No. 16-3574

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FULTON DENTAL, LLC,
Plaintiff-Appellant,

v.

BISCO, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
No. 15 C 11038
The Honorable Judge Edmond E. Chang

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In *Campbell-Ewald Co. v. Gomez*, the Supreme Court explained that a case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." 136 S. Ct. 663, 669 (2016) (citation omitted). The Court also instructed that "a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Id.* at 672.

Despite this guidance, the district court in this case held that defendant Bisco's deposit of funds and consent to have an injunction entered against it mooted plaintiff Fulton Dental's individual claim, although the deposit and consent did not make it impossible for the court to grant effectual relief. The district court then entered judgment in Fulton Dental's favor without providing Fulton Dental a fair opportunity to show that class certification was warranted.

The district court's mootness determination was wrong, and its orders and judgment should not have been entered and must be vacated. Moreover, regardless of whether Fulton Dental's individual claim was rendered moot, the class claims are live, and the class action should be allowed to proceed.

ARGUMENT

I. Fulton Dental's Individual Claim Is Not Moot.

A. Bisco's Deposit of Funds and Consent to an Injunction Did Not Moot Fulton Dental's Individual Claim.

1. The district court held that Bisco's deposit of funds under Rule 67 and consent to have an injunction entered against it rendered Fulton Dental's individual claim moot. *See, e.g.*, App. 5-6. ("Bisco's motion to deposit funds is granted. As a result, Fulton Dental's individual and class claims are both moot, and the case is dismissed for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1)."). "A case becomes moot, however, 'only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Campbell-Ewald*, 136 S. Ct. at 669 (quoting *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012)). As explained in Fulton Dental's opening brief, Bisco's deposit of funds and consent to an injunction did not deprive the court of the ability to grant relief. In fact, after the deposit and consent were made, the court *granted* relief, thereby demonstrating concretely that the deposit and consent to an injunction did not deprive the court of the power to grant relief and thus did not moot Fulton Dental's claim.

Bisco does not attempt to show that the deposit and consent deprived the court of the ability to grant relief. Instead, it contends that Fulton Dental waived this argument. Bisco Br. 9-10. But Fulton Dental vigorously argued below that the case would not be moot "[e]ven if Bisco were permitted to deposit [the funds] into the Court's registry." R. 25 at 6; *see also, e.g., id.* (explaining that one reason the deposit would not moot the case was because the complaint also requested injunctive relief). Fulton Dental has elaborated on this argument in its appellate briefing, largely to respond to the district court's opinion, "but no rule prohibits appellate amplification of a properly preserved issue." *Lawson v. Sun Microsys., Inc.*, 791 F.3d 754, 761 (7th Cir. 2015); *see Int'l Bhd. of Elec. Workers v. CSX Transp., Inc.*, 446 F.3d 714, 719 (7th Cir. 2006) (holding that argument was properly before the Court where it was "merely a more fleshed out version of an earlier" argument). "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

In addition, Bisco cites the dissents in *Campbell-Ewald*, stating that they "suggested" that a deposit of funds with the court can moot a plaintiff's claim. Bisco Br. 2, 8, 11. In those dissents, Chief Justice Roberts and Justice

Alito stated their beliefs that an offer of complete relief moots a case if the defendant will "make good on [its] promise," and that a defendant can make clear it will do so by depositing money with the district court. *See* 136 S. Ct. at 680 (Roberts, C.J., dissenting); *id.* at 684 (Alito, J., dissenting). However, the dissenters also believed that the defendant in *Campbell-Ewald* had made "the requisite mootness showing," *id.* at 684 (Alito, J., dissenting), yet the Court held that the case was not moot, thereby underscoring that the majority disagreed with the dissenters' views. The dissents also note that the Court's decision did not foreclose the possibility that payment of complete relief might moot a claim, or that such payment could happen through a deposit of funds. *See id.* at 683 (Roberts, C.J., dissenting); *id.* at 685 (Alito, J., dissenting). Although *Campbell-Ewald* did not specifically decide these issues, Fulton Dental's opening brief explains that, under the standards set forth in *Campbell-Ewald* and other Supreme Court and Seventh Circuit cases—and particularly given how Rule 67 operates (a topic left unaddressed by the *Campbell-Ewald* dissents)—a Rule 67 deposit of funds cannot moot a claim. *See* Fulton Dental Opening Br. 14-21.

Finally, Bisco cites *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308 (1893), in which the Supreme Court held that a defendant's obligation to

pay sums was extinguished when the sums were deposited in a bank, when a state statute provided that such a deposit had the "same effect as actual payment and receipt of the money." *Id.* at 314. As explained in Fulton Dental's opening brief (at 16-21), a deposit under Rule 67, unlike a deposit under the statute at issue in *San Pablo*, is not the equivalent of actual payment and receipt of money: It does not provide relief, or even the entitlement to it. Moreover, Bisco's deposit of money did not address Fulton Dental's claim for injunctive relief. *San Pablo* is thus inapplicable to the deposit here. In any event, this Court's recent case law indicates that it does not interpret *San Pablo* as holding that payment and receipt moot the case in the jurisdictional sense. In 2015, this Court explained that "even a defendant's proof that the plaintiff has *accepted* full compensation ... is an affirmative defense rather than a jurisdictional bar." *Chapman v. First Index, Inc.*, 796 F.3d 783, 787 (7th Cir. 2015).

2. Bisco devotes a large portion of its brief to arguing that the district court's decision to grant the Rule 67 motion to deposit was permissible. Because the deposit of funds did not deprive the court of the ability to grant effective relief and therefore did not moot Fulton Dental's claim, the Court does not need to reach the question whether the district court should have

granted the Rule 67 motion if the deposit would moot the case—the only Rule 67 question at issue. *See* Fulton Dental Opening Br. 28-36.

If the Court does reach the issue, however, it should hold, for the reasons discussed in Fulton Dental's opening brief, that the district court should not have granted the Rule 67 motion if the deposit would moot the case. Fulton Dental's claim was indisputably live when Bisco moved to deposit funds, and district courts should not take actions that would moot a would-be class representative's live claim without providing "a fair opportunity to show that certification is warranted," *Campbell-Ewald*, 136 S. Ct. at 672—which Fulton Dental did not have below, *see infra* at 11-15. Moreover, Rule 67 is designed to provide "a place of safekeeping for disputed funds pending the resolution of a legal dispute" and "cannot be used as a means of altering the contractual relationships and legal duties [or rights] of the parties." *LTV Corp. v. Gulf States Steel, Inc. of Ala.*, 969 F.2d 1050, 1063 (D.C. Cir. 1992) (citation omitted), *quoted in United States v. Tully*, 288 F.3d 982, 987 (7th Cir. 2002) (alteration in *Tully*).

Bisco insists that Rule 67 *can* be used to alter legal rights. Except for one out-of-circuit district court case from over 60 years ago, however, none of the cases Bisco cites for this proposition involves use of a deposit to

extinguish or otherwise affect the rights asserted in the case. Instead, they involve issues such as the use of a deposit to stop accrual of prejudgment interest, *see Lich v. Cornhusker Cas. Co.*, 774 F. Supp. 1216, 1223 n.5 (D. Neb. 1991), or to avoid breach of contract while the case is pending, *see Gulf States Utils. Co. v. Ala. Power Co.*, 824 F.2d 1465, 1474-75 (5th Cir. 1987); *but see, e.g., Engineered Med. Sys., Inc. v. Despotis*, 2007 WL 1021866, at *7 (S.D. Ind. Mar. 30, 2007) (holding that company breached license when it deposited royalties due under the license with the court instead of paying them). There is a difference between using a deposit to preserve part of the status quo "*pending* the resolution of a legal dispute," *LTV Corp.*, 969 F.2d at 1063, quoted in *Tully*, 288 F.3d at 987 (emphasis added), and using a deposit of funds to *resolve* the matter or otherwise affect the rights at issue in the case. If Bisco's deposit were going to render the legal dispute in this case moot, the district court should not have granted the motion to deposit.

B. Bisco's Deposit of Funds and Consent to an Injunction Did Not Justify the District Court's Orders and Entry of Judgment.

Rather than attempt to argue that the deposit and consent to an injunction deprived the court of the ability to grant relief, Bisco contends that the case is moot because the court proceeded to award Fulton Dental relief and enter judgment. *See* Bisco Br. 10. As explained in Fulton Dental's

opening brief (at 36-43), however, the district court erred in entering the orders and judgment. Accordingly, they cannot serve as a basis for finding any aspect of the case moot. As the Sixth Circuit recently explained in rejecting an argument identical to Bisco's, "a 'judgment that should never have been entered' does not snuff out a plaintiff's stake in the underlying litigation." *Conway v. Portfolio Recovery Assocs., LLC*, 840 F.3d 333, 335 (6th Cir. 2016) (citation omitted); *see also Wendell H. Stone Co., Inc. v. Metal Partners Rebar, LLC*, 2016 WL 7049084, at *3 (N.D. Ill. Dec. 5, 2016) (explaining that "it is inconsistent to say that the Court can render [the plaintiff's] claims moot by accepting the deposit and granting judgment on those claims in [the plaintiff's] favor" because a judgment ends the controversy "by adjudicating the dispute, not by making it moot").

The district court's entry of judgment suffers from two main problems.

First, the district court's reasoning was wrong. The court entered the orders and judgment because it believed that the deposit and consent to an injunction had mooted Fulton Dental's individual claim. *See* App. 28-29. Of course, if the deposit and consent had in fact mooted Fulton Dental's claim, the district court's entry of judgment would have violated basic jurisdictional principles, which forbid entering judgment in moot cases. *See, e.g.*,

Chapman, 796 F.3d at 786. Even so, given that the reason for the entry of judgment was the court's erroneous view that the deposit and consent to an injunction mooted Fulton Dental's claim, the orders and judgment were based on an incorrect premise that cannot support affirmance.

Bisco responds by contending that Fulton Dental's argument on this point was waived. But Fulton Dental could not explain how the district court's entry of judgment was based on mistaken beliefs about mootness before the district court issued its opinion. In any event, Fulton Dental argued below that the case should proceed even if the district court granted the motion to deposit. *See* R. 25 at 3 (stating that, if motion was granted, court should hold the funds and allow the case to proceed).

Fulton Dental also notes that *Campbell-Ewald* did not decide "whether a plaintiff's claim would be moot 'if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.'" Bisco Br. 11 (quoting *Campbell-Ewald*, 136 S. Ct. at 672). Bisco's argument is apparently that, by declining to decide whether a deposit followed by entry of judgment would moot a claim, *Campbell-Ewald* implicitly approved entering judgment after a deposit. However, the Supreme Court's decision not to address a topic

cannot reasonably be read to express the Court's opinion on that topic. And even if the Court's statement were read to indicate that entry of judgment after a deposit might be permissible in some situations, that statement would not indicate that it is permissible in all situations in which a deposit is made—such as where the case was brought on behalf of a class. To the contrary, *Campbell-Ewald* instructs that, in such cases, would-be class representatives with live claims "must be accorded a fair opportunity to show that certification is warranted." 136 S. Ct. at 672.

Finally, Bisco cites *San Pablo*, 149 U.S. at 313-14, and the dissents in *Campbell-Ewald*. These sources, however, address neither the effects of an entry of judgment based on an erroneous finding of mootness, nor when courts may enter judgment on a named plaintiff's live claim.

Second, the district court erred in entering the orders and judgment without affording Fulton Dental "a fair opportunity to show that certification is warranted." *Campbell-Ewald*, 136 S. Ct. at 672. *Campbell-Ewald*'s "admonition that 'a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted,' means that it is inappropriate to enter judgment on a named plaintiff's individual claims, 'over the plaintiff's objection, before the plaintiff has had a

fair opportunity to move for class certification.'" *Fauley v. Royal Canin U.S.A., Inc.*, 143 F. Supp. 3d 763, 765 (N.D. Ill. 2016) (quoting *Campbell-Ewald*, 136 S. Ct. at 672, and *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1147 (9th Cir. 2016)); *see also*, *e.g.*, *Wendell H. Stone Co.,* 2016 WL 7049084, at *3-*4; *Brodsky v. HumanaDental Ins. Co.*, 2016 WL 5476233, at *4 (N.D. Ill. Sept. 29, 2016). A court may not, "prior to certification, eliminate the entire suit by acceding to a defendant's proposal to make only the named plaintiff whole." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting).

Bisco insists that Fulton Dental *did* have a fair opportunity to show that class certification was warranted because it could have filed a motion for class certification with its complaint (or at some other very early point in the case). Plaintiffs, however, generally do not have the information they need to support a motion for class certification at the time they file their complaints and will need additional time to conduct discovery and prepare a motion that explains why the class should be certified. *See* Fulton Dental Opening Br. 31-32 & n.3; App. 43 (district court opinion, noting that "[p]laintiffs generally do not file, and courts cannot decide, class certification motions at the time of the complaint's filing because there has been no discovery on the Rule 23

requirements"). Here, where Bisco filed its Rule 67 motion less than seven weeks after the complaint was filed, and the court then stayed discovery, Fulton Dental cannot be deemed to have been given a "fair opportunity" to gather the information and prepare the motion necessary to "show that certification is warranted." *Campbell-Ewald*, 136 S. Ct. at 672.

In support of its argument that Fulton Dental had a sufficiently fair opportunity to show that certification was warranted, Bisco cites *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011), in which, after holding that an unaccepted offer of judgment to a named plaintiff rendered a case moot, this Court stated that plaintiffs could avoid having such offers moot their cases by moving "to certify the class at the same time that they file their complaint." *Id.* at 896. Even putting aside that this Court has expressly overruled *Damasco*'s holding that unaccepted offers can moot cases, *see Chapman*, 796 F.3d at 787, Bisco's reliance on *Damasco* is misplaced. Bisco's argument confuses two separate questions: when the mooting of a named plaintiff's individual claim deprives the court of jurisdiction over the class claims, and when a court may enter judgment on the merits of a live individual claim. *Damasco* addressed the jurisdictional *first* question—when class actions are mooted by the mootness of the named plaintiff's individual claim—but the

issue here is the merits-based *second* question—when the court may enter judgment on a live claim. There is no reason that *Damasco*'s dicta about how plaintiffs could ensure that the courts retained jurisdiction over their class claims if their individual claims were rendered moot by an unaccepted offer should provide the standard for determining when a court may enter judgment on the merits of a would-be class representative's live claim.

Indeed, the requirements for avoiding mootness in *Damasco* do not align with *Campbell-Ewald*'s "fair opportunity to show that certification is warranted" standard. 136 S. Ct. at 672. As Bisco notes, under *Damasco*, it was sufficient, to avoid mootness of the case, for the plaintiff to file a prophylactic motion without "all the facts necessary to support a motion for class certification." Bisco Br. 5. By definition, however, a motion without necessary support is insufficient to "show that certification is warranted." Correspondingly, a plaintiff who has not had the opportunity to gather the facts necessary to support a motion for class certification has not had the requisite fair opportunity to show that certification is warranted. *See Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350 (2011) ("A party seeking class certification … must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.").

Bisco asserts that Fulton Dental should have known that it was required "to file a motion for class certification to avoid having its class claims mooted" and that "[h]aving passed up this opportunity to keep its class claims live, Fulton Dental cannot be heard to complain that it had no opportunity to preserve them." Bisco Br. 5, 11-12. Again, the issue here is not whether Fulton Dental had the opportunity to avoid having the class action mooted, but whether Fulton Dental had the fair opportunity to show that class certification was warranted before the court resolved its individual claim on the merits. Those are not the same thing. Moreover, after *Chapman* overruled *Damasco*, there was no reason for plaintiffs to think they needed to file premature motions for class certification in order to preserve their class claims. As a district court in this Circuit explained, "[a]fter *Chapman*, the premature filing of a motion for class certification is no longer necessary to prevent buy-off because a defendant's offer of compensation does not moot the litigation or otherwise end the Article III case or controversy." *Oaks v. Moss*, 2015 WL 10550814, at *1 (N.D. Ind. Aug. 13, 2015).

In fact, in the months before Fulton Dental filed the complaint in this case, district courts denied motions for class certification filed for *Damasco* purposes, indicating that such motions were no longer warranted. *See Holt v.*

Lvnv Funding, LLC, 2015 WL 12570947, at *1 (S.D. Ind. Nov. 2, 2015); *Oaks*, 2015 WL 10550814, at *1; *see also id.* (explaining that, in addition to being unnecessary, "filing a motion that the parties are not yet ready to support or defend, and the Court is not yet able to rule upon, does not promote the efficient administration of justice"). And certainly, nothing in *Damasco* or *Chapman* gave Fulton Dental any reason to expect that the district court might go ahead and resolve its live individual claim on the merits, in its favor, over its objections, without allowing it to conduct the discovery necessary to support a motion for class certification, thereby depriving it of its "entitl[ement] … to pursue [its] claim as a class action" if it can meet Rule 23's criteria. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). Because Fulton Dental was not afforded a fair opportunity to show that class certification was warranted before the district court entered orders and a judgment resolving its individual claims, the orders and judgment should be vacated.[1]

[1] Bisco contends that Fulton Dental's argument that the district court should not have entered the orders and judgment without providing it the chance to show that a class should be certified "depends upon whether its class claims, as opposed to its individual claim, are moot." Bisco Br. 13. But the question whether the class action is moot only arises if the individual claim is moot. Because the deposit and consent to an injunction did not moot Fulton Dental's individual claim, both the individual claim and the class

II. The Class Action Is Not Moot.

Regardless of whether the deposit rendered Fulton Dental's individual claim moot, or whether the district court had authority to enter judgment on that claim in Fulton Dental's favor without considering class certification, the class claims should not have been dismissed.

A. In *Susman v. Lincoln American Corp.*, 587 F.2d 866 (7th Cir. 1978), this Court held that, when a class certification motion has been filed, the interests of the class members are sufficiently before the court such that a "mootness artificially created by the defendant by making the named plaintiff whole" does not moot the class action. *Id.* at 869. As explained in Fulton Dental's opening brief (at 44-53), *Susman*'s concerns would also arise if a deposit mooted a named plaintiff's individual claim, and there is no conceptual reason to base mootness on whether a motion for class certification is pending. "[A] motion to certify … indicates that the named plaintiff intends to represent a class if allowed to do so, but the complaint itself announces that same intent[.]" *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 707 (11th Cir. 2014); *see also id.* ("The assertion that a motion [to

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action as a whole were unquestionably live when the district court ordered relief and entered judgment, and the district court should not have taken those actions without providing Fulton Dental a fair opportunity to show that class certification was warranted.

certify] fundamentally changes the legal landscape—indeed, that it impacts the constitutional prerequisites to jurisdiction under Article III—makes no sense."). Accordingly, this Court should hold that a class action complaint likewise brings the interests of the class members sufficiently before the court such that "a mootness artificially created by the defendant" does not moot the class action. *Susman*, 587 F.2d at 869.

Bisco responds that, "under this circuit's approach," a named plaintiff "must file a motion for class certification to keep the class claims alive." Bisco Br. 13. In three of the cases cited by Bisco, however, either the plaintiffs *had* filed motions for class certification so any statements about cases in which motions are not filed were dicta, *see Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546-47 (7th Cir. 2003); *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999), or the claims that were determined to have been rendered moot had not previously been pleaded in a class-action complaint, *see Gates v. City of Chicago*, 623 F.3d 389, 412-13 (7th Cir. 2010). And in the two other cases—*Damasco* and *Holstein v. City of Chicago*, 29 F.3d 1145 (7th Cir. 1994)—the Court reached the question whether the class action was moot only because it had already mistakenly held that that an unaccepted offer had mooted the plaintiff's individual claim. *See Damasco*,

662 F.3d at 895; *Holstein*, 29 F.3d at 1147. Since these cases were decided, both the Supreme Court and this Court have definitively held that an unaccepted offer cannot moot a claim, *see Campbell-Ewald*, 136 S. Ct. at 672; *Chapman*, 796 F.3d at 787, thereby destroying the premise on which *Damasco* and *Holstein* were based, and making clear that these opinions were based on an overly narrow understanding of Article III mootness doctrine. Now that these cases' conceptions of Article III have been held to be erroneous, this Court should hold that a motion for class certification is not necessary to preserve jurisdiction over the class claims if the named plaintiff's claim is rendered moot against the plaintiff's will and the plaintiff has not unduly delayed in moving for class certification. *See*, *e.g.*, *Chen*, 819 F.3d at 1143; *Stein*, 772 F.3d at 707; *Lucero v. Bur. of Collection Recovery, Inc.*, 639 F.3d 1239, 1250 (10th Cir. 2011); *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004).

B. Separate from the class members' interests in class certification, Fulton Dental has an economic interest in class certification in the form of the prospect of an incentive award, which would provide Article III jurisdiction over this case if it were otherwise moot. This Court has already held that the prospect of an incentive award can give a plaintiff a sufficient

personal stake in class certification to satisfy Article III, *see Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 875 (7th Cir. 2012), and courts in this Circuit have awarded incentive awards in TCPA cases, *see, e.g.*, *Wright v. Nationstar Mortage LLC*, 2016 WL 4505169, at *17 (N.D. Ill. Aug. 29, 2016).

Bisco notes that Fulton Dental did not specifically request an incentive award in its complaint. The question for determining whether a plaintiff has an economic stake in class certification sufficient to satisfy Article III, however, is not what is written in the complaint, but whether class certification could affect the plaintiff's economic prospects. Thus, in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), the Supreme Court held that the plaintiffs' "desire to shift part of the costs of litigation" was a sufficient interest in class certification to keep the case from being moot, even though the plaintiffs' desire was to shift costs to the other class members that would share the benefits if the class was certified, not to the opposing party from whom the complaint sought relief. *Id.* at 336.

Bisco also argues that because Fulton Dental had not filed a motion for class certification when its individual claims purportedly became moot, the class action was moot, and that because it was moot, Fulton Dental could not have an economic interest in the class action sufficient to keep it from being

moot. To state this argument is to reveal its circularity. Here, class certification could affect Fulton Dental's economic interests: Fulton Dental may receive an incentive award if a class is certified, but will not if a class is not certified. This interest in class certification satisfies Article III and would suffice to keep this case alive if it were otherwise moot.

CONCLUSION

The Court should vacate the district court's entry of judgment, vacate the district court's order entitling Fulton Dental to claim funds, vacate the district court's injunction, reverse the district court's dismissal of the individual and class claims, and remand to the district court for further proceedings.

Respectfully submitted,

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January 23, 2017

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B)

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c). As calculated by my word processing software (Microsoft Word 2010), the brief contains 4,499 words.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that on this date, January 23, 2017, I am electronically filing this brief through the ECF system, which will send a notice of electronic filing to counsel for all parties in this case.

/s/ Adina H. Rosenbaum
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