DENNIS JACOBS, Circuit Judge, dissenting:

This class action alleges that the defendant firms cut sharp corners in obtaining default judgments against the class members in the Civil Court of New York City. On this interlocutory appeal from class certification, the panel concludes that the superiority and predominance prerequisites to a Rule 23(b)(3) damages class have been satisfied. I respectfully dissent.

The *superiority* ruling is error because a statutory procedure is available, in the Civil Court itself, for redressing such an allegedly wide-ranging fraud--one that is superior in every way to this unwieldy federal class action. The district court's *predominance* ruling cannot be sustained because the court failed to perform, as is necessary, a rigorous weighing of common and individualized issues. The majority also holds that a Rule 23(b)(2) equitable and declaratory relief class was properly certified even though the named plaintiffs can get no benefit from that supposed relief because they have already achieved vacatur (or discontinuance) of the default judgments against them.

This is class litigation for the sake of nothing but class litigation.

I

Four plaintiffs, on behalf of a class of over 100,000, sued a buyer of bad

debts (the "Leucadia defendants"), a law firm (the "Mel Harris defendants"), and a process server ("Samserv"), alleging that they fraudulently obtained default judgments against the class members. The alleged scheme proceeded in two steps: (1) a process server, sometimes a Samserv employee (but more often than not, not) engaged in sewer service, and then prepared a fraudulent affidavit of service; and (2) the debt buyer and the law firm generated and submitted standardized affidavits of merit falsely attesting to personal knowledge of the debt. See N.Y. C.P.L.R. 3215(f) (requiring "proof of the facts constituting the claim, the default and the amount due").

The dominant focus of the complaint is the fraud in service of process;[1] although plaintiffs do not actually deny that many class members received proper service. But service is too individualized an issue for class certification. The point was recognized implicitly by the district court,[2] and acknowledged

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[1] See Third Am. Compl. ¶ 4 ("[S]ewer service is the primary reason so few of the people sued by Defendants appear in court to defend themselves."); see also supra Op. p. 31 (acknowledging complaint's emphasis on sewer service but concluding "plaintiffs have made clear that this is but one component of the overarching debt collection plan").

[2] See Sykes v. Mel Harris & Assocs., LLC, 285 F.R.D. 279, 290 (S.D.N.Y. 2012) ("Sykes II") ("[Plaintiffs'] overarching claim is that defendants *systematically* filed false affidavits of merit and, *in many instances*, false affidavits

more directly by its dismissal of one named plaintiff's claim as time-barred because service had been effected more than a year prior to the entry of default. Sykes v. Mel Harris & Assocs., LLC, 757 F. Supp. 2d 413, 422 (S.D.N.Y. 2010) ("Sykes I"). Plaintiffs' backstop contention–-that irregularities in Samserv's logbooks should allow for a presumption that *all* service was fraudulent--is easily refuted.[3]

To patch this hole, plaintiffs changed focus to the affidavits of merit (all of

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of service to fraudulently produce default judgments . . . ." (emphasis added)); id. at 291 ("[I]ndividualized proof of service or lack thereof is not fatal to the prerequisite of commonality. Here, defendants' uniform course of conduct was to file an allegedly false affidavit of merit and, *at least in some instances*, an allegedly false affidavit of service." (emphases added)).

[3] See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2555 (2011) ("Even if [statistical proof] established . . . a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal–Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists. . . ."); id. at 2556 ("Respondents' anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory."); id. at 2561 ("Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." (citations omitted)); see also 650 Fifth Ave. Co. v. Travers Jewelers Corp., No. LT75766/20, 2010 WL 4187936, at *4 (N.Y.C. Civ. Ct. 2010) ("Where a respondent rebuts an affidavit of service with a sworn denial of service, the petitioner must establish jurisdiction by a preponderance of the evidence at a traverse hearing.").

which were generated by a software program used by a single Mel Harris employee) as the "glue" holding together this miscellaneous and diverse class. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552 (2011). (The putative debts are to Sears, a credit card company, a bank, and a gym.[4])

The district court certified two classes: (1) a Rule 23(b)(3) class seeking money damages for "all persons who have been sued by the Mel Harris defendants as counsel for the Leucadia defendants in actions commenced in New York City Civil Court and where a default judgment has been obtained"; and (2) a Rule 23(b)(2) class seeking equitable and declaratory relief for "all persons who have been or will be sued by the Mel Harris defendants as counsel for the Leucadia defendants in actions commenced in New York City Civil Court and where a default judgment has or will be sought." Sykes v. Mel Harris & Assocs., LLC, 285 F.R.D. 279, 294 (S.D.N.Y. 2012) ("Sykes II"). Plaintiffs in both classes assert claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[5] New York General Business Law,[6] and (as against the Mel Harris

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[4] See Third Am. Compl. ¶¶ 136, 166, 198, 269.

[5] See supra Op. pp. 27-28, 34, 47-49; see also 18 U.S.C. § 1962(c).

[6] See supra Op. pp. 28-29, 38; see also N.Y. Gen. Bus. Law §§ 349(a), (h).

defendants alone) New York Judiciary Law.[7] The damages class also alleges Fair Debt Collection Practices Act ("FDCPA") claims.[8]

II

It is useful and diplomatic to set out first the points of my agreement with the majority. I agree that it was no abuse of discretion to find that the Rule 23(a) prerequisites--numerosity, commonality, typicality, and adequacy of representation--are met. There is a common issue as to whether the affidavits of merit were fraudulent, and the claims asserted about the affidavits of merit are typical. Fed. R. Civ. P. 23(a)(2), (3); see also, e.g., Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge."). That issue alone is unlikely to be decisive, but the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Dukes, 131 S. Ct. at 2551. Thus, unlike in Dukes, all of the claims are held together by "glue," id. at 2552–-or some

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[7] See supra Op. p. 29; see also N.Y. Jud. Law § 487.

[8] See supra Op. pp. 25-26, 33-35, 40, 48-49; see also 15 U.S.C. §§ 1692e, 1692f, 1692k(a).

dabs of it.

I also agree that the amount of debt owed by each class member, which defendants urge as an individualized issue that defeats certification, is beside the point. The harm can be viewed as the obligation created by a fraudulent default judgment, so that it should not matter that the original debt may remain, and be unaffected. See Hamid v. Stock & Grimes, LLP, 876 F. Supp. 2d 500, 501-03 (E.D. Pa. 2012) ("It is clear from its underlying purpose that debtors may recover for violations of the FDCPA even if they have defaulted on a debt. . . . If [plaintiff's] payment was not a proper element of actual damages under the FDCPA, a debt collector could harass a debtor in violation of the FDCPA, as a result of that harassment collect the debt, and thereafter retain what it collected."); accord Abby v. Paige, No. 10-23589-CIV, 2013 WL 141145, at *8-9 (S.D. Fla. Jan. 11, 2013); cf. Sparrow v. Mazda Am. Credit, 385 F. Supp. 2d 1063, 1071 (E.D. Cal. 2005) ("[S]trong policy reasons exist to prevent the chilling effect of trying FDCPA claims in the same case as state law claims for collection of the underlying debt."); Isa v. Law Office of Timothy Baxter & Assocs., No. 13-cv-11284, 2013 WL 5692850, at *3 (E.D. Mich. 2013) ("Congress did not intend for collectors to engage in violations, enter judgments, and use state law on judgment execution to force

payment to creditors.").

The last point of my agreement with the majority is that the substantive legal questions the defendants invite us to answer either counsel in favor of commonality and typicality, or are entirely tangential to the class certification decision and best left unanswered at this stage. One such question--what is required for an affidavit of merit under New York law?--is a common question of law in this case. In any event, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent--but only to the extent--that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1194-95 (2013).

III

In my view, the damages class was improperly certified. Rule 23(b)(3) requires first, that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" and second, that "the questions of law or fact common to class members predominate over any questions affecting

only individual members." Fed. R. Civ. P. 23(b)(3). The Rule specifies, as "matters pertinent to these findings," "the desirability or undesirability of concentrating the litigation of the claims *in the particular forum*" and "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(C)-(D) (emphasis added). These very factors counsel against certification here. See Madison v. Chalmette Refining, LLC, 637 F.3d 551, 554 (5th Cir. 2011) ("The decision to certify a class is within the broad discretion of the district court, but that discretion must be exercised within the framework of Rule 23." (internal quotation marks and alterations omitted)).

A

The district court concluded that a federal class action is a superior method for resolving this litigation over state court proceedings, because: (1) it is more efficient than requiring thousands of individual suits; (2) most class members would not litigate given the small recovery and their limited means; (3) the conduct all occurred in New York; and (4) any problems could be alleviated through use of class management tools. See Sykes II, 285 F.R.D. at 294. The majority endorses this analysis. See supra Op. pp. 49-55.

Even if a federal class action were a good way to remedy an allegedly

massive and pervasive fraud perpetrated on a New York court, it cannot be superior to the adequate remedial scheme already offered by the courts of New York. State law provides that, "on motion of any interested person," a party may be relieved from a judgment based on the grounds of, inter alia, "excusable default," "fraud, misrepresentation, or other misconduct of an adverse party." N.Y. C.P.L.R. 5015(a)(1), (3). And, on an application by an administrative judge, vacatur may be granted en masse "upon a showing that default judgments were obtained by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities." Id. 5015(c); cf. Jack Mailman & Leonard Flug DDS, P.C. v. Whaley, No. 31880/02, 2002 WL 31988623, at *6 (N.Y.C. Civ. Ct. Nov. 25, 2002) (forwarding the court's decision "to the administrative judge for the possible institution of proceedings in conformity with C.P.L.R. 5015(c)"). Because vacatur en masse is done by an administrative judge, it is a remedy that is broad, wholesale, effective, and easy. The only remaining salient advantage of this federal class action is attorneys' fees, which do not much help the members of the class.

The majority observes that the availability of recourse to state avenues for relief was not raised in the district court. See supra Op. pp. 49 & n.4. True,

defendants' superiority arguments in their opposition to class certification focused on the existence of issues personal to each class member, as well as manageability, and the prospect of "mini-trials just to determine the threshold issue of class membership." See Mem. of Law in Opp'n to Class Cert., Dkt. No. 90 at 22-23. But that is because the complaint was chiefly predicated on sewer service, an issue as to which facts varied from debtor to debtor, whereas class counsel (at least for current purposes) shifted focus to the submission of materially false affidavits of merit. In any event, the district court's ruling on superiority rests on the determination that a class action is "without question, more efficient than requiring thousands of debtors to sue individually." Sykes II, 285 F.R.D. at 294. It is this consideration that is obviated by the New York procedure. See N.Y. C.P.L.R. 5015(c). "[T]he Legislature has gone so far as to create a special subdivision allowing an administrative judge to bring a proceeding to vacate default judgments en masse where obtained by fraud, misrepresentation . . . lack of service, . . . or other illegalities." Shaw v. Shaw, 467 N.Y.S.2d 231, 233 (2d Dep't 1983) (internal quotation marks omitted).

Rule 23 requires consideration of any other "available method[] for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); see also id.

advisory committee notes (observing the court "ought to assess the relative advantages of alternative procedures" and stating that "[a]lso pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum"). One such "method" that is "available" is afforded by the New York Legislature for redressing harms alleged in this case by recourse to the Civil Court, in which the alleged wrong was done. In the majority's view, "the forum analysis of Rule 23(b)(3) is not grounded in a consideration of the comparative value of pursuing a claim in federal or state court." Supra Op. p. 51. That seems to me error, at least when the state court remedy affords relief--available en masse--for harm that was suffered in that forum.

Amici briefs filed by consumer advocacy groups explain that unscrupulous debt collection practices abuse the legal process, and demonstrate that this well-documented problem has drawn the attention of all levels of government for years. But that observation does not speak to a need for federal class action remedies. As the parties point out, the Civil Court has recently issued directives regarding "Default Judgments on Purchased Debt," imposing new and additional requirements on third-party debt collectors like the Leucadia

defendants.[9] Collectors must now include an "Affidavit of Sale of Account by Original Creditor" and an "Affidavit of the Sale of the Account by the Debt Seller" for each debt re-sale. Cf. Shaw, 467 N.Y.S.2d at 234 ("A judgment obtained without proper service of process is invalid, even when the defendant has actual notice of the law suit, because as a prophylactic measure such rule is necessary to prevent 'sewer service'") (citing Feinstein v. Bergner, 48 N.Y.2d 234, 239-41 (1979)).

The New York court system needs no helping hand from a federal class action initiative. The majority observes that plaintiffs' claims cannot be heard as a class in Civil Court. See supra Op. pp. 50-51. But class litigation is not an end in itself. It is simply a "device to vindicate the rights of individuals class members." In re Gen. Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1127 n.33 (7th Cir. 1979); see also Blaz v. Belfer, 368 F.3d 501, 504 (5th Cir. 2004) (explaining a class action is merely a procedural device). New York's Civil Court also provides such a device. N.Y. C.P.L.R. 5015(c). The majority also discounts the state procedure because it is implemented by judges. See supra Op. p. 54.

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[9] Available at http://www.courts.state.ny.us/courts/nyc/SSI/directives/DRP/drp182.pdf.

But one would have thought that to be an advantage; it reduces the burden on plaintiffs and may obviate the need for counsel altogether.

The majority's other critiques of the state procedure are easily disposed of. Vacatur en masse is discretionary--so are many aspects of class certification. See id. at 55. The majority cites to the district court's observation that a class action is--"without question"--a more efficient way of proceeding. Id. at 54. But the state remedy is far more speedy than a cumbersome class action. In state court, all that is needed is to push on an open door. And that, evidently, is what the class representatives themselves did; they have all had their judgments vacated or discontinued. Thus, the door of the state court is open for the vacatur of the default judgments en masse, without class certification, subclasses, hungry lawyers, or issues of process and statutes of limitations. Cf. In re Aqua Dots Prods. Liability Litig., 654 F.3d 748, 752 (7th Cir. 2011) ("A representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests."). The countervailing benefits of a class action accrue almost entirely to the lawyers in a fee-rich environment, and leave trivial benefits for consumption by the class.

B

"Rule 23(b)(3)'s predominance criterion is even more demanding" than the "rigorous analysis" mandated under Rule 23(a), and requires a "close look at whether common issues predominate over individual ones." Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (internal quotation marks omitted); see also Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615, 623-24 (1997) ("Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding.").

The district court acknowledged problems that might easily be viewed as fatal: "individual issues may exist as to causation and damages as well as to whether a class member's claim accrued within the applicable statute of limitations." Sykes II, 285 F.R.D. at 293. The district court nevertheless hoped that these problems could be dealt with through "a number of management tools," and cited "appointing a magistrate judge or special master to preside over individual damages proceedings, decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages, creating subclasses, or altering or amending the class." Id. at 293-94 (internal quotation marks omitted).

No doubt, resourceful judges can seek or find ways to overcome difficulties. But predominance cannot be determined without a careful balancing of the individualized issues against the common issues. It is not enough to discount problems on the basis of hope and confidence. Compare In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 131 (2d Cir. 2013) ("[C]lose inspection of this case reveals that any class heterogeneity is minimal and is dwarfed by common considerations susceptible to generalized proof.") with Sykes II, 285 F.R.D. at 292 ("[U]se of sewer service and false affidavits of service may warrant equitable tolling. Even still, though, the Court can address such issues at later stages of the litigation if necessary." (citation omitted)).

The existence of such management tools, which are always at hand, does not help to distinguish a claim that justifies certification from a claim that does not. Cf. Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc., 601 F.3d 1159, 1176, 1184 (11th Cir. 2010) ("[A] class action with numerous uncommon issues may quickly become unmanageable."); cf. also In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 42 (2d Cir. 2006) ("Plaintiffs' own allegations and evidence demonstrate that the Rule 23 requirement of predominance of common questions over individual questions cannot be met

under the standards as we have explicated them."). The useful inquiries are why such tools will be needed and how they would be used. What proceedings are envisioned for the magistrate judge? The magistrate judge who hears a hundred thousand claims, four a day, would finish work in about a century. What subclasses, or "amended" or "alternative" classes would serve--and who would represent *any* of them, seeing as how all of the default judgments against the present class representatives have already been vacated or withdrawn? A better-considered case-management tool is de-certification. See Fed. R. Civ. P. 23(c)(1)(C).

Specifically, many claims in this case may be defeated by the statute of limitations. The issue demands a close scrutiny that has not been given. If members were served (or otherwise notified) of the default judgment more than one year before the class action commenced, they cannot now rely on equitable tolling. See New York v. Hendrickson Bros., 840 F.2d 1065, 1083 (2d Cir. 1988) (equitable tolling only appropriate if plaintiff was ignorant of cause of action because of defendant's concealment). A member-by-member inquiry concerning service of process will likely be required. Moreover, all members served after April 1, 2008 were provided supplemental notice by the state court before a

default judgment was entered, see N.Y. Comp. Codes R. & Regs. tit. 22, § 208.6(h)(2); so what will be required is an individualized examination of whether a plaintiff was served or what notice was effected by the court's new system.

In an effort to skate past this appeal, class counsel now jettison their clients' defense of equitable tolling, and propose to include as class members only persons whose claims are not barred by the statute of limitations. But the district court (for one) seemed to think the plaintiffs were still seeking the benefit of equitable tolling when it certified the class. See Sykes II, 285 F.R.D. at 292. Crucially, the class definition does not exclude claims based on the date of filing.

Even if this maneuver succeeds (it appears it has), see supra Op. pp. 43-45, plaintiffs are simply trading a commonality problem for problems of typicality and adequacy of representation: the district court earlier relied on equitable tolling in order to save the FDCPA claims of two of the named plaintiffs.

IV

Class certification for equitable and declaratory relief under Rule 23(b)(2) is likewise deeply flawed. Such a class may only be certified if "the party

opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). In other terms, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." Dukes, 131 S. Ct. at 2557.

The named plaintiffs seek an injunction that would do absolutely nothing for them. The injunction sought would direct defendants to (1) conform their debt collection practices to the laws cited in the complaint, (2) locate and notify class members that a default judgment has been entered against them and that they have the right to file a motion to re-open, (3) serve process in compliance with law, and (4) produce and file affidavits of merit that truthfully reflect personal knowledge. See Third Am. Compl. ¶ 80. *But the default judgments against all of the named plaintiffs were already vacated or discontinued before they asserted these claims.* See id. ¶¶ 131, 161, 215, 330; Sykes I, 757 F. Supp. 2d at 429 ("In fact, all plaintiffs have had the default judgments against them vacated or discontinued."). They get nothing from the equitable relief they seek (absent any speculation that they will be subject to future suits and default judgments by the

Leucadia and Mel Harris defendants). "[A] single injunction or declaratory judgment" will therefore not "provide relief to each member of the class." Dukes, 131 S. Ct. at 2557.

V

I cannot figure out what Samserv is doing here. The common thread identified by the district court was the preparation of the allegedly fraudulent affidavits of merit. Samserv had no role in drafting those affidavits. Moreover, fewer than half the class members were served with process (or given sewer service) by Samserv. And though plaintiffs respond that Samserv was still part of the RICO enterprise, the only common RICO issue identified is the affidavits of merit.

A class certification order cannot reach a defendant based on a purportedly common underlying thread unrelated to that defendant's conduct. See Fed. R. Civ. P. 23(c)(1)(b) ("An order that certifies a class action must define the class and the class claims, issues, or defenses . . . ."); see also, e.g., In re Initial Pub. Offerings Sec. Litig., 471 F.3d at 41 (stating "a district judge may certify a class only after making determinations that each of the Rule 23 requirements has

been met").

The majority's proposal that the district court may certify subclasses is no answer to these problems, for reasons set forth above. See supra Op. n.3; see also Sacred Heart Health Sys., 601 F.3d at 1184 (finding subclasses "no answer" when common questions did not predominate and concluding class action was not superior to other available means for fairly adjudicating claims).

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Certification of this misbegotten class will generate grinding of gears and spinning of wheels for years to come, notwithstanding an effective, superior, and immediately available remedy in state court.