UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No.9:17-cv-80393-RLR

CHARLES S. FISHMAN, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

NPAS SOLUTIONS, LLC,

Defendant.

OPPOSITION TO PLAINTIFF'S SUPPLEMENTAL SUBMISSIONS ON REMAND

I. INTRODUCTION

Although Plaintiff Charles S. Fishman styles his filing "Plaintiff's Submission in Response to Eleventh Circuit's Mandate," what his lawyers are trying to do amounts to a violation of the Eleventh Circuit's mandates. This Court, however, has jurisdiction on remand only to comply with, but not to deviate from, the Eleventh Circuit's mandate.[1] To permit Class Counsel to file supplemental evidence now, more than half a decade after the initial deadline for objections, would violate the Eleventh Circuit's 2020 mandate which held the violation of Rule 23(h) notice procedures was harmless error because Class Counsel submitted nothing of substance after the

[1] "'Even at the joint request of the litigants, the district court may not deviate from the mandate of an appellate court.'" *Litman v. Massachusetts Mutual Life Ins. Co.,* 825 F.2d 1506, 1516 (11th Cir.1987)(en banc)(quoting *Atsa of California, Inc. v. Continental Insurance Co.,* 754 F.2d 1394, 1396 (9th Cir.1985)); *see Hall v City of Los Angeles,* 697 F.3d 1059, 1067 (9th Cir.2012)("Violation of the rule of mandate is a jurisdictional error."); *accord, e.g., Valley Hosp. Med. Ctr., Inc. v. NLRB,* 93 F.4th 1120, 1125 (9th Cir.2024); *Lee Memorial Hospital v Becerra,* 10 F.4th 859, 867 n.1 (D.C.Cir.2021).

original deadline for objections. The Eleventh Circuit's 2024 mandate should not be interpreted as requiring consideration of supplemental evidence that would turn the original violation of Rule 23(h) into a manifestly harmful error.

If this Court were to permit the supplemental evidence, however, it would also be required by Rule 23(h) to give the class new notice and an opportunity to object. The Court should then exclude Class Counsel's time on the case after their initial fee application, which was submitted April 6, 2018. DE44. They are entitled to no compensation for time they devoted to opposing Dickenson's meritorious appeals, or for time devoted to matters that conferred no benefit on the class—such as their petitions for en banc rehearing and for certiorari on the issue of incentive awards. Moreover, a consideration of the relevant factors would not support the requested 30% award. Applying the *Johnson* factors, the fee should not exceed 10%.

II. STATEMENT OF THE PROCEEDINGS

After filing this action on March 28, 2017, DE1, Class Counsel about eight months later filed a Notice of Settlement on November 2, 2017. DE33.

Class Counsel, as experienced TCPA litigators, must have known by late 2017 that Federal Rule of Civil Procedure 23(h) and fundamental due process require motions for attorney's fees and their supporting documentation to be filed ***before,*** and not after, the deadline for class members to object.[2] Yet their November 29, 2017, motion for preliminary approval of a class-action settlement was accompanied by a Proposed Order making class members' objections due before the date for filing their own motion for attorney's fees.[3] This Court erred by adopting Class

[2] *See In re Mercury Interactive Corp. Sec. Litig.,* 618 F.3d 988, 993-95 (9th Cir.2010); *Redman v. RadioShack Corp.,* 768 F.3d 622, 637-38 (7th Cir.2014); *Allen v. Bedolla,* 787 F.3d 1218, 1225-26 (9th Cir.2015); *In re National Football League Players Concussion Injury Litig.,* 821 F.3d 410, 446 (3d Cir.2016)("We have little trouble agreeing that Rule 23(h) is violated in those circumstances.")(dictum); *Keil v. Lopez,* 862 F.3d 685, 704-05 (8th Cir. July 5, 2017); *Lawler v. Johnson,* 253 So. 3d 939, 948-52 (Ala. Oct. 20, 2017)(noting that "[a]t least four United States Courts of Appeals have indicated that such a schedule is problematic" under Rule 23(h), and holding that it also violates constitutionally protected due process).

[3] *Compare* DE37-1:4 (Proposed Order: "Any class member who intends to object to the fairness of this settlement must file a written objection with the Court within 60 days after the Notice

Counsel's unlawful proposal, thereby making class members' objections due before Class Counsel would file their motion for attorney's fees.[4]

Class Counsel, as experienced Eleventh Circuit litigators, also knew very well that controlling precedent required applicants for common-fund attorney's fees to disclose their "hours claimed or spent on [the] case" as "a necessary ingredient to be considered" in awarding attorney's fees under the twelve-factor "*Johnson* factors" approach of *Johnson v. Georgia Highway Express,* 488 F.2d 714, 717 (5th Cir.1974), that the Eleventh Circuit has since its 1991 decision in *Camden I Condominium Ass'n v. Dunkle,* 946 F.2d 768 (11th Cir.1991), required district courts to apply when evaluating and awarding common-fund attorney's fees as a percentage of the fund.[5] Yet Class Counsel's fee motion, filed after the deadline for class members' objections, provided no data concerning their hours on the case. *See* DE44 & DE44-1.

Deadline (105 days after the Court's entry of this order), i.e., no later than _____, 2018.") *with* DE37:8 (Proposed Order: "Submissions by the Parties, including memoranda in support of the proposed settlement, responses to any objections, petitions for attorneys' fees and reimbursement of costs and expenses by Class Counsel, shall be filed with the Court no later than 30 days prior to the Final Approval Hearing, i.e., no later than _____.").

[4] *Compare* DE38:4 (Preliminary Approval Order: "Any class member who intends to object to the fairness of this settlement must file a written objection with the Court within 60 days after the Notice Deadline (105 days after the Court's entry of this order), i.e., **no later than March 19, 2018**.") *with* DE38:8 (Preliminary Approval Order: "Submissions by the Parties, including memoranda in support of the proposed settlement, responses to any objections, petitions for attorneys' fees and reimbursement of costs and expenses by Class Counsel, shall be filed with the Court no later than 30 days prior to the Final Approval Hearing, i.e., no later than **April 6, 2018**.")(bold text in original).

[5] *See Camden I,* 946 F.2d at 772, 775 (noting that "the first criterion of the *Johnson* test, and indeed the one most heavily weighted, is the time and labor required" and holding that "the *Johnson* factors continue to be appropriately used in evaluating, setting, and reviewing percentage fee awards in common fund cases); *see also, e.g., Dikeman v. Progressive Exp. Ins. Co.,* 312 Fed.App'x 168, 172 (11th Cir.2008)("Whether the district court uses the lodestar or the common-fund method, the district court should apply the twelve factors listed in *Johnson v. Georgia Highway Express,* ... to determine the appropriate statutory fee or the percentage to be utilized."); *Walco Invs., Inc. v. Thenen,* 975 F. Supp. 1468, 1471-72 (S.D.Fla.1997).

Class member Jenna Dickenson objected to the whole process, citing Rule 23(h)'s requirement that Class Counsel file their attorney's fee motion before the deadline for objections to that motion, contending Class Counsel's time should be considered in connection with any award of attorney's fees, and objecting that the proposed incentive award for the representative plaintiff was barred by Supreme Court precedent. *See* DE42 (Dickenson Objection).

Despite Dickenson's timely Objection, Class Counsel continued to withhold information concerning both the time they had devoted to the case, and the hourly rates that they ordinarily charge—even when they filed their April 6, 2018, motion for final approval (DE43), motion for attorneys' fees (DE44) and, response to Ms. Dickenson's timely objection (DE45). Class Counsel refused to specify their hours worked, or even their billing rates. Although Dickenson had objected that any fee award should take account of Class Counsel's hours and their lodestar, DE42:11, Class Counsel refused to reveal the "hours claimed or spent on [the] case," which *Johnson v. Georgia Highway Express* itself holds "are a necessary ingredient to be considered." *Johnson v. Georgia Highway Express,* 488 F.2d at 717.

This Court observed at the May 7, 2018, final-approval hearing's outset that Dickenson "argues that the Court should consider Lodestar in determining a reasonable fee." DE58:5(lines6-7). But Class Counsel continued to elide, stating: "Time and labor involved, this case has been pending for a little over a year now. We have gone through a lot of discovery, expert reports, motion practice, getting cued up for the class certification motion," that Class Counsel never had to write or file because the case had settled. DE58:10(lines4-7). The record, of course, demonstrated that there had been no significant motions practice and little, if any, discovery. Dickenson's counsel objected to Class Counsel's continuing concealment of their time, observing that Class Counsel had frustrated class members' ability to evaluate their 30% fee request award. DE58:21.

Having determined that it would nonetheless approve the settlement and fee request, this Court asked Class Counsel about the form of order it should enter. Class Counsel urged this Court,

rather than conducting its own analysis, to enter the conclusory order in the form that the Settling Parties had prepared for it:

> *THE COURT:* ... Is the proposed final order and judgment a proposed final order and judgment put together by Defense?
>
> *MR. GREENWALD:* Yes.
>
> *THE COURT:* That is what you envision that the Court would enter?
>
> *MR. GREENWALD:* Yes.

DE58:15.

As experienced class-action lawyers practicing in the Eleventh Circuit, Class Counsel should have known that under controlling precedent such an order could not be sustained: "A 'mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law' will not suffice."[6] Yet they prepared a wholly conclusory Proposed Order, and urged this Court to file it without revision. This Court did so, signing the Order prepared by the Settling Parties, exactly as they requested, foregoing the analysis and explanation needed for meaningful appellate review of its findings approving the proposed settlement as fair, reasonable, and adequate, or of its attorney's fee award of 30% of the common fund. *Compare* DE53 (Final Order, signed May 7, 2018, and entered May 8, 2018) with DE43-2 (Proposed Order).

Dickenson appealed, DE54, and the Eleventh Circuit reversed. *See Johnson v. NPAS Solutions,* 975 F.3d 1244 (11th Cir.2020). It held that "Supreme Court precedent prohibits

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[6] *Piambino v. Bailey,* 757 F.2d 1112, 1139 (11th Cir.1985)(quoting *Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir.1977)(quoting *Protective Committee v. Anderson,* 390 U.S. 414, 434 (1968)); *see, e.g., In re Corrugated Container Antitrust Litig.,* 643 F.2d 195, 212 (5th Cir. April 3, 1981)(Tjoflat, Cir.J.); *see also Heffner v. Blue Cross & Blue Shield of Alabama, Inc*., 443 F.3d 1330, 1345–46 (11th Cir.2006). Had Class Counsel somehow missed Eleventh Circuit law on this point, Dickenson's Objection drew their attention to it:

> The Court must "undertake an analysis of the facts and the law relevant to the proposed compromise" and "support [its] conclusions by memorandum opinion or otherwise in the record." *Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir. 1977).

DE42:2 (Objection).

incentive awards," *id.* at 1255, that a schedule allowing Class Counsel to file their attorney's fee motion after the deadline for objections violated Rule 23(h), *id.* at 1251-53, and that this Court should provide an explanation for its rulings. *Id.* at 1261-64.

Its opinion made clear that ***the purpose*** of Rule 23(h)'s requirement is that class members are entitled to see Class Counsel's documentation of their time ***before***, rather than after, deciding whether to object—essentially precluding the years-after-the-fact submission that Class Counsel are now attempting in support of their attorney's fee application. The Eleventh Circuit explained:

> Reading Rule 23(h) in accordance with its plain text also happens to make good practical sense in at least two respects. First, it ensures that class members have full information when considering—and, should they choose to do so, objecting to—a fee request. While class members may learn from a class notice the all-in amount that counsel plan to request, they would be "handicapped in objecting" based on the notice alone because only the later-filed fee motion will include "the details of class counsel's hours and expenses" and "the rationale ... offered for the fee request." *Redman v. RadioShack Corp.,* 768 F.3d 622, 638 (7th Cir.2014); *see also Mercury,* 618 F.3d at 994 ("Allowing class members an opportunity thoroughly to examine counsel's fee motion, inquire into the bases for various charges and ensure that they are adequately documented and supported is essential for the protection of the rights of class members."); *Keil v. Lopez,* 862 F.3d 685, 705 (8th Cir.2017) (raising similar concerns).
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> Second, a plain-language reading of Rule 23(h) ensures that the district court is presented with a fee petition that has been tested by the adversarial process. While, in theory, class counsel act as fiduciaries for the class as a whole, once a class action reaches the fee-setting stage, "plaintiffs' counsel's understandable interest in getting paid the most for its work representing the class" comes into conflict "with the class' interest in securing the largest possible recovery for its members." *Mercury,* 618 F.3d at 994. Accordingly, "the district court must assume the role of fiduciary for the class plaintiffs" and "ensure that the class is afforded the opportunity to represent its own best interests." *Id.* (quotation omitted). The district court cannot properly play its fiduciary role unless—as in litigation generally—class counsel's fee petition has been fully and fairly vetted.
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> For all these reasons, we have no difficulty concluding that by requiring class members to object to an award of attorneys' fees before class counsel had filed their fee petition, the district court violated Rule 23(h).[7]

[7] *Johnson v. NPAS Sols., LLC,* 975 F.3d 1244, 1252-53 (11th Cir.2020); *accord, e.g., Drazen v. Pinto,* 106 F.4th 1302, 1338-39 (11th Cir.2024)(Tjoflat, Cir.J.); *Chieftain Royalty Co. v. SM Energy Co.,* 100 F.4th 1147, 1158 n.15 (10th Cir.2024).

This rationale forecloses any possibility that the Eleventh Circuit thought Class Counsel should be able to file additional evidentiary materials supporting their fee petition on remand, years after the deadline ran on class members' right to file objections. "Because Dickenson makes essentially the same arguments before us that she did when filing her written pre-petition objection," the Court of Appeals observed, "we cannot conclude that the district court's procedural error was harmful—*i.e.,* that it 'affected the outcome of the proceeding.'" *Johnson v. NPAS Solutions,* 975 F.2d at 1255 (quoting *Keil,* 862 F.3d at 705).

The panel then "remand[ed] the case so that the district court can adequately explain its fee award to class counsel, its denial of Dickenson's objections, and its approval of the settlement." *Id.* at 1264. Its mandate clearly did not authorize the submission and consideration of additional evidence, to be filed years after the deadline for objections had run, that is designed to "'affect[] the outcome of the proceeding.'" *Id.* at 1255 (quoting *Keil,* 862 F.3d at 705).

Although the Eleventh Circuit issued its opinion on September 17, 2020, *id.* at 1244, its mandate was delayed for two years by Class Counsel's unsuccessful petition for en banc rehearing, which was designed not to benefit the class, but only to resurrect the representative plaintiff's $6,000 incentive award. Concurring in the Eleventh Circuit's August 8, 2022, denial of en banc rehearing Judge Newsom observed: "The panel issued its decision in September 2020—almost two full years ago now." *Johnson v. NPAS Solutions,* 43 F.4th 1138, 1139 (11th Cir. Aug.8, 2022)(Newsom, Cir.J., concurring). Although the Eleventh Circuit's mandate, transferring jurisdiction back to this Court, issued on October 25, 2022, DE61, Class Counsel on December 14, 2022, filed a motion to stay proceedings in this Court pending resolution of petitions for certiorari focusing exclusively on the legality of incentive awards (Johnson's petition) and the law governing attorney's fees (Dickenson's petition). DE69. The certiorari petitions were denied on April 17, 2023, DE73, DE74, nearly five years after Class Counsel submitted their fatally deficient Proposed Order. All that delay was attributable first to Class Counsel's own litigation errors, lack of candor concerning their time, and their strategic judgments in first seeking en banc rehearing

on the legality of incentive awards and then asking for a stay while they sought review on that issue in the Supreme Court.

In a hearing on remand, Class Counsel conceded that they were not entitled, under the Eleventh Circuit's mandate, to submit any additional evidence supporting their attorney's fee award. This Court recognized that the Eleventh Circuit's mandate did not invite the submission of any additional evidence:

> As the Court reads the Eleventh Circuit's remand, it is narrow insofar as it requires the Court to explain the award of attorneys' fees, denial of Ms. Dickenson's objections, and the approval of the settlement.

DE81:5(lines7-10) (the Court).

Class Counsel agreed that an additional evidentiary submission was untenable in light of the Eleventh Circuit's mandate:

> We do not think that the record should or needs to be reopened. I agree with your Honor's summary, I think the remand is narrow for the Court to explain why it issued the rulings that it did at the final fairness hearing. So, we have no intention and will not be submitting anything supplemental.

DE81:9(lines18-22) (Greenwald).

> MR. GREENWALD: ... Again, your Honor, I think the remand is—the instruction is for the Court to explain the reasons why the Court reached the decisions that it did, going back five years, but at the time that it was. And so, in my view, that instruction is narrow and just asks for an explanation of what the Court already decided, not looking at supplemental things.

DE81:10(lines15-21) (Greenwald).

Class Counsel conceded, moreover, that allowing for the admission of additional evidence could be deemed a harmful error:

> What I am very concerned about is the part of the Eleventh Circuit's opinion where the Court said "petitions for attorneys' fees need to be filed prior to the objection deadline." Now, the Court found that the error here was harmless. What I don't want to have happen is have an error become harmful.

DE81:13(lines12-17) (Greenwald).

> Ultimately, our position is that the remand order is narrow and simply asks for the Court to explain the reasons for the decisions that it already made, and we do not think any supplemental briefing is necessary or appropriate.

DE81:14(lines 5-8).

> MR. GREENWALD: ... My concern is simply that the Eleventh Circuit, looking at this later and saying you are now briefing, whether it is the objector or us, or you're submitting items to the Court that class members did not have an opportunity to review before the objection deadline, that is problematic and that is what I want to avoid.

DE81:20(11-17).

This Court issued a June 14, 2023, Order sustaining the original 30% attorney's fee award by observing that the Eleventh Circuit had remanded "for the Court to explain its fee award to class counsel, its approval of the settlement, and its denial of Ms. Dickenson's objections." DE77:1. "Now, on remand," it said, "the Court reviews the record to further explain the findings of fact and conclusions of law it made at the time of the [May 7, 2018, final-approval] hearing in support of its decision to grant class counsel's motion for attorneys' fees and costs." DE77:2. And it granted Class Counsel's attorney's fee motion despite their refusal to disclose their time on the case. DE77.

Dickenson again appealed, DE78, and again won her appeal.

This time, the Eleventh Circuit held that Class Counsel's failure to disclose their time was fatal to their fee award.

> Here, all that class counsel and the district court pointed to in support of their assessment of the time-and-labor factor was a short procedural history in one of class counsel's declarations that outlines 10 different aspects of this case that they worked on. Absent from this procedural history—and the statements submitted by various class counsel attorneys—is any indication of how much time, effort, and resources went into their work. While the attorneys attested to previous class-action cases that they'd worked on none of them so much as estimated the time that they spent on this case, indicated if this was the only case that they worked on during its pendency, or proffered any information that would permit reasonable inferences about how much work they had done on the case. Put simply, there isn't enough in this record to permit a meaningful application of the time-and-labor factor. And because that factor is a "necessary ingredient" to a court's consideration of an attorneys'-fee request, failure to properly consider that factor results in an abuse of discretion.

> * * *
>
> Because we hold that the district court abused its discretion by incorrectly applying *Camden I*'s time-and-labor factor, we vacate the part of its order granting the requested attorneys' fees, and we remand for further proceedings consistent with this opinion.

Dickenson v. NPAS Solutions, No.23-12353, 2024 WL 4142934, at *2 (11th Cir. Sept. 11, 2024).

As the Eleventh Circuit's mandate neither directs nor authorizes this Court to allow Class Counsel to augment the record with additional evidentiary material in violation of Rule 23(h) more than half a decade after the deadline for objections, and as allowing them to do so would violate the mandate of the prior appeal, which remains binding, Dickenson respectfully submits that the only proceeding consistent with the Eleventh Circuit's decisions in this case is an order denying Class Counsel leave to file supplemental evidence supporting their fee award, and then to deny their application for attorney's fees.

Dickenson further submits that if the Court were to permit Class Counsel's submission of evidence concerning their time in this case, it would be required to provide new notice to the class—with a full opportunity for class members to object.

III. ARGUMENT

A. Class Counsel Should Not Be Permitted to Violate Rule 23(h) and the Eleventh Circuit's Mandate with Impunity

In the initial appeal, the Eleventh Circuit held that "[w]hile class members may learn from a class notice the all-in amount that counsel plan to request, they would be 'handicapped in objecting' based on the notice alone because only the later-filed fee motion will include 'the details of class counsel's hours and expenses,'" if they were submitted by Class Counsel after the deadline for objections. *Johnson v. NPAS Solutions,* 975 F.3d at 1252 (quoting *Redman,* 768 F.3d at 638). "Allowing class members an opportunity thoroughly to examine counsel's fee motion, inquire into the bases for various charges and ensure that they are adequately documented and supported," the Eleventh Circuit held, "is essential for the protection of the rights of class members." *Id.* (quoting *Mercury Interactive,* 618 F.3d at 994). But as Class Counsel had submitted no supporting

documentation with their attorney's fee motion showing their time on the case, the violation of Rule 23(h) was deemed harmless error: "Because Dickenson makes essentially the same arguments before us that she did when filing her written pre-petition objection, we cannot conclude that the district court's procedural error was harmful—i.e., that it 'affected the outcome of the proceeding.'" *Johnson v. NPAS Solutions,* 975 F.3d at 1255 (quoting *Keil,* 862 F.3d at 705).

Permitting Class Counsel to submit time records now, more than half a decade after their initial fee application, would inflict the very harm that the Eleventh Circuit held that Rule 23(h) is designed to prevent. The Eleventh Circuit's mandate from its 2020 opinion clearly precludes Class Counsel from making a supplemental submission, years later, that is designed to "'affect[] the outcome of the proceeding.'" *Johnson v. NPAS Solutions,* 975 F.3d at 1255 (quoting *Keil,* 862 F.3d at 705). Nothing in the Eleventh Circuit's mandate from its 2024 opinion requires or authorizes this Court to accept such a submission. Its holding that this Court cannot award attorney's fees without considering Class Counsel's actual time on the case, and its "remand for further proceedings consistent with this opinion," *Dickenson v. NPAS Sols.,* LLC, No. 23-12353, 2024 WL 4142934, at *2 (11th Cir. Sept. 11, 2024), is best honored by an order denying Class Counsel's motion for attorney's fees.

Were the Court to permit Class Counsel to submit additional material evidence, critical to their attorney's fees motion, years after the fact, Rule 23(h) would of course require notice to the class and an opportunity to object. The Tenth Circuit recently held that allowing Class Counsel to make a renewed fee application on remand from an earlier appeal requires new notice to the class if Class Counsel are permitted to supplement their time records. *See Chieftain Royalty Co. v. SM Energy Co.,* 100 F.4th 1147, 1157-58 (10th Cir. 2024). In *Chieftain,* "'class counsel did not present evidence [with its initial motion for attorneys' fees] that permitted the use of a lodestar method," when they requested 40% of a common-fund settlement as attorney's fees. *Id.* at 1157. On remand, they put in time records to support a reduced request for one third of the fund. *See id.* Thus, "in support of their 2018 motion for attorneys' fees on remand, 'class counsel ... compiled an extensive evidentiary record ... that includes time records for each attorney, paralegal, and legal assistant

whose work is included in a lodestar computation, and declarations from the individual attorneys.'" *Id.* at 1157. "Under these circumstances," the Tenth Circuit held, "we cannot say the 2015 Class Notice provided the class with notice of the 2018 motion for attorneys' fees, even if Class Counsel titled the 2018 motion as merely a 'renewed" motion for attorneys' fees.'" *Id.* at 1157-58 (10th Cir.2024).

> Class Counsel here say they will provide the required notice to the Class
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> by posting this submission and supporting declaration, including counsel's billing records, to the dedicated settlement website, www.JohnsonNPASsolutionssettlement.com. See ECF No. 43-1 at 13, 15 (class notices directing class members to the settlement website for additional information). Class members will then have an opportunity to review counsel's submissions and can respond should they choose to do so.

DE98:8.

But that is plainly insufficient. Rule 23(h) and fundamental due process require class members be given meaningful notice and an opportunity to object. The proposed notice is ineffective: Why in the world would class members be monitoring the settlement web site now, nearly seven years after the March 19, 2024, deadline for filing objections to their original April 6, 2018, fee motion? And how would any who did monitor the settlement web site know that they are entitled to object to Class Counsel's new fee request?

If Class Counsel are permitted to submit new time records on remand, they must—at their own expense—provide new notice in compliance with Rule 23(h), and class members with an interest in the common-fund against which the fees are to be assessed must be given an opportunity to object. Class Counsel has said that "re-noticing, you know, over a hundred thousand people at a considerable cost to the class" would be "very unfair." DE81:13(lines23-25). But because the notice relates only to Class Counsel's fee application, notice likely can be restricted to the 9,543 Class Members who submitted claims, since they are the only ones, at this point, who have an interest in the common fund against which the fees will be assessed. Either way, Class Members should not be taxed for the expense of the notice—Class Counsel, whose misconduct created the problem, should be responsible for the expense of class notice.

B. Even if Supplemental Evidence of Class Counsel's Time Were Accepted, They are Not Entitled to Be Compensated for Time Worked After Their Initial Fee Application

Having previously acknowledged that the Eleventh Circuit remanded for this Court to explain its fee order as entered in 2018, on the then existing record, Class Counsel now ask the Court to base its attorney's fee determination on all the time they spent on the case thereafter. That is improper.

Class Counsel say that they are submitting "their lodestar and detailed time records reflecting the work they committed to this case over the past nearly eight years," and that "***through November 22, 2024,*** and after deducting 59.5 hours in an exercise of billing discretion, class counsel Greenwald Davidson Radbil PLLC ('GDR') devoted 918.4 hours" to the matter. DE98:2 (emphasis added). "In total, therefore, and ***through November 22, 2024***," Class Counsel claim, "GDR has accrued a combined lodestar of $498,855.00 after deducting 59.5 hours in an exercise of billing discretion." DE98:6. Rather little of this was incurred by the time of their initial fee application, however, and the vast majority of their claimed time is clearly non-compensable.

As Class Counsel have repeatedly acknowledged, their fee application is to be evaluated in light of work they had done by the time of their initial application, submitted on April 6, 2018. The Eleventh Circuit's mandates require an explanation of this Court's May 2018 fee determination—not a new determination based on Class Counsel's work over the next seven years.

Class Counsel are not, in any event, entitled to compensation for time devoted to their meritless defense against appeals necessitated to correct their own errors. For one thing, that work plainly conferred no benefit on the Class—it has merely delayed resolution of these proceedings. Class Counsel lost not one, but two appeals. They suggest they devoted years to "successfully defending against Ms. Dickenson's objections to the settlement amount on appeal." DE98:2. But that is nonsense. Dickenson did not challenge the amount of the settlement, as such. Rather, as the Eleventh Circuit observed, she argued, and the Eleventh Circuit agreed,

> that the district court didn't sufficiently explain itself to enable meaningful appellate review. In particular, she contends that the district court failed to adequately explain (1) its award of attorneys' fees, (2) its denial of her objections, and (3) its approval of the settlement. As we will explain, we agree.

Johnson v. NPAS Solutions, 975 F.2d at 1261.

The error was caused by Class Counsel's submission of a conclusory Proposed Order, jointly prepared by the parties, that they successfully urged this Court to enter without revision. *See* discussion, *supra*, at 5-6. Class Counsel lost the issue on appeal. In Dickenson's first appeal, moreover, Class Counsel prevailed on only two points: that their violation of Rule 23(h) was harmless error because they submitted nothing material after the deadline for objections, and that common-fund attorney's fee awards in the Eleventh Circuit are to be awarded as a percentage of the common fund, based on the *Johnson* factors, under *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir.1991). *See Johnson v. NPAS Solutions,* 975 F.3d at 1253-54 (harmless error); *id.* at 1262 n.14 (*Camden I*). Far from benefitting the Class in any way, those were holdings that benefited Class Counsel.

The Class cannot be made to pay for Class Counsel's work that was designed to benefit themselves in trying to grab a large attorney's fee award, or in defending the representative plaintiff's claim to an incentive award. Only work that benefits the Class, as opposed to Class Counsel and the Named Plaintiff, may be paid from the common fund.[8] The Second Circuit has

[8] "There being no benefit to the fund from services performed by appellees in connection with their fee application, there should be no attorneys' fee award from the fund for those services." *Lindy Bros. Builders, Inc. v. American Radiator,* 540 F.2d 102, 111 (3d Cir.1976)(en banc). "Where the fees will be drawn from a common fund," the Second Circuit holds "that counsel is not entitled to fees for seeking fees, on the theory that 'the fund, created for the benefit of a group or class, which already has been diminished by an award of fees, should not be further diminished by an additional award for work performed in fee applications.'" *Savoie v Merchants Bank*, 166 F.3d 456, 461 (2d Cir.1999)(quoting *Mautner v. Hirsch*, 32 F.3d 37, 39 (2d Cir.1994)). "In short, in the action-in-chief, the attorney is working for the class and therefore should be compensated by it, whereas in the fee application portion, the attorney is working solely for himself and his work conveys no benefit to the fund." *Mautner*, 32 F.3d at 39; *accord, e.g., United States v. 110-118 Riverside Tenants Corp.,* 5 F.3d 645, 646-47 (2d Cir.1993); *City of Detroit v. Grinnell Corp.,* 560 F.2d 1093, 1102 (2d Cir.1977); *In re WPPSS Sec. Litig.,* 19 F.3d 1291, 1299 (9th Cir.1994)(following *Grinnell*); *Van Gemert v. Boeing Co.,* 516 F. Supp. 412, 415 (S.D.N.Y.1981).

warned that "if counsel is allowed compensation for efforts to obtain his fee, any class member objecting to an initial award would risk increasing the total attorneys' fee—and thereby decreasing the class's fund—even though successful in pressing the objection." *City of Detroit v. Grinnell Corp.,* 560 F.2d 1093, 1102 (2d Cir.1977). The Class should not be penalized because a Class Member made meritorious objections and won two appeals.

That the appeals were caused by Class Counsel's own errors is another reason they are entitled to no compensation for their work opposing them. Generally speaking, a lawyer "is not entitled to fees that were unreasonably caused by his own legal error."[9] The Class should not be required to pay Class Counsel for the many serious mistakes that the lawyers made, or for trying to defend their mistakes and lack of candor on appeal. To compensate such work in this case would be to reward Class Counsel—and to punish the Class—because Dickenson pursued meritorious objections to vindicate class members' rights.

C. Even if Supplemental Evidence of Class Counsel's Time Were Accepted, the *Johnson* Factors Do Not Support a 30% Fee Award in this Case

Even assuming the Court accepts Class Counsel's supplemental evidence and directs notice to the class, the requested 30% award is wholly untenable under the *Johnson* factors.

With respect to the first *Johnson* factor, the "(1) the time and labor required," the great majority of Class Counsel's time was billed ***after*** the April 6, 2018 fee motion, in connection with defending appeals caused by their errors, and trying to sustain an incentive award and attorney's

[9] *Blackorby v. BNSF Ry. Co.,* 60 F.4th 415, 421-22 (8th Cir.2023); *accord, e.g., Shott v. Rush-Presbyterian- St. Luke's Med. Ctr.,* 338 F.3d 736, 742 (7th Cir.2003)("We simply do not think it appropriate to award a litigant attorney's fees for a trial that was voided by her unreasonable strategy."); *Rodriquez v. Bowen,* 865 F.2d 739, 747 (6th Cir.1989)("Nor should a court reward incompetence by allowing an award which has become inflated through any procedural missteps. If a lawyer has taken an improper route or turn, he should not benefit from time spent finding his way.").

fees that do not benefit the Class. As of April 6, 2018, it appears that Class Counsel's billing was as follows:

Aaron Radbil	14.9 hours @$550 =	$8,195
Alexander Kruzyk	20.9 hours @$450 =	$9,405
James Davidson	14.9 hours @$550 =	$8,195
Jesse Johnson	10.1 hours @$500 =	$5,050
Michael Greenwald	191.9 hours @$550 =	$105,545
Total	252.7 hours	$136,390

See DE98-1 Ex.1.

Thus, it is apparent an award of 10% of the $1.4 million fund would amply cover Class Counsel's lodestar for the period ending April 6, 2018, providing an award presumptively sufficient to attract and compensate capable counsel under *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551-52 (2010). Of course, *Perdue* is a statutory fee-shifting case, that the Eleventh Circuit has held does not directly limit the award in a common-fund case. Nonetheless, the Supreme Court's conclusion that an unenhanced lodestar sufficiently compensates prevailing class-action counsel is at least relevant. If "the district court must assume the role of fiduciary for the class" in connection with common-fund attorney's fee awards, *see Johnson v. NPAS Solutions,* 975 F.3d at 1253, and such awards are to be "made with moderation and a jealous regard to the rights of those who are interested in the fund," *Trustees v. Greenough*, 105 U.S. 527, 536-37 (1882), it is hard to fathom how a court could reasonably select a percentage that greatly exceeds the amount sufficient to attract and fairly compensate capable counsel. It appears, moreover, that the Supreme Court has never approved a common-fund fee award exceeding ten percent of the fund.[10] The first *Johnson* factor thus favors a fee award that does not exceed 10% of the common fund.

[10] *See, e.g., Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116, 128 (1885) (slashing common-fund fee award from an unreasonably high 10% of the fund to just 5%); *Harrison v. Perea,* 169 U.S. 311, 317-18, 325-26 (1897) (affirming award of a fee amounting to 10% of the

With respect to the second *Johnson* factor, the "novelty and difficulty of the questions involved," 488 F.2d at 718, Class Counsel never briefed any novel or difficult issues in this case. Class Counsel grappled with no difficult or novel issues in their two-page response to NPAS's motion to dismiss. DE16. They filed no discovery motions, and their motion for class certification and preliminary approval of a settlement was unopposed.

As for the third *Johnson* factor, "the skill requisite to perform the legal service properly," *Johnson,* 488 F.2d at 718, Class Counsel's lack of candor and their many errors violated Class Members' rights and produced two appeals, both of which Class Counsel emphatically lost. Their patent lack of candor and even moderate skill has caused many years of delay. And while Class Counsel have "reported that they had served as class counsel in at least twelve TCPA class action cases," DE77:4, they do not claim to have litigated even one of them through trial. A cookie-cutter litigation mill does not, as a matter of course, deserve a 30% fee.

On the fourth *Johnson* factor, the "preclusion of other employment," the record in this case of rapid settlement and no seriously litigated motions contradicts any notion that work on this case, from filing through settlement, precluded Class Counsel from working on other matters. And they are entitled to no compensation for the hours devoted to defending appeals caused by their own errors and lack of candor, or for time devoted to procuring attorney's fees for themselves or an incentive award for the representative plaintiff. The fourth *Johnson* factor weighs strongly against a 30% fee.

On *Johnson* factors (5) "the customary fee," and (12) "awards in similar cases," it is again worth noting that the Supreme Court has never approved a common-fund fee award exceeding 10% of the fund. *See supra* at 17 n.11. Fee awards in such cases are to be "made with moderation

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fund); *United States v. Equitable Trust Co.,* 283 U.S. 738, 746 (1931) (holding "the allowance [for attorneys' fees] of $100,000 unreasonably high and that to bring it within the standard of reasonableness it should be reduced to $50,000," which was roughly $7\frac{1}{2}$% of the fund in question).

and a jealous regard to the rights of those who are interested in the fund." *Greenough,* 105 U.S. at 536-37. Any fee award in this case should not exceed 10% of the fund.

As to *Johnson* factor "(6) Whether the fee is fixed or contingent," *Johnson,* 488 F.2d at 718, Class Counsel avoided substantial contingency risk by settling quickly. And the risk that the claims might be legally meritless hardly warrants a generous fee. Courts should be loath to encourage meritless litigation.

With respect to *Johnson* factor (8) "the amount involved and results achieved," *Johnson,* 488 F.2d at 718, the Eleventh Circuit observed that after deducting the requested attorney's fees and expenses, "each of the potential 179,642 class members stood to receive only $7.97. (Happily, because only 9,543 class members submitted claims, each stands to receive a whopping $79.)" *Johnson v. NPAS,* 975 F.3d at 1251. This is extremely little considering that the claims were for from $500 to $1,500 per call. It looks good only in light of Class Counsel's subsequent concession that the claims are worthless under the TCPA's statutory language as construed by the Supreme Court in *Facebook, Inc. v. Duguid,* 592 U.S. 395 (2021). Yet the claims' lack of legal merit hardly seems like a good reason for a generous attorney's fee award. Courts should not encourage meritless litigation.

Johnson factor (9) the "experience, reputation, and ability of the attorneys," *Johnson,* 488 F.2d at 718-719, also weighs in favor of denying or reducing the requested fee. Class Counsel have never actually tried a TCPA case. Moreover, Counsel have committed numerous errors in this case, producing two appeals so far, to the detriment of the Class. And they acted unethically in this case, breaching their fiduciary duty to the Class by submitting a scheme of notice that they must have known violated Rule 23(h), and by refusing for years to reveal their time devoted to the case.

With respect to *Johnson* factor (11) "the nature and length of the professional relationship with the client," *Johnson,* 488 F.2d at 719, it may be worth noting that Class Counsel were for many months unaware that Charles Johnson had died, and that they even petitioned for certiorari on behalf of a dead client.

The *Johnson* factors clearly do not justify a 30% fee award in this case. Applying the *Johnson* factors as required by *Camden I* and the Eleventh Circuit's mandate in this case, *see Johnson v. NPAS Solutions,* 975 F.2d at 1262 n.14, a ten percent fee award would be far more appropriate.

IV. RESERVATION OF RIGHT TO CHALLENGE ELEVENTH CIRCUIT LAW IN APPROPRIATE PROCEEDINGS

This Court is of course bound by the Eleventh Circuit's mandate rejecting Dickenson's argument, in her first appeal, that "the Supreme Court's decision in *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010), overruled *Camden I Condominium Ass'n v. Dunkle,* 946 F.2d 768 (11th Cir.1991)," *NPAS Solutions,* 975 F.2d at 1262 n.14. The Eleventh Circuit held that "*Camden I* therefore remains good law." *Id.* In order to preserve her ability to challenged otherwise controlling Eleventh Circuit precedent, whether by means of a petition for en banc review or for certiorari, Dickinson states for the record her position that *Perdue* repudiated the *Johnson* factors as too subjective to permit meaningful appellate review of fee determinations, and that the Eleventh Circuit's requirement that common-fund attorney's fees be awarded as a percentage of the fund conflicts with Supreme precedents, including (without limitation) both *Trustees v. Greenough,* 105 U.S. 527, 536-37 (1882), and *Boeing Co. v. Van Gemert,* 444 U.S. 472, 472 (1980). *Cf. Grizzell v. San Elijo Elementary School,* 110 F.4th 1177, 1181 (9th Cir.2024)(on point governed by the Circuit Court's own existing precedent, "Grizzell ... acknowledges that the only path to relief ... is en banc review"); *United States v. Boukamp,* 105 F.4th 717, 749 (5th Cir.2024)("Boukamp raises two arguments to preserve them for possible future appellate review, as he concedes that both are foreclosed by binding precedent.").

V. CONCLUSION

The Court should reject Class Counsel's submission of additional evidence concerning their time. If the evidence is accepted, the Court should direct notice to the class, affording class members an opportunity to object. In no event should the Court enter an award of attorney's fees exceeding ten percent of the common fund in this case.

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Respectfully submitted,

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