Case No. 05-13335-HH

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RONALD W. HELMS, individually and on behalf of all persons similarly situated,

Plaintiff-Appellee,

v.

CONSUMERINFO.COM, INC.,

Defendant-Appellant.

On Appeal From the United States District Court
for the Northern District of Alabama
Case No. CV-03-HS-1439-M

BRIEF OF DEFENDANT-APPELLANT CONSUMERINFO.COM, INC.

Samuel H. Franklin
LIGHTFOOT, FRANKLIN & WHITE LLC
400 20th St. North
Birmingham, Alabama 35203
(205) 581-0700 — Telephone

Richard J. Grabowski
JONES DAY
3 Park Plaza, Suite 1100
Irvine, California 92614
(949) 553-7514 — Telephone

Meir Feder
JONES DAY
222 East 41st Street
New York, New York 10017
(212) 326-3939 — Telephone

Jerome R. Doak
Margaret I. Lyle
JONES DAY
2727 North Harwood
Dallas, Texas 75201
(214) 969-2977 — Telephone

Attorneys for Defendant-Appellant ConsumerInfo.com, Inc.

CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fed. R. App. P. 26.1 and Eleventh Cir. R. 26.1-1, ConsumerInfo.com, Inc. provides 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. GUS plc is ConsumerInfo.com, Inc.'s ultimate parent corporation. GUS is publicly traded on the London Stock Exchange. In addition, although they are privately held corporations, there are two American intermediate corporate entities: Experian Holdings, Inc., a Delaware corporation, and Experian North America, Inc., a Delaware corporation.

ConsumerInfo.com, Inc. certifies 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:

Judge:

The Honorable Virginia Emerson Hopkins,

Plaintiff/Appellee:

Ronald W. Helms

Attorneys and Law Firms Representing Plaintiff/Appellee:

Peter A. Grammas

William J. Trussell

E. Clayton Lowe, Jr.

Lowe Grammas LLP

Trussell & Funderburg, P.C.

Defendant/Appellant:

ConsumerInfo.com, Inc.

GUS, plc

Attorneys and Law Firms Representing Defendant/Appellant

Jerome R. Doak

Meir Feder

Samuel H. Franklin

Richard J. Grabowski

Margaret Lyle

William E. Marple

S. Andrew Kelly

Amy Payne

Benjamin Walther

Jones Day

Lightfoot Franklin & White, LLC.

STATEMENT REGARDING ORAL ARGUMENT

ConsumerInfo.com requests oral argument. The appeal presents complex legal issues that are of first impression and of great practical significance, and ConsumerInfo.com believes the Court will benefit from the opportunity to address the issues fully at oral argument.

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JURISDICTIONAL STATEMENT

This case arises under Section 409 of the Credit Repair Organizations Act, 15 U.S.C. § 1679g. The District Court has jurisdiction under 28 U.S.C. § 1331.

This is an interlocutory appeal from a February 14, 2005 order of the United States District Court for the Northern District of Alabama, granting plaintiff's motion for partial summary judgment under Fed. R. Civ. P. 56. This Court has jurisdiction under 28 U.S.C. § 1292(b), pursuant to the district court's certification of the order for interlocutory review, and this Court's June 17, 2005 grant of appellant's petition for such review.

APPLICABLE STATUTORY PROVISION

The text of the Credit Repair Organizations Act, 15 U.S.C. §§ 1679 *et seq.*, is set out in full in an addendum to this brief.

QUESTIONS PRESENTED

Whether a corporation can be deemed a "credit repair organization" within the meaning of the Credit Repair Organizations Act without selling (or representing that it sells) the service of improving consumers' credit records.

Whether a corporation can be deemed a "credit repair organization" within the meaning of the Credit Repair Organizations Act without seeking the removal of prior negative credit history from consumers' credit records or representing that it will do so.

Whether a consumer can sue a corporation as a "credit repair organization" under the Credit Repair Organizations Act based on representations made by the corporation to other consumers, when the corporation has not acted as a credit repair organization with respect to that consumer.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This interlocutory appeal arises from a putative class action filed in the Northern District of Alabama, asserting claims under the Credit Repair Organizations Act ("CROA" or the "Act"), 15 U.S.C. §§ 1679 *et seq.*, as well as certain state law claims. The district court entered an opinion and order on February 14, 2005, granting partial summary judgment to plaintiff Ronald Helms, an Alabama businessman and bank director, on certain claims under the CROA, including the contention that defendant ConsumerInfo.com ("CIC"), an Experian affiliate that sells to consumers, over the Internet, information from their credit records, is a "credit repair organization" ("CRO") under section 403 of the Act, 15 U.S.C. § 1679a(3). However, recognizing that "there is no controlling Eleventh Circuit precedent" on the claims at issue, and that the proper definition of a CRO under the Act is a "controlling question of law" that could advance the termination of the litigation, the district court certified the order to this Court pursuant to 28 U.S.C. § 1292(b). (Doc. 89 - pg 27). On March 1, 2005, CIC timely filed a

petition in this Court for interlocutory review of the order, pursuant to 28 U.S.C. § 1292(b), and this Court granted the petition on June 17, 2005. (Doc. 97).

This appeal principally argues that the district court erred in failing to recognize that the definition of a CRO under the Act is limited by the Act's plain language, structure, legislative history, and purpose to organizations that provide (or represent that they provide) the service of acting to "improv[e] any consumer's credit record," and further argues that CIC, which is in the business of selling consumers the information in their credit records, cannot be deemed thereby to be selling a service for the purpose of *improving* that credit-record information. The appeal also argues that the district court erred in relying on statements made by CIC that were never made to or seen by the plaintiff.

STATEMENT OF FACTS

This case was brought as a putative class action under the Credit Repair Organizations Act by Ronald W. Helms, a sophisticated businessman, bank director, and insurance company president who has never been denied credit, against CIC (an affiliate of the national credit reporting agency Experian), which has never purported to be in the business of credit repair. Helms, who does not recall any specific representation he saw stating that CIC would improve his credit, nonetheless seeks to recover against CIC based on statements allegedly made to

other consumers. Helms also seeks, as class relief, a full refund of all fees paid to CIC, for any product it sold, by its more than one million customers.[1]

A. Statutory Background

The CROA was passed in 1996 to combat the deleterious effects of "credit repair clinics," which are companies that falsely "lead consumers to believe that the companies can 'repair' bad credit histories." S. Rep. No. 103-209, at 7-8 (1993). The CROA imposes a number of onerous restrictions on businesses deemed under the Act to be credit repair organizations, including disclosure requirements, a requirement of written contracts, a post-contract cooling-off period, postponed payment, and disgorgement remedies. *See* 15 U.S.C. § 1679 *et seq.*

The bill that ultimately became the CROA was introduced on January 7, 1987, by Rep. Frank Annunzio, the chairman of the House Banking Committee Subcommittee on Consumer Affairs and Coinage ("House Subcommittee"). In the fall of 1988, the House Subcommittee held its first set of hearings on the bill,

[1] A number of similar suits have been filed against other providers of credit information and credit scores, three by the attorneys representing Helms. *See Barnes v. Trilegiant Corp.*, Case No. 7:02-cv-02688-TMP (N.D. Ala.); *Brown v. Trilegiant Corp.*, Case No. 7:02-cv-00187-RDP (N.D. Ala.); *Hillis v. Equifax Consumer Servs., Inc.*, Case No. 1:04-cv-03400-BBM (N.D. Ga.); *Slack v. Fair Isaac Corp.*, Case No. 3:05-cv-00257-MEJ (N.D. Cal.); *Townes v. Trans Union, LLC*, Case No. 1:04-cv-01488-JJF (D. Del.); *Browning v. Yahoo! Inc.*, Case No. 5:04-cv-01463-HRL (N.D. Cal.); *Denton v. Fair Isaac Corp.*, Case No. 2:05-cv-

which, from the beginning, focused on "credit repair clinics," which Rep. Annunzio described as organizations "hold[ing] themselves out as companies that can help consumers clean up bad credit histories or obtain a clean credit report." *Hearing on the Credit Repair Organizations Act (H.R. 458) Before the House Subcomm. on Consumer Affairs and Coinage of the Comm. on Banking, Finance and Urban Affairs*, 100th Cong. 145 (Sept. 15, 1988) ("*1988 Hearing*"), (Doc. 46, Tab. 6, pg 1). As Rep. Annunzio explained, "[c]redit repair clinics claim that they can help consumers remove adverse information from their files even if it is true . . . [even though] you cannot remove accurate information from your credit file." *Id.*[2]

Besides bilking consumers, the practices of credit repair clinics were also considered a problem because, to the extent such clinics made any effort to deliver on their promises of fixing customers' credit histories, they did so in ways that threatened to "jeopardize the file integrity of the nation's consumer reporting system." Statement of Walter B. Kurth, *1988 Hearing*, Sept. 15, 1988, at 42. In particular, credit repair clinics relied on "inundating the credit bureaus with

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00244-JEO (N.D. Ala.) (voluntarily dismissed); *Rosser v. TrueLink, Inc.*, Case No. 2:05-cv-00245-LSC (N.D. Ala.) (voluntarily dismissed).

[2] Under federal law, most negative credit history generally can be reported on a consumer's credit report for up to seven years, and bankruptcies generally can be reported for up to ten years. 15 U.S.C. § 1681c(a) (2005).

disputes, [such that] the credit bureaus would become mired and unable to respond to the disputes within the period of time prescribed by law. This would result in the disputed item being removed from the credit history report." *1988 Hearing*, (Doc. 46, Tab. 6, pg 4) (Statement of Kenneth P. Walton, Deputy Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation). In other words, the clinics' "objective [was] to overwhelm the established system with . . . challenges to the information in file." Kurth Statement, *supra*, at 44.[3] To the extent credit repair clinics were successful in fraudulently removing information from credit files, they "jeopardize[d] . . . the integrity of credit reports," leading lenders to "tighten lending requirements . . . or raise the cost of credit." *Id.* at 42.

These themes — credit repair clinics' false representations to customers that that they could repair credit reports by deleting or modifying information regardless of its accuracy, as well as the clinics' approach of inundating consumer reporting agencies with meritless challenges to accurate negative credit entries —

[3] Under the FCRA, a credit reporting agency generally has only 30 days to confirm the accuracy of any entry that is challenged, and is required to make the change requested by the consumer if that deadline is not met. 15 U.S.C. § 1681i(a)(1)(A).

were echoed repeatedly through the years leading up to the ultimate enactment of CROA in 1996.[4]

The heart of the statute as ultimately enacted is its definition of a "credit repair organization," which closely tracks the characteristics of credit repair clinics that Congress sought to combat. That definition, contained in section 403 of the Act, describes a credit repair organization, in pertinent part, as one that utilizes interstate commerce to "sell, provide, or perform (or represent that [it] will sell, provide, or perform)":

> *any service*, in return for the payment of money or other valuable consideration, *for the express or implied purpose of—*
>
> > *(i) improving any consumer's credit record, credit history, or credit rating*; or
> >
> > (ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i).

15 U.S.C. § 1679a(3) (emphasis added).

In short, a credit repair organization is defined as one that sells (or represents that it sells) a "service . . . for the . . . purpose of . . . improving any consumer's

---

[4] *See generally Amendments to the Fair Credit Reporting Act: Hearing Before the Subcomm. On Consumer Affairs and Coinage of the House Comm. On Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. 258 (1989); *Amendments to the Fair Credit Reporting Act: Hearing Before the Subcomm. On Consumer Affairs and Coinage of the House Comm. On Banking, Finance and*

credit record, credit history, or credit rating." Indeed, the FTC opposed a provision in an early version of the CROA bill that would have expanded the definition to include persons "who offer . . . services to help consumers obtain an extension of credit," on the ground that CROA was, and should be, concerned "*solely [with] organizations offering credit history repair services*, as this is the area in which false claims and consumer injury have been a recurrent theme." *See Amendments to the Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs & Coinage of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. (1990) (statement of Jean Noonan, Associate Director for Credit Practices, Federal Trade Commission), (Doc. 46, Tab 8, pg 7) (emphasis added).

Once a business is deemed a credit repair organization, the Act imposes a number of strict requirements, including:

- A CRO may not collect any payments for services rendered until all services have been performed. 15 U.S.C. § 1679b(b).
- A CRO must furnish each consumer with a written statement (whose contents are prescribed word-for-word by the statute) entitled "Consumer Credit File Rights Under State and Federal Law," which must be signed by the consumer. 15 U.S.C. § 1679c(a).
- A CRO must furnish each consumer with a written contract that specifies all guarantees of performance, a timetable for completion of

(continued…)

Urban Affairs, 101st Cong., 2d Sess. 10 (1990); H.R. Rep. No. 102-692 at 42 (1992); S. Rep. No. 102-209, at 7(1993); H.R. Rep. 103-486, at 57-58 (1994).

the services, and the company's name and principal business address, and contains a statement informing consumers that they may cancel the contract without penalty for three business days from the date of signing. 15 U.S.C. § 1679d(a)-(b).

- A CRO may not provide any services until the end of the three-business-day period following the signing of the contract. 15 U.S.C. § 1679d(a).

- A failure to comply with any provision of the Act with respect to a particular consumer subjects a CRO to the greater of the plaintiff's actual damages or a refund of monies paid, as well as potential punitive damages. 15 U.S.C. § 1679g(a).

In addition, the legislation strengthened the enforcement powers of the Federal Trade Commission by granting it the power to bring a civil enforcement action for violations of the Act, and created a private right of action for consumers who were improperly sold credit repair services. 15 U.S.C. 1679g-1679h.

Subsequent to CROA's enactment, Congress passed another credit-related statute entitled the Fair and Accurate Credit Transactions Act ("FACTA"), Pub. L. No. 108-159, 117 Stat. 1952 (2003), 15 U.S.C. § 1681 *et seq*., which embodied a Congressional intention to encourage the free flow of credit information and credit education. Among other provisions, the FACTA requires credit bureaus to make available to consumers one free credit report every year, Pub. L. No. 108-159 § 211 (2003), established a Financial Literacy and Education Commission to "increase awareness of the availability and significance of credit reports and credit scores in obtaining credit, the importance of their accuracy (and how to dispute

inaccuracies), their effect on credit terms, and the effect common financial decisions may have on credit scores," 20 U.S.C. § 9703(a)(C), and requires credit bureaus to inform consumers who purchase a credit score of the "key factors that adversely affected the credit score," 15 U.S.C. § 1681g(f)(1).

B. ConsumerInfo.com

Defendant CIC, a sister corporation to Experian Information Solutions, Inc., one of the three nationwide credit bureaus, is an Internet company that provides consumers with immediate online access to credit information about themselves from several websites that CIC operates. (Doc. 46, Tab 1, ¶ 3.) Though specific website content varies from site to site, and varies within each website over time, each of CIC's websites offers the same three products:

Credit Reports: A credit report is a written document containing a summary of a consumer's raw credit data, and can be printed or viewed on a computer screen. CIC provides two types of credit reports: an Experian credit report, which summarizes raw credit data on record with the Experian credit bureau, and is provided free of charge to customers ordering a free trial subscription to CIC's credit-monitoring product, or can be purchased alone; and a three-bureau credit report, which summarizes credit information from all three major credit reporting bureaus, and is sold to consumers for a fee. (Doc. 46, Tab 1, ¶ 11).

Credit Scores: A credit score further summarizes and encapsulates the consumer's credit information into a three-digit number that predicts, on the basis of the consumer's past credit history, how likely the consumer is to promptly service loans and credit card debt. CIC charges five dollars per credit score, and consumers who pay that price receive a written document that can be printed or viewed onscreen. (Doc. 46, Tab 1 ¶¶ 12-14).

CreditCheck Credit Monitoring: CreditCheck is a credit-monitoring product. A consumer who purchases a one-year subscription will receive online alerts (upon logging onto a CIC homepage) whenever new and potentially negative credit information is added to the consumer's Experian credit file. (Doc. 46, Tab 1, ¶ 15). Among other things, such credit-monitoring alerts can provide early warning of identity theft, or minimize its consequences, as the FTC has recognized.[5]

CIC's websites contain additional content relating to these products, as well as some educational and reference materials provided at no additional charge, much of which is similar in content to what the FTC has on its own website. Some

[5] The FTC has noted that "[f]or victims of identity theft, early notification could provide the opportunity to prevent the [identity] thief from causing further damage," particularly when notification is provided — as it is to purchasers of CreditCheck — whenever a new account is opened. Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003 [FACTA]*, at 73 (Dec. 2004).

of this content explicitly cautions consumers that credit cannot be repaired and advises them not to pay for credit repair. For instance, CIC tells its consumers that "[a]lthough some consumers pay credit clinics hundreds or even thousands of dollars to "fix" their credit reports, only time can improve bad credit. . . . The key fact: There is nothing a credit repair clinic can legally do to fix a credit report that you can't do yourself for free." (Doc. 32, Exh. H, Exh. P). Other materials summarize public information widely available elsewhere. (Doc. 46, Tab 1, ¶ 28). In addition, CIC's website provides links directly to the FTC's website. Finally, some additional website content is available to consumers who subscribe to CreditCheck or who have enrolled for a 30-day trial subscription.

C. Plaintiff Ronald W. Helms

Plaintiff Ronald W. Helms is a longtime businessman who, among other things, founded and has been president of an insurance company for 25 years; owns the insurance company's building; has been on a bank's board of directors since 1998, and its loan committee since 2001, in which capacity he reviews individuals' and businesses' credit information; and owned and sat on the board of directors of a savings and loan association. (*See* Doc. 46, Tab 27 at 22-29, 172, 174, 183-85). Helms has never been denied credit in the last 20 years, pays his credit card balances in full each month, and has "always managed to pay cash for [his] cars." (*Id*. at 36-37.)

On February 27, 2003, Helms made his only visit to CIC's website, where he signed up for CreditCheck (initially free for a 30-day trial), obtained and reviewed a free copy of his credit report, and purchased his credit score for $5. (Doc. 46, Tab 27 at 55, 98-100, 108, 114-16, 219). On the following day, he received an e-mail from CIC confirming his signing up for CreditCheck. (Doc. 46, Tab 26 ¶ 4). Helms cannot remember how he learned of CIC or came to visit its website; he thinks it may have been through a search engine, but he cannot remember which one or which keywords he may have used. (Doc. 46, Tab 27 at 101, 110). Other than signing up for CreditCheck and seeing his credit report and credit score, Helms has no other specific recollection of anything he saw on CIC's website. (*Id*. at 113-14.) Indeed, the district court held that Helms failed to show that he relied on any allegedly misleading statements on defendant's websites, granting CIC's motion for summary judgment on Helms' § 1679b(a)(4) fraud claim. (Doc. 89 - pg 25-26.)

At his deposition, Helms testified that he visited the CIC website because of a concern over an allegedly inaccurate item from Cingular Wireless in his credit history. (Doc. 46, Tab 27 at 108). He "couldn't tell" whether the Cingular account appeared on his report, *id*. at 115, but nonetheless expected to receive help from CIC in "getting that [account] off [his] credit report." *Id.* at 219. When asked what on CIC's website led him to believe he would get such help, he recalled only

that "there was something on there about doing such as that, be a member of this thing and as part of their service, you got a credit report and that type thing." *Id.* at 114. He never contacted CIC about the Cingular account or any other issue, never talked to anyone at CIC, and does not know how CIC could have known of his trouble with that Cingular account. *Id*. at 98-99. 123-24, 126-28, 131, 141-43, 151-53, 165.

D. The Present Litigation

Helms filed the present lawsuit in the Northern District of Alabama on June 17, 2003 as a putative class action on behalf of all persons in the United States who "paid defendant any sums of money in advance for any credit repair services, counseling, advice or assistance that defendant agreed to perform or provide" and were not provided with the written contract and disclosures plaintiff alleges CIC is required to provide under CROA. (Doc. 25, ¶ 12). The complaint sought the return of all monies paid to CIC by class members during the Class Period. *Id.*, ¶¶ 40-46.

On February 14, 2005, on cross-motions for summary judgment, the district court held, among other things, that CIC is a credit repair organization under the Act, denying the portion of CIC's motion for summary judgment relating to the credit repair organization definition and granting the portion of Helms' cross-motion for summary judgment addressing that issue. Although not identifying any

particular service that met the statutory definition of a credit repair service, *i.e.*, a "service . . . for the . . . purpose of . . . improving any consumer's" credit record, the district court held that the definition was applicable based on the findings that CIC "provides at least some form of service for money," and has made statements on its websites or elsewhere addressing consumers' interest in improving their credit. (Doc. 89, pg 12-15). The court focused, among other things, on CIC's intention to "market its products to those looking to improve their credit rating," *id.* at 15, as determined by its purchase of certain keywords on search engines and its use of buzzwords like "maximize your credit" and "take control of your credit." *Id.* at 12. Except in a few instances, the court did not link any of CIC's statements to the marketing of any particular product.

The district court also ruled on Helms' claims under CROA provisions prohibiting misrepresentations with respect to "the services of a credit repair organization," 15 U.S.C. §§ 1679b(a)(3-4), granting CIC's motion for summary judgment on Helms' claim under § 1679b(a)(4), and declining to grant summary judgment on the claim under § 1679b(a)(3) due to the existence of disputed fact issues. The court recognized, however, that the claim under § 1679b(a)(3) was viable only if CIC were deemed a credit repair organization. (Doc. 89 - pg 20).

Shortly after ruling on summary judgment, the district court denied Helms' motion to certify a class, on the ground that a class action did not meet the

"superiority" requirement of Rule 23(b)(3) because "the potential damages [of a class action] could include a refund to nearly every customer who entered an agreement with [CIC] since 1988. The damages resulting would be devastating and largely out of proportion with the culpability of [CIC's] conduct." (Doc. 90 - pg 20).

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed *de novo*. *Harris v. Coweta County*, 406 F.3d 1307, 1312 (11th Cir. 2005).

SUMMARY OF ARGUMENT

In concluding that CIC, a company that sells to consumers information from their credit files, should be deemed a "credit repair organization" under the CROA, the district court fundamentally misconceived what type of business can constitute a CRO under the Act. The definition of a CRO applies only to organizations providing (or representing that they provide) "*service[s] . . . for the . . . purpose of . . . improving*" consumers' credit records, 15 U.S.C. § 1679b(3)(A) (emphasis added), which necessarily requires providing the service of *fixing* a consumer's bad credit record. It clearly does *not* include the business of selling credit-record information: providing such credit record information cannot plausibly be called a "service for the purpose of improving" that self-same information. In addition, the Act's specific focus on credit "repair," and its various provisions that would make

no sense as applied to a business, like CIC's, that does not provide the service of fixing consumers' credit, dictate the same result.

Moreover, even if the statutory language left some ambiguity, the CROA's legislative history overwhelmingly establishes that the Act was intended to apply only to businesses in the nature of credit-repair clinics, which do sell the service of purportedly fixing consumers' credit records. In addition, the Act must be harmonized with the FACTA's goal of making credit record information available to consumers, which would be significantly harmed if the CROA were applied to providers of such information.

Furthermore, the district court's reliance on "representations" by CIC was also misconceived. The statutory clause making the CROA applicable to organizations that "sell, provide, or perform (*or represent that such person can or will sell, provide, or perform*)" any service for improving consumers' credit, 15 U.S.C. § 1679b(3)(A) (emphasis added), merely provides for parallel treatment of companies that provide credit repair services and those that "represent" that they provide such services. It does not sweep in companies that may market to consumers interested in improving their credit — or whose products have the ancillary benefit of contributing to the improvement of some consumers' credit — but that do not represent that they sell credit repair services, *i.e.*, the service of acting to improve consumers' credit records. Because none of the CIC statements

cited by the district court is of that nature, the district court erred in ruling that the statements (which the district court did not, in any event, link to any "service" sold by CIC) rendered CIC a CRO under the Act.

Finally, even if the district court had not misinterpreted the Act in this way, reversal would still be required because there was no evidence (and the court did not find) that any of the representations on which the district court relied was made to, or seen by, Helms. Because the Act creates a cause of action only where the defendant has acted as a CRO (or otherwise violated the Act) "*with respect to [the plaintiff]*," 15 U.S.C. § 1679g (emphasis added), Helms cannot recover for representations made to other consumers.

ARGUMENT

The district court fundamentally misread CROA's definition of a "credit repair organization," expanding the Act to apply far beyond Congress's intention, and far beyond anything that can reasonably be called "credit repair." In particular, the court erred by addressing the word "service" in the abstract, instead of interpreting *as a whole* the statutory phrase requiring a particular *type* of service: a "service . . . for the . . . purpose of . . . improving any consumer's credit record, credit history, or credit rating." 15 U.S.C. § 1679a(3)(A). As a result, the district court mistakenly treated as a CRO any business that (1) "provides at least some form of service for money" — regardless of whether the service is (or is

represented to be) a service for improving credit — and (2) makes statements addressing consumers' desire to "establish" or "rebuild" or "improve" their credit — regardless of whether the statements even relate to the service at issue, let alone whether they represent that the business offers the service of seeking to improve consumers' negative credit history. (Doc. 89 - pg 12-15). In so doing, the district court gave the statute a meaning that its language and purpose cannot bear.

As established below, the plain language, legislative history, and structure of the Act — as well as its title's focus on "repair" — all make clear that the Act applies far more narrowly, to businesses that sell (or represent that they sell) the service of *fixing* negative items in consumers' credit records by acting to remove or neutralize prior negative credit history. This definition is simply inapplicable to businesses like CIC, because CIC's business is providing consumers with the factual content of their credit records — as opposed to selling (or purporting to sell) the service of acting to *improve* that content by removing past negative credit items from those records.

POINT I

THE DEFINITION OF A CREDIT REPAIR ORGANIZATION DOES NOT EXTEND TO ORGANIZATIONS LIKE CIC, WHICH ARE NOT IN THE BUSINESS OF IMPROVING CONSUMERS' CREDIT

CIC sells three products to consumers: the consumer's credit report or reports; credit scores, which summarize the information in the consumer's credit

file; and CreditCheck, which informs the consumer when new, potentially negative information is added to his or her file. None of these products is a credit repair service within the meaning of the Act, because each lacks two essential characteristics of a CRO: the provision of a service undertaking actively to *improve* a consumer's credit, and a focus on erasing past negative credit history.

A. Providing The Factual Content Of A Consumer's Credit Record, Without Providing A Service For Actively Improving That Record, Is Not Within The Definition Of A CRO

All of the relevant tools of statutory construction compel the conclusion that a credit repair organization under the Act must be one that, like the "credit repair clinics" Congress was concerned about, sells a service that undertakes to improve a consumer's credit record, not one whose essence is simply providing the consumer with the contents of that record.

1. The Plain Language Of The Act Makes Clear That The Definition Of A CRO Is Limited To Organizations That Sell The Service Of Actively Improving A Consumer's Credit Record

It is axiomatic that the starting point for interpreting any statute is the plain language of that statute. *See, e.g., Calzadilla v. Banco Latino Internacional*, 413 F.3d 1285, 1287 (11th Cir. 2005) ("The starting point in statutory construction is the language of the statute, and if that is plain, then the sole function of the court is to enforce the statute according to its terms.").

In the present case, the plain language of the statute makes clear that the definition of a "credit repair organization" embraces only businesses that sell the service of improving a consumer's credit record, not those that — like CIC — provide consumers with their credit information. The relevant statutory definition reads, in pertinent part, as follows:

> **(3) Credit repair organization.** The term "credit repair organization" —
>
> (A) means any person who uses any instrumentality of interstate commerce or the mails to *sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service*, in return for the payment of money or other valuable consideration, *for the express or implied purpose of —*
>
> > *(i) improving any consumer's credit record, credit history, or credit rating;* or
> >
> > (ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i).

15 U.S.C. § 1679a(3) (emphasis added).

This language unambiguously defines a "credit repair organization" as one selling (or representing that it sells) a particular type of "service": one that is provided "for the . . . purpose of . . . *improving* any consumer's credit record, credit history, or credit rating." 15 U.S.C. § 1679a(3)(A)(i) (emphasis added). There is no reasonable reading of this language under which a company that sells consumers their credit-record information — as opposed to selling the service of actively improving (or assisting the consumer in improving) that information —

falls within the scope of the definition. Quite simply, providing consumers with the information in their credit records cannot plausibly be called a service for the purpose of *improving* that self-same credit information, any more than a bank offers its depositors a "service for improving their financial information" by sending them bank statements.

The district court went astray in interpreting this language by addressing the wrong question. Instead of addressing the unitary definition set forth in the Act — *i.e.*, whether CIC sells, or represents that it sells, *the service of improving consumers' credit records* — the district court addressed the word "service" in the abstract, asking only whether anything CIC sold could be termed "some form of service" (*see* Doc. 89 - pg 12 & n.10), without addressing the *type* or *purpose* of any such service. The court then went on to *separately* address whether CIC had made any statements relating to credit improvement, without addressing whether any of those statements represented that CIC was offering to provide the *service* of acting to improve consumers' credit records. (Doc. 89 - pg 12-15). This was mistaken, because "statutory language must always be read in its proper context" and not "viewed in isolation," *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991), and statutory construction "is a holistic endeavor," *United Savings Ass'n of Texas*

v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988).[6] When the definition is read as a whole, as it must be, it is clear that the relevant question is not whether CIC sells anything that in the *abstract* can be called a "service," but rather whether CIC sells (or represents that it sells) a "service . . . *for the* . . . *purpose of* . . . *improving any consumer's*" *credit record*, *i.e.*, a service whose very aim is improving such a record.[7] And it is equally clear that providing consumers with their credit information, as opposed to offering the service of actively *improving* that information, does not fit that description.

Moreover, even aside from the plain language of the definition itself, there are numerous other aspects of the statute that compel the same conclusion. The

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[6] It is worth noting that even addressing the word "service" in the abstract, the district court found only CreditCheck, one of CIC's three products, to be a service, while finding that credit reports are *not* a service and making no determination as to credit scores but "assum[ing]" they were a service. Doc. 89 - pg 12 & n.10. *See also Credit Serv., Inc. v. Fleming*, 372 F.2d 143, 146 (5th Cir. 1967) (holding that the "collection, sale and dissemination . . . of credit data and credit reports" is not a service).

[7] Notably, the definition requires that credit improvement be "*the* . . . purpose" of the service, not simply *a* purpose, making clear that a company becomes a CRO only if credit repair is the *essence* of the service at issue. A company does not become a CRO merely by offering a product that is not aimed at credit repair but can be used in some ancillary way, or by some consumers, for credit improvement as a subsidiary purpose. *See, e.g.*, *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 574 (5th Cir. 1980) (interpreting statutory phrase "for the purpose of" as connoting "primary purpose"); *Sannes v. Jeff Wyler Chevrolet, Inc.*, No. C-1-97-930, 1999 WL 33313134, at *4 (S.D. Ohio Mar. 31, 1999) (alleged credit repair activities ancillary to primary purpose of business could not render auto dealership a CRO); *see also* Point II.A, *infra*.

statutory findings focus on "credit *repair* organizations" (emphasis added), and the titles of both the statute and the CRO definition also expressly focus on credit "repair." *See Thompson v. Colorado*, 278 F.3d 1020, 1029 (10th Cir. 2001) (relying on statutory finding as part of relevant language of statute); *Carter v. United States*, 530 U.S. 255, 267 (2000) (title of a statute relevant "when it sheds light on some ambiguous word or phrase in the statute") (internal quotation marks omitted). Providing the service of fixing a consumer's bad credit record is the very definition of "credit repair," whereas providing the contents of that record, as CIC does, plainly is not. In addition, the statutory findings make clear that a credit repair organization is one "which *offer[s] to improve* the credit standing of" consumers "who have experienced credit problems," 15 U.S.C. § 1679(a)(1) (emphasis added) — thereby confirming that the definition focuses on organizations that seek (or offer) to actively improve consumers' credit.[8]

Furthermore, the obligations imposed on CROs by the Act would make no sense if the definition of a CRO were extended beyond businesses offering the service of actively fixing a consumer's credit. *See, e.g.*, *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) ("'In ascertaining the plain meaning of the statute, the court

[8] Similarly, other provisions of the statute repeatedly refer to the services of CROs as services performed by a CRO "for" a consumer. *See* §§ 1679b(b), 1679d(a), 1679d(b)(2). Unlike the service of fixing a consumer's credit on his behalf, selling a consumer information from his credit file — if a "service" at all — is one "provided to the customer," not one "performed for the customer."

must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'") (citation omitted). For example, the Act requires CROs to enter into written contracts with every customer, and prohibits them from providing any services to a customer until three business days after the contract is signed. 15 U.S.C. § 1679d(a). This provision makes perfect sense as applied to companies that sell the service of actively improving customers' credit records over a period of time, such as credit repair clinics. But it would make no sense at all to require a written contract and lengthy waiting period for a company that sells consumers their credit information, particularly those like CIC that provide customers with their credit information instantaneously over the Internet.

Indeed, such a requirement — which, if applied to products like CIC's, would undoubtedly produce a sharp drop in the frequency with which consumers acquire their credit information — would be positively counterproductive in light of Congress's expressed goal of "increas[ing] awareness of the availability and significance of credit reports and credit scores," 20 U.S.C. § 9703(a)(C), and of making consumers' credit information more easily available to them. This complete lack of fit between the obligations imposed on credit repair organizations and the characteristics of businesses like CIC's helps to confirm that Congress did not contemplate treating such businesses as CROs. *See, e.g., Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1529 (11th Cir. 1996) ("Congress is presumed

not to have intended absurd (impossible) results" or even "an odd result") (internal quotation marks omitted); *see also Ehrlich v. American Airlines, Inc.*, 360 F.3d 366, 386 (2d Cir. 2004) ("'Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.'") (citation omitted).

The mandatory contract provisions the statute requires also evidence Congress's understanding that a CRO is a business selling the service of actively improving consumers' credit records, and not one that consists of selling consumers their credit information. The contract is required to specify "all guarantees of performance," and estimates of "the date by which the performance of the services . . . will be complete" and "the length of the period necessary to perform such services." 15 U.S.C. § 1679d(b)(2). Again, "guarantees" and estimates of "the length of the period necessary to perform" the services at issue make sense in the context of a business undertaking to actively fix someone's credit record, and make no sense at all in the context of a business that provides credit-record information but does *not* purport to act to improve customers' credit. These provisions, too, confirm that Congress intended the obligations imposed on CROs by the Act to be applicable only to true credit repair businesses that undertake to fix consumers' credit records, and not to those that provide no such service. *See, e.g., Koons Buick Pontiac GMC v. Nigh*, 125 S. Ct. 460, 469 (2005) ("'[T]here is no canon against using common sense in construing laws as saying

what they obviously mean.'") (quoting *Roschen v. Ward*, 279 U.S. 337, 339 (1929)).

In sum, the plain language of the statute, its title, and the obligations it imposes on CROs, all make clear that only businesses that sell the service of improving a consumer's credit are "credit repair organizations" within the meaning of the Act.

2. The Act's Legislative History Confirms Beyond Any Doubt That The Definition Of A CRO Is Limited To Organizations That Sell The Service Of Fixing Consumers' Credit Records

To the extent that the plain language of the Act leaves any ambiguity, the legislative history of the Act makes it completely clear that in defining CROs under the Act and imposing restrictions on them, Congress was specifically targeting the problems caused by "credit repair clinics" — *i.e.*, businesses selling the service of fixing a customer's credit record — and did not intend that the Act extend to businesses, like CIC's, that did not purport to sell such services. *See, e.g., United States v. Pringle*, 350 F.3d 1172, 1180 n.11 (11th Cir. 2003) (when statute is ambiguous, appropriate for court to look to legislative history); *Janowski v. Int'l B'hood of Teamsters*, 673 F.2d 931, 936-37 (7th Cir. 1982) (resort to legislative history particularly appropriate when statute "has not yet been judicially interpreted), *vacated on other grounds*, 463 U.S. 1222 (1983). The Supreme Court has made clear that where the legislative history focuses so clearly on Congress's

intention to address a particular social problem, that factor compels construing the statute, if there is any ambiguity, as applying to that problem, and not to others that Congress expressed no intention of addressing. *See General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587-94 (2004) (construing discrimination "because of [an] individual's age," in Age Discrimination in Employment Act, as applying only to discrimination against older workers in favor of younger ones, in light of Congress's focus on that specific problem, and absence of evidence Congress was also concerned about discrimination against younger workers in favor of older ones); *see also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 453 (1989) (adopting narrow interpretation of statutory language when statute "was enacted to cure specific ills" that were not implicated by the case at issue and "it cannot have been Congress' intention" for act to sweep more broadly).

Here, the legislative history is replete with evidence that the Act was designed to combat the very specific problems raised by "credit repair clinics," and that its definition of a CRO was designed to be synonymous with such clinics. For example, the House of Representatives Ways and Means Committee report from the Congress preceding the one that enacted the CROA, H.R. Rep. No. 103-486 (1994), 1994 WL 164513, uses "credit repair clinic" and "credit repair organization" interchangeably, and states flatly that "the Credit Repair Organizations Act . . . addresses the practices of 'credit repair' clinics." *Id.* at

preamble to Title II. The report describes the problematic characteristics of such clinics in a way that makes clear that the service the clinics purport to provide is that of acting to repair consumers' credit records. For instance, the report notes that such clinics falsely:

> lead consumers to believe that adverse information in their consumer reports can be deleted or modified regardless of its accuracy. . . , [and as a result,] consumers, mostly low- and moderate-income individuals, are cheated out of the money they paid for services.

Id. The report also notes that:

> [w]here credit repair clinics do succeed, however, they often do so through abuse of the reinvestigation procedures. . . . by inundating consumer reporting agencies with so many challenges to consumer reports that the reinvestigation system breaks down.

Id.

In addition, the 1994 report cites a New York Times article as describing the relevant problems. That article, "Need Credit? Be Wary Of Clinics Offering Help" (July 23, 1988), also focuses on credit repair clinics, noting that such "clinics promise to help remove derogatory information from individuals' credit files, and charge as much as $2,000 for the service," and reporting on a consumer who "paid more than $500 to clear up her credit record" and was "guaranteed results, but nothing was done." Finally, the report describes the definition of a CRO, consistent with the focus on credit repair clinics, as covering "persons who,

in exchange for payment, provide (or represent that they will provide) *services to improve a consumer's credit record, credit history or credit rating* or provide advice or assistance to any consumer with regard to those services." *Id.* (emphasis added).

To the same effect, the author and sponsor of the bill, Rep. Frank Annunzio, at the initial hearing on the CROA, described credit repair organizations as clinics that "hold themselves out as companies that can help consumers clean up bad credit histories or obtain clean credit report" and "claim that they can help consumers remove adverse information from their files even if it is true." 1988 Hearing, Doc. 46, Tab 6, pg 1. *See generally McAbee v. City of Fort Payne***,** 318 F.3d 1248, 1255-56 (11th Cir. 2003) (relying on statement of sponsor of bill); *Cunningham v. Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611, 619 (11th Cir. 2001). Similarly, the Federal Trade Commission witness at the hearing stated that "companies that sell credit repair services" claim "to be able to improve consumers' credit records." *1988 Hearing,* (Doc. 46, Tab 6, pg 19). She added that credit repair companies "typically promise the impossible," such as: "'We erase bad credit.'" *Id.*

The relevant statements at later hearings that addressed proposed CROA legislation are to the same effect. For example, in 1990 the FTC noted that the proposed legislation "was designed to address deceptive practices engaged in by

credit repair companies that purport to be able to rewrite consumer's [sic] credit history." *See* Statement of Jean Noonan, Associate Director for Credit Practices, *supra*, Doc. 46, Tab 8, pg 12. And a 1993 Senate Report described "credit repair organizations" as "offering, for a fee, to help consumers eliminate adverse information from consumer reports." S. Rep. No. 102-209, at 7 (1993).

Numerous other statements in the legislative history, which we will not further belabor, are to the same effect. What is overwhelmingly clear in the legislative history is that the Act was designed to regulate credit repair clinics, *i.e.*, businesses that promise, in return for payment, to improve consumers' credit records. And it is equally clear that the legislative history does not focus on businesses that sell consumers the information in their credit record, or express any desire to sweep such businesses within the definition of — and the onerous requirements imposed on — credit repair organizations. *See, e.g., General Dynamics*, 540 U.S. at 589-91 (construing statute narrowly in light of absence of evidence in legislative history that Congress was concerned with discrimination in favor of older workers); *Public Citizen*, 491 U.S. at 460 (narrow construction where "no indication" entity at issue "was the type of . . . entity that legislation was urgently needed to address"); *Williams v. United States*, 458 U.S. 279, 290 (1982) (rejecting broad reading of statute based in part on fact that its legislative history "fails to evidence congressional awareness of the statute's claimed scope").

In short, to the extent the plain language of the Act leaves any ambiguity, the legislative history establishes beyond any doubt that the restrictions on credit repair organizations apply only to businesses that do what credit repair clinics do (and what companies like CIC do *not* do): provide, for a fee, the service of actively improving consumers' credit records.

3. Congress's Passage Of Other Legislation Encouraging The Provision Of Credit Information Further Supports The Interpretation Compelled By The Act's Plain Language And Legislative History

It is also significant that other federal legislation strongly encourages providing consumers with access to the type of credit-record information sold by CIC. As the Supreme Court instructed in *Brown & Williamson Tobacco Corp. v. FDA*, 529 U.S. 120 (2000), "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Id.* at 133. Courts must therefore interpret statutes as part of a "*symmetrical and coherent regulatory scheme . . . and fit, if possible, all parts into an harmonious whole*." *Id.* at 133 (emphasis added).

Here, Congress has deliberately acted to *encourage* the widespread availability of credit information like that provided by CIC. In 2003, Congress passed the Fair and Accurate Credit Transactions Act ("FACTA"), which expressed a general Congressional policy in favor of the widespread dissemination of credit information and education. As one of the bill's sponsors noted,

> [f]inancial education is crucial to the effective operation of our credit markets since the Fair Credit Reporting Act places significant responsibility on the consumer to ensure the accuracy of their credit reports.

149 Cong. Rec. S13848-02, *S13851 (Nov. 4, 2003) (statement of Sen. Shelby).

Among other things, the FACTA established a "Financial Literacy and Education Committee" to "increase awareness of the availability and significance of credit reports and credit scores in obtaining credit, the importance of their accuracy (and how to dispute inaccuracies), their effect on credit terms, and the effect common financial decisions may have on credit scores." 20 U.S.C. 9703(a)(C). The FACTA also provides consumers with a right to receive a free credit report each year, and *requires* credit bureaus to inform any consumer who orders a credit report that he or she may also purchase a credit score for a "fair and reasonable fee." 15 U.S.C. § 1681g(f)(1)(A), 1681g(f)(8). In addition, the FACTA requires the credit bureaus to accompany such credit scores with an analysis of the "key factors that adversely affected the credit score of the consumer in the model used." 15 U.S.C. § 1681g(f)(1)(C).

If the CROA's requirements were interpreted to apply to providing credit-record information of the sort CIC sells, those requirements would clearly conflict with the goals of the FACTA. As noted earlier, the CROA requirements, if applied to the sale of credit records or credit scores — which would otherwise be provided instantaneously — would make it significantly *harder* for consumers to gain access

to their credit information, in direct contravention of the Congressional intent expressed in the FACTA. Accordingly, only an interpretation of the CROA as *not* applying to the selling of credit-record information — which is compelled, in any event, by the statute's language and legislative history — can fit all of the statutory "parts into an harmonious whole." *Brown & Williamson*, 529 U.S. at 133; *see also Pittsburgh & L.E.R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989) (describing the judicial "obligation to avoid conflicts between two statutory regimes . . . that in some respects overlap").

B. Only A Service That Focuses On Altering The Effect Of Past Credit Events Can Be A Credit Repair Service

The district court also failed to recognize another fundamental requirement of the definition of a CRO: that the service at issue aim to improve consumers' credit records by removing or neutralizing *past* negative credit events, as opposed to focusing on the improvement or maintaining of the consumer's credit standing by changing forward-looking behavior. As one court has noted, the CROA embodies a fundamental distinction between "illegitimate forms of credit repair in which clients are given false hopes of absolution for confessed *past credit sins*," and services that focus on future events like "encouraging creditworthy behavior going forward." *Limpert v. Cambridge Credit Counseling Corp.*, 328 F. Supp. 2d 360, 364 (E.D.N.Y. 2004) (emphasis added).

This requirement, too, is inherent in the language of the statute. The statute, as noted earlier, repeatedly uses the word "repair," which is necessarily backward-looking: an individual's credit record cannot be "repaired" unless there is some previously-existing defect to be repaired. Similarly, the definition of a CRO specifies that the only covered "service[s]" are those for the purpose of "improving any consumer's credit record, credit history, or credit rating." These items are all necessarily linked to *prior* credit events. A "credit record" and "credit history" are compilations of the consumer's past credit events, and a "credit rating" uses past credit events to derive a score reflecting the consumer's overall credit-worthiness. "Repairing" any of these things necessarily involves obviating the effect of the past negative events, and a "credit repair organization" is one that sells the service of fixing credit records by negating the effect of such past events. *See, e.g.*, Federal Trade Commission, *Credit Repair: Self Help May Be Best*, available at www.ftc.gov/bcp/conline/pubs/credit/ repair.htm (last visited August 23, 2005) (describing the "tell-tale signs" of credit repair organizations as including "suggest[ing] that you try to invent a 'new' credit identity," and "advis[ing] you to dispute all information in your credit report" — both of which aim to change or obviate the effect of past credit events).

The legislative history confirms this understanding. As the Ninth Circuit has noted — and as described earlier — Congress passed the CROA in response to

specific concerns that "'credit repair businesses . . . lead consumers to believe that adverse information in their consumer reports can be *deleted or modified* regardless of its accuracy,'" and that to the extent such businesses did manage to erase or nullify accurate information from consumers' credit histories, they did so through "'abus[ive]'" practices. *Federal Trade Comm'n v. Gill*, 265 F.3d 944, 949 (9th Cir. 2001) (emphasis added) (quoting H.R. Rep. No. 103-486 (1994)). Similarly, the sponsor, Rep. Annunzio, described credit repair services as "hold[ing] themselves out as companies that can help consumers clean up bad credit histories" and "claim[ing] that they can help consumers remove adverse information from their files even if it is true." *1988 Hearing* (Doc. 46, Tab 6, pg 1); *see also Sannes v. Jeff Wyler Chevrolet*, 1999 WL 33313134, at * 4 (credit repair organizations "falsely promise that truthful, adverse information in a consumer's credit report can be removed," or "advise the consumer on how to illegally create a new credit history by applying to the Internal Revenue Service for an employee identification number").

Needless to say, none of the products CIC sells aims at (or is claimed to be aimed at) "fixing" prior negative credit history in this fashion. This is particularly clear as to CreditCheck, which is the *only* one of CIC's services that the district court found to be a "service," even in the abstract. (Doc. 89 - pg 12 n.10). Even if deemed a "service," CreditCheck plainly is *not* designed — and, indeed, *could not*

be designed — to repair any consumer's prior bad credit events. CreditCheck provides alerts about *future* negative credit events, to help customers guard against identity theft, and therefore can only be used by consumers to *maintain* their existing credit records, not to "repair" existing negative credit events.

In short, for this reason, too, the district court erred in determining that CIC is a credit repair organization under the Act.

POINT II

NO STATEMENT CAN RENDER A COMPANY A "CREDIT REPAIR ORGANIZATION" IN THE ABSENCE OF A REPRESENTATION THAT THE COMPANY OFFERS THE SERVICE OF IMPROVING CONSUMERS' CREDIT

A. The District Court Erred In Expanding The Statutory Definition Beyond Organizations That Represent That They Provide The Service Of Fixing Consumers' Credit Records

The district court also betrayed a fundamental misconception in holding that the CRO definition applied to CIC based on a clause making the definition applicable to businesses that "represent" that they provide credit repair services. (Doc. 89 - pg 12-15.) In essence, the district court, by failing to treat the statutory definition as a unitary whole, held that it was sufficient to satisfy the definition that (1) CreditCheck is, in the abstract, a "service"; and (2) CIC made statements, most of them unconnected to that service (or any other), relating to consumers "establish[ing]" or "rebuild[ing]" or "tak[ing] control of" their credit; and also "market[ed] its services to those interested in 'improving their credit.'" (Doc. 89 -

pg 12 & n.11.) This interpretation of the Act, however, is flatly incorrect. The correct inquiry, required by the CROA's language, is whether the defendant represented that it provided a service for improving consumers' credit records.

What the district court failed to recognize is that the "representation" phrase provides (and was intended to provide) no basis for expanding the CRO definition beyond the credit repair clinics to which, as already established, it was intended to apply. The relevant language at issue is the phrasing that defines as a credit repair organization any person that uses interstate commerce to:

> sell, provide, or perform *(or represent that such person can or will sell, provide or perform)* any service, in return for the payment of money . . . for the express or implied purpose of —
>
> (i) improving any consumer's credit record, credit history, or credit rating . . . .

15 U.S.C. § 1679a(3)(A) (emphasis added). The manifest purpose of the parenthetical phrase italicized above is simply to make the definition of a CRO equally applicable to businesses that actually provide the service of credit repair and those that merely *represent* that they provide that service.[9] Moreover, as is

[9] Although the genesis of the "represent" language is unspecified, it was presumably included in an effort to avoid the loophole that would otherwise be created if a credit repair clinic took consumers' money based on the representation that it would repair their credit, but pocketed the money without actually providing that service. *See, e.g.*, *1988 Hearing*, Doc. 46, Tab 6, pp 11-12 (testimony regarding credit repair organization that solicited money from customers, cashed

clear from the grammar of the provision, nothing in the "represent" clause changes the *type* of service necessary to fall within the CRO definition; it simply establishes that the definition covers both providing the service of actively *fixing* a consumer's credit record by repairing negative credit information *and representing* that one provides that service.

In short, under the plain language of the Act, the only type of representation that triggers application of the CRO provisions of the Act is a representation that one offers or provides, in exchange for money, a "service . . . for the . . . purpose of . . . improving any consumer's" credit record. *Id.* Conversely, the same plain language does *not* permit the court to identify a CRO by mixing and matching a finding that a company "provides at least some form of service for money" (Doc. 89 - pg 12) with various credit-related statements that do *not* represent that the company sells the *service* of actively repairing those records. *See White v. Financial Credit Corp.*, 2001 WL 1665386, at *6 (N.D. Ill. Dec. 27, 2001) ("[T]he CROA is aimed at companies that are in the business of performing 'any service . . . in return for' money for the purpose of improving a party's credit history. [Defendant] is not in that business; . . .").

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checks, and discarded customers' credit profiles with no effort to provide the promised services).

The legislative history likewise compels the conclusion that the "represent" language merely sweeps in businesses that hold themselves out as credit repair clinics along with businesses that can actually be shown to provide such services. Notably, Rep. Annunzio, at the initial hearing on the CROA bill, referred to these two categories of credit repair clinic interchangeably, describing credit repair organizations as clinics that "*hold themselves out* as companies that can help consumers clean up bad credit histories." (*1988 Hearing*, Doc. 46, Tab 6, pg 1 (emphasis added)).

Moreover, in light of the legislative history's near-exclusive focus on the problem of credit repair clinics, it would make no sense to interpret the "representation" clause of the CRO definition as expanding the reach of the definition beyond that clear focus, to cover businesses and products there is no reason to believe Congress aimed to regulate. *See, e.g., General Dynamics*, 540 U.S. at 589-91. In particular, no member of Congress expressed a concern with businesses that did not offer any service of repairing credit, but that marketed credit-record information or other products to consumers interested in improving their credit; or with businesses that sold products consumers might use for ancillary purposes relating to credit improvement. And the language Congress enacted leaves no doubt that there are only two ways in which a business becomes

a CRO: by selling the service of repairing consumers' credit, and by representing that it sells that service. CIC, of course, does neither.

The district court's failure to appreciate this point is evident in its reliance on *In re National Credit Management Group*, 21 F. Supp.2d 424 (D.N.J. 1998), for the conclusion that "language similar to that used by the Defendant . . . brings an actor within the definition of [a] credit repair organization." (Doc. 89 - pg 13). Far from being a company that was rendered a CRO simply by using "language similar to that used by the Defendant," National Credit Management Group ("NCMG") clearly represented itself to be selling the *service* of improving customers' credit records. NCMG was not a seller of credit-record information that happened to use the wrong verbs, but rather, among other things: (1) advertised its services using "persons purporting to provide testimonials about how NCMG helped them re-establish their credit," 21 F. Supp.2d at 433; (2) sold callers, for $95, a purported two-week-long "Initial Analysis" to "pinpoint" in their credit records "negative information that can be either erased or modified by law," *id.* at 433-34; and (3) followed up the Initial Analysis (which was never actually performed) with high-pressure efforts to sell "a two-year program" to help customers "establish or re-establish their credit," *id.* at 431," for "several hundred dollars to well over a thousand dollars," *id.* at 436.

In short, NCMG, although it used the phrase "credit monitoring" to describe part of what it purportedly provided, was not materially different from a classic credit repair service; as the court in *NCMG* recognized, NCMG was selling to consumers what was overtly represented to be a service — actually, *two* services, the $95 Initial Analysis to pinpoint information that could be "erased or modified" and the far more expensive two-year program — for the purpose of improving the credit records of consumers with credit problems. *See id.* at 457 (defendants "represent that they will perform services, monitor, and provide advice to assist consumers [to] improve their credit ratings"). To the extent the district court read *NCMG* as establishing that a company's representations can make it a CRO even without representing that it is selling the service of repairing consumers' credit, that reliance was clearly misplaced. To the contrary, *NCMG* illustrates the great differences between CIC and the type of true credit repair organization that falls within the language and intent of the CROA.[10]

[10] Even more oddly, the district court (Doc. 89 - pg 13) relied on *Sannes v. Jeff Wyler Chevrolet*, *supra*, a case in which the court held that the defendant car dealership was *not* a CRO, despite having advertised that it could help consumers "[r]e-establish your credit" if they bought and financed a new car through the defendant. 1999 WL 33313134, at *2. The court ruled unequivocally that the defendant was not a CRO for two reasons, both of which are also applicable to certain of the CIC statements on which the district court erroneously relied: (1) the aspect of the business that was represented to "re-establish" consumers' credit was "ancillary to [the defendant's] primary business" and no separate fee was charged for it (thereby establishing that it was not a "service, in return for the payment of money" within CROA), *id.* at *3-*4; and (2) the defendant's line of business did

B. The District Court Erred In Applying The CROA Based On Statements By CIC That In No Way Purported To Provide A Service For The Purpose Of Repairing Any Consumer's Credit Record

An examination of the statements by CIC on which the district court relied as purportedly implicating the Act's definition of a credit repair organization confirms the district court's misapplication of the Act. The district court did not even purport to find that CIC represented that it was selling a "service . . . for the . . . purpose of . . . improving any consumer's credit record, credit history, or credit rating," and, as established below, it is clear that the evidence cited by the court does not even arguably satisfy that definition. Indeed, plaintiff's own evidence affirmatively helps to establish that CIC did *not* represent that it offered such a service, as CIC's websites warn consumers that such a service for fixing a credit record is impossible: "Although some consumers pay credit clinics hundreds or even thousands of dollars to 'fix' their credit reports, *only time can improve bad credit*." (Doc. 32, Exh H, Exh. P) (emphasis added).

1. Marketing To Consumers Interested In Improving Their Credit

The district court relied in part on facts relating to CIC's alleged "market[ing of] its services to those interested in 'improving their credit'" (Doc. 89 - pg 12), including by "purchas[ing] multiple phrases containing the word 'improve' by

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"not seem to be the primary target Congress intended when it drafted [the [CROA]." *Id.* at *3. In short, *Sannes* supports precisely the opposite of the

Google.com" (Doc. 89 - pg 13), but that reliance was misconceived. Marketing to a group of consumers interested in improving their credit is vastly different from representing to those consumers that you will sell them the *service* of actively improving it for them. And the Act's plain language and legislative history make clear that only providing or representing that one will provide that particular service falls within the definition of a CRO. *See* § 1679a(3); *White*, 2001 WL 1665386, at *6 (N.D. Ill. Dec. 27, 2001) ("The plain statutory language . . . leaves no doubt that the CROA is aimed at companies that are in the business of performing 'any service . . . in return for' money for the purpose of improving a party's credit history."). The district court made no effort to demonstrate that marketing to particular consumers could constitute a representation that CIC was selling the *service* of improving consumers' credit.

2. Statements Concerning CreditCheck

The only statements cited by the district court specifically relating to CreditCheck were the following: "CreditCheck Monitoring Service keeps you on top of information that may affect your credit"; "credit check alerts allow you to take an active role in your credit and may help you to find and dispute inaccuracies"; and CreditCheck will help you "take control of your credit." (Doc. 89 - pg 12 n.12). None of these statements offers the service of undertaking to

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position for which the district court cited it.

improve any consumer's credit, as required by the Act. And the implicit suggestion that telling consumers they can "take control" of their credit constitutes promising a credit improvement service is completely without basis in the Act. *Cf.* Federal Trade Commission, *Building a Better Credit Report*, <http://www.ftc.gov/-bcp/conline/pubs/credit/bbcr.htm> (last visited August 24, 2005) ("The first step toward taking control of your financial situation is to do a realistic assessment of how much money you take in and how much money you spend.")

3. Use Of Words Such As "Maximize," "Establish," "Rebuild," "Raise," And "Improve"

The district court's reliance on CIC's use of words like "maximize," "establish," "rebuild," "raise," and "improve" in various contexts, such as CIC's website, advertisements, or search engines (Doc. 89 - pg 12, 15), suffers from at least two flaws. As an initial matter, the court failed to tie CIC's use of these words to CreditCheck, the one CIC product found by the court to be a "service," and there is therefore no basis on which the use of these words can have constituted a representation that a "service" CIC was providing was a credit repair service.

More fundamentally, even if CIC had affirmatively represented that consumers could use CreditCheck as a *tool* to "improve" their credit standing — and it could therefore be argued that an ancillary or secondary purpose of CreditCheck was improving credit — that would still be a far cry from

representing that CIC was selling, in CreditCheck, a "service . . . for *the* . . . purpose of . . . improving any consumer's credit record, credit history, or credit rating." 15 U.S.C. § 1679a(3) (emphasis added). Congress, which used the word "any" six times in § 1679(a)(3)(A), chose, when specifying what purpose is necessary, to specify "*the* purpose" rather than "*any* purpose." *See, e.g., Chisom v. Roemer*, 501 U.S. 380, 397 (1991) (statute using singular form "*the right*" "does not create two separate and distinct rights.") (emphasis in original). Likewise, it would have been easy for Congress, had it desired to vastly expand the CRO definition in this way, to make the definition applicable to "any service represented to be useful in improving any consumer's credit record . . . ." Congress's choice to require that the service at issue be for "*the* express or implied purpose" (emphasis added) of improving a consumer's credit record makes it clear that such credit improvement must be the *primary* purpose of the service at issue, and not merely an ancillary or secondary one. *See, e.g., Murphy v. Inexco Oil Co.*, 611 F.2d 570, 574 (5th Cir. 1980) (interpreting statutory phrase "for the purpose of" as connoting "primary purpose"); *Sannes v. Jeff Wyler Chevrolet, Inc.*, 1999 WL 33313134, at *4 (alleged credit repair activities ancillary to primary purpose of business could not render auto dealership a CRO).

Imposing the onerous obligations of the CROA based on a purpose that is merely secondary or ancillary would also make no sense in light of the legislative

history. There is no indication in the legislative history that Congress wanted the definition of a CRO to apply beyond the paradigm of credit repair clinics. Such clinics were businesses whose openly stated, primary purpose was selling to consumers the service of repairing credit records. And the primary purpose of CreditCheck, which provides consumers with up-to-date information about the contents of their credit records, clearly is not the "improvement" of those records.

Finally, common sense — always important in statutory interpretation, *see Koons Buick Pontiac GMC v. Nigh*, 125 S. Ct. at 469 — strongly supports this point. Absent a primary purpose requirement, liability under the CROA would be exceedingly unpredictable, less a consumer protection tool than a trap for unwary businesses. A company that markets products such as financial education seminars, debt consolidation and/or settlement services, or credit monitoring, could face staggering liability by virtue of an advertising campaign that conveyed some ancillary purpose that could be described as "credit improvement." And this cost would not be balanced by any offsetting gain, because the evil addressed by the Act — credit repair clinics — is clearly covered by the CRO definition even in the absence of such a broadening of the Act's scope.

4. "Tips" Provided With Credit Score

The final "representation" on which the district court relied is a statement that customers who purchase a credit score for $5 "will receive 'personalized tips

that can help you raise your credit score.'" (Doc. 89 - pg 12-13). The district court's reliance on this statement, too, evidences an inattention to both the plain language of the Act and to the FACTA. With respect to the FACTA, that statute specifically requires that credit bureaus inform consumers who purchase a credit score of the "key factors that adversely affected the credit score." 15 U.S.C. § 1681g(f)(1). It would be truly odd — and clearly conflict with the goals expressed in the FACTA — if providing the same information that the FACTA *requires* credit bureaus to provide with credit scores could render CIC or any other organization a credit repair organization.

In any event, the plain language of the CROA makes clear that the only type of service that falls within the definition of a CRO is a "service, *in return for the payment of money or other valuable consideration*." 15 U.S.C. § 1679a(3)(A) (emphasis added). As the district court recognized, the "tips" at issue were *not* provided in return for a payment; rather, they were an ancillary item provided free to consumers who bought a credit score. *See Wojcik v. Courtesy Auto Sales, Inc.*, 2002 WL 31663298, at *9 (D. Neb. Nov. 25, 2002) (CROA inapplicable where "the defendants did not charge the plaintiffs any additional fee for any alleged credit repair service"); *Oslan v. Collection Bureau of Hudson Valley*, 2001 WL 34355648, at *1-*2 (E.D. Pa. Dec. 13, 2001) (CROA inapplicable where defendant did not "seek additional money for credit repair services"); *Sannes v. Jeff Wyler*

Chevrolet, Inc., 1999 WL 33313134, at *4 (alleged credit repair activities ancillary to primary purpose of business could not render auto dealership a CRO). In addition, there is no evidence that the credit score is a "service" at all — the district court "assume[d]" it was, without deciding, (Doc. 89 - pg 12 n.10) — let alone one for the purpose of improving a consumer's credit record. Moreover, the district court failed to address whether any of the "tips" at issue focused on repairing prior negative credit events, as opposed to simply indicating how consumers can raise their credit scores by adopting good credit behavior.[11]

Thus, this is not a case in which CIC is in the business of *selling* "personalized tips that can help you raise your credit score" — let alone tips that involved erasing or negating prior negative credit events. The core product that

[11] It is worth noting that the district court's citation in this context of § 1679a(3)(A)(ii) — the clause in the CRO definition that addresses selling a "service . . . for the . . . purpose of . . . providing advice or assistance" in improving a consumer's credit record — adds no support to the district court's reasoning. Contrary to the district court's assertion, this clause does *not* make a CRO of any business that "'provide[s] advice or assistance . . .' concerning credit history improvement." (Doc. 89 – pg 15). Had Congress desired that broad a scope, it could easily have made the definition applicable to "any person who advises or assists" in improving a consumer's credit record. However, Congress chose not to do so, and instead limited the clause's application to those who sell a "service, in return for the payment of money or other valuable consideration," for the purpose of such advice or assistance. *See* § 1679a(3). Thus, this clause, at a maximum, can apply only to selling the *service* of helping consumers to repair negative credit history, and only to offering that service in return for payment. It certainly has no application to providing free "tips" that are ancillary to the sale of one of CIC's products.

CIC sells is factual credit-record information, *not* the service of improving any consumer's credit record, and it therefore falls far outside the scope of the Act's definition of a CRO.

C. At A Minimum, The District Court Erred In Relying On Representations That Bore No Relationship To A Service Offered For Money And In Not Addressing The Primary Purpose Of Such A Service Or The Materiality Of Any Representations

Even assuming *arguendo* that the district court was correct that the statements discussed above — if made about a particular service — could somehow satisfy the statutory definition of a CRO, reversal would still be required here because the district court made no effort to link the statements to any service, let alone a service "in return for the payment of money or other valuable consideration." 15 U.S.C. § 1679a(3)(A). As noted above, the only one of CIC's products that the district court determined to be a "service" was CreditCheck, yet the vast majority of the statements the district court focused on were *not* about CreditCheck. The only statements the district court linked to CreditCheck were relegated to a footnote (*id.* n.11), and those statements invited consumers to "take control" of their credit, without using the word "improve" or anything synonymous with it.

If CIC is to be deemed a CRO based on its alleged representations, those representations must be shown to be about a "service in return for [compensation]"

within the meaning of the Act. As the district court utterly failed to identify any such connection, the court's order must be reversed for that reason alone.

In addition, the district court erred in another, related way: by failing to address the *extent* of the representations that ostensibly "imply that [CIC's] services will help customers improve their credit ratings." (Doc. 89 – pg 15). As established earlier, the CRO definition's language specifying that the service at issue must be "for *the* . . . purpose of . . . improving" a consumer's credit record requires that that credit improvement purpose be the *primary* purpose of the service. *See* pp. 46-47, *supra*; *Murphy v. Inexco Oil Co.*, 611 F.2d at 574 (statutory phrase "for the purpose of" connotes "primary purpose"). The district court, however, failed to address whether the representations that established the "impl[ication]" on which it relied were sufficiently widespread or prominent to imply that improvement of a consumer's credit record was the primary purpose of CIC's services, or whether they merely implied a subsidiary purpose.

Moreover, even if this Court were to rule that the required credit-improvement purpose need not be the primary purpose of a defendant's service, there necessarily must be *some* threshold the representations must satisfy. Congress cannot have intended that *any* representation relating to credit improvement, no matter how obscure, or *any* implication, no matter how faint, would suffice to make a company a CRO. At a minimum, the district court should

have addressed whether the implied representation of a credit improvement purpose was *material*, in light of the nature of the service and the totality of representations seen by customers[12] — just as, for example, courts addressing Lanham Act false advertising claims have interpreted the statute's requirement of deceptive advertising as containing a materiality requirement not expressly set forth in the statutory language. *See, e.g.*, *Hickson Corp. v. Northern Crossarm Co.*, 357 F.3d 1256, 1260 (11th Cir. 2004).

POINT III

IN ANY EVENT, HELMS CANNOT RECOVER FOR REPRESENTATIONS MADE TO OTHER CONSUMERS

Finally, reversal is also required because there was no district court finding — nor is there any evidence — that any of the alleged representations on which the district court based its holding was made to, or read by, Helms, let alone pertained to a particular service he purchased.[13] And Helms cannot recover, under the CROA, for representations that were made to *other* consumers. Rather, under the CROA, Helms can only recover if CIC acted as a credit repair organization *with respect to him*.

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[12] These representations would include, for example, CIC's prominent warnings on its website that "only time can improve bad credit" and consumers should *not* pay for credit repair (Doc. 32 – Exh. H), and the site's focus on the value of CreditCheck in detecting fraud and identity theft.

This conclusion is clear from the language of the Act, which focuses on whether a business acts as a CRO with respect to a *particular* consumer. The definition of a CRO is phrased in the singular rather than the plural, specifically requiring that the service at issue be for the purpose of "improving *any consumer's*" credit record. 15 U.S.C. § 1679a(3)(A)(i) (emphasis added). Even more tellingly, the civil liability provision of the Act, 15 U.S.C. § 1679g, is specifically limited to situations in which the defendant violates the provisions of the Act with respect to a particular consumer: "Any person who fails to comply with any provision of this title *with respect to any other person* shall be liable to such person." 15 U.S.C. § 1679g (emphasis added). A person does not fail to comply with any provision of the Act (except parts of § 1679c, which sets forth certain specific prohibitions applicable to any "person") unless that person is a credit repair organization; therefore, in order to fail to comply with the Act "with respect to any other person," the organization must hold itself out as a credit repair organization *to that person*.

Accordingly, consumers like Helms, who purchase no credit repair services and see no credit repair representations — and who, therefore, have suffered no

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[13] Helms has no specific recollection of any representation he saw on CIC's website, and cannot recall which search engine, if any, he used to reach CIC's website. (Doc. 46, Tab 27 at 101, 113-14; *see also* Doc. 89 at 25-26).

harm — are not entitled to recover under the Act. Put slightly differently, persons such as Helms, who have not suffered any of the harm against which the Act is aimed, lack standing to sue on the basis of harm allegedly suffered by others. *Cf. Hall v. Jack Walker Pontiac Toyota, Inc.*, 758 N.E.2d 1151, 1157 (Ohio App. 2000) (under Ohio analogue of the CROA, court must "examine the individual facts of each case to determine if the behavior of an appellee towards an individual appellant made the appellee a credit services organization").

Indeed, if there were no requirement that the defendant have acted as a CRO with respect to the individual plaintiff — and instead representations made to *some* consumers would permit *every* customer of the defendant organization to sue for a refund, without regard to whether the organization had ever represented itself to the plaintiff as offering credit repair — the statute would produce absurd and pernicious results. For example, Helms' position necessarily means that a national credit information provider would be forced to grant three-day waiting periods to all of its customers (for all of its products) if one local advertising manager were to get too aggressive in marketing its products. Likewise, if one attorney at a law firm were to tell a prospective client or clients that the firm could help "improve" the client's credit record in anticipation of applying for a mortgage, the entire firm would be rendered a CRO, and the full panoply of the CROA's onerous duties and obligations would apply to all clients (including clients receiving unrelated

services, such as representation in personal injury litigation, or will and trust advice), regardless of whether any credit repair representations were made to them.

The absurdity of such a rule strongly counsels against construing the Act as embodying it. *See, e.g.*, *Hughey v. JMS Development Corp.*, 78 F.3d at 1529 ("Congress is presumed not to have intended absurd (impossible) results" or even "an odd result") (internal quotation marks omitted). Nor is there any basis in the purpose or legislative history of the CROA to believe that such a rule would be appropriate. Providing a windfall cause of action and a full refund to individuals like Helms, who never purchased either a credit repair service or a service *represented* to him as credit repair, would do nothing to advance the Act's goal of protecting, and providing a remedy for, vulnerable consumers who *have* been misled into buying credit repair services. *See, e.g., Blue Shield of Va. v. McReady*, 457 U.S. 465, 477 (1982) (applicability of a statutory remedial provision turns on "the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned"). At the same time, it would cause affirmative harm to the goals expressed in the FACTA, by severely burdening the sale of credit information the FACTA seeks to make widely available.

In sum, there is no basis in the language, purpose, or history of the Act to uphold a plaintiff's CROA cause of action based on representations that were not

seen or heard by the plaintiff bringing suit — *i.e.*, a suit by a plaintiff who has not himself suffered any injury, against a defendant that did not act as a credit repair organization in its dealings with that plaintiff. The CROA creates liability to a particular consumer *only* when the defendant "fails to comply with any provision of this title *with respect to*" that consumer, 15 U.S.C. § 1679g, and Helms' inability to produce any evidence that CIC acted as a CRO with respect to *him* clearly places him outside that category.

This deficiency in Helms' claim, and in the district court's reasoning, independently mandates reversal.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order and direct that summary judgment be entered in favor of CIC on all claims under the Credit Repair Organizations Act.

Dated: August 25, 2005.

Respectfully submitted,

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Meir Feder
JONES DAY
222 East 41st St.
New York, NY 10017
(212) 326-3939

Jerome R. Doak
Margaret I. Lyle
JONES DAY
2727 North Harwood
Dallas, TX 75201
(214) 969-2977

Richard J. Grabowski
JONES DAY
3 Park Plaza, Suite 1100
Irvine, California 92614
(949) 553-7514

Samuel H. Franklin
LIGHTFOOT, FRANKLIN & WHITE LLC
The Clark Building
400 20th Street North
Birmingham, AL 35203
(205) 581-0700

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 13,784 words.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-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.

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Meir Feder
Attorney for Defendant-Appellant
ConsumerInfo.com, Inc.

Dated: August 25, 2004

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 Plaintiff/Appellee Ronald W. Helms via FedEx overnight delivery on this 25th day of August 2005.

E. Clayton Lowe, Jr.
Peter A. Grammas
LOWE GRAMMAS, LLP
1952 Urban Center Parkway
Liberty Park
Vestavia Hills, AL 35242

William J. Trussell
TRUSSELL & FUNDERBURG, P.C.
1916 1st Avenue North
Pell City, AL 35125

_____