Record No. 14-4156

In the

United States Court of Appeals

for the Sixth Circuit

ELAINE PELZER; DIANNE FREDERICK; GULAR PROBOST; RAUL OSORIO,
Intervenors – Appellants,

v.

MARTHA VASSALLE; JEROME JOHNSON; ANDREA BRENT; HOPE FRANKLIN; CLASS MEMBERS,
Plaintiffs – Appellees.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO AT TOLEDO

BRIEF AMICUS CURIAE OF AARP IN SUPPORT OF INTERVENORS – APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: **14-4156**
Case Name: ***Vasalle, et al. v. Midland Funding, LLC, et al***.

Name of Counsel: **Mary Ellen Signorille**

Pursuant to 6th Cir. R. 29(c)(1) and 26.1, **AARP** makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party: *No.*

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest: *No.*

CERTIFICATE OF SERVICE

I certify that on February 24, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/Mary Ellen Signorille
Mary Ellen Signorille

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STATEMENT OF INTEREST

AARP is a nonprofit, nonpartisan organization that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. As the leading organization representing the interests of people aged fifty and older, AARP is greatly interested in this case because the settlement could immunize debt collectors from using abusive practices to collect on stale and invalid debt.

AARP has participated as amicus curiae in cases involving challenges to abusive debt collections in federal and state courts. AARP filed an amicus brief in this Court in *Vassalle v. Midland Funding LLC*, 708 F.3d 747 (6th Cir. 2013), the proceeding that considered the adequacy of the originally proposed settlement, and requests to file again in this matter because the revised settlement does not resolve the issues underlying this Court's rejection of the original settlement. AARP's participation in this case will assist this Court in its consideration of the issues raised on appeal.

SUMMARY OF ARGUMENT

This Court should reject the revised settlement for the same reasons it rejected the original settlement. Once again, the district court failed to serve the

interests of the class and the interests of the public when it certified a nationwide class and approved a settlement which is not fair, reasonable and adequate. In this case, a nationwide class action is not a superior means of adjudication against one of the nation's leaders in the debt collection industry. The relief provided to class members is trivial, yet the release of claims is expansive. At the root of this case, Midland exhibited conduct typifying the severe consumer abuse prevalent in the debt buying industry. This settlement not only fails to compensate class members but also fails to deter Midland's egregious and pervasive violation of consumer rights with it's release of state based litigation claims has. A class of 1.44 million individuals is required to give up affirmative litigation claims in consideration of the company's payment of only $5.7 million, while Midland continues business as usual by collecting on fraudulent debt judgments at issue in this case. The settlement is inconsistent with the text and standards of Rule 23.

The revised settlement is materially no different than the original settlement this Court rejected. Under the revised settlement, like the original settlement, the unnamed class members give up valuable litigation rights that are crucial to defend against the abuses prevalent in the debt buying industry. As a consequence of giving up affirmative litigation rights, unnamed class members, unlike class representatives, will be prevented from obtaining the benefit of counsel to defend themselves in state courts against the fraudulent claims of Midland. The injunctive

relief, which is also substantively identical to the one in the original settlement, does not actually prevent Midland from filing false affidavits. Furthermore, it provides Midland a competitive advantage over other debt collectors by providing a means for Midland to defend against suits challenging its use of fraudulent affidavits.

This Court should reject the revised settlement on the same grounds it rejected the original settlement because the settlement has not changed in any material way.

ARGUMENT

I. ONCE AGAIN, THE COURT SHOULD REJECT THE NATIONWIDE CLASS CERTIFICATION ON THE BASIS OF THIS SETTLEMENT.

The revised settlement does not resolve any of this Court's concerns with the original settlement. This nationwide settlement still does not provide a superior method of resolving the controversy and it is unfair to class members. As this court recognized in *Vassalle v. Midland Funding LLC,* 708 F.3d 747, 756-59 (6th Cir. 2013), when parties seek class certification along with a class settlement proposal, satisfaction of the Fed. R. Civ. P. 23(a) and 23(b) class certification requirements depends on the terms of the settlement. *Id.* This Court rejected the original settlement on grounds of superiority because the unnamed class members would forfeit their "strongest" interest in the litigation: their rights to "individually

control[] the defense" of Midland's actions against them. *Id.* at 758. The revised settlement, like the original settlement, eliminates the ability of judgment debtors to effectively challenge judgments obtained by fraud and requires class members to release all affirmative litigation rights. The revised settlement must be rejected on the same grounds.

A. This Court should reject the revised settlement's class certification on the same grounds it rejected the original settlement: the nationwide class action is not a superior means of adjudication in light of the individual litigation potential that the settlement requires class members to waive.

The district court should not have certified the nationwide class because, like in the original settlement, the value of the large number of claims released "would exceed the value of monetary relief in this settlement." *See Vassalle*, 708 F.3d at 758. The settlement, in requiring such a broad release of claims for *de minimus* monetary compensation, is not a superior means of adjudicating the claims. The district court erred in accepting the superiority of this nationwide class action at the expense of the affirmative litigation rights of numerous victims of the abusive practices at issue.

The revised settlement purports to resolve this Court's earlier ruling on superiority by providing an exception to the broad class release. The carve-out to the class release permits individuals merely to challenge judgments entered by Midland based on false affidavits but does not affect the important rights of class

members to bring affirmative or class litigation. The district court erroneously found that the revision satisfies this Court's concern with class members being unable to "control[ ] the defense" of the fraudulent state court judgments against them. *See Vassalle*, 708 F.3d at 758.

The district court's finding misapprehends the superiority requirement. Rule 23(b)(3) requires courts to consider "the class members' interests in individually controlling the *prosecution or defense* of separate actions" as an element of satisfying the superiority requirement. Fed. R. Civ. P. 23(b)(3)(A) (emphasis added). The proper focus is not limited to the defense *per se*: it extends to litigation rights generally. For example, in *Abby v. City of Detroit*, 218 F.R.D. 544 (E.D. Mich. 2003), the court denied class certification by viewing the incentive of unnamed class members to bring *separate actions*, not merely to allow them a defense against the opposing party's action. *Id*. at 549 (noting as a superiority consideration that a number of other individual litigation actions had been brought by class members); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (acknowledging plaintiffs' "significant interest in individually controlling the prosecution of [his case]" as a consideration of superiority) (internal reference omitted). Similarly, in *Gascho v. Global Fitness Holdings, LLC*, No. 2:11-cv-436, 2014 U.S. Dist. LEXIS 46846, at *43 (S.D. Ohio Apr. 4, 2014), the court considered the interest of individual members in "individually controlling *separate*

actions," not merely defensive actions. *Id.* The revised settlement's allowance to class members a limited right to challenge the invalid debt judgments already entered against them does not satisfy this requirement.

As this Court previously found, there is a decent likelihood that "many members of the class will choose to bring individual lawsuits[.]" *Vassalle*, 708 F.3d at 758. The Court discussed that class members had brought other class action litigations around the nation against Midland, which was a factor in concluding that individuals could be better served without the class settlement. *See Vassalle*, 708 F.3d at 758 (referencing multiple live class actions around the nation against Midland as examples of absent class members' rights to control their defenses against Midland's actions). This Court also held that class members could seek damages under state law claims, another factor in concluding superiority was not met. *Id.* The revised settlement fails altogether to address the requirement that class members still must release their litigation rights against Midland. The exception to the class release does not overcome this Court's superiority finding, which the Parties took out of context on the basis of a paraphrase.

B. By requiring the release of litigation rights, this settlement also abolishes the potential to use litigation to deter abuses in the debt collection industry.

Private litigation rights are especially important for the protection of the consumer in the debt buying industry. *See, e.g.*, *Sykes v. Mel S. Harris & Assocs. LLC*, No. 13-2742-cv, 13-2747-cv, 13-2748-cv, 2015 U.S. App. LEXIS 2057 (2d Cir. Feb. 10, 2015) (approving class certification of FDCPA, RICO, and state law claims challenging judgments obtained by debt buyer and law firm—using false affidavits of merit and service—that otherwise could not have been obtained). The Fair Debt Collection Practices Act (FDCPA) and state law consumer protection statutes provide statutory damages for abusive debt collection practices, as well as fee-shifting provisions, to encourage individuals to litigate against debt collection abuses. Certification of the nationwide class in this case blocks the potential for masses of individual suits that could provide better damages for class members. *See Vassalle*, 708 F.3d at 758 (concluding individuals could likely collect damages under state law claims that would exceed the monetary relief in the original settlement). The relief this settlement provides to class members is trivial compared to the aggregate potential relief available to the mass of individuals who have been harmed by Midland's practices.

Not only does this settlement bar class members' potential to do better in individual actions, *see Vassalle*, 708 F.3d at 758; it also does not deter the fraud

perpetrated by Midland because it bars the potential for class litigation. *See Watkins v. Simmons & Clark, Inc.*, 618 F.2d 398, 401-02 (6th Cir. 1980) (explaining that Congress intended "to use the threat of class action recoveries to force compliance with the [Truth in Lending] Act."); *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013) ("A class action . . . has a deterrent as well as a compensatory objective."); *see also* William Rubenstein, Newberg on Class Actions § 1:8 (5th ed.) ("[C]lass actions deter misconduct by harnessing private attorneys general to assist in the enforcement of important public policies.").

Individuals need protection from abuses inherent in the debt buyer business model. The right to private litigation is essential for an individual's potential to get a remedy, which this Court recognized in its rejection of the original settlement, and also to deter the industry from engaging in abusive practices. In 2013, the FTC issued a report expressing "serious concerns about the sufficiency and accuracy of the information that debt buyers have at all stages of the collection process." Federal Trade Commission, *Structure and Practices of the Debt Buying Industry* 29 (Jan. 2013), *available at* http://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf [hereinafter *FTC Debt Report*]. Increasing volumes of complaints from alleged debtors who often claim they don't owe the debt being

collected prompted the Consumer Financial Protection Bureau (CFPB) to assert supervisory authority over debt collectors. *See id.* at iv (reporting allegations from consumers that they did not owe the debt in over one million cases each year). Federal regulators are beginning to enforce consumer protection obligations against banks that sell debt without sufficient documentation to verify the debt is actually owed by the person named on the account. *See, e.g.*, *Shining a Light on the Consumer Debt Industry*, Subcomm. on Financial Institutions and Consumer Protection, S. Comm. on Banking, Housing, and Urban Affairs (July 17, 2013) (Statement of Office of the Comptroller of the Currency) (discussing bank sale of debt without adequate controls), *available at* http://www.occ.treas.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf. The OCC also recently issued new guidance prohibiting banks from continuing to sell debt without the accompanying documentation about the account. Office of the Comptroller of the Currency, *OCC BULLETIN 2014-37, Consumer Debt Sales: Risk Management Guidance,* http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html.

Many millions of judgments, worth tens of billions of dollars, were entered in state courts well before regulators or other consumer advocates could address the industry-wide fraud. The debt buyer industry was designed to take advantage of the weaknesses inherent in the judicial system. *See, e.g.*, Peter A. Holland, *The*

One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases, 6 Md. J. of Bus. and Tech. L. 259, 263 (2011) (addressing evidentiary issues related to debt buyer suits in small claims courts because the federal rules of evidence do not apply). Many people fear or do not understand the court system. They often do, however, understand that having a judgment entered against them subjects them to wage or bank garnishment and may prevent them from such things like maintaining a security clearance, getting or keeping a job, qualifying for a loan, or renting an apartment. To cut their real or imagined losses (such as the fear that they will be arrested on the basis of a debt judgment), many purported debtors pay on debts they do not owe just to prevent a judgment being entered against them.

Affirmative lawsuits challenging the practices of the debt collection industry provide the only hope of relief from the illegal and abhorrent practices of the debt buyer industry. Private litigation to enforce legal protections and obtain remedies is especially important to deter widespread illegal practices where public enforcement authorities lack the ability or resources to regulate comprehensively. *See, e.g.*, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government."); *see also* Mark A. Cohen and Paul H. Ruben, *Private*

Enforcement of Public Policy, 3 Yale J. on Reg. 167, 168-69 (1985) (arguing that private enforcement may be more efficient than public enforcement). The settlement should be rejected because it disposes of private litigation rights at nearly no expense to the wrongdoer and *de minimus* compensation to the victims.

The settlement's monetary relief of a mere $5.7 million is paltry compared to the amount Midland stands to collect if the millions of judgments obtained by fraud are sanctified by this Court. Consider, for example, the relief obtained by the New York Attorney General in a settlement with Encore (Midland's parent group) for the same practices of robo-signing affidavits. The settlement required Encore to vacate 4,500 judgments against borrowers (which amounts to nearly $18 million in debt relief) in addition to a monetary penalty of $675,000. Press Release, *A.G. Schneiderman Obtains Settlement From Major Debt Buyer Who Filed Thousands Of Time-Barred Debt Collection Actions*, Attorney General Eric T. Schneiderman (Jan. 9, 2015), http://www.ag.ny.gov/press-release/ag-schneiderman-obtains-settlement-major-debt-buyer-who-filed-thousands-time-barred (last visited Feb. 24, 2015). The New York settlement "ensures that thousands of [consumers] will see millions in relief from debts that *were not enforceable in the first place*." Jessica Silver-Greenberg, *Debt Buyer Faces Fine and Loss of Thousands of Court Judgments*, New York Times Dealbook (Jan. 8, 2015, 8:43PM EST), *available at* http://dealbook.nytimes.com/2015/01/08/debt-buyer-faces-fine-and-loss-of-

thousands-of-court-judgments/?_r=0 (*quoting* Attorney General Schneiderman regarding the New York settlement) (emphasis added). Because the revised settlement requires class members to waive their rights to a class action or to "seek relief [from Midland's practices] on behalf of two or more judgment debtors," Settlement Agreement at §V.D, *Vassalle v. Midland Funding LLC*, 708 F.3d 747 (6th Cir. 2013) (No. 3:11-cv-00096), ECF No. 227-1, it may influence whether class members would be entitled to relief if the attorneys general chose to exercise their regulatory authority and seek vacature of the fraudulently procured judgments. The revised settlement should be rejected because it neither adequately compensates the class for nor deters the fraud perpetrated by Midland, which is worth billions of dollars, and is similarly practiced by thousands of other debt collectors.

C. The settlement sanctions the illegal practices prevalent in the debt buying industry.

The debt collection industry touches a huge percentage of Americans,[1] and Midland specifically has a major market share.[2] Midland's illegal practices

[1] "In 2013, approximately 30 million individuals—14% of American adults—had debt subject to the collections process averaging $1,400." Consumer Financial Protection Bureau, *Annual Report 2014, supra.*

[2] Encore Capital Group, Inc. ranks among the nine largest debt buyers in the U.S. Collectively these firms purchased 76.1% of consumer debt sold in 2008; Encore alone accounting for approximately 11% of the total debt purchased by the nine firms—nearly $11 billion in face-value consumer debt, *See* Federal Trade

underlying this lawsuit have become common since the emergence of the secondary market of debt buyers. "Debt collection is a large, multi-billion dollar industry" that "has experienced dramatic growth [since the advent of the FDCPA in 1977] along with significant evolution in business practices." Consumer Financial Protection Bureau, *Annual Report 2014: Fair Debt Collection Practices Act* 7 (Mar. 2014). The debt buying industry has become so successful because of legally questionable practices that are harming millions of consumers. This settlement immunizes debt buyers in harmful practices because it sets the cost of consumer violations too low to justify a change in practices. The settlement certainly will lead to more consumer abuse.

Midland's practice of committing fraud to compensate for inaccurate debt information displays inherent flaws in the debt buyer business model. Debt buyers commonly purchase portfolios of spreadsheets containing limited information about any given debt account. The information in these spreadsheets is inadequate to determine whether the debt is valid. *See e.g. FTC Debt Report* at 20 (explaining

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Commission, *Structure and Practices of the Debt Buying Industry* 7 (Jan. 2013), *available at* http://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuying report.pdf; *see also* Press Release, Encore Capital Group, Encore Capital Group Announces Third Quarter 2014 Financial Results; Diversification Drives Record Quarter (Nov. 6, 2014) http://investors.encorecapital.com/phoenix.zhtml?c=115920&p=irolnewsArticle&ID=1987002 (last visited Feb. 24, 2015) (reporting "[g]ross collections from the portfolio purchasing and recovery business grew 7% to $407.2 million, compared to $379.7 million in the same period of the prior year.").

that debt buyers purchase only "data files," "[s]ome of the information in the initial data file . . . may be redacted or masked"). The spreadsheets do not include information necessary to verify the validity of the debt, the amount owed and by whom. *See id.* (noting information provided on spreadsheets do not include identity of debtor). Nor do they distinguish account holders from authorized users, who are not liable for the debt. *See, e.g.*, *Johnson v. MBNA*, 357 F.3d 426 (4th Cir. 2003) (finding MBNA could not locate credit application showing whether husband, wife, or both were responsible for card purchases). It does not include statements or payment history that might indicate whether the debt has been satisfied in part or in full. *See* Claudia Wilner and Nasoan Sheftel-Gomes, Neighborhood Econ. Dev. Advocacy Project, *Debt Deception: How Debt Buyers Abuse The System To Prey On Lower-Income New Yorkers*, Neighborhood Econ. Dev. Advocacy Project 5 (2010), *available at* http://www.neweconomynyc.org/wp-content/uploads/2014/08/DEBT_DECEPTION_FINAL_WEB-new-logo.pdf ("[I]nformation [obtained in debt accounts] is insufficient to ensure that the debt buyers collect the correct amount from the correct person."). The inadequacy and inaccuracy of the data generally makes such affidavits inherently unreliable. *See Gionis v. Javitch, Block & Rathbone, LLP*, 238 Fed. Appx. 24, 30 (6th Cir. 2007) (concluding that affidavits stating company is entitled to recover

legal fees to which it is not entitled by law is a violation of FDCPA); *accord Foster v. DBS Collection Agency*, 463 F. Supp. 2d 783, 802 (S.D. Ohio 2006).

Banks that sell large portfolios of debt know the validity of debt is inherently questionable. In fact, debt sales agreements disclaim all warranties as to the accuracy of the information on the spreadsheets. *See FTC Debt Report* at iii, 24-25 (reporting "[d]ebt portfolios are regularly sold on an "as is" basis, without consideration for whether collection of the debts in the portfolio is legal" and that "sellers disclaimed all warranties and representations" about the accuracy of the information sold"). Debt buyers very rarely make any effort, nor do they have the means, to verify the information on the spreadsheet. *See, e.g.*, *Midland Funding, LLC v. Brent*, 644 F. Supp. 2d 961, 966 (N.D. Ohio 2009) (debt buyer employee admitting to robo-signing affidavits pursuant to standard company procedure and noting the "percentage of [affidavits] that are checked for accuracy is 'very few and far between'"); *Sykes*, 2015 U.S. App. LEXIS 2057 (certifying class action to challenge thousands of judgments obtained through the filing of false affidavits of merit and service); *see also FTC Debt Buying Report* at T-15 (reporting debt buyers rarely obtain additional supporting documentation on debt accounts after purchase: *e.g.* in less than 6% they obtain account statements; less than 1%, payment history documents; and less than 1%, affidavits). Despite having no admissible evidence that any debt is owed by the alleged debtor, let alone that the

right amount is being sought, debt buyers fraudulently obtain millions of judgments every year using false affidavits, such as those used by Midland. *See, e.g.*, Settlement Agreement and Consent Order, at *¶11.a, *In the Matter of Sunshine Fin. Grp.*, No. CRF-FY2011-135, No. CFR-FY2012-019, (Md. State Licensing Bd., Sept. 9, 2011), *available at* http://www.dllr.state.md.us/finance/consumers/pdf/sunshinesettlement.pdf (Consent Order to resolve allegations that Sunshine used insufficient affidavits under Maryland law. Sunshine used "affidavits that were based, in part, on the affiant's knowledge, information and belief, a standard insufficient to obtain such judgments…"); Compl. at *¶51, 55, *Colorado v. United Credit Recovery LLC.*, No. 13-CV-35182, (D. Colo. Nov. 25, 2013), *available at* http://www.coloradoattorneygeneral.gov/sites/default/files/press_releases/2013/12/10/121013_ucr_complaint.pdf (Colorado Att'y Gen. action against three collection agencies alleging that the agencies "engaged in a routine and pervasive scheme to fabricate documents to aid in [debt collection efforts]" including creation of false bank affidavits "that purport to provde the personal knowledge of a bank officer regarding a debt owed by a particular debtor.").

Midland, like other debt collection mills, has translated technological efficiencies into a profit-making machine, at the expense of consumers and the integrity of the courts. *See* Federal Trade Commission, *Collecting Consumer*

Debts: The Challenges of Change - A Workshop Report 20 (Feb. 2009), *available at* http://www.ftc.gov/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report (debt buyers use mathematical scoring models based on likelihood of collection, regardless of the validity of the debt, to determine whether to purchase a portfolio and how much to pay). The lynchpin of the highly profitable industry is the filing of millions of false affidavits to obtain judgments that could not otherwise be obtained. See *FTC Debt Report* at iv (based on its study of subpoenaed records from the nine largest debt buyers of approximately 5000 debt portfolios containing approximately 90 million accounts, the FTC found that "each year, [debt] buyers sought to collect about one million debts consumers did not owe," and this may understate the problem). This case is a specific and large scale demonstration: "Midland employees had been signing between 200 and 400 computer-generated affidavits per day for use in its debt-collection actions without personal knowledge of the accounts." *Vassalle*, 708 F.3d at 752.

II. THE REVISED SETTLEMENT SHOULD BE REJECTED BECAUSE IT STILL IS UNFAIR TO UNNAMED CLASS MEMBERS

This Court rejected the original settlement because it was not fair, reasonable and adequate. *Vassalle v. Midland Funding LLC,* 708 F.3d 747, 756-59 (6th Cir. 2013). This court found that "the named plaintiffs receive[d] 'preferential treatment,' while the relief provided to the unnamed class members [was]

'perfunctory,'" and that the settlement "prevent[ed] unnamed class members from using Midland's use of false affidavits against Midland." *Id.* (citing *Williams v. Vukovich*, 720 F.2d 909, 925 n.11 (6th Cir. 1983)).

The material terms of the revised settlement are functionally the same as those rejected by this Court in *Vassalle*, aside from the class members agreeing to a reduced monetary payment. *See Vassalle v. Midland Funding, LLC*, No. 3:11-cv-00096, 2014 U.S. Dist. LEXIS 146543, at *13 (N.D. Ohio Oct. 14, 2014) (class representatives agreeing to accept $1,000 each instead of $8,000 in sum). The settlement terms must be scrutinized to determine the actual effects of the settlement. Mere "perfunctory relief" is inadequate to satisfy the requirements of Rule 23. *Williams*, 720 F.2d at 925 n.11. This Court observed in *Williams* that a "slight possibility" that absent class members will be awarded relief comparable to named class representatives is insufficient to qualify the settlement as fair to unnamed class members. *Id.* (holding the final decree "gives preferential treatment to the named plaintiffs while only perfunctory relief to unnamed class members" because "unnamed class members receive little more than the slight possibility of a promotion" while "named plaintiffs receive a promotion"); *see also Vassalle*, 708 F.3d at 755 (citing *Williams*, *supra*); *Vought v. Bank of Am., N.A.*, 901 F. Supp. 2d 1071, 1089 (C.D. Ill. 2012) (determining "it is more practical to examine [actual relief] rather than a hypothetical value that represents no actual value to the class").

Courts "must scrutinize [the relief to unnamed class members] to determine whether the [award to class representatives] amounts to 'preferential treatment' in comparison to it." *Greenberg v. Procter & Gamble Co. (In re Dry Max Pampers Litig.)*, 724 F.3d 713, 718 (6th Cir. 2013).

Class members are not awarded any new relief under the revised settlement that would improve the value of their relief vis-à-vis the class representatives. The revised settlement contains only "perfunctory relief" in allowing class members to seek to vacate Midland's debt judgments against them. Like in *Williams*, it provides only the slight possibility of relief.

A. The broad class waiver is functionally identical to the waiver in the original settlement: the carve-out to the waiver is perfunctory relief because it provides only the slight possibility of relief.

The revised settlement purports to provide unnamed class members valuable relief by carving out an exception to the broad class waiver to permit individuals to challenge judgments entered against them in state courts. In other words, the right to seek vacature on an individual basis is class members' only avenue of relief from Midland's unlawful practices. This exception provides very limited value, and probably no value, to most class members.

With the release of affirmative and class claims, the revised settlement, like the original settlement, waives all claims that could incentivize an attorney to provide counsel on a fee-shifting basis. It would be nearly impossible for an

unnamed class member bound by the terms of this settlement to obtain meaningful relief from a judgment already entered against it based on Midland's use of a false affidavit. Most or nearly all class members don't have the financial means to pay an attorney to challenge a judgment already entered against them; if they did, they presumably would have retained an attorney to defend them from the collection before a judgment was entered. *See Vassalle*, 708 F.3d 747, 758 (6th Cir. 2013) (noting "the limited resources of the typical class member"); *see also* North American Collection Agency Regulatory Association, *Cnt. submitted in response to Advance Notice of Proposed Rulemaking for Debt Collection (Regulation F) – Docket No. CFPB-2013-0033, RIN 3170-AA41, Response to Q 74*, (Feb. 28, 2014), *available at* http://www.nacaraweb.org/wp-content/uploads/NACARA-letter-FINAL.pdf ("In our experience it's relatively rare for an attorney to represent a consumer on a debt subject to routine debt collection practices. It's not cost-effective for the consumer or the attorney on small-dollar matters and a consumer unable to pay a valid debt is unlikely to have funds available to pay an attorney."); New York State Courts, Access to Justice Program 1 (2010), *available at* http://www.nycourts.gov/ip/nya2j/pdfs/NYA2J_2010report.pdf (reporting results of a 2009 study of New York courts finding that nearly 100% of debtors-defendants are unrepresented in collections lawsuits while nearly 100% of plaintiffs had counsel).

Statutes like the FDCPA incentivize private attorneys to represent injured consumers through fee-shifting provisions. Congress enacted the FDCPA to deter abusive collection practices through a "calibrated scheme of statutory incentives to encourage self-enforcement." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 603 (2010); *Coulter v. Tennessee*, 805 F.2d 146, 148 (6th Cir. 1986) (discussing fee-shifting statutes as "provid[ing] an economic incentive for the legal profession to try meritorious cases"); *Mace v. Van Ru Credit Corp.*, 109 F.3d 388, 344 (7th Cir. 1997) ("The [FDCPA] attorney's fee provision makes the class action more likely to proceed, thereby helping to deter future violations."). Similarly, the class action mechanism provides incentive for attorneys to take a case because of the potential to aggregate claims. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Mace*, 109 F.3d at 344. The revised settlement ensures class members will not be able to avail themselves of the intended benefits of the fee-shifting or class action mechanisms by requiring a waiver of all affirmative claims and all rights to proceed in any action other than an individual action. As argued by the brief amicus curiae of thirty-two state attorneys general in the district court,

> Class members need some claim with accompanying attorneys' fees if they ever want to challenge an affidavit's admissibility or assert an affirmative defense to begin with . . . [T]he revised settlement makes it prohibitively expensive for many class members to seek to vacate the judgments illegally obtained by Defendants or defend themselves against the use of their deceptive affidavits.

Br. Amicus Curiae of the Att'ys Gen. of Ill., et al. at 10-11, *Vassalle v. Midland Funding LLC*, 708 F.3d 747 (6th Cir. 2013) (No. 3:11-cv-00096), ECF No. 247 [*hereinafter* Amicus of AGs]. The broad waiver of class claims makes the carve-out exception mere perfunctory relief and not likely to provide any benefit to class members.

B. Class representatives' agreement to forego debt relief is no real difference from the original settlement.

The other revision from the original settlement also does not alter the fairness of the settlement to class members. Class representatives' agreement to forgo the relief provided in the original settlement, that of having their debts extinguished, does not assist in balancing the remedies between class representatives and absent class members. Class representatives maintain their "preferential treatment" because not one of the four class representatives has any interest in challenging the debt judgments against them, unlike the absent class members. *Vassalle*, 708 F.3d at 755 (citing *Williams*, 720 F.2d at 925 n.11). Of the four named class representatives, two individuals already have had their debts extinguished (Andrea Brent and Hope Franklin) and two individuals already have satisfied their debts (Martha Vassalle and Jerome Johnson). Objection to Class Settlement at *6-7, *Vassalle v. Midland Funding LLC*, 708 F.3d 747 (6th Cir. 2013) (No. 3:11-cv-00096), ECF No. 245. The supposed sacrifice of class

members to forgo having their debt extinguished is illusory and immaterial because not one will be affected by it.

III. THE INJUNCTIVE RELIEF IS SUBSTANTIVELY IDENTICAL TO THE INJUNCTIVE RELIEF IN THE ORIGINAL SETTLEMENT THAT THIS COURT RULED INADEQUATE; IT HARMS THE PUBLIC WHILE IMMUNIZING MIDLAND FOR ILLEGAL PRACTICES

The injunctive relief in the revised settlement only insulates Midland from being challenged for operating in a way that harms consumers. This Court found the original settlement's injunctive relief inadequate for three separate reasons:

> First, it does not actually prohibit Midland from creating false affidavits; rather, it only requires Midland to change its policies and provides oversight of this process. Second, the injunction only lasts one year, after which Midland is free to resume its predatory practices should it choose to do so. Third, the injunction offers only prospective relief that likely does not benefit class members at all.

Vassalle v. Midland Funding LLC, 708 F.3d 747, 756-59 (6th Cir. 2013). The revised settlement purports to address only the second of these findings: the term of the purported injunctive relief was extended to five years. In light of this Court's ruling that the substance of the injunction is inadequate, it remains inadequate in the revised settlement. The extension of time provides no value.

A. As this Court ruled previously, the injunction does not prevent Midland from filing fraudulent affidavits.

Because the injunction is substantively identical to the injunction in the original settlement, it is likewise inadequate because "[the injunction] does not actually prohibit Midland from creating false affidavits; rather, it only requires Midland to change its policies and provides oversight of this process. . . ." *Vassalle*, 708 F.3d at 756. Despite that the original settlement was rejected, a Special Master acted pursuant to the injunctive relief requirements in the original settlement. Pursuant to the original settlement, the Special Master sanctioned Midland in using specific, but undisclosed[3] affidavit procedures for five years.

The injunction is improper for numerous reasons. First, the injunction purports to impose specific affidavit procedures that must be used in all state courts, but the standards under which the injunction were approved are inconsistent with more stringent state law affidavit requirements. The Special Master found that Midland's affidavit procedures satisfy the business records exception to the hearsay rule of the federal rules. *See* Findings of Fact and Conclusions of Law by Special Master, *Vassalle v. Midland Funding LLC*, 708 F.3d 747 (6th Cir. 2013) (No. 3:11-cv-00096), ECF No. 204. The Federal Rules of Evidence do not apply in most state courts where the vast majority of judgments are entered. *See* Amicus

[3] The affidavits approved by Special Master appear nowhere in the public record. *See* Br. of Appellants at 30, Feb. 17, 2015, ECF No. 20.

of AGs at 15-18 (discussing various state laws of evidence that are more stringent than the rules of evidence applicable in federal court.). For example, Maryland, Maine, New York, Missouri, Wisconsin, Texas and Ohio courts have ruled that debt buyers may not incorporate business records of the original creditor without having certain testimony surrounding the record, either based on personal knowledge or by a custodian of the originating business. *See, e.g.*, *Bernadyn v. State*, 887 A.2d 602, 613-14 (Md. Ct. App. 2005) ("[an] outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have." (citing 2 McCormick on Evidence § 292, at 277)); *CACH, LLC v. Askew*, 358 S.W.3d 58, 63 (Mo. 2012) (en banc) (excluding records generated by bank because debt buyer is not competent to testify as to business records of bank); *Beneficial Maine v. Carter*, 25 A.3d 96 (Me. 2011) (a qualified witness would have to testify to familiarity with the original creditor's record keeping practices); *see also* Amicus of AGs at 15-18. Pennsylvania does not follow the relevant provision of the Federal Rules of Evidence, allowing incorporation of another business's records into a business. *Commonwealth Fin. Sys. v. Smith*, 15 A.3d 492 (Pa. Super. Ct. 2011) (debt buyer employee cannot authenticate creditor' records because they are not a custodian or qualified witness); *see also* Amicus of AGs at 16. Indiana and Arizona rules require an affidavit to have attached "all records

referred to or relied upon on by affiant." Amicus of AGs at 18. Because many state evidentiary requirements exceed the requirements of the federal rules, the Special Master's approved procedures for Midland to follow do not necessarily meet the more stringent state evidentiary requirements.[4]

Next, even if the federal rules applied, the Special Master's findings do not even conform to the Federal Rules of Evidence because the processes approved by the special master do not satisfy the business records exception to the hearsay rule. The Federal Rules of Evidence allow the admission of business records into evidence only if the movant can first establish the foundational requirements necessary to establish that the records are reliable and accurate. Fed. R. Evid. 803(6)(E). The affidavit preparation procedures approved by the Special Master do not satisfy those requirements. *See* Amicus of AGs at 23 (in order for business records of another entity to be incorporated into a business's records under Rule 803(6), the witness must show several other elements of reliability, such as

[4] Additionally, many states passed legislation requiring debt collectors to satisfy more stringent evidentiary requirements. *See* Lisa Stifler and Leslie Parrish, *The State of Lending in America & its Impact on U.S. Households: Debt Collection & Debt Buying*, Center for Responsible Lending, 15-16 (April 2014), *available at* http://www.responsiblelending.org/state-of-lending/reports/11-Debt-Collection.pdf (Wisconsin and Mississippi have blanket prohibitions on debt exceeding the statute of limitations. North Carolina's Consumer Economic Protection Act requires "reasonable verification" for debt collection actions. California's 2013 Fair Debt Buying Practices Act prohibits debt buyers from obtaining a judgment without supporting court business records. And at least a dozen other states recently considered similar debt buying controls.).

"incorporation of third party records in the ordinary course of business[,] reliance upon the records for their accuracy[, and] substantial interest in the records' accuracy" (in one jurisdiction), or similar elements (other jurisdictions)) (citing *MRT Const., Inc. v. Hardrives*, 158 F.3d 478, 483 (9th Cir. 1998); *United States v. Ullrich*, 580 F.2d 765, 771 (5th Cir. 1978); *Air Land Forwarders, Inc.* v. *United States*, 172 F.3d 1338, 1344 (Fed Cir. 1999)).

Additionally, the federal courts do not have the authority to require the state courts to use the federal rules of evidence in lawsuits filed in state courts against debtors by Midland. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *see also Vassalle*, 708 F.3d at 757 (recognizing the limits of lower federal courts' power under *Rooker-Feldman*). These results of the injunction soundly defeat any argument that the class action is a superior means to settle the claims. Under the revised settlement, class members must give up their rights to seek state law remedies and better prospective relief in state court.

B. The injunction grants Midland a safe harbor for the next five years against any potential challenge to its affidavit procedures.

According to the district court, "[t]he Revised Settlement also contains a stipulated injunction which, among other things, *requires* Midland to use affidavit procedures and language consistent with Judge McQuade's orders for a period of at least five (5) years. . . ." *Vassalle v. Midland Funding, LLC*, No. 3:11-cv-00096, 2014 U.S. Dist. LEXIS 146543, at *14 (N.D. Ohio Oct. 14, 2014) (emphasis

added). The injunction harms, rather than benefits class members and future debtors not even bound by this settlement because the injunction *authorizes* Midland *though an order* purporting to bind non-parties to the litigation, that it may use specific affidavit procedures even if such procedures are inadequate in state courts. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 785 (7th Cir. 2014) (rejecting class action settlement because injunctive relief is "superfluous—or even adverse to consumers," noting "injunction actually gives [the wrongdoer] protection by allowing it, with a judicial imprimatur (because it's part of a settlement approved by the district court)" and is "substantively empty"). Thus, Midland can use the injunction as a defense of any potential actions based on the Special Master-approved processes for the next five years.

The revised settlement should be rejected because the court does not have authority to bind non-parties, as the parties attempt to do by enjoining Midland to use the affidavit procedures established by the Special Master. A consent decree or a court-approved settlement carries the effect of a judgment on parties who assented, but a settlement does not have the force to bind nonparties. *See Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 522, 525-27 (1986) ("it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree"). Injunction is an extraordinary remedy that cannot be used in a settlement

to require Midland to circumvent state court procedural and evidentiary requirements or eliminate statutory rights of non-class members. *See id.* at 525-27. Midland will certainly use the settlement and injunction to its benefit. In fact, Midland has already indicated it will be able to challenge any proceedings contrary to the Special Master's rulings. Joint Mot. for an Order Enjoining (1) Parallel Litigation of Claims to be Released by Proposed Settlement and (2) Any Attempted Mass Opt Out, at 9, *Vassalle v. Midland Funding LLC*, 708 F.3d 747 (6th Cir. 2013) (No. 3:11-cv-00096), ECF No. 226 (arguing that Midland's being bound by the settlement will trump any attempt at inconsistent order regarding Midland's affidavit processes by another court).

Such an injunction also may interfere with federal enforcement efforts aimed at preventing judgments from being entered based on false affidavits. Increasing volumes of complaints from alleged debtors who often claim they don't owe the debt being collected prompted the Consumer Financial Protection Bureau to assert supervisory authority over debt collectors, recognizing that the coercive power of judicial debt collection creates a major consumer protection concern. *See* CFPB, Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65775-01, 65777 (Oct. 31, 2012) (to be codified at 12 C.F.R. pt. 1090). The injunctive relief could potentially be asserted by Midland as a defense to any enforcement action the CFPB might initiate. Similarly, the injunction could

arguably be asserted as a defense to any action a bank might take against a debt buyer in order to comply with recent guidance issued by the Office of the Comptroller of the Currency ("OCC"). Office of the Comptroller of the Currency, OCC BULLETIN 2014-37, *supra* (guidance for banks to strengthen their oversight of debt buyers, stating, "[i]f necessary, banks should complete look-back reviews to determine whether they or the debt buyers engaged in practices that hurt consumers.").

Midland should not be permitted to use this settlement as a benefit. The FDCPA "was enacted to eliminate abusive debt collection practices; to ensure that debt collectors who abstain from such practices are not competitively disadvantaged. . . ." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010). Based on the injunctive relief approved by the district court, Midland can use inadequate and arguably illegal affidavit procedures against non-parties going forward, and gain a significant competitive advantage over other debt collectors who are not immunized for using illegal and fraudulent practices.

CONCLUSION

AARP urges this Court to reject the revised settlement just as it rejected the original settlement. The settlement rewards rather than punishes Defendants by certifying a nationwide class, provides Defendants a release from millions of

valuable claims, and grants Defendants permission to use debt collection processes which will facilitate the abuses rampant in the debt collection industry.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 6th Cir. R. 32(b) and Fed. R. Ap. P. 32(a)(7)(B). This brief contains 6988 words which includes footnotes, and excluding the corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on this 24th day of February, 2015, I caused this Brief Amicus Curiae of AARP in Support of Appellants be filed electronically with the Clerk of this Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF.

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