UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT CLAWSON, et. al
Objector/Appellant,

Case No. 11-3961

v.

MARTHA VASSALLE and JEROME JOHNSON
Plaintiffs/Appellees,

MIDLAND FUNDING LLC, MIDLAND CREDIT MANAGEMENT, INC.
ENCORE CAPITAL GROUP, INC.
Defendants/Appellees

On Appeal from the United States District Court for the North District of Ohio
Case No. 3:11-cv-0096
David A. Katz, District Judge
Appeal from Order and Judgment Approving Class Action Settlement dated August 12, 2011 [RE# 160]

BRIEF OF APPELLANTS CLAWSON, PELZER, RIVERA, GUEST, HERRING, JAMES AND RUBIO

Submitted by:

Charles Delbaum
Counsel for Robert Clawson
Email: cdelbaum@nclc.org
THE NATIONAL CONSUMER LAW CENTER
7 Winthrop Square, 4th Fl.
Boston, MA 02110
Telephone: (617) 542-8010
Facsimile: (617) 542-8028

CONTENTS

PAGES

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

Treatises

I. STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellants/Objectors Robert Clawson, Elaine Pelzer, Manuela Rivera, Christopher Guest, Ladon Herring, Gilbert James and Ann Rubio, all of whom join in this Brief, request oral argument. The settlement at issue will have a dramatic impact on 1.44 million class members unless reversed by this Court. Both the procedural posture and merits of the settlement are complex.

II. JURISDICTIONAL STATEMENT

This is an appeal from a final order and judgment approving a class action settlement. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

III. STATEMENT OF ISSUES

Appellants seek reversal of an order approving a nationwide class action settlement. Summary judgment on liability had been entered against the Defendants. Yet in exchange for (at most) a $17 payment, class members forfeited important rights including one not presented by the underlying litigation: the right to vacate default judgments that were based upon the Defendants' routine false submissions to state courts throughout the Country. In that context, this appeal presents the following issues:

1. Did the trial court abuse its discretion in finding that the settling parties had shown the settlement to be fair, reasonable, and adequate where it is more harmful than helpful to large numbers of class members, the class representatives receive disproportionate relief, an unnecessary and potentially harmful claim form was required, and the public interest weighed heavily against approval?

2. Did the trial court abuse its discretion and fail to rigorously analyze the prerequisites for class certification where the parties presented almost no evidence regarding the representatives' adequacy and none showing their support for the

settlement, and where a nationwide class action was not shown to be superior to the existing and potential statewide class actions and individual actions?

3. Did the trial court err as a matter of law in finding that the notice to class members comports with due process where it does not disclose a key right that class members release, inaccurately describes the relief granted to the class representatives, and does not inform recipients of other competing class actions against the same defendants?[1]

IV. STATEMENT OF THE CASE

On August 12, 2011, the District Court granted final approval to a nationwide class settlement in three related cases, *Midland Funding v. Brent* (No. 3:08-cv-1434)[2], *Franklin v. Midland Funding* (No. 3:10-cv-00091), and *Vassalle v. Midland Funding* (No. 3:11-cv-00096)[3]. *Vassalle* RE# 160, Memorandum Opinion and Judgment. In its Order, the Court also certified a nationwide class of persons who had been sued by Defendants, Midland Funding LLC and Midland Credit Management, Inc., *Encore Capital Group, Inc., and related entities (collectively, "Midland") between January 1, 2005* and the date of the approval order, in debt collections suits where Midland used affidavits attesting to facts about the underlying debt.

The settlement encompasses these three class action lawsuits that arise from similar factual predicates. The oldest, *Midland Funding v. Brent*, began as a debt collection action filed by Midland against Andrea Brent in the Municipal Court of Sandusky, Ohio, on April 17, 2008. *Brent* RE# 1, Exh. A. In response, Brent filed a class action counterclaim on behalf of herself and a class of Ohio individuals.

---

[1] Where a decision is based on legal grounds alone, review is de novo. *In re Powerhouse Licensing, LLC,* 441 F.3d 467, 472 (6th Cir. 2006).

[2] Citations to the record in *Brent* are designated "*Brent* RE" herein.

[3] Citations to the record in *Vassalle* are designated "*Vassalle* RE" herein.

The action was then removed to the United States District Court for the Northern District of Ohio, Western Division. *Brent* RE# 1.

In her counterclaims, which she later amended (*Brent* RE# 22), Brent alleged violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA") and the Ohio Consumer Sales Practice Act, Ohio Rev. Code Ann §1345 *et seq.* ("OCSPA"). Brent alleged that Defendants employed unfair and deceptive means to collect debts when they filed debt collection lawsuits routinely using affidavits that contained false attestations of personal knowledge.

On August 11, 2009 the Court partially granted Brent's motion for summary judgment based upon the findings noted in the Statement of Facts, below. *Midland Funding v. Brent*, 644 F. Supp. 2d 961, 966 (N.D. Ohio 2009). The Court concluded that Midland's practice of "robo-signing" affidavits in debt collection actions violated the FDCPA. The Court found that the falsehoods were material, as "the fact that the affiant allegedly had personal knowledge that the debt was valid, would effectively serve to validate the debt to the reader." *Id* at 971. It rejected the contention that the errors in question were "bona fide errors" under the FDCPA. *Id*. at 972. The Court also held that the practice of "robo-signing" affidavits violates the OCSPA and ordered declaratory and injunctive relief pursuant to that statute. As modified shortly thereafter, that injunction precluded Midland from "using form affidavits that falsely claim to be based on the affiant's personal knowledge." *Brent* RE# 56, Memorandum Opinion and Order, p. 5.

Brent then filed a motion on March 24, 2010, seeking certification of two Ohio classes: one class that had been sued by Midland in an Ohio court using an affidavit that falsely claimed to be based on the affiant's personal knowledge, and another class that had been sued by Midland in an Ohio court where Midland sought to collect on a higher interest rate than was allowed by law. *Brent* RE# 76, Sealed Motion for Class Certification. Midland apparently challenged every aspect

of the class certification motion, but its response was inexplicably sealed in its entirety. *Brent* RE# 84, Joint Response to Brent's Motion for Class Certification. Midland also filed a motion for partial summary judgment on Brent's claim for actual damages. *Brent* RE# 88, Motion for Summary Judgment.

The Court issued a memorandum opinion on November 4, 2010, granting in part Brent's motion for class certification and granting Midland's motion for partial summary judgment on the issue of actual damages. *Brent* RE# 104. The Court certified the proposed Ohio affidavit class, but limited it to seeking recovery of statutory damages and attorneys' fees, and declined to certify an interest rate class.

Meanwhile, on December 9, 2009, Hope Franklin and Thomas Hyder, also represented by Class Counsel, filed a putative nationwide class action, *Franklin v. Midland Funding* action in Erie County, Ohio Common Pleas Court. This action raised only a common law misrepresentation claim, but was predicated on the same affidavit process as in *Brent*. The action was removed pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). On October 6, 2010, the District Court granted Midland's motion to dismiss the complaint on the grounds that it failed to state a claim. (*Franklin* RE# 18) Plaintiffs appealed to this Court, and the appeal was pending when the parties filed their Joint Motion for Preliminary Approval of Settlement in the *Brent* case on March 9, 2011.[4]

In the final case, Martha Vassalle and Jerome Johnson, likewise represented by Class Counsel, sued Midland in the District Court on January 17, 2011, alleging claims on behalf of a nationwide class for common-law fraudulent

[4] Two months later, on May 27, 2011, upon the parties' request, this Court remanded the dismissed action to the District Court. Case: 10-4363, Document: 006110969591.

misrepresentation (as in *Franklin*), negligence, and unjust enrichment, again based on the same alleged affidavit practices.

Less than two months later, on March 9, 2011, the parties filed joint motions for preliminary approval of a nationwide settlement (*Brent* RE# 107) and for entry of an order enjoining parallel litigation. *Brent* RE# 108. In the settlement agreement, which applied to the *Brent, Franklin* and *Vassalle* actions, the parties stipulated to certification of the following class:

> All natural persons (a) sued in the name of Encore Capital Group, Inc., Midland Funding, LLC, Midland Credit Management, Inc., or any other Encore and/or Midland-related entity (collectively, "Midland"), (b) between January 1, 2005 and the date the Order of Preliminary Approval of Class Action Settlement is entered by the Court, (c) in any debt collection action in any court (d) where an affidavit attesting to facts about the underlying debt was used by Midland in connection with the debt collection lawsuit.

Brent RE# 107-1, Settlement Agreement, p. 6. In exchange for a nationwide release of claims, Midland agreed to pay a total of $5.2 million. *Id.* at p. 7. From this amount, attorneys' fees of $1.5 million would be deducted, as would the substantial costs of administration. *Id*. The remainder of the fund would be used to make payments to class members who returned a claim form, in a timely fashion, and were determined to be eligible by a Class Administrator. *Id*.

The notice sent to class members informed them that if they filled out a claim form, they would receive a maximum of $10 each. *Brent* RE# 107-2, Proposed Notice, p. 2. Later, after all claims had been filed, this amount was raised to $17 based upon the low rate of class member participation. *Vassalle* RE# 153, Motion for Leave to File Proposed Allocation of Funds, p. 2.

The named Plaintiffs received additional benefits under the settlement agreement. Midland agreed to exonerate the debts of each of the named plaintiffs. *Brent* RE# 107-1, Settlement Agreement, p. 13. The agreement expressly provided that this benefit would not extend to any other class member. *Id*. In addition, each

named plaintiff was given an unspecified share of an incentive award totaling $8,000, with the various amounts to be determined by class counsel. *Id*. at 7.

The settlement agreement included injunctive relief, requiring Midland to create and implement written procedures for the generation and use of affidavits in debt collection lawsuits to prevent their use where the affiant lacks personal knowledge of the facts. *Brent* RE# 107-1, Settlement Agreement, pp. 9-10. A Special Master was appointed to monitor Midland's compliance with the injunction. *Id.*

In exchange for the monetary and injunctive relief noted above, the settlement contained a class wide release. In addition to waiving claims based upon state and federal law, class members forfeit the right to seek to vacate judgments that were predicated upon Midland's affidavits, falsely claiming to be based on personal knowledge.

On March 11, 2011, the Court granted the motion for preliminary approval of the class settlement, finding that the proposed nationwide class met all requirements for class certification, and approved the form of notice to class members. *Brent* RE# 111. The Court scheduled a Fairness Hearing for July 11, 2011, and granted the parties' motion for preliminary injunction against parallel litigation. *Brent* RE# 110.

The proposed settlement received vociferous and widespread objection. Appellant Clawson, a member of a California putative class (*Reimann v. Midland*, et. al.) that had been filed on August 5, 2010, submitted two briefs opposing the settlement, and through his attorneys, appeared at the final fairness hearing, as did counsel for several other objectors and for the Attorneys General.

Sixty other objectors voiced their disapproval of the proposed settlement. *Vassalle* RE# 160, Memorandum Opinion and Judgment, p. 30. The Attorneys General from 38 states joined together objecting to the settlement under the

provisions of CAFA. *Vassalle* RE# 27, Brief *Amicus Curiae* of the Attorneys General. In addition, the Federal Trade Commission, chief federal enforcer of the FDCPA, submitted a brief opposing the settlement. Public interest organizations such as The Center for Responsible Lending, Legal Counsel for the Elderly, MFY Legal Services, and The Legal Aid Society of New York, submitted cogent objections to the settlement. *Vassalle* RE# 137-1, 57, 68, 88.

Notwithstanding these objections, and the absence of any class representative's declaration of support for the settlement, the Court approved the settlement on August 12, 2011. Mr. Clawson timely filed his notice of appeal on August 29, 2011 (*Vassalle* RE# 161) and other Objectors now before this Court did likewise soon thereafter.

V. STATEMENT OF FACTS

Midland used a computer system to generate affidavits for law firms to use in debt-collection actions. *Brent* RE# 50, Memorandum Opinion, p. 8; *Midland Funding v. Brent,* 644 F. Supp.2d 961, 966 (N.D. Ohio 2009). "Specialists" in Midland's litigation support department signed between 200 and 400 of these automatically-generated affidavits per day. *Id.* at 967. While the affidavits stated that the statements therein were based on the signer's personal knowledge, the Court found that Midland's specialists did not have personal knowledge of the accounts at issue. *Id.* at 967. The affidavits were improperly sworn as well. The notary was not present during signing but was given the affidavits for later notarization. *Id.* at 971.

VI. SUMMARY OF ARGUMENT

Summary judgment was entered against Midland, finding it liable under both the FDCPA and the OCSPA for routinely using affidavits falsely asserting personal knowledge of the facts asserted therein. The Settling Parties nevertheless agreed to

a deal that deprives 1.44 million class members of the right not only to assert the federal and state claims at issue in the litigation, as is standard in such cases, but also much more: the right to seek to vacate state court collection judgments on the basis that they were obtained using affidavits falsely asserting personal knowledge -- a right which was not at issue in the litigation. The settlement benefits class representatives and class counsel handsomely, while protecting Midland from potentially billions of dollars in liability. Class members, in contrast, gain little and lose much. Less than 10% of the class will receive $17 apiece, while the rest will receive nothing, and all those who might wish to seek to vacate fraudulently obtained judgments lose a potent means for doing so.

Not only should the settlement have been disapproved, but a nationwide class should not have been certified in the first place. There was no evidence whatsoever regarding the adequacy of three of the four class representatives, and the only evidence regarding the fourth was that Midland used a false affidavit in its collection suit against her. Moreover, the trial court failed to rigorously analyze whether a nationwide class was superior to the existing and potential statewide class actions and individual actions seeking to redress the harm from Midland's fraudulent affidavits.

Notice to class members was flawed as well. By definition, all class members had been sued by Midland and thus their identities were readily available from its records, yet the parties required them to complete an unnecessary and intrusive claim form. The parties did so because otherwise each class member would have received just $1.70, and many more would have opted out in lieu of accepting such a meaningless amount.

The notice to class members also violated due process because it did not disclose that class members release the right to seek to vacate judgments based on false attestations of personal knowledge; it inaccurately described the relief granted

to the class representatives; and it did not inform recipients that there were other competing class actions against the same defendants.

VII. ARGUMENT

A. The Settling Parties Failed To Demonstrate That The Settlement Was Adequate, Reasonable And Fair To The Class As A Whole

In considering whether to grant final approval to a proposed settlement, the touchstone is whether the settlement is "fair, reasonable, and adequate." *UAW v. General Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007). Moreover, "[c]ounsel for the class and the other settling parties bear the burden of persuasion that the proposed settlement is fair, reasonable, and adequate." Federal Judicial Center's *Manual on Complex Litigation, Fourth,* § 21.631 (2004). It will be shown below that the Settling Parties here failed to carry that burden.

1. When Considering a Proposed Settlement of a Class Action, a District Court Has A Fiduciary Duty to Act in the Best Interests of the Class.

Rule 23(e) protects unnamed class members from "unjust or unfair settlements" agreed to by "fainthearted" or "self-interested class representatives." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (U.S. 1997). "The [district] court should ensure that the interests of counsel and the named plaintiffs are not unjustifiably advanced at the expense of unnamed class members." *Williams v. Vukovich*, 720 F.2d 909, 923 (6th Cir. 1983). Because a lawyer's self-interest may trump the interests of the class members, district court judges evaluating settlements under Rule 23(e) act as "fiduciaries," guarding the claims and rights of the absent class members. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d, 277, 279-80 (7th Cir. 2002) (recognizing that a lawyer's self interest may trump the interests of the class members and finding that district judges are "subject therefore to the

high duty of care that the law requires of fiduciaries"). *Accord*, *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 782, 805 (3d Cir. 1995); *Grant v. Bethlehem Steel Corp., 823 F.2d 20, 22 (2d Cir.1987)*; *Grunin v. International House of Pancakes,* 513 F.2d 114, 123 (8th Cir.), *cert. denied,* 423 U.S. 864, 96 S.Ct. 124 (1975).

2. The Settlement is Unreasonable, Inadequate and Unfair to the Class Because Success on the Merits Was Highly Likely, Yet the Release Will Significantly Harm Large Numbers of Class Members, While Merely Providing a Paltry Payment to Just 10% of the Class.

a. The Settling Parties Failed to Show That the Plaintiffs' Likelihood of Success Justified the Compromise They Reached.

It is well-established that a court "cannot 'judge the fairness of a proposed compromise' without 'weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement.'" *UAW,* 497 F.3d at 631 (citations omitted).[5] The court must require sufficient evidence from all parties to determine possible damages, and conduct approximate valuations of success for both sides if the case went to trial. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d at 283-85. The judge should not "paint with too broad a brush, substituting intuition for the evidence and careful analysis that a case…and settlement proposal…required." *Id.* at 283. A settlement is fair, reasonable and adequate only if "the interests of the class as a whole are better served if the litigation is resolved by settlement rather than pursued." *In re Lorazepam & Clorazepate Antitrust Litig.*, 2003 WL 22037741, at *2 (D.D.C. June 16, 2003) (quoting Manual for Complex Litigation (Third)).

[5] Other Circuits agree. *See, e.g., In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 396 F.3d 922, 933 (8th Cir. 2005).

Here, the Settling Parties failed to carry their burden of proof because success on the merits was virtually certain, as summary judgment on liability had been granted. Therefore, when both the extremely limited monetary benefit per class member from the settlement and the grave harm the overbroad release will cause many of them are weighed in the balance, the scales tip heavily against the compromise reached by the parties. Most tellingly, class members will forfeit an important right that would not have been lost even if the case had proceeded to trial and plaintiffs had lost on the merits. Under this settlement, they will be barred from filing individual motions asserting that a state court collection judgment should be vacated because Midland obtained it using an affidavit falsely claiming to be made on personal knowledge. Yet all class members will receive in return is either nothing, if they didn't fill out the claim form that was unnecessary in the first place, or $17 if they did return the claim form.

b. *Success on the Merits of the Claims in this Case was Virtually Certain.*

There was not just a likelihood of prevailing on the merits of the FDCPA and OSCPA claims; plaintiffs had prevailed as to liability in the *Brent* action. Success on the merits of the claims in this case was therefore virtually certain on a nationwide basis too. The District Court, in granting Summary Judgment under the FDCPA and OCSPA in the *Brent* litigation, found that Midland uniformly used robo-signers to supply affidavits falsely attesting to personal knowledge of facts necessary to obtain judgments in state court collection actions. *Brent v. Midland*. 644 F.Supp.2d 961, 970, 977 (2009). It also found that they were "improperly sworn," in that the signatures on the affidavits were not properly notarized. *Id*. at 969. Moreover, the Court below held the "falsehoods were material" and "rejected the notion that the errors in question were 'bona fide errors' under the FDCPA." *Vassalle* RE# 160, Memorandum Opinion and Judgment, p. 4.

Furthermore, this likelihood of success extended beyond the Ohio class which had been at issue in the *Brent* action. As the District Court subsequently found in approving a nationwide class settlement, these deceptive and unlawful practices were "susceptible to classwide proof" as to the national class because "'they were produced pursuant to Midland and MCM's general business practices.'" *Id*., p. 19.

In granting final approval to the settlement, the Court nevertheless opined that "success on the merits is not assured" (*Id*. at p. 28), citing what it believed to be *legal*[6] impediments to prevailing. Both cases the court cited, however, are readily distinguishable. In *Myers v. Asset Acceptance LLC*, 750 F.Supp.2d 864, 867 (S.D.Ohio 2010), the court itself differentiated the factual scenario before it from that in *Brent*: "Sandusky did not state that his affidavit was based on personal knowledge, unlike the affiant in the distinguishable *Midland Funding LLC v. Brent,* 644 F.Supp.2d 961, 969 (N.D.Ohio 2009)." In the other cited case, *Albritton v. Sessoms & Rogers, P.A.*, 2010 WL 3063639 (E.D.N.C. 2010), the district court merely found that the affidavit of the creditor's employee was not a "false representation." Thus neither *Albritton* nor *Myers* support the District Court's devaluation of the plaintiffs' likelihood of success on the merits of their claims based on Midland's affidavits falsely asserting personal knowledge.

c. *Class Members' Option to Opt Out Does Not Justify a Deficient Settlement.*

In finding the settlement reasonable despite the low payment per class member and the release of absent class members' claims, the District Court noted that "any class member who believes he or she can obtain a greater recovery has been free to opt out of the class." *Vassalle* RE# 160, Memorandum Opinion and

[6] The District Court's legal conclusions are reviewed de novo on appeal. *In re Powerhouse Licensing, LLC*, *supra*.

Judgment, p. 29. However, as several courts have held, "[t]he fact that disgruntled class members may opt out of the settlement class does not cure the deficiencies in the settlement." *Acosta v. Trans Union, LLC,* 243 F.R.D. 377, 388 (C.D.Cal. 2007). *Accord*, *Zimmerman v. Zwicker & Assocs. at P.C.*, 2011 WL 65912, *8 (D.N.J., January 10, 2011).

d. The District Court Improperly Discounted the Potential Value to the Class of Not Approving the Settlement.

The District Court improperly discounted the value of the potential recovery for class members from various statewide class actions and from the possibility of having judgments vacated in those actions, and also underestimated the importance of the rights to vacate individual judgments that are being lost by class members who did not opt out. In each instance, the Court's fiduciary duty to the class was violated.

(i) The Likelihood of a Recovery Greater than $5.2 Million for all Midland Victims around the Country was Improperly Minimized

The Court discounted the possibility of a recovery greater than $5.2 Million because statutory damages in a single FDCPA class action are capped at $500,000, and only four statewide class actions had been filed up to the time that it enjoined any further filings against Midland relating to false affidavits. *Brent* RE# 110, Order Granting Preliminary Injunction Against Parallel Litigation, pp. 2-3. This analysis ignored two significant considerations.

First, had the Court not entered the *ex parte* injunction against any further filings against Midland in March 2011, it is likely that other statewide class actions would continue to have been filed, for example by Objectors Pelzer in Michigan,

Guest and Rivera in New York, not to mention numerous individual actions.[7] Additional statewide (or smaller) class actions would have enhanced the total recovery of statutory damages.[8]

Second, these separate actions could have raised state-specific Consumer Protection claims, as the *Brent* complaint had for Ohio (but the *Vassalle* and *Franklin* complaints which sought nationwide certification had not).[9] Where such actions were or would be filed in state court, as the *Reimann* California case was, state law remedies far exceeding those set by the FDCPA are available.

For example, equitable relief under the California Unfair Competition Law[10] may permit California class members to obtain relief from judgments entered against them, in contrast to the bar against a federal Court granting such relief due to the *Rooker-Feldman* doctrine.[11] Similarly, Objector Pelzer observed that when a Michigan judgment is vacated, Michigan MCR 2.612 authorizes disgorgement of any amounts paid pursuant to the illegal judgment. *Vassalle* RE# 42, Pelzer Objection, p. 9. Treble damages are also recoverable in Michigan. *Id*. at p. 10.

---

[7] For example, Objector Sotelo noted that class members in Texas would be better off filing individual cases because "In similar cases with similar damage models, Midland funding has submitted offers of settlement well in excess of the potential class recovery." *Vassalle* RE# 105, Sotelo Objection, p. 1.

[8] *See, e.g., Mace v. Van Ru Credit Corp*., 109 F.3d 338 (7th Cir. 1997) (reversing the denial of a request to certify a statewide FDCPA class action which had been based on the ground that the class should have been nationwide).

[9] Even though the only consumer sales practices claim pled in the settled cases was the OCSPA claim in *Brent*, all state consumer sales practices claims of the nationwide class members were released in the settlement under review.

[10] Under Cal. Bus. & Prof. Code § 17200, a court may fashion injunctive relief for the violation of other laws prohibiting unfair business practices. *See, e.g., Irwin v. Mascott, 112 F. Supp. 2d 937*, 964 (N.D. Cal. 2000).

[11] Under California law, a court may set aside a judgment when it has been "procured by fraud". California Code of Civil Procedure section 473(d). *Don v. Cruz*, 131 Cal. App. 3d 695, 702 (1982) ("The court's power to vacate a judgment procured by intrinsic fraud is beyond question.").

Taking into account the possibility of equitable relief from illegal judgments, the Court below violated the well-established precept that certification of a nationwide class should be denied where "a nationwide class would be a disservice to the potential plaintiffs because the group as a whole might obtain a larger total recovery by maintaining several class actions rather than only one." *Brink v. First Credit Resources*, 185 F.R.D. 567, 573 (D. Ariz. 1999).

The District Court's conclusion, that a greater recovery from statewide class actions was unlikely, employed the wrong standard and also contained an incorrect assumption of fact. The Court stated:

> No strong precedent exists that convinces this Court that class members would be able to recover significant relief under state law with respect to affidavits that correctly state the amount the debtor owes, but which falsely claim to be based on the affiant's personal knowledge.

Vassalle RE #160, Memorandum Opinion and Judgment, p. 29.

However, given its fiduciary duty to the class, the Court should have demanded that the Settling Parties demonstrate that such a recovery is unlikely, for example by showing that CSPA suits against debt buyers using false affidavits had failed in other states. No such evidence was presented. Nor did the Settling Parties demonstrate that the equitable relief sought in the California state court action -- vacating judgments and restitution of ill-gotten gains --could not also be obtained under the many state CSPA statutes that authorize such relief.[12]

[12] Ten jurisdictions expressly name restitution as a remedy available to a private litigant. Alaska Stat. § 45.50.531; Cal. Civ. Code § 1780; Cal. Bus. & Prof. Code § 17203; D.C. Code § 28-3905; Idaho Code § 48- 608; Ind. Code § 24.5-0.5-4; Me. Rev. Stat. tit. 5, § 213; Neb. Rev. Stat. § 87-303.07; Tex. Bus. & Com. Code § 17.50; Vt. Stat. Ann. tit. 9, § 2461; Va. Code Ann. § 59.1-204. At least fifteen other jurisdictions authorize equitable relief for a private litigant in general terms or give judges broad discretion in fashioning an appropriate UDAP remedy. Conn. Gen. Stat. Ann. § 42-110g; 815 Ill. Comp. Stat. 505/10a; Ky. Rev. Stat. § 367.220;

Moreover, the Court's statement quoted immediately above is predicated on the incorrect assumption that the plaintiffs in such state court actions would concede that the affidavits "correctly state the amount the debtor owes," when in fact, as in *Vassalle, Franklin*, and *Reimann*, generally the alleged debtor bringing such claims denies owing the debt or at least challenges the accuracy of the amount claimed.[13] Indeed, if the state court collection affidavits in *Vassalle* and *Franklin* "correctly state the amount the debtor owes," then why has Midland agreed to forgive their debts as part of the settlement of this action, while refusing to do so for other class members? As the FTC observed in its amicus brief, "Given the uncontroverted evidence that Defendants favored expediency over accuracy in their litigation practices – this Court has already found that Defendants' employees failed to check the accuracy of affidavits prior to signing them, and falsely swore to personal knowledge of the affidavits' contents – other errors are especially likely." *Vassalle* RE# 55, p.14.

The District Court not only ignored the possibility of additional statewide class actions, but also largely wrote off the two existing class actions that already raise important state law claims, one in California state court and one in federal court in Washington, asserting that "both face significant hurdles to obtaining their desired relief." *Vassalle* RE# 160, Memorandum Opinion and Judgment at p. 29.

Mass. Gen. Laws ch. 93A, § 9; Minn. Stat. § 8.31(32); Mo. Rev. Stat. § 407.025; Mont. Code Ann. § 30-14-133; N.H. Rev. Stat. Ann. § 358-A:10; N.J. Stat. Ann. § 56:8-19; Or. Rev. Stat. § 646.638; 73 Pa. Cons. Stat. § 201- 9.2; R.I. Gen. Laws § 6-13.1-5.2; S.C. Code Ann. § 39-5-140; Tenn. Code Ann. § 47-18-109; W. Va. Code § 46A-6-106.

[13]Such a denial by the alleged debtor is highly plausible in the context of a suit by a debt buyer. For example, the Maryland Department of Labor's Office of Financial Regulation recently found that over the last six years, another debt buyer, LVNV Funding LLC and Resurgent Capital Services L.P., attempted to collect on consumer claims in default by "[i]ntentionally misrepresenting the amount of the consumer claims and collecting impermissible compound interest and [kn]owingly collecting unauthorized attorney's fees and prejudgment interest at unauthorized rates." http://www.dllr.state.md.us/whatsnews/lvnv.shtml.

Tellingly, the District Court did not articulate a single such hurdle nor cite a single case supporting the existence of such a hurdle. At least as to the competing California state court action, if the Court relied on the arguments of Defendants, then it was badly misled. Midland contended that the California state law claims were limited to equitable relief, when in fact the *Reimann* plaintiffs' claims under the Rosenthal Fair Debt Collection Practices Act, Cal. Civil Code Section 1788 et. seq., are for statutory and actual damages.[14] Midland then argued that the California state law claims were "weak," predicting that a California Court would shield its fraudulent affidavits under the "litigation privilege." *Vassalle* RE# 133, Defendants' Response To Objections Of Herring, Clawson, et. al., p. 10. However, as Appellant noted to the Court below, a long line of California state and federal cases shows that Midland was wrong.[15] The District Court did not discuss these cases, thereby undoubtedly contributing to its minimization of the value of the parallel cases.

(ii) Many Class Members are Worse Off than if There had been no Settlement.

Even if the Court had articulated a sound basis for concluding that separate statewide class actions would not generate a total exceeding the $5.2 million settlement in this action -- which it did not -- and even if only some of the state court class actions had resulted in orders vacating judgments, nevertheless the class would still have been far better off without this settlement. This is because the settlement deprives them of what they otherwise could not possibly have lost in those other actions nor even in this one if it had gone to trial: the right to seek to

[14] Objectors pointed out this misrepresentation or misunderstanding below. *Vassalle* RE# 148, Joint Memorandum In Opposition To Joint Motion for Approval Of Class Action Settlement, p. 3.

[15] See, e.g., *Komarova v. National Credit Acceptance, Inc.*, 175 Cal.App.4th 324 (2009); *Welker v. Law Office of Daniel Horwitz*, 699 F.Supp. 2d 1164, 1173 (C.D. Cal. 2010).

vacate a judgment on the basis that it was predicated on an affidavit falsely purporting to be based on personal knowledge.

The claims at issue in the subject class actions are affirmative claims for damages. The class plaintiffs did not seek to vacate any underlying judgments. Moreover, as the Court below correctly noted, as a federal court constrained by the *Rooker-Feldman* doctrine, it would have lacked jurisdiction to order any such judgments vacated had plaintiffs succeeded at trial. *Vassalle* RE# 160, Memorandum Opinion and Judgment, pp. 29-30. Thus, even if the settled cases had proceeded to trial and even if plaintiffs had lost, no class member would have been barred from seeking to vacate a judgment in state court based on a fraudulent affidavit. *See Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 486-487 (6th Cir. 2009) ("If Plaintiffs' claim for breach of contract is dismissed for lack of jurisdiction, res judicata does not prevent re-litigation of the breach of contract claim in a state court with plenary jurisdiction.").

This is not to say that *issue* preclusion would not have been applicable had the case gone to judgment. If plaintiffs had lost at trial on the issue of whether the pseudo-affidavits were falsely asserted to have been made on personal knowledge, then class members would have been barred from re-litigating this issue in state court. However, given the admissions of Defendants' employees in their depositions and the District Court's ruling on summary judgment in plaintiff's favor, this result was impossible in *Brent* and highly unlikely in the other two cases. Class members would have been able to use a favorable verdict as a sword: issue preclusion would have affirmatively allowed them to get their state court judgments vacated on request. This would have been an enormously beneficial outcome for the class.

Instead, in a highly unusual if not unprecedented agreement for a class action settlement, the release gives Midland an important immunity from attacks

on illegal judgments which are the fruits of its fraudulent practices. The release extends to:

> all causes of action, suits, **claims and demands**, whatsoever, known or unknown, in law or in equity, based on state or federal law, which the class now has, ever had or hereafter may have against the Released Parties, arising out of or relating to the Released Parties' use of affidavits in debt collection lawsuits.

Brent RE# 107-1, Settlement Agreement at p. 12, emphasis added.

In its Final Judgment, the Court below clarified a Settlement Agreement provision that had been ambiguous prior to that time and that had misled not only all the Objectors represented by counsel, but 38 Attorneys General and the FTC as well: the provision that those who do not opt out release all claims "arising out of or relating to the Released Parties' use of affidavits in debt collection lawsuits." This is a far broader release than just claims based on Midland falsely asserting personal knowledge or proper notarization. *See Vassalle* RE# 27, pp. 7-9 (Attorneys General); *Vassalle* RE# 55, pp. 11-12 (FTC). The Court held that the quoted language nevertheless will only cover claims relating to the affiant's lack of personal knowledge because established case law restricts the scope of a release to claims based on the same factual predicate as the settled suit. *Vassalle* RE# 160, Memorandum Opinion and Judgment, p. 22. While this result is far better than the alternative reading of the release, the Court's statement is not entirely accurate and cold comfort for class members.

It is inaccurate because in all three settled cases, the factual predicate of the claims includes Midland's practice of having documents notarized without having the witness swear to their accuracy in the presence of the notary. This deficiency in the notarization process is a direct affront to the solemnity and significance of the entire notarization process.

Moreover, the Court's analysis is cold comfort because it ignores the fact that the release bars class members from individual attempts to vacate judgments based on the false assertion of personal knowledge and improper notarization. While this specific concern was raised by objectors, the 38 States Attorneys General and the FTC, the Court below did not directly address the issue. Its only explicit discussion of vacating judgments was in the context of whether a mass vacatur of judgments was feasible, which it noted it was not due to the Rooker-Feldman doctrine. However, it stated that "the release is limited to claims where the basis for relief is the affidavit itself." *Vassalle* RE# 160, Memorandum Opinion and Judgment, pp. 21-22. The implication of this is that efforts to obtain relief from individual judgments -- to vacate them -- are barred if based upon a lack of personal knowledge or improper notarization of the affidavit.

The loss of this right is exceedingly harmful to the class. Midland is a debt buyer, generally suing on alleged credit card debt that is charged off and many years old. Few debtors retain their credit card agreements and credit card statements for more than a few months at most. Without such records, it is exceedingly difficult for them to get a judgment vacated because they have to prove a negative: that they don't owe what is alleged, or that the amount asserted was inaccurate, or that Midland did not own the debt.

On the other hand, if the alleged debtor is permitted to use Midland's reliance on affidavits falsely attesting to personal knowledge as a basis for vacating a judgment, the case probably is over and will not be reinstituted as Midland lacks admissible evidence of the debt. Yet without any supporting evidence, the Court below assumed the contrary, noting that "Midland would seek to relitigate formerly closed judgments where the debtor was sued on the correct amount, but

the affidavit contained a technical defect."[16] *Vassalle* RE# 160, Memorandum Opinion and Judgment, p. 30. This assumption was unjustified both because it presumes the debtor was sued on the correct amount and also because it assumes that Midland could properly prove the debt if challenged. It was the Settling Parties' burden to show that these assumptions were likely true, but in fact the evidence is to the contrary.

It is far more likely that many alleged debtors were not liable on the debt on which they were sued because the debt was time-barred, as debt purchased by debt buyers often is, or because it had been discharged in bankruptcy, or previously paid, or the person sued was a victim of identity theft or was not liable because she was merely an authorized user on a credit card account.[17] Also, the amount claimed may well have been incorrect.

Thus in *Brim v. Midland Credit Management, Inc*., 2011 WL 2665785, *9 (N.D.Ala., May 4, 2011), for example, Midland had filed suit on an alleged debt in state court despite the fact that at the time "defendant purchased the 'debt' the statute of limitations on collecting it had expired."[18] The same was true for Sylvia Yeado, as noted in her Objection. *Vassalle* RE# 57, p. 2. The state court case brought against Objector Kelli Gray was dismissed with no indication that it was later reinstated. *Vassalle* RE# 32, p.23. The FTC reported that it had received numerous complaints that Midland had sued on time-barred debts or debts that were not owed by the defendant, for example because they were created by an identity thief or discharged in bankruptcy. *Vassalle* RE# 55-1, FTC *Amicus* Brief,

[16] As noted above, and with all due respect, the defects at issue here were far from "technical."

[17] *See, e.g*., the Affidavit of Max Dubin, attached as Exhibit A to the *Amicus* Brief of the State Attorneys General, *Vassalle* RE# 27, p.6.

[18] The federal court jury found that Midland had "placed the debt on plaintiff's credit report to attempt to force the plaintiff to pay a debt it otherwise could not collect."

p. 4. Numerous unrepresented Objectors likewise reported having succeeded in defeating Midland suits against them.[19]

Even where complete defenses are absent, suits by debt buyers cannot easily be reinstituted after default judgments are vacated because debt buyers generally lack proper proof of the alleged debt and of their ownership of it. This was established in the *Brent* case, where class counsel, to their credit, showed in depositions of Midland employees that generally Midland cannot properly prove the debt upon which it sues. A Midland employee admitted that Midland typically receives only a magnetic tape with information about the alleged debt, not any actual account documents. *Brent* RE# 34, *Brent* Motion for Summary Judgment, pp. 4-5. Midland does not seek such documents from the seller of the debt except sometimes in the event of a dispute, and even then, Midland may or may not be able to obtain them. *Id*. In most states, once a judgment is vacated, Midland would be unable to obtain a valid judgment without such documents to prove up its case.[20] Thus being able to get a judgment vacated by showing that Midland used false proof to obtain it is a very valuable right for class members to lose.

A $5.2 million settlement that greatly insulates from attack judgments Midland obtained with false "affidavits" and that also protects Midland from FDCPA and CPA claims will protect Midland from exposure to potential losses amounting to approximately $3 billion in such judgments,[21] plus millions more in

[19] These Objectors include Hickey, *Vassalle* RE# 98 (Midland could not prove they were owners of the debt), Luna, *Vassalle* RE# 58, Rivas, *Vassalle* RE# 94 (dismissed due to lack of evidence) and Sutton, *Vassalle* RE# 74 (account not his).

[20] In New York City, a plaintiff may seek a default judgment by applying to the clerk (not a judge), who, with the requisite proof, will automatically grant the application. *See* N.Y. C.P.L.R. § 3215. The "requisite proof" in a consumer credit transaction includes an affidavit of merit from the plaintiff by someone with personal knowledge of both the underlying claim and the debt being collected. Guest objection, *Vassalle* RE# 83, pp. 3-4. *See also*, as to Virginia, Judge Pointdexter Dec., *Vassalle* RE# 148, App'x. B, ¶ 10.

[21] This estimate is based on the fact that the median default judgment in New York, where according to the class administrator, more than a quarter of a million class

attorneys' fees that would otherwise be incurred trying to prevent individual judgments being vacated and defending against FDCPA and CSPA suits.

In contrast, many class members will be worse off because of this settlement, while only 10% of them will receive a payment, and that a mere $17.[22] Those who didn't take the time and effort to submit a claim for what they were told would be a maximum of $10 get nothing.

Regardless of whether they receive a payment or not, class members will suffer not only the loss of the right to bring FDCPA and CSPA claims, but also the right to *readily* undo fraudulently obtained judgments. Since most state Rules of Civil Procedure mimic Fed.R.Civ.P. 60(b), demonstrating to the court that Midland had used an affidavit that was false both substantively and procedurally to obtain a default judgment would entitle the judgment debtor to have that judgment vacated. In sum, the settlement is a great bargain for Midland, and a very bad one for the class.

Indirect means of vacating a judgment also were lost in this settlement. A class member's FDCPA claim does not just involve the potential recovery of $100 -$1,000 in statutory damages and possibly actual damages due to emotional distress if, for example, the debt was time-barred or not owed. Where the claim is that a judgment was obtained based on a misrepresentation, Midland may agree to lift an illegally obtained judgment and perhaps even drop the claim; at a minimum, vacatur of the judgment allows the class member to defend against the alleged debt

---

members reside, is $2577. *Vassalle* RE# 137-1, Proposed Memorandum of Law of *Amici Curiae* CAMBA Legal Services et al., p. 7. The class consists of approximately 1.44 million individuals.

[22] As argued in Section VIIA4, *infra*, if the unnecessary claim form had not been required, the payment per class member would have been approximately $1.70.

on the merits. This is particularly important where a motion to vacate the judgment would be untimely.[23]

Appellants recognize that a nationwide settlement of the claims at issue here may not have been possible absent a release of class members' affirmative FDCPA and CSPA claims. However, this settlement's release improperly went much further[24]. Given the paltry recovery per class member, the strength of plaintiffs' claims, and the probability that class members could remedy the harm caused by Midland's unlawful practices using the released claims to vacate judgments, the bargain struck by class counsel was wholly deficient for the class.

3. The Disparity in the Relief Accorded to the Class Representatives Compared to Class Members is Evidence of Unfairness to the Class.

Unlike the rest of the class, the four class representatives not only receive an unspecified share of the lump sum service award of $8,000, but are blessed with complete exoneration of their debts.[25] Absent class members, in contrast, explicitly do not receive the same benefit: "Nothing herein shall prevent Defendants from continuing to attempt to collect the debts owed by the other Class Members." *Brent* RE# 107-1, Settlement Agreement, p. 13.

The total benefit to the named plaintiffs is truly excessive in comparison with the meager payment of $17 that 10% of the class members are to receive

[23] Under Fed.R.Civ.P. 60(b), for example, such a motion when based on fraud must be brought within one year of the date of the judgment.

[24] National Association of Consumer Advocates, Guidelines for Consumer Class Actions, #12, reported at 206 F.R.D. 215 (2009) counsels: "Except in unusual circumstances, counsel should not agree to any settlement that releases non-certified or non-plead claims. In addition, a claim should not be released unless the settlement includes relief for the claim…The Scope of the release must be fully set forth in the notice."

[25] The Settlement Agreement provides that "Defendants shall release the debts owed to Midland by Brent, Franklin, Johnson, and Vassalle that were the subject of the collection lawsuits described in their complaints in the above-captioned actions." *Brent* RE# 107-1, Settlement Agreement, at p. 13.

under the settlement, not to mention the nonexistent benefit to the rest of the class and the serious loss of rights suffered by so many. For example, Midland claimed that plaintiff Brent had defaulted on a debt of $4,516.57 on November 10, 2000 and that it was entitled to interest on that amount accrued at the rate of 8% per year, for a total amount owing of more than $10,500 by the time of the Settlement. In granting summary judgment on liability, the District Court had noted that Ms. Brent probably owed this debt,[26] and no evidence to the contrary appears in the record subsequent thereto. Nevertheless, as a result of this settlement, that entire debt is being discharged.

Nor was any evidence presented to the court showing that the three other class representatives probably did not owe their alleged debts. The only justification the Settling Parties proffered for the special treatment the class representatives receive under the Settlement is that they are releasing all claims against Midland, in contrast to class members who are only releasing claims predicated on the false assertion of personal knowledge or improper notarization, and that "[unlike]the absent class members, the named plaintiffs do not have the option of seeking to vacate their judgments on the ground that the debts were not owed." *Vassalle* RE # 133, Defendants' Response to the Objections of Herring, Clawson, Gray, and Pelzer at p. 12. One weakness in this contention is that the named plaintiffs' debts are being forgiven, so they hardly need to vacate such judgments. And a class member who is not permitted to show that Midland used a

[26] "In finding assertions in the affidavit to be false and misleading, this Court is not concluding that all the information in the affidavit is incorrect. Brent has provided no evidence that the amount of the debt, the fact that it is unpaid, or other vital account information, is false. As discussed *infra,* the actual account information is probably either correct or likely thought correct in good faith by Midland and MCM (and likely a *bona fide* error if so)." *Midland Funding LLC v. Brent*, 644 F.Supp.2d 961, 969 (N.D.Ohio 2009).

false attestation of personal knowledge to obtain a judgment on the debt has had his most likely path to successfully vacating a judgment blocked.

The disparity between what the class representatives and the class members are to receive is evidence of the unfairness of this settlement to the class. *See e.g., Holmes v. Continental Can Co.,* 706 F.2d 1144, 1148 (11th Cir. 1983) ("where representative plaintiffs obtain more for themselves by settlement than they do for the class for whom they are obligated to act as fiduciaries, serious questions are raised as to the fairness of the settlement to the class"); *Plummer v. Chemical Bank,* 91 F.R.D. 434, 442 (S.D.N.Y. 1981) ("*prima facie* evidence that the settlement is unfair to the class"), *aff'd*, 668 F.2d 654 (2d Cir. 1982). Thus in *Williams v. Vukovich*, 720 F.2d 909, 925 (6th Cir. 1983), this Court considered and rejected a proposed settlement of a class action alleging racial discrimination in the Youngstown police department because most named plaintiffs would have received a promotion, while unnamed class members would only receive "perfunctory relief": the possibility of a promotion if a vacancy were to occur in the minority track. The same type of disparity exists here, and the same result should obtain as well.

4. The Settlement Also is Unfair to the Class Because The Claim Form Was Unnecessary and Was Intended to Disguise the Inadequacy of the Settlement.

The small payment provided for in the settlement goes only to those class members who receive and review the class notice, then fill out a claim form and submit it in a timely fashion. Other class members will receive nothing, but apart from those who opt out, all will nevertheless be bound by the devastating release contained in the settlement documents.

Claim forms are at times necessary, but otherwise should not be required as they greatly reduce the number of class members who will benefit from the

recovery. As noted in 3 Newberg on Class Actions, (4th Ed.) § 8:35 at p. 272-3, this is due to "apathy, ignorance, burdensomeness, size of individual recovery involved, as well as a myriad other factors." See National Association of Consumer Advocates, Guidelines for Consumer Class Actions, #12, reported at 206 F.R.D. 215 (2009).

While the return rates for cases employing claim forms varies, they almost always fall within a limited range between zero and about 20%. *See*, *e.g.*, *Sylvester v. Cigna Corp.*, 369 F. Supp. 2d 34, 41-42, 44 (D. Me. 2005); *Hillebrand & Torrence, Claims Procedures In Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 Santa Clara L. Rev. 747, 752 (1988) (between 3% and 20% rate typical). Given this well-known low rate of participation, class counsel's agreement to the requirement of claim forms in this case shows that it failed in its duty "to strive to achieve the widest class distribution of the settlement proceeds and benefits." 3 Newberg on Class Actions § 8:35 (4th Ed.) at p. 273. Likewise, the Court below did not fulfill its fiduciary duty to the class when it approved the use of these forms.

Given these respective duties, it is remarkable that in seeking approval of the settlement, both preliminary and final, the parties did not even suggest to the Court any reason whatsoever why the use of claim forms in this case is necessary or appropriate. Appellants submit that they ignored the issue because no good reason exists for using a claim form in this case. The Court, in turn, did not discuss why a claim form was necessary, even though Appellant Clawson and the Attorneys General of 38 states, among others, had argued that it was not. (*See Vassalle* RE# 25, pp. 14-15; *Vassalle* RE# 27, p. 7).

This is not a situation where class members could not be identified from defendants' records, as those very records were used to give notice. Nor did class members have to provide some information to establish either their eligibility for

inclusion in the settlement or their entitlement to a certain amount of damages, as is shown by the fact that no such information was requested in the claim form. *Brent* RE# 107-2, Class Notice, p. 7.

Indeed, the primary purpose of the claim form appears to be to disguise the inadequacy of the settlement fund being proposed. By using claim forms to artificially reduce the number of class members receiving cash, the settling parties could pretend that their proposed settlement provided relief of $10 per class member, or even better, when fewer class members submitted claims than anticipated, $17.38 per class member, as per the reallocation requested after the hearing on final approval. *Vassalle* RE# 153, Motion for Leave to File Proposed Allocation of Funds, p. 2. If the $2,433,000 available for distribution to the class after payment of attorneys' fees, expenses and service awards had been divided among all of the actual 1.44 million class members who were victims of Defendants' practices, other than the 4,262[27] who excluded themselves, each class member would have been entitled to a check for just $1.70. Had the notice informed class members that unless they opted out, they could receive a check for $1.70 but would at the same time lose their right to assert that an affidavit falsely attesting to personal knowledge of their debt had been used to obtain a judgment taken against them, many more individuals likely would have excluded themselves from the settlement.

Moreover, the use of an unnecessary claim form in a case arising from unlawful debt collection practices should have raised additional concerns for the court below in its capacity as fiduciary for the class. Many class members could be expected to shy away from responding to any contact from any entity seen as related to Midland's collection activities, or from volunteering information about

[27] *Vassalle* RE# 53, Motion for Leave to File Proposed Allocation of Funds, p. 4; *Vassalle* RE# 160, Memorandum Opinion and Judgment, p. 30.

their current address and home telephone number, for fear of making collection efforts easier. *Vassalle* RE# 26, Gardner Dec'l at ¶¶ 27, 29, 31(noting also that there was no need for the claim form to request a current phone number. While Midland subsequently agreed to a stipulation that it would not use information obtained from the claim forms for collection purposes, it did not announce this until July 5, 2011, long after the notice had gone out and a month after the June 1, 2011 deadline for submission of claims. *Vassalle* RE# 125, Defendants' Response to Amicus Curiae Brief of the Federal Trade Commission, pp.3-4.

Since a claim form was not necessary to accomplish the distribution to the class in the first place, the fact that neither class counsel nor the Court was troubled that the fear of providing personal information to Midland that could be useful in its collection activities would impede participation in the settlement proceeds -- particularly since the Notice stated that the maximum payment was an unenticing $10 -- shows that neither adequately protected the interests of the class members. Preliminary approval of the Settlement requiring a claim form should neither have been requested nor granted.

5. Virtually All Other Relevant Factors Also Weighed Against Approval of the Settlement.

In addition to evaluating the benefit (and in this case, the harm) to the class from the proposed settlement as discussed above, courts may consider seven other factors in determining whether to approve a proposed settlement: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. *UAW v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007). No one of these factors is dispositive. Rather, all are to be weighed and considered in light of the particular demands of

the case. *See, e.g., Granada Investments, Inc. v. DWG Corp*., 962 F.2d 1203, 1205-06 (6th Cir. 1992).

All of the UAW factors except the amount of discovery counseled against approval. Some factors are covered in the above discussion, for example the preferential treatment of Class Representatives discussed at Section VIIA(3), *supra*, implies a serious risk of collusion, [28] and the favorable summary judgment ruling discussed at Section VIIA(2)(b) shows a strong likelihood of success. The complexity, expense and likely duration of the litigation did not warrant an abrupt settlement as the Settling Parties had merely asserted in support of the Settlement that the "trial could last several days." *Vassalle* RE# 131, Joint Motion For Order Granting Approval Of Class Action Settlement, p. 19.

Three other particularly compelling UAW factors require amplification here.

a. The Opinions of the Class Representatives Do Not Support the Proposed Settlement.

While class counsel naturally supports the proposed settlement, this factor also looks to whether *the class representatives* too proclaim their support of the proposal. The proposed class representatives in this case were completely silent. Not a single class representative submitted a declaration avowing his or her support for the Settlement.

b. The Reaction Of Absent Class Members, Public Officials and Public Minded Institutions Counseled Against Approval of the Agreement.

It is well established that in most settlements, few objections if any are received. *In re Traffic Executive Asso.--Eastern Railroads*, 627 F.2d 631, 634 (2d

[28] *Compare Sheick v. Automotive Component Carrier LLC* , 2010 WL 4136958, 20 (E.D.Mich.,Oct. 18, 2010) ("The even-handed treatment of Class Members and the absence of any special or inappropriate treatment of class representatives and Class Counsel in the Settlement Agreement also demonstrate the absence of collusion. *IUE-CWA,* 238 F.R.D. at 599.").

Cir. 1980). Even where there is a "lack of significant opposition," this may "signify no more than inertia by class members…" *Ehrheart v. Verizon Wireless,* 609 F.3d 590, 604 (3rd Cir. 2010). "When the recovery for each class member is small, the paucity of objections may reflect apathy rather than satisfaction." Manual for Complex Litigation, Fourth, § 21.63.

Defects in class notice, such as those apparent in this case,[29] contribute to a low response rate. *See, e.g., In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 813 (3d Cir. 1995). In any event, 61 individuals objected here, both persons in states with competing class actions and many others as well, and the objections were vociferous, a factor lending them greater weight. *In re GMC, supra,* 55 F.3d at 813. Moreover, the Attorneys General of 38 states plus the Federal Trade Commission all voiced their concerns about the many deficiencies in the proposed settlement. Organizations such as the Legal Counsel for Elderly (*Vassalle* RE# 57), CAMBA Legal Services, a Municipal Employees Union and others, and MFY Legal Services strenuously and unequivocally urged the Court to reject the proposed settlement. (*Vassalle* RE# 137-1); (*Vassalle* RE# 68).

The Attorneys General represent "hundreds of thousands, if not millions, of eligible class members." *Figueroa v. Sharper Image Corp*., 517 F. Supp. 2d 1292, 1328 (S.D. Fla. 2007); *see also*, *Wilson v. DirectBuy, Inc*., *supra*, at *9 ("The court finds [the Attorneys General] Memorandum to be especially helpful and *views it as a placeholder for many absent class members' objections*" (emphasis added)). The requirement of the Class Action Fairness Act that the states Attorneys General be given notice of class action settlements shows that Congress views them as guardians of the public interest in this context. In addition, the FTC, the "chief federal enforcer of the FDCPA," is uniquely situated to evaluate the benefits (and

[29] These problems are discussed in Section VIIC, *infra*.

in this case, detriments) of a class settlement of debt collection claims. While it rarely files amicus briefs, it too, like the Attorneys General, strongly objected to the settlement on numerous grounds, and not just because of the apparent breadth of the release which turned out, fortunately, to be in part a false alarm. For example, the Attorneys General argued that "[t]he paltry monetary relief [the settlement] would provide to individual class members does not address the harm incurred by class members as a result of Defendants' misconduct and is not commensurate with the strong and valuable claims that class members are waiving." Vassalle RE# 27, Brief *Amicus Curiae* of the Attorneys General at p. 4.[30]

c. *The Public Interest Weighed Heavily Against the Settlement*

This final factor is strongly against the proposed settlement. Midland has committed a massive fraud on courts across the nation. It has abused the judicial system by obtaining hundreds of thousands of judgments based upon falsified factual assertions. As the Court below noted in its opinion granting partial summary judgment to plaintiff in the *Brent* case,

> Considering public policy, it is also worth noting many debt collection cases of these types place courts in the position of evaluating the validity of the plaintiff's claim without any response from the defendant. Thus, in general terms, courts rely on the assertions in an affidavit to determine, among other things, whether the debt is valid and judgment, usually default judgment, should be granted.

644 F.Supp.2d at 970.

In granting final approval, the Court ignored its earlier appreciation of the harm to public policy from defendants' practices. Instead, it mentions only that the $5.2 million common fund was above the usual $500,000 cap for a statutory

[30] The Attorneys General also protested that the benefits to the named plaintiffs were disproportionate, the injunctive relief insufficient because limited to a year, and the notice inadequate. *Vassalle* RE# 27.

damages class action and thus a significant penalty, and that the stipulated injunction requires that policies to ensure accuracy be submitted to a Special Master. Yet this settlement gives apparent legitimacy to the very same judgments the Court had been concerned about earlier, and would safeguard them from attack on the most readily available and easily proven basis: the lack of personal knowledge of the affiant whose apparent testimony was used to obtain the judgment. As a result, Midland can continue to accrue post-judgment interest on judgments it should never have obtained in the first place and probably could not obtain again because the claims are time-barred, or against the wrong person, or it lacks documentary evidence to support the suits it files. It can garnish wages, levy bank accounts, put liens on and conduct sales of property. It can continue to report these judgments on credit reports.[31]

The public interest goes far beyond the direct victims of Midland's fraudulent practices as Midland is not the only debt buyer which illegally has been using fraudulent affidavits to obtain judgments. For example, the Maryland Department of Labor's Office of Financial Regulation recently found that over the last six years, LVNV Funding LLC and Resurgent Capital Services L.P. had attempted to collect on consumer claims in default by "knowingly filing false, deceptive or deficient affidavits with regard to the affiant's personal knowledge of the consumer's claim." *See supra* at fn. 13. Nor is it the only debt buyer that lacks proper evidentiary proof of the debts upon which it sues. *See, e.g., Vassalle* RE# 137-1, Proposed Memorandum of Law of *Amici Curiae* CAMBA Legal Services, et al., p. 10, listing court cases so finding.

[31] See, e.g., *Vassalle* RE# 117, Barclay Objection (denied a job), p. 1; *Vassalle* RE# 74, Sutton Objection (bad credit rating), p. 1; *Vassalle* RE# 107, Lindsey Objection (credit limit), p. 2; *Vassalle* RE# 60, Kleinpeter-Baker Objection (credit report and employment), p. 1; and *Vassalle* RE# 104, Redden Objection (credit report and therefore employment prospects), pp.1-2.

Contrary to the view of the Court below, the public interest is not being adequately served by the imposition of a financial penalty on Midland. According to published reports, in 2010, Encore Capital Group collected $266.7 million through lawsuits.[32] The class period covers slightly more than six years, from January 1, 2005 through March 11, 2011. *See Brent* RE# 111. Thus it is reasonable to infer that Midland's systemic fraudulent practices allowed it to collect approximately $1.5 billion during the class period, some of which was legitimately owed and an indeterminate amount of which was not. Given the magnitude of its business, the $5.2 million settlement, which is a mere one-third of one percent (.35%) of its income from illicit judgments over that period, was a very light slap on the wrist, particularly considering that all but approximately $1 million of the $5.2 million is covered by insurance.[33]

Nor is the public interest adequately served because Midland is now subject to a time-limited injunction requiring it to implement procedures to prevent the use of affidavits prepared without personal knowledge in the future. While the injunctive relief provision of the settlement appears at first glance to advance the public interest, it is neither as strong nor as comprehensive as it should have been. The injunction requires "procedures" to be crafted to prevent the use of affidavits filed without personal knowledge in the future. This is in stark contrast to the

[32] http://www.insidearm.com/daily/debt-buying-topics/debt-buying/debt-buyer-encore-capital-reports-huge-q4-and-2010-discusses-lawsuit-settlement/. InsideARM.com, is a primary news and information source for the accounts receivable management industry.

[33] " In its annual report filing (10-K) with the SEC, Encore noted that the total settlement fund is $5.2 million, the bulk of which will be covered by insurance." http://www.insidearm.com/daily/debt-buying-topics/debt-buying/debt-buyer-encore-capital-reports-huge-q4-and-2010-discusses-lawsuit-settlement/.

injunction the District Court had already ordered in the *Brent* case, which absolutely prohibited the use of "affidavits that falsely claim to be based on the affiant's personal knowledge." *Brent* RE#. 56, p 6. The earlier injunction put the defendants at risk of contempt, but the settlement only requires them to try hard not to do wrong again. The FTC also criticized the injunction because "Defendants need not establish procedures to ensure that affidavits are based on credible and accurate information and supported by admissible evidence." *Vassalle* RE# 55 at p. 12.

In addition, the stipulated injunction does not provide any relief to class members who have already suffered the effects of defendants' illegal conduct. Finally, the injunctive relief provision should not have been limited to one year; long-term monitoring should have been required.

B. The Court Erred In Certifying A Nationwide Settlement Class

As part of the Court's order, it certified a nationwide class. In so doing, the Court found that the class representatives were adequate. *Vassalle* RE #160, Memorandum Opinion and Judgment, p. 17. It also found that a nationwide class was superior to other available methods of resolving the controversy. *Id*. at 19. Each finding, however, is unsupported by *any* evidence in the record below. The parties instead acted as if class certification of a nationwide class were a foregone conclusion upon presentation of the proposed agreement. Such a view was soundly rejected by the Supreme Court in *Amchem Products v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231; 138 L. Ed. 2d 689 (1997). In fact, as the Court noted in *Amchem*, courts must give "undiluted, even heightened, attention" to a request to certify a settlement class. *Id*. at 620.

The parties' cavalier attitude toward class certification is demonstrated by the fact that only one paragraph was devoted to obtaining certification in the

parties motion[34] for preliminary approval, *Brent* RE# 107, Joint Motion for Preliminary Approval, ¶ 7, and just three pages in their Joint Motion for Order Granting Approval of Class Action Settlement. *Vassalle* RE # 131. They did not submit a single affidavit from any of the class representatives. This showing was insufficient to sustain the key findings Rule 23 requires to certify a class.

1. Plaintiffs Did Not Establish Adequacy of Representation

As a preliminary matter, it is not even clear *which* individuals were proposed or appointed to represent the class. One must presume that all named plaintiffs, Andrea Brent, Martha Vassalle, Jerome Johnson and Hope Franklin were proffered as representatives because all jointly moved for preliminary approval of the settlement. The District Court, however, did not specifically appoint any class representative by name in its order. Worse still, the parties did not provide the Court with any facts demonstrating that any of the representatives are adequate.

Thus, perhaps because only one proposed class representative – Andrea Brent – had been deposed, the record is utterly devoid of any evidence suggesting that the potential class representatives are adequate. None of the plaintiffs filed a declaration supporting the settlement. No representative affirmed a belief that the settlement was fair to absent class members. None stated that they understood class members would be barred from seeking to vacate judgments. Indeed, once the class representatives had their debts resolved and did not need to seek to vacate any judgments against them, their interests were in conflict with that of other class members. Moreover, the Court was not assured that the representatives did not

[34] The parties apparently relied on the Court's previous certification of a statewide class in *Brent*. *Brent* RE# 107, Joint Motion for Preliminary Approval, p. 7, ¶ 7. This reliance was misplaced as the settlement class had a different class definition, different representatives, and was nationwide in scope, encompassing other state law claims.

suffer from some infirmity that would render them inadequate. *See, e.g.*, *Shroder v. Suburban Coastal Corp*., 729 F.2d 1371, 1376 (11th Cir. 1984) (employee of class counsel's law firm not adequate); *In re Tableware Antitrust Litig.,* 241 F.R.D. 644, 649-650 (N.D. Cal. 2007) (representative must have some familiarity with the case).

The parties simply did not place sufficient facts before the Court to permit it to conduct "a rigorous analysis" to ensure that the class representatives were adequate. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982).

2. Plaintiffs Did Not Establish Superiority

To maintain a class action, the district court must find, among other things, "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Under Rule 23 (b)(3)(A) and (B), the Court should consider, among other factors "the class members' interests in individually controlling the prosecution or defense of separate actions" and "the extent and nature of any litigation concerning the controversy already begun by or against class members." These factors compel the conclusion that a nationwide class action is not "superior" to other available methods for fairly and efficiently adjudicating the controversy.

Demonstrating to a state court that Midland procured a default judgment by fraud, would entitle the defendant to relief from default in California as well as courts throughout the country. *See, e.g.*, California Code of Civil Procedure Section 473(d) (court may set aside a judgment "procured by fraud."); New York Civil Practice Laws and Rules § 5015 (a)(3) (court may relieve party from judgment based upon "fraud, misrepresentation, or other misconduct of an adverse party."). An individual's ability to vacate a default judgment which may enable

Midland to garnish wages, levy bank accounts and devastate credit scores, is a powerful tool for any class member which far surpasses the $17 afforded by the parties' settlement.

Moreover, the fact that Midland submitted false affidavits gives rise to independent claims under both state and federal law. In California, plaintiffs Reimann and DaRonco claim that use of these affidavits violates the Rosenthal Fair Debt Collections Practices Act (Cal. Civil Code Section 1788 et seq.) and constitutes an unfair and unlawful business practice under Cal. Business and Professions Code Section 17200 et seq. *Brent* RE# 144-1, Complaint. In Washington State, Midland's conduct violates the Washington Collection Agency Act (RCW 19.16.250 and 19.16.450). *Vassalle* RE# 32, Gray Objection, pp. 30-31. In Michigan, it violates the Michigan Occupational Code, M.C.L. §339.915(d)8(f) and the Michigan Collection Practices Act, M.C.L. §§ 339.916 and 445.257. *Vassalle* RE# 42, Pelzer Objection, pp. 12-13. And in New York, affirmative claims are available under General Business Law §349. *Vassalle* RE# 137, Center for Responsible Lending Objection, p. 30. *See also*, Section VIIA2(d)(i) *supra* (citing available equitable relief under state consumer laws).

The Court was not provided with any analysis that could support a conclusion (required under Rule 23 (b)(3)) that *this* nationwide class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Such a finding is especially important here given the existence of other pending class and individual actions alleging violations of the laws of the states in which they are venued. Under Rule 23(b)(3)B, the Court should consider "the extent and nature of any litigation concerning the controversy already begun by or against class members."

Here, the extent of litigation already commenced by class members weighed heavily against nationwide certification. Class action litigation asserting

appropriate state law claims had already been commenced in California, Washington, Virginia, Illinois, and Mississippi; and individual claims were pending throughout the country. *Brent* RE# 108, Joint Motion For Order Enjoining Parallel Litigation, pp. 2-3, 9.

The California and Washington actions both include, as defendants, the local law firm that frequently represents Midland in these cases and actually uses the false affidavits. The California Plaintiffs allege that Midland's lawyers committed independent state law violations by filing thousands of California cases without prior reasonable investigation and meaningful attorney involvement, *Brent* RE# 144-1, Reimann Complaint, ¶ 1. Similarly, in Washington, Midland's lawyers allegedly attached documents to affidavits of Midland employees to make it appear that the documents were properly authenticated. *Vassalle* RE# 33, Declaration of Michael D. Kinkley, Exhibit 2, ¶¶ 7.46-7.43. A federal court in Ohio has little interest in policing the actions of lawyers' appearing in California or Washington State Courts. On the other hand, those state courts have a vital interest in protecting the integrity of their respective court systems and the lawyers that practice in those courts. Thus, even if it were *possible*, it is not *desirable* to resolve all claims in one forum and a nationwide settlement should not have been approved.

The parties utterly failed their burden to provide the Court with facts or sufficient legal argument to support a rigorous analysis of whether a nationwide class is the superior means to resolve claims against these defendants preventing the Court below from conducting the required rigorous analysis. Accordingly, this Court should reverse the decision below granting nationwide class certification.

C. The District Court Erred In Determining That The Notice To Prospective Class Members Satisfied Due Process

The notice to the proposed settlement class was a combined notice of proposed class certification under Federal Rule of Civil Procedure 23(b)(3), and of proposed settlement under Rule 23(e). The notice therefore has to meet the requirements of both Rule 23(c)(2) and 23(e). *In re Diet Drugs Prod. Liab. Litig.*, 226 F.R.D. 498, 517 (E.D. Pa. 2005). The "best notice practicable under the circumstances" is required, "including individual notice to all members who can be identified through reasonable effort." Rule 23(c)(2). Such notice must "adequately describe" the substantive claims and "contain information that a reasonable person would consider to be material" in deciding whether to opt out of the class. *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104-05 (5th Cir. 1997). Ultimately, the required notice must be "reasonably calculated, under all the circumstances," to afford interested parties the opportunity to present relevant objections. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950).

Objectors below identified several problems with the class notice that undermined due process. Problems include that the notice 1) does not adequately disclose the extent of the claims that class members release; 2) does not accurately describe the relief granted to the class representatives; and 3) does not inform recipients of other competing class actions against the same defendants. *Vassalle* RE# 25, Objections of Class Members Clawson and Herring to Proposed Settlement, pp. 16-23.

Despite these shortcomings, the court below deemed the notice to be adequate. The court stated that the objections reflected a misunderstanding of the nature of the release, but did not even address the other significant concerns raised regarding the sufficiency of the notice. *Vassalle* RE#160, Memorandum Opinion and Order. For the reasons set forth below, the court abused its discretion in

determining that the class notice was adequate. *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 536 (6th Cir. 2008).

1. The Notice Does Not Adequately Inform Consumers Concerning the Release of Claims They Might Otherwise Have Against the Settling Defendants.

As discussed separately herein, the release of claims greatly impairs class members' ability to vacate the thousands of fraudulent judgments that have been obtained against them in state court collection lawsuits. *Supra* at Section VIIA(2)(d)(ii). The notice makes no mention of this fact. The salient section of the notice is captioned "What am I giving up to receive these benefits" and reads as follows:

> By staying in the class, all of the Court's orders will apply to you, and you give Defendants and their affiliates a "release." A release means that you can't sue or be part of any other lawsuit against Defendants about the claim or issues in this lawsuit, or any other claims arising out of affidavits attached or executed in support of collection complaints filed against Class Members by Defendant or any of their subsidiaries or affiliates.

Brent RE# 107-2, Proposed Notice, p. 3.

Although class members are told that they "can't sue or be part of any other lawsuit against Defendants" they are unlikely to understand this as limiting their ability to challenge the legitimacy of collection judgments that Midland already obtained against them by means of false affidavits because the language used does not actually say this. Class members would not have to "sue" Midland to seek to vacate a judgment, and their effort would not be "part of any lawsuit against Defendants." Rather, efforts by class members to vacate the fraudulent judgments would be undertaken within the lawsuits that Midland and its cohorts had brought against the class members. Yet, as discussed herein at Section VIIA(2)(d)(ii), the effect of the release is to bar any effort to vacate a judgment on the ground that an

affidavit falsely purporting to be on personal knowledge or falsely purporting to have been properly notarized was used to obtain it.

The district court's determination that the release pertains to the collection attorneys in the underlying cases renders the notice even more deficient. *Vassalle* RE#160, Memorandum Opinion and Order, p. 23. The notice does not inform class members that these attorneys will be released, however the settlement agreement specifically releases them. The trial court's description of the release of attorneys and agents as "standard" is wide of the mark here, where collection attorneys were not incidental background figures, but have independent liability predicated on their vital role in the use of false affidavits in underlying collection litigation, such that their release should be specifically called out in the notice.[35] *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d at 1104-05 (notice should "contain information that a reasonable person would consider to be material"); *Bremiller v. Cleveland Psychiatric Inst.*, 898 F.Supp. 527, 581 (N.D. Ohio 1995).

It is the "special province and responsibility" of the trial court, to ensure the "best notice practicable" to the prospective class. *Kleiner v. First Natl'l Bank*, 751 F.2d 1193, 1202 (11th Cir. 1985). Surely the notice provided here, which does nothing to explain to consumers that they are giving up important tools necessary to vacate fraudulently obtained judgments against them, and does not alert them that independent claims against attorneys will be barred too, is not the "best notice practicable." *Id.*

2. The Notice Does Not Adequately Disclose the Relief Awarded to the Class Representatives

The notice contains a section labeled "How much will the Class Representatives receive," but that section fails to fully describe the benefit to the

[35] The release of collection attorneys is important because they are frequently sued for practices related to Midland's affidavits, e.g., the *Reimann* and *Gray* cases referred to herein.

class representatives. Specifically, there is no mention of the fact that the underlying debts of the class representatives are forgiven as part of the settlement. *Compare Brent* RE# 107-2, Proposed Notice *with Brent* RE# 107-1, Settlement Agreement, ¶VD2, p.13.

This is a notable omission, because the $8,000 award to the class representatives that is disclosed, is potentially less valuable than the secret debt-forgiveness that the representatives are also receiving. The benefit to class representatives is a relevant consideration to a prospective class member considering whether to opt out, both because it is revealing as to the potential motives of the class representatives in settling, and because it provides some measure of the type of relief that could conceivably be gained in individual litigation (but which in this case was denied to the non-representative class members).

3. The Notice Fails to Notify Recipients of Competing Class Actions Against the Same Defendants.

Finally, the settlement does not inform class members that other class actions are pending against the same defendants that would be thwarted by the settlement at issue, but which alternatively, for persons in the relevant states, might provide a more favorable vehicle for their concerns. This information could affect these class members' decision whether to object.

In sum, given the deficiencies of the notice, it is little wonder that the vast majority of the notice recipients lost their ability to challenge the bogus Midland collection judgments without requesting any compensation whatsoever, while only .3% of the notice recipients chose to preserve their ability to vacate the fraudulent judgments. *Vassalle* RE#160, Memorandum Opinion and Order, p. 11.

VIII. CONCLUSION

The District Court failed to act as a fiduciary to class members when it approved the settlement under review and failed to rigorously analyze whether to certify a nationwide class. The settlement provided little or no pecuniary benefit to class members even though summary judgment had been granted against Midland. Critically, it forces them to forfeit important rights including the right which they would not have lost even if the case had failed: the right to vacate judgments that were based upon fraudulently prepared affidavits submitted routinely to state courts nationwide. In addition, the notice did not comport with Due Process as it failed to inform class members of the key right they would be giving up and did not inform them of existing state class actions in which they might well have preferred to participate.

For the foregoing reasons, the District Court's Order should be reversed.

Date: January 9, 2012

Respectfully Submitted,

/s/ Charles M. Delbaum

THE NATIONAL CONSUMER LAW CENTER
Charles M. Delbaum
Stuart Rossman
7 Winthrop Square, 4th Fl.
Boston, MA 02110
Telephone: (617) 542-8010
Facsimile: (617) 542-8028
Email: cdelbaum@nclc.org

Daniel E. Birkhaeuser
BRAMSON PLUTZIK MAHLER & BIRKHAEUSER, LLP
2125 Oak Grove Road, Suite 120
Walnut Creek, CA 94598
Telephone: 925-945-0200
Facsimile: 925-945-8792
Email: dbirkhaeuser@bramsonplutzik.com

Reginald S. Jackson, Jr. (0003558)
E-Mail: rjackson@cjc-law.com
Adam S. Nightingale (0079095)
E-Mail: anightingale@cjc-law.com
CONNELLY, JACKSON & COLLIER LLP
405 Madison Avenue, Suite 2300
Toledo, Ohio 43604
Telephone: (419) 243-2100
Facsimile: (419) 243-7119

Counsel for Robert Clawson

And

/s/ Carolyn E. Coffey
Carolyn E. Coffey,
MFY LEGAL SERVICES, INC.

299 Broadway, 4th Floor
New York, NY 10007
Telephone: 212-417-3701
Facsimile: 212-417-3890
ccoffey@mfy.org

Counsel for Christopher Guest and Manuela Rivera

And

/s/ Ian B. Lyngklip
Ian B. Lyngklip (P47173)
LYNGKLIP & ASSOCIATES
CONSUMER LAW CENTER, PLC

24500 Northwestern Hwy., Ste #206
Southfield, MI 48075
(248) 208-8864

Counsel for Elaine Pelzer

And

/s/ Matthew A. Dooley
MCGLAMERY & LOUGHMAN
CO LPA
By:
Matthew A. Dooley, Esq. (0081482)
/s/ Matthew A. Dooley
Dennis O'Toole, Esq. (0003274)
Anthony R. Pecora, Esq. (0069660)
5455 Detroit Road
Sheffield Village, OH 44054
Telephone: (440) 930-4001

Facsimile: (440) 934-7205
Email: mdooley@sheffieldlaw.com
dotoole@sheffieldlaw.com
apecora@sheffieldlaw.com

and

Matthew James Erausquin, Esq.
1800 Diagonal Road, Suite 600
Alexandria, VA 22314
Telephone: (703) 273-6080
Facsimile: (888) 892-3512
Email: matt@clalegal.com
Leonard A. Bennett, Esq.
CONSUMER LITIGATION ASSOCIATES, P.C.
12515 Warwick Boulevard, Suite 100
Newport News, Virginia 23606
Telephone: (757) 930-3660
Facsimile: (757) 930-3662
Email: lenbennett@clalegal.com

Counsel for Ladon Herring, Gilbert James, and Ann Rubio

CERTIFICATE OF COMPLIANCE

This brief contains 13,866 words, excluding the parts of the brief exempted by Fed. R.App.P. 32(a)(7)(B)(iii).

/s/ Charles M. Delbaum
Counsel for Robert Clawson

PROOF OF SERVICE

This is to certify that a copy of the foregoing has been electronically filed with the Court this 12th day of January, 2011. Notice of the filing will be sent to the parties by the operation of the court's electronic filing system. The parties may access this filing through the Court's system.

/s/ Charles M. Delbaum
Counsel for Robert Clawson

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT CLAWSON, et. al
Objector/Appellant,

Case No. 11-3961

v.

MARTHA VASSALLE and JEROME JOHNSON
Plaintiffs/Appellees,

MIDLAND FUNDING LLC, MIDLAND CREDIT MANAGEMENT, INC. ENCORE CAPITAL GROUP, INC.
Defendants/Appellees

On Appeal from the United States District Court for the North District of Ohio
Case No. 3:11-cv-0096
David A. Katz, District Judge
Appeal from Order and Judgment Approving Class Action Settlement dated August 12, 2011
[RE# 160]

Addendum: Appellants' Designation of Relevant District Court Documents

Appellants hereby designate the following filings in the District Court as items to be included in the joint appendix:

Record Citations to *Vassalle et al. vs. Midland Funding et al.* Case 11-cv-00096		
• **DESIGNATION OF ENTRY**	**Date Filed**	**Record Entry Number**
Objection of Class Members Robert Clawson and Ladon Herring to Proposed Settlement	06/01/2011	*Vassalle* RE# 25
Declaration of Stephen Gardner	06/01/2011	*Vassalle* RE# 26
Brief *Amicus Curiae* filed by State of New York, et al.	06/01/2011	*Vassalle* RE# 27
Objection to Proposed Settlement	06/03/2011	*Vassalle* RE# 32
Declaration of Michael D. Kinkley authenticating and seeking judicial notice of documents in support of Objection	06/03/2011	*Vassalle* RE# 33
Objection as to Approval of Class Settlement	06/07/2011	*Vassalle* RE# 42
Motion for leave to File Brief As *Amicus Curiae*	06/20/2011	*Vassalle* RE# 53

filed by *Amicus Curiae* Federal Trade Commission		
Brief As *Amicus Curiae* filed by Federal Trade Commission	06/21/2011	*Vassalle* RE# 55
Exhibit One to Brief As *Amicus Curiae* filed by Federal Trade Commission – Declaration of Tracy S. Thorleifson	06/21/2011	*Vassalle* RE# 55-1
Objection of Ada Carter & Sylvia Yeado	06/27/2011	*Vassalle* RE# 57
Objection of Al Luna	06/27/2011	*Vassalle* RE# 58
Objection of Anita Kleinpeter-Baker	06/27/2011	*Vassalle* RE# 60
Objection of Christopher Guest	06/27/2011	*Vassalle* RE# 68
Objection of Felix Sutton	06/27/2011	*Vassalle* RE# 74
Objection of Manuela Rivera	06/27/2011	*Vassalle* RE# 83
Objection of Sarai Ossers	06/27/2011	*Vassalle* RE# 88
Objection of Kathy Rivas	06/27/2011	*Vassalle* RE# 94
Objection of Mark Hickey	06/27/2011	*Vassalle* RE# 98
Objection of Roger and Dana Redden	06/27/2011	*Vassalle* RE# 104
Objection of Rose Sotelo	06/27/2011	*Vassalle* RE# 105
Objection of Roy Lindsey	06/27/2011	*Vassalle* RE# 107
Objection of Lucille Barclay	06/27/2011	*Vassalle* RE# 117
Response to Brief As *Amicus Curiae* of the Federal Trade Commission	07/05/2011	*Vassalle* RE# 125
Joint Motion for Order Granting Approval of Class Action Settlement and Memo in Support	07/05/2011	*Vassalle* RE# 131
Response to Objections of Herring, Clawson, Gray and Pelzer	07/05/2011	*Vassalle* RE# 133
Amicus Motion leave to file Brief *Amicus Curiae* filed by Amicus Curiae Center for Responsible Lending	07/05/2011	*Vassalle* RE# 137
Brief in Support Proposed Brief *Amicus Curiae* of Center for Responsible Lending, et al	07/05/2011	*Vassalle* RE# 137-1
Joint Opposition to Joint Motion for Order Granting Approval of Class Action Settlement and Memo in Support	07/08/2011	*Vassalle* RE# 148
Motion for leave To File Proposed Allocation of Funds	07/12/2011	*Vassalle* RE# 153
Memorandum Opinion & Judgment Entry	08/12/2011	*Vassalle* RE# 160
NOTICE OF APPEAL to the Sixth Circuit Court of Appeals from the Memorandum, Opinion and Judgment of 8/12/11, filed by Robert Clawson, Christopher Guest and Manuela Rivera.	08/29/2011	*Vassalle* RE# 161

Record Citations to *Midland Funding LLC vs. Brent, et al.* Case 08-cv-01434		
Designation of Entry	**Date Filed**	**Record Entry Number**
Notice of Removal from Sandusky Municipal Court, Erie County, OH, case number CVF0800975, with jury demand.	06/13/2008	*Brent* RE# 1
First Amended Counterclaim against Midland Funding LLC	12/01/2008	*Brent* RE# 22

SEALED Motion for Summary Judgment on Counterclaims and Third Party Complaint	02/19/2009	*Brent* RE# 34
Memorandum Opinion	08/11/2009	*Brent* RE# 50
Memorandum Opinion & Order	09/23/2009	*Brent* RE# 56
SEALED Motion for class certification	03/24/2010	*Brent* RE# 76
SEALED Document: Midland Funding, LLC and Midland Credit Management, Inc.'s Joint Response to Brent's Motion for Class Certification	04/26/2010	*Brent* RE# 84
Motion for summary judgment as to Counterclaimant Brent's Claim for Actual Damages	05/26/2010	*Brent* RE# 88
Memorandum Opinion	11/04/2010	*Brent* RE# 104
Joint Motion for preliminary approval of proposed class settlement	03/09/2011	*Brent* RE# 107
Exhibit A to Joint Motion for preliminary approval of proposed class settlement - Class Settlement Agreement	03/09/2011	*Brent* RE# 107-1
Exhibit B to Joint Motion for preliminary approval of proposed class settlement - Notice	03/09/2011	*Brent* RE# 107-2
Joint Motion for an Order Enjoining (1) Parallel Litigation of Claims to Be Released by Proposed Settlement and (2) Any Attempted Mass Opt Out	03/09/2011	*Brent* RE# 108
Order granting preliminary injunction against parallel litigation	03/11/2011	*Brent* RE# 110
Order granting Motion for preliminary approval of Class Settlement Agreement	03/11/2011	*Brent* RE# 111
Exhibit One to Opposition to Motion for Order to Modify, Amend, or Clarify Preliminary Injunction – Reimann Complaint	04/14/2011	*Brent* RE# 144-1

Record Citations to *Franklin et al vs. Midland Funding, LLC et al* Case 10-cv-00091		
Designation of Entry	**Date Filed**	**Record Entry Number**
Memorandum Opinion	10/06/2010	*Franklin* RE# 18