APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FINAL JUDGMENT

October 31, 2018

Before: Diane P. Wood, *Chief Judge*
Diane S. Sykes, *Circuit Judge*
David Hamilton, *Circuit Judge*

ARCHIE BEATON
Plaintiff - Appellee

v. No. 18-1010

SPEEDYPC SOFTWARE, a British Columbia Company,
Defendant - Appellant

District Court No: 1:13-cv-08389
Northern District of Illinois, Eastern Division
District Judge, Andrew R. Wood

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

Filed: 10/31/2018

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 18 1010

ARCHIE BEATON,

Plaintiff Appellee,

v.

SPEEDYPC SOFTWARE, a British Columbia Company,

Defendant Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 13 C 8389 — Andrea R. Wood, *Judge*.

ARGUED MAY 30, 2018 — DECIDED OCTOBER 31, 2018

Before WOOD, *Chief Judge*, and SYKES and HAMILTON, *Circuit Judges*.

WOOD, *Chief Judge*. When Archie Beaton's laptop started misbehaving, he looked for an at-home fix. An internet search turned up a product from SpeedyPC Software ("Speedy") that offered both a

diagnosis and a cure. Beaton took ad vantage of Speedy's free trial, which warned that his device was in bad shape and encouraged him to purchase its software solution: SpeedyPC Pro. He did. But he was disappointed with the outcome: despite Speedy's promises, the software failed to improve his laptop's performance.

Beaton became convinced that he was the victim of a scam. He filed a consumer class action against Speedy, raising both contract and tort theories. The district court certified a nationwide class and an Illinois subclass of software purchasers. Hoping to dodge the consumer class action, Speedy turned to this court for relief. See FED. R. CIV. P. 23(f). Because we find no abuse of discretion in the district court's certification orders, we affirm.

I

The ad for SpeedyPC Pro that Beaton found in August 2012 promised that Speedy's software would fix common problems affecting computer speed and performance and un leash the device's "true potential." It also offered a free scan to detect any problems. Beaton decided to give it a try, and so he downloaded and ran the free trial. After assessing the laptop's health across five modules, the program told Beaton that his computer was in critical condition as a result of hundreds of serious errors.

The free trial prompted Beaton to buy the licensed version of the software, which (he was

promised) would fix the identified problems. Beaton was sold. Using his personal business's credit card, he purchased SpeedyPC Pro and ran it on his laptop. It began by scanning his device, just as the free trial had done. The program then told Beaton to click on "Fix All." Beaton dutifully did so. Yet nothing happened. Beaton ran the software a few more times, to no avail. Feeling ripped off, and suspecting that his experience was not unique, Beaton sued Speedy in 2013 on behalf of a class of consumers defined as "All individuals and entities in the United States who have purchased SpeedyPC Pro." Despite Speedy's lofty pledges, Beaton claimed, the software failed to perform as advertised. Instead, it indiscriminately and misleadingly warned *all* users that their devices were in critical condition, scared them into buying SpeedyPC Pro, and then ran a functionally worthless "fix." The district court had jurisdiction over this putative class action under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2).

Speedy twice tried, and twice failed, to get the lawsuit thrown out. The district court first rejected its effort to have the complaint dismissed for failure to state a claim on which relief could be granted. Speedy then tried a motion to dismiss on *forum non conveniens* grounds, based on the fact that the software's End User License Agreement ("the Agreement") contained a choice of law provision selecting the law of British Columbia (Canada) to govern any claims arising from it. The district court, however, decided to retain the case without definitively resolving the choice of law issue at that juncture.

Four years after the suit was filed, Beaton moved to certify a class and subclass of software purchasers. Beaton's proposed class definition was narrower than the one in his complaint. It included "[a]ll individuals living in the United States who downloaded a free trial of SpeedyPC Pro and thereafter purchased the full version between October 28, 2011 and November 21, 2014." He also proposed a subclass of class members "who reside in Illinois" and several other states.

The district court certified Beaton's class claims for breaches of the implied warranties of fitness for a particular purpose and merchantability. On behalf of a subclass consisting only of Illinois residents, the court certified claims for fraudulent misrepresentation under the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA). It rejected the proposed subclass insofar as it included residents from other states, because Beaton failed to identify the relevant consumer protection laws of those states.

The court had the benefit of dueling expert testimony before it at the time it made these certification decisions. Beaton's expert, Craig Snead, described how the free trial operated across devices. Speedy's expert, Monty Myers, disputed Snead's account. Although the court had not yet issued its ruling on the parties' cross motions to exclude the testimony of each other's expert, it ultimately denied both motions (with minor exceptions) roughly two months later. See FED. R. EVID. 702. In that order, the court noted that it had "considered the challenged

expert testimony for purposes of class certification only to the extent consistent with the rulings stated."

At that point, Speedy filed and we granted a petition for interlocutory appeal of the class certification decisions. See FED. R. CIV. P. 23(f). We note that Speedy's petition may have been untimely, but Beaton chose not to press the issue. The time limit for an appeal under Rule 23(f) is not statutory, and so a failure to abide by it does not affect our jurisdiction. See *Bowles v. Russell,* 551 U.S. 205, 210–11 (2007); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 485 (7th Cir. 2012) (holding that Rule 23(f)'s 14 day limitations period is not jurisdictional), *abrogated on other grounds by Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541 (7th Cir. 2016).

II

Before we reach the heart of this appeal—the district court's Rule 23 decisions—we address Speedy's more substantial preliminary objections.

A

Speedy complains that the class definitions and legal theories covered by the court's certification orders impermissibly differ from those outlined in the original complaint. Speedy first attacks the narrowing of the class from everyone in the United States who had purchased SpeedyPC Pro, to individual persons (not entities) who downloaded the free trial and purchased the licensed software over roughly a three year period.

This is nothing like what we faced in *Supreme Auto Transport, LLC v. Arcelor Mittal USA, Inc.*, 902 F.3d 735, 741 (7th Cir. 2018), where the later proposed class greatly expanded the scope of the litigation beyond what the defend ants could have imagined. We see no reason here why Speedy is prejudiced by the narrower certified definition. Speedy complains that it would have conducted discovery differently had it known about the narrowed class. See *Chessie Logistics Co. v. Krinos Holdings, Inc.*, 867 F.3d 852, 859 (7th Cir. 2017). But it has not told us, either in its briefs or at oral argument, what exactly would have changed. Speedy's position is further weakened by the fact that the district court allowed additional merits discovery following its certification decision. District courts may amend class definitions either on motion or on their own initiative. See FED. R. CIV. P. 23(c)(1)(C); *Chap man v. First Index, Inc.*, 796 F.3d 783, 785 (7th Cir. 2015); *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 807 (7th Cir. 2013). We are satisfied that the court reasonably exercised its discretion in adopting its class definition.

We similarly find no reversible error in the district court's decision to certify Beaton's two implied warranty claims. It is immaterial that these legal theories were not spelled out in the initial complaint. See *Chessie Logistics Co.*, 867 F.3d at 860. As the Supreme Court and this court constantly remind litigants, plaintiffs do not need to plead legal theories. *Johnson v. City of Shelby*, 135 S. Ct. 346, 346–47 (2014) (per curiam); *BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co.*, 900 F.3d 529, 540–41 (7th Cir.

2018); *King v. Kramer*, 763 F.3d 635, 642 (7th Cir. 2014). Rule 8 requires only that a complaint must set forth plausible facts that, if true, would support a claim for relief. See *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007); FED. R. CIV. P. 8(a)(2). Even where a plaintiff initially asserts particular theories of recovery, unless the change unfairly harms the defendant she is allowed to switch course and pursue other avenues of relief as litigation progresses. *Chessie Logistics Co.*, 867 F.3d at 859; *Whitaker v. Milwaukee Cnty.*, 772 F.3d 803, 808 & n.18 (7th Cir. 2014). Here, the court's certification of the implied warranty claims was permissible as long as Beaton's allegations were plausible and Speedy had fair notice of what this suit was about. See *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 517 (7th Cir. 2015). We note as well that applicable law is no longer in dispute, as the parties now agree that the implied warranty claims derive from the Agreement, which chooses the law of British Columbia.

Beaton's complaint describes Speedy as a company that sells software products. He alleges that it marketed SpeedyPC Pro in the hope of persuading consumers to purchase the software to fix their computers. And he asserts that customers relied on the company's expertise and representations that the software would improve their devices. For present purposes, this is enough to provide fair notice that he intends to pursue warranty claims under the law of British Columbia. See R.S.B.C. 1996, ch. 410, § 18(a)–(b). It is hard to imagine how Speedy suffered

any "unfair surprise," given that the "legal basis for liability is based on the same allegations" about the sale of worthless software. *Whitaker*, 772 F.3d at 809 & n.19. Though Speedy insists that it is worse off because it cannot move to dismiss on the ground that the Agreement expressly disclaimed these implied warranties, there is no final judgment in this case. Nothing prevents Speedy from pursuing this point on remand.

B

Next, we briefly consider Speedy's assertion that Beaton is judicially estopped from seeking relief under the law of British Columbia because initially he argued for Illinois law. Equitable estoppel requires that: (1) the party's later position is clearly inconsistent with her earlier one; (2) the party success fully persuaded the court to adopt her first position; and (3) the party would be unfairly advantaged if not estopped. *Janusz v. City of Chi.*, 832 F.3d 770, 776 (7th Cir. 2016).

Speedy forfeited its estoppel argument by not raising it before the district court. *1st Source Bank v. Neto*, 861 F.3d 607, 611–12 (7th Cir. 2017). It merely acknowledged that Beaton changed his position on whether British Columbia or Illinois law controlled his contract claims.

Even on the merits, Speedy's estoppel theory falls short. It is true that Beaton flip flopped his position on the source of his implied warranty claims,

and so the first criterion for estoppel may be met. In his opposition to the motion to dismiss for *forum non conveniens*, Beaton argued that "[n]one of [his] claims are based upon [the Agreement]." But by the time he sought class certification, he sang a different tune, conceding that the implied warranty "claims derive from the End User License Agreement." Still, the other two factors necessary for estoppel are missing. Beaton may have defeated Speedy's motion to dismiss for *forum non conveniens*, but he did not persuade the district court that Illinois law controlled. The court thought that British Columbia law *may* not apply to Beaton's contract claims because they "have little or nothing to do with the terms of the [Agreement]." But ultimately the court found that this question did not matter for class certification and so could safely be postponed. And in any event, we cannot see how Beaton could derive an unfair advantage by agreeing to apply the substantive law that Speedy wanted all along.

C

Speedy also contends that the district court lacks personal jurisdiction over the claims of class members from states other than Illinois. Its argument relies on the Supreme Court's decision in *Bristol Myers Squibb Co. v. Superior Court of Cal., San Francisco Cnty.*, 137 S. Ct. 1773 (2017). In that mass tort action, there was no connection between the forum and the specific claims at issue. Under those circumstances, the Supreme Court held that a state court lacks specific jurisdiction over non-resident plaintiffs' claims

against non resident defendants. *Id.* at 1781–82. Speedy seems to be asking us to extend *Bristol Myers Squibb* to nationwide class actions.

While briefing the issue now before us—class certification—in the district court, neither party raised personal jurisdiction. Thus, we have no need to opine on this question, because it does not bear directly on our determination. See *Abelesz v. OTP Bank*, 692 F.3d 638, 652–53 (7th Cir. 2012) (a court's personal jurisdiction and class certification decisions were "only tangentially related" and so the former could not be evaluated on a Rule 23(f) appeal (quoting *Poulos Caesars World, Inc.*, 379 F.3d 654, 671–72 (9th Cir. 2004))). On remand, Speedy is free to explain if and how it preserved this point and how *Bristol Myers Squibb* applies in these circumstances. For his part, Beaton will be free to contend that Speedy waived this defense through its conduct. See, *e.g.*, *H D Mich., LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827, 848 (7th Cir. 2012). On a Rule 23(f) appeal, it is not for us to take the first bite of this apple.

III

Now we turn to the main event: the district court's decision to certify the nationwide class and the Illinois subclass. To certify a class under Federal Rule of Civil Procedure 23, a district court must rigorously analyze whether the plaintiff satisfies the rule's requirements. *Blow v. Bijora, Inc.*, 855 F.3d 793, 806 (7th Cir. 2017). Rule 23(a) sets forth four universal requirements for class actions: "numerosity, typicality,

commonality, and adequacy of representation." *Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 811 (7th Cir. 2012). Rule 23(b) then identifies particular types of classes, which have different criteria. Where, as here, certification is sought under Rule 23(b)(3), common questions of law or fact must predominate over individual inquiries, and class treatment must be the superior method of resolving the controversy. *Id.*

In evaluating these factors, the court must go beyond the pleadings and, to the extent necessary, take evidence on disputed issues that are material to certification. *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 377 (7th Cir. 2015); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675–76 (7th Cir. 2001). At this early stage in the litigation, the merits are not on the table. *Abbott*, 725 F.3d at 810 (describing class definition as a "tool of case management"); *Messner*, 669 F.3d at 811 (class certification should not be turned into a "dress rehearsal for the trial on the merits"). Beaton bears the burden of showing that each requirement is met by a preponderance of the evidence. *Steimel v. Wernert*, 823 F.3d 902, 917 (7th Cir. 2016).

We review the district court's class certification orders deferentially, leaving considerable room for the exercise of judgment unless the factual determinations are clearly erroneous or there are errors of law. *Reliable Money Order, Inc. v. McKnight Sales Co., Inc.*, 704 F.3d 489, 498 (7th Cir. 2013).

A

Speedy complains generically that the district court failed to give its evidence adequate attention. We see no basis for that accusation. The court referred to Beaton's pleadings in providing the case's background, and then it considered evidence submitted by Beaton and Speedy. A district court may abuse its discretion by omitting key factual and legal analysis. See *Priddy v. Health Care Serv. Corp.*, 870 F.3d 657, 661 (7th Cir. 2017). But it has no obligation to describe every part of the record.

Speedy also specifically challenges the district court's findings on commonality, typicality, and adequacy of representation for purposes of Rule 23(a). (It concedes that numerosity is not at issue.) We consider each of these in turn.

B

To satisfy the commonality requirement found in Rule 23(a)(2), there needs to be one or more common questions of law or fact that are capable of class wide resolution and are central to the claims' validity. *Bell*, 800 F.3d at 374. The district court identified several such issues:

- Can the customers avail themselves of any implied warranties, or is the Agreement's disclaimer valid?

- What functions did the marketing materials represent that the

software would perform?

- Did the software perform those functions?

Speedy takes exception to some of these questions, but most are amenable to class wide resolution. See *Nikka Traders Inc. v. Gizella Pastry Ltd.* (2012), D.L.R. 4th 120, para. 65 (Can. B.C. Sup. Ct.) (describing the elements of claim for the implied warranty for fitness for a particular purpose); *Dream Carpets Ltd. v. Sandhedrai*, [2009] B.C.W.L.D 5070, para. 68 (Can. B.C. Prov. Ct.) (elements for implied warranty of merchantability); *Dubey v. Pub. Storage, Inc.*, 395 Ill. App. 3d 342, 353 (2009) (same for ICFA). And we can see additional common questions, including whether Speedy typically deals in goods related to this software and whether a reasonable consumer would be deceived by the advertisements' representations. Commonality is easily satisfied.

C

Second, we consider typicality. See Rule 23(a)(3); *Oshana v. Coca Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006). This requires us to evaluate whether Beaton's claims arise from the same events or course of conduct that gives rise to the putative class members' claims. The individual claims may feature some factual variations as long as they "have the same essential characteristics." *Id.* (citation omitted).

The district court thought this requirement

satisfied be cause Beaton "appears to have seen the same representations as the other users of Speedy's free software, and the software appears to operate in the same way on each computer." Unlike Speedy, we do not take exception with the court's use of the word "appears" to describe the match between Beaton's claim and that of the other class members. This semantic choice suggests only that the court's determinations are pre liminary, as they should be. See *Messner*, 669 F.3d at 811.

On the merits, neither of the court's findings reflects an abuse of discretion. We begin with the finding that Beaton saw the same representations as other users. Speedy emphasizes that some customers bought the software through third party platforms, which could advertise as they saw fit. Yet the advertisements in the record, drawn from various sites, feature almost identical language. The class members were thus exposed to the same message (and promises) from Speedy.

Next, we turn to the court's determination that the free trial operated the same way across devices. Based on a review of the free trial's source code, Beaton's expert, Snead, concluded that the software was programmed to operate uniformly on all PCs, independent of any differences among individual devices. He asserted that the software universally reported "problems" and "errors," mislabeled innocuous and routine features, and issued a low performance rating before any scan had begun. In his view, the scan failed to account for factors that do

influence a device's performance, and it incorporated factors that have no impact. Speedy's senior director of technical operations confirmed that the scan identified as problems characteristics that might not affect performance.

Speedy asks us to reject this evidence because Snead examined only the source code for the free trial's scanning portion, as opposed to the scanning or repair portions of the licensed software. It is not clear how similar the two scanning programs are, but that does not matter for our purposes. The district court was entitled to credit the evidence indicating that the free trial scan software did not differentiate between devices before declaring them to be in "critical condition." This is sufficient to show that Beaton's claims are typical. He focuses on Speedy's uniform (alleged) misrepresentation of computer health to induce users to buy its product. Though Speedy issued 19 different versions of the software during the class period, Snead opined that "the primary features and functionality remained consistent" across versions. Speedy's expert, Myers, disagreed with Snead's conclusions, and the company pointed to positive survey responses and third party reviews to argue that Beaton's experience was atypical. But that just indicates that there are merits issues to be resolved. For class certification purposes, the district court needed only to find by a preponderance of the evidence that the software scanned Beaton's device in the same way as it scanned other class members' computers. We see no reason to reject its conclusion.

But, Speedy argues, the district court did not say out loud that it weighed both expert reports and found Snead's conclusions more persuasive. In fact, the court did not mention Myers's report at all. Speedy sees this as a glaring omission be cause the court had yet to rule on the Rule 702 cross motions. It points out that a district court should not certify a class, and thereby raise the stakes of the litigation, based on faulty opinion evidence. Instead, it "must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion," if the "expert's report or testimony is critical to class certification." *Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 814–15 (7th Cir. 2010). Speedy concludes that the court erred by not doing so.

If this was error (a point we need not resolve), it was harm less. See *Messner*, 669 F.3d at 814. In its Rule 702 ruling, the district court made clear that it had considered only the expert testimony it later deemed admissible. Speedy gives us no reason to doubt the district court's assurance. And it is also worth recalling that the district court permitted additional merits discovery after its certification decision. Had Speedy wished to pursue the expert qualifications issue further, it could have done so. We thus find no abuse of discretion in the court's ruling on typicality.

D

The last requirement is adequate representation. See FED. R. CIV. P. 23(a)(4). A named plaintiff must be a member of the putative class and

have the same interest and injury as other members. *Conrad v. Boiron, Inc.*, 869 F.3d 536, 539 (7th Cir. 2017). A representative might be inadequate if he is subject to a substantial defense unique to him. *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 726, 728 (7th Cir. 2011).

The district court generously characterized Speedy's adequacy challenge as "scattershot." We need not catalog every objection Speedy raises, but we have considered all of them, and we will mention a few. First, Speedy claims Beaton is not actually a class member because he did not purchase the software as an individual. It cites the credit card statement billing the charge to Beaton's business, Chlorine Free Products Association, for which he was the sole shareholder. But Beaton averred in his declaration that he purchased the software for a laptop that he personally owned and used for primarily personal reasons. The software subscription was in Beaton's name. The district court did not clearly err in finding that Beaton purchased the software in his personal capacity.

Next, Speedy accuses Beaton of spoliating evidence—an act that (it says) makes him an inadequate representative. But spoliation is a harsh word for what happened (or so the district court could conclude). Beaton deleted a potentially use ful email and took his laptop to an IT professional for repairs, where his data were lost when the hard drive was reformatted. The district court rejected Speedy's interpretation of this incident when it denied Speedy's

motion for sanctions. It found as a fact that Beaton did not intend to destroy evidence. Speedy offers no reason for us to revisit that conclusion.

Speedy also launches a multi-part attack on Beaton's credibility. It makes much ado of Beaton's decades old manslaughter conviction. But assaults on the credibility of a named plaintiff must be supported by *admissible* evidence. *Id.* at 728. Wholly unrelated criminal history does not fit that bill. See FED. R. EVID. 609(b) (a conviction's probative value must substantially outweigh its prejudicial effect in order to introduce it to impeach a witness over 10 years after his release); *e.g.*, *United States v. Rogers*, 542 F.3d 197, 201 (7th Cir. 2008).

Beaton's various "lies" during discovery underlie Speedy's next attempt to discredit him. Some of these alleged discrepancies are minor, such as his omitting a marijuana conviction when asked about his criminal background. Beaton's supposed inconsistency in describing his laptop usage—that he uses his laptop primarily for personal reasons but also for business ones—is nothing of the sort; in fact, his statements are consistent. Speedy does, however, point out one relevant discrepancy. In both the complaint and his first set of interrogatories, Beaton professed to have purchased the software for $39.94, while his credit card statement says that he paid only $9.97. The district court did not abuse its discretion, how ever, in concluding that Beaton's credibility was not *severely* undermined by this detail. See *CE Design*, 637 F.3d at 728. We see no reason to disturb the court's

determination that Beaton was an acceptable class representative.

Speedy also throws barbs at plaintiff's counsel, Edelson PC, citing allegations of wrongdoing made against the firm in another case. Yet Speedy points to no evidence that Edelson is unqualified, has created a conflict between the firm and the putative class, or has violated a specific ethical rule. Speedy may dislike Edelson PC, and we can assume it is not a fan of class actions, but "general distaste for the class action device" will not preclude certification. *Mejdrech v. Met Coil Sys. Corp.*, 319 F.3d 910, 912 (7th Cir. 2003). Nothing in this record persuades us to consider Speedy's request for sanctions under Federal Rule of Appellate Procedure 38. The request is, in any event, procedurally irregular: Rule 38 requires sanctions requests to be filed in separate motions, see *Vexol, S.A. de C.V. v. Berry Plastics Corp.*, 882 F.3d 633, 638 (7th Cir. 2018), and it does not contemplate sanctions against *appellees*.

IV

After clearing the hurdles posed by Rule 23(a), a person wishing to bring a class action must also demonstrate that the action fits under one of the three subsections of Rule 23(b). As we said, the only one that applies to Beaton is Rule 23(b)(3), the common question variant. It requires the putative class representative to show that questions of law or fact common to the class members predominate, and that the class device is the superior method for adjudicating

those claims.

A

The guiding principle behind predominance is whether the proposed class's claims arise from a common nucleus of operative facts and issues. *Messner*, 669 F.3d at 815. This requires more than a tally of common questions; the district court must consider their relative importance. *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014). On the other hand, not every issue must be amenable to common resolution; individual inquiries may be required after the class phase. *Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 922 (7th Cir. 2016).

Speedy identified 10 individual issues that allegedly defeated predominance. The district court was not persuaded. It found that some were best addressed on a class wide basis, and they outweighed the remaining individualized inquiries.

The district court did not abuse its discretion in so concluding. For example, it will be easy to ascertain from whom the class members purchased the software. The court found that they all bought it through the portal at the end of the free trial that redirected customers to two payment platforms. Similarly, the court found that users saw the same representations about the software's capabilities, and so a common answer to the question whether a reasonable customer would be deceived is possible. And based on the court's preliminary determination that the software's

diagnostic mechanisms operated uniformly across devices, the trier of fact could reach a single answer on the software's functionality and value. Speedy insists that the court needs to inquire individually about each customer's level of satisfaction with the product. But dissatisfaction is not an element of any of the certified claims. If the product truly serves none of its functions, its users' subjective satisfaction is likely evidence of misrepresentation, not that the users were not harmed. See *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 750–51 (7th Cir. 2011) (purchasers suffered financial loss by paying more for products than they would have had they known the products' true quality).

Admittedly, some individualized questions remain. For instance, what was the class member's purpose (business or personal?) in buying the software? Did the class member seek a refund? What are each customer's damages? Speedy reminds us that we have frowned upon class treatment as a poor fit for warranty and fraud claims because they can involve so many individualized issues. See *Szabo*, 249 F.3d at 674. But these theories do not automatically fail the predominance test. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (certain consumer fraud cases readily establish predominance); *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 759– 60 (7th Cir. 2014) (the fact that "[e]very consumer fraud case involves individual elements" does not preclude class actions). Speedy misreads Supreme Court precedent in arguing that *liability* with regard to all class members must be resolved in a single stroke. See *Wal-Mart*

Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (requiring resolution in "one stroke" of a "common contention" central to the common claim); see also *Suchanek*, 764 F.3d at 759–60; *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010).

The district court recognized that individualized inquiries could be handled through "streamlined mechanisms" such as affidavits and proper auditing procedures. We agree. Defendants' due process rights are not harmed by such case management tools. *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 667–72 (7th Cir. 2015). Speedy's attempts to distinguish *Mullins* as merely about proving class membership, and not liability, are unavailing. The company makes the obvious point that it can neither cross examine an affidavit nor depose every class member. But Speedy will still have the opportunity to challenge the class members' credibility. See *Mullins*, 795 F.3d at 671. It can obtain the testimony of a representative sample of the class members and, if necessary, present evidence contradicting statements found in particular affidavits.

Speedy also contends that there is a fatal lack of uniformity in the purpose for which each person acquired its software. We do not see that as a barrier to class treatment, however. It is true that the law of British Columbia insists that a particular purpose be brought clearly to the seller's attention. Compare *Kobelt Mfg. Co. v. Pac. Rim Engineered Prods. (1987) Ltd.* (2011), 84 B.L.R 4th 189, para. 104 (Can. B.C. Sup. Ct.) (leaky brakes did not violate an implied warranty because no implied communication that

purchasers intended to use the brakes on drawworks), with *Wharton v. Tom Harris Chevrolet Oldsmobile Cadillac Ltd.* (2002), 97 B.C.L.R. 3d 307, para. 59–60 (Can. B.C. App. Ct.) (buzzing sound system violated implied warranty where salesman knew purchasers wanted a luxury vehicle). But we do not see that flaw here. The people who used the free trial and then bought SpeedyPC Pro were all concerned about the health and performance of their computers. Why they owned a computer is beside the point. To the extent it is relevant, each user's specific reason for buying the software can be established through affidavits, subject to the defendant's right to challenge them with evidence.

B

Finally, the district court had several reasons for concluding that a class action was the superior way to resolve this dispute. All are well supported. First, common questions of fact and law predominate. Speedy insists that we should categorically reject class treatment for implied warranty and consumer fraud claims because of the choice of law clause. See, *e.g.*, *Szabo*, 249 F.3d at 674; *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002). But that makes no sense here, since all parties agree that British Columbia law controls for the nationwide class and Illinois law for the subclass. And there is no risk of inconsistent rules with respect to recognition of the contractual choice of law clause, because that fol lows the forum, Illinois. See *Martin v. Reid*, 818 F.3d 302, 308 (7th Cir. 2016).

Second, the amount of damages to which each plaintiff would be entitled is so small that no one would bring this suit without the option of a class. *Suchanek*, 764 F.3d at 759–60. "Rule 23(b)(3) was designed for situations such as this, in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006). The fact that others have not sued over this software is more likely because "only a lunatic or a fanatic sues for $30," *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004), than it is because the software is flawless. Consumer class actions are a crucial deterrent against the proliferation of bogus products whose sticker price is dwarfed even by a court filing fee (now $400 for a civil case in federal district court). Though punitive damages may also deter, few litigants would risk filing suit on the off-chance that punitive damages would be recovered after years of litigation. See *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 677–78 (7th Cir. 2013). The district court did not abuse its discretion in finding the class action device superior.

V

Defendants spend much time and money fighting Rule 23 certifications to the hilt. Yet "certification is largely independent of the merits … and a certified class can go down in flames on the merits." *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010). We say this not to imply that the merits in this case favor either party, but simply to remind

defendants that the class action glass is sometimes half-full: dismissed claims of a certified class end litigation once and for all. That, after all, is why settlement classes are so popular.

Finding no abuse of discretion in the district court's decisions to certify the nationwide class and the Illinois subclass, we AFFIRM the court's certification orders.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS
EASTERN DIVISION

ARCHIE BEATON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

No. 13-cv-08389
Judge Andrea R. Wood

SPEEDYPC SOFTWARE, a British Columbia company,

Defendant.

MEMORANDUM OPINION

Plaintiff Archie Beaton ("Beaton") has sued Defendant SpeedyPC Software ("SpeedyPC"), a Canadian computer software company, claiming that it engaged in fraudulent and deceptive marketing of SpeedyPC Pro, a software product that SpeedyPC claims diagnoses and repairs various computer errors, optimizes computer performance, and protects computers from malware. SpeedyPC's customers would first run a diagnostic scan using its free software. After receiving the results of the scan, customers would be invited to purchase SpeedyPC's

premium software, SpeedyPC Pro—and many of them accepted that invitation. Beaton claims to be one such customer. He claims that he purchased SpeedyPC's software and installed it on his laptop computer, but the software did not satisfy SpeedyPC's promises. As result, according to Beaton, SpeedyPC breached implied warranties of fitness for a particular purpose and merchantability and committed fraudulent misrepresentation under various consumer protection laws. Now under the Court's consideration is Beaton's motion to certify a class and subclass of purchasers of SpeedyPC's software. For the reasons discussed below, the Court grants Beaton's motion to certify the class and also grants the request to certify a subclass but with a modified class definition.

BACKGROUND

This putative class action arises out of Beaton's purchase of a license to use the SpeedyPC's software. SpeedyPC promotes its software through online advertisements and on websites as being capable of increasing computer speed and performance, removing harmful computer errors, and protecting users' privacy and security. (Compl. ¶ 15, Dkt. No. 1.) Beaton alleges that these representations do not reflect the software's true capabilities. (*Id.* ¶ 22.) Instead, the software has two main functions: first, it is a registry cleaner;[1] and

[1] Registry cleaner software is a type of utility program designed to remove unwanted or redundant items from the Microsoft Windows operating system registry. The "registry" is a database of configuration settings that help facilitate the operation of

second, it removes superfluous "temporary" files from a user's hard drive. (*Id.*) According to Beaton, these functions "do not come close to squaring with SpeedyPC's representations about the functionality of SpeedyPC Pro." (*Id.*)

Beaton claims that SpeedyPC engages in a deceptive marketing scheme to induce consumers to purchase the premium version of its software. Online ads for the premium version of the software promise that the software can, among other things, "[b]oost your PC's speed and performance," "[f]ind your PC's performance potential," and "improve[] your PC's health." (*Id.* ¶ 16.) Consumers who click on one of SpeedyPC's advertisements are directed to one of SpeedyPC's websites, which warns consumers about various risks to their computers. (*Id.* ¶ 17.) The websites recommend that consumers download the trial version of the software to detect issues that the product is supposedly designed to identify and fix. (*Id.* ¶ 24.) Once a consumer downloads and runs the trial version of the software, it displays hundreds or thousands of serious problems that it claims are affecting the computer and "require attention." (*Id.* ¶ 28.) After presenting the results of the diagnostic scan, the software displays to the user a half-page warning with bold red letters stating: "SpeedyPC Pro has determined that your computer requires immediate attention!" and is in "Serious" or "Critical" condition. (*Id.* ¶ 29.) The user is then given the option to purchase the premium version of the software to fix

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computer applications in the operating system. (*Id.* ¶ 21 n.1.)

and repair the supposedly harmful errors that have been detected. (*Id.*)

In August 2012, while browsing the Internet for software to repair and optimize his computer, Beaton encountered one of SpeedyPC's ads. (*Id.* ¶ 42.) Based on various representations made in the ad, Beaton went to one of SpeedyPC's websites, which presented more representations regarding the utility of the software. (*Id.* ¶ 43.) Beaton includes in his Complaint screenshots of several of these representations. One such screenshot makes the claim that the software can "clean and optimize your computer for peak performance." (*Id.* ¶ 43 fig. 10.) Based on SpeedyPC's representations, Beaton downloaded and installed the software. (*Id.* ¶ 44.) The software scanned Beaton's computer and reported that it detected hundreds of serious errors, some of which were causing damage to the computer. (*Id.* ¶ 45.) The software warned Beaton that these problems were decreasing his computer's performance and compromising his security, and urged him to purchase the software to "fix" the problems. (*Id.*) Beaton clicked on a button labeled "Fix All," which forwarded him to a SpeedyPC website that urged him to register the software to fix the problems identified. (*Id.* ¶ 46.) After reaching the registration webpage, SpeedyPC again represented to Beaton that it "detected some problems that needed to be fixed" and instructed him to "Register SpeedyPC Pro now!" (*Id.* (citing ¶ 43 fig. 10).) Relying on these representations about the software's capabilities and his computer's condition, Beaton paid to activate the software and repair the purported errors. (*Id.* ¶ 47.)

After he downloaded the software, every time Beaton ran it, the software reported harmful errors that were adversely affecting his computer and that he needed to fix. The software continued to report harmful errors even though Beaton repeatedly ran the program and "fixed" any errors that were found. (*Id.* ¶ 49.) Beaton's computer performance did not improve despite his repeatedly running the software's scan. (*Id.*)

In addition to his personal experience with the software, Beaton, through his attorneys, also engaged an expert to examine it. (Ex. 6 to Pl.'s Mot. to Certify Class at 4, Dkt. Nos. 125-6 & 127-3.) The expert concluded that the diagnostic function of SpeedyPC's software is designed to report that a computer has "low" performance without conducting any diagnosis, scan, or analysis of the user's computer. (*Id.* at 21.) Beaton's expert further concluded that supposed errors identified by the software were not in fact credible threats to a computer's functionality. (*Id.* at 22.)

DISCUSSION

To be certified, a proposed class must satisfy the four requirements of Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy of representative"). Fed. R. Civ. P. 23(a). If Rule 23(a) is

satisfied, the proposed class must then fall within one of the three categories in Rule 23(b), which the Seventh Circuit has described as: "(1) a mandatory class action (either because of the risk of incompatible standards for the party opposing the class or because of the risk that the class adjudication would, as a practical matter, either dispose of the claims of non-parties or substantially impair their interests), (2) an action seeking final injunctive or declaratory relief, or (3) a case in which the common questions predominate and class treatment is superior." *Spano v. Boeing Co.*, 633 F.3d 574, 583 (7th Cir. 2011).

I. Definitions of Class and Subclass

Beaton first proposes as the Class:

> All individuals living in the United States who downloaded a free trial of SpeedyPC Pro and thereafter purchased the full version between October 28, 2011 and November 21, 2014.

On behalf of the Class, Beaton seeks to litigate contractual warranty claims for breaches of the implied warranties of fitness for a particular purpose and merchantability. These claims arise under British Columbia law.

Beaton also proposes as the Subclass:

> All Class members who reside in Illinois, California, Colorado, Florida,

> New York, Oregon, Alabama, Tennessee, New Jersey, North Carolina, New Hampshire, Hawaii, Vermont, Massachusetts, Michigan, and Washington, D.C.

On behalf of the Subclass, Beaton seeks to litigate claims for fraudulent misrepresentation under the consumer-protections laws of each of the respective jurisdictions. The Court observes that, apart from identifying the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1, *et seq.*, Beaton has not identified the laws of any of the other jurisdictions under which he seeks to assert the Subclass's claim. Beaton apparently has in mind the similar consumer-protection laws of these jurisdictions, but the Court is unable to divine what statutes Beaton has in mind. This is problematic because the applicable statutes may have different elements, different statutes of limitation, and different damages that are available. Beaton, as Plaintiff, bears the burden of proving that class certification is appropriate, *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993), and without identifying the statutes underlying the Subclass claims Beaton has not satisfied this burden. Thus, for purposes of this motion the Court will deny the motion to certify this Subclass and instead restrict the Subclass to the Revised Subclass consisting of "all Class members who reside in Illinois."

For both the Class's and Revised Subclass's claims, Beaton's basic theory is that the free version of

SpeedyPC's software "blindly report[s]" that the customer's computer has low performance, thereby inducing the customer to purchase the premium version of SpeedyPC's software that ultimately confers no benefit on the customer. Consequently, Beaton moves to certify both the Class and Revised Subclass under Rule 23(b).

II. Analysis under Rule 23(a)

A. Preliminary Considerations on Class Propriety

SpeedyPC raises two preliminary concerns for why class certification should be denied. First, SpeedyPC claims that Beaton's proposed Class is improper as the definition in his motion for class certification differs from the definition in his Complaint. But nothing prevents this Court from considering a revised definition or, indeed, *sua sponte* revising the definition of a proposed class. *Green v. Serv. Master on Location Servs. Corp.*, No. 07-cv-4705, 2009 WL 1810769, at *3–4 (N.D. Ill. June 22, 2009) (revising class definition *sua sponte*); *Kress v. CCA of Tenn., LLC*, 272 F.R.D. 222, 232 (S.D. Ind. 2010) ("[T]he Court has broad discretion to modify the class definition if necessary." (citing *Harden v. Raffensperger, Hughes & Co., Inc.*, 933 F. Supp. 763, 769 n.5 (S.D. Ind. 1996) (modifying class definition *sua sponte*))). Here, there is no prejudice to SpeedyPC in this Court's consideration of Beaton's revised class definition and doing so is in the interests of judicial economy.

Second, SpeedyPC argues that Beaton's Class definition is vague. In particular, SpeedyPC states that the phrase "living in the United States" does not specify a time period. As such, it is not clear whether "an individual living in Ireland [who] purchased the software in 2013 and since that time has moved to Wisconsin" is in Beaton's proposed Class. (Def.'s Resp. to Pl.'s Mot. for Class Cert. at 8, Dkt. No. 135.) In his response, Beaton clarifies that this phrase means "the class individuals [of] who purchased the product while living the United States."[2] (Pl.'s Reply at 4 n.1, Dkt. No. 151.) With this revision, the Court concludes that any potential vagueness has been cured.[3]

B. Numerosity

SpeedyPC's records reflect that over 574,000 individuals downloaded the free trial of SpeedyPC's software before purchasing the full version of SpeedyPC's software. (Ex. 14 to Memo. to Pl.'s Mot. to Certify Class at 1, Dkt. No. 125-14.) The Revised

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[2] SpeedyPC does not raise the vagueness concern with respect to the proposed Subclass, but the Court will assume that the phrase in the Revised Subclass "who reside in Illinois" similarly refers to Class members who purchased the software when they lived in Illinois.

[3] SpeedyPC also complains that it is unsure whether the Class includes "[a]ll individuals and entities"—as stated in Beaton's Complaint—or just "[a]ll individuals"—as stated in Beaton's motion for class certification. Beaton does not respond to this point in its reply brief. As such, the Court will use Beaton's revised definition, which simply says "[a]ll individuals."

Subclass has over 19,000 individuals. (Ex. 5 to Pl.'s Mot. to Supp. Mot. for Class Cert. at 1, Dkt. No. 171-5.) These numbers are sufficiently large to make joinder impracticable with respect to both the Class and Revised Subclass. *See, e.g.*, *Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 859 (7th Cir. 2017) ("While there is no magic number that applies to every case, a forty-member class is often regarded as sufficient to meet the numerosity requirement."). Thus, both the Class and Revised Subclass are sufficiently numerous under Rule 23.

C. Commonality

"For class certification, only one question of law or fact common to the class is required. However, some factual variations among class members' experiences will not defeat class certification when the legal issues are the same for all. The central issue is the same for all when defendants have engaged in standardized conduct toward members of the proposed class. Accordingly, [c]lass actions . . . cannot be defeated on commonality grounds solely because there are some factual variations among the claims of individual members." *Kazarov v. Achim*, No. 02cv-5097, 2003 WL 22956006, at *5 (N.D. Ill. Dec. 12, 2003) (internal citations omitted and alterations in original); *Rosario v. Livaditis*, 963 F.2d 1013, 1017 (7th Cir. 1992) ("The fact that there is some factual variation among the class grievances will not defeat a class action.").

Here there are undoubtedly questions of law and fact that are common to the Class and Revised

Subclass. The Class's contractual warranty claims raise legal questions about whether customers can avail themselves of these warranties or whether they have been disclaimed by the End User License Agreement accompanying SpeedyPC's software. These claims will also include factual questions about what function SpeedyPC's software was marketed as performing, whether the software did in fact perform that function, whether customers expressly or impliedly made known that they were purchasing the software for that purpose, and whether customers were harmed. *See, e.g.*, British Columbia Sale of Goods Act, RSBC 1996, Ch. 410, §18(a) ("[I]f the buyer or lessee, expressly or by implication, makes known to the seller or lessor the particular purpose for which the goods are required, so as to show that the buyer or lessee relies on the seller's or lessor's skill or judgment, and the goods are of a description that it is in the course of the seller's or lessor's business to supply, whether the seller or lessor is the manufacturer or not, there is an implied condition that the goods are reasonably fit for that purpose."). And these factual questions also arise with respect to the Revised Subclass's ICFA claims. *See Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 593 (Ill. 1996) ("The elements of a claim under the Illinois Consumer Fraud Act (815 ILCS 505/2 (West 1994)) are: (1) a deceptive act or practice by defendant; (2) defendant's intent that plaintiff rely on the deception; and (3) that the deception occurred in the course of conduct involving trade and commerce.").

D. Typicality

Beaton's claims appear to be entirely typical of the other Class and Revised Subclass members' claims. In interacting with SpeedyPC's free software, Beaton appears to have seen the same representations as the other users of SpeedyPC's free software, and the software appears to operate in the same way on each computer. (Ex. 6 to Pl.'s Mot. to Certify Class at 4–5, Dkt. Nos. 125-6 & 127-3.) SpeedyPC does not point to any counterexamples in which different customers saw different representations or the software functioned differently on one type of computer than another. Rather SpeedyPC contends that, in Beaton's deposition, he conceded that his experience with SpeedyPC's software was different than that of other customers. To this end, SpeedyPC cites Beaton's deposition testimony where SpeedyPC's counsel showed Beaton an anonymous positive internet review of SpeedyPC's software and he responded, "I'm just going on my own experience. My own experience does not coincide with this individual's response or his computer." (Def.'s Resp. to Pl.'s Mot. for Class Cert. at 10, Dkt. No. 135 (citing Ex. D to Def.'s Resp. to Pl.'s Mot. for Class Cert. at 116, Dkt. No. 137).) This does not constitute a concession by Beaton that his experience with SpeedyPC's software was different from others. Beaton's response implied that he had no knowledge of the posting individual's experience. As such, he was simply saying that because he had a negative experience with SpeedyPC's software, he differed in opinion from the anonymous positive internet review he was shown. Nowhere did he concede that SpeedyPC's software ***functioned*** differently for other people or computers. Thus, SpeedyPC has

provided no reason to think that Beaton's claims are atypical.

E. Adequacy of Representative and Counsel

"To determine whether the class representatives will adequately represent the class as a whole, courts examine whether: (1) the representatives have antagonistic or conflicting claims with the other class members; and (2) the counsel for named plaintiffs can sufficiently represent the class." *Birnberg v. Milk St. Residential Assocs. Ltd. P'ship*, No. 02 V 0978, 2003 WL 21995177, at *2 (N.D. Ill. Aug. 20, 2003) (citing *Retired Chicago Police Assoc. v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993)). SpeedyPC takes a scattershot approach to arguing that Beaton and his counsel, Edelson, P.C., are inadequate, arguing: (1) Beaton was convicted of felony manslaughter; (2) Beaton is not credible; (3) Beaton did not purchase the software, but rather his business purchased the software; (4) Beaton does not represent Class members who were satisfied with the software; (5) Beaton committed spoliation of evidence; and (6) opposing counsel in other cases have accused Edelson of sanctionable conduct and incompetence.[4] The Court considers each of these arguments in turn.

[4] SpeedyPC also argues that Beaton cannot represent members of his proposed Subclass who reside outside of Illinois. Because the Court has revised the definition of Beaton's Subclass to include members of the Class who reside in Illinois, this argument is moot.

First, the Court rejects SpeedyPC's argument that Beaton's felony conviction and allegedly false deposition testimony renders him inadequate as a class representative. Beaton's felony manslaughter conviction stems from conduct occurring over 30 years ago, and in any event does not bear any relation to this case. There is no bar on felons being class representatives. *Streeter v. Sheriff of Cook Cty.*, 256 F.R.D. 609, 613 (N.D. Ill. 2009). Moreover, SpeedyPC has not explained how Beaton's conviction differentiates him from other class members or makes his interests different from or antagonistic to the other class members.And Beaton's purportedly "false" deposition testimony in connection with this lawsuit is not nearly as clear or provocative as SpeedyPC suggests.

Second, the Court finds unpersuasive SpeedyPC's recitation of purported lies that Beaton told. For example, SpeedyPC points to Beaton's assertion in his declaration that he used his laptop "primarily for personal use" as contradicting his deposition testimony that it was used for both business and personal use. (Def.'s Resp. to Pl.'s Mot. for Class Cert. at 20, Dkt. No. 135 (citing Ex. 15 to Pl.'s Memo. in Supp. of Class Cert. ¶ 3, Dkt. No. 125-15 (January 27, 2017 declaration); Ex. D to Def.'s Resp. to Pl.'s Mot. for Class Cert. at 51, Dkt. No. 137 (July 28, 2016 deposition testimony)).) But these statements are not contradictory at all—it is possible to use a laptop for both business and personal use, but still use it primarily for personal use. Another example SpeedyPC highlights is that Beaton alleged in his Complaint and

sworn interrogatory responses that he paid $39.94 for SpeedyPC's premium software; but documents Beaton produced showed that he paid $9.97 for the software. (*Id.* at 20 (citing Compl. ¶ 38, Dkt. No. 1; Ex. E to Def.'s Resp. to Pl.'s Mot. for Class Cert. at 4 of 9, Dkt. No. 138 (produced document)).) But that appears to have simply been a mistaken assertion in his Complaint, which was corrected by Beaton's production of documents. Finally, SpeedyPC claims that Beaton originally testified at his deposition that no one performed any maintenance on his laptop, but later in his response to SpeedyPC's motion for sanctions Beaton explained in a declaration that he had his laptop reformatted by an IT expert. (*Id.* at 20–21 (citing Ex. D to Def.'s Resp. to Pl.'s Mot. for Class Cert. at 59, Dkt. No. 137 (July 28, 2016 deposition testimony); Decl. to Pl.'s Memo. in Opp. to Mot. for Sanctions ¶ 3, Dkt. No. 133-2).) This apparent contradiction again appears to be the product of an uncharitable reading of Beaton's deposition testimony. SpeedyPC's counsel asked Beaton about his normal use of his laptop. (Ex. D to Def.'s Resp. to Pl.'s Mot. for Class Cert. at 59, Dkt. No. 137.) In the course of this questioning, Beaton responded that he performed maintenance on the laptop himself and he did not take the laptop to anybody else to have maintenance done. (*Id.*) Beaton did take the laptop to an IT professional, but only after he stopped using this laptop and instead was using his other computers. (Mem. in Supp. of Def.'s Mot. for Sanctions at 2–3, Dkt. No. 114.) Thus, when Beaton was answering SpeedyPC's counsel's queries about his maintenance of the laptop, it is plausible that he was referring to his routine conduct,

and not whether he had ever taken it to service. All in all, SpeedyPC has not provided any persuasive reason to think that Beaton is not credible or that any issues with his credibility require his removal as class representative. *See, e.g.*, *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 728 (7th Cir. 2011) ("[F]ew plaintiffs come to court with halos above their heads; fewer still escape with those halos untarnished. For an assault on the class representative's credibility to succeed, the party mounting the assault must demonstrate that there exists admissible evidence so severely undermining plaintiff's credibility that a fact finder might reasonably focus on plaintiff's credibility, to the detriment of the absent class members' claims." (internal quotations omitted)).

SpeedyPC's third argument is similarly unpersuasive. SpeedyPC argues that Beaton's business, the Chlorine Free Products Association ("CFPA"), actually bought the software, not Beaton. As such, SpeedyPC's argument is that Beaton does not possess any claims against SpeedyPC; those would belong to CFPA. And because CFPA is not an individual, it would not fit in the definition of the Class or Revised Subclass. In support of this argument, SpeedyPC points out that Beaton used his business's credit card to purchase the software from Speedy, therefore the business was the actual purchaser of the software. But Beaton owns that business, Beaton purchased the software under his own name, and Beaton indicated that the software was used for his personal purposes. (Ex. D to Def.'s Resp.

to Pl.'s Mot. for Class Cert. at 116, Dkt. No. 137 (Beaton stating that he started his own company CFPA); Ex. 10 to Memo. to Pl.'s Mot. to Certify Class at 1, Dkt. No. 125-10 (indicating that Beaton was the customer of the SpeedyPC premium software purchase); Ex. 15 to Memo. to Pl.'s Mot. to Certify Class at 1, Dkt. No. 12515 (Beaton declaring he used the software primarily for personal purposes).) Under these circumstances the Court declines to find that Beaton did not purchase the software himself.

SpeedyPC's argument that Beaton does not seek to represent people who were satisfied with SpeedyPC's software is simply mistaken. SpeedyPC mischaracterizes Beaton's testimony: Beaton never says that he does not wish to represent people satisfied with SpeedyPC's software; in fact, Beaton expressly states that he wishes to represent them. (Ex. D to Def.'s Resp. to Pl.'s Mot. for Class Cert. at 107, Dkt. No. 137 ("If the individuals have had the same program that I bought[,] . . . I would like to represent them. . . . Regardless [of whether they are satisfied,] I would only assume that they had suffered the same way I have.").) Importantly, even if customers were satisfied with SpeedyPC's software, they might still have a claim against SpeedyPC. Dissatisfaction with the software does not appear to be an element of the contractual warranty claims or the ICFA. Insofar as people satisfied with SpeedyPC's software have claims, Beaton is clearly willing to represent them.

Regarding SpeedyPC fifth argument, SpeedyPC simply states that it brought a motion for sanctions for

spoliation of evidence and that his alleged spoliation renders Beaton inadequate as a class representative. The Court has rejected SpeedyPC's motion for sanctions for spoliation of evidence. (Order at 4–5, Dkt. No. 184.) These allegations relate to Beaton engaging the help of an IT professional to fix his computer, which resulted in the reformatting of the hard drive of the laptop on which SpeedyPC's software was downloaded. (*Id.* at 4.) The Court determined that SpeedyPC had not shown that Beaton reformatted his hard drive to destroy evidence. (*Id.* at 5.) Speedy PC offers no other reason why Beaton's conduct in reformatting his laptop's hard drive renders him inadequate as a class representative. Thus, given the Court's ruling denying the motion for sanctions, the Court also rejects SpeedyPC's argument that Beaton is inadequate as a class representative on the basis of the purported spoliation of evidence.

Finally, the fact that opposing counsel in other cases have accused Edelson of sanctionable conduct and incompetence does not disqualify them as class counsel. SpeedyPC only trudges up adversarial claims against Edelson—SpeedyPC has not pointed to any judicial rulings on those adversarial claims. The most SpeedyPC does is point out that in another class action case against Speedy, *Bastion v. SpeedyPC Software*, Case No. 3:12-cv-04739 (N.D. Cal.), Edelson had to change the named plaintiff and then subsequently voluntarily dismissed its complaint. (Def.'s Resp. to Pl.'s Mot. for Class Cert. at 22, Dkt. No. 135.) In essence, SpeedyPC asks this Court to disqualify Edelson from class-action litigation for once

voluntarily dismissing a case. That is not enough and thus the Court rejects the request. Based on a review of the dockets of the cited Edelson matters and Edelson's conduct in this matter, the Court has not seen anything indicating Edison lacks the competence to adequately litigate this case. Thus, the Court finds that Beaton and his counsel Edelson are adequate representatives of the Class and Revised Subclass.

Consequently, the Court finds that Beaton's proposed Class and Revised Subclass meet the requirements of Rule 23(a).

III. Analysis under Rule 23(b)

Based on Beaton's motion, it appears that Beaton seeks to litigate this class action under Rule 23(b)(3), which states:

> A class action may be maintained if Rule 23(a) is satisfied and if . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the

> prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). Thus, the Court considers whether questions of law or fact common to the Class and Revised Subclass claims predominate and whether a class action is superior to other available methods for fairly and efficiently adjudicating the Class and Revised Subclass claims.

A. Predominance of Common Questions

"Generally, predominance is satisfied when common questions represent a significant aspect of [a] case and . . . can be resolved for all members of [a] class in a single adjudication. In other words, common questions can predominate if a common nucleus of operative facts and issues underlies the claims brought by the proposed class. The presence of some individual questions is not fatal, but individual questions cannot predominate over the common ones." *Kleen Prod. LLC*

v. Int'l Paper, 306 F.R.D. 585, 593 (N.D. Ill. 2015) (internal quotations and citation omitted and alteration in original). As discussed, there are common questions of law and fact to the Class and Revised Subclass. SpeedyPC does not address these common questions, but rather poses ten material questions that it claims require individual attention such that they would predominate over the common questions relating to the Class and Revised Subclass:

> (1) Who did the class member purchase the software from?
> (2) Was the software purchased primarily for business or personal use?
> (3) Did the software work?
> (4) Was the class member deceived into purchasing the software?
> (5)What was the value of the software as promised to the class member?
> (6) What was the value of the software as delivered to the class member?
> (7) Did the class member provide notice of its claim to Speedy?
> (8) Is the class member's claim time barred?
> (9) Did the class member request a refund?
> (10) Was a refund issued to the class member?

The Court disagrees and does not find that these questions predominate over the common questions that relate to the Class and Revised Subclass.

Question (1) is best addressed through a common proceeding because the evidence shows that the class members purchased the premium version of SpeedyPC's software through the free version's portal and were directed to one of two payment processors. (Ex. 9 to Memo. to Pl.'s Mot. to Certify Class at 24, 39, Dkt. No. 125-9.) Thus, if SpeedyPC intends to argue that this does not result in the requisite privity to ground the class's contractual warranty claims, that argument can be resolved for the entire class through one proceeding.

Similarly, questions (3), (4), (5), and (6) too can be addressed through a common proceeding, because each of these questions is intricately related to SpeedyPC's representations about the software and the function of the software. Beaton alleges that SpeedyPC's software did not properly diagnose problems with computers and therefore did not confer any benefit on customers of SpeedyPC's premium software product. This claim can be resolved in a common proceeding, because, as discussed, the Class members received the same software product, the software appears to operate in the same way on each computer, and all of the Class members were exposed to the same representations in SpeedyPC's free software. Moreover, even if there are differing individual damages based on the impact of SpeedyPC's software on each Class and Revised Subclass member's computer, such damages issues do not predominate over the common issues concerning the representations and operation of SpeedyPC's software. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 671 (7th Cir. 2015)

("It has long been recognized that the need for individual damages determinations at [a] later stage of the litigation does not itself justify the denial of certification."); *see also Kalow & Springut, LLP v. Commence Corp.*, 272 F.R.D. 397, 407 (D.N.J. 2011) (granting certification in computer software class action case and ruling that the presence of differing individual damages did not bar certification because class issues still predominated).

Questions (2), (7), (8), (9), and (10) are questions that may require individual responses and evidence, but they do not predominate over the common questions relevant to the Class and Revised Subclass. Each of these questions is, as a general matter, sufficiently simple that there are streamlined mechanisms available to determine which of the Class members has a viable claim. For example, as all of these questions have straightforward binary answers, the parties could utilize a form affidavit, with accompanying audit procedures, to address these questions.

B. Superiority of Class Action

In light of all this, the Court determines that the class action is a superior way of proceeding. Chiefly, as discussed, there are common questions of law and fact relating to the Class and Revised Subclass that predominate over any individual questions. Moreover, the claims of the Class and Revised Subclass are manageable. The Class's claim is under the law of British Columbia, Canada and the Revised Subclass's

claim is under the ICFA. And as discussed, the relevant individual questions can be addressed through a streamlined process, with appropriate auditing procedures. Finally, because SpeedyPC sold its software for between $9.95 and $39.97, each Class and Revised Subclass member stands to recover an amount too small to make individual litigation economically feasible. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all."). Indeed, if SpeedyPC did engage in misconduct, allowing a class action to proceed will not only compensate the Class members, but it will also ensure that there is appropriate deterrence. *Murray v. New Cingular Wireless Servs., Inc.*, 232 F.R.D. 295, 305 (N.D. 2005) (allowing a class action of over 700,000 class members and stating that "[c]lass actions were designed 'not only to compensate victimized members of groups who are similarly situated . . . but also to deter violations of the law, especially when small individual claims are involved" (internal quotations omitted)).

CONCLUSION

For the foregoing reasons, the Court grants Beaton's motion to certify the class to bring contractual warranty claims for breaches of the implied warranties

of fitness for a particular purpose and merchantability. The Court grants in part Beaton's motion to certify the subclass. Specifically, the Court revises the subclass definition to include "all Class members who reside in Illinois" in order to bring claims for fraudulent misrepresentation under the ICFA.

ENTERED:

Dated: October 19, 2017 /s/
Andrea R. Wood
United States District Judge

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 28, 2018

Before

DIANE P. WOOD, *Chief Judge*
DIANE S. SYKES, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*

No. 18 1010

ARCHIE BEATON,
Plaintiff Appellee,

v. No. 1:13 cv 08389

SPEEDYPC SOFTWARE,
Defendant Appellant.

Andrea R. Wood, *Judge*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

O R D E R

Defendant appellant filed a petition for rehearing and rehearing *en banc* on November 14,

2018. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing *en banc* is therefore **DENIED**.

Filed: 11/28/2018