# 13-2742(L)

# 13-2747(Con), 13-2748(Con)

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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MONIQUE SYKES; REA VEERABADREN; KELVIN PEREZ; and CLIFTON ARMOOGAM, individually and on behalf of all others similarly situated

*Plaintiffs-Appellees,*

v.

MEL S. HARRIS AND ASSOCIATES LLC; MEL S. HARRIS; MICHAEL YOUNG; DAVID WALDMAN; KERRY LUTZ; TODD FABACHER; LEUCADIA NATIONAL CORPORATION; L-CREDIT, LLC; LR CREDIT, LLC; LR CREDIT 10, LLC; LR CREDIT 14, LLC; LR CREDIT 18, LLC; LR CREDIT 21, LLC; JOSEPH A. ORLANDO; PHILIP M. CANNELLA; SAMSERV, INC.; WILLIAM MLOTOK; BENJAMIN LAMB; MICHAEL MOSQUERA; and JOHN ANDINO,

*Defendants-Appellants*.

v.

MEL HARRIS JOHN/JANE DOES 1-20, LR CREDIT JOHN/JANE DOES 1-20; and SAMSERV JOHN/JANE DOES 1-20,

*Defendants*.

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On Appeal from the United States District Court for the Southern District of New York, No. 09 Civ. 8486

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**BRIEF FOR APPELLANTS MEL S. HARRIS AND ASSOCIATES LLC; MEL S. HARRIS; MICHAEL YOUNG; DAVID WALDMAN; KERRY LUTZ; AND TODD FABACHER**

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## CORPORATE DISCLOSURE STATEMENT

Defendant-Appellant Mel S. Harris and Associates, LLC has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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## INTRODUCTION

In this sprawling class action, plaintiffs sued subsidiaries of debt-buying company Leucadia National Corporation ("LR Credit"), their outside counsel Mel S. Harris and Associates LLC ("Mel Harris"), their sometimes-process server Samserv, Inc. ("Samserv"), and various affiliates alleging a conspiracy to obtain default judgments against them in New York City Civil Court. Specifically, plaintiffs allege that LR Credit and Mel Harris often hired Samserv to serve process; that Samserv often did not do so; that debtors often defaulted due to Samserv's deficient service; and that LR Credit and Mel Harris, using allegedly false affidavits of service and false affidavits of merit, obtained default judgments enabling them to collect on dubious debts. Framing the default judgments as a common injury, plaintiffs assert a class-wide entitlement to the return of tens of millions of dollars paid pursuant to those default judgments, as well as idiosyncratic damages from everything from bus fare to babysitting, and other sweeping relief.

The District Court certified a massive class of individuals who had been defendants in New York City Civil Court default judgments obtained by LR Credit and Mel Harris. Although much of the complaint focused on Samserv's inadequate service, the class includes individuals assigned to different process servers. There are few subjects more individualized and less suited for class treatment than the

sufficiency of service. And there a few subjects less appropriate for a *federal-court* class action that the massive *de facto* invalidation of thousands of state-court default judgments. The District Court certified this case nonetheless by focusing on the "common factual nexus" of the affidavits of merit, which were filed with the state courts—and not seen by the debtors. SA29. But the affidavits of merits are not a common issue that drives this litigation, let alone an issue that predominates over individualized issues (like service and damages) that lie at the heart of this case. Nor is a federal class action the superior forum for effectively invalidating thousands of state-court judgments based on the validity of a filing made directly to that state courts. The state courts are far and away the superior forum for addressing the sufficiency of the affidavits of merit, and the effect on the default judgments of any deficiency found in the affidavits of merit. Nor is the relief plaintiffs seek the kind of cohesive injunctive relief permitted by Rule 23(b)(2).

The District Court's effort to refocus the litigation on affidavits of merits is no answer to the inherently individualized nature of plaintiffs' claims. In the first place, it is plaintiffs, not the District Court, who are masters of their complaint, and the plaintiffs focused on Samserv's allegedly deficient service. The Rules Enabling Act does not allow the district court to rewrite the substance of plaintiffs' claims to make them better fit with the procedural device of a federal class action. More fundamentally, plaintiffs were right to focus on service, since their claim to

relief ultimately depends on an inquiry into that highly individualized issue. Federal courts cannot presume the invalidity of state-court judgments unless those judgments are void ab initio. And the only way plaintiffs can even attempt to avail themselves of that exception is by showing that they were never served with process and that the ensuing default judgments were therefore void for lack of jurisdiction. Absent such a jurisdictional defect, default judgments, even those involving an allegedly false affidavit of merit, are presumptively valid in the New York courts and certainly may be treated no differently by federal courts. In short, plaintiffs' entire case for relief hinges on their ability to demonstrate deficient service, an issue even the District Court acknowledged must be proved class member by class member, transaction by transaction. In class action terms, the issue that drives the resolution of this litigation and predominates over any purportedly individualized issues is service.

The problems with the certified class do not end there. Damages, like service, require an individualized inquiry. But rather than grapple with that issue and determine whether the individualized nature of the damages inquiry precluded class certification, the District Court simply kicked that issue down the road with the observation that individualized damages issues do not necessarily preclude certification. That truncated inquiry was inadequate even before the Supreme Court focused on the importance of having an adequate common damages theory

in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). In the wake of *Comcast*, that approach cannot stand. Nor can a Rule 23(b)(2) class action stand when the issues are not common, the plaintiffs are not typical, and the relief sought is not cohesive class-wide relief, but rather the invalidation of individual state-court judgments. In the final analysis, the proper forum for invalidating state-court judgments based on the alleged insufficiency of state-court filings directed to state-court officers is, not surprisingly, the state courts. The class certification order here should be reversed or, at a minimum, vacated.

## JURISDICTION

Mel Harris Defendants appeal the District Court's September 4, 2012 class certification opinion and March 28, 2013 class certification order. On July 19, 2013, this Court granted Mel Harris Defendants' Petition for Leave to Appeal Class Certification Pursuant to Federal Rule of Civil Procedure 23(f). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1292(e) and Rule 23(f).

## STATEMENT OF THE ISSUES

1. Whether the District Court erred in certifying a Rule 23(b)(3) damages class when plaintiffs' theory of injury and damages from state-court default judgments hinges on individualized inquiries into whether class members were properly served and actually owed the debts enforced by the judgments.

2. Whether the District Court erred in treating affidavits of merit directed at state courts, but not consumers, as triggering the consumer-oriented protections of the Fair Debt Collection Practices Act.

3. Whether the District Court erred in certifying a Rule 23(b)(2) equitable-relief class when individualized issues surrounding service and debts render class members uncommon, named plaintiffs atypical, and injunctive relief incapable of benefitting all class members in the same way.

## STATEMENT OF THE CASE

Although this case ultimately morphed into a massive class action involving two certified classes of over 100,000 debtors and four causes of action seeking federal-court review of state-court practices, its origins were far more modest. The suit commenced in October 2009, when a single plaintiff, Monique Sykes, brought claims only under the Fair Debt Collection Practices Act ("FDCPA") and New York General Business Law ("GBL")[1] against various LR Credit, Mel Harris, and Samserv defendants. The suit expanded in December 2009 to include class allegations, claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and three additional named plaintiffs. In March 2010, the suit expanded

[1] New York GBL § 349(a) provides: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."

yet again to include a New York Judiciary Law claim[2] and four additional named plaintiffs. Today, after five class representatives entered settlements and another named plaintiff joined the action, Sykes, Rea Veerabadren, Kelvin Perez, and Clifton Armoogam are the named plaintiffs. The four seek to represent themselves and all others "similarly situated" in seeking actual and compensatory damages, statutory damages, treble damages, and injunctive and declaratory relief based on alleged violations of two federal statutes, the FDCPA and RICO, and two state statutes, New York GBL § 349 and New York Judiciary Law § 487. JA140-41, 166 (Third Amended Complaint).

In December 2010, the District Court (Chin, J.) granted in part and denied in part defendants' motion to dismiss. JA137. The court allowed the majority of claims to proceed even as it underscored factual differences surrounding whether class members had been served. For instance, the court acknowledged that the FDCPA's one-year statute of limitations, 15 U.S.C. § 1692k(d), had presumptively expired for many plaintiffs. The court thus dismissed the FDCPA claims of one then-named plaintiff who conceded that she had been served, but permitted other untimely FDCPA claims to progress because those named plaintiffs had

[2] New York Judiciary Law § 487 renders guilty of a misdemeanor, and subject to treble damages, "[a]n attorney or counselor who … [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."

"sufficiently alleged" *lack* of service that rendered equitable tolling of the limitations period "plausible." JA114-15. Moreover, the court dismissed RICO allegations that each of the three defendants comprised distinct RICO "enterprises." But the court permitted allegations of a "collective enterprise" in which all three defendants effected their common purpose of obtaining default judgments "by engaging in 'sewer service'—the practice of failing to serve a summons and complaint and then filing a fraudulent affidavit attesting to service" so that "debtors failed to appear in court because they did not have notice of the lawsuits." JA103, 124-27; *see also* JA108 ("Sewer service was integral to this scheme"); JA117-18 (declining to dismiss FDCPA claims against Samserv because its "alleged failure to serve plaintiffs process and provision of perjured affidavits of service remove them from the exemption" for process servers).

On September 4, 2012, the District Court issued an opinion allowing class-wide relief for damages and equitable relief under Rule 23(b)(3) and Rule 23(b)(2) respectively. The court acknowledged "factual differences" surrounding whether class members were properly served or owed the underlying debts. SA30. The court reasoned, however, that "none of these issues preclude[s] a finding of commonality" or typicality given the "common factual nexus of the affidavits of merit"—filings made, not to class members, but to the New York City Civil Court in obtaining default judgments. SA28-30. The court also acknowledged that

"individual issues may exist as to causation and damages as well as to whether a class member's claim accrued within the … statute of limitations," but reasoned that the issues did not "preclude a finding of predominance" given the "uniform" practice of filing "affidavits of merit" with the state courts. SA29, 37. Finally, the court found that class treatment was a superior method of adjudication given the issues concerning "'use of standardized documents.'" SA38. The court thus held that the criteria for certification had been satisfied.

On March 28, 2013, the District Court issued a class certification order. The court certified a Rule 23(b)(3) damages class for the RICO, FDCPA, New York GBL, and New York Judiciary Law claims including "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," regardless of whether they had been served and whether they owed the underlying debts. SA47. The court also certified a similar Rule 23(b)(2) equitable-relief class for the RICO, New York GBL, and New York Judiciary Law (but not FDCPA) claims including all members of the Rule 23(b)(3) class and extending to persons who "*will be* sued" and where a default judgment "*will be* sought." SA46 (emphases added).

On April 10, 2013, LR Credit defendants, Mel Harris defendants, and Samserv defendants each filed petitions for leave to appeal class certification

pursuant to Federal Rule of Civil Procedure 23(f). This Court granted all three petitions on July 19, 2013. JA427.

## STATEMENT OF FACTS

Mel S. Harris and Associates LLC is a law firm with a primary practice of consumer debt collection. The firm represents a wide range of clients, including, as relevant here, various LR Credit entities in collecting on debt portfolios they have purchased.

### A. The Alleged Scheme

Plaintiffs are New York City residents connected solely by the fact that they were sued by Mel Harris on LR Credit's behalf in debt-collection actions in New York City Civil Court from 2006 and 2010 and had default judgments entered against them. Plaintiffs contend that those default judgments resulted from a fraudulent enterprise involving all three defendants. Specifically, plaintiffs allege that LR Credit and Mel Harris "regularly" hired Samserv to serve process in debt-collection actions; that Samserv "frequently" failed to serve debtors; that unserved debtors defaulted in court; and that LR Credit and Mel Harris thus obtained default judgments by submitting to court false (i) affidavits of service by Samserv attesting that debtors were served when they were, in fact, not served, and (ii) affidavits of merit by the LR Credit entity's custodian of records claiming "personal

knowledge" of facts and listing debts due when the debts were, in fact, dubious. JA140-42, 162-66.

Claiming injury from the state-court default judgments, plaintiffs seek not only treble damages under RICO and the New York Judiciary Law and statutory damages under the FDCPA, but the wholesale return of *all* payments made pursuant to the default judgments regardless of whether the debts were actually owed, as well as unique costs incurred in their efforts to get the state court to overturn the judgments. Plaintiffs also seek injunctive relief "directing Defendants to comply with the N.Y. C.P.L.R. in their debt collection activities" by, *inter alia*, providing class members with notice of the default judgments and their "right … to re-open" their cases, "serv[ing] process in compliance with the law," and "fil[ing] affidavits of merit" that "accurately reflect their personal knowledge of the facts." JA219.

### B. Different Facts Surrounding Service

Despite the centrality of deficient service to the alleged fraudulent conspiracy (and the timeliness of the FDCPA claims), the certified classes are not even limited to individuals who were assigned to Samserv for service. The certified classes cover individuals who, unlike any of the four named plaintiffs, were sued by Mel Harris on LR Credit's behalf, but assigned to a different process server. Plaintiffs have not sued any of the other process serving companies

employed by LR Credit and Mel Harris. And yet the class definition sweeps in individuals with no connection to Samserv. Nor is this a mere rounding error affecting a few individuals; the record suggests that LR Credit and Mel Harris hired companies other than Samserv in tens of thousands of actions during the approximate time period. *Compare* D.E. 71 ¶¶ 3-4 (De Jesus Decl.) (Mel Harris and LR Credit filed 124,376 actions from January 2006 to November 2009), *with* SA6 (citing 7/31/11 Egleson Decl. ¶¶ 2-4) (Mel Harris and LR Credit hired Samserv to serve process in 59,959 actions from January 2007 to January 2011).

Equally critically, the certified classes are not limited to individuals who were, in fact, never served with process. Limiting the class to members who self-identify as unserved would have created serious ascertainability problems. Plaintiffs solved that insurmountable ascertainability problem by sweeping in everyone subject to a default judgment after being sued by Mel Harris on LR Credit's behalf during the class period, without regard to whether they were served. Although each class has over 100,000 members, the record shows just "hundreds" of irregularities in Samserv's recordkeeping of service. SA6. In particular, the records indicate that on 517 occasions, Samserv employees Michael Mosquera, Benjamin Lamb, and John Andino recorded that they performed service in two or more places at the same time, raising the possibility that at least one of the two individuals was not actually served. Without further support, plaintiffs simply

assume that the high rate of default by individuals in the debt-collection actions must necessarily reflect "a high rate of sewer service." JA163-64; *see* JA163 ("*most* of the default judgments [LR Credit and Mel Harris Defendants] obtain are the result of sewer service") (emphasis added).

The named plaintiffs all allege that they were never served with process. Nonetheless, they give differing accounts of their individual circumstances. Both Sykes and Veerabadren admit that they resided at the address where the Samserv employee reportedly served process. JA167-68, 171. Both claim to have been home at the recorded time of service and dispute Samserv's claims that the papers were left with another person of suitable age and discretion to give to them. By contrast, Armoogam and Perez allege that they did not live at the address where the Samserv server reportedly served process; Armoogam concedes that his sister lives at the address, while Perez says that he is unfamiliar with the address. JA176, 181-82. Thus, neither Armoogam nor Perez, in contrast to Sykes and Veerabadren, can speak to Samserv's claims to have left papers with individuals of suitable age and discretion at each address. A meta-data encrypted photograph confirms the server's presence at Armoogam's sister's residence at the time of reported service—8:24 p.m. on June 14, 2010. D.E. 90 at 14.

Meanwhile, even within the subset of class members who were assigned to Samserv and allegedly did not receive service, many, including Sykes and

Veerabadren, were sent supplemental notices by the Mel Harris defendants. *See* D.E. 90 at 15; JA168 (in addition to process server's mailing on 7/24/2008, "Defendant Lutz also affirmed that he sent a copy of the summons and complaint to Ms. Sykes" on 8/7/2008). In addition, all members who were served after April 1, 2008, including Armoogam, were sent supplemental notice by the state court before it entered any default judgments. Those supplemental notices are mandated by the NYCCC rules. *See* 22 N.Y.C.R.R. § 208.6(h)(2) ("[T]he clerk promptly shall mail to the defendant the envelope containing the additional notice …. *No default judgment based on defendant's failure to answer shall be entered* unless there has been compliance with this subdivision and at least 20 days have elapsed from the date of mailing by the clerk."). To establish lack of service (or seek equitable tolling for time-barred claims based on lack of service), any class members who were mailed such supplemental notices must prove that they failed to receive not only Samserv's initial notice, but the supplemental notices as well. *See* JA168, 172 (Sykes and Veerabadren disclaiming receipt of supplemental notices).

### C. Different Facts Surrounding Debts and Damages

Meanwhile, despite plaintiffs' claim that all default-judgment payments made by class members should be compensated in full, the class is represented by named plaintiffs who have already had their default judgments vacated. JA97

(Opp. to Mot. to Dismiss). All four named plaintiffs concede that the payments they made have already been returned or, in some cases, that they never made any payments. *See* JA617 (Perez); JA664-65 (Sykes); JA765 (Armoogam); JA855-56 (Veerabadren).

The certified class, moreover, includes both individuals who actually owed the underlying debts enforced in the default judgments and individuals who contend they never owed the underlying debts. Two of the named plaintiffs, Sykes and Veerabadren, legitimately owed their underlying debts to JPMorgan Chase Bank and Sears. JA167, 173-74; JA648-50; JA842-44. Veerabadren complained instead that she believed she had already been subject to a debt-collection action by a different debt collector. JA173-74. Meanwhile, Armoogam concedes that the debt reflected in his default judgment—an amount due to Chase Bank USA NA—was incurred by his account, but contends that his identity was stolen. JA809. Finally, Perez denies any connection to the underlying debt enforced by the default judgment. JA175-76.

Plaintiffs also seek damages in the form of reimbursement for individualized costs incurred in getting default judgments vacated. Once again, the named plaintiffs demonstrate the variety of the possible damage claims. Sykes seeks compensation for money spent copying her court file, transportation to and from the courthouse, cab fare, and her husband's need to decline work to watch their

children while she appeared in court. JA170. Veerabadren cites a $125 legal processing fee incurred by enforcement of the default judgment, her lost use of levied funds, transportation costs to and from the courthouse and lawyer's office, and missed days of work. JA175. Perez seeks compensation for fees he incurred in using check-cashing services and for negative effects on his ability to find employment and housing due to a negative credit report. JA180. Finally, Armoogam seeks recovery of money spent on copying his court file and getting to and from his lawyer's office. JA184.

**D. Affidavits of Merit**

Finally, at the tail end of plaintiffs' alleged fraudulent course of conduct are their professed concerns about affidavits of merit filed with the state court prior to entry of the default judgments. New York law requires any motion for a default judgment to be accompanied by (1) "proof of service of the summons and the complaint" and (2) "proof of the facts constituting the claim, the default and the amount due by affidavit made by the party." N.Y. C.P.L.R. 3215. The motions filed by Mel Harris on LR Credit's behalf thus attached affidavits of service by the relevant process server as the former, and affidavits of merit signed by Todd Fabacher as the latter.

Fabacher, the Information Technology Director for Mel Harris, simultaneously served as Custodian of Records for the LR Credit entities. The

affidavits of merit were generated by sophisticated software Fabacher developed. In each debt-collection action, Fabacher verified the right to collect the relevant debts by manually examining chain-of-title documents, debt purchase contracts, and warranties attesting that the debt came from the original creditor. He then utilized his software to import data from the portfolios. JA946, 948-49. The software screened out cases beyond the statute of limitations, cross-checked third-party databases for bankruptcy, death, and change of address, generated letters to debtors requesting payment, and flagged returned mail. JA949-51. If letters went unheeded, the software generated a summons and complaint, but only after approval of Mel Harris's Executive Director and attorney review. JA958-59.

The software generated an affidavit of merit in which Fabacher usually attested "that he [wa]s 'an authorized and designated custodian of records' for the plaintiff [LR Credit]" in the State of NY, "that he 'maintain[ed] the daily records and accounts … in the regular course of business, including records maintained by and obtained from [LR Credit's] assignor,'" and that he was "'*thereby* fully and personally familiar with, and ha[d] *personal knowledge of, the facts and proceedings relating to the [debt collection action].*'" SA8 (emphases added). Fabacher did not purport to have "personal knowledge" of the original credit agreements between the account holders and the creditors. The affidavit of merit then provided information on the amount due—for instance, "That LR CREDIT,

LLC [plaintiff] is a LIMITED LIABILITY COMPANY. LR CREDIT 21, LLC is the assignee and purchaser of Account Num #4266841081400945, owed to CHASE BANK USA NA. As such LR CREDIT 21, LLC retains all rights and benefits as owner and purchaser of said debt, as well as all right to collect same." D.E. 90 at 12 n.5. Fabacher manually checked 1 in 50 affidavits of merit to ensure the software was functioning in accordance with his design. JA966, 979.

The affidavits of merits were addressed exclusively to the state court. No plaintiff saw the affidavits before the entry of default judgments. JA315.

In 2009, the New York City Civil Court issued specific guidance on the contents of affidavits to be submitted by debt collectors seeking default judgments. The court did not require original credit agreements between the account holders and the credit holders; instead, it required chain-of-title documents, such as the "Affidavit of Sale of Account by Original Creditor" and "Affidavit of the Sale of the Account by the Debt Seller" for each subsequent sale. NYCCC Directives and Procedures DRP-182 (May 13, 2009), http://www.courts.state.ny.us/courts/nyc/SSI/directives/DRP/drp182.pdf. The court's example templates do not require affiants to attest to their "personal knowledge" of any facts, but rather to the truth of any statements "to the best of my knowledge." *Id.*

## STANDARDS OF REVIEW

This Court reviews a class certification decision for an abuse of discretion. *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244 (2d Cir. 2007). A "district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as the application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001). The Court "review[s] *de novo* any issues of law underlying the Rule 23 ruling," such as "whether the district court applied the correct standard of proof." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 201 (2d Cir. 2008).

## SUMMARY OF ARGUMENT

**I.** The District Court improperly certified a Rule 23(b)(3) damages class. At the threshold, plaintiffs fail to satisfy the prerequisites of Rule 23(a), including commonality and typicality. Although class members have all been defendants in state-court default judgments obtained by LR Credit and Mel Harris, service is a critical issue with respect to each class member's claims, implicating everything from whether a claim was timely, to whether the underlying judgment was void ab

initio, to the nature of a member's damages. Yet, despite the fact that all four named plaintiffs allege deficient service by Samserv, the District Court certified a class that includes individuals improperly served by Samserv, individuals properly served by Samserv, and even individuals whose service was handled by an entirely different process server. Meanwhile, the nature and degree of injury from the default judgments also turns pivotally on whether the plaintiffs actually owed the underlying debts enforced by those judgments. Yet the certified class lumps together individuals who did and allegedly did not owe the money and even individuals who attribute the debts to identity theft, as well as their inherently individualized requests for damages, with some plaintiffs seeking compensation for expenses as distinctly personal as childcare.

The District Court ignored these individualized issues by fixating on affidavits of merit filed with the state court prior to entry of the default judgments. But any concerns about the adequacy of those state-court filings under state law are not "common" issues that "drive the resolution of the litigation," nor, by themselves, do they render named plaintiffs "typical" of the diverse class. *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The District Court's certify-first, ask-questions-later approach underscores both an incorrect application of Rule 23(a) and a failure to perform the rigorous review required before taking the momentous step of class certification.

The District Court's mistaken approach was magnified when it came to the prerequisites of Rule 23(b)(3), predominance and superiority. Even assuming the affidavits of merit were a "common" issue, the District Court proceeded as if identifying a common issue were sufficient to satisfy predominance. In fact, a qualitative comparison of common issues with individualized issues is required to meaningfully assess whether a case is suited to class treatment. The District Court's failure to conduct any meaningful analysis was on full display in its consideration of damages, when it used the mere possibility that common liability issues could predominate over individualized damages issues as a reason for failing even to undertake the comparison. That approach was error even before the Supreme Court's decision in *Comcast*, but *Comcast* removes all doubt on this score. In any event, under a proper analysis of the claims plaintiffs actually pleaded, individualized issues of service clearly predominate over the purportedly common issue of the affidavits of merit. Plaintiffs' damages claims hinge on treating the state-court default judgments as void ab initio, which in turn necessitates individualized inquiries into service. And because the affidavits of merit were directed only to state-court officers, they are not even actionable under the FDCPA.

The District Court's analysis of superiority was likewise deficient. Again, the District Court dwelled on the affidavits of merit, but the superior forum for

addressing their adequacy is manifestly the state courts to whom those affidavits were addressed. The idea that such issues should be decided in the first instance by a federal court in a sprawling class action misunderstands the superiority requirement and the federalist nature of our government. The New York courts have yet to definitively decide whether the methods used to produce the underlying affidavits of merit are acceptable and if not, what the remedies should be. There is nothing superior about a federal court undertaking that role and potentially inflicting millions of dollars of damages premised on the invalidity of state-court judgments as a remedy, especially when a federal class-action procedure would invariably devolve into countless federal mini-trials.

**II.** The District Court also improperly certified a Rule 23(b)(2) equitable-relief class. Again, the certification falls short of the Rule 23(a) baseline. And although Rule 23(b)(2) does not independently require findings of predominance and superiority, that is because it is designed for situations in which relief for a single plaintiff would likely benefit the entire class, even in the absence of certification. That is not remotely the case here. Plaintiffs seek injunctive relief that would, among other things, redress deficient service, re-open individual judgments and, in short, be no different from other issues in this case: The same individualized issues would preclude the commonality of injuries, prevent the typicality of named plaintiffs, and ensure that no single injunction can "provide

relief to each member of the class," the hallmark of Rule 23(b)(2) relief. *Wal-Mart*, 131 S. Ct. at 2557.

## ARGUMENT

### I. The District Court Erroneously Certified a Sweeping Damages Class Under Rule 23(b)(3).

The District Court certified a massive damages class united by nothing more than the fact that Mel Harris has obtained default judgments against class members on LR Credit's behalf in state court. Never mind whether individuals owed the underlying debts, never mind whether they were actually served, and never mind whether defendant Samserv was even the service processor; individuals are lumped together in one unwieldy class. That was clear error. Any effort to adjudicate these claims requires individualized inquiries into whether service actually occurred, whether debts were actually owed, and what damages were sustained, questions that clearly do not yield the common answers necessary for class certification.

The District Court acknowledged the individualized nature of these issues but certified the class based on a belief that there was a common thread—the affidavits of merits filed in the state-court actions—that meant that those concededly individualized issues did not necessarily predominate. But the validity of the affidavits of merits is not a common issue that either drives the litigation, or suffices to render the named plaintiffs' claims typical. Even more obviously, the mere presence of a single purportedly common thread does not mean that thread

predominates. The predominance inquiry by its very nature requires a weighing of common issues and individualized issues. The District Court's truncated analysis failed to do just that, and a proper analysis would have made clear that it is the numerous individualized issues that predominate. Likewise, it is clear that a sprawling federal damages class action is not the superior vehicle for resolving the propriety of the affidavits of merits filed in state court. In short, the class action certified here is incompatible with the careful and demanding analysis required by Rule 23.

### A. Individualized Issues Defeat Commonality and Typicality.

All class actions must satisfy the prerequisites of Rule 23(a) as well as one of the provisions of Rule 23(b). While there may have been a time when the Rule 23(a) prerequisites were viewed as relatively undemanding, *Wal-Mart* ended that era. *Wal-Mart* explained that it is not enough for a class action merely to raise "'common questions'"; rather, the questions must generate "'common *answers* apt to drive the resolution of the litigation.'" 131 S. Ct. at 2551. The Supreme Court likewise indicated that similar concerns prevent a named plaintiff with a highly individualized claim from satisfying the related typicality requirement. *See id.* at 2551 n.5.

The District Court erred at the threshold in finding that the Rule 23(b)(3) class satisfied Rule 23(a) commonality and typicality. The District Court

emphasized that class members shared the "'unifying thread'" of having a default judgment entered pursuant to an allegedly deficient affidavit of merit. SA25. But as *Wal-Mart* underscores, a shared detail is not enough. There must be a common issue that "'drive[s] the resolution of the litigation'" in the sense that "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." *Id.* at 2551; *see also id.* ("Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'"). Each class member's theory of injury and damages from the default judgments turns critically on highly individualized questions of whether class members were served, whether they owed the underlying debts, and what harms they sustained—issues that are not common but actually drive the litigation. And a plaintiff who was not served, did not owe the debt, and suffered significant damage from a default judgment is hardly typical of a plaintiff who was in fact served, did in fact owe the debt, and suffered only nominal damage if any. The reality that some class members received supplemental service from defendants and the court, and that others were not even assigned to Samserv for service, only further undermines typicality. As explained at greater length below and in LR Credit's brief, the class actions certified fail at the Rule 23(a) threshold. *See infra* Part II.A; LR Credit Br. 19-29.

### B. The District Court's Cursory Predominance "Analysis" was Inadequate Under *Comcast v. Behrend* and Longstanding Class Action Principles.

The District Court's unduly lenient approach to the Rule 23(a) factors was only magnified when it came to the Rule 23(b)(3) requirements. The Supreme Court has emphasized that Rule 23(b)(3)'s predominance inquiry is "far more demanding" than the Rule 23(a) requirements. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615, 623-24 (1997); *accord Comcast*, 133 S. Ct. at 1432. By its very nature and placement in the Rule, the predominance requirement presupposes that there will be circumstances in which the Rule 23(a) criteria are satisfied and yet the requisite common issues do not predominate over individualized issues.

The District Court's treatment of predominance is incompatible with the basic thrust of the predominance requirement and fell short of the "'close look'" required before a Rule 23(b)(3) class is certified. *Amchem*, 521 U.S. at 615. The District Court recognized numerous individualized issues that it acknowledged went to "causation and damages as well as … whether a class member's claim accrued within the applicable statute of limitations." SA37. Yet rather than balance those individualized issues against the purportedly common issue it identified to determine which side of the ledger predominates—the sine qua non of the predominance inquiry—the District Court merely observed that it "'does not *necessarily* follow'" from the existence of individualized issues that those issues

will overwhelm the litigation because individualized questions "do[] not *preclude* a finding of predominance under Rule 23(b)(3)." SA37 (emphases added).

True enough. But it is equally true that it does not necessarily follow from the mere existence of a common issue that the common issue predominates. The recognition that there are common *and* individualized issues is the beginning of the requisite analysis—not, as the District Court appeared to view it, the alpha and omega. *See, e.g., Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009) ("a district court abuses its discretion in relying on an internal uniform exemption policy to the near exclusion of other factors relevant to the predominance inquiry"). Reasoning that individualized issues do not "'necessarily'" "preclude" the predominance of common issues in the abstract does nothing to affirmatively establish that the single common issue identified in this case in fact predominated over the numerous individualized issues also identified in this case. SA37. What is required is a meaningful, qualitative assessment of which issues will dominate the litigation—an inquiry into whether this is a misguided attempt to combine inherently individualized cases that happen to share a few common elements, or an effort to litigate essentially common issues with a few individualized details. But the District Court's analysis stopped with the true, but irrelevant, observation that individualized issues do not preclude the possibility that common issues predominate.

The deficiencies in the predominance analysis were on full display when it came to the District Court's flawed treatment of damages. The District Court conceded that individualized damages issues "may exist," SA37, but disclaimed any need to explore the nature and scope of the individualized damages issues at the certification stage. Indeed, when appellants queried whether the return of default-judgment payments plaintiffs seek was contemplated by the class certification, the District Court declined to clarify what damages were even at stake on the rationale that any damages issues "can be addressed later in the proceedings, if necessary." SA43. Rather than detail just how individualized and time-consuming the damages would be and weigh those and other individualized issues against any common thread, the District Court deferred any consideration of damages. In the certification opinion, it merely offered the assurance that courts have "'a number of management tools available … to address any individualized damages issues that might arise in a class action'" later, such as "'appointing a magistrate judge,'" "'decertifying,'" "'creating subclasses,'" and "'amending the class.'" SA38. By declining to even consider the individualized character of the damages issues so they could be meaningfully placed on one side of the predominance ledger, the District Court punted any individualized damages issues until another day. This kind of certify-first, ask-questions-later approach cannot withstand scrutiny.

The District Court's failure to engage with individualized damages issues at the certification stage conflicts with bedrock class action principles. It has long been settled in this Circuit that whether "damages may have to be ascertained on an individual basis is … a factor *that we must consider* in deciding whether issues susceptible to generalized proof 'outweigh' individual issues." *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008) (emphasis added). And the Supreme Court's recent decision in *Comcast*, 133 S. Ct. 1426, underscores the error of the District Court's approach. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 12-7085, 2013 WL 4038561, at *8 (D.C. Cir. Aug. 9, 2013) ("Before [*Comcast v.*] *Behrend*, the case law was far more accommodating to class certification under Rule 23(b)(3)."). Before *Comcast*, some courts used the fact that individualized damages issues do not necessarily preclude class certification when merits issues were common and predominant as shortcuts in their analysis of the extent to which class damages required individualized proof. The Supreme Court in *Comcast* made crystal clear that the mere possibility that damages could be handled on a class-wide basis was no excuse for shirking "the court's duty to take a 'close look'" at whether damages, in fact, could be proved on a class-wide basis or would require highly individualized proof. 133 S. Ct. at 1432. The Court specifically chastised the Third Circuit for "refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification,"

which "ran afoul of [Supreme Court] precedents requiring precisely that inquiry." *Id.* at 1432-33. And whereas the district court in *Comcast* at least made a finding, albeit an erroneous one, that damages could be calculated on a class-wide basis, the District Court here did that erroneous decision one better—it made *no finding at all* about damages. *Comcast* makes clear that even where there are common issues on the merits, the extent to which damages issues require individualized or common proof can make or break the predominance finding. The failure to even engage in that inquiry is clear reversible error.

### C. Individualized Issues Plainly "Predominate" in This Action.

#### 1. Plaintiffs' Claims Stemming From The Default Judgments Are Not Amenable To Class Treatment.

Under the proper and complete analysis of predominance, it is clear that individualized issues—including but hardly limited to damages—predominate over any purportedly common issue here. Individualized issues inhere in plaintiffs' underlying theories of injury and damages. At the heart of plaintiffs' case is the complaint that the state-court default judgments entered against them were void ab initio because they were never served with process, and the presumption that the federal courts can redress those injuries. Even the District Court recognized that issues concerning service were individualized, but the extent to which that is true and tips the balance in a proper predominance analysis cannot be overstated.

Whether Samserv failed to serve plaintiffs is a paradigmatically individualized question. As an initial matter, many class members were not even assigned to Samserv, the only process server that plaintiffs have sued and the entity whose allegedly shoddy service practices formed the heart of plaintiff's complaint. Concerns about allowing plaintiffs to create a hypothetical "perfect plaintiff" from evidence not applicable to the entire class are dramatically illustrated by this effort to allow individuals assigned to *different* process servers to recover based on evidence of *Samserv's* practices. *See Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998) ("plaintiffs enjoyed the practical advantage of being able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation" by "draw[ing] on the most dramatic alleged misrepresentations" applicable only to some class members).

Even among class members who were actually assigned to Samserv, proving whether Samserv served or failed to serve them is an inherently individualized inquiry. *Cf.* JA114-15 (dismissing FDCPA claims of one plaintiff who was served, but declining to dismiss claims of other plaintiffs who "sufficiently alleged" lack of service). The District Court acknowledged the panoply of "factual differences" surrounding whether class members were properly served, SA30—differences that would necessitate transaction-by-transaction proof. Indeed, Samserv's records reveal only a small fraction—hundreds out of tens of thousands—of service

irregularities, and even those raise only an inference of improper service; they do not establish lack of service without additional inquiry. The reality is that most class members *were* served. More importantly, any attempt by plaintiffs to disprove such record-based indications that the vast majority of class members were duly served would enmesh the District Court in tens of thousands of individual, fact-intensive inquiries to sort the served from the unserved.

The individualized proof problems are further compounded by the fact that some class members but not others were mailed *supplemental* notices of the claims—that is, they were served yet again. Mel Harris defendants sent supplemental summonses and complaints to many class members, including named plaintiffs Sykes and Veerabadren. In addition, the state court sent supplemental notice to class members who were served after April 1, 2008, including named plaintiff Armoogam, before entering any default judgment. *See* 22 N.Y.C.R.R. § 208.6(h)(2). Thus, even class members who could prove that they were not served by Samserv would have to prove that they were *twice* (or even thrice) deprived of service to establish that their default judgments were void for lack of service. *See* JA168, 172 (Sykes and Veerabadren disclaiming receipt of supplemental notices). Adjudicating plaintiffs' claim for the return of default-judgment payments would therefore devolve into one hundred thousand individual mini-trials that would inevitably overwhelm the litigation. *See Babineau v. Fed.*

*Express Corp.*, 576 F.3d 1183, 1191 (11th Cir. 2009) ("common issues will not predominate over individual questions if, 'as a practical matter, the resolution of [an] overarching common issue breaks down into an unmanageable variety of individual legal and factual issues'").

It gets worse: Disgorgement of default-judgment payments cannot be compelled without conducting still more individualized inquiries into whether those payments were actually owed. Indeed, the certified class is rife with differences surrounding the underlying debts. Some class members legitimately owed the debts reflected in the judgments; others did not. Still others admit that the debts were incurred under their names but purport to be victims of identity fraud. Ultimately, it is doubtful whether a class member who actually owed the debt enforced by a default judgment can be deemed "injured." But at a minimum, a class member who was properly served and paid debts that he actually owed has sustained a radically different "injury" from an unserved member subject to a default judgment for a debt he did not owe, or from a member who was a victim of identity theft.

The individualized features of class members' claims do not end there. Many members have already had their default judgments vacated, which radically reduces their compensatory damages and undercuts any RICO treble damages claim. *See Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1166 (2d Cir.

1993) (no RICO claim unless and until plaintiff "ultimately fail[s] to collect the judgment"). Others have entered voluntary settlements and have made payments, acknowledged debts, and waived claims against defendants—releases they must overcome to see any recovery. *See Lomando v. Duncan*, 257 A.D.2d 649 (N.Y. App. Div. 1999) (refusing to vacate default judgment because defendant made payments, thereby waiving jurisdictional objections about lack of service). Still other members will be time-barred by the limitations period, while some unserved members may have the limitations period tolled in the court's discretion—a judgment that again entails individualized inquiries into service and any supplemental notices. *See* JA113-14 (equitable tolling "plausible" if member was "fraudulently deprived … of notice"). At bottom, determining whose default-judgment payments are compensable and to what degree are not questions amenable to class treatment. *Cf.* 2d Cir. No. 13-1320 D.E. 29 at 18 (Pltfs.' 23(f) Answer) ("compensation for the money Defendants extracted … pursuant to the default judgments" warrants "class-wide resolution" because courts "need only consult Defendants' records for the precise figures they obtained from each Plaintiff").

Plaintiffs' other damages claims are, if anything, even more individualized. Plaintiffs seek compensation for a hodgepodge of incidental expenses they allegedly incurred in getting default judgments lifted. These asserted damages

range from copying and check-cashing service fees to transportation costs to and from courthouses. *See* JA170 (Sykes) (copying, transportation, cab, work foregone by husband's babysitting); JA175 (Veerabadren) (processing fee from restraint upon bank account, lost use of levied funds, transportation, missed work days); JA180 (Perez) (check-cashing service, negative credit report, "costs" in visiting courthouse); JA184 (Armoogam) (copying, transportation). And pinning down those idiosyncratic damages would require the District Court to proceed class member by class member, transaction by transaction.

**2. The Affidavits of Merit do not Remedy the Problem.**

The District Court minimized the predominance of individualized issues only by exaggerating the importance of a "'unifying thread'" between class members: affidavits of merit filed with the state court in applying for default judgments. SA25. The District Court candidly acknowledged that "factual differences exist as to whether … each member was, in fact, properly served." SA28; *see also* JA303 ("whether someone has been served with process is a highly individualized situation and usually [requires] an inquest"). It likewise acknowledged "differences surrounding the underlying debts of the named plaintiffs." SA30. Nevertheless, the District Court dismissed the individualized issues as "no more than 'minor variations' in the facts" by deeming them subsidiary to the affidavits of merit.

The District Court's singular reliance on the affidavits of merit was flawed on many levels. First, and most obviously, it reflected its unduly truncated predominance inquiry. Even assuming that the validity of the affidavits of merits is a common issue that satisfies Rule 23(a) and means that individualized issues do not *necessarily* predominate, the analysis of how this one common issue could somehow predominate over all the individualized issues in the case is simply missing.

Second, the District Court elevated the importance of the affidavits of merit only by impermissibly rewriting plaintiffs' substantive claims to fit the class-action procedure. Plaintiffs' own claims focus on deficient service and correctly treat the affidavits of merit as a subsidiary part of the overall scheme. JA207, 209, 216-17, 218; *cf.* JA219 (seeking service-related injunctions first, then an injunction relating to affidavits of merit). Plaintiffs' operative complaint unambiguously declares Samserv's sewer service "the primary reason" for the default judgments. JA153; *see also* JA163 ("most of the default judgments they obtain are the result of sewer service"); JA54 (defendants avoid their "proof problem in two ways": (1) "they intentionally engage in 'sewer service'" and (2) "fraudulently swear to the courts that they have actually served their victims, when they have not"); JA75 (affidavits of service are "*crucial* to the functioning of the entire enterprise, as Defendants could not have obtained tens of thousands of default judgments without Samserv's

assistance"). Even the District Court, in declining to dismiss Samserv at the motion-to-dismiss stage, noted that Samserv's "[s]ewer service was integral to this [alleged] scheme." JA108. The District Court thus minimized the individualized issues of service, and correspondingly magnified the purportedly common issue of the affidavits of merit, only by recasting plaintiffs' substantive claims to better suit class treatment—an approach fundamentally at odds with Rule 23 and the Rules Enabling Act. *See* 28 U.S.C. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right."); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) (Rule 23 "is a procedural right only, ancillary to the litigation of substantive claims"). A proper predominance analysis, however, requires a finding that common issues predominate over individual issues when it comes to the claims plaintiffs *actually pleaded*.

Third, and more fundamentally, any effort to emphasize the affidavits of merit at the expense of individualized service deficiencies ignores plaintiffs' claim for relief, which puts service issues front and center. Plaintiffs assert a class-wide entitlement to the return of tens of millions of dollars paid pursuant to state-court default judgments, as well as other sweeping relief, based solely on the fact that they have been defendants to those judgments. Their underlying premise is that the federal courts should bar defendants from enforcing state-court default judgments entered *in defendants' favor*, or compel defendants to disgorge money already

collected on those state-court judgments. Plaintiffs' entire case for relief thus hinges on their ability to demonstrate that those state-court judgments are void ab initio. But the only way a federal court could possibly reach that conclusion is for plaintiffs to show a *jurisdictional* defect like the deprivation of service.[3] *See Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 705 (1982) ("If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given."); 28 U.S.C. § 1738 (otherwise, federal courts shall give state-court judgments "full faith and credit"). A faulty affidavit of merit would not do the trick; Todd Fabacher's alleged overstatement of his "personal knowledge" about "relevant facts" in the affidavits would at most be akin to false evidence that does not render a default judgment void ab initio.[4] *See* 73 Paul M. Coltoff et al., N.Y. Jur. 2d Judgments

[3] Even a jurisdictional defect, however, can be waived by failure to raise the objection in timely or diligent fashion. *See In re Parkside Ltd. Liab. Co.*, 294 A.D.2d 582 (N.Y. App. Div. 2002); *Renova Realty Corp. v. Wasserman*, 4 A.D.2d 444, 448 (N.Y. App. Div. 1957).

[4] In any event, the flaws of the affidavits of merit are not at all clear. Rather than assert that the affidavits misstated any debts, plaintiffs complain that the "personal knowledge" claim suggested that "Fabacher and/or the other Defendants have obtained or could obtain documentation of the debt from the original creditor." JA165. But federal courts have repeatedly held that filing a collection action without immediate means of proving the debt does not violate the FDCPA. *E.g., Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 330-31 (6th Cir. 2006); *Mansfield v. Midland Funding LLC*, No. 09-358, 2011 WL 1212939, at *5 (S.D. Cal. Mar. 30, 2011). Fabacher, moreover, did not claim knowledge of documentation from the original creditor. And the District Court, by fixating on

§ 263 (2d ed. 2013). In other words, try as they might to change the focus, the inquiry that ultimately drives this litigation is the inherently individualized question of service. And requiring the wholesale disgorgement of all default-judgment payments based on the affidavits of merit would effectively require the federal courts to treat as void judgments that the state courts do not.

Finally, the affidavits of merit cannot be said to "predominate" over the litigation because they are only of *some* relevance to *some* claims, and indeed the greater their relevance, the manifestly weaker the claims. For unserved members deprived of the ability to raise valid defenses to the underlying debts, the affidavits of merit are of only marginal relevance; the affidavits could have been impeccable and they still would have sustained the same injury and attribute that injury to Samserv. For members who were served and actually owed the underlying debts, the affidavits of merit may have marginally more relevance, but such members also face greater problems establishing causation (for they chose to default in court) or

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Fabacher's use of software, overlooked Fabacher's personal familiarity with the software he created and personal review of supporting documentation defendants *did* have. Fabacher, moreover, explained the basis for his professed personal knowledge—his capacity as "custodian of records" for Leucadia and one who "maintain[s] the daily records and accounts." *Cf. Intervale Ave Assoc v. Donlad*, 969 N.Y.S.2d 803 (Civ. Ct. 2013) ("the affiant fails to state the basis of his personal knowledge"). In any event, the District Court acknowledged that Fabacher's statement would have been unobjectionable had he based the same exact facts on "'information and belief.'" SA26-27 n.9; *cf.* NYCCC DRP-182, *supra* (example affidavit attesting that statements "are true to the best of my knowledge").

anything more than nominal damages. Thus, the affidavits of merit are either peripheral to a potentially strong claim fundamentally about lack of service, or central to a very weak claim by a class member ineligible for the lion's share of requested relief. *Cf. Wal-Mart*, 131 S. Ct. at 2551 (a "common" issue must be "central to the validity of *each one of the claims* in one stroke") (emphasis added). They do not match, much less outweigh, the individualized issues in the case.

### 3. The Affidavits of Merit, as Court Filings, Are Not Even Cognizable Under The FDCPA.

Indeed, the District Court's heavy reliance on the affidavits of merit in its predominance finding is additionally flawed with respect to plaintiffs' FDCPA claims because those affidavits are not even actionable under the FDCPA.

The FDCPA "establishes certain rights for *consumers* whose debts are placed in the hands of professional debt collectors for collection, and requires that such debt collectors advise the *consumers* whose debts they seek to collect of specified rights." *DeSantis v. Computer Credit, Inc.*, 269 F.3d 159, 161 (2d Cir. 2001) (emphases added). Consistent with the Act's avowed purpose "to protect consumers against debt collection abuses," 15 U.S.C. § 1692(e), the statute prohibits the use of "any false, deceptive, or misleading representation[s] or means in connection with the collection of any debt," § 1692e. The provision provides 16 illustrative examples of such prohibited practices—for example, falsely representing "that the consumer committed any crime… in order to disgrace the

consumer," § 1692e(7), or failing to disclose "in the initial written communication with the consumer … that the debt collector is attempting to collect a debt," § 1692e(11). Courts applying § 1692e, accordingly, consider whether a misrepresentation would mislead "the least sophisticated consumer." *Easterling v. Collecto, Inc.*, 692 F.3d 229, 234 (2d Cir. 2012); *see also Markup on Debt Collection Legislation: Hearing Before Senate Committee on Banking, Housing and Urban Affairs*, 95th Cong. 4063, at 9 (June 30, 1977) (statement of Sen. Riegle, principal sponsor of FDCPA) ("Mr. Chairman, this bill prohibits, generally, harassment of a consumer, misleading representations made to a consumer, and certain unfair practices.").

Given the FDCPA's consumer-oriented protections, this Court has held that communications made to persons other than the consumer, at least where the consumer did not "stand in the shoes" of the recipient, are not actionable under the FDCPA. *See Kropelnicki v. Siegel*, 290 F.3d 118, 130 (2d Cir. 2002) ("In order to make out this claim, Kropelnicki must first show that the letter was a communication *to her*."). This Court has even expressed in dicta "grave reservations" about the argument that communications to a consumer's *attorney* are FDCPA violations. *Id.* at 127. Numerous courts in this Circuit have thus held that "[f]or a misrepresentation to be actionable under the FDCPA, the false statement must be made to the debtor directly." *Okyere v. Palisades Collection,*

*LLC*, No. 12 Civ. 1453, 2013 WL 1173992, at *10 (S.D.N.Y. Mar. 22, 2013); *see also Schuh v. Druckman & Sinel, L.L.P.*, 751 F. Supp. 2d 542, 548-50 (S.D.N.Y. 2010); *Tromba v. M.R.S. Assocs.*, 323 F. Supp. 2d 424, 428 (E.D.N.Y. 2004). Such circumspect interpretations of the FDCPA's reach accord with the Act's broader restrictions on debt-collectors' "[c]ommunication with third parties," which require consent by the consumer or court to communicate at all with "any person other than the consumer," the relevant attorneys, or the consumer reporting agency. 15 U.S.C. § 1692c(b).

In *O'Rourke v. Palisades Acquisition XVI*, 635 F.3d 938 (7th Cir. 2011), the Seventh Circuit squarely held that a debt collector's communications with a state court, even if misleading, were not actionable under the FDCPA. *See Okyere*, 2013 WL 1173992, at *10 (citing *O'Rourke*). Palisades had attached to its complaint an exhibit resembling a credit card statement that listed O'Rourke's balance and that created the impression that O'Rourke had received the statement but not objected. The Seventh Circuit reasoned that, although the misrepresentation "reflects negatively on Palisades' debt-collection practices," the FDCPA "regulates communications directed at the consumer" and "does not extend to communications that are allegedly meant to mislead the judge in a state court action." 635 F.3d at 939-40. In so holding, the Seventh Circuit aligned itself with the numerous other Circuits that have expressed caution about extending the

FDCPA's protections beyond consumer-directed communications and done so, if at all, only to persons enjoying exceptionally close relationships with the consumer. *See, e.g., Guerrero v. RJM Acquisitions, LLC*, 499 F.3d 926, 934 (9th Cir. 2007) ("communications directed solely to a debtor's attorney are not actionable" under the FDCPA); *Volden v. Innovative Fin. Sys., Inc.*, 440 F.3d 947, 954-55 (8th Cir. 2006) (misrepresentations not "to the plaintiff … do not fall within the [FDCPA's] 'general application'"); *Wright v. Fin. Serv. of Norwalk, Inc.*, 22 F.3d 647, 651 (6th Cir. 1994) (en banc) (executrix who "stand[s] in the shoes of the debtor [with] the same authority as the debtor to open and read the letters of the debtor" can invoke FDCPA).

This result makes sense and should be definitively adopted here. State courts and state bars are perfectly capable of policing the conduct of lawyers and the adequacy of state-court filings without the intervention of the FDCPA. Courts, lest they upset the federal-state balance, should not lightly assume that this federal consumer-protection statute was designed to protect state courts from the lawyers who practice before them. *See United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *cf. Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (recognizing that FDA, not state courts, should police misrepresentations to the federal agency).

Here, the affidavits of merit were not directed at consumers—indeed, not even seen by them before entry of the default judgments—and thus do not trigger the FDCPA's protections. The state-court clerks on the receiving end, like state-court judges, merely "stand as impartial decision-makers in the discharge of their office." *O'Rourke*, 635 F.3d at 944. They "do not have a special relationship with consumers" warranting an extension of the Act's prohibitions. *Id.* at 943.

Knocking out the FDCPA claim would only further unravel the District Court's predominance analysis. The District Court dismissed variations in whether plaintiffs owed the underlying debts by contending that "[l]iability under the FDCPA can be established irrespective of whether the presumed debtor owes the debt." SA31. But if the FDCPA claim falls for the independent reason that affidavits of merit are not actionable—wiping out the only claim that the District Court invoked to support a uniform damages award—that leaves only the RICO, Judiciary Law, and possibly GBL[5] claims, where individualized issues like whether

[5] As if anticipating that the FDCPA claims would fall on *O'Rourke*'s rationale, the district court stressed that plaintiffs challenged the affidavits of merit "under several statutes." SA26 n.9. But the text and purpose of New York's GBL are on all fours with the FDCPA, suggesting that the affidavits of merit would likewise not be actionable under GBL § 349. *See* GBL § 349(a) ("Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."); *Wilson v. Nw. Mut. Ins. Co.*, 625 F.3d 54, 64 (2d Cir. 2010) (§ 349 requires showing that defendant's conduct is "consumer-oriented" and "have a broader impact on consumers at large"); *City of New York v. Smokes-Spirits.com*, 12 N.Y.3d 616, 621 (2009) (§ 349 private plaintiffs "must allege that a defendant has engaged in … consumer-

the underlying debts were actually owed loom large. *See Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (a RICO plaintiff must show "that the defendant's violation not only was a but for cause of his injury, but was the proximate cause as well'"); *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20 (1995) (a GBL plaintiff "must show that the defendant engaged in a material deceptive act or practice that caused actual … harm."); *Nason v. Fisher*, 36 A.D.3d 486, 487 (N.Y. App. Div. 2007) (a Judiciary Law plaintiff must establish that the "alleged conduct was the proximate cause of any loss").[6]

### D. A Federal Class Action Is A Far From "Superior" Means Of Adjudication.

The District Court likewise erred in evaluating the "superiority" of a federal class action in a case that is, at bottom, about the validity of state-court judgments and state-court filings. As noted, the commonality, typicality, and predominance findings are all based on the affidavits of merit—filings directed exclusively at

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oriented conduct"). The District Court thus merely raised an uncertain state-law claim in its attempt to bolster an already-uncertain federal law claim.

[6] Nor can plaintiffs use Rule 23(b)(2) to revive these claims for damages. In *Wal-Mart*, the Supreme Court unanimously held that claims for monetary relief may not be certified under 23(b)(2) "at least where … the monetary relief is not incidental to the injunctive or declaratory relief." 131 S. Ct. at 2556. Here, any request for damages would not be "incidental" to the injunctive or declaratory relief. Far from subject to mechanical calculations, the amount of compensable damages will pivot on individualized issues surrounding whether each class member received service or owed the underlying debt.

state courts. Given that reality, there is no basis for concluding that a sprawling federal damages class action is a superior vehicle vis-a-vis the state courts that received the affidavits of merit and entered the default judgments.

In evaluating superiority, the District Court was obligated to consider "the desirability or undesirability of concentrating the litigation of the claims in the *particular forum*." Fed. R. Civ. P. 23(b)(3)(C) (emphasis added). But rather than seriously grapple with the profound federalism and comity concerns of a federal court evaluating the validity of state-court filings and state-court judgments en masse, the court issued only a conclusory statement, parroting the rule without analysis, that "as the alleged conduct occurred in New York City Civil Court, concentrating the litigation of these claims in this particular forum is desirable." SA39. If the District Court had rejected a federal class action by substituting the word "that" for "this," the statement above would make eminent sense. But the United States Federal District Court and the New York City Civil Court are hardly fungible. And if the gravamen of this case—the common issue that really drives the litigation—really were the adequacy of the affidavits of merits filed with the New York City Civil Court, surely *that* court is the superior forum to hear the complaint and devise any remedies.

The District Court's unexplained conclusion that a federal district court is the superior forum to consider the sufficiency of state-court filings and validity of

state-judgments ignores numerous doctrines designed to prevent federal courts from lightly disturbing state-court judgments. It is axiomatic and fundamental to our structure of government that federal courts treat state-court judgments as valid and enforceable. Under the Full Faith and Credit Act, federal courts will not disturb state-court judgments even when erroneous. *See* 28 U.S.C. § 1738; *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996); *see also* LR Credit Br. 40-42 & n.6 (discussing the related *Rooker-Feldman* doctrine).

As noted, a narrow exception to that bedrock principle lies when the state-court judgments were entered without jurisdiction and thus void ab initio. Restatement (Second) of Judgments § 65 (1982). But that exception is exceptionally limited. Even default judgments issued in spite of deficient affidavits of merit are not treated by New York courts as void ab initio. Rather, when a default judgment is entered despite a movant's failure to submit the "'proof of the facts constituting the claim'" required by N.Y. C.P.L.R. 3215(f), "[t]he defect in the default judgment … is not jurisdictional" and "does not justify treating the judgment as a nullity." *Manhattan Telecomms. Corp. v. H&A Locksmith, Inc.*, 21 N.Y.3d 200, 203-04 (2013); *see also Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 829 (2008) (refusing to set aside default judgment despite contention that C.P.L.R. 3215(f) defect renders the judgment a nullity). Indeed, New York courts have held that even the omission of

an affidavit of merit "would not render the default judgment a nullity." *Araujo v. Aviles*, 33 A.D.3d 830, 830 (N.Y. App. Div. 2006). More generally, affidavits filed in default-judgment proceedings "need only allege enough facts to enable a court to determine that a viable cause of action exists" because "defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them." *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71 (2003). Default judgments treated as valid until proven otherwise by state courts can certainly be treated no differently by federal courts.

Nor can federal courts treat as "common" a defect that state courts would recognize only upon specific, individualized showings. Indeed, in New York, judgments tainted by deficient affidavits of merit, though not a nullity, "can be corrected by the means provided by law—*i.e.*, by an application for [discretionary] relief from the judgment pursuant to [N.Y. C.P.L.R. §] 5015." *Manhattan Telecomms. Corp.*, 21 N.Y.3d at 203-04. That is, such judgments can be overturned in the court's discretion upon individualized, substantive proof. *See* N.Y. C.P.L.R. § 5015(a) (party may obtain relief from judgment should he demonstrate "excusable default" in motion "made within one year" after judgment is served); *Maroscia v. Pastore*, 245 A.D.2d 2, 3 (N.Y. App. Div. 1997) (no relief where defendant failed to prove that error in affidavit of merit was "intentional" or "show how he was harmed"). Under New York's standards, then, even a flawed

affidavit of merit would not entitle the defendant to relief from the judgment in the absence of a reasonable excuse and meritorious defense. But permitting federal courts to adjudicate and devise federal remedies for what are essentially fraud-on-state-court claims invites the imposition of conflicting standards. *Cf. Cole v. Baum, P.C.*, No. 11-3779, slip op. at 19-21 (E.D.N.Y. July 11, 2013) ("federalism and comity militate against construing the FDCPA so broadly as to encompass violations of 22 NYCRR § 202.12-a and/or CPLR § 3408" and "effectively … establishing a remedy for the violation of these state-law provisions").

This prospect of conflicting federal and state substantive standards is all the more problematic where the alleged flaw with the affidavits of merit is a matter extensively regulated by state rules. *See* NYCCC DRP-182, *supra* (providing template affidavits to be submitted by debt collectors seeking default judgments); *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010) (FDCPA's purpose is typically not implicated "'when a debtor is instead protected by the court system and its officers'"). Notably, under those state rules, "personal knowledge" of original credit agreements is not even the crux of whether an affidavit of merit is substantively adequate. *See* NYCCC DRP-182, *supra* (requiring attestations to truth of facts "to the best of my knowledge"). At bottom, it makes little sense for a federal court, much less a federal class action, to treat as invalid New York default judgments that New York courts would continue to treat

as valid and enforceable. And it makes even less sense for a federal court, in treating such judgments as invalid, to referee the bounds of what statements should pass muster in a state-court filing carefully regulated by state rules. This federal forum is not only not superior, but manifestly inferior.[7]

Nor is there any plausible basis for justifying this forum on manageability grounds. The District Court's truncated predominance analysis allowed it to ignore the many individualized issues that would need to be addressed to resolve the class members' claims. When factored into a proper predominance inquiry, those individualized issues clearly predominate—but those same issues ensure that a federal class action will not be manageable. There is no way to determine the liability on plaintiffs' claims or the appropriate measure of damages without engaging in one hundred thousand mini-trials. The need for those mini-trials eviscerates any purported efficiency advantage of a class action. Especially when the underlying issues are the sufficiency of state-law filings and the validity of state-law judgments, federal adjudication en masse is neither superior nor manageable.

[7] Indeed, state courts have already determined that various recitations of "personal knowledge" in Mel Harris's affidavits of merit pass muster. *E.g.*, Judgment, *LR Credit 23, LLC v. Ismail*, No. 1801-13 (N.Y. Cnty. Civ. Ct. May 6, 2013) (entering default judgment upon receipt of revised affidavit of merit asserting that affiant is "personally familiar *with those account records maintained by plaintiff[] related to the within action*").

## II. The District Court Erroneously Certified a Sweeping Class for Injunctive and Declaratory Relief Under Rule 23(b)(2).

Because the certified Rule 23(b)(3) damages class is untenable, for all the reasons discussed above, that leaves at best the Rule 23(b)(2) equitable-relief class, and certification should at a minimum be amended to reflect this. But the Rule 23(b)(2) certification is likewise flawed for many of the reasons that doomed the damages class.

The District Court certified a Rule 23(b)(2) class of over 100,000 class members linked only by the fact that state-court default judgments have been *or will be* entered against them in lawsuits brought by Mel Harris on LR Credit's behalf. Although Rule 23(b)(2) actions have no explicit predominance and superiority requirements, that is because the rule is designed to facilitate injunctive relief on common issues that would give relief to a cohesive class. In other words, Rule 23(b)(2) is designed for situations in which an injunction in favor of a member of a cohesive class would provide relief to the broader class as a practical matter, even without certification. This case involves the antithesis. The logical relief in an individual case would be to vacate the default judgment in that case based on service defects in that case. Other class members would only benefit if they could show their own individualized circumstances justified individual relief. There is nothing cohesive about the injunctive relief sought here, which only underscores that the issues driving the litigation are not common, the named

plaintiffs' claims are not typical, and certification was not proper. And that injunctive relief would change the very modes of proceeding in state court, underscoring yet again the inferiority of plaintiffs' chosen forum for their claims.

### A. Individualized Issues Defeat Commonality and Typicality.

The Rule 23(a) prerequisites, including commonality and typicality, are requirements for a Rule 23(b)(2) class every bit as much as for a Rule 23(b)(3) class. Indeed, because a Rule 23(b)(2) class is a mandatory class, courts must be vigilant in protecting unnamed class members who have no "right to opt out," *Wal-Mart*, 131 S. Ct. at 2558, and therefore even "'more hesitant in accepting a (b)(2) suit which contains significant individual issues than … under subsection 23(b)(3).'" *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998). Thus, the problems with commonality and typicality discussed above apply *a fortiori* to the claims for injunctive relief.

As noted, whether Fabacher overstated his "personal knowledge" in the affidavits of merit simply does not amount to a truly "common" issue under the definition laid out in *Wal-Mart*. Not only were affidavits of merit peripheral to plaintiffs' actual claims and district court pleadings, which centered on allegations of service, but they are manifestly not "central" to the many members of the class whose grievances lie with Samserv. 131 S. Ct. at 2551. For unserved class members who did not actually owe the underlying debts, the affidavits of merits

could have been flawless and they still would have sustained exactly the same injury. That is, they were injured, not by any representation in the affidavit of merit, but because they were never served and were therefore deprived of the chance to raise their valid defenses in state court. In short, only the issues of service, not the affidavits of merit, truly "'drive the resolution of the litigation.'" *Id*.

Nor are named plaintiffs' claims "typical of the class claims." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982). Indeed, the named plaintiffs are not even typical of one another, much less of other class members. Sykes and Veerbadren concede that they owed the underlying debts, Perez disputes any connection to the debt, and Armoogam concedes that the debts were incurred by his account but only after his identity was stolen. Nor can it be said that Sykes, Veerabadren, or Armoogam sustained the same injury as class members who did not owe the underlying debts enforced against them and were unable to raise their valid defenses because they were never served with process.

The typicality problems with the four named plaintiffs are particularly glaring with respect to the injunctive relief sought in (b)(2) class. All four named plaintiffs have had the default judgments entered against them vacated. Accordingly, the vast majority of relief requested by the Rule 23(b)(2) class has no significance to their representatives. The class, for instance, seeks an injunction

directing defendants "to locate class members and notify them that a default judgment has been entered against them and that they have the right to file a motion with the court to re-open their case." JA219. But that injunction offers no relief to any of the named plaintiffs, all of whom have long been aware of the default judgments entered against them and have already had those judgments vacated.

### B. Plaintiffs Seek Individualized Injunctive Relief Under Rule 23(b)(2) In Violation Of *Wal-Mart v. Dukes*.

Beyond the problems with commonality and typicality, certification was also improper because Rule 23(b)(2) "applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart*, 131 S. Ct. at 2557. Indeed, the reason Rule 23(b)(2) does not require a showing of predominance and superiority is that both features should be "self-evident" when the class is seeking an "indivisible injunction *benefitting all its members at once*." *Id.* at 2558 (emphasis added). Accordingly, the Supreme Court has said that, "at a minimum, claims for *individualized* relief … do not satisfy the Rule." 131 S. Ct. at 2557. But individualized relief is precisely what this class would need.

Tellingly, notwithstanding the District Court's insistence that "the crux of plaintiffs' claims" has always been the affidavits of merit, SA30, plaintiffs seek first and foremost an injunction to redress victims of deficient *service*.

Specifically, plaintiffs seek a court order "[d]irecting Defendants to locate class members and notify them that a default judgment has been entered against them and that they have the right to file a motion with the court to re-open their case; to provide each class member with a copy of the affidavit of service filed in their action; and to notify the court of the index number of each class member's case." JA219.

Even a casual look at that injunction makes clear that it would not "benefit[] all [class] members at once," *Wal-Mart*, 131 S. Ct. at 2558, because individual class members are far from similarly situated with respect to service. Some class members were served. Others were not. And still others were not served by Samserv but *were* served with supplemental copies of the summonses and complaints by the defendants, by the state court after April 1, 2008, or both. Though the injunction ensures that all members will be notified "that a default judgment has been entered against them," only those class members who to this day have *still* never been notified will derive any relief from that order.

Similarly, though the injunction informs all members of their "right … to re-open their case," that right pertains only to a subset of class members. It is patently inapplicable to the many class members, including the named plaintiffs, who have already had their default judgments vacated or settled and waived claims. It is also inapplicable to class members who have no such right because

the statute of limitations has lapsed and they cannot qualify for equitable tolling (which itself depends on individualized inquiries into service). And it is likely inapplicable to the undefined number of class members who "*will be* sued," for there is no indication that such members will experience similar service practices when a default judgment "*will be* sought." In short, this is not the "indivisible injunction" that is the hallmark of a Rule 23(b)(2) class.

Plaintiffs additionally seek injunctive relief geared at the affidavits of merit—specifically, an order "[d]irect[ing] Defendants to produce and file affidavits of merit in future actions that truthfully and accurately reflect their personal knowledge of the facts, or lack thereof." JA219. But this raises all the same problems as the District Court's inordinate reliance on the affidavits of merit in its commonality, typicality, and predominance analyses. Because the affidavits of merit are of only marginal significance to class members who were not served (as their gravamen of their complaint lies with Samserv, not Fabacher's assertion of personal knowledge), the injunction would provide only marginal benefit to such class members. The principal beneficiary of this injunction would be state-court officers, but that only exposes the glaring federalism problem with this whole class action. Similarly, the injunction would prove little benefit to class members who actually owed the underlying debts, for whom even a tempered assertion of "personal knowledge" of the debt would make no difference to the amounts

ultimately paid. And the injunction would provide only speculative benefit to class members who "*will be* sued," for there is no indication in the record that Mel Harris on Leucadia's behalf will be submitting affidavits of merit in their cases that are flawed in any respect. *See supra* n.7.

Accordingly, the injunctive relief, while making no explicit distinctions between class members, cannot apply uniformly to the class as a whole. And injunctive relief that applies only to certain class members but not others is irreconcilable with Rule 23(b)(2) certification.

### C. RICO Does Not Permit Private Parties To Seek Injunctive Relief, Leaving A Rule 23(b)(2) Class Based On Only State-Law Claims.

The Rule 23(b)(2) certification is additionally improper because, for all the reasons discussed in LR Credit's brief, injunctive relief is not available under RICO. *See* LR Credit Br. 44-50. The District Court recognized that "neither injunctive nor declaratory relief is available under the FDCPA" and thus excluded that claim from the Rule 23(b)(2) class. It should have done the same for the RICO claim. As this Court emphasized nearly 30 years ago, it "seems altogether likely that [RICO] … was not intended to provide private parties injunctive relief." *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 489 n.20 (2d Cir. 1984).

Without the RICO claims, only the New York GBL and New York Judiciary Law claims would remain in the class, and this Court should remand to give the District Court the opportunity to decline supplemental jurisdiction over the state-

law claims. *See* 28 U.S.C. § 1367(c) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if … the district court has dismissed all claims over which it has original jurisdiction, or … in exceptional circumstances, there are other compelling reasons for declining jurisdiction."). Both the Supreme Court and this Court have repeatedly noted that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966); *accord Lanza v. Merrill Lynch & Co.*, 154 F.3d 56, 61 (2d Cir. 1998); *Lennon v. Miller*, 66 F.3d 416, 426 (2d Cir. 1995). In short, "the balance of factors to be considered under the pendant jurisdiction doctrine—judicial economy, convenience, fairness and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7 (1988); *see also S. New England Tel. Co. v. Comcast Phone of Conn., Inc.*, 718 F.3d 53, 61 (2d Cir. 2013) ("'principles of federalism and comity' instruct us to leave unresolved questions of state law to the states 'where those questions concern the state's interest in the administration of its government'").

More fundamentally, the mere prospect of a Rule 23(b)(2) class based solely on state-law claims directed to the sufficiency of state-court filings and the validity of state-court judgments underscores that this federal class action is the wrong

vehicle in the wrong forum. *See* JA219 (subsuming requested injunctive relief under "[a]n order enjoining and directing Defendants to comply with the NY CPLR"). At its core, plaintiffs' case remains an effort to invoke the jurisdiction of the federal courts to seek the wholesale invalidation of valid, final judgments entered against them in state courts.

* * *

In sum, the District Court premised its Rule 23(b)(2) certification on claims that are not common, named plaintiffs who are not typical of the class, and injunctive relief that would not benefit all class members equally as the rule demands. The certification was based on errors of law and an abuse of discretion. The remedy for any deficiencies in state-court filings or defects in state-court judgments should come from the state courts, not the federal courts proceeding en masse.

## CONCLUSION

For the reasons set forth above, this Court should reverse or, at a minimum, vacate the District Court's order granting class certification.

Respectfully submitted,

s/Paul D. Clement

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September 25, 2013

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(N) because it contains 13,758 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

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September 25, 2013

s/Candice Chiu
Candice Chiu

## CERTIFICATE OF SERVICE

I hereby certify that, on September 25, 2013, an electronic copy of the foregoing Brief for Appellants Mel S. Harris and Associates LLC, Mel S. Harris, Michael Young, David Waldman, Kerry Lutz, and Todd Fabacher was filed with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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