IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

CHAD MARTIN HELDT, CHRISTI W. JONES, SONJA CURTIS, and CHERYL A. MARTIN, individually and on behalf of all similarly situated individuals *Plaintiffs*,	*	
v.	*	Case 3:13-cv-3023-RAL
PAYDAY FINANCIAL, LLC, d/b/a Lakota Cash and Big Sky Cash; WESTERN SKY FINANCIAL, LLC, d/b/a Western Sky Funding, Western Sky, and Westernsky.com; CASHCALL, INC; and WS FUNDING, LLC, *Defendants*.	*	**Set for Hearing: Dec. 18, 2015**

Intervenors' Supplemental Memorandum In Support of Objections to Preliminary Approval

Judith K. Zeigler
JUDITH K. ZEIGLER LAW, PC
P.O. Box 1448
Sioux Falls, SD 57101-1448
(605) 222-8649 (telephone)
(888) 231-0577 (facsimile)
judy@jkzlaw.com

Matthew W.H. Wessler*
Deepak Gupta*
Neil K. Sawhney
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741 (telephone)
(202) 888-7792 (facsimile)
matt@guptawessler.com
deepak@guptawessler.com
neil@guptawessler.com

* admitted *pro hac vice*

Counsel for Intervenors
(additional counsel listed on next page)

Dated: December 17, 2015

Leonard A. Bennett
CONSUMER LITIGATION ASSOCIATES
12515 Warwick Boulevard, Suite 201
Newport News, VA 23606
(757) 930-3660
Counsel for James Hayes, Debera Grant, and Herbert White (Virginia)

James W. Speer
VIRGINIA POVERTY LAW CENTER
919 E. Main Street, Suite 610
Richmond, VA 23219
(804) 782-9430
Counsel for James Hayes, Debera Grant, and Herbert White (Virginia)

Dale W. Pittman
THE LAW OFFICE OF DALE W. PITTMAN
112-A West Tabb Street
Petersburg, VA 23803i
(804) 861-6000
Counsel for James Hayes, Debera Grant, and Herbert White (Virginia)

Kristi C. Kelly
KELLY & CRANDALL
4084 University Drive, Suite 202A
Fairfax, VA 22030
(703) 424-7572
Counsel for James Hayes, Debera Grant, and Herbert White (Virginia)

Nathan DeLadurantey
Heidi N. Miller
DELADURANTEY LAW OFFICE LLC
735 W. Wisconsin Ave., Suite 720
Milwaukee, WI 53233
(414) 377-0518
Counsel for Lisa Walker (Wisconsin)

Thomas J. Lyons, Jr.
CONSUMER JUSTICE CENTER, P.A.
367 Commerce Court
Vadnais Heights, MN 55127
(651) 770-9707
tommycjc@aol.com
Counsel for Lisa Walker (Wisconsin)

Mona L. Wallace
John S. Hughes
WALLACE & GRAHAM, P.A.
525 N. Main Street
Salisbury, NC 28144
(704) 633-5244
mwallace@wallacegraham.com
jhughes@wallacegraham.com
Counsel for Thomas Brown, Monica Johnson, Melinda Long, Renee Holmes, Kevin Hayes, Leslie Jan Lydon and Elizabeth Jackson (North Carolina) and Counsel for Abraham Inetianbor (Florida)

Janet R. Varnell
VARNELL & WARWICK, P.A.
P.O. Box 1870
The Villages, FL 32158
(352) 753-8600
jvarnell@varnellandwarwick.com
Counsel for Abraham Inetianbor (Florida)

Daniel A. Edelman
James O. Latturner
Tara L. Goodwin
EDELMAN, COMBS, LATTURNER & GOOWIN, LLC
20 S. Clark Street, Suite 1500
Chicago, Illinois 60603
(312) 739-4200
Counsel for James Binkowski (Illinois)

Robert R. Sparks
STRAUSS TROY CO., LPA
150 East Fourth St.
Cincinnati, OH 45202
(513) 629-9417
rrsparks@strausstroy.com
Counsel for Jeffrey Moore (Kentucky)

Matthew T. Sanning
224 Main St.
Augusta, KY 41002
mattsanning@windstream.net
Counsel for Jeffrey Moore (Kentucky)

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INTRODUCTION

Two major, late-breaking, developments within the past 48 hours—the filing of an amended settlement by the parties, and the filing of warring declarations by the class representatives themselves—compel us to supplement our objections. If there were any doubt about the settlement's glaring deficiencies, these new developments should lay them to rest: This proposed nationwide settlement must be rejected at the threshold.

First, in a last-ditch effort to salvage their deal, the parties have filed "amendments" to the settlement that amount to a rewriting in a few key respects. Filed less than 72 hours before the hearing, they purport to (1) "clarify" that the deal does not "release claims by state or federal entities" or enjoin consumers from "participating in" such actions; (2) "modify the prospective interest rate relief" to "the lower of 18% or the applicable maximum allowable interest rate at the time of origination of the loan in the state where the borrower resided"; and (3) alter the "notice materials" accordingly.

But, paradoxically, these amendments only succeed in making matters worse. By carving out state enforcement actions, the parties have created yet another irreconcilable conflict: a conflict between those class members who reside in states with pending or settled enforcement actions and those who do not—all of whom must vie for limited settlement funds. And, they have touched off a hopelessly confused and indeterminate exercise in guessing how a class member (or this Court) could determine and apply "the applicable maximum allowable interest rate" of a state—a new feature that grafts an even more variable and state-specific dimension onto this case. In their zeal to stave off disapproval at any cost, the parties have only made class certification *even less* appropriate.

Second, one of the named class representatives, Christi Jones, has filed a declaration indicating that her lawyers—the proposed class counsel here—"pressure[d] the four plaintiffs to accept the settlement" by, among other things, promising them special relief in exchange for their signatures. Ms. Jones recounts that the parties' lawyers "promised" to write off the named representatives' loans in a separate, secret "side deal" even though the hundreds of thousands of absent class members would be entitled to no similar (and far worse) relief. Another class representative, Chad Heldt, claims that this arrangement should not be characterized as a "side deal" but corroborates Ms. Jones's central allegation: He acknowledges that he was told that *his* loan—unlike those of the vast majority of class members—was deemed "uncollectible." At the very least, this means that Ms. Jones and Mr. Heldt were neither typical of, nor adequate representatives for, the class. Even setting aside the factual dispute, then, class certification fails here.

Such a lopsided deal cannot withstand scrutiny: A proposed settlement that "gives preferential treatment to the named plaintiffs while only perfunctory relief to unnamed class members. . . . make[s] a settlement unfair." *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 755 (6th Cir. 2013). This differential treatment also defeats any pretense that a class-action settlement was the product of anything approaching the high standard of adequate representation—for either the named representatives or class counsel—that Rule 23(a)(4) requires. To the contrary, the existence of different treatment for the named representatives would mean that their (as well as class counsel's) interests are "antagonistic" to the unnamed class members. *Id.* at 757. Under these circumstances, the named representatives have "no interest in vigorously prosecuting the [interests of] unnamed class members," content in the knowledge that they have secured a better deal for themselves. *Id.* And "as soon as" the named plaintiffs' interests are "divorced" from

the interests of the class, class counsel "simultaneously represent[s] clients with conflicting interests"—an "independent ground" requiring denial of approval. *Radcliffe v. Experian Information Solutions*, 715 F.3d 1157, 1167 (9th Cir. 2013).

There is a broader lesson here: These new filings demonstrate beyond doubt that this settlement contains "almost every danger sign in a class action settlement" that courts and commentators have "warned district judges to be on the lookout for." *Eubank v. Pella Corp.*, 753 F.3d 718, 728 (7th Cir. 2014). Especially at this juncture—where preliminary approval would involve provisional certification of a nationwide settlement class—the "need for the adequacy of representation finding is particularly acute," *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 795 (3d Cir. 1995), and Rule 23's basic requirements must be "scrutinized more closely, not less," *In re Dry Max Pampers Litig.*, 724 F.3d 713, 721 (6th Cir. 2013). Doing so here should lead this Court to decisively reject the parties' bid for preliminary approval. Ultimately, as the recent filings make clear, this is a case in which "the lawyers support the settlement to get fees; the defendants support it to evade liability; [and] the court can't vindicate the class's rights." *Eubank*, 753 F.3d at 729 (internal quotations omitted).

I. The latest amendments make certification of a nationwide settlement class even less appropriate.

A. We explained in our initial objections that, because the complaint in this case seeks to certify a nationwide class based on three states' usury laws, Rule 23 cannot be satisfied because the "variations in state law" will overwhelm any common issues and defeat predominance. Am. Obj. 22–23. In response, the parties have doubled down, proposing a new form of prospective relief that requires resolving even more state-specific questions. *See* Dkt. # 97-1, at 2–3. But this strategy cannot survive Rule 23.

"No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed. R. Civ. P. 23(a) [and] (b)(3)." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002). Indeed, as a general matter, "the application of the laws of fifty-one jurisdictions to the claims of the proposed class creates problems for the typicality, adequacy, predominance, and superiority requirements of Rule 23." *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 459 (E.D. La. 2006). It makes no difference that the certification questions come in the form of a *settlement* class—regardless of its nature, Rule 23's specifications are "designed to protect absentees by blocking unwarranted or overbroad class definitions" and "demand undiluted, even heightened, attention in the settlement context." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

The amendments to the settlement establish an even more state-specific approach to relief that dooms the proposed settlement class's prospects for Rule 23 certification. The Western Sky entities have now agreed to "reduce the interest rate prospectively on all outstanding loans . . . to the lower of 18% or *the applicable maximum allowable interest rate at the time of origination of the loan in the state where the borrower resided*." Dkt. # 97-1, at 2 (emphasis added). But the settling parties never explain what these "applicable maximum allowable interest rate[s]" will be for class members in different states, nor how they should be calculated—not in its notice to the Court, the amendments to the settlement, or even the proposed class notice. They do not explain because they do not know: Not only do the states have different maximum interest rates, but they have varying rules as to when certain interest rate limitations apply.

Take just a couple examples. In Alabama, the maximum legal interest rate is 8% if there is a written loan agreement; for loans exceeding $2,000, however, there is no

maximum rate. *See* Ala. Code §§ 8-8-1, 8-8-5(a). In Arizona, by contrast, the maximum rate is 10%, "unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to." Ariz. Rev. Stat. Ann. § 44-1201. Delaware sets its maximum interest rate at 5% above the "Federal Reserve discount rate" at the time the loan was made, Del. Code Ann. tit. 6, § 2301(a)—a rate that, by its very nature, will vary for different borrowers. And what about Maryland, which has a general maximum interest rate of 8% that can be raised to 24% under certain conditions and is subject to numerous exceptions? *See* Md. Code Ann., Com. Law § 12-103; *see also Lyle v. Tri-Cty. Fed. Sav. & Loan Ass'n of Waldorf*, 363 A.2d 642, 645 (Md. 1976) (noting "the peculiarities" of Maryland's usury law); Corwin, *A Road Map Through Maryland's Consumer Credit Laws*, 35-APR Md. Bus. J. 31, 31 (March/April 2002) (explaining that "the laws applicable to credit extensions in Maryland are confusing"). As one of the nation's leading consumer-law experts observes in her attached declaration, the substantial variance among state consumer lending laws, in addition to their often "confusing, duplicative, or contradictory provisions," makes such laws "incredibly difficult for lawyers and scholars—let alone lay consumers or borrowers—to understand." Carter Declaration (Ex. A), at 2–4.

"In a nationwide class, variations in state law may swamp any common issues and defeat predominance." *In re Conagra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 696 (N.D. Ga. 2008). Thus, to establish predominance, "nationwide class action movants must creditably demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles." *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) (Ginsburg and Edwards, JJ.) (internal quotation marks omitted). Here, it is clear that the variations in the usury and lending laws of all fifty states completely "swamp any common" issues among the nationwide class. And class counsel

do not even attempt to argue—let alone demonstrate "through an extensive analysis"—that these state law variances can be overcome. Rather, class counsel appear to have never taken those variances into account, confirming that they never actually intended to represent the differing interests of a nationwide class.

"Differences across states may be costly for courts and litigants alike," Judge Easterbrook has explained, "but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." *In re Bridgestone/Firestone*, 288 F.3d at 1020. If parties do "not provid[e] the district court with a sufficient basis for a proper choice of law analysis or a workable sub-class plan, [they] fail[] to meet their burden of demonstrating that common questions of law predominate." *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 316 (5th Cir. 2000). The parties have entirely failed to do that here, and thus certification is inappropriate.

B. That the proposed class notice only parrots the amended settlement's "applicable maximum allowable interest rate" language is yet another reason to deny preliminary approval. "[T]he contents of a settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with (the) proceedings." *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 122 (8th Cir. 1975) (internal quotation marks omitted). The notice must describe "the essential terms of the proposed settlement"; "explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class members, clearly set forth those variations"; and "provide information that will enable class members to calculate or at least estimate their individual recoveries." Newberg on Class Actions § 8:17 (5th ed.). And Rule 23's

commentary stresses that "class-certification notice [must] be couched in plain, easily understood language." Fed. R. Civ. P. 23 advisory committee's note (2003).

The proposed class notice here falls woefully short of these standards. Rather than using "plain, easily understood language," the notice employs the same problematic language contained in the amended settlement—language that even experienced consumer lawyers find difficult to comprehend. *See* Ex. A at 3–4 (explaining that a consumer law expert had to spend "two hours per state" to determine the "maximum finance charges" for just "two sample loans"). And, given the widely differing state laws regarding interest rates in any event and the absence of tailored information for each eligible borrower, how could a class member understand if she is entitled to monetary relief under the settlement, and, if so, how that relief would be calculated? In short, the class notice fails to provide class members with the most critical information that would inform their decision as to whether they should participate, object, or opt-out of the settlement. *See id.* On this ground alone, the court should deny preliminary approval.

C. The problem with the parties' proposed amendments, however, do not end with a lack of predominance and due process. By its terms, the proposed amendments create multiple tiers of subclasses (and entitles those subclasses to disparate amounts of relief) within the larger class. Yet these new subclasses were not represented by named representatives at the bargaining table and each subclass did not have separate counsel to represent them. Indeed, how could they have been, since amendments were filed less than 72 hours before this Court's preliminary approval hearing? That reflects a straightforward violation of Rule 23(a)(4)'s requirement that all class representatives "possess the same interest" as the class members. *Amchem*, 521 U.S. at 625–26. And it runs afoul of the basic rule that, where "the interests of those within the single class are not

aligned," subclasses "must be established" to safeguard the interests of all class members. *Id.* at 626–27 (internal quotation marks and citation omitted). Under *Amchem*, class settlements must provide "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Id.* at 627. That did not happen here and it means the proposed settlement cannot be approved.

Consider, first, what the proposed amendments accomplish. Under the new amendments, "Settlement Class Members" are now placed into three distinct tiers:

1. Those class members who reside in states where state enforcement agencies have obtained *no relief* for borrowers who purchased illegal CashCall loans.

2. Those class members who reside in states where state enforcement agencies have obtained *prospective injunctive relief only* for borrowers who purchased illegal CashCall loans.

3. Those class members who reside in states where state enforcement agencies have obtained both *prospective injunctive and retrospective monetary relief* for borrowers who purchased illegal CashCall loans.

For class members falling into the first tier, relief under the settlement is little different than before: they are allowed to make a claim for a *pro rata* "Cash Award" based on their "Excess Payment" (defined as "the amount that each Claimant paid on his or her Residual Balance Loan in excess of what would have been due has such loan been originated at an 18% interest rate"). And, they are entitled to a prospective interest rate reduction to 18% (or, now, something less depending on unspecified state law) on the payment of their loan.

But, for class members falling into the second tier—those with state settlements that either cancel the loan outright or impose a lower interest rate on loan repayment—the settlement does not "entitle" them "to the Interest Rate Reduction." Instead, they are only "eligible for a Cash Award," assuming they qualify. And, for class members in the

third tier—who have the right to both prospective and retrospective monetary relief under a state settlement—the settlement lets them double dip into the capped fund while at the same time obtaining any monetary relief under their state's settlement and any more favorable prospective loan modifications. *See* Addenda to Settlement at 8 (stating that a class member is "eligible to receive money from a state settlement and this settlement" and "may claim a share of any fund in which [the class member] is eligible").

This setup creates intolerable adversity among the class. Those with no relief available under a state settlement must balance the size of any retrospective fund with the need for beneficial future interest rate reductions—they have distinct interests given their distinct harms. But the class members in the other two tiers are incentivized only to care most about the size of the fund (safe in the knowledge that they have some prospective relief already in hand). These settlement-focused goals "tug[] against" each other and require some "structural assurance" designed to safeguard the divergent interests of the class members—like separately represented subclasses encompassing the differently situated class members. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999). "No such procedure was employed here, and the conflict was as contrary to the equitable obligation entailed by the limited fund rationale as it was to the requirements of structural protection applicable to all class actions under Rule 23(a)(4)." *Id.* at 856–57.

And that is not the only conflict. Because state law varies so widely—both in terms of state-enforcement action and consumer-protection law—different state residents hold claims with potentially massive disparate value. For instance, in a state like Kentucky, where state enforcement action is entirely absent and where state law would completely invalidate a CashCall loan, *see* Ky. Rev. Stat. Ann. § 286.4-991(1), class members hold more valuable claims than residents in a state like Maryland, where all CashCall loans are

cancelled and a fund exists to reimburse consumers. *See* Am. Obj. 10. The "consequence" of a class that includes claimants with "more valuable" claims than other claimants is another "instance of disparate interests" and conflict among the class that falls "within the requirement of structural protection recognized in *Amchem*." *Ortiz*, 527 U.S. at 857.

II. The proposed settlement should not be given preliminary approval in light of the serious questions raised about the existence of separate side deals for the named plaintiffs.

A proposed settlement that confers more favorable relief for the named plaintiffs cannot satisfy Rule 23's fairness requirement. It is black letter law that in "evaluating the fairness of a settlement," courts must look "to whether the settlement gives preferential treatment to the named plaintiffs while only perfunctory relief to unnamed class members." *Vassalle*, 708 F.3d at 755. "[S]uch inequities in treatment make a settlement unfair." *Id.* That is because named representatives "are obligated to act as fiduciaries" for the absent class members; where those named representatives "obtain more for themselves by settlement than they do for the class," the fairness of the settlement can no longer be assured. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983). In cases where such disparities exist, courts "must" regard the preferential treatment "as prima facie evidence that the settlement is unfair to the class, and a heavy burden falls on those who seek approval of such a settlement." *Plummer v. Chem. Bank*, 91 F.R.D. 434, 442 (S.D.N.Y.1981), *aff'd*, 668 F.2d 654 (2d Cir. 1982).

The Sixth Circuit's recent decision in *Vassalle*—a case with remarkably similar facts—provides a careful illustration right on point. There, a putative nationwide class of borrowers sought approval of a settlement that offered the named plaintiffs "preferential treatment"—the "exoneration of debts owed to Midland"—that none of the unnamed class members received. *Vassalle*, 708 F.3d at 755. Had the absent class members received

this "primary benefit," they would have been "absolved of debts in the hundreds or even thousands of dollars." *Id.* Instead, "provided they respond to the notice, the unnamed class members receive $17.38" and no guarantee that Midland would refrain from its "predatory practices." *Id.* at 756. The disparity in relief was glaring: The "$17.38 payment can only be described as *de minimis*, especially in comparison to the now-forgiven debt of $4,516.57 owed by [the named plaintiff]." *Id.* The Sixth Circuit had no trouble concluding that "the settlement is unfair to the unnamed class members." *Id.* at 756.

The preferential deal for the named representatives alleged here is nearly identical. According to Ms. Jones, CashCall and class counsel agreed to place the named plaintiffs' loans "in a special bucket" labeled "uncollectible loans" that meant CashCall would "not collect on [the] loans[]." Dkt. # 96-1, at 3. This deal, Ms. Jones recounts, was given to all the named plaintiffs—each "was promised" that they "would never owe any more" on their loan and that CashCall would "let their loan go." *Id.* At the same time, every unnamed class member under this settlement gets a different, much less favorable, deal—those with outstanding balances will be required to pay, and CashCall will be allowed to collect, on both principal and interest. The difference in relief is potentially massive. If Chad Heldt were *not* a named plaintiff, he would owe $16,630.75; as a named plaintiff, he owes nothing. *Id.* at 3. Such a discrepancy cannot be tolerated. Offering a different deal for the named plaintiffs "remove[s] a critical check on the fairness of the class-action settlement"—which "rests on the unbiased judgment of class representatives similarly situated to absent class members." *Radcliffe*, 715 F.3d at 1165. By any measure, differential treatment of the sort alleged here flunks the fairness standard. Indeed, if Ms. Jones's account is correct, what other conclusion could be inferred from the fact that class

counsel felt it was necessary to use a secret side deal to pressure Ms. Jones to agree to the proposed settlement?

It bears emphasis that "class representatives who do find the independence and voice to challenge class counsel"—as Ms. Jones did here, in the face of considerable pressure—"should be applauded, not punished." Newberg on Class Actions § 17:15 (5th ed.). "A class representative who disagrees with the terms of the settlement and so informs class counsel provides a valuable service to the class"; indeed, she "has discharged precisely the duty the law seeks from her: to operate as a monitor or check on class counsel by stating her own independent opinions to class counsel and the court." *Id.*

III. Because the named representatives' loans were deemed "uncollectible," Rule 23(a)(3)'s typicality and 23(a)(4)'s adequacy-of-representation requirements cannot be satisfied.

In addition to the adequacy problems addressed above and in our amended objections, the preferential relief alleged here also defeats Rule 23's adequacy-of-representation requirement. Under Rule 23, adequacy of the named class members' representation is based upon two factors: "1) the representatives must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Vassalle*, 708 F.3d at 757. In other words, the rule requires that "the class members have interests that are not antagonistic to one another." *Id.* And "the linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class." *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 183 (3d Cir. 2012). A representative who holds "the prospect of receiving" a different deal from the class has "very different interests than the rest of the class" and cannot satisfy Rule 23's adequacy requirement. *Radcliffe*, 715 F.3d at 1165.

Considering the alignment of interests and incentives here makes it easy to see why a finding of adequacy is impossible. One set of class members (the named plaintiffs) apparently have a deal that would exonerate their loans entirely, while another set of class members (the hundreds of thousands of absent class members) have a different deal in which repayment will still be required. "There is no overlap between these deals: they are two separate agreements"—and so "[t]herein lies the conflict." *Dry Max*, 724 F.3d at 722. Having been promised that their loans would be "written off," Dkt. # 96-1, at 1, the class representatives had "no interest in vigorously prosecuting the [interests of] unnamed class members." *Vassalle*, 708 F.3d at 757. To the contrary, the chance at complete loan forgiveness "provided a disincentive for the [named] class members to care about the adequacy of relief afforded unnamed class members, and instead encouraged the class representatives 'to compromise the interest of the class for personal gain.'" *Dry Max*, 724 F.3d at 722 (quoting *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003)). That result means—as a matter of law—that the named plaintiffs are all inadequate representatives under Rule 23(a)(4). *Id.*; *see also Radcliffe*, 715 F.3d at 1167.

The recently filed declaration by named plaintiff Chad Heldt both confirms the inadequacy of representation and demonstrates yet another, related problem that dooms the proposed class's prospects for certification: the class representatives cannot satisfy Rule 23(a)'s typicality requirement. Mr. Heldt states that he was told that his loan "is in a 'bucket' along with many other loans . . . [that] CashCall has decided . . . are 'uncollectible.'" Dkt. No. 105, at 1–2. He further declared that "[his] loan had been 'written off' and . . . would likely not be reinstated," *id.* at 2, corroborating Ms. Jones's central allegation that the named representatives are situated differently from the vast majority of the class. Whether or not this differential treatment is characterized as a

"secret side deal" is beside the point. What is clear is that it leaves the named plaintiffs in an entirely different condition than the class members: their loans have been deemed "uncollectible" while the absentees' loans have not. Rule 23's typicality requirement serves as a "guidepost[]" for determining "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Golan v. Veritas Entm't, LLC*, 788 F.3d 814, 821 (8th Cir. 2015) (quoting *Amchem*, 521 U.S. at 626 n.20). There is no such interrelatedness here; the named plaintiffs in fact have *opposing* interests and claims, given that CashCall has assured them—unlike the absent class members—that it will not collect on any of the named plaintiffs' outstanding loans. That difference alone confirms that the class representatives did not have the class members' interests at heart when agreeing to the proposed settlement.

And the same inadequacy problems unavoidably afflict class counsel. "Class counsel has a fiduciary duty to the class as a whole"—which "includes reporting potential conflict issues" to the district court—and the failure to "discharge" its "duty of loyalty to absent class members" is a bright-line basis for a finding of inadequacy. *Radcliffe*, 715 F.3d at 1167–68. Class counsel's duty in this respect arises *the minute* a conflict is created: "As soon as" the named plaintiffs' interests is "divorced" from the interests of the absent class members, class counsel was "simultaneously representing clients with conflicting interests"—an "independent ground" for denial of a proposed settlement. *Radcliffe*, 715 F.3d at 1167. And for good reason: "Because class actions are rife with potential conflicts of interest between class counsel and class members," class counsel must "behav[e] as honest fiduciaries for the class as a whole." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004); *see also Gen. Motors Pick–Up Litig.*, 55 F.3d at 788. Where class counsel fail

the class as a whole, a "court's ability to reach a just and proper outcome in the case" in thwarted. *Reliable Money Order v. McKnight Sales Co.*, 704 F.3d 489, 499 (7th Cir. 2013).

Lawyers who negotiate side deals for named representatives sacrifice the interests of the absent class members, and are therefore hopelessly inadequate under Rule 23. Once the parties agreed to exonerate the named plaintiffs' loans, as has been alleged here, the "interests of the class representatives" were "divorced" from those of the absent class members, creating a clear simultaneous conflict in class counsel's representation. *Radcliffe*, 715 F.3d at 1167. As fiduciaries to the absent class, class counsel had two options: "obtain a waiver for the conflict" or "contain the conflict by alerting the district court." *Id.* Class counsel apparently chose neither, choosing instead to ignore the conflict or cover it up. Either way, taking "the position that a conflict d[oes] not even exist" requires a finding of inadequacy: "Conflicted representation provides an independent ground" for denying a proposed settlement. *Id.*

What's more, even if an unresolved conflict between the class is not, standing alone, sufficient to deny adequacy (and it is), class counsel's "lack of integrity" delivers the final blow. *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir. 2011). Courts have "often remarked" on the "incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers." *Id.* A "deal that promotes the self-interest of both class counsel and the defendant and is therefore optimal from the standpoint of their private interests" does nothing for the thousands of class members who rely on the parties to act as "conscientious fiduciaries." *Id.* Any misconduct that "creates a serious doubt that counsel will represent the class loyally requires denial of class certification." *Id.*

Even before this week's filings, the parties' proposed settlement bore many of the indicia of collusion:

- injunctive provisions halting parallel state-specific cases that trigger immediately on this Court's preliminary approval;
- a mismatched and overbroad release for claims and corporate entities well beyond those in the complaint;
- a massive potential fee award compared with an overall settlement fund that delivers borrowers barely pennies on the dollar; and
- a perfunctory justification for the settlement that offered nothing more than boilerplate claims in support.

Now, though, there are even more serious questions concerning the existence of outright collusion. When "representative plaintiffs make what amounts to a separate peace with defendants, grave problems of collusion are raised"—and that is just what Ms. Jones's declaration claims. *Women's Comm. for Equal Empl't Opportunity v. Nat'l Broad. Co.*, 76 F.R.D. 173, 180 (S.D.N.Y. 1977). No understanding of Rule 23 permits a court to endorse that kind of bargaining.[1]

* * * * *

[1] Following a full and fair accounting of all relevant facts, counsel's conduct may also be found to raise serious ethical questions. *See, e.g.*, *Radcliffe*, 715 F.3d at 1167. The Court may wish to consider a referral to the Bar Counsel, *see* S. Dakota Code of Judicial Conduct, Canon 3(D)(2)—a matter of attorney governance on which we take no position here. But, although that is a matter for the relevant bar authorities, ethical lapses in a putative class action "prior to the motion for class certification" are also "relevant to the adequacy analysis." 5 Newberg on Class Actions § 3.78 (5th ed.). "Misconduct by class counsel" that creates a "serious doubt that counsel will represent the class loyally requires denial of class certification." *Creative Montessori*, 662 F.3d at 918; *see also Reliable Money Order*, 704 F.3d at 499 (concluding that "unethical conduct . . . raises a 'serious doubt' about the adequacy of class counsel when the misconduct jeopardizes the court's ability to reach a just and proper outcome in the case").

The proposed settlement, we explained in our amended objections, is a classic reverse auction, in which Western Sky negotiated a deal with lawyers seeking to certify a nationwide class "in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002). Among the many problems we identified earlier: The settlement is premised on a defective legal architecture that fails numerous Rule 23 requirements, includes an extraordinarily broad anti-injunction clause, and provides absent class members with less than pennies on the dollar in exchange for a global release from liability. Remarkably, the recent developments in this case only confirm that this collusive and improper settlement should not receive preliminary approval. The parties' amendments make the proposed settlement class's weak prospects for certification under Rule 23 impossible. And the competing declarations from the class representatives raise even more serious questions that counsel against preliminary approval.

As the Seventh Circuit has observed, cases concerning "inequitable" and "scandalous" class action settlements like this one "underscore[] the importance . . . of objectors," because "without them there would [be] no [] challenge to the settlement." *Eubank*, 753 F.3d at 721. Even more important, however, is "intense judicial scrutiny" of such settlements. *Id.* This Court should apply that scrutiny here, and deny the settling parties' attempts to obtain preliminary approval.

CONCLUSION

For the foregoing reasons, the Intervenors respectfully request that this Court deny preliminary approval of the amended proposed settlement.

Respectfully submitted,

/s/ Judith K. Zeigler

Judith K. Zeigler
JUDITH K. ZEIGLER LAW, PC
P.O. Box 1448
Sioux Falls, SD 57101-1448
(605) 222-8649 (telephone)
(888) 231-0577 (facsimile)
judy@jkzlaw.com

Matthew W.H. Wessler*
Deepak Gupta*
Neil K. Sawhney
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741 (telephone)
(202) 888-7792 (facsimile)
matt@guptawessler.com
deepak@guptawessler.com
neil@guptawessler.com

Mona L. Wallace
John S. Hughes
WALLACE & GRAHAM, P.A.
525 N. Main Street
Salisbury, NC 28144
(704) 633-5244
mwallace@wallacegraham.com
jhughes@wallacegraham.com
Counsel for Thomas Brown, Monica Johnson, Melinda Long, Renee Holmes, Kevin Hayes, Leslie Jan Lydon and Elizabeth Jackson (North Carolina)
Counsel for Abraham Inetianbor (Florida)

Janet R. Varnell
VARNELL & WARWICK, P.A.
P.O. Box 1870
The Villages, FL 32158
(352) 753-8600
jvarnell@varnellandwarwick.com
Counsel for Abraham Inetianbor (Florida)

Daniel A. Edelman
James O. Latturner

Tara L. Goodwin
EDELMAN, COMBS, LATTURNER &
GOOWIN, LLC
20 S. Clark Street, Suite 1500
Chicago, Illinois 60603
(312) 739-4200
Counsel for James Binkowski (Illinois)

Leonard A. Bennett
Susan M. Rotkis
CONSUMER LITIGATION ASSOCIATES, P.C.
12515 Warwick Boulevard, Suite 201
Newport News, VA 23606
(757) 930-3660
Counsel for James Hayes, Debera Grant, and Herbert White (Virginia)

James W. Speer
VIRGINIA POVERTY LAW CENTER
919 E. Main Street, Suite 610
Richmond, VA 23219
(804) 782-9430
Counsel for James Hayes, Debera Grant, and Herbert White (Virginia)

Dale W. Pittman
THE LAW OFFICE OF DALE W. PITTMAN
112-A West Tabb Street
Petersburg, VA 2380319
(804) 861-6000
Counsel for James Hayes, Debera Grant, and Herbert White (Virginia)

Kristi C. Kelly
KELLY & CRANDALL, PLC
4084 University Drive, Suite 202A
Fairfax, VA 22030
(703) 424-7572
Counsel for James Hayes, Debera Grant, and Herbert White (Virginia)

Robert R. Sparks
STRAUSS TROY CO., LPA
150 East Fourth St.
Cincinnati, OH 45202
(513) 629-9417
rrsparks@strausstroy.com

Counsel for Jeffrey Moore (Kentucky)

Matthew T. Sanning
224 Main Street
Augusta, KY 41002
mattsanning@windstream.net
Counsel for Jeffrey Moore (Kentucky)

Nathan DeLadurantey
Heidi N. Miller
DELADURANTEY LAW OFFICE LLC
735 W. Wisconsin Avenue, Suite 720
Milwaukee, WI 53233
(414) 377-0518
nathan@dela-law.com
Counsel for Lisa Walker (Wisconsin)

Thomas J. Lyons, Jr.
CONSUMER JUSTICE CENTER, P.A.
367 Commerce Court
Vadnais Heights, MN 55127
(651) 770-9707
tommycjc@aol.com
Counsel for Lisa Walker (Wisconsin)

Counsel for Intervenors

* Admitted *pro hac vice*

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