UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FEDERAL TRADE COMMISSION Plaintiff, v. RCA CREDIT SERVICES, LLC a Florida Corporation; and RICK LEE CROSBY, JR., individually, and as an officer or manager of Defendant; and BRADY WELLINGTON, individually, and as an officer or manager of Defendant; Defendants.	Case No. 8:08-cv-2062-T-27AEP

PLAINTIFF'S DISPOSITIVE MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS RCA CREDIT SERVICES, LLC AND RICK LEE CROSBY, JR. AND INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

I. INTRODUCTION

Plaintiff Federal Trade Commission ("FTC" or "Commission"), pursuant to Fed. R. Civ. P. 56(c), hereby moves for summary judgment against defendants RCA Credit Services, LLC ("RCA") and Rick Lee Crosby, Jr. ("Crosby") (collectively "Defendants") for deceptive acts or practices in the marketing or sale of credit repair services. The uncontroverted evidence demonstrates that Defendants made numerous false or misleading representations

to consumers in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). The uncontroverted evidence further demonstrates that Defendants violated several provisions of the Credit Repair Organizations Act ("CROA"), 15 U.S.C. §§ 1679-1679j.

Since at least September of 2005 until approximately November of 2008, Defendants have operated RCA as a common credit repair scam. Defendants enticed consumers to pay substantial upfront fees by making extravagant claims regarding the effectiveness of their credit repair services. Specifically, through emails, phone conversations and websites, Defendants represented that their services could increase a consumer's credit score "into the 700's"[1] in as little as 30 days, and that they could remove "ANY or ALL" negative information from a consumer's credit reports. As the FTC's evidence demonstrates, however, no one can achieve the results promised by Defendants for all consumers. Consequently, after collecting the upfront fees, Defendants failed to live up to their promises.

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[1] 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, commonly known as a FICO score. FICO scores range from 300-850, with the median score being approximately 720. See Dkt. No. 4, Exhibits in Support of Plaintiff's Motion for Temporary Restraining Order (hereafter, "TRO Ex.s") 9 Quinn Dec. ("Quinn") ¶¶ 2-4.

Counsel for Plaintiff is informed by the Clerk's Office not to refile the voluminous set of TRO Exhibits because, although they were not scanned into the Court's electronic document system, a paper copy is on file in the Clerk's office. If an additional copy of the TRO exhibits would be helpful to the Clerk, Plaintiff will expeditiously deliver such to chambers.

The FTC's evidence also demonstrates that Defendants ignored numerous requirements that CROA imposes on credit repair businesses. Accordingly, the FTC is entitled to summary judgment in its favor on all counts. A proposed order is hereto attached.

II. JURISDICTION AND VENUE

Defendants agree that this Court has jurisdiction over this matter pursuant to 15 U.S.C. §§ 45(a), 53(b), 57b, and 28 U.S.C. §§ 1331, 1337(a) and 1345. *See* Dkt. No. 35, Answer of Defendants RCA and Rick Lee Crosby ¶ 2 ("Answer"). Neither do Defendants contest that venue in the Middle District of Florida is proper under 15 U.S.C. § 53(b) and 28 U.S.C. § 1391(b). Answer ¶ 3.

III. PARTIES

A. The Federal Trade Commission

Plaintiff FTC is an independent agency of the United States created by the FTC Act, 15 U.S.C. §§ 41 *et seq*. The FTC is charged with enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair and deceptive act and practices in or affecting commerce. Pursuant to Section 410(a) of CROA, 15 U.S.C. § 1679h(a), the FTC also has the authority to enforce provisions of CROA relating to credit repair organizations. Section 410(b) of CROA, 15 U.S.C. § 1679h(b), grants the FTC authority to enforce compliance with CROA in the same manner as it enforces the FTC Act. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC to initiate federal district court proceedings to enjoin violations of the FTC Act in order to secure appropriate equitable relief, including restitution and disgorgement. *See also FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-69 (11th Cir.

1996).

B. Corporate Defendant

Corporate Defendant RCA is a Florida corporation organized in September 2005 with an address of 12360 66th Street in Largo, Florida. *See* Exhibits in Support of Plaintiff's Motion for Summary Judgment ("Ex.") 2 Deposition of Rick Crosby ("Crosby Dep.") 57:1-6. CROA defines a "credit repair organization" as

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

15 U.S.C § 1679a(3). RCA made express representations that, in exchange for upfront payment, it could boost its customers' credit scores "into the 700's in as little as 30 days" and that it could "[r]emove ANY and ALL negative accounts from your credit report." *See* Ex. 7 Response to Plaintiff's First Set of Requests for Admissions to Defendant RCA Credit Services, LLC ("Admis.") No. 28 - 29; *see also* TRO Ex. 1 Chiniquy Dec. ("Chiniquy") ¶¶ 10-11; TRO Ex. 2 Harris Dec. ("Harris") ¶¶ 7-8; TRO Ex. 3 Jones Dec. ("Jones") ¶¶ 9-11; Crosby Dep. 43:15-44:3; 83:13-87:16 (Crosby admits copies of websites in Deposition Exhibits 3-6 that contain the above statements are accurate copies of websites and templates that he placed on the Internet). Accordingly, RCA is credit repair organization, as defined by Section 403(3) of CROA, 15 U.S.C § 1679a(3).

C. Individual Defendant

Defendant Rick Lee Crosby Jr. is a resident of Florida and the founder and owner of RCA. Crosby Dep. 9:20-21; 23:18-24:18. Crosby established RCA by filing Articles of Organization with the Florida Secretary of State on September 24, 2005, listing himself as the registered agent. *See* TRO Ex. 12 Childs Dec. ("Childs") Att. E p. 1; Crosby Dep. 23:18-24:18.

IV. FACTUAL BACKGROUND

A. Procedural Background

The FTC initiated this action by filing a Complaint and Motion for a Temporary Restraining Order ("TRO") on October 16, 2008. The Court granted the TRO on October 17, 2008, and after a preliminary injunction hearing on October 29, 2008, the Court entered a preliminary injunction on October 30, 2008.[2]

B. Defendants' Business Practices

Defendants' credit repair scam was in operation from September of 2005 through approximately November of 2008, when RCA Credit's website became inactive. *See* Ex. 1 Deposition of Kevin Bessant ("Bessant Dep.") 33:1-10. Defendants solicited consumers nationwide through representations regarding its services on two internet websites, www.RCACredit.com and www.RCAcreditservices.com. *See* Childs Att. B, D. Consumers who were interested in RCA's services called RCA's toll-free number, heard a recorded message,

[2] The Court entered default judgment against Defendant Brady Wellington on February 25, 2009 in the amount of $204,517.13.

and were invited to leave contact information. *See* TRO Ex. 11 Stahl Dec. ("Stahl") ¶ 3; Crosby Dep. 88:12-17. An RCA representative subsequently contacted the consumer and pitched RCA's credit repair services. *See* Stahl ¶ 4-6; Crosby Dep. 89:2-12.

To sell their credit repair services, Defendants promised rapid and profound increases to a consumer's credit score, asserting to the public at large that they could increase anyone's credit scores "into the 700's" in as little as 30 days. This claim appeared in writing on RCA's websites, Childs Att. B p.1, 2, 7; Att. D p. 1, in an audio message on RCA's website, Childs Att. C 3:4-7 ("Hi I'm Rick Crosby, founder of RCACredit.com. I developed this website, along with many others, to teach you my insider secrets on how to boost your credit score into the 700s in as little as 30 days[.]"), in emails to consumers, Dkt. No. 18, Attachments in Support of Motion for Preliminary Injunction (hereafter "PI Ex.") 2 Jones Supp. Dec. ("Jones Supp.") Att. H p.2 ("If you would like to learn how to increase your credit score into the 700s or above in as little as 30 days by legally adding positive payment history to your credit file, please click the link below[.]"); Crosby Dep. Ex. 8 ("[M]y RCA CREDIT ADVICE HOTLINE will open your eyes and teach you how easy and painless it can be to build your credit score into the 700's in a s little as 30 days."), in prerecorded messages consumers heard when they called RCA, Stahl Att. A 4:1-9 ("Hi this is RCACredit.com. If you're looking to increase your credit score into the 700's in as little as 30 days . . ."); Childs Att. A 3:14-15 ("Press one for more information on how you can increase your credit score into the 700s in as little as 30 days."), and in live telephone calls with RCA representatives, Harris ¶¶ 3, 7-8 (RCA representative told her Harris that her credit score would improve to over 700

within a month); TRO Ex. 4 Marolda Dec. ("Marolda") ¶ 11 (RCA representative promised that Marolda's credit score would raise to over 700 within 30 days); TRO Ex. 5 Mitchell Dec. ("Mitchell") ¶ 5 (RCA promised to get Mitchell's credit score into the 700s in 30-90 days); TRO Ex. 7 Thiefault Dec. ("Thiefault") ¶ 9 (RCA representative told Thiefault that they could raise his credit score above 700 within 30 days).

Defendants claimed that they could achieve these extraordinary credit score increases through two actions. First, Defendants offered to sell to consumers associations with positive credit information belonging to other unrelated entities or individuals. Specifically, Defendants offered to register the consumer as an "authorized user" of one to three lines of credit with positive payment history, with the promise that the association with the line of credit would increase the consumer's credit score. *See* Stahl Att. A p. 12, l. 14-16 (transcript of RCA representative: "guaranteed increase, to add the trade lines to your file and increase your credit score."); Childs Att. A p. 7, l. 21-22 (transcript of RCA representative: "It's going to give [people who purchase our services] about a 70 percent increase in their credit score..."); Harris ¶ 8; Jones ¶ 9 (RCA representative told Jones that becoming an authorized user of trade lines would boost her credit score over 700 with 30 days after the information showed up on her credit report); Marolda ¶ 9 (same); Mitchell ¶¶ 5-6(same); TRO Ex. 6 Smith Dec.("Smith") ¶ 8 (same). These lines of credit are often referred to as "trade lines." Consumers, however, do not actually have access to the underlying lines of credit. *See* Jones ¶ 10; Ex. 3 Deposition of Robert Liskiewicz ("Liskiewicz Depo.") 29:4-11. They do not receive the account numbers or copies of the debit cards, and therefore cannot charge

purchases against the trade lines. *See Id*; Crosby Dep. 160:16-161:1. Second, Defendants asserted that they could remove "any or all" negative information from a consumer's credit report. *See* Childs Att. B p.1, 7; Att. D p.1; Att. C 3:8-9; Stahl Att. A 4:4-5; 5:24-25; 7:12-13; Mitchell ¶ 7; *see also* PI Ex. 3 Smith Supp. Dec. ("Smith Supp.") Att. A p.1; Jones Supp. Att. I p. 1; Crosby Dep. Ex.s 8-12. Negative information from creditors, such as delinquent accounts or late payments is considered in calculating a consumer's FICO Score. *See* Quinn ¶ 4.

After a consumer agreed to engage RCA's services, Defendants collected upfront fees ranging from $500 to over $3000, depending on how many trade lines a consumer wished to purchase. *See, e.g.,* Childs Att. B p. 19 (website lists the silver, gold, and platinum RCA packages of credit lines as costing $1,300, $2,200, and $3,000, respectively); Chinquy ¶ 16 (consumer paid $950); Harris ¶ 11 (consumer paid $1,480 for a three line package); Jones ¶ 17 (consumer paid $1500 for three lines); Marolda ¶ 12 (consumer paid $3,000); Mitchell ¶ 9 (consumer paid $800); Smith ¶ 11 (consumer paid $600); Theifault ¶ 14 (consumer paid $500). Defendants then emailed or instructed consumers to download a "Confirmation Agreement," which reflected the purchase of trade lines, and "Payment Authorization," which authorized RCA to collect payment. *See, e.g.* Jones Att. B-C; Theifault Att. D. Defendants did not provide consumers with any additional documents or disclosures beyond the three page Confirmation Agreement. *See* Crosby Dep. 91:15-17; Jones ¶ 16; Harris ¶ 12; Theifault ¶ 15-17. During his deposition, Crosby indicated that the Confirmation Agreement did not change over time. *See* Crobsy Dep. 92:18-19.

V. LEGAL STANDARD FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is properly granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate an absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden under Rule 56(c), the burden shifts to the non-moving party to produce "specific facts showing there is a genuine issue for trial." FED. R. CIV. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, "[a] mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the [court] could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). If the non-moving party's evidence "is merely colorable, or is not significantly probative, then summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

VI. THE FTC ACT

The FTC Act provides that "unfair or deceptive acts or practices in or affecting commerce" are unlawful. 15 U.S.C. § 45(a)(1). "To establish that an act or practice is deceptive, the FTC must show that (1) there was a representation or omission, (2) the representation or omission was likely to mislead consumers acting reasonably under the

circumstances, and (3) the representation or omission was material." *FTC v. Peoples Credit First, LLC*, 2005 WL 3468588, at *5 (M.D. Fla.. Dec. 18, 2005) (citing *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003)).

False representations are likely to mislead consumers acting reasonably. *See, e.g.*, *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994); *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 258 (E.D.N.Y. 1998). In determining whether a representation is likely to mislead, courts also consider the "net impression" of the representation. *See Peoples Credit*, 2005 WL 3468588, at *6; *see also FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009). In other words, "whether a representation is likely to mislead reasonable consumers must be determined by viewing it as a whole, without emphasizing isolated words or phrases apart from their context." *Peoples Credit*, 2005 WL 3468588, at *6 (quotations omitted).

For purposes of FTC Act liability, "[e]xpress claims, or deliberately made implied claims used to induce the purchase of a particular product or service are presumed to be material." *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1267 (S.D. Fla. 2007). Materiality is also presumed if the claims go to the core characteristic of the product or service. *See Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000).

A. This Court Should Enter Summary Judgment as to Count I - Defendants' Representations That They Can Remove Negative Information from Consumer's Credit Reports Even Where Accurate Are False

Defendants admit that their websites contained express claims to consumers that RCA could "[r]emove ANY and ALL Negative Accounts From Your Credit Report." Admis. No. 29; *see also* Childs Att. B pp.1, 7; Att. D p.1; Att. C 3:8-9. Defendants repeated

these assertions in telephone calls and emails. *See* Stahl Att. A 4:4-5; 5:24-25; 7:12-13; Mitchell ¶ 7; Smith Supp. Att. A p.1 ("I am now able to COMPLETELY REMOVE ANY NEGITIVE (sic) from your file in 7 Days and Raise Your FICO Score Instantly!"); Jones Supp. Att. I p. 1 (same). The FTC's uncontroverted evidence, however, demonstrates that no credit repair company can legitimately remove any or all negatives on a consumer's credit report. Rather, as established by Tim Puckett, Fraud and Security Manager of the National Consumer Assistance Center of Experian Information Solutions, Inc. ("Experian"[3]), accurate negative information that is not obsolete cannot be deleted. TRO Ex. 8 Puckett Dec. ("Puckett") ¶¶ 11-22. Accordingly, Defendants representations that they could remove "any and all" negative information from a consumer's credit report are false. This is confirmed by consumer experience indicating that RCA never removed non-obsolete, accurate negative information from their credit reports. *See, e.g.,* Mitchell ¶ 14; Ex. 5 Deposition of Ronald Wray ("Wray Dep.") 27: 16-25, 28:1-17. Because the entire purpose of Defendants' "business" was to increase credit scores, Defendants'express representations regarding their ability to remove negative information from credit reports are undisputably material. Thus, the FTC is entitled to summary judgment on Count I of its complaint.

B. This Court Should Enter Summary Judgment as to Count II - Defendants' Claims That They Can Raise Any Consumer's Credit Score "Into the 700s" In As Little As 30 Days Are False

Defendants further admit that their websites stated that RCA could boost consumer's credit scores "into the 700's in as little as 30 days." Admis. No. 28; *see also* Childs Att. B

[3] Experian is one of the three major credit reporting agencies in the United States.

p.1, 2, 7; Att. C 3:4-7; Att. D p. 1. This claim was reiterated to consumers, without any limitation or qualification, in numerous telephone calls and emails. *See, e.g.,* Jones Supp. Att. H p.2, Att. I p. 1, Att. J p. 1; Smith Supp. Att. A p. 1, Att. B p. 1, Att. C p. 1, Att. D p. 1; Stahl Att. A 4:3, 5:22-23, 7 :10-11; Childs Att. A 3:14-15; Harris ¶ 3, 7; Jones ¶ 9; Marolda ¶ 9; Mitchell ¶ 5; Smith ¶ 8; Thiefault ¶ 9. Once again, the FTC's uncontroverted evidence establishes that Defendants cannot live up to this unlimited, blanket claim. To the contrary, as Thomas Quinn, Vice President for Global Scoring Solutions for Fair Issac Corporation provides, claims that any consumer can raise his or her credit score into the 700s within 30 days are false. *See* Quinn ¶¶ 7, 9. As noted above, Defendants specifically claimed that by purchasing trade lines from them, consumers would improve their credit scores to over 700 within a month. But as Mr. Quinn further explains, the addition of trade lines would not necessarily even increase a consumer's credit score. For instance, if the trade line incurred a delinquency, an authorized user's credit score could decrease. *See id.* ¶ 8. In fact, Fair Issac's testing demonstrates that "over 95% of consumers with credit scores below 600 would not be able to improve their FICO scores to over 700 within 30 days through the addition of authorized user trade lines." *Id*. ¶ 9.

Despite their promises, in virtually all cases, Defendants did not even provide consumers the trade line or lines that they purchased. *See, e.g.,* Harris ¶ 20; Jones ¶ 29; Marolda ¶ 17; Mitchell ¶ 13; Smith ¶ 19. Consequently, consumers indicated that Defendants in fact never raised their credit scores above 700. *See, e.g.* Harris ¶ 19; Jones ¶ 20; Marolda Dec. ¶ 13; Mitchell ¶¶ 12-14. The few consumers who saw even a modest

increase in their credit scores testified that it resulted solely from their own efforts, not from any action taken by RCA. *See, e.g.,* Mitchell ¶ 13; Wray Dep. 28:20-25, 29:1-8. Tellingly, during his deposition, Crosby was unable to provide *any* details for his assertion that RCA's services increased consumers' credit scores into the 700s. Crosby Dep. 150:4-7 ("Q: ...do you have any information concerning the consumers' credit scores after trade lines were provided? A: No"). Indeed, RCA's own records indicate, without any detail or corroboration, that only three consumers achieved credit scores over 700. *See* Crosby Dep. 150:8-12. Apart from these three consumers, Crosby could not identify a single other customer that obtained the promised results. *See* Crosby Dep. 150:13-151:2.

Moreover, the net impression conveyed by Defendants' representations is that any consumer purchasing Defendants' services will raise his or her credit score over 700 in short order. Defendants' website includes numerous instances where they promise "100% Guaranteed Results", promise to "Boost Your Credit Score into the 700's" and assert that their techniques "raise [clients'] credit score by 100 or more points in a very short amount of time." *See* Childs Att. B, D. In several instances, these false promises are in larger and different colored font than the rest of the text on the website. *See, e.g.,* Childs Att. B p. 1. In addition, these claims are reiterated orally in audio files on the website. *See, e.g.,* Childs Att. C 3:5-9. These claims are also made in email communications to consumers. *See* Jones Supp. Att. H p.2, Att. I p. 1, Att. J p. 1; Smith Supp. Att. A p. 1, Att. B p. 1, Att. C p. 1, Att. D p. 1.; Crosby Dep. Ex.s 8, 10.

In contrast to the repeated assertions of Defendants' ability to raise credit scores into

the 700s, the only time qualifying language is presented to a consumer is in two sentences of RCA's confirmation agreement, provided to the consumer only after the consumer has already paid an upfront fee, stating that RCA could not predict the maximum impact of its service. The mere presence of a disclaimer in a consumer contract, however, "does not automatically exonerate deceptive activites." *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999) *see also Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) ("The Federal Trade Act is violated if [a defendant] induces the first contact through deception, even if the buyer becomes fully informed before entering the contract"). Rather, "[d]isclaimers or qualifications . . . are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression." *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1496-97 (1st Cir. 1989). The two sentence qualification, presented after a consumer has paid an upfront fee, pales in comparison to the prominent, repeated claims regarding the effect of purchasing Defendants services. Moreover, Defendants make no attempt to qualify in any way their false representation that they can remove "ANY or ALL negative accounts" from a consumer's credit report. Accordingly, the net impression of Defendants' representations are that any consumer will see removal of all negative credit information and a rapid increase of their credit scores into the 700 point range after engaging Defendants' services. Because these representations are false and clearly go to the core characteristic of RCA's credit repair "business", the Court should grant summary judgment to the FTC on Count II of its complaint.

VII. THE CREDIT REPAIR ORGANIZATIONS ACT

In 1996, Congress passed CROA "to protect the public from unfair or deceptive advertising and business practices by credit repair organizations." 28 U.S.C. § 1679(b)(2). Towards that end, CROA provides consumers with several substantive protections. Defendants, however, blatantly ignored these statutory consumer protections. Indeed, Defendants simply operated as if CROA did not exist. As detailed below, there is no genuine issue of material fact regarding Defendants' violations of CROA. Accordingly, the FTC is entitled to summary judgment on Counts III through VII of its complaint.

A. This Court Should Enter Summary Judgment As to Count III - Uncontroverted Evidence Establishes that Defendants Charged Upfront Fees in Violation of CROA

Section 404(b) of CROA provides that "no credit repair organization may charge or receive any money or valuable consideration for the performance of any service which the credit repair organization has agreed to perform for any consumer before such service is fully performed." 15 U.S.C. § 1679b(b); *see also* Compl. Count III. Despite this unambiguous statutory prohibition on upfront fees, Defendants demanded and received hundreds, and sometimes thousands of dollars from consumers the moment they entered into a contract with Defendants. Defendants admit that they collected money from consumers "in advance of the [sic] RCA's purchase of such trade lines from its third party sellers' inventory." Answer ¶ 16; *See also* Crosby Dep. 91:5-8; Chinquy ¶ 16; Harris ¶ 11; Jones ¶ 17; Marolda ¶ 12; Mitchell ¶ 9; Smith ¶ 11; Theifault ¶ 14 (consumers paid for credit repair services before receiving any services or, in almost all cases, never receiving any of the promised services);

Admis. No. 37. This violation of CROA Section 404 is undisputed and obvious. Accordingly, the Court should grant the FTC summary judgment on Count III of its complaint.

B. This Court Should Enter Summary Judgment As to Counts IV through VI - Uncontroverted Evidence Establishes that Defendants Failed to Make Disclosures Required by CROA

CROA also requires credit repair organizations to make several disclosures to consumers. Section 405(a) provides that a credit repair organization must provide a specific written disclosure to consumers which outlines certain consumer rights under state and federal law. *See* Compl. Count IV; 15 U.S.C. § 1679c(a). A credit repair organization must provide this disclosure before entering into a contract with a consumer, and the disclosure must be provided as a document separate from the contract between the credit repair organization and the consumer. *See id*. It is undisputed that Defendants never provided their customers with the mandated disclosure document. *See* Crosby Dep. 91:15-17; Admis. No. 38. Accordingly, Defendants' violation of Section 405(a) is undisputed and obvious, entitling the FTC to summary judgment on Count IV of its complaint.

In addition to the disclosure document discussed in the previous paragraph, section 406(b)(4) of CROA requires "a conspicuous statement in bold face type, in immediate proximity to the space reserved for the consumer's signature" regarding a consumer's right to cancel the contract. 15 U.S.C. 1679d(b)(4); *see also* Compl. Count V. It is undisputed that this conspicuous statement does not appear in Defendants' contract. *See, e.g.,* Harris Att. B p. 3-4; Admis. No. 39. Similarly, Section 407(b) of CROA requires a credit repair

organization to provide a specific cancellation form. *See* Compl. Count VI; 15 U.S.C. § 1679e(b). It is also undisputed that Defendants failed to provide this form to its customers. *See* Crosby Dep. 91:15-17; Admis. No. 40; Jones ¶ 16; Harris ¶ 12; Theifault ¶ 15-17 (indicating consumers did not receive any forms other than the Confirmation Agreement and the Payment Authorization). Thus, Defendants' violation of Sections 406 and 407(b) are also uncontroverted. Consequently, the Court should enter summary judgment in favor of the FTC on Counts V and VI of its complaint.

C. This Court Should Enter Summary Judgment As to Count VII - Uncontroverted Evidence Demonstrates That Defendants Made Untrue or Misleading Statements to Induce Consumers to Purchase Their Services.

Section 404(a)(3) of CROA prohibits "mak[ing] or us[ing] any untrue or misleading representation of the services of the credit repair organization." 15 U.S.C. § 1679b(a)(3). As detailed in Section VI above, Defendants made numerous false statements regarding the effectiveness of their credit repair services. Accordingly the Court should enter summary judgment in favor of the FTC on Count VII of its complaint.

VIII. THE REQUESTED RELIEF

A. This Court Has the Authority to Grant the Requested Relief

To remedy Defendants' violations of the FTC Act and CROA, the FTC seeks injunctive and equitable monetary relief against both RCA and Crosby. Section 13(b) of the FTC Act provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). A "proper case" includes any matter involving practices that violate any of the laws enforced by the FTC. *FTC v. Gem*

Merch. Corp., 87 F.3d at 468. A court's power to issue an injunction under Section 13(b) "carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits." *Id*.

B. The Requested Conduct and Compliance Monitoring/Record Keeping Provisions are Appropriate

Defendants' actions in defrauding economically vulnerable consumers warrant the imposition of strong injunctive relief. Courts have the power to craft injunctive relief "to fit the exigencies of a particular case," including bans on certain business activities. *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 536 (S.D.N.Y. 2000) (imposing ban on all multi-level marketing by defendant and noting that "courts have ordered broad bans on otherwise legitimate behavior based on past conduct by defendants as a means of preventing potential future law violations"); *see also McGregor v. Chierico*, 206 F.3d 1378, 1386 n.9 (11th Cir. 2000) (affirming district court's permanent ban on defendant engaging in telemarketing); *FTC v. Jordan Ashley, Inc.*, 1994 WL 200775, *5 (S.D. Fla. April 5, 1994) (permanently restraining defendant from "engaging, participating or assisting in any manner or any capacity whatsoever in the marketing or sale of any franchise or business venture, whether directly or through any intermediary"). The prohibition on sale of credit repair products and services is particularly appropriate here. As part of its ongoing investigation and discovery efforts, late in the course of this case the FTC obtained evidence suggesting that Crosby has associated himself with a new credit repair venture, www.creditambassador.com, which provides goods or services substantially similar to Defendant RCA Credit. *See* Ex. 6 Fourth Supp. Dec. Of Andrew Hernacki ("Hernacki") ¶¶

7-10; Hernacki Att. A p.1 (creditambassador.com website includes video image of Crosby.) On that website, Mr. Crosby uses an alias "Chris Smith" and purports to sell "e-books" on credit repair in an apparent attempt to evade law enforcement and to vitiate the existing asset freeze. Hernacki ¶ 8. Indeed, many of the claims on the creditambassador.com website are substantially similar to claims Mr. Crosby made on the RCA websites. Hernacki Att. A p. 3](video depiction of Crosby, headed by the caption: "Amazing Credit Building Secrets Discovered By A 31 Year Old (Under-The-Radar) "Credit Guru" Shows You How To Raise Your Credit Score Into the 700's Without Wasting Money!" (emphasis in original)). When asked to clarify the nature of his association with creditambassador.com, Crosby invoked his Fifth Amendment right against self-incrimination. *See* Ex. 8 Resp. to Pl.'s Second Set of Interrogatories to Defendant Rick Lee Crosby Nos. 21-25. Accordingly, a permanent ban on Defendants' sale of any credit repair service or product is appropriate.

The proposed order also contains fencing-in provisions that prohibit Defendants from misrepresenting any material fact in connection with the sale of goods or services unrelated to credit repair. Courts have long recognized that the FTC may obtain injunctive relief that is broader than the practices giving rise to the complaint. *See, e.g. FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) ("The Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. Having been caught violating the [FTC] Act, respondents must expect some reasonable fencing in."); *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982) (reasonable fencing-in provisions serve to "close all roads to the prohibited goal, so that [the FTC's] order may not

be by-passed with impunity"). To prevent Defendants from committing illegal acts in the future, the concurrently filed proposed order, *inter alia*, prohibits the Defendants from selling credit repair products or services, prohibits misrepresenting any material facts in connection with the sale of any goods or services, and prohibits disclosure of consumer information.

To ensure enforceability of the order, the proposed order also contains record-keeping and monitoring provisions. Like the fencing-in provisions, Courts have routinely held that such record-keeping and monitoring provisions are justified in FTC actions. *See FTC v. Capital Choice Consumer Credit,* 2004 WL 5141452, *2 (S.D Fla. May 5, 2004) (noting that "[i]t is well settled that 'record-keeping and monitoring provisions . . . are also appropriate to permit the Commission to police the defendants' compliance with the order'") (quoting *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 737, 753-54 (S.D. Fla. 1999)). In light of Crosby's continued suspect business activities after entry of the Preliminary Injunction, and considering the gravity and nature of the harm Defendants have inflicted on economically vulnerable consumers the proposed conduct prohibitions, fencing in prohibitions, record-keeping and monitoring requirements are reasonable and warranted.

C. Restitution in the Full Amount of Consumer Injury is Appropriate Relief

In addition to injunctive relief, the Commission seeks restitution and the monetary equivalent of rescission of contracts for consumers injured by Defendants' deceptive practices. *See Gem Merch.*, 87 F.3d at 469 ("Among the equitable powers of a court is the power to grant restitution and disgorgement."); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431,

1434 (11th Cir. 1984) (holding that the equitable power granted to district courts in Section 13(b) of the FTC Act includes the power to order restitution and rescission). Here, restitution is equal to the full amount consumers paid, less any refunds already paid to consumers.[4] *See TC v. Home Assure, LLC*, 2009 WL 1043956, at *2 (M.D. Fla. April 16, 2009)(noting that monetary relief in a Section 13(b) case "may include a refund to the consumer of the full amount paid by the consumer to the defendants").[5] Moreover, a full refund is appropriate even if, assuming *arguendo*, RCA's services had any value. *See FTC v. Figgle Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993) (affirming a full refund to consumers and

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[4] Courts consistently hold that the FTC need not demonstrate reliance and injury by each individual consumer because "[n]ot only would such proof be virtually impossible, but such a requirement would thwart effective prosections of large consumer redress actions ans frustrate the statutory goals of the section" *FTC v. Wilcox*, 926 F. Supp. 1091, 1105 (S.D. Fla. 1995) (quotations omitted). Instead, "there arises a presumption of actual reliance where the FTC has demonstrated that 'the defendant made material misrepresentations, that they were widely disseminated , and that consumers purchased the defendant's product.'" *Id*. (quoting *Figgle Int'l, Inc.*, 994 F.2d at 605). Here, Defendants disseminated their false statements to anyone who visited their websites or called their phone number.

[5] Relying on *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48 (2d. Cir. 2006), the Eleventh Circuit in *CFTC v. Wilshire Inv. Mgmt. Corp*, 531 F.3d 1339, 1345 (11th Cir. 2008) reversed a district court's restitution award that was "based on the amount the customers lost, not the amount of unjust enrichment received by [defendants]." In *Verity*, the Court held that because a middleman who was not a party to the lawsuit received some consumer money before it reached the defendant, a restitution award of the entire consumer loss was unwarranted. *Verity*, 443 F.3d at 68. The *Verity* Court explicitly noted, however, that "in many cases in which the FTC seeks restitution, the defendant's gain will be equal to the consumer's loss because the consumer buys goods or services directly from the defendant." *Id*. (citing *Gem Merch Corp.*, 87 F.3d at 469-70). To the extent one could argue *Wilshire* might overrule *Gem*'s holding that a district court may grant restitution, "the law of this circuit is emphatic that only the Supreme Court or this court sitting en banc can judicially overrule a prior panel decision." *United States v. Faris*, 583 F.3d 756, 761 (11th Cir. 2009) (quotation omitted). In the instant case, consumers purchased credit repair services directly from RCA without the involvement of a middleman.

noting "[t]he fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds"). The FTC's analysis of RCA's business accounts indicate total deposits of $569,866.77 and returned items of $46,125.00, for a total of $523,741.77.[6] Hernacki ¶¶ 3-6. Accordingly, the Court should enter judgment against the Defendants for the entire consumer loss of $523,741.77.

1. Crosby is Individually Liable for Consumer Restitution

Individuals are held personally liable for corporate FTC Act violations if "the individual defendants participated directly in the practices or acts or had authority to control them [and] that the individual had some knowledge of the practices." *Gem Merch.*, 87 F.3d at 470. Authority to control a company's practices or acts "is established by proof that the individual participated in corporate activities by performing the duties of a corporate officer." *FTC v. Global Marketing Group, Inc.*, 594 F. Supp. 2d 1281, 1289 (M.D. Fla. 2008). Here, the undisputed material evidence demonstrates that Crosby should be held individually liable.

Crosby directly participated in the misrepresentations regarding RCA's ability to raise consumer's credit scores and remove negative credit items. For instance, Crosby admits that he was responsible for the content of RCAcredit.com and RCAcreditservices.com, both of which contained numerous instances of the

[6] The total deposits of $569,846.77 consist of $397,654.16 in RCA bank accounts and 172,191.91 in MarketingWebTraffic bank accounts. Miranda Wilson, Mr. Crosby's assistant at the time he was running RCA, testified that Mr. Crosby routinely co-mingled RCA and MarketingWebTraffic funds. *See* Ex. 4 Deposition of Miranda Wilson ("Wilson Dep.") 39:9-17, 40:18-25.

misrepresentations at issue. *See* Admis. Nos. 16, 19; Crosby Dep. 43:15-44:3; 83:13-87:16; (Crosby admits copies of websites in Deposition Exhibits 3-6 are accurate copies of websites and templates that he placed on the Internet). Crosby also sent numerous email messages containing the misrepresentations. *See, e.g.,* Crosby Dep. Ex.s 8-12. Moreover, Crosby had authority to control RCA's business affairs. Crosby held himself out as the president and owner of RCA and, for the purposes of establishing individual liability for an FTC Act violation, "[a]n individual's status as a corporate officer gives rise to a presumption of ability to control a small, closely-held corporation." *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1270 (S.D. Fla. 2007). Crosby controlled hiring for RCA, payment of business expenses, and refund decisions. *See* Crosby Dep. 42:6-43:1 (Crosby hired Brady Wellington); 80:1-81:18 (Crosby handled chargebacks and refund requests); *see also* Wilson Depo.18:2-17 (Crosby initially ran three of his companies, including Defendant RCA Credit Services from 12360 66th Street, Largo, Florida).

Crosby also satisfies the knowledge prong for individual liability. The FTC does not have to demonstrate subjective intent to defraud; rather, the knowledge requirement "may be satisfied by a showing of 'actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.'" *FTC v. FTC Promotions, Inc.*, 2008 WL 821937, at *2 (M.D. Fla. March 26, 2008) (quoting *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 574 (7th Cir. 1989)).

In the instant case, the undisputed evidence establishes that Crosby knew that his

representations regarding Defendants' abilities to raise credit scores were false, or at a bare minimum, displayed reckless indifference to the truth or falsity of the misrepresentations. Crosby admits that he cannot identify any consumers, apart from three persons, who for any reason obtained a credit score over 700.[7] *See* Crosby Dep. p. 150:4 - 151:2. Crosby further admits that he knew that adding trade lines would not always increase a consumer's credit score. *Id*. p. 154:14-155:2. Robert Liskiewicz, a trade line supplier, testified that he had a conversation with Crosby where they discussed the fact that trade lines were not appearing on consumer's credit reports, Liskiewicz Dep. p. 59:21-60:8, and that he stopped working with Crosby because their actions were not producing any results. *Id*. p. 49:22-50:10. Crosby also identified another trade line provider, Steven Dejesus, but admitted that Mr. Dejesus' trade lines "never showed up." Crosby Dep. p.72:21-73:2. Apart from Mr. Liskiewicz and Mr. Dejesus, Crosby did not identify any other trade line providers. *See* Ex. 9 Resp. to Pl.'s First Set of Interrogatories to Defendant RCA Credit Services, LLC No. 2.

Furthermore, in considering the knowledge prong of individual liability, "the degree of participation in business affairs is probative of knowledge." *Amy Travel*, 875 F.2d at 574.

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[7] Crosby's bare assertion that three consumers obtained credit scores in the 700s is not itself an issue of material fact sufficient to preclude summary judgment. *See Celotex Corp.*, 477 U.S. at 325 (holding that a party opposing summary judgment must "present more than just bare assertions, conclusory allegations or suspicions" to demonstrate a genuine issue of material fact); *see also FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) ("A non-movant's bald assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary judgment."). Crosby has not produced any evidence, apart from his own deposition testimony, that these consumers actually obtained credit scores in the 700s. Moreover, even assuming *arguendo* that three consumers did obtain credit scores in the 700s, the existence of some satisfied customers is not a defense to FTC Act liability. *See Wilcox*, 926 F. Supp. at 1099.

Here, the record demonstrates Crosby's intimate involvement in RCA's business affairs. As noted above, Crosby created the RCA websites containing the misrepresentations, hired and trained RCA's sales staff, paid RCA's business expenses, created RCA's email solicitations, decided which customers would receive refunds, and was present at the RCA offices every day. Crosby Dep. pp. 43:18-44:1; 42:10-43:8; 47:20-48:5; 49:4-6; 94:2-96:15; 80:1-3; Wilson Dep. 21:6-20. Crosby's extensive involvement in RCA's business affairs demonstrates his knowledge of RCA's misrepresentations. Accordingly, individual liability for Crosby is warranted.

IX. CONCLUSION

WHEREFORE, the Commission respectfully requests that the Court grant its motion for summary judgment against Defendants RCA Credit Services, LLC and Rick Lee Crosby, Jr.

Respectfully submitted,

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Dated: March 18, 2010

CERTIFICATE OF SERVICE

I, Peter Lamberton, hereby certify that on March 18, 2010, I electronically filed the foregoing Motion for Summary Judgment and Incorporated Memorandum of Points and Authorities In Support Thereof on the Court's ECF system and served *pro se* Defendant Rick Lee Crosby Jr. by Federal Express at 10426 65th Avenue North, Seminole, FL 33772.

___/s/_ Peter Lamberton_____

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