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UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION

Plaintiff,

v.

KEITH GILL, an individual doing business as the Law Offices of Keith Gill, and RICHARD MURKEY, an individual,

Defendant.

CV-98-1436 LGB (MCx)

ORDER GRANTING FEDERAL TRADE COMMISSION'S MOTION FOR SUMMARY JUDGMENT

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

I. INTRODUCTION

Defendants run a service that advertises that it can remove "negative information" from credit reports. The FTC brings the instant suit against defendants under (1) the Credit Repair Organization Act for defendants' allegedly misleading statements and illegal billing practices and (2) the FTC Act for deceptive practices.

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1 II. FACTUAL AND PROCEDURAL BACKGROUND

2 A. THE PARTIES

3 Defendant Gill is a licensed attorney who does business as a
4 sole practitioner as the Law Offices of Keith Gill. See FTC's
5 Statement of Uncontroverted Facts at 3 ("FTC's Statement").¹ In
6 addition to a general law practice, Gill has offered credit
7 repair services to consumers since 1995. See *id.* Defendant
8 Murkey is a retired attorney. See *id.* at 7. Since 1995, in
9 conjunction with Gill's office, Murkey has offered credit repair
10 services to consumers. See *id.* at 3.²

11 B. THE REPRESENTATIONS

12 Through the use of radio broadcasts, ads in various
13 newspapers, and phone conversations and personal meetings, the
14 FTC alleges that defendants "prey on consumers with bad credit
15 histories" by offering them a free initial consultation and then
16 using that consultation to convince consumers that defendants can
17 remove all of the negative information on their credit report.
18 See FTC's Mem. P. & A. Sup. Mot. S.J. at 6 ("FTC's Mem.").

19 Consumers who contact defendants have the option of visiting
20 the office or dealing completely over the phone. See FTC's
21 Statement at 4. Consumers who go to the office are asked to
22 bring a copy of their credit report or asked to sign an
23 authorization so that defendants can obtain a copy. See *id.*

24
25 ¹Unless stated otherwise, the facts drawn from the FTC's
Statement of Uncontroverted Facts are undisputed by defendants.

26
27 ²Murkey disputes that contention and instead argues that they
jointly operated a credit repair business. See Murkey's Statement
of Genuine Issues of Material Facts at 7 (Murkey's Statement).
28 This dispute is irrelevant.

1 Consumers conducting business over the phone either fax a copy of
2 their report, or an authorization form. See id.

3 Gill does not usually participate in the initial
4 consultation, Murkey does. See id. Murkey usually uses the
5 consultation to explain the type of service he plans to offer,
6 discusses costs, and discusses the positive results that he has
7 obtained for previous customers. See Murkey's Statement of
8 Genuine Issues of Material Facts at 10 ("Murkey's Statement").
9 According to the FTC, defendants tell consumers that accurate and
10 non-obsolete information can and will be removed from a
11 consumer's report if they retain defendants' service. See FTC's
12 Statement at 5. Defendant Murkey, however, states that potential
13 customers are told that defendants "will use [their] best efforts
14 to get negatives removed, and tells [the potential customer] of
15 his prior success in getting different types of negatives
16 removed, including what plaintiff describes as 'accurate non-
17 obsolete' negative information." See Murkey's Statement at 11.
18 Defendants also tell their customers that credit reports will
19 begin improving in as little as a month to six weeks. See FTC's
20 Statement at 5.

21 C. PAYMENT ISSUES

22 The starting point for the fees charged to consumers is set
23 forth in a fee schedule. See FTC's Statement at 5.³ Consumers
24

25 ³The defendants dispute that the fee schedule is the starting
26 point. See Murkey's Statement at 35. Rather, they argue that the
27 fee schedule is the maximum charged by defendants and that the fee
28 charged is always less than the amount shown in the fee schedule.
See id. This dispute does not negate the fact that defendants use
a fee schedule to determine the fees charged to consumers.

1 are typically given a written estimate of the total costs, with
2 each negative item listed separately. See id. at 16. Consumers
3 are then required to make a down-payment and commit to a monthly
4 payment plan for payment of the balance. See id. After
5 consumers make the down payment, defendants bill the consumers on
6 a regular basis. See id. at 17.⁵ Defendants have continued to
7 bill consumers who had attempted to cancel their contract. See
8 id.

9 **D. PROCEDURAL HISTORY**

10 The FTC filed this complaint on March 2, 1998. The case was
11 originally assigned to Judge Irving Hill. Also on March 2, 1998,
12 the FTC sought an order temporarily placing the case under seal,
13 a temporary restraining order, an asset freeze, an order
14 permitting expedited discovery, and an order to show cause why a
15 preliminary injunction should not be issued. Judge Hill denied
16 the request to place the case under seal, denied plaintiff's
17 request to hear the temporary restraining order without notice to
18 the defendants, and ordered the FTC to serve all the papers filed
19 in the case on defendants.

20 On March 31, 1998, the case was reassigned to this Court.
21 On April 21, 1998, the FTC, Murkey, and Gill entered into a
22

23
24 ⁴Defendants, in response to this contention, allege that they
25 perform services before requesting payment. See Murkey's Statement
26 at 35. However, this conclusory allegation does not negate the
fact that defendants do ask for a down-payment, and do require
monthly payments.

27 ⁵Defendants again conclusorily argue that the payments are for
28 services rendered. However, they do not challenge that these
payments are due on a monthly basis.

1 stipulation as to the preliminary injunction. The parties
2 agreed, inter alia, that Murkey and Gill would not represent that
3 anyone can substantially improve most consumer's credit reports
4 or profile by permanently removing bankruptcies, tax liens, late
5 payments, collection accounts, or other evidence of delinquencies
6 from the consumer's credit reports; that they would not violate
7 any provision of the Credit Repair Organization Act, 15 U.S.C. §
8 1679 et seq. by, inter alia, charging or receiving money for
9 credit repair services before the services are fully performed,
10 making statements to credit reporting agencies that defendants
11 knew or had reason to believe were untrue or misleading, making
12 or using any untrue or misleading representation of their
13 services; that they would not dissipate any assets in their
14 possession; that they would not dispose of any documents relating
15 to this litigation; that they would turn over to the FTC a
16 detailed accounting of all funds they have received for credit
17 repair services; that they would maintain a detailed accounting
18 of all the uses and changes in status quo of any assets they own;
19 that they would prepare and turn over to the FTC a financial
20 statement; that they would return to the FTC all payments made by
21 customers not yet cashed or received; and that they would enjoin
22 from exercising any control over any business entity without
23 first giving notice to the FTC. See April 21, 1998 Murkey Stip.;
24 April 21, 1998 Gill Stip.

25 Discovery then proceeded amidst a constant state of battle,
26 culminating in the plaintiff's filing of the instant summary
27 judgment motion on September 3, 1999. On September 14, 1999,
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1 defendant Gill filed a brief opposition and joined in Murkey's
2 opposition. On September 15, 1999, defendant Murkey filed his
3 opposition. The FTC filed its reply on September 20, 1999.⁶

4 III. STANDARD FOR SUMMARY JUDGMENT

5 Rule 56 of the Federal Rules of Civil Procedure provides
6 that a court shall grant a motion for summary judgment if "the
7 pleadings, depositions, answers to interrogatories, and
8 admissions on file, together with the affidavits, if any, show
9 that there is no genuine issue as to any material fact and that
10 the moving party is entitled to judgment as a matter of law."
11 Fed. R. Civ. P. 56(c). Material facts are those that may affect
12 the outcome of the case. See Anderson v. Liberty Lobby, Inc.,
13 477 U.S. 242, 248 (1986). A dispute as to a material fact is
14 genuine if there is sufficient evidence for a reasonable jury to
15 return a verdict for the nonmoving party. See id.

16 The moving party for summary judgment bears the initial
17 burden of demonstrating the absence of a genuine issue of
18 material fact for trial. See Celotex Corp. v. Catrett, 477 U.S.
19 317, 323 (1986). When the moving party has the burden of proof
20 on an issue at trial, it must affirmatively demonstrate that no
21 reasonable trier of fact would find other than for the moving
22 party. Conversely, on an issue for which the nonmoving party has
23 the burden of proof at trial, the moving party need only point
24 out "that there is an absence of evidence to support the
25 nonmoving party's case." Id. at 325.

26
27 ⁶In conjunction with this motion, the parties have filed
28 approximately 5300 pages of exhibits, not including the lodged
depositions.

1 Where the operative facts are substantially undisputed, and
2 the heart of the controversy is the legal effect of such facts,
3 such a dispute effectively becomes a question of law that can,
4 quite properly, be decided on summary judgment. See Odle v.
5 Heckler, 707 F.2d 435, 438 (1983). However, summary judgment
6 should not be granted where contradictory inferences may be drawn
7 from undisputed facts. See Braxton-Secret v. A.H. Robins Co., 769
8 F.2d 528, 531 (1985). In such a case, the non-moving party must
9 show that the inferences it suggests are reasonable in light of
10 the competing inferences. See Matsushita Elec. Indus. Co. v.
11 Zenith Radio Co., 475 U.S. 574, 588 (1986).

12 IV. ANALYSIS

13 A. THE FAIR CREDIT REPORTING ACT

14 The Fair Credit Reporting Act ("FCR Act") was enacted to
15 assure fair and accurate credit reporting. See 15 U.S.C. §
16 1681(a)(1). The FCR Act regulates the credit reporting industry
17 by limiting the type of information credit reporting agencies
18 ("CRA") may compile, the manner in which it may be reported, and
19 the procedures for ensuring the accuracy of the information. See
20 id. § 1681a-c, e, 1. The law permits a CRA to obtain accurate
21 negative information from a review of public records or
22 information that can be provided by a public agency. See
23 generally, id. § 1681 et seq. Additionally, a CRA is entitled,
24 under certain circumstances, to gather information for the
25 purpose of preparing an investigative consumer report. See id. §
26 1681d.

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1 Generally, a CRA has a duty of reasonable care in the
2 preparation of consumer reports. See 21 C.J.S. Credit Reporting
3 Agencies § 6, at 358 (1990). Because preparation of a consumer
4 credit report may be viewed as a continuing process, the
5 obligation to ensure accuracy arises with every addition of
6 information. See id. But to require an agency to update
7 independently information after receipt and verification would
8 burden commercial dealings beyond any required legislative
9 mandate. See id. As such, the statutory duty to maintain
10 accurate information does not require the credit reporting agency
11 to include all the relevant credit information. See id. at 359.
12 Furthermore, for a consumer to prevail on a claim under the
13 statute based on the allegation that the report is incomplete,
14 the lack of completeness must be of a fundamental nature. See
15 id. n.20 (citing Stewart v. Credit Bureau, Inc., 734 F.2d 47
16 (D.C. Cir. 1984)).

17 If a consumer disputes the completeness or accuracy of any
18 item on his or her credit report, the CRA must verify the
19 accuracy of the disputed item or remove it, subject to certain
20 limitations. See 15 U.S.C. § 1681i(a)(1)(A). If an item is
21 found to be inaccurate or unverifiable, the CRA must delete the
22 information from the credit report. See id. If the entry is
23 verified, and the consumer continues to dispute it, the consumer
24 is entitled to have his side of the dispute included in the
25 record. See id. § 1681i(b). There is nothing in the law which
26 precludes the disputed information from being reinstated on a
27 consumer's credit report if the information is found to be
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1 accurate and non-obsolete. Indeed, because a CRA is under a
2 mandate to furnish credit reports or profiles which are accurate,
3 the CRA is obligated to reinstate the negative information on the
4 credit report if found to be accurate and non-obsolete. See id.
5 § 1681e(a). Although a CRA has a general obligation to
6 reinvestigate a dispute, the law also permits a CRA to terminate
7 a reinvestigation of information disputed by a consumer if the
8 CRA reasonably determines that the consumer's dispute is
9 frivolous or irrelevant. See id. § 1681i(a)(3)(A). The grounds
10 for such a determination include circumstances where the consumer
11 fails to provide sufficient information to investigate the
12 disputed information. See id.

13 **B. THE CREDIT REPAIR ORGANIZATIONS ACT**

14 The Credit Repair Organization Act ("CRO Act") took effect
15 on April 1, 1997. The purpose of the CRO Act is to
16 ensure that prospective buyers of the services of
17 credit repair organizations are provided with the
18 information necessary to make an informed decision
19 regarding the purchase of such services; and . . . to
20 protect the public from unfair or deceptive advertising
21 and business practices by credit repair organizations.

22 See id. § 1679(b).

23 As of 1997, the FTC is responsible for enforcing the CRO Act
24 which spells out the duties of credit repair organizations. See
25 Federal Trade Commission § 19.09, at 48 (Supp. 1999). The CRO
26 Act regulates the activities of "credit repair organizations,"
27 which are defined as

28 any 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

1 money or other valuable consideration, for the express
2 or implied purpose of (i) improving any consumer's
3 credit record, credit history, or credit rating; or
4 (ii) providing advice or assistance to any consumer
with regard to any activity or service described in
clause (i)

5 See 15 U.S.C. § 1679a(3)(A).

6 The CRO Act prohibits any credit repair organizations from
7 making any statement to any CRA or any person who has extended
8 credit to the consumer or to whom the consumer has applied for an
9 extension of credit. (1) which is untrue or misleading (or which,
10 upon the exercise of reasonable care, should be known by the
11 credit repair organization to be untrue or misleading) with
12 respect to the consumer's creditworthiness, credit standing, or
13 credit capacity, or (2) the intended effect of which is to alter
14 the consumer's identification to prevent the display of the
15 consumer's credit report, credit history, or credit rating for
16 the purpose of concealing adverse information that is accurate
17 and non-obsolete. See id. § 1679b(a)(1), (2).

18 The CRO Act also prohibits credit repair organizations from
19 (1) making or using any untrue or misleading representations of
20 the services of the credit repair organization, or (2) charging
21 or receiving any money or other valuable consideration for the
22 performance of any service which the credit repair organization
23 has agreed to perform for any consumer before such service is
24 fully performed. See id. § 1679b(a)(3), (b).

25 Additionally, credit repair organizations may not provide
26 any services to any consumers until (1) the consumer has signed a
27 written and dated contract for the purchase of such service, and

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1 (2) three business days have passed since the date the contract
2 was signed. See id. § 1679d(a). The consumer signing such a
3 contract may cancel the contract without penalty or obligation
4 before midnight of the third business day after the date on which
5 the consumer signed the contract. See id. § 1679e(a). The
6 contract must contain a conspicuous statement in bold face type
7 informing the consumer of his right to cancel the contract, and
8 must be accompanied by a form that the consumer can use to cancel
9 the contract. See id. § 1679d(b)(4). The contract must also
10 contain the credit repair organization's name and business
11 address, the terms and condition of payment, and a full and
12 detailed description of the services to be performed, including
13 all guarantees of performance and an estimate of the date by
14 which the service will be completed. See id. § 1679d(b)(1)-(3).
15 Any contract that does not comply with the CRO Act is void and
16 unenforceable, and the consumer cannot waive any of his or her
17 rights under the statute. See id. 1679f(a), (c).

18 To ensure compliance, the CRO Act provides a right of action
19 by private citizens injured by a credit repair organization, see
20 id. § 1679g(a), by states on behalf of their residents, see id. §
21 1679h(c)(1), and by the FTC, see id. § 1679h(a). For the purpose
22 of the exercise by the FTC of its functions and powers under the
23 Federal Trade Commission Act ("FTC Act"), any violation of any
24 requirement or prohibition imposed under the CRO Act shall
25 constitute an unfair or deceptive act or practice in commerce in
26 violation of Section 5(a) of the FTC Act. See id. § 1679h(b)(1).
27 Thus, all functions and powers of the FTC under the FTC Act are
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1 available to the FTC to enforce compliance with the CRO Act,
2 including the power to enforce the provision of the CRO Act as if
3 the violation had been a violation of a trade regulation rule.
4 See id. § 1679h(b)(2).

5 C. THE FTC ACT

6 Plaintiff also brings this action under Section 5 of the FTC
7 Act. Section 5 provides that "[u]nfair methods of competition in
8 or affecting commerce, and unfair or deceptive acts or practices
9 in or affecting commerce, are hereby declared unlawful." 15
10 U.S.C. § 45(a)(1). Under Section 5, the Court will find an act
11 or practice deceptive or misleading if there is a representation,
12 that is likely to mislead consumers acting reasonably under the
13 circumstances, and the representation is material. See FTC v.
14 Pantron I Corp., 33 F.3d 1088, 1095 (9th Cir. 1994).

15 D. ALLEGED VIOLATION

16 Plaintiff alleges that defendants violated (1) section
17 404(a)(3) of the CRO Act; (2) section 404(b) of the CRO Act, and
18 (3) Section 5 of the FTC Act. The Court addresses the violations
19 of the CRO Act as a matter of first impression.

20 The moving party for summary judgment bears the initial
21 burden of demonstrating the absence of a genuine issue of
22 material fact for trial. See Celotex Corp. v. Catrett, 477 U.S.
23 317, 323 (1986). When the moving party has the burden of proof
24 on an issue at trial, it must affirmatively demonstrate that no
25 reasonable trier of fact would find other than for the moving

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1 party. As such, it is the FTC's burden to show that the
2 undisputed facts entitle it to a judgment as a matter of law.
3 The Court analyzes the FTC's claims seriatim.

4 1. SECTION 404(a)(3) OF THE CRO ACT

5 Section 404(a)(3) of the CRO Act provides that "[n]o person
6 may . . . make or use any untrue or misleading representation of
7 the services of the credit repair organization." 15 U.S.C. §
8 1679b(a)(3). Plaintiff argues that the elements needed to prove
9 a violation of section 404(a)(3) of the CRO Act are analogous to
10 those needed to prove a violation of Section 5 of the FTC Act
11 prohibiting unfair or deceptive practices. As such, the FTC
12 states that it must show that (1) there is a representation,
13 omission, or practice that is likely to mislead consumers acting
14 reasonably under the circumstances, and (2) the representation,
15 omission, or practice is material. See FTC's Mem. at 32. For
16 support, the FTC cites FTC v. Pantron I Corp., 33 F.3d 1088, 1095
17 (9th Cir. 1986). Pantron I, however, did not address Section 404
18 of the CRO.⁷

19 Contrary to Section 5's somewhat amorphous language, section
20 404(a)(3) of the CRO Act is much more specific and prohibits
21 particular conduct (as opposed to unfair or deceptive acts).
22 Unlike Section 5 of the FTC Act, liability attaches even if the
23 representation made by the credit repair organization is not made

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25 ⁷Pantron held that, under Section 5 of the FTC Act, a
26 representation is considered deceptive if (1) there is a
27 representation, omission, or practice that (2) is likely to mislead
28 consumers acting reasonably under the circumstances, and (3) the
representation, omission, or practice is material. See FTC v.
Pantron I Corp., 33 F.3d 1088, 1095 (9th Cir. 1994).

1 "for the purpose of induc[ing]" consumers to purchase a
 2 particular service or good. Compare 15 U.S.C. § 45(a) with 15
 3 U.S.C. § 1679b(a)(3). On the face of the statute, liability
 4 attaches for violation of Section 404(a)(3) if the statement made
 5 regarding the service of the credit repair organization is untrue
 6 or misleading, nothing more or nothing less. As such, the burden
 7 on the FTC is to show an "untrue or misleading representation."
 8 15 U.S.C. § 1679b(a)(3).

9 Plaintiff argues that under this standard, defendants should
 10 be held liable as a matter of law because the representations
 11 that they made were both untrue and misleading. Defendants, on
 12 the other hand, argue that judgment as a matter of law is
 13 inappropriate because there remains genuine issues of fact as to
 14 (1) whether defendants did in fact improve a substantial number
 15 of consumer credit reports by removing negative items from their
 16 reports; (2) whether defendants represented that they could
 17 permanently remove negative items from consumer credit reports;
 18 and (3) whether defendants represented that they could
 19 permanently remove all negative items on consumer credit reports.
 20 See Murkey's Mem. P. & A. Op. S.J. at 14-15 ("Murkey's Mem.").
 21 As such, defendants contend that none of the aforementioned
 22 issues can be decided by the Court. As the following discussion
 23 highlights, defendants err.

24 Plaintiff argues that defendants should be liable for making
 25 untrue or misleading representations based on two grounds.⁸

27 ⁸Defendants do not dispute that they are a credit repair
 28 organization as defined by statute. See Murkey's Statement at 8.
 Therefore, the provision of the CRO Act apply to them.

1 First, plaintiff argues that defendants' representation that they
2 can remove accurate non-obsolete negatives legally is false.
3 Second, plaintiff argues that defendants' representation that
4 they can permanently take negative items off a consumer's credit
5 report is also false.

6 **a. Untrue Representations**

7 Defendants appeared on a one hour weekly radio broadcast
8 called "Turn Your Life Around" on a local Los Angeles radio
9 station from sometime in 1997 until March of 1998. See FTC's
10 Statement at 12-13. Defendants encouraged people who called or
11 visited the office to listen to the program. See *id.* at 13.
12 During the broadcast, Murkey made the following statements:

13 "There literally is nothing a consumer can possibly
14 have on a credit report that we cannot remove and we
can remove it legally."

15 "There [are] many legal ways under the Federal Fair
16 Credit Reporting Act to fix credit, no matter what type
17 of negative it is, including foreclosure and or
bankruptcy, judgment, tax liens . . . even if those
[items] are not paid off."

18 "Because of the Federal laws and the consumers' rights
19 under the Federal laws, we still have legal rights as
20 consumers and we can, in fact, knowing the right proper
21 techniques and strategies and procedures that we have
perfected in our offices over the years, we can legally
remove those negatives from someone' (sic) credit
report."

22 "It doesn't make a difference what type of negative you
23 have: We have files in our office verifying that we
24 can legally remove bankruptcies, foreclosures, what
they call short pays in the real estate community,
25 judgments, tax liens, surrenders, repossessions,
defaulted student loans, charge offs, settlements,
26 collections and even late accounts for child support. .
27 . . It does not make a difference if that item was
legally put on there or not and to us it doesn't make a
difference if you still owe money."

28 "When it comes to removing negatives that actually were
yours in the first place, you can forget it, they

1 [credit bureaus] aren't going to help you at all. But
2 yet we can, that's where we come in and provide a
service to the consumer."

3 "I'll repeat this again: It doesn't make a difference
4 what kind of negative you have on the report, whether
they're paid or unpaid accounts, they can legally be
5 removed from your report."

6 "No matter what kind of negative you can possibly have,
7 there are legal ways to take those items off your
8 credit report and that can be done even without you
9 paying off that account. Even tax liens or judgments
10 can be removed from your report legally without you
having to pay that charge. . . ."

11 "In our offices, we can clean your credit in six weeks
12 to two months."

13 FTC's Statement at 13-14. Defendants do not challenge the
14 substance of these broadcasts, but allege that they are taken out
15 of context. See Murkey's Statement at 32. The Court fails to
16 see exactly what defendants mean by "out of context." Statements
17 are either made or they are not. In this case, defendants
18 admitted making these statements, and the Court will deem them as
19 undisputed. However, even though the statements are undisputed,
20 plaintiff must show that they are false or misleading.

21 Plaintiff also points to statements made by defendants at
22 public appearances before mortgage brokers and before a bar
23 association. See FTC's Statement at 15. During a presentation
24 to a group of mortgage brokers, Murkey represented that

25 99.9 percent of the time everything we take off stays
26 off forever. And usually, if something comes back on,
27 it's an open account not a closed account. But we tell
28 our client this, and we put it in writing, if anything
comes back on the credit report at all, we'll take it
off again for free. . . . [O]n average of all our
clients, at least half the negatives will be gone in
the first six weeks period.

id. (citing FTC's S.J. Ex. 18 at 1207 ("CAMB Presentation")). At

1 the same public appearance, Murkey told the mortgage brokers that
2 the removal of negative items was done "100 percent legally so
3 [their] clients can sleep at night." See id. at 1211.

4 There are two overarching themes embodied in the radio
5 broadcasts and the public appearances. The first one is that
6 defendants can legally remove all kinds of negative information
7 from consumers' credit reports. The second one is that once the
8 items are removed, they are so removed permanently.⁹

9 Addressing the permanency issue first, the statements made
10 at the CAMB presentation unequivocally claim that everything (or
11 99.9%) defendants take off consumer credit reports stays off.
12 According to the declarations provided by plaintiff, this is not
13 a true statement. See TRO Ex. 3 at 198-99; TRO Ex. 4 at 209-11;
14 S.J. Ex. 1 at ; S.J. Ex. 2 at 55-56; S.J. Ex. 3 at 72-74; S.J.
15 Ex. 4 at ; S.J. Ex. 10 at 479, 482; S.J. Ex. 12, at 505-10.
16 Defendants do not challenge that at least four of the declarants'
17 negative entries on their credit report were not permanently
18 removed. What they do challenge is that the affidavits proffered
19 by plaintiff represent only a small proportion of defendants'

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21 ⁹Additionally, plaintiff submits evidence that consumers who
22 speak with the defendants over the telephone are regularly told
23 that any and all negative information can be removed from their
24 credit report in a very short time. See FTC's Statement at 14.
25 Defendants challenge that assertion and state that no such
26 statements were made. Defendants state that their customers "are
27 told that it is possible to remove all types of negatives, but no
28 guarantee is given that all negatives will be removed." Murkey's
Statement at 32. To support that assertion, defendants cite to
evidence in the record which shows that he does not give
guarantees. See Murkey Decl. at 3612, attached to Murkey's Mem.
Op. S.J., Ex. 58 ("Murkey Decl."); CAMB Presentation at 3458. As
such, the defendants have raised a genuine issue of material fact
as to those particular statements only.

1 clients. See Gill Decl. at 3; Murkey Decl. at 3618. To support
2 that assertion, defendants direct this Court to review exhibits
3 45 through 56 filed in support of their opposition. However,
4 defendants offer no testimony as to what these documents
5 represent or how these documents could possibly show (1) that
6 they achieved any removal of negative information, (2) that any
7 information removed was accurate, (3) that any such information
8 was not obsolete, (4) that any information, if actually deleted,
9 was not later reinserted, or (5) that the permanent removal of
10 that information was achieved in a lawful manner.¹⁰

11 Additionally, defendants emphasize that the FTC had access
12 to over 2,000 files, and yet could only find a very few number of
13 "dissatisfied" customers, who "will make false statements to
14 obtain [a] 'free ride.'" Gill Decl. at 5. The defendants miss
15 the point. Plaintiff does not need to submit a declaration for
16 every single injured customer to meet its burden. If so, this
17 courthouse would be buried under a mountain of paper. The FTC
18 need only offer sufficient evidence to meet its burden at trial.
19 Once it has done so, it is the defendants' task to challenge that

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21 ¹⁰In addition, the exhibits offered by defendants, even if
22 probative, are not admissible under the Federal Rules of Evidence.
23 As plaintiff points out, they lack authentication and they are
24 inadmissible hearsay. At oral argument, Murkey's counsel urged
25 this Court to ignore such deficiencies. Counsel argued that in the
26 name of justice, such a "technicality" should not prevent the Court
27 from considering the substance of the evidence. First, the Court
28 would like to make something very clear: the Federal Rules of
Evidence are not mere technicalities--they are federal laws. As
such, this Court is obligated to follow their mandate. Second, it
is not this Court's responsibility to cure defense counsel's
inadequate attempt to introduce evidence. To do so would create an
"injustice" to the other party, who has complied with the letter of
the law.

1 showing with sufficient evidence to create a genuine issue of
2 material facts. Other than defendants' self-serving, unsworn,
3 and unsubstantiated statements that they do remove negative items
4 permanently, defendants have provided no admissible evidence to
5 create such a genuine issue here.

6 Addressing the "legality" of defendants' techniques, the FTC
7 alleges that the defendants' so-called legal methods consist of
8 inundating the credit reporting agencies with dispute letters,
9 sent in the name of consumers, which falsely allege that various
10 items on the credit report are incorrect or that a particular
11 account does not belong to a consumer. See FTC's Statement at
12 10.

13 The defendants dispute that characterization and state that
14 they "do not intentionally misrepresent any of their client's
15 credit status in their dispute letters to the credit bureaus."
16 Murkey's Statement at 23.¹¹ Furthermore, defendants allege that

17
18 ¹¹It is interesting to note that it is these kinds of practices
19 which provided the catalyst for Congress's decision to pass the CRO
20 Act. In commenting on an earlier version of the CRO Act, the House
21 Committee on Banking stated that

21 credit repair clinics . . . through advertisements and
22 oral representations, lead consumers to believe that
23 adverse information in their consumer reports can be
24 deleted or modified regardless of its accuracy. . . .
25 Therefore, such representations by credit repair clinics
26 are often misleading, and consumers . . . are cheated out
27 of the money they paid for services. . . . Where credit
28 repair clinics do succeed, however, they often do so
through abuse of the reinvestigation procedure. . . .
This title seeks to regulate the industry to ensure that
consumers are provided with necessary information about
credit repair organizations so that they can make
informed decisions regarding the purchase of their
services and to protect the public from unfair and
deceptive advertising and business practice by the

1 they "use various methods to remove negatives in credit reports,
2 other than sending dispute letters to credit reporting agencies."
3 See id. Finally, defendants claim that "the letters dispute
4 information which defendants believe is either inaccurate or
5 incomplete." See id.

6 First, the Court addresses defendants' contention that they
7 "do not intentionally misrepresent any of their client's credit
8 status." Plaintiff provided eleven declarations of consumers who
9 had allegedly been deceived by Murkey's statements, but a few of
10 them are particularly enlightening. John Frye's declaration has,
11 attached to it, approximately 30 letters that were sent on his
12 behalf to the credit reporting agencies (Equifax and Experian)
13 from Murkey.¹² See Frye Decl., FTC's S.J. Ex. 3. These letters
14 were sent by Murkey to these agencies without Frye's consent or
15 knowledge. See id.¹³ As an illustration, the Court quotes some
16 of the statements made by Murkey:

17 "This is not an account that I have with this company, this
18 is someone else's information entirely!" (Spokane Credit
19 Union; Universal Bank Cust.; Crdt First)

20 industry-

21 Consumer Reporting Reform Act Of 1994, H.R. Rep. 103-486.

22 ¹²In his Statement of Genuine Issues of Material Facts, Murkey
23 "disputes" the declaration of John Frye. See Defs.' Statement at
24 40. However, he points to no evidence which would refute any of
25 Frye's testimony, or render inadmissible any of the documents
attached as exhibits to the declaration.

26 ¹³All the letters attached to the Frye declaration were sent
27 after the enactment of the CRO Act. The letters are dated June
28 1997, November 1997, October 1998, and March 1999. See FTC's S.J.
Ex. 3 at 148-177. As to the letters which were sent after March
1998, these letters are in violation of both the CRO Act and of the
preliminary injunction entered in this case.

1 "I have never been late on any of my payments towards this
2 account!!" (Wells Fargo Marine)

3 "I did not file bankruptcy. This is absurd!"

4 "I don't owe them any money." (Crdt First)

5 "I might have some bad credit but this doesn't belong here."
6 (First USA)

7 "This is not my account." (Sears)

8 Id. at 148-177. John Frye testified that the Sears and the
9 Spokane Teachers Credit Union accounts (which the Murkey letters
10 state did not belong to him) did in fact belong to him, and that
11 he did file for bankruptcy. See id. at 79. John Frye further
12 testified that he had told Murkey about this. See id. Therefore
13 Murkey knew that the accounts belonged to Frye and that Frye did
14 file bankruptcy.

15 Another client of defendants provided two letters which were
16 written on her behalf by Murkey.¹⁴ The letters were addressed to
17 Trans Union (another credit reporting agency) and stated that a
18 particular Visa account "was not written off as a loss. This was
19 a good account." See Cole Decl., FTC's S.J. Ex. 2 at 70. In
20 regard to a foreclosure, the letter further stated that "this is
21 crazy! This foreclosure is not mine! This false information is
22 causing my family and I great hardship. Could you please
23 investigate this matter and take care of it for us." Id. Elsa
24 Cole, Murkey's client in this case, testified that she told
25 Murkey that the foreclosure was hers. Id. at 58. Furthermore,

26 ¹⁴The two letters sent on behalf of Cole are dated February
27 1998 and March 1999. See FTC S.J. Ex. 2 at 70-71. Both letters
28 were written after the enactment of the CRO ACT, and the March 1999
letter is also in violation of the preliminary injunction entered
in this case.

1 she testified that the Visa account was also hers. See id.
2 Thus, the representations in the letters were false.

3 Another client of Murkey and Gill's credit repair clinic,
4 Kimberly Harris, attached six letters to her declaration. Those
5 letters are written to Equifax, Trans Union, and Experian.¹⁵ One
6 of those letters states that the bankruptcy reported on her
7 credit report was done so in error. The letter states "Wow. This
8 is a screw up I never expected to be on my report. Please take
9 this false information off my report immediately! It is not
10 mine." Harris Decl., FTC's S.J. Ex. 4 at 195. The other five
11 letters are similar in substance, and essentially deny owning
12 certain accounts. See id. at 195-200. However, once again, Mrs.
13 Harris testified that the bankruptcy was hers, and that she told
14 defendant Murkey that it was hers when she met with him. See id.
15 at 178. She also told him that the other accounts were hers.
16 See id. As such, Murkey's statements on Harris' behalf were
17 false.

18 Contrary to defendants' contention, these kinds of
19 challenges are not legal. Section 404(a)(1) of the CRO Act
20 prohibits any person from making "any statement . . . which is
21 untrue or misleading (or which, upon the exercise of reasonable
22 care, should be known by the credit repair organization . . . to
23 be untrue or misleading) with respect to any consumer's credit
24 worthiness . . . to . . . any consumer reporting agency."

25
26
27 ¹⁵The letters sent on behalf of Harris are dated December 1997,
28 November 1998, and March 1999. See FTC's S.J. Ex. at 195-200. All
the letters violate the CRO Act, and all the letters but the
December 1997 letters violate the preliminary injunction entered in
this case.

1 Clearly, these statements were untrue. Furthermore, the
2 addressees (Equifax, Trans Union, and Experian) are consumer
3 credit agencies. See 15 U.S.C. § 1681a(f). As such, at least
4 one of defendants' practices is not legal, and any representation
5 that it is, is false as a matter of law.

6 As to the contention that defendants use other legal
7 methods to remove negative items from consumer's credit reports,
8 defendants point to deletion letters which allegedly resulted
9 from negotiations with creditors. See Murkey's Statement at 24
10 (citing to Murkey's Mem., Ex. 37 at 3515-3530). It is unclear
11 how these deletion letters came about--whether they are the
12 result of negotiations with the creditors, whether they are the
13 result of successful removals of negative items based on
14 inaccuracy, whether they are the result of successful removals of
15 negative items based on the fact that they were obsolete, or
16 whether they are the result of defendants' illegal mailing
17 campaigns.¹⁶ Defendants argue, based on these letters, that
18 there remains a genuine issue of fact as to whether defendants
19 can legally remove accurate and non-obsolete information from
20 consumers' credit reports. Even if these letters were admissible
21 and probative, the issue whether these practices are legal is not
22 material. Because at least one of defendants' practices is

23 ///

24 ///

25
26 ¹⁶The FTC objects to these letters on the ground that (1) they
27 are inadmissible hearsay, (2) they are not authenticated, and (3)
28 they are irrelevant. The FTC's hearsay objection is well taken.
The Christie Declaration fails to support a finding that the
letters fall within the business record exception. Furthermore,
the letters are not properly authenticated.

1 illegal as a matter of law, their claim that they can remove
2 negative credit information "100% legally" is false. See CAMB
3 Presentation. at 1211.¹⁷

4 In a last effort to show that their tactics are legal,
5 defendants claim that "the letters [sent on behalf of consumers]
6 dispute information which defendant[s] believe[] is either
7 inaccurate or incomplete." Murkey's Statement at 23. First,
8 plaintiff challenges that characterization by pointing to the
9 fact that defendants often do not inquire from the customers
10 whether the information on their credit report is accurate or
11 not, and by pointing to the dispute letters quoted above. See
12 FTC's Statement at 11.

13 Addressing the charge that defendants often do not ask
14 consumers about the information on their credit report,
15 defendants state that they can determine the accuracy or
16 completeness of the reports based on the four corners of the
17 report and need not always ask information from their customers.
18 See Murkey Dep. at 237-38, attached to FTC's Mot. S.J., Ex. 16
19 ("Murkey Dep."). For example, if a customer has a tax lien on
20 his report, and the tax lien originated in Alaska, defendants can
21 tell from the addresses on the credit report if the customer ever
22 lived in Alaska. See *id.* at 239-40. If not, defendants can
23 challenge that entry without any other information from the
24 customer. See *id.* at 240. Additionally, defendants state that

25
26 ¹⁷At oral argument, defense counsel had difficulties
27 articulating which other methods defendants use to repair credit.
28 After consultation with his client and Mr. Gill, counsel was able
to identify only two or three other methods. However, there is no
evidence anywhere in the record that substantiate these empty
allegations.

1 the amounts of such liens are always inaccurate because the
2 reports never identify whether the amount owed, as reflected on
3 the credit report, is at the time the lien was entered or at the
4 time the report was generated. See id. Therefore, defendants
5 argue that they need not talk to their customers to determine
6 that the information on the credit report is incomplete. See id.
7 Also, defendants need not talk to the customers to determine
8 whether the negative information is obsolete because the law
9 specifies how long a credit reporting agency may maintain certain
10 entries. See 15 U.S.C. § 1681c. This may be true, but as
11 demonstrated by the letters cited above, defendants do more than
12 merely contest the "technical" accuracy of the entries on credit
13 reports. Furthermore, defendants have a duty to exercise
14 reasonable care in making representations to credit reporting
15 agencies. See 15 U.S.C. § 1679b(a)(1)(A). Defendants'
16 admissions that they do not ask about the accuracy of the reports
17 violate that duty, and as such violate the law. Furthermore, a
18 brief reading of the letters sent by defendants on behalf of
19 their clients show that defendants' challenges are far outside
20 the "four corners" of the credit reports.

21 **b. Misleading Representations**

22 Moving away from the minutia of determining whether the
23 statements were actually false as a matter of law, the Court now
24 analyzes the representations made as a whole. There are no
25 reported cases that have laid out the standard a court should use
26 to interpret whether particular representations made by a person
27 were misleading or not. There are, however, cases which
28 addressed the interpretation of advertisements. The Court finds

1 those issues to be similar and analyzes the current
2 representations in light of the standards used by courts in
3 analyzing advertisements. In deciding questions of ad
4 interpretation, the Court looks at the "overall net impression
5 made by the advertisement in determining what message may
6 reasonably be ascribed to it." FTC v. US Sales Corp., 785 F.
7 Supp. 737, 745 (N.D. Ill. 1992). The question then becomes
8 whether plaintiff has affirmatively demonstrated that the
9 representation/advertisement, taken as a whole, was misleading as
10 a matter of law. Even if some of the statements are impliedly
11 misleading, and not expressly so, this is a distinction without a
12 difference. See FTC v. Figgie Int'l, Inc., 994 F.2d 595, 604
13 (9th Cir. 1993). There is nothing in the case law which protects
14 from liability those who merely imply their deceptive claims.
15 See id. With that principle in mind, the Court now analyzes
16 defendants' statements.

17 Defendant Murkey stated in his radio broadcast that there
18 was "literally . . . nothing a consumer can possibly have on a
19 credit report that we cannot remove." FTC's Statement at 13.
20 This statement implies that the defendants are able to remove all
21 negative information on consumers' credit report, not just
22 inaccurate and obsolete information. Murkey further stated that
23 there are many legal ways under the Federal Fair Credit Reporting
24 Act to "fix credit, no matter what type of negative it is,
25 including foreclosure and or bankruptcy, judgment, tax liens . .
26 . even if those [items] are not paid off." Id. (emphasis added).
27 Once again, this statement implied that all kinds of negative
28 information can be removed. The rest of the statements in the

1 radio broadcast are similarly misleading. Furthermore, although
2 defendants do not specify that the negative information will be
3 removed permanently, it is implied from the context of the
4 advertisement. The reference to "fixing" credit clearly connotes
5 permanency. Random House Webster's College Dictionary defines
6 "fix" as "to place definitively and more or less permanently [or]
7 to settle definitely." Random House Webster's College Dictionary
8 491 (2d ed. 1997).

9 Defendants also placed advertisements in local newspapers
10 stating that they "can and will help" and that "all can be
11 removed." See FTC's Statement at 12. Although the Court need
12 not analyze all of the defendants' statements to impose
13 liability, these statements are also facially deceptive because
14 they indicate that defendants can remove all negative information
15 from consumers' credit report.

16 Defendants claim that they have provided sufficient evidence
17 to show that the statements were not misleading. They point to
18 the disclaimer provided in their contract, the fact that they
19 never guaranteed anything to anyone, and that they never
20 represented that the removal of negative information would be
21 permanent. The Court first addresses the disclaimer issue.
22 First, the disclaimer is not included in the representations. It
23 is found on the contract that consumers eventually sign with the
24 defendant. Therefore, because each representation must stand on
25 its own merit, even if other representations contain accurate,
26 non-deceptive information, that argument fails. See Removatron
27 Int'l Corp. v. FTC, 884 F.2d 1489, 1496-97 (1st Cir. 1989).
28 Second, a disclaimer does not automatically exonerate deceptive

1 activities. See In re Rexplore Securities Litigation, 671 F.
2 Supp. 679, 683-85 (N.D. Cal. 1987).

3 Addressing the guarantee issue, the Court finds that the
4 lack of guarantee does not negate the misrepresentations. The
5 guarantee issue is a perfect example of what is misleading about
6 these representations because it is implied in the text, yet it
7 is never given. The same analysis applies to the argument that
8 Murkey never represented that any of the negative items would
9 come off permanently.

10 Looking at all the statements made by defendants, and taking
11 into consideration all the omissions, the defendants have failed
12 to raise a genuine issue of material fact that the
13 representations were not misleading.

14 **2. SECTION 404(B) OF THE CRO ACT**

15 Section 404(b) of the CRO Act provides that

16 [n]o credit repair organization may charge or receive
17 any money or other valuable consideration for the
18 performance of any service which the credit repair
19 organization has agreed to perform for any consumer
before such service is fully performed.

20 15 U.S.C. § 1679b(b). Plaintiff states that when consumers first
21 meet with Murkey, they are given a written estimate of total
22 costs, with each negative item listed separately, and before any
23 services are actually rendered, let alone completed, consumers
24 are required to make a down payment of as much as 50% and commit
25 to a monthly payment plan for payment of the balance. See FTC's
26 Statement at 16. In support of this statement, the FTC provides
27 the testimony of numerous declarants.

28 As to the down-payment, defendants do not dispute that they

1 obtain one, but rather, they dispute the size of the down-
2 payment. See Murkey Statement at 36. Furthermore, they deny
3 that the down payment represents payment for services not yet
4 rendered. See id. Considering that defendants offer a "Free
5 Initial Consultation without any obligation," FTC's Statement at
6 12, that last denial makes little sense. If the initial
7 consultation is free, yet consumers are required to pay a down-
8 payment at the end of the initial consultation,¹⁸ the money
9 cannot possibly be for anything which has already been performed.

10 As to the monthly installments, defendants summarily dispute
11 that the installments are received before any service is
12 completed. See Murkey Statement at 35. Murkey somewhat
13 clarifies his position in his declaration, where he states that
14 he does not charge for taking off negative items, but that his
15 charges relate to the services rendered in trying to remove the
16 negative items. See Murkey Decl. at 3617. Defendant Murkey
17 alleges that his services consist of analyzing credit reports;
18 planning a strategy as to how to help the consumer remove a

19 _____
20 ¹⁸In his statement of genuine issues of material fact, Murkey
21 does not deny that he asks for a down-payment at the initial
22 consultation but he does dispute that any payment made by consumers
23 is for services not yet rendered. Counsel for Murkey made a
24 similar argument at the hearing, where he stated that there is
25 often days between the initial consultation and the time at which
26 the down payment is received. As such, defendants argue, the money
27 received is for services which are completed. Defendants, however,
28 point to no evidence which would validate that argument. Counsel's
statements are not evidence. Furthermore, defendants' statement
that a "[d]own payment is accepted after services are rendered by
defendant," Murkey's Statement at 36, without more is not enough
to present a genuine issue of material fact. As a matter of fact,
all of Murkey's disputes relating to Section 404(b) are
unsubstantiated. See id. at 37-38. Therefore, as to that issue,
he has failed to raise any issue of fact at all.

1 negative; making telephone calls; writing letters; reviewing of
2 subsequent credit reports; consultations with clients regarding
3 credit and debt issues; negotiate, dispute and/or request
4 verification of negative item to either credit bureaus,
5 creditors, and/or collection agencies. See id. He thus
6 concludes that he does not offer a service which "removes"
7 negative items from consumers' credit reports, and as such argues
8 that he can charge in increments for services allegedly already
9 performed. As such, defendants violated section 404(b) of the
10 CRO Act.

11 Furthermore, defendants dispute the FTC's interpretation of
12 the statute. Defendants argue that the language in the Act which
13 states that a "credit repair organization may [not] charge . . .
14 for the performance of any service . . . before such service is
15 fully performed" cannot mean that all negative entries must be
16 removed before any fees can be assessed by the organization. 15
17 U.S.C. 1679b(b). Defendants allege that to construe the statute
18 as such would render the statute punitive and unconstitutional.
19 The reasoning behind defendants' argument is that if the statute
20 was interpreted as such, and because it may take months to
21 resolve certain types of negative entries on a consumer's credit
22 report, to give such meaning to the statute would in essence
23 force all credit repair companies out of business due to the
24 practical impossibility of operating such a business for six
25 months without seeing a penny of payment.¹⁹ Instead, defendants
26 urge this Court to interpret the statute so as to allow payment
27

28 ¹⁹Interestingly, however, defendants represent to consumers
that negative entries may be removed within a month to six weeks.

1 for each interim service rendered by the organization short of
2 actually removing all negative information from a credit report.
3 Because defendants have failed to raise genuine issues of fact to
4 counter the FTC's showing that it is defendants' practice to
5 receive payment before any service has been rendered, and as such
6 violates the statute even as interpreted by the defendants, the
7 Court need not enter into a statutory or constitutional analysis
8 at this point.

9 3. SECTION 5 OF THE FTC ACT

10 Section 5 of the FTC Act prohibits "unfair or deceptive acts
11 or practices in or affecting commerce." 15 U.S.C. § 45(a)(1).
12 Under Section 5, an act or practice is deceptive or misleading if
13 (1) there is a representation, (2) that is likely to mislead
14 consumers acting reasonably under the circumstances, and (3) the
15 representation is material. See FTC v. Pantron I Corp., 33 F.3d
16 1088, 1095 (9th Cir. 1994). Defendants do not challenge that
17 there were representations and that the representations were
18 material. As such, the Court only addresses whether the
19 representations were likely to mislead consumers as a matter of
20 law.

21 In determining whether the representations were likely to
22 mislead, the FTC must show probable deception ("likely to
23 mislead," not "tendency and capacity to mislead"). See Southwest
24 Sunsuites, Inc. v. FTC, 785 F.2d 1431, 1436 (9th Cir. 1985).
25 Also, in cases brought under Section 5 and Section 12 of the FTC
26 (false advertisement), "[a]dvertising capable of being
27 interpreted in a misleading way should be construed against the
28 advertiser." Resort Car Rental Sys., Inc. v. FTC, 518 F.2d 962,

1 964 (9th Cir. 1975). Failure to disclose material information
2 may cause a representation to be deceptive within the meaning of
3 the FTC Act, even though the representation does not state false
4 facts. See Simeon Mgmt. Corp. v. FTC, 579 F.2d 1137, 1145 (9th
5 Cir. 1978). Additionally, this Court may examine the
6 representation to determine whether the net impression is such
7 that the representation would be likely to mislead reasonable
8 consumers. See generally FTC v. Colgate-Palmolive Co., 380 U.S.
9 374 (1965) (meaning of an advertisement may be determined by an
10 examination of the advertisement itself); Simeon, 579 F.2d at
11 1145 ("the words 'deceptive practices' set forth a legal
12 standard and they must get their final meaning from judicial
13 construction'" (quoting Colgate-Palmolive Co., 380 U.S. at 385));
14 see also FTC v. US Sales Corp., 785 F. Supp. 737, 745 (N.D. Ill.
15 1992) (granting summary judgment in favor of the FTC on its
16 Section 5 claim of deceptive advertisement). As such, the Court
17 interprets the instant representations as representing to
18 consumers that the defendants can and will remove all types of
19 accurate and non-obsolete information from consumers' credit
20 reports permanently. Furthermore, the fact that the contracts
21 signed by consumers with defendants did not contain the
22 misrepresentations is immaterial to this inquiry under Section 5.
23 The FTC Act is violated "if it induces the first contact through
24 deception, even if the buyer later becomes fully informed before
25 entering the contract." Resort Car Rental Sys., Inc., 518 F.2d
26 at 964.

27 Adopting the analysis discussed in Section IV.D.1 above,
28 addressing Section 404(a)(3) of the CRO Act, whereby the Court

1 found no genuine issues of material fact as to the false and
2 misleading character of defendants' representations, and
3 concluding that the net impression of those false and misleading
4 representations are likely to mislead reasonable consumers, the
5 Court determines that there is no genuine issue of material fact
6 that the representations violate Section 5 of the FTC Act.

7 4. PERSONAL LIABILITY AGAINST INDIVIDUAL DEFENDANTS

8 The FTC argues that both Gill and Murkey are individually
9 liable for both monetary and equitable relief. The defendants do
10 not challenge this contention. Furthermore, the Court finds the
11 argument persuasive. Clearly, based on Murkey's direct
12 misleading representations, Murkey is personally liable as a
13 participant and a primary violator. As to Gill, Murkey stated
14 that both he and Gill jointly operated a credit repair business
15 and that consumers who desired to have their credit report
16 improved signed a retainer agreement with the Law Offices of
17 Keith Gill. See Murkey Decl. at 3607; Murkey's Statement at 7.
18 It is unclear as to whether the "business" (Gill's law offices)
19 was a corporation, a partnership, or a sole proprietorship.
20 Using the more stringent standard afforded to corporations--
21 thereby giving the non-moving parties the benefit of the doubt--
22 Gill would still be liable. Once the FTC has established
23 corporate liability, which it has in this case, it must show that
24 the individual defendant participated directly in the practices
25 or acts or had authority to control them. See FTC v. Amy Travel
26 Service, Inc., 875 F.2d 564, 573 (7th Cir. 1989). The FTC must
27 then demonstrate that the individual had knowledge. See id. The
28 knowledge requirement is satisfied by showing that a defendant

1 had actual knowledge of the material misrepresentations, reckless
2 indifference to the truth or falsity of these misrepresentations,
3 or an awareness of a high probability of fraud coupled with an
4 intentional avoidance of the truth. See id. Both Gill and
5 Murkey have testified that they consider every customer who signs
6 a retainer agreement with the Gill law office to be a client of
7 Gill, thereby meeting the knowledge requirement. See Gill Dep.
8 at 722, 725-26 attached to FTC's Mot. S.J., Ex. 1 ("Gill Dep.");
9 Murkey Dep. at 828. Furthermore, neither Gill nor Murkey dispute
10 that Gill had knowledge of the representations. Additionally, as
11 the primary signatory to those retainer agreements, Gill had de
12 facto control over the conduct of the parties. As such, Gill is
13 also personally liable.

14 5. **REMEDIES**

15 The FTC seeks a permanent injunction against Gill and
16 Murkey, including a provision banning them from conducting or
17 participating in credit repair, a provision requiring payment of
18 consumer redress, and other ancillary relief. Section 13(b) of
19 the FTC Act provides that:

20 Whenever the [FTC] has reason to believe . . . that any
21 person . . . is violating . . . any provision of law
22 enforced by the Federal Trade Commission, and . . .
23 that the enjoining thereof . . . would be in the
24 interest of the public--the Commission . . . may bring
25 suit in a district court of the United States to enjoin
26 any such act or practice.

27 15 U.S.C. § 53(b).

28 The second proviso of Section 13(b) provides that "in proper
cases the Commission may seek, and after proper proof, the court
may issue, a permanent injunction." Id.; see also Pantron I

1 Corp., 33 F.3d at 1102; FTC v. H. N. Singer, Inc., 668 F.2d 1107,
2 1110 (9th Cir. 1982). According to plaintiff, defendants'
3 activities, grounded in misrepresentations of material facts in
4 violation of Section 5(a) of the FTC Act and Section 404 of the
5 CRO Act, qualify as a "proper case" for injunctive relief under
6 Section 13(b). See H. N. Singer, 668 F.2d at 1111.

7 That section has been interpreted to authorize this Court to
8 permanently enjoin defendants from violating the FTC Act if there
9 is some cognizable danger of recurring violation. See United
10 States v. W.T. Grant, 345 U.S. 629, 633 (1953); CFTC v. Co Petro
11 Mktg., 502 F. Supp. 806, 818 (C.D. Cal. 1980), aff'd 680 F.2d 573
12 (9th Cir. 1981). Such a likelihood may involve the consideration
13 of past unlawful conduct. See Co Petro Mktg., 502 F. Supp. at
14 818. But if the Court draws

15 the inference from past violations that future
16 violations may occur, the Court should look at the
17 "totality of circumstances," and factors suggesting
18 that the infraction might not have been an isolated
19 occurrence are always relevant." . . . [W]hen the
violation has been predicated upon systematic
wrongdoing, rather than isolated occurrences, a court
should be more willing to enjoin future conduct.

20 Id. (quoting CFTC v. Hunt, 591 F.2d 1211, 1220 (7th Cir. 1979).

21 As demonstrated by the frequency of the misrepresentations
22 (such as the weekly radio broadcast and the advertisements in
23 local newspapers), defendants have exhibited a pattern of
24 misrepresentations which convinces this Court that violations of
25 the CRO Act and of the FTC Act were systematic. As to the
26 possibility of recurrence, defendants have ceased to operate
27 through the law offices of Gill, but currently operate their
28 credit repair business through the auspices of a "non-profit"

1 organization called "Credit Restoration Corporation of America"
2 ("CRCA"). See Murkey Dep. at 816. Although Gill claims to be
3 unaffiliated with CRCA in his deposition, documents filed by
4 Murkey with the Internal Revenue Service indicate that Murkey is
5 the President of CRCA as well as a director and Gill is a
6 Director of CRCA. See Harris Decl., FTC's S.J. Ex. 14 at 670.
7 Through their new corporation, defendants are still trying to
8 collect from previous customers under their new corporate name,
9 admittedly in violation of the preliminary injunction entered in
10 this case. See FTC's S.J. Ex. 1 at 47-53; Ex. 2 at 68-69; Ex. 3
11 at 143-47; Ex. 4 at 192; Ex. 12 at 523-26. Furthermore,
12 defendants have continuously ignored and violated both the CRO
13 Act and the preliminary injunction in this case. As the evidence
14 demonstrates, defendants continue to send the same false and
15 misleading letters to CRAs. See Section IV.D.1. supra. As such,
16 there is a real likelihood of recurring violation.

17 The FTC also seeks equitable monetary damages against Murkey
18 and Gill jointly and severally. The FTC argues that defendants
19 are liable for violations of the CRO Act from its enactment until
20 the present, and that they are liable for violation of the FTC
21 Act from the time they started making misrepresentations about
22 their ability to repair credit.²⁰ As to defendants' liability

23

24 ²⁰In order to obtain redress under the FTC Act, the FTC need
25 not show that each consumer for whom redress is sought actually
26 relied on the misrepresentation for which the FTC seeks redress.
27 Reliance is presumed if the FTC shows that "the defendants made
28 material misrepresentations, that they were widely disseminated,
and that consumers purchased the defendant's product." FTC v.
Figgie Int'l, Inc., 994 F.2d 595, 605-06 (9th Cir. 1993). Here, it
is uncontested that the representations made to the consumers were
material. It is also uncontested that the representations were

1 under the CRO Act, plaintiff argues that they are liable under
2 Section 409. See 15 U.S.C. § 1679g. Section 409 provides that

3 [a]ny person who fails to comply with any provision
4 of this subchapter with respect to any other person
5 shall be liable to such person in the amount equal to
6 the sum of the amounts determined under each of the
7 following paragraphs:

8 (1) Actual damages

9 The greater of --

10 (A) the amount of any actual damage sustained
11 by such person as a result of such failure;
12 or

13 (B) any amount paid by the person to the
14 credit repair organization.

15 (2) Punitive damages

16 (3) Attorneys' fees

17 Id. As such, the plain language of the statute does not allow
18 the FTC to recover damages incurred by consumers. The FTC may,
19 however, recover under Section 410. See id. § 1679h. Section
20 410 provides that "[a]ll functions and powers of the Federal
21 Trade Commission under the Federal Trade Commission Act shall be
22 available to the Commission to enforce compliance with this
23 subchapter . . . as if the violation had been a violation of any
24 Federal Trade Commission trade regulation rule." Id. As such,
25 the FTC's ability to seek equitable monetary remedies lies in its
26 powers under the FTC Act.

27 The FTC Act does not specifically address equitable monetary

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widely disseminated. Finally, the FTC only seeks redress for the
consumers who actually bought defendants' product. As such, the
FTC is entitled to recover the amounts paid by the consumers as a
result of the representations.

1 relief. See id. However, the Ninth Circuit has held that the
2 power to grant any ancillary relief necessary to accomplish
3 complete justice necessarily includes the power to order
4 restitution. See Pantron I Corp., 33 F.3d at 1102. Plaintiff
5 argues that defendants have operated their credit repair business
6 since January 1995, and therefore seek recovery for all income
7 since the inception of defendants' business. Plaintiff had
8 access to defendants' bank records from January 1, 1995 through
9 August 1998 only. Plaintiff has shown that during that time
10 frame, defendant Murkey has deposited \$836,706.30 in various bank
11 accounts. See FTC's S.J. Ex. 17 (bank records). This number is
12 undisputed by defendants. However, plaintiff seeks damages to
13 the present date. To calculate how much money defendants
14 collected from August 8, 1998 to present, plaintiff used
15 defendants' 1998 average monthly income and projected it to the
16 present. Defendants' total deposits for the months of January
17 through August 1998 were \$285,260.52, or an average of \$35,657.56
18 per month. Plaintiff used that average monthly income to project
19 the income received from September 1998 until August 1999. See
20 FTC's Mem. P. & A. S.J. at 44. The estimated grand total from
21 January 1995 until August 1999 is therefore \$1,264,597.02. The
22 defendants do not dispute that figure. We are now in October,
23 and as such, the Court must adjust the figure to include total
24 income up to the date this order is entered, or another two
25 months. Therefore, the total amount of restitution shall be
26 \$1,335,912.14.²¹

27

28 ²¹At oral argument, defendants argue that it would be "unfair"
for the Court to order such damages against defendants, as

1 V. CONCLUSION

2 Because defendants have failed to raise genuine issues of
3 material fact, plaintiff is entitled to a judgment as a matter of
4 law for violations of both the CRO Act and the FTC. As such, the
5 Court GRANTS plaintiff's motion for summary judgment. The Court
6 also finds that this case is a "proper case" for purposes of
7 injunctive relief under the FTC Act.

8
9 IT IS THEREFORE ORDERED that Defendants Gill and Murkey,
10 individually and doing business as any other entity, and their
11 agents, servants, employees, attorneys, and all persons or
12 entities directly or indirectly under their control, and those in
13 active concert or participation with them who receive actual
14 notice of the Order by personal service or otherwise, whether
15 acting directly or through any business entity or other device,
16 are hereby permanently restrained and enjoined from participating
17 in the advertising, promoting, offering for sale, sale,

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19
20 "thousands" of their customers are satisfied with their services,
21 and as such have not been injured. Even assuming that defendants
22 do have thousands of satisfied consumers, it does not excuse their
23 violation of the law. "Satisfied" customers are still injured when
24 that satisfaction arises out of the illegal practices of
25 defendants--illegal practices which are conducted in the consumer's
26 name. The CRO Act contemplates as much. Section 1679g states that
27 a consumer can recover "any amount paid by the person to the credit
28 repair organization" if the credit repair organization failed to
comply with any of the provisions of the CRO Act. 15 U.S.C. §
1679g. This provision provides a remedy in the absence of "actual
damages" sustained by the consumer as a result of the failure to
follow the CRO Act. Compare *id.* § 1679g(a)(1)(A) (allowing
consumers to obtain any actual damages sustain as a result of the
failure to follow the CRO Act) with *id.* § 1679(a)(1)(B) (allowing
consumers, in the alternative, to receive back any amount the
consumers have paid to the credit repair organization).

1 performance, or distribution of any credit repair service,
2 including but not limited to sitting on the board of directors of
3 any credit repair organization, including any non-profit
4 organization or any other organization that performs credit
5 repair service.

6
7 IT IS FURTHER ORDERED that Defendants Gill and Murkey,
8 individually and doing business as any other entity, and their
9 agents, servants, employees, attorneys, and all persons or
10 entities directly or indirectly under their control, and those in
11 active concert or participation with them who receive actual
12 notice of the Order by personal service or otherwise, whether
13 acting directly or through any business entity or other device,
14 are hereby permanently restrained and enjoined from:

- 15
- 16 1. Misrepresenting any fact material to a consumer's
17 decision to purchase any credit repair product or
18 service from either Defendant;
 - 19
20 2. Representing that either Defendant can substantially
21 improve most consumers' credit reports or profiles by
22 effectuating the permanent lawful removal of
23 bankruptcies, liens, judgments, charge-offs, late
24 payments, foreclosures, repossessions, and other
25 negative information from consumers' credit reports
26 where such information is accurate and not obsolete;

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- 1 3. Representing that either Defendant will substantially
- 2 improve any consumer's credit report or profile by
- 3 effectuating the permanent lawful removal of
- 4 bankruptcies, liens, judgments, charge-offs, late
- 5 payments, foreclosures, repossessions, or other
- 6 negative information from the consumer's credit report
- 7 where such information is accurate and not obsolete;
- 8
- 9 4. Inducing, encouraging, or requesting, or assisting or
- 10 advising any consumer to induce, encourage, or request,
- 11 any creditor to report false or misleading information,
- 12 with respect to any consumer's credit worthiness,
- 13 credit standing, or credit capacity, to a credit
- 14 reporting agency;
- 15
- 16 5. Violating the Credit Repair Organization Act, 15
- 17 U.S.C., §§ 1679 to 1679j, as presently enacted or as it
- 18 may hereinafter be amended, including:

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1 a. Violating 15 U.S.C. § 1679(a)(1) by making any
2 untrue or misleading statement, or counseling or
3 advising any consumer to make any untrue or
4 misleading statement, with respect to any
5 consumer's credit worthiness, credit standing, or
6 credit capacity to any consumer reporting agency
7 as defined in 15 U.S.C. § 1681(f) or to any person
8 who has extended credit to the consumer or to whom
9 the consumer has applied or is applying for an
10 extension of credit; or

11
12 a. Violating 15 U.S.C. § 1679(a)(2) by making or
13 using any untrue or misleading statement, or
14 counseling or advising any consumer to make any
15 untrue or misleading statement, the intended
16 effect of which is to alter the consumer's
17 identification to prevent the display of the
18 consumer's credit record, history, or rating for
19 the purpose of concealing adverse information that
20 is accurate and not obsolete.

21
22 IT IS FURTHER ORDERED that Defendants Gill and Murkey are
23 hereby permanently restrained and enjoined from:

24
25 1. Failing to return within ten days of receipt any
26 payment either Defendant receives for any credit repair
27 service pursuant to any contract or agreement that was
28 entered into prior to March 4, 1998, and to include

1 with each such returned payment a notice to the client
2 stating that as a result of a court order the contracts
3 are rescinded and no further payments are due;

4

5 2. Demanding payment or enforcing or threatening to
6 enforce any contract or agreement for the performance
7 of credit repair service entered into prior to March 4,
8 1998; or

9

10 3. Failing to mail notices within ten days after the date
11 this Order is entered, to all credit repair clients, if
12 any, who have payments that are due or may become due
13 on contracts for the performance of credit repair
14 service signed prior to March 4, 1998, stating that as
15 a result of a court order the contracts are rescinded
16 and no further payments are due.

17

18 IT IS FURTHER ORDERED that:

19

20 1. JUDGMENT is hereby entered against Keith H. Gill and
21 Richard F. Murkey, jointly and severally, and in favor
22 of the Commission in the amount of \$1,335,912.14 for
23 equitable monetary relief, including, but not limited
24 to, consumer redress, restitution and/or disgorgement;

25

26 2. Any funds received by the Commission pursuant to this
27 Order shall be deposited in an interest bearing account
28 maintained by the Commission, or its designated agent.

1 Said assets shall be either (a) distributed as redress
2 to consumers or (b) paid to the U.S. Treasury, if such
3 distribution is deemed by the Commission in its sole
4 discretion to be impractical. The Commission shall
5 have full and sole discretion to determine the criteria
6 and parameters for participation by injured consumers
7 in a redress program and may delegate any and all task
8 connected with such redress program to any individuals,
9 partnerships, or corporations, and pay the fees,
10 salaries and expenses incurred thereby in carrying out
11 said tasks from the funds received pursuant to this
12 Paragraph, provided that such redress plan, and the
13 fees associated with it, shall be filed with the Court
14 for approval prior to implementation by the FTC or its
15 delegate;

16
17 3. No funds paid from any such account shall be returned
18 to Gill or Murkey, and

19
20 4. This judgment for equitable monetary relief is solely
21 remedial in nature and is not a fine, penalty, punitive
22 assessment, or forfeiture. In the event of any default
23 on any obligation to make payment under this section,
24 interest, computed pursuant to 28 U.S.C. § 1961(a),
25 shall accrue from the date of default to the date of
26 payment, and shall immediately become due and payable.

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1 IT IS FURTHER ORDERED that the Commission is authorized to
2 monitor the Defendants' compliance with this Order by all lawful
3 means, including but not limited to the following:

4
5 1. The Commission is authorized, without further leave of
6 the Court, to obtain discovery from any person in the
7 manner provided by Chapter V of the Federal Rules of
8 Civil Procedure, Fed. R. Civ. P. 26-37, including the
9 use of compulsory process pursuant to Fed. R. Civ. P.
10 45, for the purpose of monitoring and investigating the
11 Defendants' compliance with any provision of this
12 Order;

13
14 2. The Commission is authorized, without further leave of
15 the Court, to use representatives posing as consumers
16 and suppliers to the Defendants, or to employees or
17 independent contractors of any other entity owned,
18 managed, or controlled in whole or in part by either
19 Defendant, without the necessity of identification or
20 prior notice, and

21
22 3. Nothing in this Order shall limit the Commission's
23 lawful use of compulsory process, pursuant to Sections
24 9 and 20 of the FTC Act, 15 U.S.C. §§ 49 and 57b-1, to
25 investigate whether the Defendants have violated any
26 provision of this Order, including Section 5 and 19 of
27 the FTC Act, 15 U.S.C. § 45, 57b, or the CRO Act, 15
28 U.S.C. § 1679 et seq.

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IT IS FURTHER ORDERED that, within five (5) business days after the entry of this Order, Defendants Gill and Murkey shall submit to the Commission a truthful statement that shall acknowledge receipt of this Order.

IT IS FURTHER ORDERED that, for purposes of allowing plaintiff to monitor the Defendants' compliance with this Order:

1. For a period of three years from the date of entry of this Order, the Defendants shall notify the Commission of the following:

- a. Any changes in residence, mailing address, and telephone number(s), within ten days of such change; and
- b. Any changes in employment status (including self-employment) within ten days of such change. Such notice shall include the name and address of each business that is affiliated with or employs either Defendant, a statement of the nature of the business, and a statement of the Defendant's duties and responsibilities in connection with the business or employment; and
- c. Any proposed change in the structure of any business entity owned or controlled by either

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Defendant, in whole or in part, such as creation, incorporation, dissolution, assignment, sale, merger, creation, dissolution of subsidiaries, proposed filing of a bankruptcy petition, or change in the corporate name or address, or any other change that may affect compliance obligations arising out of this Order, thirty days prior to the effective date of any proposed change; Provided that the Commission may not disclose any information received solely pursuant to Part a of this Paragraph to any person except for law enforcement purposes;

2. One hundred eighty days after the date of entry of this Order, each Defendant shall provide a written report to the Commission, sworn to under penalty of perjury, setting forth in detail the manner and form in which the Defendant has complied and is complying with this Order. This report shall include but not be limited to:-

a. the Defendant's then current residence address and telephone number(s)

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1 IT IS FURTHER ORDERED that entry in the docket of this Order
2 by the Clerk of Court shall constitute notice to the Defendants
3 of the terms and conditions of this Order.

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7 IT IS SO ORDERED.

8 DATED: November 2, 1999



LOURDES G. BAIRD
United States District Judge

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