11-10044

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

RICK CROSBY, JR,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA (Case 8:08-cv-02062-JDW-AEP)

BRIEF FOR PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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Federal Trade Commission v. Rick Crosby, Jr., No. 11-10044

PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1 and 28-1(b), the Federal Trade Commission ("FTC" or "Commission") certifies that, in addition to those persons and entities listed in the Certificate of Interested Persons filed by Appellant, the following persons or entities are known to have an interest in the outcome of this case or appeal:

Arington, Michelle —FTC Attorney

Coulliou, Chris M.—FTC Acting Ass't Regional Director, Southeast Region

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STATEMENT REGARDING ORAL ARGUMENT

No material facts are in dispute and the controlling law is settled. Oral argument, therefore, is not required.

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STATEMENT OF JURISDICTION

The Commission filed a seven-count complaint on October 16, 2008, charging appellant Rick Lee Crosby, Jr. ("Crosby") and his co-defendants with making false representations to consumers, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), and with violating various provisions of the Credit Repair Organizations Act, 15 U.S.C. §§ 1679-1679j ("CROA"). The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337(a), 1345, and 15 U.S.C. §§ 45(a), 53(b) and 57(b). The Commission prevailed on all counts and, on October 15, 2010, the district court issued an amended final judgment, entered a permanent injunction, and awarded equitable monetary relief. D.139.[1]

On November 16, 2010, Crosby filed an untimely motion for a new trial or in the alternative to alter or amend judgment. D.145. On December 13, 2010, the district court denied Crosby's motion as untimely. D.148.

Crosby noticed this appeal on January 3, 2011. D.150. Crosby's notice of appeal references both the October 15th amended final judgment and the December 13th denial of Crosby's post-trial motion. *Id*. Because Crosby's untimely Rule 59 motion did not toll the time for filing his notice of appeal from judgment, this Court issued a sua sponte Order on February 24, 2011, dismissing for lack of jurisdiction that part of Crosby's appeal seeking review the district court's amended final

[1]District court docket entries are referenced as "D.xx."

judgment and permanent injunction. *See* Order issued February 24, 2011 (per Black and Wilson, JJ.)

With respect to the district court's December 13th denial of Crosby's Rule 59 motion, the notice of appeal was timely filed within 60 days from the date that order was entered. *See* Fed. R. App. P. 4(a)(1)(B). This Court thus has jurisdiction, under 28 U.S.C. § 1291, to review only the district court's denial of Crosby's post-trial motion.

STATEMENT OF THE ISSUES

Whether the district court properly denied Crosby's Rule 59 motion as untimely filed.

STATEMENT OF THE CASE

A. Nature of the Case, the Course of Proceedings, and the Disposition Below

On October 16, 2008, the Commission filed a complaint against Crosby, Crosby's company, corporate defendant RCA Credit Services, LLC ("RCA") and Crosby's colleague, individual defendant Brady Wellington. D.1.[2] The complaint alleged that defendants made blanket false promises that they could remove all negative information from consumers' credit histories and rapidly improve

[2] No other defendants have appealed.

consumers' credit scores "into the 700's."[3] These misrepresentations were made on defendants' Web sites and repeated during subsequent phone calls and emails. Crosby and his co-defendants did not provide notice of consumers' cancellation rights, nor did they advise consumers of their credit file rights under state and federal law. In reliance on Crosby's promises that he could rapidly improve their credit scores, consumers paid hefty advance fees. Based on this conduct, the Commission charged Crosby and his co-defendants with making false representations to consumers, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and with violating various provisions of the CROA, 15 U.S.C. §§ 1679-1679j. The Commission sought both injunctive relief and monetary equitable relief. D.1. The day after the complaint was filed, the district court entered an *ex parte* temporary restraining order ("TRO") and asset freeze. D.7.

On October 28, 2008, the court issued an order to show cause demonstrating that service of process had been properly effected on each Defendant. D.23. The

[3] This number refers to a consumer's FICO credit score. A credit score is derived through a statistical analysis of a consumer's credit report. A credit report is a collection of information concerning a consumer's payment history as reported by lenders, as well as public record information such as judgments, tax liens and bankruptcy filings. Credit scores are often used by lenders to make lending decisions. The Fair Isaac Corporation, an analytics and decision management provider, has developed the most widely used consumer credit score, known as a FICO score. FICO scores range from 300-850, with the median score being approximately 720. See D.4, Exhibits in Supp't of Pltf's Motion for TRO, 9 Quinn Dec. ¶¶ 2-4.

Commission's response demonstrated that Crosby was properly served when a process server left the Complaint, Summons, TRO and other initial filings and exhibits with Crosby's step-father at Crosby's Florida address, thereby satisfying Fed. R. Civ. P. 4(c) and 4(e)(2)(B). *See* D.27 at 3. Crosby and Wellington also requested to be served via email, and Crosby was again served that way. *Id.* at 6. To assuage any lingering doubt about proper service, the court granted the Commission leave to serve Crosby via email, under Fed. R. Civ. P. 4(f)(3), as Crosby had represented to the court that he was in the Philippines. D.27 at 6; D.17; D.28.

On October 30, 2008, following a hearing, the court entered a preliminary injunction. D.29. Default judgment was entered against Brady Wellington on February 25, 2009. D.63. After entry of the Preliminary Injunction, Crosby retained counsel for himself and RCA. Crosby's counsel represented him through discovery and settlement negotiations but on March 1, 2010, the district court granted counsel's motion to withdraw. D.98. Thereafter, Crosby continued to represent himself pro se, participating actively in the proceedings. No counsel was secured for corporate defendant RCA.

On March 18, 2010, the Commission moved for summary judgment. D.99. Crosby filed responses on April 13, 2010, and April 26, 2010. D.100; D.104.[4] On

[4] The district court, on multiple occasions, advised Crosby that under Fed. R. Civ. P. 56, corporations could not proceed pro se, and treated Crosby's pro se

July 20, 2010, the court granted the Commission summary judgment on six of the seven counts of the complaint. D. 124. A written order and opinion followed. D.125. On July 28, 2010, after a two-day bench trial in which Crosby participated, the district court found in favor of the FTC on the sole remaining complaint count, issuing a final judgment and permanent injunction. D.130; D.131. Subsequently, on October 15, 2010, the district court issued an amended final judgment and permanent injunction. D.139.

On November 16, 2010, Crosby filed an untimely motion for a new trial or, in the alternative, to alter or amend judgment. D.145.[5] On December 13, 2010, the district court denied Crosby's motion as untimely. D.148. Crosby noticed this appeal on January 3, 2011. D.150.

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responses to the FTC's motion for summary judgment as filed solely on behalf of Crosby. *See* D.125 at 3; D.98; D.101. This Court ruled on February 24, 2011, that the scope of this appeal is limited to any issues raised on appeal which affect appellant as an individual. *See* Order of 2/24/2011 (per Black and Wilson, JJ.)

[5]The 28 days allowed for filing such a motion under the Federal Rules of Civil Procedure 52(b), 59(b) and 59(e) expired on November 12, 2010, four days before Crosby filed his motion. *See also* D.148 at 1.

B. Statement of the Facts

The underlying facts are not at issue. Since at least September of 2005 until approximately November of 2008, Crosby operated RCA as a common credit repair scam. Crosby and his co-defendants enticed consumers to pay substantial up-front fees by making extravagant and unfounded claims regarding the effectiveness of their credit repair services. Consumers already struggling with poor credit were induced to pay money they could not afford to lose on promised credit repair services that were not provided, and in many instances, were impossible to provide. In selling services expressly intended to improve consumers' credit records, credit histories, and credit ratings, Crosby and his co-defendants qualified as a "credit repair organization," and therefore fell within the regulatory purview of the Credit Repair Organizations Act. 15 U.S.C. § 1679a(3)(A); D.125 at 14-16.

Crosby's company, RCA, solicited consumers nationwide through two Internet websites. D.125 at 3. These websites invited consumers, with RCA's assistance, to "Boost Your Credit Score into the 700's in as little as 30 days." *Id.* at 4. Interested customers called RCA's toll-free number, where a recorded message invited them to leave contact information. *Id* at 3-4. Subsequent emails and live telephone conversations with consumers repeated the promise to aid consumers in raising their credit score to above 700 within 30 days. *Id.* at 4.

The RCA website promised "100% Guaranteed Results." *Id.* at 5. Consumers were told that their credit scores were sure to improve by two mechanisms: 1) by purchasing the right to be registered as an "authorized user" of one to three existing lines of credit, or "trade lines" with positive payment history, *id.* at 4-5, a practice commonly known as "piggybacking," D.130 at 3; and 2) that "ANY or ALL" negative information could be removed from their credit history, D.125 at 6. These promises were repeated and reinforced by similar blanket representations on the website, and in follow-up phone calls and emails, *id.*, even though "no credit repair company can legitimately remove or enable consumers to remove all negative entries from a consumer's credit report," *id.*, at 11.

The Commission's first two complaint counts alleged deceptive practices in violation of Section 5(a) of the FTC Act: Count I alleged that Crosby's promises that he could remove all negative information from consumers' credit reports, even when such information was accurate and not obsolete, were false and misleading, D.1 at 7; Count II alleged that Crosby's promises that he would substantially improve consumers' credit scores "into the 700s" within 30 days were likewise false and misleading, *id.* at 7-8. The remaining five counts of the complaint, Counts III through VII, alleged that Crosby and his co-defendants, in connection with their operation as a credit repair organization as defined in 15 U.S.C. § 1679a(3), violated provisions of

the CROA by: (III) charging or receiving payment before full performance of credit repair services, prohibited by § 1679a(3); (IV) failing to provide the written statement of "Consumer Credit File Rights Under State and Federal Law," required by § 1679c(a); (V) failing to provide the requisite conspicuous statements regarding consumers' cancellation rights under § 1679d(b)(4)); (VI) failing to provide the written "Notice of Cancellation," required by § 1679e(b); and (VII) making untrue and misleading statements to induce consumers to purchase their credit repair services, prohibited by § 1679b(a)(3).

The district court granted the Commission summary judgment on the first FTC Act count and all of the CROA counts—six of the seven counts of the Commission's Complaint. D.125. On Count I, the district court ruled that Crosby's representations that he could completely remove negative information in the consumers' credit files for a fee violated Section 5(a) of the FTC Act, which prohibits "deceptive acts or practices in or affecting commerce." D.125 at 10-13 (quoting 15 U.S.C. § 45(a)). The district court concluded that the promises to remove all negative information were material, and deceptive as a matter of law. D.125 at 12 (citing, inter alia, 15 U.S.C. § 1679c, a CROA provision mandating a written disclosure to consumers that neither a consumer nor a credit repair organization "has the right to have accurate, current, and verifiable information removed from [a consumer's] credit report.").

With respect to the CROA counts, the district court roundly rejected Crosby's argument that the CROA did not apply, concluding that the "undisputed facts" established that Crosby and his co-defendants operated as a credit repair organization subject to the CROA. D.125 at 14-16.[6] Defendants' own admissions and the undisputed record evidence accordingly established the FTC's entitlement to summary judgment on Counts III through VI. *Id.* at 17-18. Because the undisputed evidence also established that Crosby and his co-defendants falsely represented that they could, and for payment, would, remove or help consumers remove any and all negative information from their credit reports, the district court likewise awarded the FTC summary judgment as to Count VII. *Id.* at 18-19 (citing, inter alia, *FTC v. Gill*, 265 F.3d 944, 955 (9th Cir. 2001)).

The district court declined to grant the FTC summary judgment on Count II, the second alleged violation of Section 5(a) of the FTC Act, based on defendants' false claims that they could boost consumers' credit scores into the 700s in as little as 30 days. In so doing, the district court noted at least some record evidence tended to show that Crosby and his co-defendants did not convey the impression that the

[6]Crosby and his co-defendants operated as a credit repair organization because they "used instrumentalities of interstate commerce (the Internet and telephone communications) to represent that they could and would provide, in return for payment, services and advice about services expressly intended to improve consumers' credit records, credit histories, and credit ratings." D.125 at 15-16; *see also* 15 U.S.C. § 1679a(3).

promised increase in credit scores could "always or usually be achieved" within 30 days. *Id.* at 13.

Ultimately, however, the Commission prevailed on Count II as well. D.130. After a two-day bench trial, hearing consumer and expert testimony, and reviewing the evidence, including declarations of consumers who purchased RCA services, the district court found that the Commission had proved by a preponderance of the evidence that Crosby and his co-defendants violated Section 5(a) of the FTC Act and the CROA by falsely representing to consumers that they could "[b]oost Your Credit Score into the 700's in as Little as 30 Days." D.130 at 1. The court found the expert testimony of Paul Panichelli, a principal scientist with Fair Isaac Corporation ("FICO") to be "credible and persuasive." *Id.* at 7. Mr. Panichelli opined that Crosby's "representation that a consumer's credit score could be boosted into the 700's in as little as 30 days was not generally achievable," in light of the "numerous contingencies involved," and that a blanket promise to rapidly increase someone's score into the 700's "without knowledge of the individual's credit history would be false." *Id.* He also testified that "piggybacking" would not produce consistent results for all consumers, and would not generally improve credit scores. *Id.* The district court relied on this and other testimony and evidence to find the representations that defendants could "boost" consumers' credit scores into the 700's "in as little as 30

days" to be false and material, violating Section 5 of the FTC Act. *Id.* at 8.

The district court found Crosby individually liable for the corporate violations of RCA. *Id.* at 8-10; *see also* D.125 at 26-29. The evidence readily established that Crosby "participated directly in the misrepresentations," was responsible for the design and content of websites which contained the misrepresentations, and authored emails containing misrepresentations. He communicated directly to RCA clients. As president and founder of RCA he controlled RCA's business affairs and finances. D.130. at 9. Crosby was individually liable , the district court concluded, because "the FTC ha[d] proven that he participated directly in RCA's deceptive practices, had authority to control them, and had knowledge of the practices. *Id.* at 9-10 (citing *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996)); *see also* D.125 at 26-29.

As remedy, the district court authorized permanent injunctive relief, including a ban on the offer of credit repair services, recognizing the reasonable likelihood of future violations, and the appropriateness of "fencing in" provisions. D.130 at 10 (citing, *e.g.*, *SEC v. Caterinicchia*, 613 F.2d 102, 105 (5th Cir. 1980); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965)). In determining the necessity of fencing-in relief, the district court chronicled the evidence establishing that "Crosby will likely, unless restrained, continue to offer credit repair services using dubious claims and misrepresentations." *Id.* at 11 & n. 7; *see also* D.125 at 19-20. In addition

to granting permanent injunctive relief, the district court also awarded equitable monetary restitution. D.130 at 13. An amended final judgment and permanent injunction issued on October 15, 2010. D. 139.[7] On November 16, 2010, 32 days later, Crosby moved for a new trial, or in the alternative to alter or amend judgment. D.145.

Crosby's Rule 59 motion was untimely, four days beyond the 28-day time limit provided under the Federal Rules of Civil Procedure, which closed on November 12, 2010. *See* Fed. R. Civ. P. 52(b), 59(b) & 59(e). In denying Crosby's Rule 59 motion as untimely, the district court noted that the Federal Rules permitted no extensions. D.148 at 1 (citing Fed. R. Civ. P. 6(b)(2) ("A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)."). The district court additionally (and superfluously) observed that Crosby was "[i]n any event, * * * not entitled to the relief requested." D.148 at 2. The court readily concluded that Crosby's objection to personal jurisdiction had been waived; that his Seventh Amendment claim was without merit, given that no jury trial right exists for actions seeking equitable relief under Section 13(b) of the FTC Act; and that Crosby's other points of error were unsupported by authority or argument, much less indicative of any manifest error of law warranting grant of a new trial. *Id.* The district court

[7]The judgment was amended in response to the Commission's motion for the addition of compliance monitoring and record-keeping provisions. D.135

likewise concluded that relief under Rule 59(e) was unwarranted as Crosby's objections to the scope of the permanent injunction had been previously briefed, and Crosby's motion failed to present any argument or authority warranting revisiting or amending the judgment in any respect. *Id.*

STANDARD OF REVIEW

Denials of a Rule 59 motion are reviewed under the abuse of discretion standard. *Drago v. Jenne*, 453 F.3d 1301, 1305 (11th Cir. 2006).

SUMMARY OF ARGUMENT

This Court has already ruled that it lacks jurisdiction to hear Crosby's appeal to the district court's amended final judgment of October 15, 2010, as the appeal was untimely filed with respect to that judgment. Although this Court may entertain Crosby's appeal of the district court's order denying his untimely Rule 59 motion, it need not linger in deeming it meritless. Under the Federal Rules of Civil Procedure, the district court was obligated to dismiss Crosby's motion as untimely, and such dismissal should be affirmed. Untimeliness alone is sufficient grounds to deny Crosby's Rule 59 motion and the district court acted comfortably within its discretion in denying Crosby's untimely Rule 59 motion.

ARGUMENT

The district court was obligated, under Fed. R. Civ. P. 6(b)(2), to deny Crosby's

Rule 59 motion as untimely. Crosby filed his post-trial motion on November 16, 2010, four days after the time allowed under the Federal Rules of Civil Procedure. D.148 at 1.[8] The Commission opposed Crosby's motion as untimely, and therefore did not forfeit any objection to Crosby's failure to comply with the time limits. *See* D.147 at 2. In denying the motion as untimely, the district court noted that, under Fed. R. Civ. P. 6(b)(2), "[a] court must not extend the time to act," for post-trial motions such as Crosby's. D.148 at 1 (quoting Fed. R. Civ. P. 6(b)(2)). No more is necessary to affirm the district court's ruling. *See, e.g., Stacy v. Williams*, 446 F.2d 1366, 1367 (5th Cir. 1971) (affirming district court's "clearly correct" denial of Rule 59 motion as untimely and declining to review the district court's additional views that the motion was meritless).[9]

Even if this Court were to consider the merits of Crosby's untimely Rule 59 motion, the district court rightly deemed Crosby's motion meritless. The only grounds for granting a motion under Rule 59 are newly discovered evidence or manifest errors

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[8] Crosby recognizes that his motion was denied as untimely, *see* Crosby Appellant Br. at 7, and nowhere contests or otherwise attempts to excuse the fact that his post-trial motion was untimely filed. His opening brief simply reargues the merits.

[9] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

of law or fact. *See, e.g., Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). A Rule 59(e) motion, moreover, cannot be used "to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir.2005). Because Crosby never raised any new argument that demonstrated any legal or factual error, much less a manifest error, nor has he presented any newly discovered evidence, he would not have been entitled to relief under Rule 59 even if he had timely filed.

In what was arguably dicta, as Crosby's motion had properly been denied as untimely,[10] the district court nonetheless concluded that, "[i]n any event, Crosby is not entitled to the relief requested." D.148 at 2. The district court first found that Crosby had waived any objection to personal jurisdiction. *Id.* (citing Fed. R. Civ. P. 12(h)(1)(B)). Crosby has failed to demonstrate any error in this finding: Crosby's Answer raises no objection to personal jurisdiction, *see* D.35, and Crosby actively litigated his case without raising a jurisdictional challenge until the filing of his untimely Rule 59 motion. Once a defendant has waived any objection to insufficient service of process, "the court may not, either upon the defendant's motion or its own

[10] This Court has opined that the Supreme Court decisions in *Kontrick v. Ryan*, 540 U.S. 443 (2004) and *Eberhart v. United States*, 546 U.S. 12 (2005) "suggest that a district court has jurisdiction to hear an out-of-time Rule 59(e) motion if the non-moving party does not object promptly enough," but has not definitively resolved the question. *Green v. DEA*, 606 F.3d 1296, 1302 & n.3 (11th Cir. 2010). Here, the Commission did promptly object to Crosby's motion as untimely. *See* D.147 at 2.

initiative," dismiss on that ground. *Pardazi v. Cullman Med. Ctr.*, 896 F.2d 1313, 1317 (11th Cir.1990).[11]

The district court likewise did not err in concluding that Crosby's Seventh Amendment objection was meritless, because "no right to a jury trial exists in an action under Section 13(b) of the FTC Act." D.148 at 2. As the Second Circuit has noted, "[t]he fact that only an equitable remedy is available [in actions brought under § 13(b) of the FTC Act] eviscerates [any] contention that the Seventh Amendment confers a right to a jury trial in this case." *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006) (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989)).

Finally, the district court did not abuse its discretion in concluding that "Crosby's other points of error (including purported violations of his rights under the First, Fourth, and Fifth Amendments) are unsupported by authority or argument and do not indicate any manifest error of law warranting the grant of a new trial." D.148 at 2. As the district court also observed, Crosby's objections to the scope of the permanent injunction had been previously briefed (and rejected) and Crosby presented "no argument or authority showing that the decision should be revisited or the

[11] In addition, as discussed above, *supra* at 4, service of process was properly effected.

judgment amended in this or any other respect." *Id.*[12] In short, Crosby failed entirely to establish his entitlement to post-trial relief.

[12] Even assuming that the permanent injunction might preclude some speech otherwise and independently entitled to First Amendment protection, this is by no means unusual or improper. Having already determined that Crosby violated the law, the district court imposed restrictions to prevent future law violations. *See* D.130 at 11. To ensure the effectiveness of final relief, courts in equitable actions may enjoin conduct reasonably related to unlawful acts so long as there is a cognizable danger of recurrent violations. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969). It is well settled that, "[h]aving been caught violating the [FTC] Act, respondents 'must expect some fencing in.'" *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 395 (*quoting FTC v. Nat'l Lead Co.*, 352 U.S. 419, 431 (1957)).

CONCLUSION

For the reasons set forth above, the district court's order denying Crosby's untimely Rule 59 motion should be affirmed.

Respectfully submitted,

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Dated: March 2, 2011

CERTIFICATE OF COMPLIANCE

I certify that Appellee's Brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because it contains 4,111 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that Appellee's Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Corel WordPerfect word processing program in 14-point Times New Roman font.

/s/Ruthanne M. Deutsch
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2011, I sent for filing by express overnight delivery an original and six copies of the foregoing Brief of Plaintiff-Appellee Federal Trade Commission to the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit. On the same day, I also uploaded one copy of the foregoing Brief in electronic format onto the Web site for the United States Court of Appeals for the Eleventh Circuit. On the same day, I also served the foregoing Brief by sending two copies by express overnight delivery to Appellant Rick Lee Crosby, Jr., appearing pro se, at the following address:

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