 2015); *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429 (11th Cir. 2012).

Consideration by the full Court is necessary to secure and maintain the uniformity of decisions within this Circuit.

Dated: October 22, 2020

Respectfully submitted,

/s/ *Michael L. Greenwald*
Michael L. Greenwald

Counsel for Plaintiff–Appellee
Charles T. Johnson

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STATEMENT OF THE ISSUE WARRANTING EN BANC CONSIDERATION

Class-action settlement agreements routinely contain a negotiated term providing, subject to court approval under Rule 23, for incentive payments to named plaintiffs to compensate them for their efforts protecting absent class members' interests. Are such payments *per se* unlawful?

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Reviewing a class-action settlement "like so many others that have come before," a panel of this Court did what no court of appeals has done before: it categorically barred incentive awards. *Johnson v. NPAS Sols., LLC*, No. 18-12344, 2020 WL 5553312, at *1 (11th Cir. Sept. 17, 2020). Every court of appeals, including this court, has repeatedly approved settlements with incentive awards. For this reason, Appellees devoted just one paragraph to the issue and did not address it in any depth at oral argument.

The panel's reasoning was as novel as its result. It held that courts for decades have overlooked "on-point Supreme Court precedent" from the 1880s. *Id.* But the two 19th Century cases on which the panel relied are general common law trust cases; they do not involve settlement contracts, fiduciary duties, or Rule 23 determinations. As such, they provide no authority for the panel's vacatur of the parties' settlement.

A categorical ban on incentive payments is no trifling matter. The class-action device exists to enable redress for widespread harm that is inflicted in small increments on each individual class member. No rational plaintiff incurs the time and expense of litigation for the hope of recovering a few dollars in individual damages. A class action is the solution to this collective action problem, permitting—with judicial oversight—a small number of class representatives to vindicate the rights of a great number of absent parties. But class representatives are no more immune than absent parties to the constraints of economic reality. If few plaintiffs would suffer litigation for the hope of a tiny recovery, fewer still would do so for the *same* possible award alongside the *added* burdens—including, potentially, paying a defendant's costs—and fiduciary responsibilities that attend litigating on behalf of a class. Incentive payments help attract class representatives willing to shoulder those burdens. The full Court should address this vital issue with the benefit of full, targeted briefing on a matter that the panel acknowledged is "commonplace in modern class-action litigation." *Id.* at *12.

* * *

In March 2017, Charles Johnson filed a class-action lawsuit alleging that Defendant NPAS Solutions, LLC placed repeated calls without authorization to thousands of individuals in violation of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227 (2018). NPAS vigorously litigated the claims. The parties

ultimately entered a settlement agreement, which the district court preliminarily approved in December 2017.

Under the agreement, NPAS would contribute $1,432,000 to a settlement fund to be distributed pro rata to class members after certain deductions. Among other deductions, the settlement provided "an incentive award to Mr. Johnson, not to exceed $6,000 and subject to Court approval." DE37-1:6. No class members opted out, and only one objected. That Objector, Appellant Jenna Dickenson, considered the settlement amount too low, the attorneys' fees too high, and the incentive award both too high and unlawful altogether. The district court considered and rejected those objections. Applying the approval standard set out in Rule 23, the court found that the settlement—including the proposed attorneys' fee and incentive award—was fair, reasonable, and adequate.

Dickenson appealed, seeking reversal on five different grounds. As relevant here, Dickenson argued that the $6,000 incentive award created a conflict of interest, contravened Rule 23, and was foreclosed by *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885).

In a divided opinion by Judge Newsom and joined by Judge Baldock (sitting by designation from the Tenth Circuit), the panel reversed, holding that incentive awards, though "commonplace in modern class-action litigation," are categorically

unlawful.[1] *NPAS Sols., LLC*, 2020 WL 5553312, at *12. The majority reasoned that "the modern-day incentive award for a class representative is roughly analogous to a salary—in *Greenough*'s terms, payment for 'personal services.'" *Id.* at *9. The majority acknowledged that *Greenough* was not a class-action case, but it found that "irrelevant," since Rule 23 has nothing "to say about incentive awards." *Id.* at *10.

Judge Martin dissented in part because she "disagree[d] with the majority's decision to take away the incentive award." *Id.* at *15. Her opinion contended that Rule 23's fairness-based standard for approval of class settlements should control the permissibility of an incentive award. This flexible inquiry was not only compelled by circuit precedent, but also would better address the conflict-of-interest concerns raised by opponents of excessive incentive awards.

REASONS TO GRANT THE PETITION

I. The Panel's Categorical Prohibition on Incentive Awards Is an Issue of Exceptional Importance.

The panel opinion invalidates a widespread practice in one of the most consequential areas of civil litigation that, until now, has been universally accepted in every circuit.

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[1] The majority faulted the district court for setting a schedule that required objections to be lodged before class counsel had filed its fee petition and for insufficiently explaining some of its decisions. This petition does not challenge those holdings.

A. The panel opinion effects a sea change in class-action practice.

Under the panel's analysis, hundreds if not thousands of decisions that authorize incentive awards in this circuit and around the country are unlawful. The most recent study from Professor Rubenstein found that from 2006–2011 more than 71% of settlements provided an incentive award, and the number trended upwards. William Rubenstein, 5 *Newberg on Class Actions* § 17:7 (5th ed. 2020). The panel opinion itself recognized the "ubiquity" of incentive awards, which are "commonplace in everyday class-action practice." *Id.* at *11, *1, *12. And the Supreme Court has recognized incentive awards as a reality of class litigation. *See China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 n.7 (2018) ("The class representative might receive a share of class recovery above and beyond her individual claim. *See, e.g.*, *Cook v. Niedert*, 142 F.3d 1004, 1016 (C.A.7 1998) (affirming class representative's $25,000 incentive award)."); *Frank v. Gaos*, 139 S. Ct. 1041, 1045 (2019) (noting incentive payment).

No court in the last century has *ever* held that incentive awards are categorically impermissible. *Accord NPAS Sols., LLC*, 2020 WL 5553312, at *15 (Martin, J.) ("the majority takes a step that no other court has taken"). Indeed, the Supreme Court has repeatedly acknowledged the practice of incentive awards, *e.g.*, *China Agritech*, 138 S. Ct. at 1811 n.7, and no Justice has suggested any problem with them. All major treatises describe incentive awards as an accepted practice.

The Newberg treatise—which the panel opinion repeatedly cites—dedicates an entire chapter to incentive awards. *See generally*, 5 *Newberg on Class Actions* §§ 17:1–21 (5th ed. 2020). It finds "strong support for the conclusion that incentive awards are a quite common part of class-action practice today." *Id.* § 17:7. Similarly, the McLaughlin treatise includes an extended discussion of incentive awards in its chapter on settlements. Joseph McLaughlin, 2 *McLaughlin on Class Actions* § 6:28 (16th ed. 2019). Though it explains that a "very small minority of courts" sometimes question incentive awards on suspicion of collusion or unfairness, it finds "near-universal recognition that it is appropriate for the court to approve an incentive award payable from the class recovery, usually within the range of $1,000–$20,000." *Id.*

As the panel correctly noted, that "everyone does it" is no reason to abandon a contrary legal conclusion. But that incentive awards are a universally accepted practice provides ample reason for the full Court to consider whether such an established aspect of class-action settlements should be held *per se* unlawful.

B. Incentive awards are an important aspect of civil litigation.

The sea change wrought by the panel's decision is not in some arcane area, but one of the most common and consequential ones. The decision has already drawn commentary from around the legal profession. *E.g.*, Stephanie L. Adler-Paindiris et al, *Eleventh Circuit Rejects Incentive Awards for Class Plaintiffs*, The

National Law Review (Sept. 17, 2020), https://www.natlawreview.com/article/eleventh-circuit-rejects-incentive-awards-class-plaintiffs (calling the decision an "outlier," and predicting it "will impact the resolution of class actions within the Eleventh Circuit"); Eric J. Troutman, *BREAKING TCPA NEWS: This Is Huge! Eleventh Circuit Holds Incentive Award Payments to Class Representatives Are Per Se Forbidden*, TCPA World (Sept. 17, 2020), https://tcpaworld.com/2020/09/17/breaking-tcpa-news-this-is-huge-eleventh-circuit-holds-incentive-award-payments-to-class-representatives-are-per-see-forbidden/ ("[T]the Eleventh Circuit has made it pretty clear it does not want any more TCPA class actions."). Numerous amici are expected to support this petition.

Incentive awards implicate fundamental issues of fairness and policy. A lead plaintiff takes on fiduciary duties and responsibilities. He performs more work, takes on more risk, and delivers more value than absent class members. Incentive payments are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009). Rule 23 serves an important purpose and critically depends on lead plaintiffs' willingness to represent a class. The panel's holding that lead plaintiffs cannot *ever* be compensated undermines the policy of Rule 23. To be sure, free-floating policy

considerations do not establish that the panel decision is incorrect. But policy implications do confirm that the panel's decision is important and worth examining *en banc*.

C. The panel's holding opens a conflict with every other circuit.

Decisions in *every* other circuit have approved of incentive awards. *See, e.g.*, *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 82 (1st Cir. 2015); *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 290 (3d Cir. 2011) (en banc); *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015); *Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 290 (5th Cir. 2017) (vacating settlement with $12,500 incentive award on other grounds), *in subsequent proceedings* 742 F. App'x 846 (5th Cir. 2018) (affirming same settlement after district court provided further explanation); *Pelzer v. Vassalle*, 655 F. App'x 352, 360 (6th Cir. 2016) (affirming incentive awards); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001) (Easterbrook, J.) ("Incentive awards are justified when necessary to induce individuals to become named representatives."); *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867–68 (8th Cir. 2017) (Gruender, J.) ($10,000 service awards); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015); *Rodriguez*, 563 F.3d at 958–59; *Chieftain Royalty Co. v. Enervest Energy Instit'l Fund XIII-A, L.P.*, 888 F.3d 455, 468 (10th Cir. 2017) ("courts regularly give incentive awards"); *Cobell v. Salazar*, 679 F.3d

909, 922–23 (D.C. Cir. 2012). Although not every circuit has addressed the panel majority's reasoning, each has upheld incentive awards.

Several circuits have expressly disagreed with the panel majority's reasoning. The panel majority acknowledged a clear split with the Second Circuit, which "directly confronted" but "summarily dismissed" the same argument. *NPAS Sols.*, 2020 WL 5553312, at *9, n.8. Moreover, Objector's counsel has repeatedly raised the *Greenough* argument without success, not only in the Second Circuit, *Melito*, 923 F.3d at 96 (rejecting this argument), but also in the Tenth Circuit, *Chieftain*, 888 F.3d at 466 (argument was forfeited), and before the Civil Rules Advisory Committee, *Pub. Hr'g on Proposed Ams. to Fed. R. Civ. P.*, (Feb. 16, 2017), https://www.uscourts.gov/sites/default/files/2017-02-10-testimony_and_comment_handout.pdf. Counsel has even pressed the argument unsuccessfully in a previous case in this Court that recently was reviewed *en banc*. *See Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1196 (11th Cir.) (rejecting the argument), *reh'g en banc granted*, *opinion vacated*, 939 F.3d 1278 (11th Cir. 2019) (reconsidering standing).

The panel majority stated that the Sixth and Seventh Circuits "recognized the continuing vitality of *Greenough*." *NPAS Sols.*, 2020 WL 5553312, at *9, n.8. But both circuits distinguished *Greenough*. By way of background, in *Greenough*, a bondholder (Vose) sued trustees, a corporation, and directors alleging wasteful trust

administration. The district court found for Vose and took control of the fund, greatly improving the bond value. Vose petitioned the district court for—and received—reimbursement from the fund for attorneys' fees, private costs for travel and lodging, and personal services for 10 years. Applying principles of restitution, the Supreme Court affirmed reimbursement of the fees but disallowed the private costs and personal services. The Supreme Court extended *Greenough* in *Pettus*, holding that attorneys could petition for fees directly (rather than requiring reimbursement through a plaintiff).

The Seventh Circuit explained that an incentive award "necessary to induce [the plaintiff] to participate in the suit could be thought the equivalent of the lawyers' nonlegal but essential case-specific expenses." *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992), *as amended on denial of reh'g* (May 22, 1992) (Posner, J.).

The Sixth Circuit provided more detail:

> [In *Greenough*, Plaintiff] Vose sought $34,625 for personal services **undertaken to improve the health of the trust**. . . . The Supreme Court separated Vose's **litigation expenses** from his **personal costs**. . . . The Court disallowed only the cost of personal services and private expenses. Vose's remaining costs were paid in full. . . . The money [Grenada] spent on accountants and investment bankers was related to the claims pursued by Granada on behalf of all DWG shareholders. This expenditure was not "private" in the sense found objectionable in *Greenough*.

Granada Invs., Inc. v. DWG Corp., 962 F.2d 1203, 1207–08 (6th Cir. 1992) (emphasis added). Under this standard, incentive fees are not private, since they are always related to advancing the litigation on behalf of all class members.

The majority opened a broad split with other circuits and rejected the consensus of scholars across the country. Because the issue was one of numerous grounds presented to the panel (and had never been accepted by any court), the parties addressed it breezily, with *combined* briefing of barely six pages. The importance of this issue and considerable contrary authority justifies full briefing and argument before the entire Court.

II. The Panel Decision Is in Tension with Decisions from This Circuit.

As Judge Martin's dissent explained, *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), already set out a legal standard for incentive payments: fairness. The district court relied on this standard in approving the incentive award. DE53:4. This standard requires courts to examine any "disparity in benefits" between named plaintiffs and absent class members, searching for "substantive unfairness or inadequate representation." 706 F.2d at 1148. "When a settlement explicitly provides for preferential treatment for the named plaintiffs in a class action, a substantial burden falls upon the proponents of the settlement to demonstrate and document its fairness," *id.* at 1147, but proponents can carry that burden "by a factual showing that the higher allocations to certain parties are

rationally based on legitimate considerations," *id.* at 1148. Consent is critical: "at some point objections from the class may become so numerous that in a very real sense it can be said that 'the class' has not agreed to the proposal, that counsel's perceptions of the best interests of the class are faulty, and that approval of the settlement by the district court constitutes an abuse of discretion." *Id.* at 1149.

Holmes did not approve a settlement on the facts—partly because many class members objected and sought to opt-out—but it laid out a legal test, and, relying on that test, subsequent Eleventh Circuit cases have upheld incentive awards. *See Carter v. Forjas Taurus, S.A.*, 701 F. App'x 759, 763 (11th Cir. 2017) (upholding $15,000 incentive award); *Poertner v. Gillette Co.*, 618 F. App'x 624, 626 (11th Cir. 2015) ($1,500 incentive award); *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 433 (11th Cir. 2012) ($10,000 incentive award); *Muransky*, 922 F.3d 1175, *reh'g en banc granted*, *opinion vacated*, 939 F.3d 1278 (decision on standing pending). These opinions are irreconcilable with the panel's categorical ruling.[2] The intra-circuit (and intra-panel) conflict further supports *en banc* review.

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[2] This Court has not explained how it weighs conflicting unpublished cases in deciding whether to rehear a case *en banc*, but the Supreme Court's practice is to consider unpublished decisions in assessing circuit splits, which should be persuasive. *See C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987) ("[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case."); *see also*, *Lynce v. Mathis*, 519 U.S. 433, 436 (1997) (granting certiorari to resolve the conflict between a Tenth Circuit opinion and an Eleventh Circuit "unpublished order"); *Thompson v. Keohane*, 516 U.S. 99, 106 (1995)

III. The Panel Decision Is Wrong.

The panel majority relied on *Greenough* by analogy, but the analogy does not hold. Moreover, it skipped over two critical threshold questions: what source of law authorized judicial review of the settlement, and what source of law imposed a limit on that authority? Had it asked those questions, it would have seen that *Greenough* provides little guidance. Because it overlooked those matters, it failed to identify any text in Rule 23—or any body of substantive law—that supports its result.

A. *Greenough* is not analogous because the plaintiff there was not a fiduciary.

Greenough expressly distinguished Vose, an ordinary creditor, from a trustee. The latter could be paid to "induce persons of reliable character and business capacity to accept the office of trustee." 105 U.S. at 537–38. But "[t]hese considerations have no application to the case of a creditor seeking his rights." *Id.* A class representative is more analogous to a trustee than an ordinary creditor. For more than half a century, the Supreme Court has made class representatives fiduciaries. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549–50 (1949). This prevents them from settling without review:

> The parties, who are settling their individual claims, are not merely members of a putative class; they are the representative parties, without whose presence as plaintiffs the case could not proceed as a class action. Had

(granting certiorari "to end the division of authority" between published and unpublished opinions).

> the appellees been other than the representative parties, there would be no objection to a voluntary settlement of their claim. But, by asserting a representative role on behalf of the alleged class, these appellees voluntarily accepted a fiduciary obligation towards the members of the putative class they thus have undertaken to represent. They may not abandon the fiduciary role they assumed at will or by agreement with the appellant . . . .

Shelton v. Pargo, Inc., 582 F.2d 1298, 1305 (4th Cir. 1978) (citations omitted). Even if *Greenough* applied, its rationale authorizes payments to "induce persons" (such as Johnson) to seek a fiduciary role, even as it excludes Vose, who owed no duties to the other bondholders.

Compensating a class representative can be fair and reasonable in light of the crucial role they perform, the efforts they engage in, and the fiduciary duties placed upon them by class-action doctrine. As this Court explained in *Holmes*, 706 F.2d 1144, judicial review is still essential to ensure incentive awards are not collusive, but the flexible inquiry of Rule 23(e) fits that task. District courts do not hesitate to reduce incentive awards where appropriate. *E.g.*, *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299–300 (N.D. Cal. 1995) (awarding half of the proposed incentive award as "just and reasonable" in light of "the actual time spent on the case" and "out-of-pocket expenditures").

B. *Greenough* is not analogous because the parties did not settle.

Greenough applied pre-*Erie* federal common law to determine whether a creditor could claim reimbursement from a trust after *prevailing* in a suit seeking

preservation of trust property. *Greenough* involved no settlement or agreement. Consequently, it did not impose a limit on settlement contracts under any body of law, let alone state law or Rule 23. Had Vose settled, the case would not have arisen, since the settlement would not have been subject to judicial review at all.

Background state law empowers parties to make contracts, and "[g]enerally, as a valid, binding contract, a settlement agreement does not need to be approved, ratified or adopted by the court in order to be enforceable in court." 15B Am. Jur. 2d *Compromise and Settlement* § 9. Rule 23(e) codifies an exception, mandating judicial review of class settlements under a "fair, reasonable, and adequate" standard. The panel reasoned that because "Rule 23 has [no]thing to say about incentive awards," they must be *ultra vires*. 2020 WL 5553312, at *10. This gets things backwards. Settling parties need no affirmative authority from Rule 23 to include any particular "fair, reasonable, and adequate" term in their agreements—it was the panel that needed a source of law imposing *limits* beyond those of Rule 23. Since *Greenough* did not involve a settlement, it had none.

The Rule 23(e) standard gives district courts discretion to assess what is fair. In principle, a court might choose to look to the 1880s common law of trusts in assessing fairness. But a decision to *apply* the fairness standard in that way is not required under *stare decisis*, and cannot supplant the Rule's plain text. To grant an incentive award after verdict may well require different authority, and courts are yet

to resolve the issue. *See, e.g.*, *West v. AK Steel Corp. Ret. Accumulation Pension Plan*, 657 F. Supp. 2d 914, 938–39 (S.D. Ohio 2009) ("an incentive award is not appropriate unless there is a settlement fund from which that award would be paid"); *cf. In re S. Ohio Corr. Facility*, 24 F. App'x 520, 529 (6th Cir. 2001) (rejecting incentive award not "authorized by the parties' contract").

C. *Greenough* applied pre-*Erie* general federal common law, which is certainly not controlling.

The *Greenough* Court, consistent with *Swift v. Tyson,* 41 U.S. 1 (1842), "cite[d] cases . . . from the State Courts, from England, and the Colonies of England indiscriminately." *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). Under modern doctrine, federal courts apply federal procedure but the substantive trust and corporate law at issue in *Greenough* would be state law. The panel opinion did not consider, in light of these differences, why *Greenough*'s personal services ruling applies under modern federal common law doctrine.[3] For example, some aspects of the law for attorneys' fees and incentive payments may be governed by state law. *See Chieftain*, 888 F.3d at 469 (Oklahoma law controlled the merits and attorney's fees in a class-action settlement, and perhaps incentive awards as well). Many states have their own precedent on incentive awards, which may apply in federal court.

[3] Both the TCPA and Rule 23 are, of course, federal substantive and procedural law, respectively, but the panel did not root its holding in either of those.

E.g., *Chen v. Howard-Anderson*, 2017 WL 2842185, at *7 (Del. Ch. June 30, 2017) (granting $1.25 million incentive award).

CONCLUSION

The panel majority broke from all other circuits and remade the landscape of class-action litigation on the premise that Supreme Court precedent so required. That precedent—if it applies—requires nothing of the sort. This Court should rehear the case.

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Respectfully submitted,

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