

NORTH CAROLINA COURT OF APPEALS

WILLIAM MOODY, JR., on behalf of
himself and all others similarly situated,

Plaintiff,

vs.

SEARS ROEBUCK AND CO.,

Defendant.

From New Hanover County
02 CVS 4892

BRIEF OF DEFENDANT-APPELLANT

CLERK OF APPEALS
OF NORTH CAROLINA

2007 NOV -5 P 3:44

FILED

INDEX

TABLE OF CASES AND AUTHORITIES.....v

QUESTIONS PRESENTED1

STATEMENT OF THE CASE2

STATEMENT OF GROUNDS FOR APPELLATE
REVIEW.....3

STATEMENT OF FACTS4

I. AFTER DETERMINING THAT THE
REQUISITES OF DUE PROCESS WERE
SATISFIED, THE CIRCUIT COURT OF
ILLINOIS ENTERED A JUDGMENT IN
WROBEL v. SEARS ROEBUCK AND CO.
APPROVING A NATIONWIDE CLASS
ACTION SETTLEMENT WHICH
CONCLUSIVELY RESOLVED THE WHEEL-
ALIGNMENT LITIGATION AGAINST SEARS4

A. *Wrobel*, A Putative Nationwide Class Action,
Was Filed In Illinois, Which Is Sears’ Principal
Place Of Business4

B. After Extensive Mediation Led By A Retired
Judge, The Parties In *Wrobel* Reached, And The
Illinois Court Preliminarily Approved, A
Nationwide Class Action Settlement Agreement.....4

C. After Holding A Fairness Hearing, And Upon
Finding That The Settlement Was Fair,
Reasonable, And Adequate For Absent Class
Members And That The Requisites Of Due
Process Were Satisfied, The Illinois Court In
Wrobel Entered A Judgment Granting Final
Approval Of The Nationwide Settlement.....6

II. THE ILLINOIS JUDGMENT WAS SUBJECTED TO A COLLATERAL ATTACK BY THE TRIAL COURT BELOW	8
A. <i>Moody v. Sears Roebuck and Co.</i>	8
B. In Light Of The Illinois Judgment In <i>Wrobel</i> Approving The Nationwide Settlement And Releasing All Claims, Moody And Sears Voluntarily Dismissed <i>Moody</i> With Prejudice.....	9
C. Judge Tennille Ruled That The Parties Needed His Approval To Voluntarily Dismiss <i>Moody</i> With Prejudice, Even Though No Class Action Was Ever Certified In <i>Moody</i> , And He Proceeded To Mount A Collateral Challenge To The Illinois Judgment.....	10
D. Two Years After The Illinois Court Rejected His Objections, Judge Tennille Entered An Order Repudiating The Illinois Judgment And Refusing To Accord It Full Faith And Credit.....	12
ARGUMENT.....	13
I. STATEMENT OF THE STANDARD OF REVIEW.....	13
II. THE TRIAL COURT’S JURISDICTION TERMINATED ONCE THE ILLINOIS JUDGMENT WAS ENTERED AND THE PARTIES FILED A VOLUNTARY DISMISSAL WITH PREJUDICE	13
III. THE ILLINOIS JUDGMENT IS ENTITLED TO FULL FAITH AND CREDIT, AND THEREFORE THE TRIAL COURT’S ORDER DENYING FULL FAITH AND CREDIT MUST BE VACATED.....	17
A. The Concept Of Full Faith And Credit Clause Is Central To Our System Of Jurisprudence	18

B. The Broad Collateral Review Undertaken By Judge Tennille Is Not Permitted By The Full Faith And Credit Clause	19
IV. EVEN IF BROAD COLLATERAL REVIEW WERE APPROPRIATE, THE TRIAL COURT ERRED IN CONCLUDING THAT THE ILLINOIS JUDGMENT FAILED TO SATISFY DUE PROCESS	30
CONCLUSION.....	34
CERTIFICATE OF COMPLIANCE.....	36
CERTIFICATE OF SERVICE	37

Table of Cases and Authorities

	Page
<u>Cases</u>	
<i>Alford v. Davis</i> , 131 N.C. App. 214, 505 S.E.2d 917 (1998).....	14
<i>Boozer v. Wellman</i> , 80 N.C.App. 673, 343 S.E.2d 540 (1986)	27
<i>Boyles v. Boyles</i> , 308 N.C. 488, 302 S.E.2d 790 (1983)....	27-28
<i>Childress v. Fluor Daniel, Inc.</i> , 172 N.C.App. 166, 167, 615 S.E.2d 868, 869 (2005).....	13
<i>Creek Point Homeowner's Ass'n, Inc. v Happ</i> , 146 N.C. App. 159, 552 S.E.2d 220 (2001)	14
<i>Donnell v. Howell</i> , 257 N.C. 175, 125 S.E.2d 448 (1962).....	27
<i>Epstein v. MCA, Inc.</i> , 179 F.3d 641 (9 th Cir.), cert. denied, 528 U.S. 1004, 120 S.Ct. 497, 145 L.E.2d 384 (1999).....	20-22, 29
<i>Fine v. Am. Online, Inc.</i> , 743 N.E.2d 416 (Ohio Ct. App.), rev. denied, 736 N.E.2d 24 (Ohio 2000).....	19, 23-24, 30
<i>Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.</i> , 285 N.C. 344, 204 S.E.2d 834 (1974)	27-28
<i>Freeman v. Pacific Life Ins. Co.</i> , 156 N.C. App. 583, 577 S.E.2d 184 (2003).....	28
<i>GMAC Mortg. Corp. of Pa. v. Stapleton</i> , 603 N.E.2d 767, 774 (Ill. App. 1992).....	7
<i>Goodson v. P.H. Glatfelter Co.</i> , 171 N.C.App. 596, 615 S.E.2d 350 (2005).....	13

<i>Hansberry v. Lee</i> , 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed 22 (1940).....	25-26
<i>Hospitality Mgmt. Assoc., Inc. v. Shell Oil Co.</i> , 591 S.E.2d 611 (S.C. 2004).....	22-23, 29
<i>In re Compact Disc Minimum Advertised Price Antitrust Litig.</i> , 216 F.R.D. 197 (D. Me. 2003).....	34
<i>In re Diet Drugs Prods. Liab. Litig.</i> , 431 F.3d 141 (3d Cir. 2005).....	25
<i>In re Mexico Money Transfer Litig.</i> , 164 F.Supp.2d 1002 (N.D. Ill. 2000), <i>aff'd</i> , 267 F.3d 743 (7 th Cir. 2001)	34
<i>Lamarque v. Fairbanks Capital Corp.</i> , 927 A.2d 753 (R.I. 2007).....	24-25, 30
<i>Matsushita Elec. Indus. Co., Ltd. v. Epstein</i> , 516 U.S. 367, 116 S.Ct. 873, 134 L.E.2d 6 (1996)	18-21, 28-29
<i>Nottingham Partners v. Trans-Lux Corp.</i> , 925 F.2d 29 (1 st Cir. 1991).....	25
<i>Russ v. Hedgecock</i> , 161 N.C.App. 334, 588 S.E.2d 69 (2003), <i>rev. denied</i> , 358 N.C. 545, 599 S.E.2d 407 (2004).....	15
<i>Rutledge v. U.S.</i> , 517 U.S. 292, 116 S.Ct. 1241, 134 L.E.2d 419 (1996).....	25
<i>Simeon v. Hardin</i> , 339 N.C. 358, 451 S.E.2d 858 (1994).....	14-15
<i>State v. Newman</i> , --- N.C.App. ---, --- S.E.2d --- (2007)	13
<i>Stephenson v. Dow Chem. Co.</i> , 273 F.3d 249 (2d Cir. 2001), <i>aff'd without opinion by equally divided Court</i> , 539 U.S. 111, 123 S.Ct. 2161, 156 L.Ed.2d 106 (2003)	25

Taylor v. Carolina Rest. Group, Inc., 170 N.C.App. 532, 613 S.E.2d 510 (2005).....31

Thrasher v. Thrasher, 4 N.C.App. 534, 167 S.E.2d 549 (1969).....27

Underwriters Nat'l Assur. Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 102 S.Ct. 1357, 71 L.Ed.2d 558 (1982)..... 18

Constitutional Provisions, Statutes, and Rules

U.S. CONST., Art. IV, § 1passim

28 U.S.C. § 1738..... 18

N.C.G.S. § 7A-27(b).....3

N.C.G.S. § 7A-27(d)..... 3-4

N.C.R.Civ.P. 23(c)..... 15-17

N.C.R.Civ.P. Rule 41(a).....9

Fed.R.Civ. P. 23..... 5, 15-16

Fed.R.Civ.P. 23, 2003 Advisory Comm. Note..... 15-16

735 ILCS 5/2-8015

Other

5 Moore's Federal Practice § 23.64[2][a] (3d ed.)..... 16

NORTH CAROLINA COURT OF APPEALS

<hr/>)	
WILLIAM MOODY, JR., on behalf of)		
himself and all others similarly situated,)		
)		
)	Plaintiff,	
vs.)		<u>From New Hanover County</u>
)		02 CVS 4892
SEARS ROEBUCK AND CO.,)		
)		
)	Defendant.	
<hr/>)		

BRIEF OF DEFENDANT-APPELLANT

QUESTIONS PRESENTED

1. AFTER AN ILLINOIS COURT ENTERED A JUDGMENT APPROVING A NATIONWIDE CLASS ACTION SETTLEMENT, WHICH CONCLUSIVELY RESOLVED AND RELEASED ANY CLAIMS IN THIS OVERLAPPING NORTH CAROLINA CASE, THUS LEAVING NO JUSTICIABLE CONTROVERSY TO BE LITIGATED IN NORTH CAROLINA, AND WHERE THE PARTIES IN THIS NORTH CAROLINA CASE THEREAFTER FILED A VOLUNTARY DISMISSAL WITH PREJUDICE AS REQUIRED BY THE ILLINOIS JUDGMENT, DID THE TRIAL COURT BELOW NONETHELESS HAVE JURISDICTION UNDER N.C.R.CIV.P. 23(c) TO APPROVE OR REJECT THE UNOPPOSED VOLUNTARY DISMISSAL WITH PREJUDICE, EVEN THOUGH NO CLASS ACTION WAS EVER CERTIFIED IN THIS NORTH CAROLINA CASE?

2. IF N.C.R.CIV.P. 23(c) DOES REQUIRE COURT APPROVAL OF AN UNOPPOSED VOLUNTARY DISMISSAL FILED IN A CASE IN WHICH A MOTION FOR CLASS CERTIFICATION WAS NEVER FILED AND A CLASS WAS NEVER CERTIFIED, AND IF THE BASIS FOR THE DISMISSAL IS

THAT THE CLAIMS WERE RESOLVED BY A FOREIGN JUDGMENT APPROVING A GLOBAL SETTLEMENT IN A NATIONWIDE CLASS ACTION, DID THE TRIAL COURT BELOW ERR IN CONCLUDING THAT RULE 23(c) AUTHORIZES PLENARY REVIEW OF THE FOREIGN COURT'S JUDGMENT AND THE FAIRNESS OF THE SETTLEMENT?

3. IN LIGHT OF THE U.S. SUPREME COURT'S HOLDING THAT JUDGMENTS APPROVING CLASS ACTION SETTLEMENTS ARE ENTITLED TO FULL FAITH AND CREDIT NO LESS THAN ANY OTHER TYPE OF JUDGMENT, WHEN A COURT ENTERS SUCH A JUDGMENT AFTER CONCLUDING THAT THE SETTLEMENT COMPLIES WITH DUE PROCESS, DOES THE FULL FAITH AND CREDIT CLAUSE PERMIT A SECOND COURT TO UNDERTAKE A BROAD COLLATERAL REVIEW OF THAT JUDGMENT AND SETTLEMENT AND SECOND-GUESS THE CERTIFYING COURT'S DUE PROCESS DETERMINATIONS?

4. DID THE TRIAL COURT BELOW ERR IN CONCLUDING THAT THE ILLINOIS JUDGMENT IN *WROBEL v. SEARS ROEBUCK AND CO.* IS NOT ENTITLED TO FULL FAITH AND CREDIT ON THE BASIS OF DUE PROCESS, ADEQUACY OF REPRESENTATION, AND OTHER PURPORTED DEFICIENCIES?

STATEMENT OF THE CASE

On a complaint alleging deceptive advertising and charges by Sears Roebuck and Co. ("Sears") for wheel alignment services, a nationwide class action settlement was negotiated and approved by a judgment entered in Illinois on 16 December 2004 in *Wrobel v. Sears Roebuck and Co.* (the "Illinois Judgment"). (R p. 232) Thus, on 29 December 2004, the parties in this overlapping North Carolina case, in which no motion to certify a class was ever filed and no class action was ever certified, filed a voluntary dismissal with prejudice. (R p. 217) However, the trial court (Judge Ben F. Tennille) refused to accept the voluntary dismissal with

prejudice. (R p. 218) Over the parties' objections, he launched a collateral attack on the Illinois Judgment, entering a series of orders seeking information about the settlement. (R pp. 219, 224, 266, 312, 377, 379) The parties objected on the grounds that the Illinois Judgment mooted the controversy (thus divesting the court of jurisdiction) and was entitled to full faith and credit. (R pp. 221, 226, 229, 310, 359) On 7 May 2007, however, Judge Tennille entered an order in which he exercised jurisdiction, concluded that the Illinois Judgment violated due process, and held that it is not entitled to full faith and credit. (R p. 435) From that order and earlier orders entered after the Illinois Judgment, Sears filed a notice of appeal on 6 June 2007. (R p. 492) Plaintiff cross-appealed. (R p. 495) Pursuant to Appellate Rule 11(d), the parties agreed on a procedure for constituting a joint record on appeal, which was filed on 6 September 2007. (R p. 2)

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Pursuant to N.C.G.S. § 7A-27(b), this is an appeal from a final judgment of the Superior Court entered 7 May 2007, and earlier related interlocutory orders. The 7 May 2007 Order is a final judgment because nothing remains to be done by the trial court in this case; the Order dismissed the claims of the only plaintiff (William Moody) with prejudice. Insofar as the Order is deemed interlocutory, it should be immediately appealable, because the Order discontinues the action and because the Order—particularly its holding that the Illinois Judgment is not

entitled to full faith and credit and that members of the *Wrobel* settlement class are not bound thereby—undermines Sears’ substantial rights to finality and repose in the settlement of claims against it; it is doubtful that Sears could ever obtain appellate review of the Order in any future proceeding. *Id.* § 7A-27(d)(1), (3).

STATEMENT OF FACTS

I. AFTER DETERMINING THAT THE REQUISITES OF DUE PROCESS WERE SATISFIED, THE CIRCUIT COURT OF ILLINOIS ENTERED A JUDGMENT IN *WROBEL v. SEARS ROEBUCK AND CO.* APPROVING A NATIONWIDE CLASS ACTION SETTLEMENT WHICH CONCLUSIVELY RESOLVED THE WHEEL-ALIGNMENT LITIGATION AGAINST SEARS

A. *Wrobel*, A Putative Nationwide Class Action, Was Filed In Illinois, Which Is Sears’ Principal Place Of Business

Sears, based in Illinois, operates a nationwide chain of automobile repair centers which perform wheel alignment service. (R p. 233) In December 2002 a putative nationwide class action was filed against Sears in Illinois: *Wrobel, et al. v. Sears Roebuck and Co.* (*Id.*) Plaintiffs’ lead counsel was Gary Shipman of North Carolina. (R pp. 107, 117, 211) The complaint alleged that Sears’ advertisements and charges for wheel alignment services were deceptive. (R p. 81)

B. After Extensive Mediation Led By A Retired Judge, The Parties In *Wrobel* Reached, And The Illinois Court Preliminarily Approved, A Nationwide Class Action Settlement Agreement

A year after *Wrobel* was filed, the parties began mediation under the stewardship of retired Illinois Circuit Judge Richard Neville. (R pp. 81-82, 96,

189) Sears categorically denied the claims had merit and was prepared to defend the litigation vigorously, but an extensive, eight-month mediation ultimately resulted in a settlement agreement. (R pp. 82, 96, 198-199)

On 10 September 2004 the parties moved the Illinois Circuit Court for preliminary approval of their proposed settlement. (R pp. 80-165) They requested certification of an opt-out nationwide class for settlement purposes consistent with Illinois' statutory prerequisites for class certification (*id.*), which are substantially identical to those in Rule 23 of the Federal Rules of Civil Procedure. *See* 735 ILCS 5/2-801 (at App. 3).

After a hearing on that motion, the Illinois Circuit Court entered an Order For Preliminary Approval of Settlement. (R pp. 169-176) The Order conditionally certified a nationwide settlement class and preliminarily approved the settlement agreement, subject to further consideration at a later fairness hearing. (*Id.*) In that Order, the Court approved a notice plan, consistent with Illinois law and due process, to notify the class about the terms of the proposed settlement agreement and their rights to object and opt out. (R pp. 172; see R pp. 103-06, 118-19, 137-46) In addition to requiring an interactive website, the notice plan required the parties to provide notice to the class by means of nationwide publication, with notice published in daily newspapers in Sears' top 25 auto service markets and circulated nationally through *Parade Magazine* and *USA Weekend*. (R pp.

171(¶6), 118; R pp. 194, 207) The notice advised of the fairness hearing scheduled for 17 November 2004, where the *Wrobel* court would further consider the fairness, reasonableness, and adequacy of the settlement. (R pp. 137-38, 273)

C. After Holding A Fairness Hearing, And Upon Finding That The Settlement Was Fair, Reasonable, And Adequate For Absent Class Members And That The Requisites Of Due Process Were Satisfied, The Illinois Court In *Wrobel* Entered A Judgment Granting Final Approval Of The Nationwide Settlement

At the 17 November 2004 fairness hearing in *Wrobel*, the Illinois Circuit Court probed a variety of issues to determine if the proposed settlement was fair, reasonable, and adequate and met the prerequisites of Illinois law and due process. (R pp. 248-259) Retired Judge Neville, the mediator, appeared at the hearing and confirmed that settlement negotiations were hard fought. (R pp. 249, 257-58) The Court took the matter under advisement. (R p. 258)

On 16 December 2004 the *Wrobel* court entered an Order And Judgment Granting Final Approval Of Settlement (the “Illinois Judgment”). (R pp. 232-247, 185-215) The Illinois Judgment made a number of significant findings, including:

- the parties had engaged in “intensive, arm’s length negotiations” and there was no collusion between them (R pp. 234(¶2), 239 (¶17), 240(¶¶19-20));
- the notice plan constituted “valid, due, and sufficient notice” and “provided the best notice practicable under the circumstances to Class

Members,” and fully complied with the requirements of due process and Illinois law (R p. 235, ¶¶ 3, 6));

- the settlement was fair, adequate, and reasonable using eight factors that must be applied under Illinois law (R pp. 236-44(¶¶11-27), 246(¶6))¹;
- the value of settlement benefits for participating class members was “substantial,” was rationally related to an assessment of risk, potential damages, and the difficulty of establishing injury, and was consistent with the benefits achieved by New Jersey’s Attorney General in settlement of a related action; and the use of coupons for a subclass was justified by the unique factual circumstances and the particular difficulty that the subclass would have in establishing any injury (R pp. 234(¶2), 237-238(¶¶12-13), 241(¶¶21-22)); and
- the proposed attorney’s fee award, which must be paid by Sears, was reasonable and less than the amount expended by the many lawyers who served as class counsel (R pp. 242-44(¶¶25-26), 246(¶7)).

The Court also found that Judge Neville deemed the settlement non-collusive, fair, and adequately protective of class members’ interests. (R pp. 239(¶17), 240(¶19), 243-244 (¶26))

¹ *GMAC Mortg. Corp. of Pa. v. Stapleton*, 603 N.E.2d 767, 774 (Ill. App. 1992).

II. THE ILLINOIS JUDGMENT WAS SUBJECTED TO A COLLATERAL ATTACK BY THE TRIAL COURT BELOW

A. *Moody v. Sears Roebuck and Co.*

The same week *Wrobel* was filed in Illinois, William Moody, represented by Gary Shipman, filed in New Hanover County, North Carolina, an overlapping state-wide putative class action suit. (R p. 4) The North Carolina complaint raised the identical allegations of *Wrobel*, but limited the proposed class to North Carolina. (R p. 10(¶21)) The case was assigned to Judge Tennille. (R p. 48)

Moody barely progressed, however. Indeed, Sears never filed an answer, because its motion to dismiss was never resolved by a written order. (R p. 18) Instead, the case was effectively stayed pending mediation in *Wrobel*. (R p. 166) The plaintiff never moved to certify a class in *Moody*, and none was ever certified.

The parties informed Judge Tennille of the *Wrobel* settlement before it received final approval by the Illinois Circuit Court (*id.*), and he took it upon himself to write an unsolicited letter to the presiding judge in *Wrobel*, Judge Julia Nowicki, a week before the *Wrobel* fairness hearing. (R p. 266) While stating in his letter that he “ha[d] no desire to intrude on [the *Wrobel* court’s] jurisdiction” and acknowledging that “[t]here are sound reasons for a nationwide class action to be administered in Illinois,” Judge Tennille offered a critique of the *Wrobel* notice plan and raised questions about other aspects of the proposed *Wrobel* settlement that he did not like. (R pp. 266-269)

Judge Nowicki took Judge Tennille's concerns under consideration at the fairness hearing (R pp. 252-258), but ultimately rejected them en route to entering the Illinois Judgment on 16 December 2004. (R p. 232)

B. In Light Of The Illinois Judgment In *Wrobel* Approving The Nationwide Settlement And Releasing All Claims, Moody And Sears Voluntarily Dismissed *Moody* With Prejudice

On the heels of the Illinois Judgment, Moody and Sears filed in *Moody*, pursuant to N.C.R.Civ.P. Rule 41(a), a voluntary dismissal with prejudice. (R p. 217) They did so for obvious reasons. The *Wrobel* class action settlement was a nationwide settlement. Because Moody was a member of the nationwide class (in fact, he signed the settlement agreement), his claims were released.² Also released were the claims of any North Carolina residents whom he would have sought to represent had he successfully moved to certify a class in North Carolina.³ Indeed, the settlement agreement explicitly required the dismissal of *Moody*.⁴

Likewise, the Illinois Judgment declared that all class members who did not opt out "are bound by the Settlement Agreement," that their claims must be

² R pp. 274-309 (Settlement Agreement and Release); R p. 287 (§2.04 Release); R pp. 292-294 (§5.01 Release and Covenant Not to Sue); R pp. 295-296 (§6.06 Binding Effect); R p. 300 (Moody's signature).

³ R pp. 279-80 (§1.03 Class); R p. 287 (§2.04 Release); R pp. 288-89 (§3.04: class members who do not opt "remain a member of the Class and . . . shall be bound by an order(s) of the Court regarding the Class."); R pp. 292-94 (§5.91 Release and Covenant Not to Sue); R pp. 295-96 (§6.06 Binding Effect).

⁴ R p. 275 (defining the "Litigation" to include *Moody*); R p. 277 (parties agreed to settle the "Litigation," including *Moody*).

dismissed with prejudice, that they are enjoined from commencing or prosecuting in any forum any related claim against Sears, and that they have waived any objections by way of “collateral attack.” (R pp. 236(¶¶8-9), 247(¶¶5-6))

C. Judge Tennille Ruled That The Parties Needed His Approval To Voluntarily Dismiss *Moody* With Prejudice, Even Though No Class Action Was Ever Certified In *Moody*, And He Proceeded To Mount A Collateral Challenge To The Illinois Judgment

After *Moody* and Sears filed the voluntary dismissal with prejudice, Judge Tennille responded with an order on 5 January 2005 expressing his opinion that “class actions may not be dismissed without approval of the Court.” (R p. 218) He issued that order even though no motion to certify a class had ever been filed in North Carolina in this case and no class was ever certified here.

Two weeks later, Judge Tennille filed an order stating he would not approve a voluntary dismissal unless he were given “a final accounting” of the claims filed and paid in *Wrobel*, the benefits distributed to the *Wrobel* class, the administrative costs and payment of fees to plaintiffs’ counsel under the *Wrobel* settlement, and other *Wrobel* matters. (R pp. 219-220) Over ensuing months, he proceeded to issue similar orders seeking information about the *Wrobel* settlement. (R pp. 224, 228, 312, 377) The parties objected that he had no jurisdiction and that the Illinois Judgment was entitled to full faith and credit. (R pp. 229, 310)

On 3 May 2005, Judge Tennille further injected himself into *Wrobel* with another letter to Judge Nowicki. (R pp. 379-383) In this letter, Judge Tennille

criticized the already-executed notice plan which Judge Nowicki had approved; complained about the benefits to the class approved in the Illinois Judgment; accused Mr. Shipman of having misrepresented claims information to Judge Nowicki six months earlier at a fairness hearing (a charge based on Judge Tennille's review of a hearing transcript); and otherwise objected to the settlement as unfair and unreasonable. (*Id.*) By lodging objections, Judge Tennille evidently wanted Judge Nowicki to reconsider the Illinois Judgment.

In response, Mr. Shipman and Sears' counsel wrote to Judge Nowicki. (R pp. 390-429) They addressed Judge Tennille's factual errors, misunderstandings, and accusations regarding the notice plan and the settlement. (*Id.*) Sears also submitted to Judge Nowicki an affidavit from an expert witness who confirmed that the notice plan was reasonable and the most practicable means of delivering notice under the circumstances of this case. (R pp. 400-429)

Judge Nowicki took Judge Tennille's concerns and objections under consideration (R p. 389), but found them unconvincing. (R pp. 430, 474-475) In fact, she entered an Order on 10 August 2005 rejecting Judge Tennille's accusation that the settlement was approved based on a misinformation: "The Court remains satisfied that this misstatement was inadvertent and that the settlement in this case was not procured by fraud or misrepresentation on the Court." (R p. 430) She declined to disturb the Illinois Judgment. But Judge Tennille not stop there.

D. Two Years After The Illinois Court Rejected His Objections, Judge Tennille Entered An Order Repudiating The Illinois Judgment And Refusing To Accord It Full Faith And Credit

Two years after Judge Nowicki entered the Order rejecting his accusation of impropriety in *Wrobel*, Judge Tennille entered an astonishing Order on 7 May 2007. (R p. 435) He concluded that Rule 23 of the North Carolina Rules of Civil Procedure authorized him to review the voluntary dismissal in *Moody*—even though no motion to certify the class had ever been filed in *Moody* and no class had ever been certified in *Moody*—and that he had authority to review the substance of the Illinois Judgment and settlement—despite the Full Faith and Credit Clause. (R pp. 457-59) He repudiated the Illinois Judgment in a number of respects and held that it is not entitled full faith and credit. (R pp. 458-59)

Judge Tennille's 7 May 2007 Order tries to negate the Illinois Judgment. The Illinois Judgment and settlement agreement *require* that all pending actions, including *Moody*, must be dismissed with prejudice; that absent class members who did not opt out are bound by the settlement; and that their claims against Sears are released. *See* pp. 9-10, *supra*. Under Judge Tennille's Order, however, absent class members may contend that they may commence new lawsuits against Sears. Sears now stands exposed to the threat of class action litigation all over again, even outside this State should Judge Tennille's Order (incorrectly) be given preclusive effect in other jurisdictions.

ARGUMENT

I. STATEMENT OF THE STANDARD OF REVIEW

Judge Tennille's orders should be reviewed *de novo* because they raise issues of law. Whether he had jurisdiction to issue the orders is reviewed *de novo*, *Childress v. Fluor Daniel, Inc.*, 172 N.C.App. 166, 167, 615 S.E.2d 868, 869 (2005), as is the subsidiary issue whether he properly interpreted Rule 23. *See Goodson v. P.H. Glatfelter Co.*, 171 N.C.App. 596, 605, 615 S.E.2d 350, 357 (2005). Whether he could undertake collateral review of the Illinois Judgment, that proper scope of that review, and whether grounds exist for not according the Judgment full faith and credit concern legal conclusions and questions of law; as such, they are reviewed *de novo*. *State v. Newman*, --- N.C.App. ---, --- S.E.2d --- (2007).

II. THE TRIAL COURT'S JURISDICTION TERMINATED ONCE THE ILLINOIS JUDGMENT WAS ENTERED AND THE PARTIES FILED A VOLUNTARY DISMISSAL WITH PREJUDICE

ASSIGNMENTS OF ERROR NOS. 1-8, 26, 27, 32, 34, 38, 43, 46,
50, 55, 57, 60, 63, 66, 68, 72, 77, 79, 81, 85, 88, 91, 92, 94, 99
(R pp. 522-24, 528-544)

Whether a court has jurisdiction is a threshold question. Thus, this Court should first determine whether the trial court below had jurisdiction over this case after the Illinois Judgment was entered.

“Jurisdiction in North Carolina depends on the existence of a justiciable case or controversy.” *Creek Point Homeowner’s Ass’n, Inc. v Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001). After the Illinois Judgment, Moody, the only plaintiff in this case, had no justiciable claim to prosecute. He forever released his claim and explicitly agreed to dismiss *this* action. See notes 2-4, *supra*. Moreover, with respect to any North Carolina resident whom he *might have* represented *if* a class action had been certified here—which it was not—the settlement agreement released and extinguished all such claims, since no North Carolina resident opted out. See note 4, *supra*. The Illinois Judgment declares that all members of the nationwide class who did not opt out—which would include anyone who could bring a claim in North Carolina—are bound by the settlement, are barred from prosecuting or commencing such claims in any forum, and must have their claims *dismissed with prejudice*. (R pp. 236(¶¶8-9), 247(¶¶5-6))

Simply put, the claims lodged in the Superior Court by Moody’s complaint were resolved upon entry of the Illinois Judgment, at which point this case became moot, and jurisdiction ceased to exist. See *Alford v. Davis*, 131 N.C. App. 214, 218, 505 S.E.2d 917, 920 (1998).

Whenever during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law.

Simeon v. Hardin, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994). Accordingly, Judge Tennille's orders after 16 December 2004 should be vacated. *See Russ v. Hedgecock*, 161 N.C.App. 334, 337, 588 S.E.2d 69, 71 (2003) (order entered without jurisdiction is a nullity), *rev. denied*, 358 N.C. 545, 599 S.E.2d 407 (2004).

Judge Tennille concluded that Rule 23(c) afforded him jurisdiction to approve or reject the voluntary dismissal. (R pp. 458-59) Rule 23(c) provides,

A class action shall not be dismissed or compromised without the approval of the judge. In an action under this rule, notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the judge directs.

N.C.R.Civ.P. 23(c) (emphasis added). The trouble is, *this* case was never certified as a class action. Moody never moved the trial court below to certify a class.

The issue arises whether Rule 23(c) should be construed to require court approval of a voluntary dismissal when, although the complaint was filed with the aspiration of becoming a class action, a class was never certified.

The second sentence from Rule 23(c) contemplates notice to "members of the class." This presupposes the existence of a class, which cannot exist or be identified absent *certification* pursuant to the requirements of North Carolina law. The first sentence of Rule 23(c), with its reference to "class action," is, perhaps, ambiguous. But the identical ambiguity formerly resided in the cognate federal Rule 23(e), and that ambiguity was resolved by a clarifying amendment that the rule "requires approval *only* if the claims, issues, or defenses of a *certified* class are

resolved by a settlement, voluntary dismissal, or compromise.” Fed.R.Civ.P. 23, 2003 Advisory Comm. Note (emphasis added). Thus, “[t]he named plaintiffs may settle or voluntarily dismiss their own claims just as in an individual action ..., in which case the class claims would have to be dismissed as well. Rule 23(e) does not provide the district court with any supervisory authority over such dismissals, nor does it require notice to the absent class members.” 5 Moore’s Federal Practice § 23.64[2][a] (3d ed.).

Just as a perceived ambiguity in federal Rule 23(e)’s reference to “class action” was clarified to mean only a *certified* class action, any perceived ambiguity in North Carolina’s Rule 23(c) should be similarly interpreted. There is no reason why North Carolina’s Rule 23 should be construed to make voluntary dismissal more onerous. *Cf. Brewer v. Harris*, 279 N.C. 288, 292, 182 S.E.2d 345, 347 (1971) (because the federal rules are the source of North Carolina’s rules, federal decisions provide guidance); *Suarez v. Wotring*, 155 N.C.App. 20, 27-28, 573 S.E.2d 746, 751 (2002) (same). In approving the federal clarification, the U.S. Supreme Court and Congress evidently did not find a compelling reason to require court approval of voluntary dismissals in cases that aspired to be, but were never certified as, class actions. After all, before certification, absent (putative) class members are not parties to the proceedings and therefore are not bound by the court’s rulings.

But even if Rule 23(c) requires court approval of a voluntary dismissal in a case never certified as a class action, then, at most, the Rule 23(c) inquiry should be limited to determining *the reason* for the dismissal. Here, the reason was that a nationwide class settlement approved by a foreign court had conclusively resolved the controversy. That should have been the end of any Rule 23(c) inquiry. Under no circumstances should Rule 23(c) be read to give a trial court a license to do what Judge Tennille did below—undertake *sua sponte* a substantive, *de novo* review of another state court’s judgment approving a class action settlement.

At any rate, jurisdiction and Rule 23(c) aside, the scope of Judge Tennille’s collateral review violated the Full Faith and Credit Clause, as explained below.

III. THE ILLINOIS JUDGMENT IS ENTITLED TO FULL FAITH AND CREDIT, AND THEREFORE THE TRIAL COURT’S ORDER DENYING FULL FAITH AND CREDIT MUST BE VACATED

ASSIGNMENTS OF ERROR NOS. 9-25, 28, 33, 35, 39, 40,
45, 48, 52, 58, 59, 62, 67, 71, 75, 76, 80, 83, 87, 98, 100-103
(R pp. 522-545)

Judge Tennille reasons that a class action settlement may be reexamined and reopened on collateral review if a later court believes that the certifying court got it wrong in concluding that the settlement comported with due process. If upheld, his ruling could threaten the finality of many class action settlements, rendering the class action device a precarious and thus highly unstable and unreliable method for resolving disputes. It is difficult to imagine a rule that would more seriously

undermine the core utility and rationale of class actions. As explained below, his theory of collateral review is contrary to the Full Faith and Credit Clause.

A. The Concept Of Full Faith And Credit Clause Is Central To Our System Of Jurisprudence

We begin by reiterating the U.S. Supreme Court's decisive views on the Full Faith and Credit Clause (from a case which held that North Carolina's courts erred in failing to grant full faith and credit to a foreign judgment):

[T]he concept of full faith and credit is central to our system of jurisprudence. Ours is a union of States, each having its own judicial system capable of adjudicating the rights and responsibilities of the parties brought before it. Given this structure, there is always a risk that two or more States will exercise their power over the same case or controversy, with the uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue. Recognizing that this risk of relitigation inheres in our federal system, the Framers provided that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST., Art. IV, § 1.

Underwriters Nat'l Assur. Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 703-04 (1982). The Clause is implemented by the Full Faith and Credit Act, 28 U.S.C. § 1738, which "mandates that the 'judicial proceedings' of any State 'shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.'" *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 373

(1996). “The Act thus directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state.” *Id.*

Importantly, the Supreme Court in *Matsushita* held that this principle applies with equal force to a judgment approving the settlement of a class action. *Id.* at 374. Thus, in this case, the Illinois Judgment in *Wrobel* is duly protected by the Full Faith and Credit Clause, meaning it must be treated with same respect it would receive in the courts of Illinois. *Id.* at 373, 375. Unquestionably the Illinois Judgment would be entitled to preclusive effect in Illinois; in Illinois, members of the settlement class would be barred from litigating the released claims. *See Fine v. Am. Online, Inc.*, 743 N.E.2d 416 (Ohio Ct. App.) (applying Full Faith and Credit Clause to Illinois judgment approving nationwide class settlement; Illinois courts accord preclusive effect to such judgments, barring class members from re-litigating settled claims), *rev. denied*, 736 N.E.2d 24 (Ohio 2000).

B. The Broad Collateral Review Undertaken By Judge Tennille Is Not Permitted By The Full Faith And Credit Clause

Judge Tennille concluded that the Full Faith and Credit Clause permitted him to undertake a *de novo* review of the Illinois court’s due process determinations. What he failed to appreciate, however, is that the scope of collateral review in this context is exceedingly narrow. As explained below, review is limited to ensuring that the certifying court followed *procedures* for determining that the rights of absent class members were adequately protected.

And, when the certifying court *itself* has determined that the settlement comports with due process, the Full Faith and Credit Clause does not permit that substantive determination to be second-guessed on collateral review in another jurisdiction.

The scope of collateral review surfaced in the aftermath of the U.S. Supreme Court's *Matsushita* decision, which, as noted, held that judgments approving class action settlements are entitled to full faith and credit. In *Matsushita*, the issue was whether a judgment rendered by a Delaware court was entitled to full faith and credit in the context of an overlapping federal class action pending in California. When the Supreme Court remanded the case to the Ninth Circuit, class members who were within the settlement class argued (as Judge Tennille reasoned below) that the court could not "accord full faith and credit to the Delaware judgment because it violated their due process rights." *Epstein v. MCA, Inc.*, 179 F.3d 641, 644 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999). The Ninth Circuit held, however, that a broad collateral review of due process requisites is *not* permissible. Rather, review is "limited" to determining if the certifying court that approved the class settlement determined that due process requirements had been met. *Id.* at 649. If so, that is the end of the matter; the certifying court's due process determinations may not be second-guessed:

Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States

Supreme Court. . . . Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court; *due process does not require collateral second-guessing of those determinations and that review.*

Id. at 648 (citations omitted; emphasis added). The court made clear that this reasoning applies to all aspects of due process, holding that “broad collateral review of the adequacy of representation (or of the other due process requirements for binding absent class members) is not available.” *Id.* at 649 (emphasis added).⁵

In so holding, the Ninth Circuit stressed that the Supreme Court in *Matsushita* had “satisfied itself that [due process] requirements had been met by referencing the Delaware courts’ findings on these matters, rather than by independently determining whether the requirements were met.” *Id.* (emphasis in original). Indeed, the Supreme Court had concluded that the absent class members were “bound” by the settlement *precisely because* the Delaware courts had found that the settlement was “fair, reasonable and adequate and in the best interests of the . . . Settlement Class,” that the class was adequately represented, and that the notice plan was “in full compliance with . . . the requirements of due process.” *Matsushita*, 516 U.S. at 378-79 (internal quotation marks and citations omitted).

⁵ See also *Epstein*, 179 F.3d at 651 (Wiggins, J., concurring) (“Because the [due process] issue was fully and fairly litigated and necessarily decided in the [Delaware] Chancery Court, the Delaware courts would give preclusive effect to that determination. . . . As such, we are required to give preclusive effect to the Chancery Court’s judgment that class representation was adequate irrespective of whether we agree with that determination.”).

The Ninth Circuit's analysis in *Epstein* is the prevailing view. *See, e.g., Hospitality Mgmt. Assoc., Inc. v. Shell Oil Co.*, 591 S.E.2d 611 (S.C. 2004). In *Hospitality Management*, courts in Alabama and Tennessee approved nationwide class action settlements. Class members who did not opt out tried to proceed with an overlapping action in South Carolina. They raised objections similar to Judge Tennille's below: they argued that the foreign judgments were not entitled to full faith and credit because class members were not adequately represented and did not receive proper notice (they contended the content of the class notice was incomplete and that publication notice should not have been used). *Id.* at 620-21. But the South Carolina Supreme Court unanimously held that the settlements were entitled to full faith and credit. Embracing *Epstein*, the court held that only a limited collateral review of due process issues is appropriate—limited to determining whether the rendering courts had in place procedures (such as those in Rule 23) for evaluating the adequacy of class notice and representation. *Id.* at 623.

[S]econd-guessing the fully litigated decisions of our sister courts would violate the spirit of full faith and credit. . . . [B]oth the *Spencer* court in Alabama and the *Cox* court in Tennessee actually ruled that the due process requirements had been met. Both these courts specifically found that the respective notice programs met minimal due process. The *Cox* final order stated that the adequacy requirement (in terms of Tennessee's Rule 23) had been met The *Spencer* final order found the "settlement fair, adequate and reasonable" to the members of the class. Accordingly, under a limited collateral review, the two foreign judgments on their face appear to be entitled to full faith and credit.

Id. at 619-20 (citations omitted). Thus, the Court concluded that it was not appropriate to address the *substantive merits* of their due process arguments regarding the notice plan and the adequacy of representation. *Id.* at 620-22.

In reaching its holding, the Court also found persuasive *Fine v. America Online, Inc.*, 743 N.E.2d 416 (Ohio Ct. App.), *rev. denied*, 736 N.E.2d 24 (Ohio 2000), another post-*Matsushita* case embracing limited collateral review. *Fine* is noteworthy because, like this case, it involved an Illinois judgment approving a nationwide class settlement. Absent class members who did not opt out sought to proceed with an overlapping action in Ohio, contending the Illinois judgment was not entitled to full faith and credit because it failed to protect their due process rights. They challenged the adequacy of representation and the notice plan in the Illinois proceeding, contending that the publication notice was deficient, even though the Illinois court had expressly found that it was sufficient. *Id.* at 417.

Fine held that, pursuant to the Full Faith and Credit Clause, the Illinois court's approval of the notice plan and nationwide settlement could not be subjected to a substantive collateral review. *Id.* at 420. "Modern constitutional jurisprudence requires that the absent class members' rights to due process be protected not by substantive collateral review, but, rather, by the application of appropriate procedures in the certifying court and by the courts that review its determinations." *Id.* *Fine* observed that Illinois law has in place adequate

procedural safeguards for protecting due process rights, and those safeguards were employed by the Illinois court, which had addressed the requisites of due process, found the notice sufficient, afforded class members the opportunity to opt out, conducted a fairness hearing, and considered adequacy of representation. *Id.* at 423-24. Therefore, the Illinois order was entitled to full faith and credit. *Id.* Whether the certifying court was right or wrong in its due process determinations was, *Fine* held, beyond the scope of any legitimate collateral review. *Id.* at 421-24. “Mere disagreement with the terms of a settlement cannot provide grounds for a collateral attack. If such an argument were upheld, absent class members could always mount a collateral attack against the fairness of a settlement under the guise of challenging the adequacy of representation.” *Id.* at 423.

Indeed, the *Fine* court observed that, if the objecting class members had sought direct review on appeal in the Illinois judicial system, the Illinois trial court’s findings regarding the sufficiency of notice, the adequacy of class representation, and the fairness of the settlement would be reviewed for abuse of discretion, not *de novo*. *Id.* at 423. The court concluded that “it would be inconceivable to expand [its] review of another jurisdiction’s determination beyond that which it would be subject to on direct appeal.” *Id.* n.8.

The most recent state court decision to address this issue is *Lamarque v. Fairbanks Capital Corp.*, 927 A.2d 753 (R.I. 2007), and it, too, embraced a limited

scope of collateral review. In *Lamarque* absent class members contended they should not be bound by a settlement because the notice allegedly did not comport with due process. The court held that it could not properly respond to their argument on the merits, because such “an inquiry [was] well beyond the bounds of the narrow scope of review.” *Id.* at 766-67.⁶

Judge Tennille cited *Hansberry v. Lee*, 311 U.S. 32 (1940). But that case is hardly on point. To begin with, the initial state court proceeding in *Hansberry*—which was brought to establish the effectiveness of a racially restrictive covenant on property—was not a formal class action proceeding at all. *See id.* at 42-43, 45-46. The trial court was under no obligation to and did not in fact take any steps to ensure the adequacy of the class representation or to provide notice to absent class members. *See id.* After all, the underlying case was decided long before the adoption of Rule 23 and its state-court counterparts (which require trial courts to make findings and manage class actions to protect due process interests). The trial

⁶ For similar cases, see, e.g., *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 146 (3d Cir. 2005); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991). The most notable decision embracing a broad standard of collateral review is *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), which was affirmed without opinion by an equally divided Court, 539 U.S. 111 (2003), leaving it without precedential value, *see Rutledge v. U.S.*, 517 U.S. 292, 304 (1996). *Stephenson* was an unusual case concerning the Agent Orange settlement for millions of Vietnam veterans. The plaintiffs contended they were not parties to the class action judgment, since their injuries were not discovered until after the settlement was approved. The case did not involve the Full Faith and Credit Clause. The court undertaking the collateral review, the Second Circuit, was the same court that had initially reviewed and approved the settlement.

court in *Hansberry* in fact made *no* effort to protect the interests of the absent class members. *Id.* at 38-39. The conflict between the class representative and absent class members was patent and egregious—as directly adverse as those of plaintiff and defendant—because the representative wanted to enforce the restrictive covenant and the absent class members did not. *Id.* at 38-40, 44-45.

Hansberry said that absent class members are bound by a judgment only “where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties.” *Id.* at 43. But that background statement of law was not suggesting that adequacy, *once determined*, is open to re-litigation. On the contrary, the Court immediately added that, if “a *procedure* were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue,” representatives of the class “could stand in judgment for all.” *Id.* at 43 (emphasis added). *Hansberry* thus does not require collateral review where, as here, the certifying court scrupulously adhered to procedural protections, took measures to protect the absent class members’ interests (including an opt-out right), and expressly resolved the due process issues.

Judge Tennille also cited three North Carolina cases on this federal issue. (R pp. 457-78) But the cases are inapposite.⁷ In *Boyles v. Boyles*, 308 N.C. 488, 302 S.E.2d 790 (1983) and *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 285 N.C. 344, 204 S.E.2d 834 (1974), the parties contended, and the Court agreed, that foreign judgments entered against them were not valid because jurisdictional issues were not fully and fairly litigated, since the defendants did not receive actual notice of the proceedings. The Court followed U.S. Supreme Court precedent stating that full faith and credit does not apply unless the issues are fully and fairly litigated. *Boyles* and *Hosiery* make clear that “[i]f the second court’s inquiry reveals that [the] questions have been ‘fully and fairly litigated and finally decided in the court which rendered the judgment,’ the inquiry need go no further.” *Boozer v. Wellman*, 80 N.C.App. 673, 676, 343 S.E.2d 540, 542 (1986) (quoting *Boyles*).

Under that rule, the Illinois Judgment is entitled to Full Faith and Credit. In compliance with Illinois procedure, the Illinois court examined the sufficiency of notice, the adequacy of representation, and the other issues, and concluded—after multiple hearings and briefing—that due process was satisfied and that the settlement was fair, reasonable, and adequate. That these issues were fully and fairly litigated is made all the more clear by the fact that Judge Tennille essentially

⁷ *Donnell v. Howell*, 257 N.C. 175, 125 S.E.2d 448 (1962) is clearly irrelevant. There the parties *stipulated* that they perpetrated a fraud on the Alabama court. See *Thrasher v. Thrasher*, 4 N.C.App. 534, 544, 167 S.E.2d 549, 556 (1969).

intervened in *Wrobel* and tendered to Judge Nowicki (both before and after the fairness hearing) a thorough list of concerns and objections, the very ones he ultimately raised in his 7 May 2007 Order. (R pp. 266-269, 379-383) Given the fact that Judge Nowicki considered Judge Tennille's objections, it is implausible to contend that these issues were not fully and fairly litigated in *Wrobel*.

Finally, *Boyles* and *Frances Hosiery* provide no support here because they did not involve class action judgments. Things are different in the class action context because, once a court determines, upon certifying a class, that the named plaintiff and counsel are adequate to represent the class, the class *is* represented in court, and the certifying court then has an obligation to safeguard the class' interests. This is decidedly unlike the posture of *Boyles* and *Frances Hosiery*, in which the defendants neither appeared nor were represented in the underlying court proceedings. *See Freeman v. Pacific Life Ins. Co.*, 156 N.C. App. 583, 587-88, 577 S.E.2d 184, 187 (2003) (granting full faith and credit to Kentucky judgment approving class action settlement despite plaintiff's argument that he did not receive notice of the Kentucky proceeding, because the Kentucky court had found that it had jurisdiction and that the notice was "best notice practicable"). As noted, the Supreme Court in *Matsushita* clearly indicated that, in the context of a judgment approving a class action settlement, the rendering court's resolution of due process issues is *itself* entitled to full faith and credit; the *Matsushita*-remand

decision (*Epstein*) so held; and post-*Matsushita* cases have thus rejected collateral review after finding that due process issues were considered and resolved by the certifying courts.⁸

In conclusion, under Judge Tennille's approach to collateral review, settlement of a class action upon a finding that absent class members were adequately represented and afforded due process signals not the end of the litigation, but merely the beginning of a new stage of litigation. During the new stage, the defendant must face the possibility of numerous collateral attacks. No amount of conscientious compliance would ensure finality at the hands of a foreign court. Class action litigations will never end.

This type of broad collateral review threatens to upset the finality of countless class action dispositions, prevent conclusive resolution of pending and future class actions, reduce the incentive for defendants to enter class action settlements, and ultimately create the type of inefficiencies and barriers to global resolution that would undermine the utility of the class action device. *See Hospitality Management*, 591 S.E.2d at 659 ("It would run counter to the class action goals of efficiency and finality to allow successive review of issues that

⁸ *Boyles* is also distinguishable because there the Court simply followed the rule that a judgment is not entitled to full faith and credit if it would not be given preclusive effect in the rendering jurisdiction; Florida law would not give the judgment binding effect because the rendering court failed to follow Florida law. 308 N.C. at 494-95, 302 S.E.2d 795. Judge Tennille never concluded, nor could he, that the *Wrobel* judgment is invalid under Illinois law.

were, in fact, fully and fairly litigated in the rendering court.”); *Lamarque*, 927 A.2d at 765 (same); *Fine*, 743 N.E.2d at 421-22 (same, and adding that substantive collateral review would “squander” the State’s “resources in its attempt to ‘re-create the wheel’”). If this type of broad collateral review were embraced, it would also render vulnerable the judgments of North Carolina’s courts in other jurisdictions. It should be rejected.

IV. EVEN IF BROAD COLLATERAL REVIEW WERE APPROPRIATE, THE TRIAL COURT ERRED IN CONCLUDING THAT THE ILLINOIS JUDGMENT FAILED TO SATISFY DUE PROCESS

ASSIGNMENTS OF ERROR NOS. 29-31, 36, 37, 41, 42, 44, 47, 49-51, 53, 54, 56, 61, 64, 65, 73, 74, 78, 82, 84, 86, 89, 90, 92, 93-97, 100-103
(R pp. 529-545)

In concluding the Illinois Judgment did not comport with due process, Judge Tennille made a number of assumptions about the notice plan, the settlements benefits, and even Judge Nowicki’s state of mind. But he did not hold an evidentiary hearing. Instead he operated largely in a vacuum, selectively reviewing information from *Wrobel*. As explained below, his conclusions about the *Wrobel* settlement process are incorrect. These arguments need be addressed, however, only if the Court concludes that Judge Tennille had jurisdiction and that the broad scope of his collateral review did not run afoul of the Full Faith and Credit Clause.

An initial word is warranted about the standard of review. Judge Tennille's due process conclusions are mixed questions of law and fact; as such, they should be reviewed *de novo*. *Taylor v. Carolina Rest. Group, Inc.*, 170 N.C.App. 532, 541, 613 S.E.2d 510, 516 (2005). Indeed, since he himself undertook a *de novo* review of the Illinois Judgment, it would be anomalous for this Court to conduct a review of his Order granting greater deference than was afforded the *Wrobel* court. And, because Judge Tennille did not hold an evidentiary hearing but instead simply reviewed information relating to the *Wrobel* proceeding, he has no institutional advantage vis-à-vis this Court, and thus there is no compelling policy reason to accord his conclusions any deference.

According to Judge Tennille's Order, "[t]he most serious problem with the settlement" from his perspective was his belief that Judge Nowicki approved the settlement based on inaccurate claims information communicated to her by Mr. Shipman at a hearing (R pp. 442-45(¶¶26-28), 459(¶60)), a belief which Judge Tennille formed by reviewing a *Wrobel* hearing transcript. (R pp. 380-381) But Judge Nowicki *herself* addressed this issue when Judge Tennille raised it to her by letter (R pp. 467-73); and, upon reviewing the matter, she entered an Order which expressly rejected the notion that she was misled or that her approval of the settlement was based on inaccurate information. (R pp. 430-31) She deemed it a harmless and inadvertent misstatement by Mr. Shipman (*id.*), a conclusion fully

supported by the record. (R pp. 390-93, 397-98) In fact, the Illinois Judgment itself reveals that she was not misled about the distinction between claims and inquiries. (R pp. 240(¶18), 398) Thus, Judge Tennille's conclusion that Judge Nowicki's approval of the settlement was infected by inaccurate information is clearly erroneous.

Judge Tennille also concluded that the publication notice to class members was deficient. (R pp. 445-448) But the notice plan approved by Judge Nowicki more than met minimal due process. At the time, *Parade Magazine* enjoyed readership of more than **78 million** people with circulation of nearly **36 million** copies distributed nationally with **340** Sunday newspapers; *USA Weekend* was distributed through more than **600** newspapers to nearly **48 million** readers with circulation of about **23 million** copies. (R pp. 406-407(¶17)) In addition, the notice plan included publication in the main news sections of daily newspapers in each of Sears' top 25 wheel alignment markets. As Judge Nowicki was aware, because of the overlap in territories, the 25 newspapers selected actually covered Sears' top 39 wheel alignment markets.⁹ (R pp. 172, 397) The notice plan was also supplemented by an interactive website. (R pp. 270-273) Moreover, Judge

⁹ The depths of Judge Tennille's error is revealed in his stated belief that no notice was published in newspapers in Chicago, Charlotte, Winston-Salem, Asheville, or Greensboro. (R pp. 447(¶34), 449 (¶37)) But the notice *was* circulated in the local newspapers in *each* of those cities, on multiple occasions, through *Parade Magazine* and *USA Weekend*. (R pp. 421, 423, 427, 428)

Nowicki reviewed the affidavit of an expert witness who specializes in the design and implementation of class action notification campaigns. (R pp. 400-413) He attested to the adequacy of notice and explained why in this case the publications were the best means of delivering notice and why personal notice was impractical. (R pp. 404-408) Judge Nowicki did not err in finding that the notice plan comported with due process.

Given the page/word limitations imposed by the Appellate Rules, Sears cannot address in detail the other facets of Judge Tennille's Order to which Sears has assigned error. It should suffice to say that the other purported "deficiencies" are not grounded in the *constitutional* requirements of the due process—the basis Judge Tennille purportedly used to circumvent the Full Faith and Credit Clause—but instead reflect his policy-based ideas for reforming perceived class action abuses, ideas over which reasonable minds may differ. (E.g., he believes that coupons should not be used, that notices should identify the attorney's fees requested, and that an attorney's fee should be linked to the claims success rate.) Indeed, after discussing the publication notice, his Order (from the discussion of the content of the notice through its discussion of attorney's fees and adequacy of representation) fails to cite a single case. (R pp. 448-456) Instead, he relied principally on a Rand Institute study and nonbinding guidelines proposed by a consumer advocacy group, the National Association of Consumer Advocates

(NACA).¹⁰ Judging by his Order, the NACA guidelines weighed most heavily in his determination that the Illinois Judgment was deficient.

Regardless of the merits of Judge Tennille's ideas about class action reform and however well-intentioned they may be, the Full Faith and Credit Clause does not permit a North Carolina court to project its preferred policies and procedures extraterritorially upon other courts around the nation. The purported deficiencies may vary from the procedures that Judge Tennille prefers for his courtroom, but they are not required by the Constitution, and therefore they cannot lawfully be applied extraterritorially to contravene or repudiate another State's considered judgment.

CONCLUSION

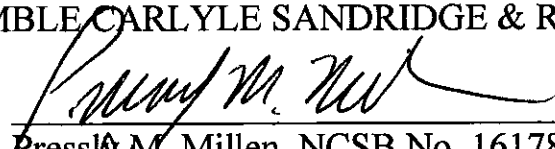
The trial court's orders entered after the entry of the Illinois Judgment (i.e., after 16 December 2004) should be vacated, and the case should be dismissed with prejudice.

¹⁰ NACA's guidelines have been mentioned in only a handful of state and federal cases nationwide, and courts have refused to apply them when asked to do so. *See In re Mexico Money Transfer Litig.*, 164 F.Supp.2d 1002, 1029 (N.D. Ill. 2000) ("The court does not share the concern expressed by the California Objectors that the proposed settlements do not meet principles established by the National Association of Consumer Advocates These Guidelines are useful, but unofficial and have never been adopted by a court."), *aff'd* 267 F.3d 743 (7th Cir. 2001); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 204 & n.12 (D. Me. 2003) (rejecting objections' argument, which was based on NACA guidelines, that notice must specify amount of attorney fees sought).

This the 5th day of November 2007.

WOMBLE CARLYLE SANDRIDGE & RICE, PLLC

By:


Pressly M. Millen, NCSB No. 16178

By:


Sean E. Andrussier, NCSB No. 25790

Attorneys for Defendant-Appellant

P.O. Box 831

Raleigh, NC 27602

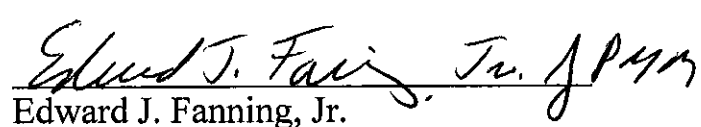
Telephone: (919) 755-2100

Facsimile: (919) 755-2150

pmillen@wcsr.com

OF COUNSEL: McCARTER & ENGLISH, LLP

By:


Edward J. Fanning, Jr.

(*Pro Hac Vice* Motion Pending)

Attorneys for Defendant-Appellant

Four Gateway Center

100 Mulberry Street

Newark, NJ 07102-4056

Telephone: (973) 639-7927

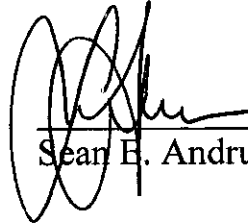
Facsimile: (973) 297-3868

efanning@mccarter.com

CERTIFICATE OF COMPLIANCE WITH RULE 28(j)

This is to certify that the foregoing brief, drafted in proportional type, complies with the requirements of Rule 28(j) of the North Carolina Rules of Appellate Procedure and that the text (including citations and footnotes) contained herein is less than 8,750 words (exclusive of covers, table of authorities, indices, and certificates of service and compliance), as reported by Microsoft Word.

This the 5th day of November 2007.

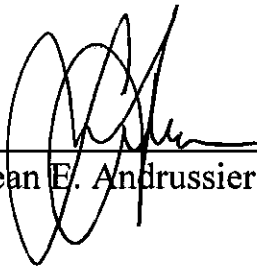


Sean E. Andrussier

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on the 5th day of November, 2007, he caused the foregoing **BRIEF OF DEFENDANT-APPELLANT** to be served upon counsel for Plaintiff shown below by first-class mail, postage prepaid, addressed to said attorney:

Gary K. Shipman
Shipman & Associates, LLP
11 S. Fifth Avenue
Wilmington, NC 28403


Sean E. Andrussier

CONTENTS OF APPENDIX

	<u>App. p.</u>	<u>Appearing in Brief at p.</u>
Full Faith and Credit Clause, U.S. CONST., Art. IV, § 1	App. 1	17-29
Full Faith And Credit Act, 28 U.S.C. § 1738	App. 2	18
735 ILCS 5/2-801	App. 3	5

United States Constitution, Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U.S.C. § 1738

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

735 ILCS 5/2-801

Formerly cited as IL ST CH 110 ¶ 2-801

West's Smith-Hurd Illinois Compiled Statutes Annotated Currentness

Chapter 735. Civil Procedure

Act 5. Code of Civil Procedure (Refs & Annos)

▣ Article II. Civil Practice (Refs & Annos)

▣ Part 8. Class Action (Refs & Annos)

5/2-801. Prerequisites for the maintenance of a class action

§ 2-801. Prerequisites for the maintenance of a class action. An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:

- (1) The class is so numerous that joinder of all members is impracticable.
- (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
- (3) The representative parties will fairly and adequately protect the interest of the class.
- (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

CREDIT(S)

P.A. 82-280, § 2-801, eff. July 1, 1982.

FORMER REVISED STATUTES CITATION

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 2-801.

HISTORICAL AND STATUTORY NOTES

Prior Laws:

Laws 1933, p. 784, art. 7, § 57.2, added by P.A. 80-809, § 1.

P.A. 81-1509, Art. II, § 85.

Ill.Rev.Stat.1981, ch. 110, ¶ 57.2.