COSAL
COMMITTEE TO SUPPORT THE ANTITRUST LAWS

February 13, 2026

Submitted Electronically

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE Washington, DC 20544
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Re: Comments Regarding Whether to Amend the Federal Rules to Expressly Permit "Incentive" or "Service" Awards by the Committee to Support the Antitrust Laws

Dear Committee on Rules of Practice and Procedure:

The Committee to Support the Antitrust Laws (COSAL) submits these comments to express its support for an amendment to Rule 23 of the Federal Rules of Civil Procedure unequivocally stating that reasonable "incentive" or "service" awards to class representatives are permitted under the Federal Rules. Such an amendment would resolve any uncertainty created by the Eleventh Circuit's decision in *Johnson v. NPAS Solutions, LLC*, which remains the only circuit court ruling to impose a per se bar on such awards.

COSAL is a nonprofit organization that was established in 1986 to promote and support the enactment, preservation, and enforcement of a strong body of antitrust laws in the United States. COSAL's members are law firms throughout the country that represent individuals and businesses that have been harmed by violations of the antitrust laws. COSAL closely monitors and comments on congressional and administrative activity with respect to antitrust policy and plays a leadership role in building support for the antitrust laws. Accordingly, COSAL has an interest in ensuring that class representatives in antitrust actions are adequately compensated for the time and effort they devote in representing a class, along with the reputational or financial risks they undertake in doing so—thereby incentivizing others to serve as class representatives in future cases and furthering private antitrust enforcement.

The provision of "incentive" or "service" awards to class representatives has long been a routine, uncontroversial feature of class action settlements.[1] "An incentive award is paid out of the

[1] *See* 5 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 17.2 (6th ed. 2025) (describing these awards as "ha[ving] been present in class action law for close to a half century); Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1310–11 (2006)

class's common fund and the class representative, as a member of the class, is, by definition, entitled to a portion of the common fund. So framed, the legal entitlement question is simple and straightforward."[2] Indeed, until recently, *all* the courts of appeals to address these awards had deemed them lawful in at least some circumstances.[3]

The Eleventh Circuit's decision in *Johnson v. NPAS Solutions, LLC*[4] marked a sharp departure from established practice. In that case, the district court had approved an approximately $1.4 million settlement—yielding about $79 per class member—which included a $6,000 award to the named plaintiff.[5] On appeal, a divided panel of the Eleventh Circuit held that these awards were categorically prohibited under two nineteenth-century Supreme Court precedents, uncritically dismissing such awards as "part salary and part bounty."[6]

As the Second Circuit has recently explained, the Supreme Court cases upon which the Eleventh Circuit relied are of little relevance because they "have been superseded, not merely by practice and usage, but by Rule 23, which creates a much broader and more muscular class action device than the common law predecessor that spawned" these precedents.[7] Moreover, the *Johnson* majority disregarded the purpose of these awards—"to compensate class representatives for their service to the class and simultaneously serve to incentivize them to perform this function."[8] As an amicus brief submitted by various nonprofit legal and advocacy organizations serving vulnerable communities explained, "[c]lass representatives routinely engage in all aspects of the litigation, including:

- coordinating decision-making among class members;

("Beginning around 1990, . . . [c]ases approving incentive awards proliferated and tests developed to identify the appropriate conditions for the grant of an award." (footnote omitted)).

[2] NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 17.4 (footnote omitted).

[3] *Murray v. Grocery Delivery E-Services USA Inc.*, 55 F.4th 340, 353 (1st Cir. 2022); *Moses v. N.Y. Times Co.*, 79 F.4th 235, 256 (2nd Cir. 2023); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) (en banc); *Berry v. Schulman*, 807 F.3d 600, 613–14 (4th Cir. 2015); *Joes v. Singing River Health Servs. Found.*, 865 F.3d 285 (5th Cir. 2017) (vacating a class action settlement with an incentive award on other grounds and affirming the same settlement after district court provided additional analysis in 742 F. App'x 846 (5th Cir. 2018)); *Pelzer v. Vassalle*, 655 F. App'x 352, 361 (6th Cir. 2016); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722–23 (7th Cir. 2001); *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 786–87 (9th Cir. 2022); *Tennille v. W. Union Co.*, 785 F.3d 422, 434–35 (10th Cir. 2015); *Cobell v. Salazar*, 679 F.3d 909, 922–23 (D.C. Cir. 2012).

[4] 975 F.3d 1244 (11th Cir. 2020).

[5] *Id.* at 1250–51.

[6] *Id.* at 1255, 1258–59 (citing *Trs. v. Greenough*, 105 U.S. 527 (1882); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885)).

[7] *Moses*, 79 F.4th at 254.

[8] NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 17.3; *see also* Benjamin Gould, *On the Lawfulness of Awards to Class Representatives*, 2023 CARDOZO L. REV. DE NOVO 1, 4–5 (2023) (collecting cases).

- working closely with lawyers and other professionals in investigating and developing the case and claims;
- reviewing the complaint and other major filings;
- responding to interrogatories and reviewing documents; and
- preparing for and participating in depositions and mediations, including travel.[9]

As the dissenting judge in *Johnson* explained, employing a visual metaphor, incentive awards recognize that named plaintiffs "incur[] costs serving in [their] roles," "includ[ing] time and money spent, along with all the slings and arrows that accompany present day litigation."[10] Notwithstanding these arguments, the Eleventh Circuit denied rehearing en banc by a slim 6–5 margin, with the dissenters warning that "the panel majority's opinion threatens the very viability of class actions in this circuit"—especially "in small-dollar-value class actions, where incentive awards help to encourage potential plaintiffs to serve as class representatives despite having to take on significant additional responsibilities while receiving the same modest recovery as other class members."[11]

In light of *Johnson*, COSAL believes that the Standing Committee should adopt a straightforward amendment to Rule 23 clarifying that reasonable incentive awards are permitted. Such a rule would restore uniformity among the federal circuits and prevent any chilling effect on class actions in the Eleventh Circuit. Importantly, such a rule would not eliminate limits on incentive awards. For decades, "[f]ederal courts have . . . been careful to set limits on class-representative awards."[12] For example, courts have rejected settlements that provided incentive awards conditioned on support for a class settlement.[13] Additionally, courts have often disfavored awards they deem excessive.[14] Such limitations carefully balance the aforementioned values of incentive awards with "the concern that class representatives may sell out the rest of the class to get extra money for themselves."[15] But the Eleventh Circuit's decision in *Johnson* abandoned any pretense of balance and unsurprisingly remains an outlier with respect to incentive awards. The

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[9] Brief for Impact Fund et al. as Amici Curiae Supporting Plaintiff-Appellee, *Johnson v. NPAS Sols., LLC*, 43 F.4th 1138 (11th Cir. 2022) (No. 18-12344) (citation modified).

[10] *Johnson*, 975 F.3d at 1264 (Martin, J., concurring in part and dissenting in part); *see, e.g.*, *Fla. Educ. Ass'n v. Dep't of Educ.*, 447 F. Supp. 3d 1269, 1278–79 (N.D. Fla. 2020) (emphasizing "participati[on] in mediation and settlement discussions" and assumption of "reputational risk" in approving award); *Hosier v. Mattress Firm, Inc.*, 2012 WL 2813960, at *5 (M.D. Fla. June 8, 2012) (approving award for "participating in the investigation, discovery, and mediation which make a settlement possible").

[11] *Johnson v. NPAS Sols., LLC*, 43 F.4th 1138, 1140 (11th Cir. 2022) (Pryor, J., dissenting from the denial of rehearing en banc).

[12] Gould, *supra* note 8, at 5; *see also Johnson*, 975 F.3d at 1266 (Martin, J., concurring in part and dissenting in part) ("Many other circuits, including this one, look to the fairness of an award to a named class representative.").

[13] *See, e.g.*, *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013).

[14] Newberg and Rubenstein on Class Actions § 17.18 (collecting cases).

[15] Gould, *supra* note 8, at 5

amendment proposed in this comment would rectify the Eleventh Circuit's erroneous and shortsighted reasoning and realign its legal principles with modern class-action practice.

Sincerely,

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