12-234

In The Supreme Court of the United States

KIMBERLY CRAVEN,

Petitioner,

v.

ELOUISE PEPION COBELL, *ET AL.*,

Respondents,

and

KENNETH LEE SALAZAR,
SECRETARY OF THE INTERIOR, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: August 20, 2012

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QUESTIONS PRESENTED

In a decision that conflicts with many decisions of both this Court and other appellate circuits, the Circuit Court of Appeals for the District of Columbia affirmed the final approval of a contested settlement of a long-standing class action involving mismanagement of land trusts for American Indians. Without allowing them to opt out, the settlement extinguishes the rights of the class members to any accounting of the moneys they are owed, in exchange for a one-time $1,000 payment. Then, despite the class members' ignorance of the amount to which they would be entitled, the settlement offers an additional baseline sum of at least $800 in exchange for which they relinquish any rights to sue on dozens of related claims.

This settlement was approved over the objections of a number of class members. In addition to the bargain described above, it afforded a $99 million fee to the plaintiffs' attorneys, and incentive payments ranging between $150,000 and $2 million for each of the named plaintiffs.

The questions presented are:

1. Whether a court may impose on an objector the burden to provide evidence of a structural conflict where it concedes that the defendant's conduct has destroyed any such evidence.

2. Whether the payment of incentives to named plaintiffs of an amount more than eighty times the award due each class member compromises their ability to adequately represent the class at settlement.

LIST OF PARTIES BEFORE THE D.C. CIRCUIT

Class Representatives/Named Plaintiffs

Elouise P. Cobell

James Louis LaRose

Penny Cleghorn

Thomas Maulson

Class Member/Objector

Kimberly Craven

Defendants

Ken Salazar, Secretary of the Interior

Larry Echohawk, Assistant Secretary of the Interior-Indian Affairs

H. Timothy Geithner, Secretary of the Treasury

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JURISDICTIONAL STATEMENT

Petitioner Kimberly Craven seeks a writ of certiorari in this Court for review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in an opinion filed on May 22, 2012. No petition for rehearing or for rehearing en banc was filed following issuance of the Court of Appeal's opinion. 28 U.S.C. § 1254 provides this Court jurisdiction to review final judgments of the United States Courts of Appeals on certiorari.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. V.

Claims Resolution Act of 2010, Pub. L. No. 111-291, § 101, 124 Stat. 3064 (2010) (full text set out in the appendix)

Federal Rule of Civil Procedure 23 (full text set out in the appendix)

STATEMENT OF THE CASE

This appeal confronts one of the fundamental dilemmas that arise in class-action litigation: how to ensure that a classwide settlement fairly compensates all of the absent class members. ALI, PRINCIPLES OF AGGREGATE LITIGATION § 1.05 Comment b (identifying "problem of allocating recoveries fairly among represented persons").

After more than fifteen years of litigation originally intended to achieve an adequate accounting for Indians holding Individual Indian Money accounts (trusts accounts administered by the United States Department of the Interior), the courts below approved a settlement agreement with pervasive intra-class conflicts. Over the course of the litigation, the plaintiffs established that the government had breached its fiduciary duties to the IIM holders, among them the duty to afford a full and adequate accounting to all Indians for whom it managed accounts. *Cobell v. Norton*, 240 F.3d 1081, 1106 (D.C. Cir. 2001). After years of hearings and a refusal by Congress to appropriate necessary funding, it became clear that providing an adequate accounting to each class member was prohibitively expensive. *Cobell v. Norton*, 392 F.3d 461, 465-66 (D.C. Cir. 2004).

The plaintiffs', the Government's, and the lower courts' answer to this impasse was a settlement agreement that aggregated wildly varying claims of individual Native Americans—some more valuable than others, but all incapable of precise valuation without an adequate accounting—

into two classes. The first is a mandatory Historical Accounting Class that provides $1,000 to each class member; in exchange each class member relinquishes her already-recognized right to an adequate accounting. The second is a Trust Administration Class, which will provide small additional payments to all class members who do not opt out. Compounding these intra-class conflicts were enormous fee requests by Class Counsel and incentive award requests by the Class Representatives. According to government counsel Thomas H. Bondy, while these provisions did not fulfill the government's fiduciary duty, they did accomplish some "rough justice" for the class members. Transcript of Oral Argument at 18, *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012) (No. 11-5205) (App. 1a).

But while the class members were forced to settle for "rough justice," the attorneys and the Class Representatives were handsomely rewarded. The starting point for Class Counsel's ultimate fee request was a "clear sailing" provision executed in the parties' Agreement on Attorney's Fees, Expenses, and Costs. The "clear sailing" provision agreed not to contest up to $99.9 million in attorney fees. *See* Agreement on Attorneys' Fees, Expenses, and Costs, § 4.e, *available at* http://www.indiantrust.com/docs/20110126_attorneysfees.pdf. From that amount, Class Counsel argued upward for a total fee of $223 million. The district court ultimately awarded a $99 million fee. *See* Plaintiff's Petition for Class Counsel's Fees, Expenses, and Costs Through Settlement (App. 50a).

Meanwhile, the four Class Representatives received $2.5 million in aggregated incentive awards. They further claimed that they were owed over $10.5 million more in "litigation expenses" that included Representatives' personal rent and public relations-related expenses. *See* Plaintiffs' Memorandum in Support of Class Representatives' Petition for Incentive Awards and Expenses (App. 107a). They sought these large sums notwithstanding the fact that the absent class members they purported to represent—and whose valuable rights they had arranged to settle —would each receive only a small fraction of their requests. Despite their drastically diverging interests—in both the types of claims and monetary recovery they stood to recover—the lower courts approved the Class Representatives as adequate to represent the interests of absent class members and approved millions of dollars in incentive awards.

Despite its central importance to ensuring due process in class actions, the adequacy requirement enshrined in Federal Rule of Civil Procedure 23(a)(4) is difficult to police. *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1254 (11th Cir. 2003) ("neither the Eleventh Circuit nor the Supreme Court has established specific standards for Rule 23(a) adequacy"); *see also* PRINCIPLES OF AGGREGATE LITIGATION § 1.05 Comment b, Reporter's Notes ("The tools [available to promote adequate representation] are costly to employ and imperfect in operation."). As a result, the adequacy requirement is frequently under-enforced. Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate*

Assessment of Adequacy in Litigation and Settlement Classes, 57 VAND. L. REV. 1687, 1691-92 (2004).

There is a particularly grave risk of under-enforcement—and with it, due process violations—in cases like this, where, after years of litigation, the plaintiffs, defendants, and even the supervising court all have strong incentives to remove the case from the docket. In standard plaintiff-on-defendant litigation, these incentives could pose no problem, but in a class action, where any settlement will bind parties who never appear before the court, this desire of the parties to be put litigation behind them may conflict with the fiduciary duty to secure the best possible deal for the absent class members. *E.g.*, *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995); *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995). The problem is so pervasive it has also attracted significant scholarly attention. John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 306 (2010) ("critical issues—class definition, settlement proposals, and the fee award—arise where the interests of the class and its agents are likely to diverge."); *see also* Hillary A. Sale, *Judges Who Settle*, 89 Wash. U. L. Rev. 377, 385 (2011) ("attorneys and representative plaintiffs may prefer settlement to save time and ensure some return, but the remaining members, who are not expending money or time, may have an interest in pursuing the litigation for a longer period"); William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1443-44 (2006) (discussing agency problems that can

arise between class counsel, class representatives, and absent class members).

Despite its under-enforcement, the adequacy requirement of Rule 23(a)(4) remains the last, best protection for the interests of absent class members. Taking this appeal would send a strong message that adequacy is worth more than lip-service in court, and would ensure that class actions remain vehicles for the compensation of absent class members rather than the enrichment of named plaintiffs and class counsel.

REASONS FOR GRANTING THE PETITION

At the settlement stage, particularly in a long-fought case like this one, the interests of the absent class members are in particular danger. Plaintiffs, defendants, and even courts all have strong incentives to approve any settlement the original parties can reach. *See* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems & Class Action Settlements*, 59 FLA. L. REV. 72, 86 (2007). For this reason, proper oversight of class-action settlements is of vital importance to the protection of the rights of absent class members. Often, that oversight will only be provided by objectors to the settlement.

This Court has recognized the dangers prevalent in class-action settlements on several occasions. In both *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855-56 (1999), it intervened to ensure that class-action settlements followed the dictates of Rule 23, a rule designed to protect the interests of those class members who may never have their day in court. This case—in which the D.C. Circuit certified an expansive class of Indians, and in which the United States government and class counsel agreed to waive the class members' meritorious accounting claims for the sum of $1,000 each—is of the same ilk as *Amchem* and *Ortiz*.

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT OVER WHEN CONFLICTS AMONG CLASS MEMBERS RENDERS ADEQUATE REPRESENTATION IMPOSSIBLE.

This Court has long held that adequate representation is a due process requirement for class actions. *Hansberry v. Lee*, 311 U.S. 32, 43 (1940); *Taylor v. Sturgell*, 553 U.S. 880, 900-01 (2008); *see also* ALI PRINCIPLES OF AGGREGATE LITIGATION § 1.05 COMMENT C. As a result, it is vital that settling parties provide structural assurances that absent class members receive adequate representation. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 621 (1997) ("the standards set for the protection of absent classmembers serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.").1 Here, that did not happen.

The settlement resolves disputes between the United States government and hundreds of thousands of individual Indians. (App. 131a ¶ 16, 136a-137a ¶35)). Those tribes (and the individuals within them) put their land to different uses, including ranching, exploiting natural resources, grazing, and harvesting timber, among myriad other

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[1] As this Court has observed, the requirements of commonality, typicality, and adequacy all tend to merge at certain points. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n. 13 (1982). In this case, as Ms. Craven argued to the D.C. Circuit, the structural conflicts that pervade this class are also the result of certifying a class that lacked any common questions that would yield common answers. (App. 23a).

uses. Indeed, the sheer breadth of the settlement's conception of "Land Administration Claims" demonstrates how widely class members' uses of their lands varied. (App. 132a-134a, ¶ 21). As a result, it makes sense that different trust claims would be worth different amounts, and that some would well exceed the far more limited award all class members would receive. *Cobell*, 679 F.3d at 914-15 (explaining the $1,000 payment for Historical Accounting Class Member and the $800 base payment for Trust Administration Class Members). Nonetheless, the courts below found that the four named plaintiffs were adequate to represent these diverse groups, because there was no evidence of any conflict.

Kimberly Craven and the other objectors provided evidence that there was a structural conflict in the proposed settlement, pitting the low-value claimants the federal government admitted existed against various high-value claimants have made themselves known in other ways. As evidence, Craven pointed to *Two Shields v. United States* (Fed. Cl. Case No. 11-531L), a lawsuit pending in the Court of Federal Claims while this case was before the district court, in which the government argued that high-value (in some cases multi-million dollar) clamaints overlapped with Trust Administration class members in this action. As a result, the need for a proper accounting was of critical importance to those Indians who held high-value claims. *See Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001) ("insofar as the federal government owes trust beneficiaries a duty to maintain records and provide an accounting, delaying review [of that accounting]

is tantamount to denying review altogether"). For class members with low-value claims, many of whom are in dire economic circumstances, forgoing the accounting to which they were entitled (and therefore forgoing any further cause of action to recovery damages) may be worth much less than $1,000. But for those class members with claims reaching into five, six, or even seven figures, $1,000 is nowhere near compensation for the rights they will be forced to relinquish.

The question here is how to evaluate a settlement that requires some class members to extinguish claims that are potentially of a very high value, but not known at this time. (In this case, those would be the claims that involve large amounts of mismanaged funds—like those of the *Two Shields* plaintiffs—which would only become known after an accounting was performed.) This settlement asks them to extinguish those claims for—at most—a few thousand dollars, the same amount that likely constitutes a generous overpayment to those class members with low-value claims. This is the same structural conflict that concerned this Court in both *Amchem* and *Ortiz*, where plaintiffs sacrificed potentially valuable future-injury claims in favor of a global settlement. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 626 (1997) (noting lack of alignment between those who need "generous immediate payments" and those who require "ample, inflation-protected fund for the future"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855-56 (1999) (settlement was not "fair" if it did not "provid[e] for procedures to resolve the difficult

issues of treating such differently situated claimants with fairness as among themselves").

On the other side, the plaintiffs (and the defendant federal government) provided *no* evidence of any *lack* of conflict. They could not, because the federal government had admitted that it lacked the ability to perform a proper accounting in a cost-effective manner. (App. 4a-5a) The appellate court took that inability to provide evidence of any type as a lack of evidence of any conflict whatsoever in the Historical Accounting Class. (App. 10a) (declaring "the absence of evidence of an intra-class conflict among the Historical Accounting Class ....").) Doing so improperly shifted the burden of demonstrating that the proposed class met the requirements of Rule 23(a)(4) from the proponents of certification (in this case, the plaintiffs and defendants) to the objectors. That shifting of burdens clearly contradicts this Court's instruction that it is the party proposing certification that bears the burden of proving it has met the various requirements of Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule -- that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.") (emphasis in original).

The Court has clearly held that representation is not adequate where class representatives and absent class members hold diametrically opposite interests. *See Hansberry v. Lee*, 311 U.S. 32, 44 (1940) (class members interested in enforcing a

restrictive covenant conflicted with class members interested in opposing the same covenant). It has suggested that a plaintiff's claim of intentional discrimination in promotion was not typical of absent class members' claims of discriminatory hiring practices, and consequently, that the former could not adequately represent the latter's interests. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982). And in limited fund cases, the Court has held that the interests of presently injured class members to share immediately in the fund may conflict with interests of class members whose injuries may manifest in the future when the fund may be diminished or depleted. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999); *Amchem Prods. v. Windsor*, 521 U.S. 591, 626 (1997). *Ortiz* and *Amchem* further held that subclasses may be required to ensure adequate representation where there are conflicts within the class. None of these cases, however, address the situation presented here—where members of the Trust Administration Class have claims with wildly varying values that place them on either side of the various awards the court authorized.

A. THE CIRCUITS HAVE SPLIT ON THIS FUNDAMENTAL QUESTION.

By finding no conflict under these circumstances, the D.C. Circuit has created a split in how to approach intra-class conflicts. The Second and Fourth Circuits have clearly held that, in a case like this, a conflict exists that renders representation of the proposed class inadequate. *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d

at 254-55; *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 337-38 (4th Cir. 1998). The Fourth Circuit has also—joined by the Seventh Circuit—held that intra-class conflicts matter whether they are real or "potential" when the class is a mandatory one. *Broussard*, 55 F.3d at 338; *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir.1993).

Most courts have held that conflicts within a class must be more than just "speculative." *Dewey v. Volkswagen Aktiengesellschaft*, Nos. 10-3618, 10-3651, 10-3652 & 10-3798, 2012 U.S. App. LEXIS 10932, *38-39 (3d Cir. May 31, 2012). But the meaning of "speculative" is itself subject to dispute. Some courts—like the D.C. Circuit below, and the Fourth and Ninth Circuits—require hard "evidence" of an actual conflict. *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) (conflict speculative because it "rests on the uncertain prediction that this lawsuit will cause premiums to increase enough to adversely affect some members of the class"); *see also Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003) (affirming certification where defendant "presented no evidence that an actual conflict existed among class members"). Others, like the Second, Third, Sixth, and Seventh Circuits, believe that a structural flaw or "potential" issue is enough to raise "serious questions" warranting denial of certification. *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.2d 242 (2d Cir. 2011) ("*Even in the absence of any evidence* that the Settlement disfavors Category C-only plaintiffs, this structural flaw would raise serious questions as to the adequacy of

representation here.") (emphasis added); *see also id.* at 259-60 (dissent argues conflict was "speculative"); *Dewey*, 2012 U.S. App. LEXIS 10932 at *42-43; *Gilpins v. AFSCME, AFL-CIO*, 875 F.2d 1310, 1313 (7th Cir. 1989) (Posner, J.). (conflict precluding adequacy existed where different types of class members "have *potentially* divergent aims") (emphasis added); *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523, 1531 (6th Cir. 1992) (quoting *Gilpin*).

The existence of these various holdings demonstrates the need for clear guidance about when intra-class conflicts preclude adequate representation of absent class members. Without this guidance, courts will continue to confuse when to require "evidence" of a conflict from objectors, and when the conflict is inherent to the class certified.

B. THE D.C. CIRCUIT IMPROPERLY SHIFTED THE BURDEN OF PERSUASION TO THE OBJECTORS.

This Court has recently reaffirmed that the proponents of certification (here, proponents of the settlement) bear the burden of demonstrating compliance with Rule 23, not the opponents:

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (emphasis in original).[2]

By assigning the burden of demonstrating *inadequate* representation to the objectors, the courts below contravened this Court's clear instructions in *Dukes*. The lower courts also ignored this Court's example: in the past, it has treated

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[2] The Court has long held that the Rule 23(a) factors are "prerequisites" to class certification, *see Falcon*, 457 U.S. at 156, because they are "designed to protect absent[]" class members. *Amchem*, 521 U.S. at 620. The Rule 23(a) factors reach constitutional import because they ensure due process for absent class members; thus, the Court has required "rigorous adherence to those provisions of the Rule . . . ." *Ortiz*, 527 U.S. at 849; *see also Falcon*, 457 U.S. at 161; *Hansberry*, 311 U.S. at 41. In the Claims Resolution Act of 2010, however, Congress purported to permit the district court to certify the Trust Administration Class without considering Rule 23 at all. Pub. L. No. 111-291 § 101(d)(2)(A), 124 Stat. 3064, 3067 ("Notwithstanding the requirements of the Federal Rules of Civil Procedure, the court in the Litigation may certify the Trust Administration Class."). Indeed, the district court's certification orders in this case are devoid of any substantive analysis of Rule 23(a)'s crucial requirements. (App. 76-78) (no analysis of Rule 23(a)); (App. 83-84) (finding, in three sentences, that the Rule 23(a) requirements are satisfied, and concluding, "In any event, the Claims Resolution Act suspends these requirements as to the Trust Administration Class."). There is a substantial question whether Congress was authorized to permit the district court to disregard Rule 23(a) given this Court's well-established precedent that Rule 23 must be rigorously analyzed to protect the due process rights of absent class members. *Ortiz*, 527 U.S. at 849; *Falcon*, 457 U.S. at 161. But at the very least, the district court's inattention to Rule 23(a) is an aggravating circumstance to the conflicts that pervaded this class settlement—"a method that invites the court to overlook these requirements properly raises eyebrows." Richard L. Marcus, *They Can't Do That Can They? Tort Reform Via Rule 23*, 80 Cornell L. Rev. 858, 899 (1994).

"potential" conflicts as sufficiently reason to find that a class has not been adequately represented at settlement. *Ortiz*, 527 U.S. at 831-32 ("the District Court took no steps at the outset to ensure that the *potentially* conflicting interests of easily identifiable categories of claimants be protected") (emphasis added). And other courts have also held that, in the absence of evidence of *no* conflict, they cannot afford to ignore a potential structural conflict. *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.2d 242 (2d Cir. 2011) ("*Even in the absence of any evidence* that the Settlement disfavors Category C-only plaintiffs, this structural flaw would raise serious questions as to the adequacy of representation here.") (emphasis added). Based on this Court's dictates in *Dukes*, it was not the objectors' burden to produce evidence of an actual conflict, particularly where it was the misconduct of one of the settling parties that destroyed any such evidence.

Nor was the D.C. Circuit's finding that the class members were adequately protected from any conflict by their ability to opt out of the Trust Administration Class justified in this case. (App. 20a ("the existence of the opt-out alternative effectively negates any inference that those who did not exercise that option considered the settlement unfair").) First of all, the class members could *not* opt out of the Historical Accounting Class that forfeited their right to an accounting, because that class was certified under Rule 23(b)(2), which does not allow for opt outs. As a result, since none of the class members knew what their particular claims against the federal government would be worth,

their right to "opt out" of the Trust Administration class would be functionally meaningless. This Court has recognized this problem in the past, when damages claims were gathered for resolution in a limited fund class. *Ortiz*, 527 U.S. at 846 ("The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class.").

Relying on the ability to opt out as the primary protection for absent class members is a problematic strategy at the best of times. *See* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems & Class Action Settlements*, 59 FLA. L. REV. 72, 108-09 (2007) (discussing "diseconomies of opting out"). A "substantial lack of response from absentee class members appears to be the norm rather than the exception." *In re Traffic Exec. Assoc.*, 627 F.2d 631, 634 (2d Cir. 1980). Moreover, it is well documented that most class notices do not meet the "clear notice" requirements of Rule 23, and have little effect on class members. Shannon R. Wheatman & Terri R. LeClercq, *Majority of Class Action Publication Notices Fail to Satisfy Rule 23 Requirements*, 30 REV. LITIG. 53 (2010); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION 1 ("It must be clear to everyone that notice has little chance of converting class members with small interests into active participants in class actions."). In a case like this, relying on the opt-out mechanism to protect absent class members is particularly dangerous. Since no high-value claimant could know whether her claim was worth opting out for, she could not make an informed choice whether to stay in the Trust

Administration Class. *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 812-13 (refusing to assume that small number of objections implied tacit approval of settlement agreement where relief difficult to evaluate).

In a case like this, clearer guidance about the necessity of adequate representation would do far more to protect the interests of absent class members than simply pointing to an opt-out right that has been hollowed out by the provisions of the settlement itself.

C. THIS ISSUE IS IMPORTANT AND RECURRING.

The question of when a conflict within a class is fundamental, so that ignoring it compromises the right to due process, is one that is certain to recur. As this Court has noted on several occasions, the rewards to be gained from aggregating claims prompt plaintiffs to be "adventuresome" in pursuing remedies. *Amchem*, 521 U.S. at 617-18 ("class action practice has become ever more 'adventuresome' as a means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one"); *Ortiz*, 527 U.S. at 845 (counseling "against adventurous application" of Rule 23).

Given these incentives, plaintiffs will continue to make class proposals that include sweeping and expansive classes, and consequently contain latent intra-class conflicts. In just the last few years, appellate courts have faced a spate of class actions that have raised this very question. *Dewey v.*

Volkswagen Aktiengesellschaft, 2012 U.S. App. LEXIS 10932, *3 (3d Cir. May 31, 2012) (finding conflict between named plaintiffs and subgroup of class members); *In re Literary Works in Elec Databases Copyright Litig.*, 654 F.3d 242, 253 (2d Cir. 2011) (conflict among subclasses); *Klier v. Elf Atochem N. Am. Inc.*, 658 F.3d 468, 473 (5th Cir. 2011) (objector raised conflict between subclasses). Indeed, this Court has found the problem of representation in settlement classes serious enough to warrant explicitly reminding lower courts that class settlements deserve "heightened scrutiny." *Amchem*, 521 U.S. at 620.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT AMONG CIRCUITS AS TO WHEN AN INCENTIVE PAYMENT IMPROPERLY INFLUENCES A CLASS REPRESENTATIVE, RENDERING ADEQUATE REPRESENTATION IMPOSSIBLE.

The American Law Institute has expressed particular concern about the potential for incentive bonuses to improperly influence class representatives. While it endorses incentive bonuses to cover reasonable, litigation-related expenses, it warns that they "should not be an incentive for securing the acquiescence of either the lead parties or the named class members on a basis adverse to the interests of the aggregated class as a whole." PRINCIPLES OF AGGREGATE LITIGATION § 1.05 Comment h. In this case, the sheer size of the incentive awards—both those that the plaintiffs requested and those that the court ultimately awarded—indicates that by the time of settlement,

the incentives of the Class Representatives were more closely aligned with their counsel than with the absent class members. In such a case, it would be error to find the Class Representatives, who now had hundreds of thousands of dollars at stake in the settlement, adequate to represent the absent class members, who at most stood to recover at most a few thousand dollars. *Cobell*, 679 F.3d at 914-15.

A. THE D.C. CIRCUIT'S OPINION CREATES A CIRCUIT SPLIT ON THE QUESTION OF HOW TO TREAT INCENTIVE PAYMENTS.

There is "[n]o consistent standard for evaluating and approving special compensation for named plaintiffs." Elisabeth M. Sperle, *Here Today, Possibly Gone Tomorrow: An Examination of Incentive Awards & Conflicts of Interest in Class Action Litigation*, 23 GEO. J. LEGAL ETHICS 873, 874 (2010); *see also* 2 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 6:27 (6th ed. 2009). Nonetheless, some 28% of class-action settlements include incentive payments to the named plaintiffs, and those payments are usually "modest," in the range of a few thousand dollars. Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1308 (2006); *see also Espenscheid v. DirectSat USA, LLC*, No. 12-1943, 2012 U.S. App. LEXIS 16258, *11 (7th Cir. Aug. 6, 2012) (Posner, J.) ("The incentive award therefore usually is modest—the median award is only $4,000 per class representative.").

The ruling below splits with established precedent discussing how to reconcile incentive awards for named plaintiffs with the requirement of adequate representation. The Seventh Circuit has affirmed the use of incentive awards. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) ("Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit."); *Espenscheid*, 2012 U.S. App. LEXIS 16258. It has suggested, however, that a sufficient disparity—where the representative received 300% of the maximum allowable recovery—might render a settlement "untenable." *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006). Following similar reasoning, the Sixth Circuit has held that a putative class representative had an impermissible conflict of interest where he insisted on receiving the maximum statutory recovery "while other members of the class would be limited to a pro rata share of the class award . . . ." *Hooks v. Gen. Fin. Corp.*, 652 F.2d 651, 652 (6th Cir. 1981) (per curiam).

The Ninth Circuit has similarly expressed concern about the effect of incentive awards on settlements:

> Generally, when a person joins in bringing an action as a class action[,] he has disclaimed any right to a preferred position in the settlement. Were that not the case, there would be considerable danger of individuals bringing cases as class actions

> principally to increase their own leverage to attain a remunerative settlement for themselves and then trading on that leverage in the course of negotiations.

Staton v. Boeing Co., 327 F.3d 938, 976 (9th Cir. 2003) (internal quotation omitted.) In fact, it specifically advised against large incentive awards like the ones that the lower courts approved here. *Staton*, 327 F.3d at 977; *see also Rodriguez v. West Pub. Corp.*, 563 F.3d 948, 960 (9th Cir. 2009) ("excess incentive awards may put the class representative in a conflict with the class").

The ruling below, by contrast, holds unequivocally that an incentive award many thousands of times greater than the class recovery does not compromise adequacy. (App. 25a) (rejecting argument that large incentive payment requests in this case created conflict of interest).

This discordance in the treatment of incentive awards speaks to the need for guidance on the issue. While there will clearly be some case-by-case variation in determining the *optimal* level of incentive awards, clarity about the maximum acceptable level of these awards would go far in buttressing the structural protections Rule 23(a)(4) affords absent class members.

B. THE D.C. CIRCUIT IMPROPERLY AFFIRMED INCENTIVE PAYMENTS THAT ALIGNED THE INTERESTS OF THE CLASS REPRESENTATIVES WITH THEIR LAWYERS INSTEAD OF THE CLASS MEMBERS.

Federal courts have generally not expressed concern where a named plaintiff's incentive award "is small, and will not decrease the recovery of other class members." *In re LG/Zenith Rear Projection Television Class Action Litig.*, No. 06-5609 (JLL), 2009 U.S. Dist. LEXIS 13568, at *25 (D.N.J. Feb. 18, 2009).

The incentive payments the D.C. Circuit approved in this case were far from "small." They represented an amount many times greater than the average class member's recovery. All told, the Class Representatives received $2.5 million in aggregated incentive awards. Ms. Cobell requested $10 million but alone received a $2 million incentive award; Mr. LaRose received a $200,000 award; and the two remaining named plaintiffs took in $150,000 each. (App. 88). These figures dwarf the per capita payments to individual class members—a modest $1,000 payment for surrendering accounting claims and a base payment of $800[3] for releasing trust administration and mismanagement claims. (App.

[3] Congress appropriated $100,000,000 more to settle Trust Administration claims than what was called for by the Settlement Agreement. *See* Claims Resolution Act of 2010, Pub. L. No. 111-291 § 101(j)(1)(A). 124 Stat. at 3069. These additional funds raised average per capita payments to approximately $800.

515). Furthermore, the Class Representatives' disproportionately large incentive payments came from the same pool of funds appropriated by Congress to pay the class claims, and consequently diminishing class members' pro rata shares. (App. 88) (ordering that the incentive awards "shall be paid out of the Settlement Account holding plaintiffs' funds immediately upon deposit of the funds in the Accounting/Trust Administration Fund").

More importantly, the sizable awards the D.C. Circuit authorized were actually *reductions* from the original amounts the named plaintiffs requested. In addition to $2.5 million in aggregated incentive awards, the Class Representatives further claimed that they were owed over $10.5 million more in litigation expenses. *See* Plaintiffs' Memorandum in Support of Class Representatives' Petition for Incentive Awards and Expenses (App. 110a). The sheer size of those requests, by themselves, should have alerted the lower courts that the adequacy of these representatives had been compromised. *See Murray*, 434 F.3d at 952; *Hooks*, 652 F.2d at 652. These requests suggest that the Class Representatives had grown far more interested in maximizing their own recovery than in protecting the interests of the class. Alternatively, the requests could indicate that Class Counsel was compensating the Class Representatives for accepting a deal they had previously rejected. *Arellano v. T-Mobile USA, Inc.*, No. C 10-05663, 2011 U.S. Dist. LEXIS 21441, at *8 (standing order addressing class settlements in Northern District of California, observing that incentive payments "too often are simply ways to make a collusive or poor settlement palatable to the

named plaintiff"). In either case, approving the Class Representatives as adequate to represent the interests of the class was an abuse of discretion in this case.

C. THIS QUESTION IS IMPORTANT AND RECURRING.

The long-admitted reality is that individual plaintiffs rarely bring class actions; instead, entrepreneurial lawyers do. *Espenscheid*, 2012 U.S. App. LEXIS 16258 at *10 ("class actions are almost always the brainchild of lawyers who specialize in bringing such actions; [b]ut they still have to find someone who is a member of the prospective class to agree to be named as plaintiff,"). Those lawyers then recruit individuals to serve as named plaintiffs, and recent empirical scholarship has shown that lawyers select plaintiffs whom they can more easily influence. Stephen Meili, *Collective Justice or Personal Gain? An Empirical Analysis of Class Action Lawyers and Named Plaintiffs*, 44 AKRON L. REV. 67, 111 (2011) ("class action lawyers often have the luxury of selecting named plaintiffs who are willing to align their goals with the attorneys"). As a result, class-action lawyers hold great sway over their so-called clients. *Id.*; *see also e.g.*, *Piambino v. Bailey*, 757 F.2d 1112, 1139 (11th Cir. 1985) (explaining that class settlement negotiations are susceptible to collusion because class counsel must look to defendants for their fee); *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05, COMMENT J (noting difficulty in firing class counsel). Given this general background circumstances, it is important to build as many protections into a class

action as possible to ensure that a class representative watches out for the interests of the *absent class members* rather than *class counsel*. *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 724 (7th Cir. 2011) (Posner, J.) (adequate class representative is "able to ensure that class counsel act as faithful agents of the class"); *Kirkpatrick v. JC Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987) (proposed class representatives inadequate where "they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys").

Incentive payments, however, create a wedge that separates the named plaintiff from the remainder of the class; aligning the her incentives with her counsel's (closing a particular negotiation) rather than those of the absent class members (ensuring that the entire class is protected). *See Rodriguez v. Disner*, No. 55309, 2012 U.S. App. LEXIS 16698, *12-13 (9th Cir. Aug. 10, 2012) (pre-existing agreement regarding incentive awards created insurmountable conflict of interest). Courts have recognized that the danger of this misalignment— the named plaintiffs having the same interest as class counsel instead of absent class members—is greatest when a class is certified for settlement purposes, when self-gratifying awards for the class representatives and lawyers are within reach. *E.g.*, *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Antitrust Liab. Litig.*, 55 F.3d at 799 n.21. "The danger of a premature, even a collusive, settlement is increased when as in this case the status of the action as a class action is not determined until a settlement has been negotiated,

with all the momentum that a settlement agreement generates . . . ." *Mars Steel Corp. v. Cont'l Ill. Nat. Bank & Tr. Co.*, 834 F.2d 677, 680 (7th Cir. 1987) (Posner, J.). But despite the "momentum" generated by news of a settlement after fifteen years of litigation, the lower courts were not free to ignore the diverging interests of the class representatives and class counsel.

Incentive awards do not have to compromise adequacy. In many cases, courts have generally exhibited "a degree of coherence and modesty" in allowing incentive awards. Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs*, 53 UCLA L. REV. at 1347. In Eisenberg's & Miller's study, "The average award per class representative was $15,992 and the median award per class representative was $4[,]357." *Id.* at 1348. Lower incentive awards are unlikely to push class representatives into agreeing to deals that are bad for the remainder of the class.

But this is not one of those cases. In *this* case, the incentive awards were many times either the average or the median award to class members. They ranged from $150,000 to $2 million for Elouise Cobell—125 to 1100 times as large as the average class member's award. The incentive awards the plaintiffs *requested* (which one can safely assume were a product of negotiations with their counsel) were even higher. Including claimed costs and expenses, the named plaintiffs requested more than $13 million. (App. 110a). To say that these awards would color a class representative's perception of a settlement does not cast aspersions on her character,

it recognizes a fundamental fact about human nature. By ignoring that fundamental conflict, the Court of Appeals committed reversible error. Correcting that error would provide essential guidance about the role of the class representative in large-scale settlements.

Setting a clear guideline on incentive awards would also help to curb the problems with attorneys' fees that tend to arise in the same circumstances. Here, at the same time as the named plaintiffs were requesting millions of dollars in incentive awards, class counsel requested an astounding $223 million attorneys' fee. (App. 50a). While this request represented a small percentage of the total recovery in the case, it was still exponentially greater than the per capita recovery of any of their clients.

This case is particularly appropriate for review because the D.C. Circuit did not pay adequate attention to these red flags: large incentive payments to the class representatives and huge fees awarded to class counsel often indicate that the interests of the absent class members have been sacrificed to those of the lawyers. As a result, this Court may offer clear guidance on whether (and under what circumstances) incentive payments to class representatives and fees awarded to class counsel—negotiated simultaneously with an exponentially smaller recovery for the class—create impermissible conflicts of interest.

CONCLUSION

It is a longstanding problem in class action practice that while the device ostensibly exists to protect the interests of the class, class settlements often provide better deals to class counsel than to the members of the class. The primary protection for absent class members is the promise of adequate representation. When the adequacy requirement of Rule 23(a)(4) is properly enforced, it ensures that class counsel are subject to independent oversight that reins in their baser impulses. Granting certiorari in this case to decide (1) the quantum of "evidence" necessary to show an intra-class conflict and (2) whether exorbitant incentive awards to class representatives compromise their ability to independently oversee counsel would significantly strengthen the enforcement of the adequacy requirement, protecting the interests of future generations of class members.

Respectfully submitted,

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