

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

FEDERAL TRADE COMMISSION)	
)	
Plaintiff,)	Case No. 8:08-cv-2062-T-27AEP
)	
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 REPLY TO DEFENDANT’S AFFIDAVIT IN OPPOSITION
TO PLAINTIFF’S DISPOSITIVE MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiff Federal Trade Commission (“FTC”) hereby submits its Reply to Defendant Rick Lee Crosby, Jr.’s (“Crosby”) response to the FTC’s Motion for Summary Judgment (“Mot. Summ. J.”), styled “Defendant’s Affidavit in Opposition to Plaintiff’s Dispositive Motion for Summary Judgment” (“Opp.”). On the merits of the case, Crosby has not raised any genuine issue of material fact and the FTC is entitled to judgment as a matter of law on all counts. Accordingly, the Reply is limited to certain aspects of the FTC’s requested relief.

In his Opposition, Crosby argues that FTC's proposed ban on the sale of credit repair products and services "would be a violation of my First Amendment Right to freedom of speech." Opp. p. 6. Although the proposed ban is sufficiently tailored to directly advance a substantial government interest in preventing Defendant from deceiving consumers, and thus Constitutionally valid, the FTC proposes a modification to the [Proposed] Final Judgment and Order ("Proposed Order") that is more narrowly tailored to prevent the type of deceptive conduct in which Crosby has been engaging. A revised Proposed Order is attached to this motion as Exhibit 1.

II. ARGUMENT

It is axiomatic that "commercial speech does not receive the same degree of constitutional protection as other forms of constitutionally guaranteed expression, and the former may be forbidden and regulated in situations where the latter may not be." *Supersign of Boca Raton, Inc. v. City of Fort Lauderdale*, 776 F.2d 1528, 1530 (11th Cir. 1985). The Supreme Court has set forth a four-part analysis when the government seeks to restrict commercial speech. First, the speech "must concern lawful activity and not be misleading." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980) (emphasis added). Second, the court must ascertain if the asserted government interest is substantial. *See id.* If the first two conditions are met, the court then determines "if the regulation directly advances the governmental interest asserted[.]" *Id.* Lastly, the court determines if the restriction is "not more extensive than is necessary to serve that

interest.” *Id.*¹

The FTC’s proposed ban on advertising or selling credit repair products and services is valid because of the government’s substantial interest in preventing deceptive advertising. *See United States v. Readers Digest Ass’n*, 464 F. Supp. 1037, 1051 (D. Del. 1978) (“The Government’s interest in preventing the use of deceptive advertising is a legitimate and important one.”). The proposed ban directly advances this interest and is sufficiently tailored in light of Defendant’s pervasive misrepresentations and continued involvement in the sale of deceptive credit repair services. As noted in the FTC’s Summary Judgment brief, during the over 3 years Crosby ran his credit repair business, he continuously made deceptive representations in telephone conversations, websites and emails. *See Mot. Summ. J.* at 5-8. Moreover, even after the Court entered a Preliminary Injunction prohibiting Crosby from making misrepresentations about credit repair goods and services, Crosby associated himself with a new credit repair business making similar claims. *See id* at 18-19. Accordingly, the FTC’s proposed ban is valid. *See FTC v. Gill*, 265 F.3d 944, 957 (9th Cir. 2001) (affirming district court’s permanent prohibition on defendant’s engaging in credit repair business where defendant, *inter alia*, made systematic misrepresentations and continued to operate credit repair business in violation of a preliminary injunction).

Although not clearly articulated, it appears that Crosby’s concern is that the Proposed Order’s ban on credit repair *products* could be read to prohibit him from disseminating lawful methods of improving an individual’s credit score. As discussed above, the ban as set

¹ The prohibition need not be the *least* restrictive means.

forth in the proposed order is narrowly tailored to the circumstances of this case.

Nonetheless, the FTC now proposes modified order language that prohibits false and misleading representations that are not protected speech. *See Miller v. Stuart*, 117 F.3d 1376, 1382 (11th Cir. 1997) (noting that “[t]he government may completely ban false and inherently misleading commercial speech”).

Section I of the FTC’s modified Proposed Order provides for a total ban on Defendant’s advertising, marketing, promoting or sale of credit repair services. As noted above, such a ban is valid because of the government’s substantial interest in preventing deceptive advertising and Crosby’s extensive and continued use of misleading advertising for credit repair services. *See Gill*, 265 F.3d at 957.

In Section II, the FTC no longer proposes a total ban on credit repair products, but instead prohibits certain claims that are false. As explained in the FTC’s Motion for Summary Judgment, assertions that consumers can improve their credit scores “into the 700s in as little as 30 days” or “remove any or all negatives” are false and deceptive. *See Mot. Summ. J.* at 10-14. Additionally, Crosby has advised individuals to obtain a Taxpayer Identification Number or Employer Identification Number to use in lieu of that person’s Social Security Number for the purpose of concealing adverse credit information. For instance, in an email to Ronald L. Wray, Crosby states that his credit repair program will provide instructions on how to obtain “a NEW 9-Digit Number that can be used for building credit with credit cards, bank loans, mortgage loans, auto loans ect. [sic].” Ex. 2. p.2. Advising an individual to obtain a number to use in lieu of a Social Security number for

applications for credit is a common credit repair scam that is specifically prohibited by Section 404(a)(2) of the Credit Repair Organizations Act, 15 U.S.C. § 1679b. Because all of these claims are false or concern unlawful activity, they do not enjoy Constitutional protection. *See Central Hudson*, 447 U.S. at 563-64 (“The government may ban forms of communication more likely to deceive the public than inform it, or commercial speech related to illegal activity.”); *FTC v. Stefanchik*, 2004 WL 5495267, *2 (W.D. Wash. Nov. 12, 2004) (“The law is well settled that, once speech is deemed to be false, misleading and commercial, it is not constitutionally protected.”). Accordingly, the Court should prohibit Defendant from making these claims in any manner.

III. CONCLUSION

WHEREFORE, the Commission respectfully requests that the Court grant its Motion for Summary Judgment against Defendants RCA Credit Services, LLC and Rick Lee Crosby, Jr.

Respectfully submitted,

/s/ James L. Chen

Peter Lamberton
K. Michelle Grajales
James L. Chen
Federal Trade Commission
601 N.J. Avenue, NW
Washington, DC 20001
Telephone: (202)326-3274;(202)326-3172;
(202) 326-2659
Facsimile: (202) 326-3768
E-Mail: plamberton@ftc.gov;
mgrajales@ftc.gov; jchen2@ftc.gov
Attorneys for Plaintiff
Federal Trade Commission

CERTIFICATE OF SERVICE

I, James L. Chen, hereby certify that on May 4, 2010, I electronically filed the foregoing Plaintiff's Reply to Defendant's Affidavit in Opposition To Plaintiff's Dispositive Motion for Summary Judgment on the Court's ECF system and served *pro se* Defendant Rick Lee Crosby Jr. by Federal Express at 10426 65th Avenue North, Seminole, FL 33772.

/s/ James L. Chen

James L. Chen
Federal Trade Commission
601 New Jersey Avenue, NW
Washington, DC 20001
Tel: (202) 326-2659
Fax: (202) 326-3629
Email: jchen2@ftc.gov
Attorney for Plaintiff
Federal Trade Commission