

## **I. JURISDICTIONAL STATEMENT**

This action was brought under the Fair Debt Collection Practices Act (FDCPA) 15 U.S.C. §1692 et seq. (JA8)<sup>1</sup> The district court had subject matter jurisdiction under 28 U.S.C. § 1331. (JA8) The district court's decision dismissing this action was entered on March 8, 2011. (JA5) The Notice of Appeal was timely filed on April 6, 2011. (JA6) Appellant Hecht filed a motion for reconsideration, which the district court treated as a motion to alter or amend under Federal Rule of Civil Procedure 59(e) and denied on April 12, 2011. (JA121-126) An Amended Notice of Appeal from that decision and from the earlier decision was filed on May 12, 2011. (JA6-7) The district court's decisions disposed of all claims of all parties. This Court has jurisdiction under 28 U.S.C. § 1291.

## **II. ISSUES PRESENTED**

A. Does a judgment in a prior class action bind an absent class member plaintiff and, thus, preclude her claim for money damages in a subsequent proceeding, where the plaintiff was not given notice reasonably calculated, under all the

circumstances, to apprise her of the pendency of the action and did not afford her a meaningful opportunity to opt out of the class?

**B.** Does a class action judgment and settlement lack binding effect on the ground that the named class action plaintiffs and their attorneys did not adequately represent the class members where (1) under the settlement, no class member under any set of circumstances could receive any monetary award and (2) the judgment purported to require each class member to forfeit his or her right to sue the defendant for up to \$1,000 in statutory damages plus actual damages?

### **III. STATEMENT OF THE CASE AND FACTS**

On or about July 22, 2010, the defendant communicated with plaintiff-appellant Chana Hecht by leaving a telephone message on her answering machine. The message asked Ms. Hecht to contact an individual about an important business matter. The message failed to state what company the individual worked for and failed to indicate that the individual was engaged in an attempt to collect a debt. The complaint alleges that this conduct violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692d(6) and 1692e(11). (JA9)

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<sup>1</sup> All references to “JA” are to the Joint Appendix.

Defendant moved to dismiss the action for failure to state a claim on *res judicata* grounds based on a class action judgment in an FDCPA case, *Gravina v. United Collection Bureau*, No. 09 CV 04816 (E.D.N.Y.). The judgment in *Gravina* incorporated a class action settlement that provided the absent class members *no* recovery at all. (JA58-60,107-109) Instead, the settlement awarded the class lawyers a substantial attorney's fee and provided a significant cash payment to two non-profit organizations, neither of which have anything to do with the *Gravina* class members or the FDCPA claims asserted in *Gravina*. (JA58-59,108) Moreover, notice of the settlement was not sent to the individual class members. Rather, the only notice was a one-time, fine-print ad in *USA Today*. (JA104) Hecht argued that the judgment in *Gravina* was not binding on her, principally because it failed to provide the absent class members notice and the right to opt out. Thus, she argued, according the *Gravina* judgment *res judicata* effect would violate due process. The district court, per the Honorable Mark R. Kravitz, based on defendant's motion, granted the motion to dismiss and held that the judgment in *Gravina* was *res judicata*. *Hecht v. United Collection Bureau, Inc.*, 2011 U.S. Dist. Lexis 22840 (D. Conn. Mar. 8, 2011). (JA138-151) The district court found that the notice given to the class was appropriate and that the named class plaintiffs and class counsel adequately represented the class. (JA147-150) After the district court

held that Chana Hecht’s FDCPA claims were *res judicata* as a result of the judgment in *Gravina*, it dismissed Hecht’s supplemental state-law claim under 28 U.S.C. § 1367(c)(3) because no federal claims remained in the case, without prejudice to its renewal in Connecticut state court. (JA151) This timely appeal followed.

#### **IV. SUMMARY OF ARGUMENT**

A class action settlement of which class members are not notified and from which class members cannot benefit does not bind the class and does not prevent class members from litigating their claims in a subsequent proceeding. The one-time publication of notice of the class action settlement in *USA Today* was not “reasonably calculated” to apprise class members of the action and their rights in it. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). It therefore did not comport with due process and does not bind the class members to the judgment. *See id.* Moreover, a settlement that provides the class members *no* recovery, when measured against the remedies provided by the underlying substantive law (which allows each absent class member up to \$1,000 in statutory damages plus any actual damages), does not constitute the adequate representation that the Due Process Clause demands. *See Stephenson v. Dow*

*Chemical Co.*, 273 F.3d 249, 257-61 (2d Cir.), *aff'd in relevant part by equally divided court*, 539 U.S. 111 (2001); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). For these reasons, the judgment in *Gravina v United Collection Bureau* does not bar Hecht from pursuing her claims in this action.

## **V. STANDARD OF REVIEW**

The burden of maintaining the affirmative defense of *res judicata* rests with the party raising the defense. *SBT Holdings, LLC v. Town of Westminster*, 547 F.3d 28, 36 (1st Cir. 2008) (citing Wright & Miller, *Federal Practice & Procedure* § 1270 (3d ed. 2004)); *Thomas v. New York City*, 814 F.Supp. 1139, 1148 (E.D.N.Y. 1993) (citing various authorities).

This Court reviews de novo a district court's grant of a motion to dismiss for failure to state a claim. *Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997).

## VI. ARGUMENT

### THE CLASS ACTION JUDGMENT IN *GRAVINA* IS NOT BINDING ON CHANA HECHT, AND THE DECISION BELOW SHOULD THEREFORE BE REVERSED

#### Introduction

In ordinary bi-polar litigation, “[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *see also Martin v. Wilks*, 490 U. S. 755, 761-62 (1989). Class litigation is a “recognized exception” to that general rule. *Hansberry*, 311 U.S. at 41. In a class action, each of the absent class members is neither “designated” by name as a party nor served with process. For absent class members, a different, but no less important, set of due process requirements apply before a class judgment is *res judicata* — that is, before the judgment can have binding effect on the absentees in a subsequent proceeding.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985), the Supreme Court described the “minimal procedural due process protections” necessary to “bind an absent plaintiff concerning a claim for money damages or

similar relief.” First, “[t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections[,]’” *id.* at 812 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 314-15 (1950)), and must “describe the action and the plaintiffs’ rights in it.” *Id.*

Second, “due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court.” *Id.*

Last, the Court explained, “the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.” *Id.* (citing *Hansberry*, 311 U.S. at 42-43).

*Shutts* succinctly described the due process protections that must be accorded class-action absentees, but, for the most part, it did not break new ground. In 1940, the Supreme Court in *Hansberry* sustained a collateral attack on a class judgment because the class representatives had not provided adequate representation to the absentees. 311 U.S. at 44-46. And, in reversing a judgment that had foreclosed the rights of trust beneficiaries, *Mullane* made clear that due

process demands that absentees be provided adequate notice if the judgment “is to be accorded finality.” 339 U.S. at 314. *Shutts* was the first case to require that absentees be provided a right to opt out, and the Supreme Court forcefully reiterated that right in *Ortiz v. Fibreboard Corporation*, 527 U.S. 815, 847-48 (1999), and, quite recently, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), where the Court held unanimously that claims for monetary relief may rarely if ever be subjected to the non-opt-out provisions of Federal Rule of Civil Procedure 23(b)(2), in part because of the opt-out right’s constitutional pedigree. *Id.* at 2559.

This Court has upheld a collateral attack and refused to accord binding effect to a class judgment with respect to absentees to whom the class representatives had not provided adequate representation. *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 257-61 (2d Cir.), *aff’d in relevant part by equally divided court*, 539 U.S. 111 (2001). Other circuit courts have similarly upheld collateral attacks. *See, e.g., Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (upholding collateral attack on class judgment in light of failure to provide opt-out-rights), *cert. dismissed*, 511 U.S. 117 (1994); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227-28 (11th Cir. 1998) (upholding collateral attack on ground of inadequate class notice).



The district court did not contest any of this. Indeed, it acknowledged that notice, the right to opt out, and adequate representation are required to bind an absent plaintiff to a class judgment. (JA145-146) And it noted that, under *Stephenson*, Chana Hecht had the right to mount a collateral attack on any of those grounds. (JA146)

Yet, the district court held that (1) the judgment in *Gravina* was binding on Chana Hecht because a one-time notice in *USA Today* that indicated that the class members had a right to opt out accorded the absent class members all the process that they were due, and (2) the terms of the class settlement evidenced that the *Gravina* class representatives had provided adequate representation, even though that settlement provided the absentees *no* monetary relief. As we now show, neither of these findings is correct, and the district court's decision should be reversed.

**A. The *Gravina* Settlement and Judgment Did Not Provide Chana Hecht Adequate Notice or the Right to Opt Out, and They Therefore Do Not Bind Her.**

The publication notice in *Gravina* was inadequate to meet the demands of due process. The question here is whether absent class members like Chana Hecht would likely have been apprised of the *Gravina* suit — and the right to opt out of it — by a notice that ran once in the Monday, September 20, 2010, issue of *USA*

*Today*. (JA101) The chance that many (if any) class members saw that issue of *USA Today* is very small. The chance that of any of them saw that issue of the *USA Today* and read the small-print notice concerning the *Gravina* suit is almost non-existent, and, therefore, the notice was (obviously) not “reasonably calculated” to reach the absentees. *Mullane*, 339 U.S. at 314. The publication notice here was nothing more than a formality, not the “best practicable” notice that due process demands. *See Shutts*, 472 U.S. at 812. The Supreme Court could have been speaking about this very case when it warned that “when notice is a person’s due, process which is a mere gesture is not due process.” *Mullane*, 339 U.S. at 315.<sup>2</sup>

As *Mullane* put it, “[t]he means employed” to give notice must be means that “one desirous of actually informing the absentee might reasonably adopt to accomplish it.” 339 U.S. at 315. The means employed here was not adequate. No one actually desiring to notify the absent class members here would have done no

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<sup>2</sup>*See also, e.g., In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315 (3d Cir. 2001) (settlement notice appearing twice in *USA Today*, once each in *TV Guide* and *Parade Magazine*, and once in a Spanish-language general circulation newspaper in Puerto Rico insufficient to bind class member in Puerto Rico); *Greenfield v. Village Indus., Inc.*, 483 F.2d 824, 830 (3d Cir. 1973) (two-time publication in *Wall Street Journal* and *Philadelphia Evening Bulletin* “was insufficient notice under any standard of fairness, justice, or due process”); *see also Twigg*, 153 F.3d at 1227 & n.4 (in class action brought by Sears customers, nationwide published notices and notices posted in Sears stores “may have been insufficient under *Mullane*”) (dicta because court sustained collateral attack on other inadequate notice grounds).

more than take out a one-time notice in *USA Today*. The class judgment in *Gravina* therefore does not bind Chana Hecht.

Tellingly, the district court did *not* find that the *USA Today* notice was likely to inform the class members of the *Gravina* action or their right to exclude themselves from it. Instead, the court held that the notice was the “best practicable” because, given the amounts that the defendant was willing to put up in settlement, and the limits on class action recoveries in the FDCPA, 15 U.S.C. § 1692k(a)(2)(B)(ii), it would have been impracticable to provide individual notice to the class members. (JA147-148) There are at least two answers to the district court’s reasoning, each dispositive.

**First**, the district court’s cost-benefit rationale has no basis in the case law. *Mullane* itself involved a “large number of small interests,” 339 U.S. at 319, and yet the Court held that due process required that individual notice be sent to all beneficiaries known to the trustee, *id.* at 320; *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-177 (1974) (rejecting same sort of cost-benefit analysis with regard to Rule 23’s notice requirements, relying in part on *Mullane*); *cf. Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84, 87 (1988) (rejecting a risk-benefit due process analysis: “a judgment entered [against a defendant] without notice or service is constitutionally infirm,” even assuming that the

defendant had no defense on the merits). Indeed, the district court’s reasoning proves far too much. The district court’s view that notice can be dispensed with because of its cost would have justified eliminating the *USA Today* notice — which, as we have explained, could not have actually notified more than a handful of the class members (if that). Thus, under the district court’s reasoning, *no* notice would have been the “best practicable” notice, which cannot be squared with *Mullane* or any notion of due process.

We note that it would have been practicable, indeed quite simple, for the parties to do what they do in other FDCPA class actions: Notify the absent class members individually of the lawsuit and their right to opt out. The gravamen of the class complaint in *Gravina* was that the defendant made unlawful telephone contacts with the class members, and the debt collector, who was working on behalf of the creditor, obviously would know or have access to the class members’ addresses. Indeed, the FDCPA generally requires the debt collector, within five days of its initial contact with the consumer, to “send the consumer a written notice” containing certain information to enable the consumer to dispute the underlying debt. 15 U.S.C. § 1692g(1). Moreover, aside from individual mailed notice, the defendant could have also undertaken a more extensive notification campaign — including electronic media, local publications, and the like — that

would have been more than the “mere gesture” exemplified by the one-time *USA Today* notice. *Mullane*, 339 U.S. at 315. Our point here is not that the parties in *Gravina* were required to undertake the more extensive means of notice demanded by due process — after all, they need not have settled at all — but only that they had to do so if they wanted to bind someone who, like Chana Hecht, filed a timely suit against the defendant.

It also bears emphasis that the parties in *Gravina* chose to proceed under Federal Rule of Civil Procedure 23(b)(2), rather than under Rule 23(b)(3), which requires individualized notice to each member of the class, *see* Fed. R. Civ. P. 23(c)(2)(B), to evade their notice obligations under the Rule, which have their origins in the Due Process Clause. *See* Rules Advisory Committee Notes to 1966 Amendments to Rule 23, 39 F.R.D. 69, 106-107 (1966) (“[N]otice must be ordered, and it is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.”) (citing, *e.g.*, *Hansberry*, 311 U.S. 32).

The *Gravina* court’s Rule 23(b)(2) certification was plainly erroneous. As the Supreme Court recently explained, Rule 23(b)(3) – and *not* Rule 23(b)(2) --

applies to class actions for monetary relief, *Wal-Mart*, 131 S. Ct. at 2558-59, and, even in cases where both monetary and injunctive relief are sought, Rule 23(b)(3) generally must be employed because, among other reasons, of the “serious possibility” that due process requires individualized notice and opt-out rights with respect to *any* claim for monetary relief. *Id.* at 2559.

Here, the *Gravina* class representatives sought *only* monetary relief, *see* JA 47 (*Gravina* Complaint, ¶ 92), making Rule 23(b)(3) and its individualized notice requirements the only permissible basis for certification. That the *Gravina* complaint sought only monetary relief is not surprising because the FDCPA does not authorize injunctive relief. *See, e.g., Weiss v. Regal Collections*, 385 F.3d 337, 342 (3d Cir. 2004); *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 882 (7th Cir. 2000); *Sibley v. Fulton DeKalb Collection Serv.*, 677 F.2d 830, 834 (11th Cir. 1982); *see also Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 977 n.39 (5th Cir. 2000) (noting unanimity among courts on this issue). In sum, the flagrant misapplication of Rule 23(b)(2) in *Gravina* underscores why, under the Due Process Clause, the judgment in *Gravina* does not bind Chana Hecht.

**Second**, and more fundamentally, the district court’s rationale is circular. The district court assumed that there had to be an FDCPA class action — and, indeed, a class action settled on *Gravina*’s terms — and then measured Chana

Hecht’s due process rights against that assumption. But that has the problem backwards. Chana Hecht owns a valuable asset — a cause of action for damages — that may not be extinguished unless she is accorded due process. *Shutts*, 472 U.S. at 808 (“a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs”). Under the FDCPA, that claim is worth up to \$1,000 in statutory damages and any actual damages that may be proved, plus costs and attorney’s fees. 15 U.S.C. §§ 1692k(a)(1), (a) (2)(A), and (a)(3). We do not know the precise value of Chana Hecht’s claims because the lack of notice eliminated her opportunity to litigate them. But whatever their worth, due process does not require her to give up her substantive rights — and the procedural right to notice that would have allowed her an opportunity to opt out and litigate her FDCPA rights despite the *Gravina* settlement — simply because *Gravina* class counsel and their named clients settled on terms that rendered the absentees’ individual claims worthless. Indeed, the principal point of the opt-out right established in *Shutts* is that it allows absentees to determine their own litigation destiny and to escape the control exercised by the class representatives and their lawyers. 472 U.S. at 813 (noting that when “the plaintiff’s claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought about filing suit, and should be fully capable

of exercising his right to ‘opt out’”).

For these reasons, *Gravina* did not provide Chana Hecht the notice and right to opt out that due process demands. The *Gravina* judgment therefore does not bind her.

**B. Chana Hecht Was Not Provided Adequate Representation in *Gravina*, and, Therefore, the *Gravina* Judgment Does Not Bind Her.**

The class settlement in *Gravina* was unusual, and unusually bad. It provided *zero* to the absent class members. The class lawyers received an attorney’s fee, and two non-profit organizations having nothing to do with the class claims, the class members’ injuries, or the FDCPA, received a substantial cash payment. (JA108-109) But the absentees got *nothing*.

In our view, a class settlement that requires the absent class members to release potentially valuable damages claims for nothing is, by definition, the product of inadequate representation and, thus, violates the absentees’ due process rights. That is the upshot of *Stephenson*, where this Court refused to give a prior class action settlement binding effect precisely because it did not provide any recovery to some of the absentees. 273 F.3d at 260-61; *see also Jamison v. Butcher & Sherrerd*, 68 F.R.D. 479, 482 (E.D. Pa. 1975) (rejecting class settlement because it would have provided nothing more than what the class members were already



entitled to under another settlement).

But the Court need not reach that question. Even if it were possible to hypothesize circumstances in which a no-value settlement was the product of adequate representation — and none come to mind — those circumstances are not present here because, as explained above, the settlement forced Chana Hecht to give up potentially valuable individual FDCPA claims for nothing. What occurred here is reminiscent of this Court’s decision in *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 17 n.6 (2d Cir. 1981), which rejected a class action settlement because, as Judge Friendly put it, the class representatives were “willing to throw to the winds” the claims of absentees “in order to settle their own claims.”

The district court’s answer to the adequacy of representation problem was essentially the same as its answer to the *Gravina* court’s failure to provide adequate notice: that in light of the amount the defendant was willing to provide in settlement and the FDCPA’s limit on aggregate class relief, the class members should not have expected to receive anything. (JA146-149)

Once again, the district court assumed the conclusion. It is improper to assess adequacy of representation to absent class members who possess valuable *individual* claims by presupposing that they would have wanted their claims

adjudicated on an *aggregate* basis. Whether, and, if so, in what circumstances, an FDCPA class action settlement may ever be the basis for a finding of adequate representation to class members who have a right to opt and pursue their claims individually is not before the Court. But a class action settlement that provides the class members nothing when they could have pursued individual claims worth up to \$1,000 or more cannot constitute adequate representation, at least not where, as here, the class members are not provided meaningful notice and the right to opt out.

### CONCLUSION

For the reasons stated above, the decision of the district court should be reversed, with directions that the district court consider Chana Hecht's claims on the merits.<sup>3</sup>

Dated: July 21, 2011

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Lawrence Katz

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<sup>3</sup>As noted earlier, the district court dismissed Hecht's supplemental state-law claim under 28 U.S.C. § 1367(c)(3) without prejudice to its renewal in Connecticut state court, because, in light of the court's *res judicata* ruling, no federal claims remained in the case. (JA151) If the Court reverses the district court's *res judicata* ruling, effectively reinstating Hecht's FDCPA claims, it should reinstate the supplemental state-law claim as well.

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