Case No. 06-3330

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EVELYN CLARK and BRADLEY ELDRED, on behalf of themselves and all others similarly situated

Plaintiffs-Appellants,

v.

EXPERIAN INFORMATION SOLUTIONS, INC. and CONSUMERINFO.COM, INC.

Defendants-Appellees.

On Appeal From the United States District Court
for the Northern District of Illinois
Case No. 03-C-7882

BRIEF OF DEFENDANTS-APPELLEES EXPERIAN INFORMATION SOLUTIONS, INC. and CONSUMERINFO.COM, INC.

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CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fed. R. App. P. 26.1 and Seventh Circuit. R. 26.1-1, ConsumerInfo.com, Inc. and Experian Information Solutions, Inc., provide the following corporate disclosure statement and certificate of interested persons.

ConsumerInfo.com, Inc. is a California corporation with its principal place of business in Irvine, California. Experian Information Solutions, Inc. is an Ohio corporation with its principal place of business in Costa Mesa, California. GUS, plc is the ultimate parent corporation of both companies. GUS plc is publicly traded on the London Stock Exchange.

ConsumerInfo.com, Inc. and Experian Information Solutions, Inc. certify that the following is a complete list of all judges, attorneys, persons, association of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal:

ConsumerInfo.com, Inc.

Experian Information Solutions, Inc.

Jones Day

Jerome R. Doak

Richard J. Grabowski

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The Honorable James F. Holderman, United States District Judge

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JURISDICTIONAL STATEMENT

The appellants' jurisdictional statement is not complete and correct because appellants fail to cite pertinent facts in the record establishing that the amount-in-controversy has been satisfied.

This Court has diversity jurisdiction over the instant case pursuant to 28 U.S.C. § 1332 and appellate jurisdiction pursuant to 28 U.S.C. § 1291. This lawsuit was originally filed in Illinois state court, and was removed on November 6, 2003 to the U.S. District Court for the Northern District of Illinois. [A-48; A-40.][1] Appellants seek review of the District Court order denying their motion for class certification on December 15, 2005 and the final order granting defendants' motion for summary judgment on August 2, 2006. Appellants filed their notice of appeal with the District Court on August 29, 2006.

The parties are completely diverse. Plaintiffs are Illinois citizens; defendant Experian Information Solutions, Inc. is an Ohio corporation with its principal place of business in California, [A-42]; and defendant ConsumerInfo.com, Inc. is a California corporation with its principal place of business in California. [A-42.] The amount-in-controversy requirement is satisfied because the injunctive relief originally requested by plaintiffs would have cost more than $75,000 to implement. [A-43, A-49, A-93.][2]

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[1] Citations to pages of the supplemental appendix submitted with this brief are placed in brackets with the appropriate page number, in the form A-xx.

[2] Plaintiffs no longer seek injunctive relief, but jurisdiction remains proper because the amount-in-controversy requirement was satisfied at the time of removal. *See Rising-Moore v. Red Roof Inns, Inc.*, 435 F.3d 813, 816 (7th Cir. 2006) ("post-removal events . . . do not authorize remand of a suit that was within federal jurisdiction when removed.").

STATEMENT OF THE CASE

This case is a putative class action filed by two Illinois consumers, alleging that plaintiffs enrolled in and were charged for defendant ConsumerInfo.com's ("CIC") credit monitoring product without adequate disclosure by CIC that plaintiffs would be enrolled in and charged for the service. Plaintiffs allege primarily that this violated the Illinois Consumer Fraud Act ("ICFA"). The district court declined to certify a class, on the ground that the ICFA would require individualized proof that each class member was actually deceived by a defendant's representations, and subsequently granted summary judment in favor of the defendants against both plaintiffs. The respective opinions are reproduced in the supplemental appendix at pages A-82 and A-91.

STATEMENT OF FACTS

A. ConsumerInfo.com

ConsumerInfo.com is an internet company that provides consumers with online access to their personal credit information.[3] It owns, operates, and maintains several web sites that describe its products, and from which consumers may order those products. [A-2]. Three CIC products are relevant to this case: single-bureau credit reports, three-bureau credit reports, and CreditCheck credit monitoring. Both types of credit reports compile credit bureau information on the consumer into an organized format. [*Id*.] Three-bureau reports, however, provide more information than single-

[3] CIC is a wholly-owned subsidiary of defendant Experian Information Solutions, Inc. Experian is not alleged to have engaged in any conduct relevant to the litigation, and appears to have been named as a defendant solely on the basis of its ownership of CIC.

bureau reports, because the three major national credit bureaus frequently have different information on file for the same consumer. Three-bureau reports are therefore more complete than are single-bureau reports. [A-52.] As a result, they are a premium product, provided to the consumer at a higher price than single-bureau reports. [*Id.*]

The third product, CreditCheck, provides subscribers with ongoing monitoring of their credit files and provides online alerts whenever potentially important changes are made to their Experian credit reports. [A-53 – A-54]. Examples of such changes include inquiries by potential creditors, new accounts being opened, and address changes on accounts. [*Id.*] Such changes can, in some cases, indicate that a third party is attempting to steal a consumer's identity by attempting to open new credit accounts or changing the address on existing accounts. Thus, many consumers subscribe to CreditCheck as a means of protecting against identity theft. Prior to October 2003, CreditCheck alerts were provided in the form of a notification whenever a consumer logged into his or her ConsumerInfo account; beginning in October 2003, notifications were also provided by email. [*Id.*] A subscription to CreditCheck cost $79.95 annually until February 2004, when the price was changed (except for existing subscribers) to $9.95 monthly. [A-60.]

B. CIC's Marketing Of CreditCheck Through The Offer Of Free Trial Subscriptions And Free Credit Reports

At all times during the class period, CIC offered a free one-month trial membership to first-time CreditCheck subscribers. [A-4]. Consumers who cancelled the service before the expiration of the one-month period were not billed for the service.

[*Id.*] After 30 days, an uncancelled trial membership would roll over into a paid membership, charged to the credit card that the consumer provided when signing up.[4] [*Id.*] If a customer cancelled his or her membership after 30 days had expired but within 150 days of enrolling, CIC would grant a pro rata refund for the unused portion of the yearly membership. [A-5.]

In addition, as an inducement for consumers to try CreditCheck, CIC offered consumers a free single-bureau credit report in conjunction with enrollment in the CreditCheck trial membership. [A-55]. In making this offer, CIC's websites, while typically highlighting the free credit report, always made clear that signing up for the free report would automatically initiate a trial CreditCheck membership, disclosed that the trial membership would roll over into a paid membership, and disclosed the fees for that membership. [A-55 – A-56]. The websites also always required recipients to enter a credit card number – in a box clearly labeled "payment information" – in order to receive the credit report and trial membership. [A-56.] Finally, CIC always sent follow-up emails that reminded consumers of their enrollment in CreditCheck and of the benefits of the service. [*Id.*]

[4] This is a widely used marketing technique called a "negative option" plan, under which the customer agrees to accept merchandise or pay for a service until he affirmatively acts to cancel the arrangement with the company that made the offer. Negative-option marketing is used, for instance, by the Book Of The Month Club, Time-Life Books, BMG Music Service, and Netflix.

For instance, the free credit report order form most likely in effect when named plaintiff Bradley Eldred visited the site,[5] reproduced at A-28 – A-29, included the following (emphasis added):

- The first thing on the order form is "Yes! Please send me a: Free copy of my credit report and *enter my free 30-day trial membership in the CreditCheck Monitoring Service*."
- In a section of the form labeled "Payment Information," the customer was required to enter his credit card type, number, and expiration date.
- In the same section labeled "Payment Information," the order form explained that "Valid credit card number and expiration date required *to activate CreditCheck Monitoring Service* and receive a free credit report."
- Immediately above the button marked "I AGREE," which each customer was required to click to submit his order, the form stated: "You may cancel at any time during the free membership period. If you wish to continue your membership in the CreditCheck Monitoring Service, do nothing — your membership will continue without interruption. The annual $79.95 fee will be charged to your credit card account and your membership will continue automatically, billable annually at the prevailing rate."

[A-28-29]. In short, this disclosure expressly informed customers that the free credit report came with an enrollment in CreditCheck, that the CreditCheck membership would continue unless and until cancelled, and that they would be charged for that membership if they continued as members beyond the free trial period.

[5] CIC's website content has frequently been changed and updated since the inception of CreditCheck. This order form dates from March, 2001. CIC possesses no record of exactly what content would have been presented in December, 2001 when Mr. Eldred visited the website. Of the website snapshots on record with CIC, March 2001 is the closest in time to Mr. Eldred's visit, and would be very similar, if not identical, to what Eldred saw. [A-9.]

In September 2003, CIC added still more disclosure language to the order form, immediately above where the customer must type in her credit card information:

> Your credit card will not be charged during the free trial period. However, valid credit card information is required to start your free 30-day trial membership. Unless you tell us that you do not want to continue your membership, you authorize the annual $79.95 fee to be charged to the credit card account below after the free trial period.

[A-58].

C. The Plaintiffs

1. Plaintiff Evelyn Clark

On March 28, 2003, Evelyn Clark purchased a three-bureau credit report from a CIC website, and enrolled in a trial membership in CreditCheck. [A-5 – A-7.] The three-bureau report would normally be available for immediate viewing. [A-52.] Clark claims that she was unable to view the report. [A-64.] She did not, however, report this alleged technical problem to CIC, even though she knew CIC's toll-free number was on the CIC website. [A-65 – A-66.]

In May 2003, Clark received a credit card bill for the period March 11-April 10, which included a $24.95 charge for a March 28, 2003 transaction described as "CIC*CREDIT REPORT FEE 877-513-4175 CA." [A-79.] At this time, Clark did not contact either CIC or her credit card company, and she paid the bill in full. [A-66 – A-67.] Clark's next credit card statement included a $79.95 entry for "CIC*CREDIT MONITORING SVC 877-513-4175 CA." [A-80.] After reviewing the bill, Clark telephoned her credit card company regarding the credit monitoring charge. [A-70.]

During this call, Clark also asserted to the credit card company, for the first time, that she had not received the three-bureau report. [A-71.] The credit card company advised her to contact CIC with respect to both charges. [A-70 – A-71.]

When Clark contacted CIC, CIC provided her a pro-rata refund of the CreditCheck charge in the amount of approximately $70. [A-69.] Clark filed a claim for the remaining $8.96 with her credit card company, and the credit card company refunded that amount.[6] [A-73.] With respect to the $24.95 charge for the credit report, a CIC representative informed Clark that she had waited too long to seek a refund. [A-69.] Clark chose not to file a claim with her credit card company for the credit report fee, explaining at her deposition that it may not have been worth the trouble and that the fee may have resulted from her own "mistake":

> I might have been thinking at that time that *I am really busy and this is way more of a hassle than I want to deal with* any more especially after the conversation with the person at CIC who made me very irate. So I may have decided at that time that, well, *$24.95 is not really a large amount of money for a huge mistake that I made and to leave it alone*.

[A-74 (emphasis added).]

2. Plaintiff Bradley Eldred

Bradley Eldred's allegations stem from his enrollment on December 28, 2001 in CreditCheck credit monitoring, and from his December 29, 2001 purchase of a three-bureau credit report. According to CIC's records and Eldred's testimony, he first

[6] At her deposition, Clark admitted that this full refund eliminated any controversy with respect to the CreditCheck charge. [A-74.]

visited a CIC website on December 28, 2001, after following a link from theYahoo! search engine. [A-7.] While on the website, Eldred signed up for a free single-bureau credit report and a one-month trial membership in CreditCheck. [A-7 – A-8.] In so doing, Eldred filled out an order form, which required him to enter, among other personal information, his credit card number in a section labeled "Payment Information." [A-4.] Immediately above the button that Eldred needed to click to submit his order, the form contained the disclosure described above concerning the ongoing nature of the CreditCheck membership and the $79.95 annual fee for such membership. [A-9.] According to CIC's records, Eldred did not contact CIC to cancel his membership within the 30-day trial period, nor does Eldred remember having done so. [A-10; A-115.]

The next morning, on December 29, 2001, Eldred returned to CIC's website and charged a three-bureau credit report, at a price of $34.95, to the same credit card. [A-9.] Less than a month later, in January 2002, Eldred received and paid the credit card statement containing the $34.95 charge for his three-bureau report. [A-110.] The following month, in February 2002, Eldred received and paid the credit card statement containing the $79.95 CreditCheck annual membership charge. [A-111.] In January 2003 and 2004, Eldred also received and paid credit card statements containing $79.95 charges for his ongoing CreditCheck membership. [A-112 – A-113.]

In January 2005, Eldred again received a credit card statement with the annual CreditCheck charge. [A-113.] Eldred, for the first time, disputed the CIC charges with his credit card company and had the 2005 charge reversed. [A-116.] However, the

credit card company refused to reverse the paid charges for the three-bureau report and the CreditCheck membership from 2002, 2003 and 2004. [*Id.*]

Eldred testified at his deposition that he could not remember numerous basic aspects of the transaction in which he ordered the free single credit-bureau report and enrolled in CreditCheck. In particular, he testified that he could not remember:

- Visiting the CIC website on two separate occasions. [A-101.]
- Whether or not he ever read the disclosures on CIC's landing page that the trial membership in CreditCheck came with the free single-bureau credit report. [A-102 – A-103.]
- Whether or not he read further disclosures that $79.95 would be charged to his credit card if he did not cancel his trial membership within 30 days, and that his membership would automatically renew, and his credit card would be charged on an annual basis. [A-104 – A-106.]

Eldred further testified that it was possible that he had understood at the time that he was signing up for CreditCheck and had attempted to cancel his membership the next day. He stated:

> For all I know, when I went back on there on the 29th, that's when I cancelled [my CreditCheck membership]. How did I know I didn't go right back the next day and cancelled it and ended up here instead?
>
> I don't know… maybe I went in for the free one and the next day I went in and cancelled.
>
> Can you prove I didn't do that?

[A-115.]

D. The Proceedings Below

Plaintiffs' Second Amended Class Action Complaint (Docket No. 143) alleges three claims on behalf of a putative class: (1) violations of the Illinois Consumer Fraud Act ("ICFA"), (2) negligent misrepresentation, and (3) unjust enrichment. Each of these claims is based on the contention that the putative class members were deceived into believing that the free credit report offered by CIC did not carry with it automatic enrollment in CreditCheck.

Plaintiffs sought certification of a Rule 23(b)(3) class comprising "all residents of the state of Illinois who, on or after August 29, 2000, responded to Defendants' electronic offer for a free credit report, were enrolled in and charged for Defendants' [CreditCheck Monitoring Service], and failed to access Defendants' CMS." On December 15, 2005, the District Court issued an Order (the "Cert Order") denying plaintiffs' motion on the ground that "common questions do not predominate" as required under Rule 23(b)(3). Cert Order at 6 [A-96]. The court noted that, under Illinois law, each of plaintiffs' three theories of recovery required "an individualize[d] person-by-person evaluation" of whether "individual potential class members were deceived" into signing up for a free credit report and automatic enrollment in CreditCheck. *Id.* at 7 n.1 [A-97]. Judge Holderman expressly rejected plaintiffs' argument that "the defendant's website is deceptive and that fact by itself . . . is enough to allow for class certification," pointing out that "in a consumer fraud case such as this, this court must examine actions by both the defendants as well as the putative class members to determine liability." *Id.* at 8 [A-98]. Judge Holderman buttressed his

conclusion that common questions did not predominate by noting that in addition to the individualized questions concerning liability, the court would be faced in a class action with individualized questions concerning affirmative defenses and damages. *Id.* at 6-8 [A-96 – A-98].

Plaintiff petitioned this Court, pursuant to Fed. R. Civ. P. 23(f), for interlocutory review of the District Court's denial of class certification. This Court denied that petition on January 31, 2006.

On August 2, 2006, the District Court issued a further Order (the "Merits Order") granting summary judgment to defendants on the individual claims of both plaintiffs. As to plaintiff Clark, Judge Holderman ruled that there was no evidence in the record showing that Clark had suffered any actual damages. Merits Order at 6-7 [A-87 – A-88]. Clark was fully refunded the $79.95 charged to her for CreditCheck, and, as to the $24.95 charged for a three-bureau credit report, Judge Holderman held that "the only evidence in the record supports the conclusion that either she received a full refund or that a full refund would have been available to her from the defendants if she requested it." *Id.* at 7 [A-88]. The court explained that Clark provided no evidence "to support her alleged efforts at a refund, the defendants' alleged obstructionist responses, or the defendants' alleged refusal to refund her money as to her alleged claim for the $24.95." *Id.* at 6 [A-87].

The Merits Order also granted summary judgment against Eldred, because Eldred had identified no evidence that he was "ever deceived or ever unknowingly enrolled himself in the defendants' credit monitoring service." *Id.* at 9 [A-90]. Judge

Holderman observed that "the only evidence in the record is that Eldred cannot remember his interactions on the websites, what he read or did not read on the websites, or how the information on the websites affected him when he made his purchase in 2001." *Id.* at 8 [A-89]. Thus, Eldred could not establish an essential element of his claims under Illinois law – that he had suffered an injury proximately caused by CIC's allegedly deceptive conduct. *Id.* With respect to Eldred's argument that CIC's marketing of its websites "was so deceptive that any individual who bought services from the defendant's websites, and made payments on these services, was deceived as a matter of law," Judge Holderman noted that Eldred's deposition testimony undermined this argument by demonstrating "that [Eldred] could have understood the websites and decided to purchase the service instead of being deceived." *Id.* at 8-9 [A-89 – A-90].

SUMMARY OF ARGUMENT

The district court's rulings were clearly correct, based on a fundamental rule of Illinois law that plaintiffs simply ignore: under the ICFA, a plaintiff must prove that he or she was *actually deceived* by allegedly deceptive conduct, and that that actual deception was the proximate cause of the plaintiff's injuries.[7] *See, e.g., Shannon v.*

[7] On appeal, plaintiffs do not pursue their negligent misrepresentation or unjust enrichment claims, and they must be deemed waived. Although plaintiffs devote one conclusory sentence at the very end of their brief, Appellants' Br. at 27, to claiming that the summary judgment on their common law claims must be reversed (they make no similar contention with respect to the denial of class certification on those claims), they nowhere discuss the substantive elements of the common law claims, provide any argument as to how or

Boise Cascade Corp., 208 Ill. 2d 517, 525 (2004) (insufficient to show defendant made deceptive statements; plaintiff must show that he or she individually was "actually deceive[d]."). This need to prove actual deception as an element of an ICFA claim is fatal to plaintiffs' argument in favor of class certification, because the question whether each and every class member was actually deceived can only be answered on an individualized, plaintiff-by-plaintiff-basis that is incompatible with class treatment.

This requirement is also fatal to plaintiffs' claims on the merits. As the district court properly concluded, Bradley Eldred cannot satisfy this element because he remembers nothing about his transactions with CIC, and, indeed, admitted in deposition testimony that he might not have been deceived at all. And Evelyn Clark cannot prove any damages proximately caused by CIC because she concededly has no proper claim for damages. Indeed, plaintiffs' brief does not even argue that the district court erred in granting summary judgment against Clark.

(continued…)

why those elements have been met, or explain why the district court's judgment was in error. Such a cursory, inadequate presentation is not sufficient to preserve their claims. *See, e.g.*, *Ross Brothers Const. Co. v. International Steel Services, Inc.*, 283 F.3d 867, 875 (7th Cir. 2002) ("As we have noted on several occasions, arguments raised in a conclusory or underdeveloped manner on appeal are waived."); *Ajayi v. Aramark Business Services, Inc.*, 336 F.3d 520, 529 (7th Cir. 2003) (appellant who intends to challenge an aspect of the district court's ruling "must identify the legal issue, raise it in the argument section of her brief, and support her argument with pertinent authority."). In any event, as the district court recognized below, CIC's arguments as to the ICFA claims apply with equal force to plaintiffs' common law claims.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO CERTIFY PLAINTIFFS' PUTATIVE CLASS

The district court denied the plaintiffs' motion to certify a class under Rule 23(b)(3) because it found that common issues did not predominate over individual ones, in that plaintiffs' claims required a plaintiff-by-plaintiff determination of actual deception (along with individualized inquiries into affirmative defenses and damages).[8] This finding was well within the district court's sound discretion, and plaintiffs fail to cast any serious doubt on the district court's decision.

Rule 23(b)(3) of the Federal Rules of Civil Procedure establishes the requirements for class certification in suits seeking recovery of monetary damages. It provides that such classes may be certified only if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. Proc. Rule 23(b).[9] *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-25 (1997). Where evidence specific to each class member is important, the predominance requirement is not satisfied. *Marcial v. Coronet Ins. Co.*, 880 F.2d 954-957-58 (7th Cir.

[8] This discussion is limited to plaintiffs' claims under the ICFA because plaintiffs make no independent argument that the district court erred in concluding that individualized proof was necessary with respect to their claims of negligent misrepresentation and unjust enrichment.

[9] In the district court, defendants challenged class certification on several other bases, including typicality and adequacy of representation. *See* Fed. R. Civ. Proc. Rule 23(a). Since the district court did not reach these issues, and plaintiffs do not address them, we do not revisit them now save to note and preserve them.

1989). Predominance is especially difficult to establish in fraud cases, because fraud is "plaintiff-specific, [and thus] issues common to all the class members [are] not likely to predominate over issues peculiar to specific members." *Nagel v. ADM Investor Services, Inc.*, 217 F.3d 436, 443 (7th Cir. 2000).

Moreover, in applying Rule 23, "a district court has broad discretion to determine whether certification of a class-action lawsuit is appropriate." *Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, 474 (7th Cir. 1997). The Court of Appeals' review is therefore "'circumscribed'"; it "will reverse the grant or denial of class certification only for an abuse of discretion." *Id.* (quoting *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993)); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) ("District courts . . . have broad power and discretion vested in them by Fed. Rule Civ. Proc. 23 with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions."); *Keele v. Wexler*, 149 F.3d 589, 592 (7th Cir. 1998) ("We have likened appellants attempting to hurdle this high standard of review to 'rich men who wish to enter the Kingdom; their prospects compare with those of camels who wish to pass through the eye of a needle.'" (quoting *United States v. Glecier*, 923 F.2d 496, 503 (7th Cir. 1991)). Plaintiffs have failed to show that the district court erred in finding of lack of predominance, let alone that it abused its discretion in a manner that meets the especially high bar for reversal.

A. The District Court Correctly Determined That Common Factors Do Not Predominate Over Individualized Issues Central To Plaintiffs' Case

1. The Illinois Consumer Fraud Act Requires Each Plaintiff To Prove That His Or Her Damages Were Proximately Caused By Having Been Actually Deceived

The district court's predominance conclusion followed directly from two undisputed, and indisputable, rules of Illinois state law – specifically, that:

1) A plaintiff cannot prevail on a Consumer Fraud Act claim without demonstrating "actual damage" that was "proximately caused by the [alleged] deception," *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 160 (2002); and

2) "It is not possible for a plaintiff to establish proximate causation unless the plaintiff can show that he or she was, 'in some manner, deceived' by the misrepresentation." *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 200 (2005) (citing *Oliviera*).

In other words, "proof of actual deception of a plaintiff" is a required element of an ICFA claim. *Shannon v. Boise Cascade Corp.*, 208 Ill. 2d at 525. As the district court noted, this proof of actual deception necessarily requires "an individualized person-by-person evaluation of what the potential class members viewed on the defendants' website [and] the potential class member's understanding . . . of this information," Cert Order at 6 [A-96]. Every plaintiff's claim therefore depends on subjective factors unique to that plaintiff, and no common adjudication is possible. The district court was thus obviously correct in finding (b)(3) certification to be inappropriate.

Plaintiffs insist that the required showing of actual deception and proximate causation can be inferred from a showing that the defendant made "*per se*" deceptive

statements,[10] but this contention is squarely refuted by controlling Illinois precedent. In *Zekman v. Direct American Marketers*, 182 Ill. 2d 359, 374-75 (1998), the Illinois Supreme Court granted summary judgment to defendants despite plaintiffs' ICFA allegations that defendants had engaged in deceptive marketing campaigns and placed deceiving statements on its bills. The court, relying on the plaintiff's deposition, found that the plaintiff had fully understood the "requirements and costs" of the defendant's offer and had nonetheless chosen to participate; thus he was not actually deceived and could show no damages proximately caused by the defendant's alleged deceptions. *Id.* With respect to the allegedly deceptive billing practice, the court found that the plaintiff was not actually deceived because he did not read the bills, leaving that task to his secretary. Thus, no matter how objectively deceptive the billing statements may have been, the plaintiff had no case because, in his subjective circumstances, the deceptiveness did not and could not have deceived him. *Id.* at 375.

Similarly, in *Price v. Philip Morris*, 219 Ill. 2d 182 (2005), the Illinois Supreme Court disapproved of a class certification of ICFA plaintiffs, because the plaintiffs were unable to demonstrate that actual deception was the proximate cause of the injuries

[10] In arguing that CIC's websites were deceptive, plaintiffs rely heavily on an FTC complaint against CIC. *See, e.g.*, Appellants' Br. at 10, 17-19. That complaint, however, is not an adjudication, and plaintiffs fail to note that it resulted in a settlement without any admission or findings of wrongdoing. *FTC v. ConsumerInfo.Com, Stipulated Final Judgment,* [reproduced in relevant part at A-38] (noting that all matters of law and fact were resolved without adjudication and without any admission by CIC); *see also, e.g., California Consumer Action Network v. ConsumerInfo.com*, [reproduced at A-35] (holding that CIC's disclosures, as a whole, were not deceptive). In any event, as explained in detail in the text, under governing Illinois law, even if plaintiffs could demonstrate that CIC made deceptive statements, no plaintiff could make out an ICFA cause of action without further establishing that he was *personally* actually deceived by CIC's statements.

suffered by each member of the proposed plaintiff class. In *Price*, the proposed class consisted of purchasers of "light" cigarettes who claimed injury from alleged misrepresentations by the defendant-manufacturers that the cigarettes were less harmful than other cigarettes. The Court observed that class certification would be appropriate only if plaintiffs could show that each smoker held "a false impression intentionally created by [defendant's] use of [deceptive] terms when they made each and every purchase decision over a period of as long as 30 years." *Id.* at 269. Furthermore, the Court found that it was not enough to show that each potential class member had *seen* and *believed* the misrepresentations; the misrepresentations also had to have *directly caused* the plaintiff's purchase. As the Court explained its skepticism about the propriety of the proposed class:

> We question, for example, whether all or most of the young people who began smoking long after these products were brought to market were deceived by the disputed words when choosing these brands of cigarettes. It may be just as likely that peer group pressure was the proximate cause of their adopting Marlboro Lights as their preferred brand. Similarly, there is no way of knowing how many smokers first tried Marlboro Lights because they were deceived by the promised lower level of tar, then tried one or more other brands, only to return to Marlboro Lights as a matter of personal preference.

Id. at 270.

Thus, Illinois law is clear that – no matter how deceptive the defendant's statements may be – a plaintiff cannot make out an ICFA claim without establishing that she was personally deceived by those statements and that the deception caused her loss. Faced with this unassailable, controlling case law, plaintiffs respond with the

irrelevant argument that "reliance" is not an element of the ICFA, citing a 1992 opinion, *Siegel v. The Levy Org. Dev. Co. Inc.*, 153 Ill. 2d 524 (1992). Appellants' Br. at 21-23. This citation, however, is beside the point. Regardless of whether there is a reliance requirement under the ICFA, the Illinois courts have repeatedly made clear (in the aforementioned cases, such as *Price*, *Zekman* and *Oliviera*, all decided subsequent to *Siegel*) that the proximate cause requirement of the ICFA requires a plaintiff to prove that she was actually deceived by the defendant's allegedly deceptive statements. *Siegel* does nothing to relieve plaintiffs of that requirement.

Plaintiffs also proffer a policy argument, warning that Illinois' actual deception requirement would eviscerate private rights of action and allow businesses to "engage in fine-print trickery with impunity." Appellants' Br. at 20, 26. Even if that were true, of course, this Court would not be permitted to second-guess the decisions of the Illinois legislature and judiciary. But it plainly is not true. The actual deception requirement does nothing to prevent recovery by plaintiffs who are actually deceived by "fine-print trickery"; it only prevents windfall claims by individuals who seek recovery despite the fact that they were not actually deceived. Moreover, private rights of action are only one prong of an extensive enforcement scheme that includes state and federal administrative penalties. The ICFA, for instance, allows the Illinois Attorney General to obtain injunctive relief and/or monetary penalties in civil court without having to show that any person has been actually deceived or even damaged. *Oliveira*, 201 Ill. 2d at 160. Far from conferring "impunity" upon deceptive businesses, the statute provides for harsh remedies – civil penalties of up to $60,000 per violation, and additional

equitable penalties such as dissolution, business license forfeiture, restitution, and appointment of a receiver. 815 ILCS § 505/7. And, as plaintiffs frequently remind this Court, the FTC has its own powers under federal law to combat deception. This Court need not be concerned that enforcement of Illinois law as written will result in consumer fraud running rampant.

In short, plaintiffs are unable to seriously contest that Illinois law requires each individual plaintiff to demonstrate actual deception as an element of an ICFA claim.

2. The District Court Properly Applied The Rule 23(b)(3) Predominance Standard To Plaintiffs' Illinois State Law Claims

Given the plaintiff-by-plaintiff inquiry required by the ICFA, the district court's Rule 23(b)(3) predominance finding was clearly correct. The predominance requirement demands an assessment of the number and significance of common issues versus individual ones, and a showing that the common issues predominate. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997); *Nagel*, 217 F.3d at 443. As explained above, Illinois law makes clear that an ICFA plaintiff can recover damages only upon an individualized showing that he or she was subjectively deceived. In the present case, the question whether each class member was actually deceived — or, conversely, knowingly signed up for CreditCheck — is likely to be the most hotly contested issue in each case, because the alleged "fraud" is not a scam, but a series of representations about a legitimate, useful product that many consumers willingly

purchase.[11] Plaintiffs offer no ready means, short of individual-by-individual adjudication, of distinguishing those plaintiffs who intentionally signed up for the product from those who were allegedly "deceived."

Indeed, plaintiffs do not contest that CIC did in fact actually and accurately disclose the terms of its offer – they claim only that the disclosure was insufficiently "clear and conspicuous." Thus, without evaluating evidence as to each plaintiff's state of mind when ordering the product, it cannot be determined what portion of the proposed class consists of consumers who voluntarily chose to order the product with a full understanding of its terms. Some plaintiffs enrolled in CreditCheck because they actively desired the product; others desired to "try" it out; and still others wanted a free credit report and knew they had to order the CreditCheck service to obtain one. These consumers' enrollment in CreditCheck was not proximately caused by any alleged deception and they therefore do not have a valid claim under the ICFA. The class action procedural device cannot afford them a recovery to which they are not entitled. 28 U.S.C. § 2072(b) (a Federal Rule of Procedure may not "abridge, enlarge or modify any substantive right."); *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020

[11] This distinguishes the present case from the three principal cases cited by plaintiffs of class-wide certification under the ICFA, all of which involved scams in which plaintiffs were bilked out of money or charged money in return for no services or plainly inadequate services, leaving no room for doubt that plaintiffs were actually deceived. In *Peterson v. H&R Block Tax Servs*, 174 F.R.D. 78, 85 (N.D. Ill. 1997), the class members had been charged for a rapid tax refund for which they were ineligible. In *Johnson v. Midland Career Inst., Inc.*, No. 93-C-1363, 1993 U.S. Dist. LEXIS 14682 at *18 (N.D. Ill. Oct. 18, 1993), the class members were students at a trade school that closed after only a few weeks but retailed the already-paid full tuition for the year. In *Arenson v. Whitehall Convalescent & Nursing Home, Inc.*, 164 F.R.D. 659, 661, the class members had been given fake invoices with inflated prices.

(7th Cir. 2002) ("Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected.").

In light of this required evidence as to each plaintiff's subjective state of mind when ordering the product, the district court correctly determined that common issues in the case do not predominate over individual issues. *See, e.g.*, *Marcial*, 880 F.2d at 957–58. At a minimum, the "actual deception" and "proximate cause" elements of the ICFA require an inquiry into (1) whether a particular customer actually read CIC's language on the order form describing the annual $79.95 fee; (2) whether the individual understood the language; (3) whether the individual desired a trial CreditCheck membership; (4) whether the individual understood that entering his or her credit card information was for the purpose of charging for membership; (5) whether the individual understood that CIC was offering the free credit report only with an accompanying membership; and (6) whether an individual who was not fully aware of the terms of the offer would nonetheless have chosen to sign up for the free credit report had he or she been fully aware of those terms. If any one of these questions is answered affirmatively for a particular customer, CIC has no liability to that customer under the ICFA.

In short, there are so many individualized issues on which liability may turn that a finding of predominance and a consequent class certification would be unreasonable. *A fortiori*, the court's decision not to find predominance was decidedly not an abuse of discretion. Plaintiffs do not mount a serious challenge to this argument, nor can they dispute the existence of a number of outcome-determinative, individualized issues of fact. They do not, for instance, assert that consumers generally *could not* understand

the terms of the offer – a claim that would be foreclosed by the uncontested evidence that thousands of people cancelled their CreditCheck membership in the credit monitoring service during the 30-day trial period after receiving the free credit report. *See, e.g.*, Appellants' Appendix at 20 (statistics showing that over 48,000 Illinois residents alone ordered a free credit report but were not charged for CreditCheck). Nor do they deny that at least some consumers knowingly signed up for CreditCheck, but forgot to cancel their memberships or chose to remain members but did not access access their CreditCheck accounts – perhaps because they had no reason to do so.

Rather, plaintiffs dwell entirely on what they believe to be the deceptive nature of CIC's advertising, in an attempt to avoid the necessary implications of Illinois law. Hence their tautological arguments that the "Class Members Could Not Have Seen What Was Not There," and "The Class Members Could Not Have Relied Upon What They Did Not See." Appellants' Br. at 19, 21. Apparently, "what" plaintiffs contend was not there and thus not seen was a sufficiently "clear and conspicuous" disclosure. But even assuming *arguendo* that the disclosures were not "clear and conspicuous," they need not have been for many consumers to have nonetheless seen them and understood them, and thus not have been actually deceived. CIC unfailingly provided disclosure to every customer, and as noted above, plaintiffs do not dispute that some class members did in fact see and understand such a disclosure. These class members thus have no right of recovery, regardless of how deceptive plaintiffs allege CIC's statement to have been. *See, e.g., Zekman v. Direct Am. Marketers, Inc.*, 182 Ill.2d at

375 (where plaintiff "understood the requirements and costs of the program," he cannot recover under the ICFA).

Plaintiffs also request that this Court modify the elements of the ICFA by crafting a presumption that any consumer who signed up for CreditCheck but did not subsequently visit a CIC website must have been actually deceived. This presumption is justified by neither the facts nor the law. Plaintiffs fail to identify a single valid case from an Illinois state court allowing a presumption of actual deception,[12] and, as argued above, the Illinois Supreme Court has consistently held that plaintiffs must prove, not presume, this element of an ICFA claim. That alone resolves the issue, because a federal court sitting in diversity is not free to go beyond established principles of state law. *See Republic Tobacco Co. v. North Atlantic Trading Co.*, 381 F.3d 717, 731 (7th Cir. 2004) (rejecting "an argument for the modification or extension of Illinois law" because "as a federal court sitting in diversity, we are obligated to apply Illinois law as announced by the Illinois Supreme Court"); *Miller v. Pardner's, Inc.*, 893 F.2d 932, 934 (7th Cir. 1990) ("Sitting in diversity, our role is not to create state law, but rather to follow the principles enunciated by the state courts.").

[12] Plaintiffs cite *Brooks v. Midas-Intl. Corp.*, 361 N.E.2d 815, 819 (Ill. App. 1st Dist. 1977), for the proposition that "it is the intent of the seller and its conduct, and not reliance or belief of the consumer, which is the pivotal point on which a CFA action arises." Appellants' Br. at 22. However, *Brooks*, to the extent that it stands for such a proposition, has been superseded by statute, as it predated the 1989 enactment of 815 ILCS 5/10a(a), which is the statutory source for the *Zekman* proximate causation/actual deception requirement. *See Zekman*, 182 Ill. 2d at 373 ("section 10(a) of the Act, which governs private causes of action under the statute, mandates that an individual's damages be 'a result of a violation of [the] Act.' . . . Thus, this court requires that a successful claim by a private individual . . . demonstrate that the fraud complained of proximately caused plaintiff's injury.") (citations omitted).

Furthermore, there are many explanations — other than fraud — for why some customers knowingly signed up for CreditCheck, but then never visited the website. Customers who enrolled after October, 2003 (when CIC began sending e-mail alerts) who never received an e-mail alert would not have needed to access the website again. Other customers may have signed up with the intention of accessing the website at a later date when they planned major purchases, or with the intention of taking the free credit report and canceling the CreditCheck service, but then failed to do so. Some customers may simply have forgotten they had signed up for it. In any event, the myriad possibilities here demonstrate the patent incorrectness of plaintiff's assertion that "one must either assume that all [class members] made an irrational decision or that they did not know they had enrolled in and paid for CreditCheck." Appellants' Br. at 23.

In conclusion, there can be no doubt that plaintiffs' claims require individual-by-individual determinations that predominate over any common issues in this case.

B. The District Court Acted Within Its Broad Discretion in Denying Partial Certification Under Fed. R. Civ. P. 23(c)(4)

Plaintiffs also ask this Court to reverse the district court's certification ruling because it declined to certify a class under Rule 23(c)(4) as to particular issues in the case. The plaintiffs spend several paragraphs arguing that (c)(4) certification "would be appropriate." Appellants' Br. at 25. But this Court reviews the district court's decision for abuse of discretion, *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 599 (7th Cir. 1993), and plaintiffs therefore carry the much heavier burden of showing

that the case for partial certification under (c)(4) was so compelling that the district court was without discretion to deny it. Plaintiffs are unable to cite a single case in which this Court overturned a district court's decision not to grant partial certification.

The cases on which plaintiffs rely, such as *In re Allstate Ins. Co.*, 400 F.3d 505 (7th Cir. 2005) and *Carnegie v. Household Int'l*, 376 F.3d 656, 661 (7th Cir. 2004), state only that judicial efficiencies *allow for* (c)(4) partial. The plaintiffs cite no case or source of law suggesting that judicial efficiencies *mandate* (c)(4) certification, and provide no other basis for suggesting that (c)(4) certification was required in the instant case. In short, their arguments, even if accepted, would establish only that the district court *could* have certified under (c)(4) – not that it abused its discretion in any way by not doing so. *See, e.g.*, *Heaven v. Trust Co. Bank*, 118 F.3d 735, 739 (11th Cir. 1997) (affirming denial of (c)(4) certification because it would not "second guess" the district court's conclusion "that a class action is not superior to other available methods for the fair and efficient adjudication of the controversy").[13]

[13] Plaintiffs suggest that the district court erred by not expressly articulating a rationale for declining to certify under (c)(4). However, this alone is not sufficient grounds for reversing the district court's decision. In *Retired Chicago Police Ass'n*, 7 F.3d at 599, the court upheld, on an abuse of discretion standard, the district court's denial of a motion to certify a subclass under (c)(4) when the district court never specifically addressed the motion or articulated a rationale for rejecting it. *Id.* (holding that the plaintiffs failed to "sufficiently demonstrate[] an abuse of discretion by the district court"). In that case, the motion was merely one of many pending motions summarily denied by the district court, but nonetheless this Court deferred to the district court's judgment, inferring from other certification decisions and a "fair reading of the record" that the district court "believed" that (c)(4) certification was not appropriate. Thus, a lack of explanation for denying (c)(4) certification does not deprive the district court of deferential review.

In any event, plaintiffs' contention that (c)(4) certification would achieve significant judicial efficiencies is demonstrably without basis. The only claimed efficiencies stem from common issues – relating to the abstract deceptiveness of CIC's websites – that even plaintiffs believe can be resolved with "little effort." Appellants' Br. at 25. The core of each class member's claim, however – and the issue requiring the greatest devotion of resouces -- is not the issue of abstract deceptiveness but the far more fact-intensive issue of actual deception. The latter inquiry is not in any way advanced by partial certification. Moreover, since the deception issue must necessarily be adjudicated individually, there would be little inefficiency in requiring all of the legal issues to be adjudicated at once. *See Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 137-38 (3d Cir. 2000) (affirming denial of class certification and recognizing (c)(4) certification is unwarranted where "liability itself requires an individualized inquiry into the equities of each claim"). By contrast, in the cases where this Court has indicated that (c)(4) certification *may* have been suitable, class treatment would have resolved extremely difficult issues that were at least as complex and fact-intensive as any of the issues left for individual adjudication. *See, e.g., In re Allstate,* 400 F.3d at 507 (single hearing could "determine whether Allstate had a policy of forcing its employee agents to quit" and allow for individualized determination of whether an employee was affected); *Carnegie*, 376 F.3d at 661 (class treatment appropriate to decide whether defendants committed a predicate RICO offense by leading "borrowers to believe that the tax preparer is their fiduciary . . . whereas, unbeknownst to them, the tax preparer is engaged in self-dealing," thus making possible

a global settlement of individual RICO claims); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003) (certifying class treatment of "whether [defendant] leaked [a noxious solvent] in violation of law and whether the [solvent] reached the soil and groundwater beneath the homes of the class members").

Furthermore, plaintiffs' proposed bifurcation of the issues of abstract deceptiveness and actual deception would necessarily lead to one jury's subsequent reexamination of issues decided by another, in violation of the Seventh Amendment. "The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995). This mandate, as applied to partial certification, means that "the district judge must carve at the joint. . . . [T]he judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries." *Id.* at 1302-03. A judge may not, therefore, separate the issues of proximate causation and negligence – even where foreseeability is not an explicit ingredient of negligence – because the issues overlap in a way that can lead to conflicting jury determinations on factual questions. *Id.* at 1303.

The same prohibited overlapping occurs with respect to the purportedly separable issue of abstract deceptiveness, which concerns an objective evaluation of the defendant's actions that will necessarily be revisited in the course of the proximate causation inquiry. Specifically, even if plaintiffs could establish to the satisfaction of a

class jury that defendants' websites were misleading, subsequent juries would have to revisit the extent to which the webistes were misleading as an inextricable part of determining whether individual plaintiffs were, as required under the ICFA, actually deceived. Put differently, a juror will typically consider the deceptiveness or lack of deceptiveness of a website as a crucial factor in determining whether it actually deceived any particular plaintiff. By splitting these two related elements of liability, partial certification would violate the Seventh Amendment.

In sum, the district court did not abuse its discretion in declining to certify a class as to limited issues pursuant to Rule 23(c)(4).

II. SUMMARY JUDGMENT WAS APPROPRIATELY GRANTED TO DEFENDANTS

The district court properly entered summary judgment against both of the named plaintiffs in this case. It held that plaintiff Clark could demonstrate no damages, since she had already received a full reimbursement for the credit card charges she disputed. As to plaintiff Eldred, the court held that there was no affirmative evidence in the record as to required elements of his claims. Specifically, Eldred's failure to remember any of the details about his transactions with CIC meant that he could not show that he had been actually deceived by CIC's alleged deceptions, or that CIC had proximately caused him any injury.

Plaintiff Clark has waived all arguments that summary judgment was inappropriately entered against her. The plaintiffs' brief does not in any way address the district court's entry of summary judgment against her, let alone offer a legal

argument as to why the district court was mistaken. This abandonment of Clark's claim is understandable, since she admitted at deposition that she seeks no recovery. She was charged by CIC only twice – $79.95 for a year's membership to CreditCheck, and $24.95 for a purchased three-bureau report. As of June 20, 2003, well before the commencement of this lawsuit, the CreditCheck charge was completely refunded and Clark no longer "had any beef" with CIC about that charge. [A-74; A-81] (June 20, 2003 letter from Clark's credit card company noting that the $79.95 CreditCheck charge had been completely refunded). As for the three-bureau report, Clark admitted that her purchase of the report was a "a huge mistake," [A-74,] has accepted the $24.95 charge as "the fee" for that mistake, [A-75,] and is pursuing her lawsuit only because she does not "want this to happen to other people." [*id.*]

As to plaintiff Eldred, the plaintiffs' opening brief also waives any argument that the district court – assuming it was correct about the requirements of Illinois law – misapplied Illinois law to the facts in record. It was Eldred's inability to proffer any evidence as to actual deception and proximate causation that caused the district court to enter summary judgment against him. On appeal, Eldred once again fails to cite any evidence demonstrating that he was actually deceived, or that CIC's alleged deceptions caused him injury. He does not even attempt to offer *any* interpretation of the record that could lead a reasonable jury to conclude that he was actually deceived. He has thus conceded that, if the district court correctly interpreted Illinois law in finding an actual deception requirement, CIC has met its summary judgment burden of "'showing' . . .

that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Eldred instead argues that the district court's insistence that evidence be provided as to each element of the claim is "logically incoherent" because it requires Eldred to "testify that he remembers not seeing a disclosure that was not there." Appellants' Br. at 26-27. This, of course, misrepresents both the district court's opinion and the relevant legal issue. The central question is not what Eldred saw or did not see, but whether Eldred understood the CreditCheck offer or was deceived by it. And Eldred has steadfastly maintained – at deposition, in his papers before the district court and now on appeal – that he does not know whether he understood CIC's offer. Indeed, at deposition, he stated that it was possible that he understood he was subscribing to CreditCheck and attempted, unsuccessfully, to cancel his CreditCheck membership. [A-115.] With Eldred able only to offer equivocation on this required element, the district court could not put his case to the jury.

Eldred also attacks the district court's observation that Eldred was obviously *capable* of understanding the terms of CIC's CreditCheck offer, as evidenced by his comprehension of the offer during deposition. Eldred claims that "an *ex post* demonstration [of the offer] with the assistance of defense counsel" is not probative of his understanding of the transaction at the time it occurred. Appellants' Br. at 27. But the district court cited this evidence only as demonstrating that the offer could have been understood, not as proving that Eldred acutally understood it at the time. Moreover, even if Eldred is right that the district court's observation "has no bearing"

on Eldred's claims, *id.*, he has merely shown that this portion of his deposition testimony is irrelevant. He still bears the burden, under *Celotex*, of producing to this Court some affirmative evidence as to his deception. This he has not done, and thus summary judgment must be affirmed on his claim.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: January 24, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief includes 8901 words.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 12-point Times New Roman font, with footnotes in 11 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned has relied upon the word count of this word-processing system in preparing this certificate.

_____
Meir Feder
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Dated: January 24, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the accompanying Brief of Appellant was served on the following counsel for Plaintiffs-Appellees via _____ on this 24th day of January 2007.

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