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United States Court of Appeals
Tenth Circuit

May 1, 2024

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CHIEFTAIN ROYALTY COMPANY, on its behalf and as representative of a class of similarly situated royalty owners,

Plaintiff - Appellee,

v.

SM ENERGY COMPANY, including predecessors, successors and affiliates; ENERVEST ENERGY INSTITUTIONAL FUND XIII-A, L.P.; ENERVEST ENERGY INSTITUTIONAL FUND XIII-WIB, L.P.; ENERVEST ENERGY INSTITUTIONAL FUND XIII-WIC, L.P.; ENERVEST OPERATING, LLC; FOURPOINT ENERGY, LLC,

Defendants - Appellees.

C. BENJAMIN NUTLEY, as personal representative of the Estate of Charles David Nutley,

Objector - Appellant,

and

DANNY GEORGE,

Nos. 22-6069, 22-6124 & 22-6125

Objector - Appellant.

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:11-CV-00177-D)

Bradley E. Beckworth of Nix Patterson, LLP, Austin, Texas (Jeffrey J. Angelovich, Susan Whatley, Lisa P. Baldwin, Trey Duck, Andrew G. Pate, and Nathan B. Hall of Nix Patterson, LLP, Austin, Texas, and Robert N. Barnes, Patranell Britten Lewis, and Emily Nash Kitch of Barnes & Lewis, LLP, Oklahoma City, Oklahoma, with him on the briefs), for Plaintiff-Appellee.

Eric Alan Isaacson of the Law Office of Eric Alan Isaacson, La Jolla, California (C. Benjamin Nutley of the Law Office of C. Benjamin Nutley, Kamuela, Hawaii and John W. Davis of the Law Office of John W. Davis, Tampa, Florida, with him on the briefs), for Objector-Appellant Nutley.

John J. Pentz of the Law Office of John Pentz, Wayland, Massachusetts, for Objector-Appellant George.

Before **TYMKOVICH, MORITZ**, and **ROSSMAN**, Circuit Judges.

ROSSMAN, Circuit Judge.

This case originated as a class action dispute about the underpayment of oil and gas royalties due on wells in Oklahoma. Plaintiff-Appellee Chieftain Royalty Company (Chieftain) sued non-party SM Energy Company, the operator of the wells, under various tort theories, including

fraud, breach of contract, and breach of fiduciary duty. In 2015, those underlying claims settled for approximately $52 million.

Following settlement, counsel for Chieftain (Class Counsel) moved for attorneys' fees, and Chieftain, as named plaintiff and class representative, sought an incentive award for its CEO, Robert Abernathy (also called class representative). Two class members objected—Appellants C. Benjamin Nutley[1] and Danny George (collectively, Objectors)—and appealed the awards. We affirmed the settlement but reversed the attorneys' fees and incentive awards, remanding to the district court for further proceedings.

The re-awarded fees and incentive award are now before us in this appeal. Exercising jurisdiction under 28 U.S.C. § 1291, we vacate in part, affirm in part, and remand. The class did not receive notice of the 2018 attorneys' fees motion as required under Federal Rule of Civil Procedure 23(h)(1), so we vacate the district court order awarding attorneys' fees and remand with instructions to direct class-wide notice of the 2018 attorneys' fees motion and to re-open the period for objections. Accordingly, we do not reach the merits of Objectors' appellate challenge to the re-awarded

[1] On January 10, 2024, C. Benjamin Nutley, the personal representative of the Estate of Charles David Nutley, was substituted for Charles David Nutley as the Appellant-Objector in this matter.

attorneys' fees. We affirm the district court's incentive award to Mr. Abernathy.

I

A

In 2015, the parties in the underlying class action settled for a cash payment of $52 million, "to be distributed pro rata to the class members after payment of expenses and fees."[2] *Chieftain Royalty Co.* v. *EnerVest Energy Inst. Fund XIII-A, L.P.* (*Chieftain I*), 888 F.3d 455, 458 (10th Cir. 2017) (amended Apr. 11, 2018), *cert. denied*, 139 S. Ct. 482 (2018). The parties moved for preliminary approval of the class action settlement, which

[2] Ordinarily, the American Rule requires prevailing litigants pay for their own attorneys' fees. *In re Syngenta AG MIR 162 Corn Litigation*, 61 F.4th 1126, 1191 (10th Cir. 2023) (citation omitted). "But the class action context offers an exception to this rule" in common fund cases, like this one. *Id.* "In large class actions . . . , a relatively small handful of plaintiffs bear the cost of suit." *Id.* If the American Rule were to apply in the class action context, "the named class plaintiffs would shoulder the costs of suit—including attorneys' fees—for the entire class, even as the remainder of the class reaps the benefits of their labor." *Id.* However, the common fund doctrine "prevents such unjust enrichment by enabling class action attorneys to extract fees from the collective award, thereby spreading the costs of suit proportionately among the ascertainable class." *Id.* at 1191–92 (internal quotation marks and alterations omitted); *see also Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980) (noting the Court's "consistent[]" recognition that the common fund doctrine entitles an attorney who recovers common, or collective, benefits for persons other than themselves or their client to a "reasonable . . . fee from the fund as a whole").

the court granted, and the court set a final fairness hearing for November 30, 2015.

The motion for preliminary approval contained a proposed notice to the class, titled "Notice of Proposed Settlement, Motion for Attorneys' Fees, and Fairness Hearing" (the 2015 Class Notice). The 2015 Class Notice gave the class information about the proposed settlement and notice that Class Counsel "would seek an award of attorneys' fees in an amount not to exceed forty percent (40%) of the Settlement Cash Amount and reimbursement of Litigation Expenses in an amount not to exceed $900,000."[3] Joint App. at 129. The 2015 Class Notice further stated the class representative, Mr. Abernathy, would seek a "Case Contribution Award," also called an "incentive award," of 1% of the settlement amount. The 2015 Class Notice warned:

> Unless otherwise ordered by the court, any class member who does not object in the manner described herein will be deemed to have waived any objection and shall be forever foreclosed from making any objection to the proposed settlement and the application for attorneys' fees and expenses and case contribution awards and will not be allowed to present any objections at the fairness hearing.

[3] Costs are not at issue in this appeal.

Supp. App. vol. 2 at 129–30. The fairness hearing was set for November 30, 2015, with objections to the proposed settlement due a few weeks in advance.

The 2015 Class Notice identified a website for the litigation, and the website contained "a copy of the Settlement Agreement, as well as other relevant documents." Supp. App. vol. 2 at 131. The 2015 Class Notice was mailed to the class on October 9, 2015. A few days later, local Oklahoma newspapers published summary notice of the proposed settlement.

The parties moved for final approval of the settlement on October 26, 2015. Class Counsel also moved for attorneys' fees, costs, and an incentive award (the 2015 motion). Two class members lodged timely objections: Mr. Nutley and Mr. George.[4]

After the final fairness hearing in late November 2015, the district court approved the $52 million cash settlement. *Chieftain I*, 888 F.3d at 458. The district court awarded Class Counsel 33⅓% of the fund ($17,333,333.33) as attorneys' fees and awarded Mr. Abernathy ½% ($260,000) as an incentive award. *Id.* at 458, 464. The district court

[4] Objectors asserted, *inter alia*, the requested attorneys' fees in the amount of 40% of the settlement was excessive and the requested incentive award of 1% of the settlement was "astronomical." Joint App. at 83. As we will explain, Objectors filed subsequent sets of objections to the motions for attorneys' fees and an incentive award filed by Class Counsel in 2018. Accordingly, the initial set of objections is not at issue in this appeal.

determined notice "was given to all Settlement Class Members who could be identified with reasonable effort." Joint App. at 128. The "form and method" of the 2015 Class Notice, the district court explained, was "the best notice practicable under the circumstances, constitute[d] due and sufficient notice to all persons and entities entitled to receive such notice, and fully satisfie[d] the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process." *Id.* at 128–29.

Objectors timely appealed. We affirmed the settlement but reversed the attorneys' fees and incentive awards.[5] *Chieftain I*, 888 F.3d at 470. We held Oklahoma state law, not federal law, governed whether attorneys' fees or an incentive award were warranted and how to calculate them. *Id.* at 462 (attorneys' fees), 468–69 (incentive award). Citing *Burk* v. *Oklahoma City*, 598 P.2d 659 (Okla. 1979), we reasoned Oklahoma law does not permit the percentage-of-the-common-fund method for calculating attorneys' fees—the method the district court used when it awarded attorneys' fees of 33⅓% of the settlement fund. *Chieftain I*, 888 F.3d at 459–64. Instead, we found the lodestar method would produce a reasonable attorneys' fee award under

[5] The decision was issued by a two-member panel of this court. Then-Judge Gorsuch heard oral arguments but did not participate in the decision because he was appointed to the United States Supreme Court. The practice of this court permits the remaining two panel judges, if they agree, to act as a quorum in resolving the appeal. *See* 28 U.S.C. § 46(d).

Oklahoma law. *Id.* at 459, 469; *see also Strack* v. *Continental Resources, Inc.*, 507 P.3d 609 (Okla. 2021) ("The lodestar method for calculating fees is to (1) determine the compensation based on the hours spent multiplied by an hourly rate, and (2) enhance or decrease the fee through consideration of the factors outlined in *Burk*."). Finally, we made an *Erie* guess[6] that Oklahoma would disapprove of the district court's percentage-of-the-fund method for determining the incentive award. *Chieftain I*, 888 F.3d at 468. We concluded Mr. Abernathy's incentive award should have been calculated using "a reasonable rate for reasonable time expended on services rendered that were helpful to the litigation." *Id.* at 469.

B

On remand, Class Counsel filed two motions in the district court: (1) a motion for attorneys' fees in the amount of $17,333,333.33 (the 2018 attorneys' fees motion); and (2) a motion seeking an incentive award of $260,000.00 to Mr. Abernathy (the 2018 incentive award motion) (collectively, the 2018 motions).[7] The 2018 motions sought different award

[6] An *Erie* guess is "an attempt to predict state law" in "the absence of explicit guidance from state courts." *Pehle* v. *Farm Bureau Life Ins. Co., Inc.*, 397 F.3d 897, 901–02 (10th Cir. 2005).

[7] The district court described these 2018 motions as "renewed motions." But these "renewed" motions were different from the 2015 motions, as we explain.

amounts than the 2015 motion did. Recall, the 2015 motion sought 40% and 1% of the common fund in attorneys' fees and as an incentive award, respectively. The 2018 motions sought 33⅓% of the common fund in attorneys' fees and ½% of the common fund as an incentive award, albeit expressed in definite quantities rather than percentages.

In support of the 2018 motions, Class Counsel "compiled an extensive evidentiary record" not previously presented to the district court. Joint App. at 673. The new evidence included time records and declarations supporting attorney hours and rates along with records documenting Mr. Abernathy's time and the nature of his contributions. *See id.* at 673–74. Class Counsel did not notify the class of the 2018 motions.

Objectors Nutley and George again objected. Objectors contended the request for attorneys' fees was unreasonable because "the hours claimed by the attorneys and their hourly rates [were] excessive" and "their legal work [was] not properly documented." Joint App. at 674. They also opposed an incentive award "in excess of a very modest amount," with Objector Nutley suggesting a $5,000 figure and Objector George suggesting a $10,000 award. *Id.* at 531–32, 611–12. Objector George also claimed, under Federal Rule of Civil Procedure 23(h)(1), the 2018 attorneys' fees motion should have been the subject of class-wide notice.

While the 2018 motions were pending, the Oklahoma Supreme Court decided *Strack* v. *Continental Resources, Inc.*, 507 P.3d 609 (Okla. 2021), which addressed certain questions unanswered at the time of *Chieftain I*. *Strack* held "both the lodestar and percentage[-of-the-fund] method[s] [are] potentially permissible" methods of determining an attorneys' fee award. *Id.* at 616. Examining the language of Oklahoma's class action attorneys' fees statute, the Oklahoma Supreme Court held "the statute suggests that either or both the lodestar or percentage methods of fee calculation are appropriate, depending on which methodology best arrives at a *reasonable award given the circumstances of the particular case*."[8] *Id.* (emphasis added).

As for incentive awards, *Strack* held "the weight of authority warns against arbitrarily awarding incentive awards, such as with a percentage-

[8] The Oklahoma Supreme Court recognized both methods "can have their shortcomings": "[w]hile a percentage computation can lead to an excessive award out of proportion with the attorney's time and labor, a lodestar computation can lead to an excessive award out of proportion with the results in the case." *Strack*, 507 P.3d at 616. Thus, the court emphasized "[t]he goal in every attorney fee case is not to select a methodology but to arrive at a reasonable fee." *Id.* To "ensure the reasonableness of the fee award . . . . [and] avoid the pitfalls in each method," courts should engage in "a detailed comparison of the results of each method." *Id.* With respect to the percentage-of-the-fund method, the court explained "attorney's fees awarded in complex class actions are normally 20% to 30% of the recovered fund, with deviations from that range" made as appropriate under the circumstances of the case. *Id.* at 617.

based method." *Id.* at 620. "Oklahoma courts should . . . use a method to calculate an incentive award similar to the lodestar method." *Id.* Specifically, "[c]ourts should grant incentive awards to class representatives based on the actual time expended on services rendered and other factors similar to those outlined in Oklahoma's class action attorney fee statute pertinent to an incentive award." *Id.* (citing Okla. Stat. Ann. tit. 12, § 2023(G)(4)(e)).

On remand, the district court, guided by *Strack*, granted the 2018 motions in separate orders. The district court rejected Objector George's contention that Rule 23(h)(1) required class-wide notice of the 2018 motion for attorneys' fees. The court next considered the thirteen factors in Oklahoma's class action attorneys' fees statute[9] and again concluded an award of 33⅓% of the common fund, or $17,333,333.33, in attorneys' fees "is entirely reasonable under the facts of this case." Joint App. at 680. The district court then conducted a lodestar calculation to cross-check the

[9] In considering the Oklahoma factors, the district court relied on its analysis of the twelve *Johnson* factors from its earlier order granting the 2015 motion for attorneys' fees. *See Johnson* v. *George Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The *Johnson* factors are "essentially the same" as those listed in Oklahoma's class action attorneys' fees statute, except the Oklahoma statute adds a thirteenth factor that the district court analyzed separately in its order. *Chieftain I*, 888 F.3d at 458, 463 ("Many courts, including this circuit, consider [the *Johnson*] factors to determine the appropriate [attorneys' fees award]."). The parties do not challenge the district court's reliance on the *Johnson* factors.

reasonableness of the amount generated by the percentage-of-the-fund method. Having found the lodestar cross-check confirmed the reasonableness of the percentage-based fee awarded to class counsel, the district court awarded class counsel $17,333,333.33 in attorneys' fees, or 33⅓% of the common fund.

As to the 2018 motion for an incentive award, the court found "[Mr. Abernathy's] entitlement to an [incentive] award . . . cannot reasonably be questioned." App. at 48. No party argued otherwise. The Objectors agreed *some* incentive award was appropriate; the only open question was how much.

The district court first rejected Objectors' arguments challenging the time Mr. Abernathy spent on the case. Based on its own experience with the litigation—over seven years by that point—the district court found this case was complex, involved significant discovery, and Mr. Abernathy was a critical player whose "expertise and advocacy for royalty owners both conceived and drove this litigation." *Id.* at 50. "A review of Mr. Abernathy's time records," the district court reasoned, "confirms that his activities throughout the litigation were appropriate to Plaintiff's role as the class representative in this type of case." *Id.* The court found Mr. Abernathy spent 774.8 compensable hours performing services "reasonably expended on behalf of the class and helpful to the litigation." *Id.* at 51–52.

The district court next considered Mr. Abernathy's hourly rate. Chieftain maintained Mr. Abernathy should be compensated at $335.58 per hour. Chieftain arrived at this figure by dividing the requested incentive award amount ($260,000) by the total hours Mr. Abernathy expended on the case (774.8). The court described Chieftain's approach as "odd" and "designed solely to preserve the Court's initial award." *Id.* at 53. Still, Mr. Abernathy had "considerable knowledge of the oil and gas industry and the law regarding royalty payments," the court reasoned, so his compensation as class representative should be "at an hourly rate that recognizes this unique level of skill, experience, and advocacy." *Id.*

To determine a reasonable hourly rate for Mr. Abernathy, the district court looked to five other Oklahoma class action settlements where Mr. Abernathy had served as class representative. In those cases, he had received incentive payments at hourly rates ranging from $142 to $400. The district court then calculated $300 as the average hourly rate for Mr. Abernathy's time across those five cases and found that rate "reasonable" here. *Id.* at 54–55. The district court held Mr. Abernathy was entitled to an incentive award of $232,440—the result of multiplying Mr. Abernathy's 774.8 total hours by the $300 hourly rate.

Objectors timely appealed.

II

In Case Nos. 22-6124 and 22-6125, Objectors appeal the district court's award of attorneys' fees. In Case No. 22-6069, Objector George appeals the district court's grant of an incentive award. We consider each appeal in turn.

A

Objector George contends the class should have been notified of the 2018 attorneys' fees motion, and the district court erroneously concluded otherwise.[10] We agree.

As a general matter, challenges to the sufficiency of a class notice under Rule 23(h) are reviewed for an abuse of discretion. *See In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1111 (10th Cir. 2001) (reviewing form and content of class notice for an abuse of discretion); *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993 (9th Cir. 2010) (reviewing Rule 23(h) challenge to class notice for abuse of discretion). "A district court abuses its discretion when it bases its decision on . . . an erroneous conclusion of law[.]" *Vallario* v. *Vandehey*, 554 F.3d 1259, 1264 (10th Cir. 2009). And "[w]e review *de novo* the district court's interpretation of the Federal Rules of

[10] Objector Nutley does not join this appellate argument.

Civil Procedure." *Esposito* v. *United States*, 368 F.3d 1271, 1275 (10th Cir. 2004).

As we explain, Federal Rule of Civil Procedure 23(h) required class-wide notice of the 2018 attorneys' fees motion. There is no dispute the class received notice of the 2015 attorneys' fee motion but did not receive notice of the 2018 attorneys' fee motion. We therefore vacate the district court's order granting the 2018 attorneys' fees motion and remand to the district court to direct notice of that motion to the class under Rule 23(h) and re-open the period for objections.[11]

1

As an initial matter, Chieftain asserts Objector George has waived any argument regarding class-wide notice. According to Chieftain, the 2015 Class Notice included language warning class members that failure to object to the proposed settlement and application for attorneys' fees by November 9, 2015 would result in waiver of any future objections. Chieftain maintains Objector George did not challenge the propriety of the 2015 Class Notice in the district court or in *Chieftain I* and thus has "waived any

[11] Given this disposition, we need not consider Objectors' challenge to the reasonableness of the attorneys' fees award itself. *See Miller* v. *Taylor*, 313 F.2d 21, 22 (10th Cir. 1962) ("[A] vacated judgment is a nullity and places the parties in the same position occupied prior to the entry of the vacated judgment . . . .").

argument regarding the *original* class-wide notice." *See* Resp. Br. at 44–45 (emphasis added) (relying on *Est. of Cummings ex rel. Montoya*, 881 F.3d 793, 801 (10th Cir. 2018) ("Any issue that could have been but was not raised on appeal is waived and thus not remanded. Parties cannot use the accident of remand as an opportunity to reopen waived issues." (quotations omitted))). We are not persuaded.

Chieftain's waiver argument proceeds from a flawed premise. Contrary to Chieftain's understanding, Objector George does not challenge the sufficiency of the 2015 Class Notice. Rather, he contends Rule 23(h)(1) required the class to receive notice of the 2018 motion for attorneys' fees. This same argument was made in the district court. Objector George argued Rule 23(h)(1) "requires that notice of [the 2018 motion for attorneys' fees], and all supporting memoranda and declarations, be directed to all class members in a reasonable manner." Joint App. at 510. The district court found unpersuasive Objector George's reliance on *Allen* v. *Bedolla*, 787 F.3d 1218, 1225–26 (9th Cir. 2015), where the class notice required class members to file objections before the attorneys' fees motion was filed. Under those circumstances, the Ninth Circuit determined the class was denied "an adequate opportunity to review and prepare objections to class counsel's completed fee motion" in violation of Rule 23(h). *Id.* at 1225 (quoting *In re Mercury*, 618 F.3d at 994–95). Here, unlike in *Allen*, the district court

reasoned, "class counsel's fee motion was filed and made available to class members before the objection deadline [in November 2015], and the reasonableness of the [2015 Class Notice] has been affirmed." Joint App. at 676.

Accordingly, Objector George's Rule 23(h)(1) argument was both "pressed" and "passed upon" in the district court, so it is preserved. *See Tesone* v. *Empire Mktg. Strategies*, 942 F.3d 979, 992 (10th Cir. 2019).

2

Objector George contends Rule 23(h) obligated the district court to direct class-wide notice of the 2018 attorneys' fees motion. He argues the 2018 attorneys' fees motion constituted a "new" fee petition made under Oklahoma law, involving a lodestar calculation, a request covering $3 million-worth of appellate services, and voluminous supporting documents not previously provided to the class. *See* George Opening Br. at 11. In Objector George's view, this new fee motion "trigger[ed] a new Rule 23(h) notice requirement." *Id.* at 14. We agree.

Rule 23(h)(1) provides "[a] claim for an [attorneys' fees] award must be made by motion . . . . Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h)(1). Rule 23(h)(1) requires class members to receive notice of "the motion" for attorneys' fees filed by class counsel. As

used in Rule 23(h)(1), "the motion" refers to "the motion that class counsel must file to make a claim for fees under Rule 23."[12] *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 895 F.3d 597, 615 (9th Cir. 2018) (citing Rule 23(h)(1)–(2)); *see also* 5 Newberg & Rubenstein on Class Actions § 8:23 (6th ed.) ("Rule 23 . . . specifically requires [notice] upon the filing of a motion for an attorney fee award.").

This circuit has not addressed whether Rule 23(h) requires that a class receive notice of a "renewed" motion for attorneys' fees after having received notice of an initial motion for attorneys' fees. However, under the

[12] Rule 23(h)(2) likewise refers to "the motion," providing "[a] class member . . . may object to the motion." The advisory committee notes on Rule 23(h)(2) explain "[i]n setting the date objections are due, the court should provide sufficient time *after the full fee motion is on file* to enable potential objectors to examine *the motion*." Fed. R. Civ. P. 23(h) advisory committee notes to 2003 amendment (emphasis added). The advisory committee notes thus make clear "the motion" as used in Rule 23(h)(2) means the attorneys' fees motion on file in the district court. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993–94 (9th Cir. 2010) ("The plain text of the rule requires that any class member be allowed an opportunity to object to the fee 'motion' itself, not merely to the preliminary notice that such a motion will be filed."). "[T]he normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *In re Woods*, 743 F.3d 689, 697 (10th Cir. 2014) (quoting *Sorenson* v. *Sec'y of Treasury of U.S.*, 475 U.S. 851, 860 (1986)); *see also Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) ("[T]here is a presumption that a given term is used to mean the same thing throughout a statute."). We thus interpret "the motion" as used in Rule 23(h)(1) to mean the same thing as "the motion" in Rule 23(h)(2): the actual motion for attorneys' fees filed by class counsel. *See Marx* v. *Gen. Rev. Corp.*, 568 U.S. 371, 376–77 (2013) (applying rules of statutory construction when interpreting Federal Rules of Civil Procedure).

plain text of Rule 23(h)(1), class members were entitled to notice of the motion filed in 2018. "Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party," the Advisory Committee notes explain, "notice is required in *all instances*." Fed. R. Civ. P. 23(h) advisory committee notes to 2003 amendment (emphasis added). We see no reason class members would have an interest in the 2015 attorneys' fee motion before remand but not the 2018 attorneys' fee motion after remand. Failing to provide class notice of the 2018 attorneys' fees motion thus contravened Rule 23(h).

Chieftain resists this conclusion, however. The 2015 Class Notice satisfied Rule 23(h), Chieftain says, and therefore, no new class-wide notice was required in 2018.[13] *See* Resp. Br. at 46. We are not persuaded.

The 2018 motion—filed nearly three years after the initial motion in 2015—was an altogether different motion for attorneys' fees. The 2018 motion sought a different amount (33⅓% of the settlement fund) than did the 2015 motion (40% of the settlement fund), expressed the award sought

[13] Chieftain likewise claims the 2015 Class Notice satisfies Oklahoma law, which does not expressly require a class notice to include lodestar data. *See* Resp. Br. at 46. Even assuming Chieftain is correct, that argument does not address the question before us: whether Rule 23(h)(1) required notice of the 2018 motion for attorneys' fees.

as a dollar amount and not a percentage, and for the first time, supported the attorneys' fees request with evidence. As the district court explained, "class counsel did not present evidence [with its initial motion for attorneys' fees] that permitted the use of a lodestar method." Joint App. at 673. By contrast, 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 673–74. Under these circumstances, 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.[14]

A contrary conclusion would run afoul of Rule 23(h)(2), which provides class members an opportunity to "object to the motion" for attorneys' fees.

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[14] The dissent says the majority opinion "requires implicitly adopting and applying a per se rule that any change to the arrangements for payment of class counsel—whatever the specifics and no matter the circumstances—mandates new and additional notice to protect class interests." Dissent at 16. But we reject the suggestion that faithful application of Rule 23(h) elevates form over substance. *See In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 895 F.3d 597, 613 (9th Cir. 2018) (reaffirming the "importance of procedural rigor in the review of [class action] settlements"). An example might help illustrate the nature of the dissent's misunderstanding. Consider a circumstance—not presented here—where class counsel files an amended motion for attorneys' fees and

"The most important issue in terms of the timing of fee petitions in class suits is that sufficient time must be given to class members to object to the petition, as Rule 23(h)(2) guarantees class members that opportunity." Newberg & Rubenstein, § 15:13; *see also In re Volkswagen*, 895 F.3d at 615 (explaining "[w]hat matters [for Rule 23(h)] is that the class members have a chance to object to the fee motion when it is filed."). "For the right to object to be meaningful, the class must obviously receive notice of the proposed fee prior to the objection deadline." Newberg & Rubenstein, § 15:13. The advisory committee notes explain "[i]n setting the date objections are due, the court should provide sufficient time *after the full fee motion is on file* to enable potential objectors to examine the motion." Fed. R. Civ. P. 23(h) advisory committee notes to 2003 amendment (emphasis added).

Here, the 2015 Class Notice set an objection deadline a few weeks before the final fairness hearing on November 30, 2015. The 2015 Class Notice provided "written objection[s] must be filed in and received by the Court . . . no later than November 9, 2015" and explained objecting entailed

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does so before the objections period expires. Say that amended motion is, in all material respects, identical to the original fee motion. In such a case, there could be an argument the original notice already informed the class of "the motion" pending before the court and thus Rule 23(h) has been satisfied. *See* Fed. R. Civ. P. 23(h)(1). But we need not dwell on hypotheticals because the dispositive question will always be the same: did notice comply with Rule 23(h)? Here, as the dissent agrees, the answer is no.

"telling the Court that you do not like something about the Settlement." Supp. App. vol. 3 at 19. The objections contemplated by the 2015 Class Notice were thus in reference to what was then pending before the district court: the motion for final approval of the proposed class action settlement and the 2015 motion for attorneys' fees and an incentive award. Nothing in the 2015 Class Notice, however, provided class members with any indication that the litigation may develop such that nearly three years later, Class Counsel might file a different motion for attorneys' fees. Without notice of the 2018 motion for attorneys' fees, the class lacked an opportunity to object to the new attorneys' fee request or scrutinize the supporting evidence previously unavailable. This result cannot be reconciled with the requirements of Rule 23(h).[15]

Finally, Chieftain asks us to find any error under Rule 23(h) harmless, but we decline the invitation. Chieftain contends the 2018

[15] Our sister circuits have also emphasized the importance of class members having an opportunity to object to the attorneys' fees motion then pending before the court. *See In re Mercury*, 618 F.3d at 994–95 (explaining that Rule 23(h) contemplates the class having a "full and fair opportunity to examine and oppose the [attorneys' fees] motion" and noting "[a]llowing 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"); *Allen* v. *Bedolla*, 787 F.3d 1218, 1226 (9th Cir. 2015) ("[T]he district court must give the entire class . . . the opportunity to review class counsel's completed fee motion and to submit objections if they

attorneys' fees motion was more "benefi[cial]" to the class than the original attorneys' fees motion in 2015. *See* Resp. Br. at 49–50. According to Chieftain, "[t]o this day, [Objectors] are the only persons who have objected to Class Counsel's fees," and on remand "Class Counsel [have] asked for *less* money and supplied *more* information in support." *Id.* at 49. Chieftain suggests that since the majority of the class did not object to a 40% fee, it is safe to assume there would have been no objection to a 33⅓% fee, so any lack of notice resulted in no harm.

We will not speculate to find the error harmless.[16] On the record before us, we decline to make assumptions about how thousands of class

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so choose."); *Redman* v. *RadioShack Corp.*, 768 F.3d 622, 637–38 (7th Cir. 2014) (finding Rule 23(h) was violated where class members' ability to object to the motion for attorneys' fees was undermined because "the details of class counsel's hours and expenses were submitted later . . . and so they did not have all the information they needed to justify their objections"); *Keil* v. *Lopez*, 862 F.3d 685, 705 (8th Cir. 2017) ("[W]e have little difficulty in concluding that *Mercury* and *Redman* correctly interpreted Rule 23(h)(2)."); *Johnson* v. *NPAS Solutions, LLC*, 975 F.3d 1244, 1252 (11th Cir. 2020), *cert. denied*, 143 S. Ct. 1746 (2023) (finding "the class members' right to object to class counsel's fee request [requires] that the fee petition itself must be filed prior to the class members' objection deadline"); *In re Nat'l Football League Players Concussion Inj. Litig.*, 821 F.3d 410, 446 (3d Cir. 2016), *as amended* (May 2, 2016) (explaining "[w]e have little trouble agreeing that Rule 23(h) is violated" if, "[b]y the time [class members] [are] served with notice of the fee petition, it [is] too late for them to object").

[16] The dissent invokes *Morrison Knudsen Corp.* v. *Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1239 (10th Cir. 1999) for the proposition that "if the court is unable, for whatever reasons, to determine whether an error was

members would have viewed the 2018 attorneys' fees motion had they been properly notified under Rule 23(h).[17] But it takes little guesswork

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prejudicial or harmless" in ordinary civil cases, the appellant "must lose." Dissent at 4. We respectfully find the dissent's reliance on *Morrison* unpersuasive.

In *Morrison*, this court considered the harmlessness of allegedly erroneous jury instructions. *Id.* at 1236. In our analysis, we determined the appellant had failed to provide a sufficient record to permit meaningful appellate review of the alleged error and allow us to determine whether the appellant was prejudiced. *Id.* at 1238. We also faulted the appellant for failing to make any "basic 'contention' essential to any conclusion that the error prejudiced its substantial rights." *Id.* at 1239. Under these circumstances, we reasoned, the court would have had to "speculate baselessly" to find prejudice. *Id.*

But here, only a finding of *harmlessness* requires baseless speculation. The record is fully developed and shows the 2018 attorneys' fees motion provided—for the first time in the litigation of this case—a significant volume of evidence pertaining to class counsel's work. Had Rule 23(h) notice been provided, the class would have been able to meaningfully assess the 2018 motion's proposed allocation of over $17 million of the settlement fund to class counsel. The class received no such opportunity.

[17] The dissent agrees the district court erred under Rule 23(h). Still, the dissent concludes affirmance is required because the error is harmless. We respectfully fail to see how the record and arguments before us could permit such a conclusion.

First, the dissent raises and resolves arguments on harmlessness that Chieftain never made. And in doing so, the dissent fashions and applies its own legal test, because Chieftain has provided no framework for assessing its conclusory assertion that the Rule 23(h) error here caused no harm. Chieftain asserts only that Objector George "is wrong that [new] notice would generate additional support for [Objectors'] cause" because "additional lodestar information did nothing if not engender more support for Class Counsel." Resp. Br. at 49. And for this reason alone, Chieftain

asserts, "there certainly was no harm." Resp. Br. at 49. Given this passing reference to harm in Chieftain's appellate brief, we readily could have found the harmless error argument "inadequately presented" and refused to address it. *See Bronson* v. *Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007); *see also United States* v. *Walker*, 918 F.3d 1134, 1151 (10th Cir. 2019) (explaining the "briefing-waiver rule applies . . . to arguments that are 'inadequately presented'" or advanced "only 'in a perfunctory manner'" (citations omitted)). Still, we proceed to address the limited argument Chieftain actually advanced—but no more. *See Perry* v. *Woodward*, 199 F.3d 1126, 1141 n.13 (10th Cir. 1999) ("This court . . . will not craft a party's arguments for him."); *United States* v. *Sineneng-Smith*, 590 U.S. 371, 375–76 (2020) ("[A]s a general rule, our system 'is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." (alteration omitted) (quoting *Castro* v. *United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment))).

Second, the dissent is wrong on the merits of the harmlessness inquiry. According to the dissent, Objector George "adequately (if not identically) represented [class-wide] interests," and "comprehensively, if not exhaustively, addressed the relevant concerns about the 2018 motion." Dissent at 8, 10 n.7. This is pure conjecture. We see no basis to conclude Objector George's views on the attorneys' fees motion can stand in for those of the entire class. Unlike the dissent, we refuse to speculate that Objector George's objections "reflect the collective concerns of the class" or that "no other relevant objections could have reasonably been raised [by the class] in this context even if more notice had been given." Dissent at 1, 18 n.12. It is our role to review the appellate record, not to guess what it might have shown. The dissent also faults Objector George for failing to present an argument to the district court that "issuing another round of notice would have elicited further objections . . . . [or that] any such objections could have materially impacted the fees the district court ultimately awarded." Dissent at 12. But the dissent cites no authority establishing such an obligation in this context, nor are we aware of any. To the extent the dissent suggests Objector George has not sufficiently shown the district court ruling caused harm, we disagree. On the record before us, the Rule 23(h) error cannot just be written off as harmless.

to conclude class members would have been prejudiced by their inability to review voluminous evidence about class counsel's work that was not previously available and to make informed decisions about whether to object—and on what grounds—to the 2018 attorneys' fees motion. *See In re Syngenta AG MIR 162 Corn Litig.*, 61 F.4th 1126, 1179 (10th Cir. 2023) (describing an error as harmful if it "prejudiced the party's substantial rights"); *see also* Newberg & Rubenstein, § 15:13 (describing class members having the opportunity to object as "the most important issue" in timing an attorneys' fees petition).

The district court abused its discretion by not requiring notice of the 2018 motion for attorneys' fees. On remand, the district court should direct notice of the 2018 attorneys' fees motion to the class in a reasonable manner that provides a meaningful opportunity to object to the motion and its supporting documentation.[18]

[18] Chieftain contends it would be too expensive to provide class-wide notice of the 2018 attorneys' fee motion. The record suggests otherwise. Here, a physical copy of the evidence supporting the lodestar calculation would not have to be provided to each class member, particularly because a website was previously maintained and updated. *See* 5 Newberg & Rubenstein on Class Actions § 15:13 (6th ed.) ("Since the development of PACER and settlement websites, class members now have the technological capacity to review the full fee petition and its supporting documentation at little cost."). In any event, Chieftain's argument about the expense of providing a particular form of Rule 23(h) notice is best addressed to the district court on remand.

B

Next, in Case No. 22-6069, we consider Objector George's[19] challenge to the incentive award. Objector George does not dispute Rule 23 permits courts to grant an incentive award.[20] And he agrees Mr. Abernathy, as class representative, was entitled to *some* incentive award. The only question is whether granting an incentive award to Mr. Abernathy in the amount of $232,440 was an abuse of discretion. We discern no reversible error.[21]

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[19] Objector Nutley did not join in this appeal.

[20] We acknowledge a circuit split on whether incentive awards for class representatives are authorized by law. *See Johnson*, 975 F.3d at 1260 (holding incentive payments in Rule 23 class action settlements are *per se* unlawful); *Murray* v. *Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 353 (1st Cir. 2022) (declining to follow *Johnson* and explaining "we choose to follow the collective wisdom of courts over the past several decades that have permitted . . . incentive payments, rather than create a categorical rule that refuses to consider the facts of each case."). The question dividing some of our sister circuits is not presented in this case.

[21] We note the class also did not receive notice of the 2018 motion for an incentive award. However, an incentive award "is not a fee award, governed by Rule 23(h)." Newberg & Rubenstein, § 17:10. Rather, "[i]t is an additional disbursement from the settlement fund to these class members, over and above what the other class members are receiving; as such, it is governed by the provision in Rule 23(e) that requires the court to ensure that the settlement fund is distributed equitably." *Id.* Rule 23(h) thus has no bearing on Objector George's appeal of the incentive award. No party contends otherwise.

1

Before we turn to the merits of Objector George's appeal, we first address a potential jurisdictional issue. *Citizens Concerned for Separation of Church & State* v. *City & Cnty. of Denver*, 628 F.2d 1289, 1301 (10th Cir. 1980) ("A federal court must in every case, and at every stage of the proceeding, satisfy itself as to its own jurisdiction . . . ."). Our appellate jurisdiction extends to "appeals from all final decisions of the district courts." 28 U.S.C. § 1291. "Absent an assurance that jurisdiction exists, a court may not proceed in a case." *Cunningham* v. *BHP Petrol. Gr. Brit. PLC*, 427 F.3d 1238, 1245 (10th Cir. 2005).

The issue before us is whether the district court's order granting the 2018 incentive award motion was final and appealable when Objector George noticed his appeal of that order. To answer this question, we first must provide some procedural background. We ultimately conclude we have jurisdiction to hear the incentive award appeal.

Following remand in *Chieftain I*, the district court issued two separate orders: on March 31, 2022, the court entered an order on class representative's incentive award (the March 31 order); and on June 22, 2022, it entered an award on Class Counsel's attorneys' fees (the June 22

order).[22] On April 29, 2022, Objector George noticed an appeal of the March 31 order granting the incentive award. At that time, the motion for attorneys' fees was still pending.[23] Shortly after Objector George filed his notice of appeal, we directed the parties, in their merits briefing, to "address this court's jurisdiction" over the March 31 order. It was not clear whether that order was final because "[o]ther proceedings related to the settlement remain[ed] ongoing in the district court."[24]

On appeal, Objector George contends we have jurisdiction to review the March 31 order. He acknowledges "[a]t the time of the appeal, the district court still had pending before it a . . . motion for attorney's fees following this Court's [*Chieftain I*] remand." Opening Br. at 5. But even if his notice of appeal was premature when filed, he explains, it ripened when

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[22] The district court's jurisdiction arose under 28 U.S.C. § 1332(d)(2). This provision grants jurisdiction to federal district courts in a class action where the parties are citizens of different states and the amount in controversy exceeds $5 million. Chieftain originally filed this action in Oklahoma state court, but SM Energy, a party no longer involved in the proceedings, removed the case to federal court.

[23] On July 22, 2022, Objector George filed a separate notice of appeal of the district court's June 22 order granting the motion for attorneys' fees.

[24] Chieftain never stated its position on whether jurisdiction exists over the incentive award appeal. But it is ultimately Objector George's burden to demonstrate jurisdiction, and he has done so. *See Radil* v. *Sanborn W. Camps, Inc.*, 384 F.3d 1220, 1224 (10th Cir. 2004) ("The party invoking federal jurisdiction bears the burden of establishing such jurisdiction as a threshold matter.").

the district court resolved the motion for attorneys' fees on June 22 and thereby "conclud[ed] all matters in the case." *Id.*[25] We agree.

"Mandates from single appeals are not separable." *Zinna* v. *Congrove*, 755 F.3d 1177, 1182 (10th Cir. 2014). Our mandate in *Chieftain I* involved remand proceedings for *both* the incentive award and the attorneys' fees award. *See Chieftain I*, 888 F.3d at 458 (holding "[t]he district court failed to compute attorney fees under the . . . method . . . required by Oklahoma law" and concluding "the incentive award is unsupported by the record"). Accordingly, the district court's rulings on remand were not appealable until the district court "fully and finally adjudicated . . . our singular mandate." *Zinna*, 755 F.3d at 1182. That did not happen until June 22, when the district court resolved both the attorneys' fees and incentive awards. Under these circumstances, Objector George's notice of appeal from the district court's March 31 order was premature when filed.

[25] Objector George additionally argues the district court's March 31, 2022 incentive award order was appealable while the 2018 attorneys' fees motion was still pending because "a fee motion does not delay the deadline for entry of a judgment or extend the time for filing an appeal" under Federal Rule of Civil Procedure 58(e). Opening Br. at 5. He does not provide any further explanation or authority in support of this assertion. We need not address this argument, however, because we conclude Objector George's notice of appeal of the March 31, 2022 order was premature when filed but ripened when the district court fulfilled its instructions on remand by entering its June 22, 2022 order on the 2018 motion for attorneys' fees.

"[A] premature notice of appeal may ripen upon the conclusion of the district court proceedings if we have not yet dismissed the premature appeal[.]" *In re Syngenta AG MIR 162 Corn Litigation*, 61 F.4th at 1174 (internal quotation marks and alteration omitted). Here, Objector George's premature notice of appeal ripened when the district court's June 22 order entered, thus satisfying our singular mandate in *Chieftain I*. *See Zinna*, 755 F.3d at 1182 (explaining the district court's disposition became "final" once it satisfied the entirety of this court's mandate for remand). Having determined we have jurisdiction over the incentive award appeal, we now consider the merits.

2

"We review a district court's grant of an incentive award for abuse of discretion." *Chieftain I*, 888 F.3d at 466. "In doing so, we review the district court's application of legal principles de novo, and we review the district court's findings of fact for clear error." *Schell* v. *OXY USA Inc.*, 814 F.3d 1107, 1126 (10th Cir. 2016) (quoting *ClearOne Commc'ns, Inc.* v. *Blamp Sys.*, 653 F.3d 1163, 1184 (10th Cir. 2011)).

"Courts regularly grant incentive awards to compensate named class representatives for the work they performed—their time and effort invested in the case." *Strack*, 507 P.3d at 620 (citing *Chieftain I*, 888 F.3d at 468). These awards are permissible under Oklahoma law "as payment for

reasonable services rendered by class representatives on behalf of the class that were helpful to the litigation." *Id.* However, "the request for an incentive award must be supported by sufficient evidence in the record," and the use of a percentage-based method to calculate an incentive award is "disfavored, if not altogether forbidden." *Id.* (quoting Newberg & Rubenstein, § 17:16).

In *Strack*, the Oklahoma Supreme Court instructed "Oklahoma courts should . . . use a method to calculate an incentive award similar to the lodestar method." *Id.* This means an award should be "based on the actual time expended on services rendered and other factors similar to those outlined in Oklahoma's class action attorney fee statute pertinent to an incentive award." *Id.* (citing Okla. Stat. Ann. tit. 12, § 2023(G)(4)(e)); *see also* Newberg & Rubenstein, § 17:12 (explaining incentive awards are based on evidence of the particular services performed, the risks encountered, and any other factors pertinent to the award).

Here, the district court found Mr. Abernathy should receive an incentive award of $232,400. To arrive at this amount, the district court multiplied the number of hours Mr. Abernathy spent working on the case by what the court determined was a reasonable hourly rate for Mr. Abernathy's time. To arrive at the number of hours worked, the district court included time Mr. Abernathy spent on the appeal in *Chieftain I*,

finding this time was "reasonably expended on behalf of the class and helpful to the litigation." App. at 51–52. In selecting a reasonable hourly rate, the district court looked to the incentive awards Mr. Abernathy received in five other class action settlements in Oklahoma, noted the hourly rate in each, and then averaged those hourly rates to $300 for Mr. Abernathy's services as class representative. *Id.* at 54–55 (collecting cases).[26]

[26] The district court relied on the following rulings granting Mr. Abernathy incentive awards: Order Awarding Case Contrib. Award at 10, *Chieftain Royalty Co.* v. *SM Energy Co.*, No. 18-cv-01225-J (Doc. No. 117), (W.D. Okla. Apr. 27, 2021) (awarding Mr. Abernathy $50,000.00 for approximately 350 hours of time, yielding an hourly rate of approximately $142); *Chieftain Royalty Co.* v. *Newfield Expl. Mid-Continent Inc.*, No. 6:17-cv-00336-KEW, 2020 WL 8339214, at *4 (E.D. Okla. Mar. 3, 2020) (awarding Mr. Abernathy $75,000.00 for approximately 190 hours of time, yielding an hourly rate of approximately $400); *Chieftain Royalty Co.* v. *Marathon Oil Co.*, No. 6:17-cv-00334-SPS, 2019 WL 7758680, at *4 (E.D. Okla. Mar. 8, 2019) (awarding Mr. Abernathy $50,000.00 for approximately 175 hours of time, yielding an hourly rate of approximately $285); Order Awarding Case Contrib. Award at 6, *Chieftain Royalty Co.* v. *XTO Energy Inc.*, No. 6:11-cv-00029-KEW (Doc. No. 230), (E.D. Okla. Mar. 27, 2018) (awarding Mr. Abernathy $225,000.00 for approximately 750 hours of time, yielding an hourly rate of approximately $300); Order Awarding Case Contrib. Award at 7–8, *Chieftain Royalty Co.* v. *BP Am. Prod. Co.*, No. 4:18-cv-00054-JFH-JFJ (Doc. No. 179), (N.D. Okla. Mar. 2, 2022) (awarding Mr. Abernathy $150,000.00 for approximately 400 hours of time, yielding an hourly rate of approximately $375). In its 2018 incentive award motion, Chieftain cited one of these rulings in support of its request for an incentive award. *See* 22-6069 Supp. App. vol. 3 at 127 (citing *Chieftain Royalty Co.* v. *XTO Energy Inc.*, No. 6:11-cv-00029-KEW (Doc. No. 230), (E.D. Okla. Mar. 27, 2018)). In its order granting the 2018 incentive award motion, the district court took "judicial notice that following [*Chieftain I*] Plaintiff began

Objector George urges reversal, challenging the district court's calculation of the incentive award on two primary grounds. First, he contends the incentive award should not include compensation for time spent by Mr. Abernathy on *Chieftain I*. Second, he claims $300 was an unreasonable hourly rate for Mr. Abernathy. We reject both arguments.

a

Mr. Abernathy has expended 774.8 hours on this litigation.[27] His work on *Chieftain I* constitutes approximately 160.5 hours of this time. Mr. Abernathy's time on *Chieftain I* should not have factored into the incentive award, Objector George insists, because those 160.5 hours "related solely to protecting his own incentive bounty and Class Counsel's outsized fee."

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applying for incentive awards based, at least in part, on information regarding the number of hours worked as a class representative." App. at 54. The district court then cited the four other rulings, each of which was entered after Chieftain filed its 2018 motion for an incentive award in this case. None of the parties challenge the district court's decision to take judicial notice of the incentive awards in these four class action settlements. Rather, Objector George argues averaging the incentive awards Mr. Abernathy received across the five total settlements is an "utterly arbitrary . . . method of deriving a reasonable hourly rate." Opening Br. at 19.

[27] At the time of filing the 2018 motion for an incentive award, Mr. Abernathy had spent 724.8 hours working on this litigation. He estimated he would spend at least 50 more hours on this case before the settlement funds were distributed to the class, bringing his total hours spent on this litigation to 774.8. On remand, Objectors did not challenge the 50 hours Mr. Abernathy estimated he would spend distributing and administering the settlement proceeds following *Chieftain I*.

Opening Br. at 9, 15–16. A lead plaintiff becomes "adverse to the class he represents at the stage where he requests an incentive award," Objector George explains. *Id.* at 13. And therefore, "a lead plaintiff may not be compensated for any time devoted to defense of an appeal of his incentive award, let alone an unsuccessful one."[28] *Id.*

Chieftain recognizes that, under Oklahoma law, Mr. Abernathy may be compensated only for time on *Chieftain I* that was "helpful to the litigation." *See* 22-6069 Resp. Br. at 16 (quoting *Strack*, 507 P.3d at 620). And here, Chieftain asserts, Mr. Abernathy's time was helpful. *Chieftain I* was not just about litigating fee awards, as Objector George claims; it involved defending against a challenge to the validity of the settlement. *Id.* at 10. Mr. Abernathy's efforts on appeal were helpful to that aspect of the

[28] The parties dispute what Oklahoma law says on whether an incentive award may compensate a class representative for time spent defending the incentive award on appeal. According to Chieftain, *Strack* instructs courts considering an incentive award to look to principles governing attorneys' fee awards, which are set forth in *Burk* v. *City of Oklahoma City*, 598 P.2d 659 (Okla. 1979). *Strack*, 507 P.3d at 619–20. In *Burk*, the Oklahoma Supreme Court approved an attorneys' fee award for time spent defending the fee award on appeal. 598 P.2d at 662. Chieftain argues *Strack* merely extends *Burk* to the incentive award context. Objector George disagrees. As we will explain, it is clear on this record that Mr. Abernathy's services were "helpful to the litigation." *Strack*, 507 P.3d at 620. So we need not consider further, particularly in the absence of controlling Oklahoma authority, whether Oklahoma law embraces a *per se* policy of allowing incentive awards to compensate a class representative for time spent defending an incentive award on appeal.

litigation, Chieftain maintains, and thus properly included in the lodestar calculation of the incentive award. We agree with Chieftain.

"[I]ncentive awards are justified as payment for reasonable services rendered by class representatives on behalf of the class that were helpful to the litigation." *Strack*, 507 P.3d at 620. A review of the litigation history confirms *Chieftain I* resolved more than the attorneys' fees and incentive awards—the decision in that appeal affirmed the finality and validity of the class settlement itself.

As originally published, *Chieftain I*'s disposition stated only that "[w]e REVERSE the attorney-fee and incentive awards and REMAND for further proceedings consistent with this opinion." Supp. App. vol. 1 at 201. Soon after, Chieftain filed a petition for panel rehearing and rehearing *en banc*. Chieftain observed that both objectors had appealed the district court's order approving the settlement, yet the panel's opinion failed to state whether the underlying class settlement was final and approved. Chieftain argued the panel's opinion "should be amended . . . to reflect that the district court's judgment was affirmed to a significant extent, and . . . revised to clarify that appellants' challenge to the settlement was rejected." *Id.* at 172.

We denied rehearing and rehearing *en banc*. But we amended the original opinion *sua sponte* in *Chieftain I* to clarify: "[w]e AFFIRM the

district court's Order and Judgment Granting Final Approval of Class Action Settlement." *See Chieftain I*, 888 F.3d at 470.[29]

Our amended opinion thus demonstrates *Chieftain I* involved a direct attack on, and successful defense of, the settlement itself, which ultimately secured a significant benefit for the class—$52 million. *Chieftain I* explicitly upheld that settlement. Under these circumstances, we do not doubt Chieftain's appellate efforts were "helpful to the litigation" and expended "on behalf of the class." *Strack*, 507 P.3d at 620.

The question remains, however, whether Mr. Abernathy contributed to these efforts in a way that was "helpful to the litigation." *Id.* The district court found Mr. Abernathy's "continued efforts to effectuate the settlement agreement [on appeal] plainly benefit[ted] the class as a whole" and determined "the services performed by Mr. Abernathy were rendered on behalf of the class and helpful." App. at 51–52. On appeal, Objector George contends Mr. Abernathy's time largely duplicated that of Class Counsel. And therefore, Objector George insists the hours Mr. Abernathy spent on *Chieftain I* are not compensable. Having reviewed the record, we cannot say the district court clearly erred. *See Flying J Inc.* v. *Comdata Network, Inc.*, 405 F.3d 821, 829 (10th Cir. 2005) ("A finding is clearly erroneous when,

[29] The amended opinion was filed *nunc pro tunc* to the filing date of the initial opinion.

although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").

On remand, Chieftain "supplied [the district court with] evidence of [Mr. Abernathy's] services through [his] declaration and time records and the declaration of Plaintiff's counsel describing the assistance [he] provided." App. at 49. Much of this evidence demonstrates Mr. Abernathy's value-add was during the district court litigation—not during the appellate proceedings—when settlement talks and negotiations were still ongoing.[30] Still, Class Counsel's declaration explained Mr. Abernathy "was [also] involved in . . . the efforts that went into protecting th[e] Settlement on appeal [in *Chieftain I*]." 22-6069 Supp. App. vol. 3 at 64. Class Counsel described how Mr. Abernathy's "experience, knowledge and skill in the oil and gas field, and as an attorney" permitted him to meaningfully "review[] . . . court filings." *Id.* Likewise, in his own declaration, Mr. Abernathy attested he "was personally and directly involved with the appeal,"

[30] For example, as the district court noted, "[c]omparing Mr. Abernathy's declaration and time entries to filings and activities in the case, the record is clear that he was actively involved in investigating and developing the claims, participating in discovery, monitoring filings and litigation activities, attending court hearings and private mediation, [and] participating in settlement negotiations and negotiation of settlement terms." App. at 50.

including "many consultations with Class Counsel regarding the issues raised in the appeal." *Id.* at 104. Similarly, Mr. Abernathy "review[ed] and discuss[ed] the panel opinion that was issued in July 2017" with Class Counsel, specifically "discussing . . . issues related to the petition for rehearing." *Id.* The record on appeal thus supports the district court's conclusion Mr. Abernathy's efforts in *Chieftain I* were "helpful to the litigation" and thus properly included in the lodestar calculation. *See Strack*, 507 P.3d at 620.

b

But that is not the end of the analysis. We must still consider whether, as Objector George contends, the district court abused its discretion by arriving at a $300 hourly rate for Mr. Abernathy's services as class representative. As we explain, we cannot say the district court erred on this record.

The district court found Class Counsel "utilized Mr. Abernathy's considerable knowledge of the oil and gas industry . . . for the benefit of the class as a whole, and [Mr. Abernathy] should be compensated at an hourly rate that recognizes this unique level of skill, experience, and advocacy." App. at 53. But, as the district court acknowledged, this calculus was no easy task. According to the district court, it would be "odd" to quantify a reasonable hourly rate for Mr. Abernathy's services simply by dividing the

requested amount ($260,000) by the number of hours expended on this case (774.8). *Id.* This method, therefore, was rejected. The district court observed that Chieftain, other than pointing to a different case where Mr. Abernathy received an incentive award, made "no attempt to provide an objective measure of the value of Mr. Abernathy's time, for example, by reference to his compensation as its president or as an industry expert or advocate." *Id.* Similarly, Objector George proposed "a rate of $25/hour is more than reasonable for . . . this case" but otherwise provided no metric for calculating a reasonable hourly rate for Mr. Abernathy's services. *Id.* at 39.

Given the limited information provided by the parties, the district court looked to incentive awards given to Mr. Abernathy for his services as class representative in four class action cases in Oklahoma between 2019 and 2022. The district court considered those four cases, and the one referenced by Chieftain, and taking "all these cases . . . together," determined the average hourly rate was $300, which it found "is a reasonable hourly rate for this case as well." *Id.* at 55.

On appeal, Objector George contends the district court used an "utterly arbitrary . . . method" to calculate Mr. Abernathy's hourly rate. Opening Br. at 19. By averaging the hourly rates of compensation in five oil and gas class action settlements where Mr. Abernathy served as class representative—"[r]ather than insisting on evidence of the actual value of

Mr. Abernathy's time" in *this* case—Objector George contends the district court erroneously outsourced the determination of a reasonable hourly rate to other courts. *Id.* at 18. Those cases, Objector George maintains, "arbitrarily derived [the rate] by dividing the [requested] case contribution award by [Mr. Abernathy's] claimed hours [spent on the case]."[31] *Id.* at 18–19. He contends "[t]he arbitrary numbers resulting from these perfunctory exercises in division are meaningless." *Id.* at 20.

This is a closer question, but we discern no abuse of discretion. Importantly, the district court's approach comported with *Strack*. That case instructs district courts to grant incentive awards "based on the actual time expended on services rendered and other factors similar to those outlined in Oklahoma's class action attorney fee statute pertinent to an incentive award." 507 P.3d at 620 (citing Okla. Stat. Ann. tit. 12, § 2023(G)(4)(e)). As

[31] In his opening brief, Objector George emphasizes that in *Chieftain I*, we described incentive awards as ranging between $11,000 and $15,000. *See Chieftain I*, 888 F.3d at 464. From this, Objector George maintains, "[t]o the extent that there is a 'market rate' for case contribution awards," it would be the "$11,000-$15,000 range described [in *Chieftain I*], not the arbitrary and percentage-based awards approved [in the five settlements relied upon by the district court]." Opening Br. at 20–21. But *Chieftain I* described a range of average amounts for incentive awards over time, not a fixed market rate of compensation for class representatives. *See Chieftain I*, 888 F.3d at 464 (summarizing studies of incentive awards to class action plaintiffs). In other words, contrary to Objector George's assertion, *Chieftain I* did not hold incentive awards for class representatives must fall between $11,000 and $15,000, or even that this range represents the market rate for class representatives.

Chieftain correctly points out, one factor listed in that statute is "awards in similar [cases]." 22-6069 Resp. Br. at 25 (citing Okla. Stat. Ann. tit. 12, § 2023(G)(4)(e)(12)); *see also Strack*, 507 P.3d at 616 n.8 (explaining one of the § 2023(G)(4)(e) factors is "awards in similar cases"). The five cases the district court considered were undoubtedly "similar" to this case: each involved an incentive award specific to Mr. Abernathy, in oil and gas class action settlements in Oklahoma federal courts with Chieftain as the plaintiff, within the last six years. Despite Objector George's contrary assertions, the five other settlements are not "meaningless" datapoints. *See* Opening Br. at 20.

The district court's incentive award analysis also specifically considered Mr. Abernathy's "unique level of skill, experience, and advocacy," "zealous and extremely fruitful" pursuit of this litigation, "active[] involve[ment] in this Litigation from its inception . . . . [and while it] was pending on [the district court's] active docket for more than seven years," and the case's "highly technical and complicated" nature. App. at 48–50, 53. These observations bear on other factors enumerated in the Oklahoma attorney fee statute, specifically, "the amount in controversy and the results obtained," "the experience, reputation and ability of the [representative]," "the nature and length of the professional relationship," "the novelty and difficulty of the questions presented by the litigation," and

"the skill required to perform the . . . service properly." Okla. Stat. Ann. tit. 12, § 2023(G)(4)(e)(2), (3), (8), (9), (11). Thus, in calculating an incentive award, the district court considered "factors outlined in Oklahoma's class action attorney fee statute pertinent to an incentive award"—the precise methodology set forth in *Strack*. 507 P.3d at 620.[32]

We discern no abuse of discretion in the district court's conclusion that $300 per hour is a reasonable rate of compensation for Mr. Abernathy's work on this case. The incentive award of $232,440 is affirmed.

III

We **AFFIRM** the district court's award of a $232,400 incentive award to Mr. Abernathy. We **VACATE** the district court's award of attorneys' fees and **REMAND** for the district court to direct the issuance of class-wide notice of the 2018 motion for attorneys' fees and re-open the period for

[32] In his Reply Brief, Objector George appears to assert determining a reasonable hourly rate for a class representative "is the basis for awarding any [incentive] award at all." *See* Reply Br. at 13. But this contention does not align with *Strack*, which holds courts should "use a method to calculate an incentive award *similar to* the lodestar method," basing these awards "on the actual time expended on services rendered *and other factors similar to* those outlined in Oklahoma's class action attorney fee statute *pertinent to an incentive award*." 507 P.3d at 620 (emphasis added).

objections, consistent with the requirements of Federal Rule of Civil Procedure 23(h).[33]

[33] We deny Objector Nutley's request for judicial notice. Objector Nutley's request, which pertains to the district court's award of attorneys' fees, has been rendered moot by our disposition.

22-6069, 22-6124, 22-6125, *Chieftain Royalty Company v. SM Energy Company, et al.*

TYMKOVICH, Circuit Judge, concurring in part and dissenting in part.

The essential question before us is whether, following our decision in *Chieftain I*, the district court erred when it refused to direct new notice under Rule 23(h). Under Rule 23(h)(1), district courts "must" "direct notice" of a motion for attorneys' fees to class members in "a reasonable manner." And under Rule 23(h)(2), a class member "may" "object" to that motion. I agree with the Court that, on the facts here, we cannot say the 2015 Class Notice of the 2015 motion for attorneys' fees provided the Class with notice of the 2018 "renewed" motion for attorneys' fees. I therefore conclude that these facts fit comfortably under the same legal error identified in *Mercury* and *Redman*.

But even if we conclude that the district court erred in applying Rule 23(h), we should "only reverse and remand in circumstances where [we] cannot conclude that the error was harmless." *In re Syngenta AG MIR 162 Corn Litig.*, 61 F.4th 1126, 1179 (10th Cir. 2023). This is where I part ways with the Court. Objector George, an objector with interests identical to the class in this context, examined the evidence and presented relevant objections to the district court. And no other relevant objections could have reasonably been raised in this context even if more notice had been given. Consequently, additional notice would not introduce additional objections different from the ones Objector George raised. Even if so, those objections, in this lodestar context, would not change the attorneys' fees amount that the district court determined were reasonable. Given that failure to provide more notice is unlikely to have affected the substantial rights of the class (whether to object or the fees ultimately awarded), I would conclude that the

error here (if any) was harmless. Because the Court concludes otherwise, I respectfully dissent from those portions of the opinion.[1]

To determine whether there is harm, we first need to examine the underlying error. The error here stems from the 2015 motion's lack of lodestar evidence: the 2015 motion's lack of lodestar evidence fundamentally differentiates it from the 2018 motion, rendering the 2015 notice substantively inadequate for the 2018 context. In 2015, the attorneys' fees award calculation was based on the Common Fund method. The district court noted in 2015 that "class counsel did not present evidence [with its initial motion for attorneys' fees] that permitted the use of a Lodestar method." Joint App. at 673. But in 2018, the attorneys' fees award calculation was based on the lodestar method.[2] And, as the panel recognizes, in support of the 2018 motion for attorneys' fees on remand, "class counsel

[1] Although the record of the case supports the panel's identified legal error, we are responsible for determining whether and how the legal errors present in the case record affected the substantial rights of the parties involved. *See* 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."). To conclude that it "takes little guesswork to conclude class members would have been prejudiced," says nothing about the substantial rights of the class members and relies on "mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record." *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009).

[2] "In a common fund case, the fund, itself, is the measure of an attorney's success." *In re Syngenta AG MIR 162 Corn Litigation*, 61 F.4th at 1192. The percentage of the fund taken as fees is critical. The lodestar method, by contrast, "produces an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Id.* The reasonableness rests on a detailed justification of hours worked and rates.

compiled an extensive evidentiary record that include[d] time records for each attorney, paralegal, and legal assistant whose work is included in a lodestar computation, and declarations from the individual attorneys." Therefore, transitioning from the common fund method to the lodestar method between 2015 and 2018 constituted a major change not covered or anticipated by the 2015 notice because it introduced another basis for calculating attorneys' fees and materially altered the distribution of the settlement fund in a way not anticipated by the initial notice. Understood this way, if the district court erred, then I would situate that error under the rubric described in *Redman*. Given the particular importance of knowing the underlying evidentiary basis for the attorneys' fees request in a lodestar context, potential objectors in 2015 became "handicapped" by "not knowing the rationale that would be offered for the fee request" in 2018. *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014). The panel, for its part, correctly identified the defect: "[w]ithout notice of the 2018 motion for attorneys' fees, the class lacked an opportunity to object to the new attorneys' fees request or scrutinize the supporting evidence previously unavailable."[3]

[3] The panel further appropriately recognizes (at Footnote 14) the differences between immaterial changes, which might not require new notice (i.e., the original notice *may still* satisfy Rule 23(h)), and material changes that may require new notice (i.e., the original notice *may no longer* satisfy Rule 23(h)). I conclude that if an error occurred here, it occurred because the new information added to the 2018 motion materially changed the 2015 motion, and that material change *could not have been anticipated.* But I would not hastily reach the same conclusion where material changes to a motion *could have been anticipated*: circumstances where the initial motion provided enough information, either directly or perhaps even implicitly, to reasonably allow class members to foresee the potential, nature, and extent of a particular change. In such cases, the original notice *may not be* substantively inadequate for the new motion.

After correctly identifying the defect, however, the panel apparently assumed that it needed to "speculate baselessly about prejudice." *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1239 (10th Cir. 1999). Apparently, to find the error harmless would require making "assumptions about how thousands of class members would have viewed the 2018 attorneys' fees motion had they been properly notified under Rule 23(h)." Failing "to see how the record and arguments before us could permit" affirming the district court, the panel declined to speculate about harmlessness and *reversed*.

Yet "if this court is unable, for whatever reasons, to determine whether an error was prejudicial or harmless, which party must lose?" *Morrison Knudsen Corp.*, 175 F.3d at 1239. In this circuit, "that party is the appellant." *Id.* So even if the district court erred, the panel's refusal to speculate does not justify reversal. Indeed, either uncertainty in the record or unwillingness to review the record would "require us to *affirm*." *Id.* at 1241 (emphasis added). Moreover, by declining to decide whether the error *prejudiced* any party's *substantial rights*, the panel must either presume the error harmful or speculate to find it harmful. This is necessary to justify reversing the district court based on the legal error. *See In re Syngenta AG MIR 162 Corn Litigation*, 61 F.4th at 1179 ("Even if we find a legal error, we will only reverse and remand *if the error prejudiced*

Still, even assuming an error occurred here, no reversal is required because the error was harmless.

the party's substantial rights."); Fed. R. Civ. P. 61 (same). Because the panel's resolution conflicts with harmless error principles, I cannot agree with its approach.

We instead should "directly ask[] the harmless-error question," *Shinseki*, 556 U.S. at 408, that the law requires. *See* 28 U.S.C. § 2111; Fed. R. Civ. P. 61. As I will explain, based on my research of our own and other relevant precedents, the following legal framework should apply to situations where appellants argue that an additional notice should have been issued under Rule 23(h)(1), assuming the initial notice to class members was valid or uncontested and there was an objector on hand. If the district court's decision was indeed erroneous, in assessing whether a decision not to issue a new additional notice under Rule 23(h) is harmless or harmful, we should evaluate whether the error substantially influenced the outcome of the attorney's fees award. An error in declining to issue new additional notice should be considered harmless if the lack of new additional notice did not deprive class members of a meaningful opportunity to object to the attorney's fees motion in a manner that could have altered the district court's attorney's fees decision. Conversely, an error from failing to issue new additional notice should be considered harmful if it likely prevented class members from participating meaningfully, thereby potentially impacting the court's decision on attorney's fees, or compromising the fairness of the fee award process. An appellant cannot satisfy the burden of showing that the district court's decision not to issue new and additional notice following a valid initial notice was harmful without showing that the decision significantly affected the substantive outcome of the attorney's fees award in a manner adverse to the class. The demonstration should be clear enough to convince the court

that, but for declining to issue new or additional notice, a different attorney's fees award was not only possible but probable. Simply put, we should examine "the specific factual circumstances in which the error ar[ose]," *Shinseki*, 556 U.S. at 412, and ask whether it "[ga]ve rise to a risk that unfavorable terms would be forced upon some class members or otherwise diminished class members' ability to bring objections before the court." *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1111 (10th Cir. 2001).

With that understanding, I conclude that the district court's decision to decline to issue more notice here, even if erroneous, was harmless for at least three reasons. [4]

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[4] The panel characterizes Chieftain's arguments as inadequate and equates this harmless error inquiry with "rais[ing] and resolv[ing] arguments on harmlessness that Chieftain never made." Even if both contentions were accurate, "[w]e have long said that we may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011). This "preference for affirmance" "follows from the deference we owe to the district courts and the judgments they reach, many times only after years of involved and expensive proceedings." *Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779, 793 (10th Cir. 2019). For this reason, the panel's reliance on *Bronson* to characterize Chieftain's arguments as inadequately presented as a justification for reversing is misplaced: "[W]e treat arguments for *affirming* the district court differently than arguments for *reversing* it." *Richison*, 634 F.3d at 1130 (emphasis in original).

That said, Chieftain adequately presented its arguments and "explain[ed] why" we should hold the error here harmless. *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007). As the panel recounts, "Chieftain asks us to find any error under Rule 23(h) harmless." For that argument, Chieftain contended that "evidence shows" that: (1) the motion "was more 'benefi[cial]' to the class;" (2) "[t]o this day, [the Objectors] are the only persons who have objected to Class Counsel's fees;" (3) "Class Counsel [have] asked for less money and supplied more information in support" of the motion; and (4) "[t]he facts show this additional lodestar information did nothing if not engender more support for Class Counsel." Aple. Br. at 49 (citing various portions of the appendix). On that basis, Chieftain concluded "there was certainly no harm"—a proposition it supported with "case law." *Bronson*, 500 F.3d at 1104. *See*, *e.g.*, Aple. Br. at 49 (citing *Keil v. Lopez* for the proposition that notice error was "harmless" because "district court would have

First, while individual class members lacked information during the original objection period, the record shows that a fellow class member with identical interests raised relevant objections to the district court when the information became available. Objector George ensured "the class" could "flush out any objections that might arise" and present them to the district court. *Tennille v. W. Union Co.*, 785 F.3d 422, 440 (10th Cir. 2015) (quoting *DeJulius v. New England Health Care Emps. Pension Fund*, 429 F.3d 935, 946 (10th Cir. 2005)). The district court here was tasked with evaluating a motion predicated on the lodestar method of analysis. The Supreme Court has noted that there is a "'strong presumption' that the lodestar figure is reasonable, which 'may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee.'" *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553–54 (2010).

At the district court, Objector George contested the lodestar evidence and contended that the attorneys' fees request was unreasonable because "the hours claimed by the attorneys and their hourly rates [were] excessive" and that the "legal work [was]

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awarded the same fee" based on evidence presented); Aple. Br. at 49 (citing *In re Integra Realty Resources, Inc.* for the proposition that there was "no way that the court's failure to provide new notice risked harming class members or their ability to object where post-notice changes to settlement benefited the class."). Since it is not the case that Chieftain failed to "submit any argument, cite relevant case law, or alert us to any part of the record" regarding harmlessness, *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1547 (10th Cir. 1995), it is not the case that "we readily could have found the harmless error argument 'inadequately presented.'"

not properly documented." Joint App. at 674.[5] Those objections suffice in this context. To be sure, this may appear only as a "generalized argument[t]," indicating that Objector George's ability to "provide the court with critiques of the specific work done by counsel" was "handicapped." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). But the record does not support that inference: it is not the case that Objector George "could make only generalized arguments" *because* he was "only provided with generalized information." *Id.* Indeed, as the panel recognizes, there was an "extensive evidentiary record that include[d] time records for each attorney, paralegal, and legal assistant whose work is included in a lodestar computation, and declarations from the individual attorneys." And Objector George does not claim that he could not access the lodestar information when it became available, such that he was "handicapped" in constructing his objections because he did "not kno[w] the rationale that would be offered for the fee request." *Redman*, 768 F.3d at 638. Based on the record evidence and case law, we can conclude that the district court considered the objections relevant to the reasonableness of the attorney's fees motion in this context. This is because Objector George adequately (if not identically) represented their interests

[5] If this objection related to one of those rare circumstances where "a factor that may *properly be considered* in determining a reasonable fee" was "not adequately take[n] into account," then that objection was presented to the district court. *Perdue*, 559 U.S. at 546–47 (emphasis added). If not, then that objection is immaterial in the lodestar context. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (considering adjustments to lodestar figure "possible" but stating that "modifications are proper only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' and 'detailed findings by the lower courts[.]'"), *supplemented*, 483 U.S. 711 (1987).

in this specific case and the objections he lodged were comprehensive. *See Juris v. Inamed Corp.*, 685 F.3d 1294, 1320 (11th Cir. 2012) ("[T]he interests of those class members who did receive notice of the settlement were essentially identical to the interests of those who were not alerted to the settlement and the former raised just the sort of objections that the latter would have raised.") (quoting *Battle v. Liberty Nat. Life Ins.*, 770 F. Supp. 1499, 1519–20 (N.D. Ala. 1991), *aff'd,* 974 F.2d 1279 (11th Cir. 1992) (cleaned up)).[6] We generally "affirm whenever the record allows it." *Naylor Farms, Inc.*, 923 F.3d at 793 (cleaned up).

Second, the record does not show that consideration of the motion was not "approached in a sufficiently adversarial manner." *Juris*, 685 F.3d at 1318. When undertaking a lodestar analysis, the trial judge becomes "an arbiter in an adversarial setting." *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1988). Objector George does not argue that the failure to provide notice to the class resulted in an insufficiently adversarial setting. To be sure, "[a] common-fund beneficiary is less incentivized to scrutinize her attorney's lodestar-based fee petition because she is one of many receiving a small slice of the collective pie." *In re Syngenta AG MIR 162 Corn*

[6] *Juris v. Inamed Corp* involved a class action under Rule 23(b)(3). But given the issue here—that absent class members were not alerted to the previously unavailable evidence—there is little difference in notice requirements under Rules 23(b)(3) and 23(h). *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("To alert class members to their right to 'opt out' of a (b)(3) class, Rule 23 instructs the court to 'direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'") (quoting Fed. R. Civ. P. 23(c)(2)).

Litigation, 61 F.4th at 1192. But Objector George was motivated, and his objections—that "legal work [was] not properly documented," "the hours claimed by the attorneys [were excessive]," and "[the attorneys'] hourly rates [were] excessive"—relate to considerations unique to the lodestar context. *See In re Syngenta AG MIR 162 Corn Litigation*, 61 F.4th at 1192 (describing the lodestar method as "produc[ing] an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case.") (quoting *Perdue*, 559 U.S. at 551–52).[7]

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[7] Recall that no one argues that the 2015 notice was "defective at the time it was given" for the 2015 claim for an award of attorneys' fees using the Common fund method, but only that "new notice should have been provided" to the class in 2018 when the claim for an award of attorneys' fees switched to the lodestar method. *See, e.g.*, *In re Integra Realty Resources, Inc.*, 262 F.3d at 1111. The district court concluded "no."

In assessing whether and how that decision prejudiced class members' substantial rights, it is not "pure conjecture" to start from the premise that objections raised by class members regarding the motion for attorney's fees would necessarily relate to the motion for attorney's fees. *See* Rule 23(h)(2) ("[A] class member, or a party from whom payment is sought, may object to the motion."). And "[n]ecessarily the character of the proceeding, *what is at stake upon its outcome*, and the relation of the error asserted to casting the balance for decision on the case as a whole" are "material factors." *Kotteakos v. United States*, 328 U.S. 750, 762 (1946) (emphasis added).

Apply that logic here. The key facts present in the record are that the class members generally knew that class counsel made a claim for fees under Rule 23(h), no class members (except Objector George) objected to the 2015 motion, Objector George had access to the lodestar evidence, and Objector George objected to the 2018 motion based on his understanding and analysis of the lodestar evidence. Therefore, we need only examine Objector George's "views" on the claim for an award of attorneys' fees (i.e., objections) given the new lodestar evidence and calculation method and decide whether Objector George's objections reasonably represented those of the class in this specific case. In my judgment, Objector George's objections comprehensively, if not exhaustively, addressed the relevant concerns about the 2018 motion, given the new lodestar evidence and calculation method.

Nor has anyone argued that the district court was deprived of the class objections necessary to perform its duty as arbiter. *Cf. Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1134 (10th Cir. 2001) (ruling that district court could not have done its job to assess the reasonableness of fees without certain information about time diaries). The district court, after seven years of this litigation, rejected Objector George's contention that the "legal work [was] not properly documented." And "there is no question that a district court may rely on its general experience as well as its closer familiarity with a case to evaluate the parties' arguments on a fees issue." *Robinson v. City of Edmond*, 160 F.3d 1275, 1285–86 (10th Cir. 1998). Because the district court was "presented with adequate, and adequately-tested, information to evaluate the reasonableness of [the] proposed fee," *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d at 994, and no other objection that could have been relevant to the district court decision has been identified, we can conclude that any further potential objections relevant to, and properly considered in, the lodestar context were "specifically considered and rejected" by the district court. *DeJulius*, 429 F.3d at 946.

Third, and finally, whether the 2018 attorneys' fees motion was more "benefi[cial]," Aple. Br. at 49–50, to the class than the 2015 attorneys' fees motion is a fact relevant to the harm question in this specific case. *See, e.g.*, *In re Integra Realty Resources, Inc.*, 262 F.3d at 1111 (holding harmless the failure to notify class a second time where the result "merely expanded the rights of class members" and did not risk imposing "unfavorable terms" on some members). The bottom line is that the attorneys' fees awarded decreased while the class fund amount increased. Plus there was "more

support" for the 2018 motion. Aple. Br. at 49. In the end, there is no evidence that the increase in the class fund or the decrease in attorneys' fees arose from, or indicates a heightened risk of, "*unfavorable* terms" being "imposed" on the class members—much less due to a lack of objections other than those raised by Objector George. *In re Integra Realty Resources, Inc.*, 262 F.3d at 1111 (emphasis added). True, class members are afforded "'an opportunity to convince the court,'" *id.* (quoting *Mayfield v. Barr*, 985 F.2d 1090, 1092 (D.C. Cir. 1993), that the claim for an award of fees is *not* "reasonable," Fed. R. Civ. P. 23(h)–(2), and district courts should take care not to frustrate their ability to object to the motion. But it is worth noting that Objector George did not identify any other class member who considered the claim for an award of fees unreasonable yet did not object to the motion due to the lack of additional notice. And he did not show how issuing another round of notice would have elicited further objections not already considered and rejected by the district court. And he did not explain how any such objections could have materially impacted the fees the district court ultimately awarded in any event. The district court was not required to make these showings on his behalf. *See Shinseki*, 556 U.S. at 413 (concluding that claimant failed to show harm from notice error where claimant did not tell the Veterans Court, the Federal Circuit, or the Supreme Court what specific additional evidence proper notice would have led him to obtain or seek, and did not explain how the notice error could have made any difference.).

Nor has Objector George satisfied his burden on appeal. *See Palmer v. Hoffman*, 318 U.S. 109, 116 (1943) ("He who seeks to have a judgment set aside because of an

erroneous ruling carries the burden of showing that prejudice resulted.").[8] To demonstrate entitlement to reversal, Objector George shoulders "a heavy burden." *Naylor Farms, Inc.*, 923 F.3d at 793 (quoting *Richison*, 634 F.3d at 1130). He "'must come ready *both* to show' that the district court erred and 'to explain why no other grounds' will allow us to affirm the district court's decision." *Id*. But given the record of the district court proceedings, that was a difficult showing for Objector George to make. Not only did "Class Counsel as[k] for less money" and "suppl[y] more information" to support the 2018 motion, Aple. Br. at 49, but also the district court employed the lodestar method to evaluate the 2018 motion—which considers "most, if not all, of the *relevant factors* constituting a 'reasonable' attorney's fee" and "adequately compensates" the attorney. *Pennsylvania*, 478 U.S. at 566 (emphasis added). *See also Perdue*, 559 U.S. at 551–52 ("[T]he lodestar method produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case."). What is more, the Supreme Court has explained that the lodestar calculation is "'objective," and so the method "cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results." *Perdue*, 559 U.S. at 551–52. Thus, we are not only assured of the relevance and comprehensiveness of the factors considered, and therefore the adequacy of the decision made in this case, but we are also confident in the

[8] Both the panel and I recognize that Objector George is "the party seeking reversal." *Shinseki*, 556 U.S. at 410. So Objector George "normally must explain why the erroneous ruling caused harm[.]" *Id.*

reliability of the outcome—obtained through an objective procedure that cabins discretion and ensures that a repeated process would yield a predictably similar result.

To be sure, failing to direct another class-wide notice after relevant and unanticipated information emerges may well constitute legal error under Rule 23(h) and, in different situations, produce harm requiring reversal—even if the "important virtues," *id*. at 551, that worked to render the legal error here harmless are present in other circumstances. Nevertheless, the failure to comport with Rule 23(h) a second time did not risk imposing unfavorable terms on members in this specific case—given, among other things, the class members' general awareness of the fees claim from the initial notice, the application of the lodestar method, the availability of an active objector, and the comprehensive nature of the objections. That is why what resulted here was a "mere[] expans[ion] [of] the rights of class members." *In re Integra Realty Resources, Inc.*, 262 F.3d at 1111. We are not speculating, but rather recognizing that identifying a procedural inadequacy under Rule 23(h)'s plain text still requires assessing the substantive impact of that procedural shortcoming.[9]

Relying on the Advisory Committee notes to Rule 23(h), the panel advances an overly broad interpretation of Rule 23(h) notice requirements. The panel focuses on the language that the class's interests in "arrangement for payment of class counsel" means

[9] *See Shinseki*, 556 U.S. at 407–08 (explaining that reviewing cases for errors of law without regard to errors that do not affect the parties' substantial rights "seeks to prevent appellate courts from becoming impregnable citadels of technicality."); *Albers v. Bd. of Cnty. Comm'rs of Jefferson Cnty., Colo.*, 771 F.3d 697, 704 (10th Cir. 2014) (applying *Shinseki v. Sanders*).

that "notice is required in all instances." I disagree that the Advisory Committee notes to Rule 23(h) mandate reversing and remanding to issue additional notice in this circumstance. At the outset, the full quote from the Advisory Committee notes points to a less sweeping proposition: that class members are adverse to class counsel on the issue of attorneys' fees—not that notice is required for all instances where a motion for attorneys' fees is changed and no harm is done. *See* Fed. R. Civ. P. 23 Advisory Committee notes ("Because members of the class have an interest in the arrangements for payment of class counsel, whether that payment comes from the class fund or is made directly by another party, notice is required in all instances.").

In any event, "it is the Rule itself, not the Advisory Committee's description of it, that governs." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011). Under Rule 23(h), district courts may award reasonable attorney's fees. But under Rule 23(h)(1), "[a] claim for an award [of attorneys' fees] must be made by motion under Rule 54(d)(2)," and district courts "must" direct notice of a motion for attorneys' fees to class members "in a reasonable manner." And under Rule 23(h)(2), "a class member, or a party from whom payment is sought, may object to the motion." Here, the district court awarded reasonable attorneys' fees but did not direct class-wide notice of the renewed 2018 motion. As a result, class members—except Objector George—lacked the information to adequately object in 2015 to the 2018 claim for an award of attorneys' fees. We reverse and remand because of legal errors only if legal errors prejudiced class members' substantial rights. Otherwise, upon an examination of the entire record, if those legal errors did not affect the substantial rights of class members, we disregard those legal

errors and do not reverse the district court on that basis. *See e.g.*, *Naylor Farms, Inc.*, 923 F.3d at 797–98 ("Accordingly, even assuming the district court erred, we see no basis upon which to conclude the district court's error prejudiced Chaparral. Thus, we decline to reverse on this basis. . . And we further conclude that Chaparral therefore fails to demonstrate the district court abused its discretion in certifying the class despite minor variations in lease language."). Both scenarios reflect "the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless." *Berger v. United States*, 295 U.S. 78, 82 (1935). Congress specifically "put an end" to the "rigid application" of "the rule that error being shown, prejudice must be presumed." *Id.*[10]

Yet the panel concludes that "procedural rigor" requires implicitly adopting and applying a per se rule that any change to the arrangements for payment of class counsel—whatever the specifics and no matter the circumstances—mandates new and additional notice to protect class interests—whatever the specifics and no matter the circumstances—and the failure to issue new and additional notice is harmful—whatever the specifics and no matter the circumstances.[11] Not only is this sweeping proposition

[10] *See also Shinseki*, 556 U.S. at 408 (interpreting 28 U.S.C. § 2111 to "expres[s] a congressional preference for determining 'harmless error' without the use of presumptions insofar as those presumptions may lead courts to find an error harmful, when, in fact, in the particular case before the court, it is not.") (emphasis added).

[11] The hypothetical scenario presented by the panel (at Footnote 14) is not relevant to the harmlessness inquiry, as it misunderstands the disagreement at hand. The scenario posits a situation where class counsel files an amended motion for attorneys' fees that is

rooted in an overly expansive reading of the Advisory Committee's description—rather than the text—of Rule 23(h), but it conflicts with the Supreme Court's caution against using "mandatory presumptions and rigid rules rather than *case-specific application of judgment*, based upon examination of the record." *Shinseki*, 556 U.S. at 407 (emphasis added).

All told, the Court's opinion focuses almost exclusively on the differences between the 2015 and 2018 motions and not on what makes these differences material *and harmful* to the substantial rights of class members given the procedural history in this specific case to warrant remanding for new additional notice. To be sure, the panel identifies the importance of the error here: the class members'—besides Objector George—access to information to make meaningful objections. But the cases relied on for this understanding did not "consider[] whether the Rule 23(h) violations at issue were harmless." *Keil v. Lopez*, 862 F.3d 685, 705 (8th Cir. 2017) (discussing *Mercury* and *Redman*). And rather than determining that the error prejudiced class members'

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essentially the same as the original motion and does so before the objections period expires.

In such a situation, I agree that "there could be an argument the original notice already informed the class of 'the motion' pending before the court and thus *Rule 23(h) has been satisfied*." But I disagree that the panel's hypothetical scenario sheds much light on whether the parties' substantial rights were affected, given that *Rule 23(h) has not been satisfied*. Our concern at this point is not with whether the original notice informed the class about the motion pending before the district court, but with the substantive effect on the parties' rights because of the lack of compliance with Rule 23(h) in a particular context. *See* 28 U.S.C. § 2111; *In re Syngenta AG MIR 162 Corn Litigation*, 61 F.4th at 1179.

substantial rights in this context such that we cannot disregard the procedural error, the panel implies that the procedural error identified here requires remand in most, if not all, cases.[12] So the Court's resolution of this case risks sending the signal that a district court errs if it does not grant a motion for additional notice even where changes are minor, foreseeable based on the initial notice, or do not materially affect class members' interests, imposing an unnecessary burden on the legal process. And the logic of this new sweeping rule would ultimately discourage class counsel from "substantively replying to [the] objections" from class members—on pain of triggering another round of notice. *In re Samsung Top-Load Washing Mach. Mktg., Sales Pracs. & Prod. Liab. Litig.*, No. 17-

[12] The panel's discussion (and citations) regarding "procedural rigor" points to an important distinction. In a class action *settlement* context, class members might have diverse and sometimes conflicting interests regarding the settlement terms. But in the scenario of a *motion for attorneys' fees*, the class typically is both adverse to class counsel and united around common interests: ensuring that the attorneys' fees are reasonable and, in the lodestar context, ensuring that the award does not unduly diminish their recovery. *See Brown*, 838 F.2d at 456 (explaining that the trial judge becomes "an arbiter in an adversarial setting" in a lodestar analysis). The class here was already on notice regarding the claim for attorneys' fees generally, and my perspective thus hinges on the judgment that the objections raised by Objector George could reasonably be expected to reflect the collective concerns of the class in the context of a motion for attorneys' fees. Since the class members are typically united in their interest to minimize attorneys' fees and maximize their recovery, we can assume that extra notice would not likely yield substantially different viewpoints that would affect the nature of the *objections* presented or the *outcome* of the attorneys' fees motion here. Contrast this with a class settlement or certification scenario, where individual class members may have unique perspectives or claims that could lead to varied objections. *But cf. Wolff v. Aetna Life Ins. Co.*, 77 F.4th 164, 172–73 (3d Cir. 2023) (distinguishing material changes to certification orders to ones that have no material impact even in the class certification context).

ML-2792-D, 2019 WL 6118267, at *2 (W.D. Okla. Nov. 18, 2019). None of that is warranted.

In sum, I agree with the panel that the introduction of a new basis for the fee calculation was a significant change, materially altering which motion was the appropriate reference point for notice purposes under the plain text of Rule 23(h). That legal error triggered a harmless error analysis. After analyzing the record, I conclude that no prejudice to substantial rights occurred and, accordingly, would not reverse and remand for additional notice. Because the panel concludes otherwise, I respectfully dissent.