

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

_____)	
FEDERAL TRADE COMMISSION)		
)		
Plaintiff,)	Case No. 8:08-cv-2062-T27AEP	
)		
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)		
_____)	

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 THE REOF

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

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) 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 of the FTC Act, 15 U.S.C. § 45(a) which prohibits unfair and deceptive acts 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 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. Ge Mech. Corp.*, 87 F.3d 466, 468-89 (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 ~~at~~ ~~to~~, 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 ~~se~~

C. Individual Defendant

Defendant Rick Lee Crosby, Jr. is a resident of Florida and the founder and owner of RCA. 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 BACK GROUND

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.

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.RCAeditservices.com. See Childs Att B, D. Consumers who were interested in RCA's services called RCA's toll-free number, heard a recorded message,

²The Court entered default judgment against Defendant Bady 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. A RCA representative subsequently contacted the consumer and
pitched RCA’s credit repair services. See

within a month); TRO Ex4 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 Thiefaul Dec. ("Thiefaul") ¶ 9 (RCA representative told Thiefaul that they could raise his credit score above 700 within 30 days).

Defendants c

purchases against the tradelines. See *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; *Shi* 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 tradelines 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 effected the purchase of tradelines, and “Payment Authorization,” which authorized RCA to collect payment. See, e.g. *Jones* Att. BC; *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 overtime. See *Crosby* 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 absence of a genuine issue of material fact.” Celotex Corp. 2. § 0.36000 0.0000 TD (a)Tj 8...00T4327tr(c). 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. Tashmar*, 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 part 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 contain 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 NEGATIVE (sic) from your file in 7 Days and Raise Your FICO Score Instantly”); Jones Supp. Att. Ip. 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

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

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 consumer credit scores into the 700s. Crosby Dep. 150:4-7 ("Q: ...do you have any information concerning the consumers' credit scores after tradelines 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 large 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 qualifying language is presented to a consumer 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 activities." *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

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 II through VII of its complaint.

A. This

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 on 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. 400 des ¶ 16; Harris ¶ 12; The fault ¶ 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 are also uncontested. Consequently, the Court should enter summary judgment in favor of the FTC on Counts V ament and

Merch. Corp, 87 F.3d 1468. 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 Ashby, Inc*, 1994 WL200775, *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 credit repair venture www.creditambassador.com, which provides goods or services substantially similar to Defendant RCA Credit. See Ex. 6 Fourth Supp. Dec. O. Andrew Hernacki ("Hernacki") ¶¶

7-10; Henacki 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 enforcement and to vitiate the existing asset
freeze. Henacki ¶8. Indeed, many of the claims on the creditambassador.com website are
substantially similar to claims Mr. Crosby made on the RCA websites. Henacki 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 700s 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

be bypassed 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 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. Slim America, Inc.*, 77 F. Supp. 737, 753-54 (S.D. Fla. 1999)). In light of Crosby’s continued suspicious 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 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 *G.M. Merch.*, 87 F.3d 1469 (“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 WL1043956, 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

⁴ Courts consistently hold that the FTC cannot 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 prosecutions of large consumer redress actions and 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 dialed 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 customer 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.

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

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 financial 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 66 Street, Largo, Florida).

CERTIFICATE OF SERVICE

I, Peter Lambert, hereby certify that on March 18, 2010, I electronically filed the foregoing Motion for Summary Judgment.