CHRISTINA ATTERBURY, Individually and on behalf of all others similarly situated, Plaintiff, v. EARN COMPANY, et al. Defendants	**COURT OF COMMON PLEAS** **PHILADELPHIA COUNTY** CIVIL ACTION APRIL TERM 2021 NO. 00637

ORDER OVERRULING PRELIMINARY OBJECTIONS

And now, this _____ day of _____, 2021, having considered Defendants' Preliminary Objections to the Complaint and Plaintiff's Response in Opposition thereto, it is ORDERED that Defendants' Preliminary Objections are OVERRULED.

Defendants shall file its Answer to the Complaint within twenty (20) days of the date of this Order.

BY THE COURT:

_____
J.

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ATTORNEYS FOR PLAINTIFF
CHRISTINA ATTERBURY, individually
and on behalf of all others similarly situated

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PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' PRELIMINARY OBJECTIONS

Plaintiff Christina Atterbury, by and through undersigned counsel, hereby answers Defendants' Preliminary Objections, and in opposition thereto state as follows:

I
DEMURRER BASED ON LACK OF STANDING
Pa. R. Civ. P. 1028(a)(4)

1. Denied as a legal conclusion.

2. Denied as a legal conclusion. Plaintiff has statutory standing to sue for violations of the Credit Repair Organizations Act. *See Milby v. Pote*, 189 A.3d 1065, 1076–77 (Pa. Super. 2018) (discussing statutory standing).

II
DEMURRER BASED ON FAILURE TO STATE A CLAIM
Pa. R. Civ. P. 1028(a)(4)

3. No response required.

4. Denied as a legal conclusion. The documents referenced speak for themselves.

5. Denied as a legal conclusion. Further, any "person" may be held liable for their violations of the Credit Repair Organizations Act, 15 U.S.C. § 1679g(a). Liability does not depend on being a named party on a credit repair contract.

WHEREFORE, Plaintiff requests that Defendants' Preliminary Objections be overruled.

Respectfully submitted:

Date: 6/1/2021

/s/ Andrew M. Milz

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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PRELIMINARY OBJECTIONS

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I. MATTER BEFORE THE COURT

This is a consumer class action for damages under the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.* ("CROA"). CROA is a consumer credit protection statute that regulates persons who contract with consumers for credit repair services. Defendants are a combination of corporate entities and their owners, agents, and employees who hold themselves out as providing credit repair services to consumers in exchange for money, or who have contracted with mostly distressed consumers seeking credit repair services. Defendants have operated under several names—sometimes using Credit Exterminators, and other times using the nonexistent, unincorporated association called the Earn Company. Indeed, most of the individual Defendants have concealed their true identities behind pseudonyms.

As part of their course of business, Defendants Earn Company, Earn Finance Company LLC, Credit Exterminators, and their agents charge their consumer clients hundreds of dollars in illegal upfront fees, followed by a minimum six-month term during which consumers are forced to shell out hundreds of dollars more each month. As part of their course of business, these Defendants use contracts that unlawfully attempt to waive the CROA rights of its consumer clients, unlawfully require payment before the performance of any services, and fail to include the most basic disclosures required by CROA. Defendants' failure to provide the required CROA disclosures prohibited it from performing any credit repair services for those consumers, and Defendants' use of illegal waivers renders all of the credit repair contracts void.

Dozens of consumers have complained about Defendants' fraudulent and deceptive business practices. Defendants fail to provide the services promised, despite the hefty upfront fees. Accordingly, Plaintiff Christina Atterbury filed this class action on behalf of herself and others similarly situated for damages under CROA, which "creates strict liability for violations and

allows minimum damage awards equal to the amount Plaintiffs and putative class members paid." *McDaniel v. Credit Sols. of Am., Inc.*, No. 08-0928, 2012 WL 13102240, at *9 n.14 (N.D. Tex. Mar. 21, 2012) (certifying CROA class; granting summary judgment for plaintiff/class).

Instantly, Defendants have lodged Preliminary Objections to the Class Action Complaint, seeking dismissal of the underlying claims on the merits and for lack of "standing." But Defendants' arguments are undermined by the credit repair contract, the allegations of harm in the Complaint, and controlling Pennsylvania law, which sets a very low bar for access to the courts. The Preliminary Objections must be overruled.

II. STATEMENT OF QUESTIONS INVOLVED

QUESTION 1: Should this Court overrule Defendants' Preliminary Objections because the Class Complaint amply pleads that Defendants—in connection with the sale of credit repair services—directly or indirectly engaged in acts, a practice, or a course of business that constitutes a deception on consumers and an attempt to commit a deception on consumers, in violation of the CROA, 15 U.S.C. § 1679b(a)(4)? **Suggested Answer: YES.**

QUESTION 2: Should this Court overrule Defendants' Preliminary Objections because the Class Complaint amply pleads Defendants charged and received payment of upfront fees before services were fully performed, in violation of the CROA, § 1679b(b)? **Suggested Answer: YES.**

QUESTION 3: Should this Court overrule Defendants' Preliminary Objections because Defendants did not wait three business days after signing to begin providing credit repair services, in violation of the CROA, § 1679d(a)(2)? **Suggested Answer: YES.**

QUESTION 4: Should this Court overrule Defendants' Preliminary Objections because the Class Complaint amply avers that Defendants used contracts that attempted to waive nonwaivable CROA rights, in violation of § 1679f(b)? **Suggested Answer: YES.**

QUESTION 5: Should this Court overrule Defendants' Preliminary Objections because the Class Complaint amply avers that Defendants used credit repair contracts that failed to satisfy the disclosure requirements of the CROA, § 1679d(b)? **Suggested Answer: YES.**

QUESTION 6: Should this Court overrule Defendants' Preliminary Objections because the Class Complaint amply avers Defendants' Credit Repair Contracts are void and unenforceable under § 1679f(c)? **Suggested Answer: YES.**

QUESTION 7: Should this Court overrule Defendants' Preliminary Objections because the Class Complaint amply avers that the Defendants all personally participated in the CROA violations alleged? **Suggested Answer: YES.**

QUESTION 8: Should this Court overrule Defendants' Preliminary Objections because Plaintiff has standing to sue for violations of the CROA under the Act itself, and because Plaintiff was harmed? **Suggested Answer: YES.**

III. FACTS

A. Background of Defendants

Defendant Earn Company ("Earn") is an unincorporated association of which the other Defendants are members, agents, and/or employees. (Compl. ¶ 7.) In Pennsylvania, no company is incorporated under the name "Earn Company." (*Id.* ¶ 8.) The other corporate defendants include Earn Finance Company LLC ("Earn Finance"), Credit Exterminators Inc. ("Credit Exterminators"), and Sprinkle of Jesus Corp. ("Sprinkle of Jesus"). All are based out of the same address in Philadelphia, PA. (*Id.* ¶¶ 6, 9, 11, 13.)

Defendants Earn, Earn Finance, Credit Exterminators, and Sprinkle of Jesus are owned by Defendants Casey Olivera a.k.a. Dana Chanel ("Olivera") and Donnell Morris a.k.a. Prince Donnell ("Morris"). (*Id.* ¶ 16.) Olivera and Morris are married. (*Id.* ¶ 20.) Defendant Cassandra

Olivera a.k.a. April ("April") is the CEO of Earn, Earn Finance, and Credit Exterminators. (*Id.* ¶ 18.) Defendant Nakia Rattray a.k.a. Uncle Majic the Hip Hop Magician ("Rattray") is the father of April and Olivera, who are sisters. (*Id.* ¶ 20.)

All of the individual defendants hold themselves out as providing credit repair services in exchange for money, and all do business from the same address in Philadelphia, PA. (*Id.* ¶¶ 14, 15, 17, 19.) When acting on behalf of Earn, Earn Finance, and/or Credit Exterminators, Defendants Olivera, Morris, April, and Rattray all acted with the common purpose of selling, advertising, and providing credit repair services in exchange for money. (*Id.* ¶ 23.) Numerous videos and photos posted publicly to Instagram and other online social media show Olivera, Morris, April, and Rattray representing that they can or will provide advice or assistance to consumers regarding their credit in exchange for purchasing a plan. (*Id.* ¶ 21.)

B. Christina Atterbury and the Contract Documents

Plaintiff Christina Atterbury is a consumer who resides in Philadelphia, PA. (*Id.* ¶ 25.) On or about April 23, 2020, Ms. Atterbury saw marketing materials posted by one or more Defendants on social media advertising credit repair services. (*Id.* ¶ 26.) In those marketing materials, one or more Defendants claimed that their services raised the credit scores of consumers. (*Id.*)

Ms. Atterbury was interested in improving her credit, so she followed the instructions in the marketing materials to send a direct message through a social media account to obtain more information. (*Id.* ¶ 27.) Defendants' April responded to Ms. Atterbury's direct message, stating that Ms. Atterbury would need to pay an initial $400 fee to set up her account, followed by monthly payments of $320. (*Id.* ¶ 28.)

Ms. Atterbury advised April that Atterbury would proceed with the purchase of the credit repair services offered, so April emailed Ms. Atterbury a package of contract documents to sign.

(*Id.* ¶ 29.) A full true and correct redacted copy of that package of documents is attached as Exhibit "1." Included in the package of documents that Ms. Atterbury was required to sign in exchange for credit repair services was a "Credit Repair Service Agreement" and "Authorization for Credit Repair Action," which is referred to herein as the "Credit Repair Contract." (Compl. ¶ 30.)

The Credit Repair Contract contains a host of inconsistencies and unlawful provisions, and operates as a deception upon consumers. It includes illegal waivers, the illegal requirement to pay upfront fees, and inadequate required disclosures.[1] (*Id.* ¶¶ 31-47.) These violations are addressed *infra* in the argument section.

Also included in the package of documents Ms. Atterbury was required to sign in exchange for credit repair services was a "Non-Disclosure Agreement" ("NDA") between Ms. Atterbury and Sprinkle of Jesus. (*Id.* ¶ 49.) The NDA purportedly prohibits Ms. Atterbury from disclosing "all personal or professional information (Confidential Information) received from Proprietor [*i.e.* Sprinkle of Jesus] and/or Dana [*i.e.* Olivera], Majic [*i.e.* Rattray, and] Prince Donnell [*i.e.* Morris]," and it entitles Sprinkle of Jesus to seek "an immediate injunction enjoining any breach" of that agreement. (*Id.* ¶ 51.)

The credit repair services provided to Ms. Atterbury did not result in any meaningful benefit for her. (*Id.* ¶ 54.) Defendants nonetheless charged and/or received from Ms. Atterbury nearly $2,000. (*Id.* ¶ 55.) Other class members have had comparable experience with Defendants.

C. Pattern and Practice of Deception

The Class Complaint avers in detail that Defendants have engaged in a pattern and practice of deception in the sale and provision of credit repair services, which was enabled by Sprinkle of

[1] As discussed *infra* to redress a history of abuse of consumers by credit repair clinics who took quick cash but provided no service in return, the statute strictly prohibits any up-front fees. "No credit repair organization may charge or receive any money or other valuable consideration for the performance of any service … before such service is fully performed." 15 U.S.C. § 1679b(h).

Jesus and its practice of using non-disclosure agreements to silence Defendants' victims in violation of CROA's anti-waiver provisions. (*Id.* ¶ 59.) Defendants failed to perform meaningful services for or improve the credit scores of countless consumers, resulting in numerous online consumer complaints that they knew about. (*Id.* ¶ 56.) Even so, Defendants charged and received money from hundreds of other consumers in amounts comparable to what they eventually charged Ms. Atterbury. (*Id.* ¶ 58.)

IV. ARGUMENT

A. Standard on Preliminary Objections

"Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections." *Sayers v. Heritage Valley Med. Grp., Inc.*, 247 A.3d 1155, 1161 (Pa. Super. 2021). Extrinsic facts such as affidavits must be disregarded. *Khawaja v. RE/MAX Cent.*, 151 A.3d 626, 633 (Pa. Super. 2016). Here, Defendants have filed an "Declaration of Gay Parks Rainville" in support of its Preliminary Objections. The Court may not consider this attorney affidavit in resolving Defendants' Preliminary Objections. *See id.*

B. Plaintiff States A Claim Under The CROA

Defendants contend that Plaintiff fails to state a claim that Defendants and their contracts violated the CROA. (Def.'s Br. at 10-12.) But, much like their credit repair contracts, Defendants' arguments deceive.

The Credit Repair Organization Act ("CROA") was enacted to counter the growth of deceptive practices by "credit repair" companies that prey on consumers seeking improvement of

their credit. *Perry v. Drivehere.com, Inc.*, No. 11-2429, 2011 WL 3204818, at *2 (E.D. Pa. July 28, 2011) (*citing FTC v. Gill*, 265 F.3d 944, 947 (9th Cir. 2001)). Congress found that these predatory business practices "have worked a financial hardship upon consumers, particularly those of limited economic means and who are inexperienced in credit matters." 15 U.S.C. § 1679(a)(2).

Congress's stated purposes for enacting CROA are twofold: (1) "to protect the public from unfair or deceptive advertising or business practices" of credit repair outfits, and (2) "to ensure that prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services." 15 U.S.C. § 1679(b). The CROA is bold, the regulation of credit repair organizations is strict, and the consumer remedies for noncompliance by a CROA are powerful. *See generally* 15A AM. JUR. 2D COLLECTION AND CREDIT AGENCIES, § 27-30 (Credit Repair Organizations).

Putting these purposes into action, Congress enacted broad prohibitions designed to protect consumers from persons engaging in deceptive business practices in connection with the services of a credit repair organization. 15 U.S.C. § 1679b. These expansive prohibitions even include *attempts* to engage, "directly or indirectly," in deceptive acts, practices, or courses of business. 15 U.S.C. § 1679b(a)(4).

In addition to prohibiting deceptive business practices, as noted, Congress prohibited credit repair organizations from charging or receiving money for credit repair services "before such service is fully performed." 15 U.S.C. § 1679b(b).

Congress also required that credit repair contracts set forth certain material terms and conditions in detail, 15 U.S.C. § 1679d(b), and that the contract be accompanied by a duplicate notice of right to cancel, 15 U.S.C. § 1679e, and a separate statement of important disclosures of rights and legal resources, 15 U.S.C. § 1679c. No credit repair services may be provided unless

and until the disclosure requirements are complied with, 15 U.S.C. § 1679d(a)(1). A contract that does not comply with the CROA is unenforceable and "shall be treated as void," 15 U.S.C. § 1679f(c). Waivers of a consumer's CROA rights are "treated as void," 15 U.S.C. § 1679f(a), and "[a]ny attempt by any person to obtain a waiver" of a consumer's CROA rights is a violation. 15 U.S.C. § 1679f(b).

Plaintiff's Complaint sets forth in exceptional detail the many ways in which Defendants violated the CROA:

- They "deceptively required payment of upfront fees, before services were fully performed, in violation of the CROA. 15 U.S.C. § 1679b(b)." (Compl. ¶ 75.)
- They attempt to waive consumers' CROA rights, in violation of 15 U.S.C. § 1679f(b). (Compl. ¶ 77.)
- They "did not include all the written disclosures" required to be a credit repair contract under § 1679d(b). (Compl. ¶ 78.)
- They "failed to provide a duplicate form notice of cancellation separate from the credit repair contract, and in the required format. 15 U.S.C. § 1679e(b)." (Compl. ¶ 79.)
- They did not accompany their credit repair contract with a separate disclosure of rights. 15 U.S.C. § 1679c(b). (Compl. ¶ 80.)

Plaintiff alleges that Defendants' "use of illegal form credit repair contracts to steal upfront fees from consumers that Defendants were not legally permitted to charge or receive" is "a practice, or a course of business that constitutes a deception on consumers and an attempt to commit a deception on consumers, in violation of the CROA. 15 U.S.C. § 1679b(a)(4)." (Compl. ¶ 76.) Further, Defendants were not permitted by the CROA to provide any services until satisfying the contract requirements of § 1679d(b), which they did not do, so their provision of services violates § 1679d(a). (Compl. ¶ 81.)

Ignoring the specific and detailed allegations in the Complaint, Defendants contend that the contract documents do not violate the CROA. (Def.'s Br. at 10-12.) These arguments are

meritless, and the Complaint amply states a claim upon which relief may be granted.

i. The Credit Repair Contract Requires Payment of Upfront Fees Before the Performance of any Services

The CROA prohibits credit repair organizations from charging or receiving any money for the performance of any agreed-to service before such service is "fully performed." 15 U.S.C. § 1679b(b). Additionally, the agency must wait to perform services until three business days after the contract is signed. 15 U.S.C. § 1679d(a)(2) ("No services may be provided by any credit repair organization for any consumer . . . before the end of the 3-business-day period beginning on the date the contract is signed.").

Virtually all courts have found that any sort of advance payment before the performance of credit repair services violates the prohibition on advance payments. *See, e.g.*, *F.T.C. v. Gill*, 265 F.3d 944, 956 (9th Cir. 2001) (down payment after initial free consultation violated prohibition on accepting any payment before fully performing all services); *Zimmerman v. Cambridge Credit Counseling Corp.*, 529 F. Supp. 2d 254, 279 (D. Mass. 2008) ("Design Fee" assessed upon enrollment violated CROA); *Greene v. CCDN, LLC*, 853 F. Supp. 2d 739, 754 (N.D. Ill. 2011) (illegal down payment); *Rannis v. Fair Credit Lawyers, Inc.*, 489 F. Supp. 2d 1110, 1117 (C.D. Cal. 2007) (illegal down payment).

The FTC has likewise spoken on the issue, explaining:

> This ban on advance fees applies to any fee that is collected before full performance, regardless of what the fee is called or how it is characterized (*e.g.*, processing fee, enrollment fee, start-up fee, or periodic or "installment" payment). When an advance fee for credit repair services is inextricably intertwined with a fee collected in advance for other goods or services, the portion of the advance fee attributable to credit repair services may violate CROA.

FTC Letter, 2011 WL 5023280, at *1.

Defendants' Credit Repair Contract requires payment of $400 in upfront fees before the performance of any services. (Complaint ¶ 34 & Ex. 1 at ATTERBURY0008.) The Credit Repair Contract specifies in multiple places that services will not be provided until payment of the upfront fees. (Complaint ¶ 35.) For ease of reference, Plaintiff reproduces a portion of the Credit Repair Contract below with the offending (and often contradictory) language highlighted by counsel:

Customer acknowledges that payment of Fees is authorization for us to begin providing information/ education. These products include but are not limited to, providing educational back portal with credit tips about how to help with financial education and how to build credit. We also provide back portal access on education on credit. We will start providing product a week after their customer has signed up and customer payment of Fees. All Fees are earned when received and are non-refundable. Fees may be paid via Debit, Credit Card or by ACH Check only and Customer authorizes us to set up an

. . . .

Customers will pay the monthly fees and other fees set forth in this proposal or in the online fee schedule provided at the time of sign up ("Fees"). All Fees are due once the services have been agreed upon. Credit Exterminators has the ability to change the payment form at any time if such form of payment is not able to be taken in our system.

Refunds.

Customer acknowledges that payment of Fees is authorization for us to begin providing education in your back portal. These products include your back portal. We will start providing services immediately upon Customer payment of Fees. All Fees are earned when received and are non-refundable. Fees may be paid via Debit, Credit Card or by ACH Check only and Customer authorizes us to set up an automated recurring billing process. If Customer desires to terminate the service, such

(Ex. 1 at ATTERBURY0009, emphasis added.) The Credit Repair Contract specifically refers to this upfront fee as an "INITIAL DEPOSIT" and "set up fee". (*Id.* at ATTERBURY0003, 0008.)

Defendants attempt to evade the prohibition on upfront fees by arguing that upon Plaintiff's payment of the $400 upfront fee, Defendants "instantaneously performed its agreed-to service – access to the secure back portal." (Def.'s Br. at 10.) This assertion misrepresents the true nature of the credit repair services offered, and attempts impermissibly to argue facts at the demurrer stage.

The Credit Repair Contract required Defendants to do much more than merely provide "access" to a "back portal." Defendants agreed to provide substantive credit repair services: "[t]o evaluate [Plaintiff's] current credit reports"; to "dispute any inaccurate, erroneous, false or obsolete information contained in the customer's credit reports"; to "prepare all necessary correspondence to explain of inaccurate, erroneous, false, or obsolete information in customer's credit reports"; and to "review credit profile status from the credit reporting agencies such as:

Experian, Equifax and Transunion." (Ex. 1 at ATTERBURY0008.) These credit repair services are specified elsewhere in the contract, as depicted in the reformatted reproduction below:

1. I, Christina Atterbury, hereafter known as "client" hereby authorize, Earn Company, 555 DIAMOND ST # 301, PHILADELPHIA, PA 19122, to make, receive, sign, endorse, execute, acknowledge, deliver, and possess such applications, correspondence, contracts, or agreements, as necessary to improve my credit. Such instruments in writing of whatever and nature shall only be effective for any or all of the three credit reporting agencies which are TransUnion, Experian, Equifax, and any other reporting agencies or creditor's list, as may be necessary or proper in the exercise of the rights and powers herein granted.

• • • •

4. I grant to {Credit Exterminators}, {555 Diamond Street}, {Philadelphia}, {PA} {19122}, authority to do, take, and perform, all acts and things whatsoever requisite, proper, or necessary to be done, in the exercise of repairing my credit with the three credit reporting agencies, which are TransUnion, Experian, Equifax and any other reporting agencies or creditor's listed, as fully for all intents and purposes as I might or could do if personally present.

(*Id.* at ATTERBURY0010.) The Credit Repair Contract specifies that Defendants will not begin providing services until "**a week after** their [sic] customer has signed up and customer payment of Fees." (Ex. 1 at ATTERBURY0009.) These provisions belie the notion that the credit repair services consist only of "access" to a "back portal."

To the extent the Credit Repair Contract represents that the "set up fee" is *only* for access to a back portal, this is merely a subterfuge—*i.e.* deception built into the contract for the purpose of avoiding the CROA prohibition on charging or receiving upfront fees. Defendants' decision to bake this deception into the Credit Repair Contract necessarily violates the prohibition on "engag[ing], directly or indirectly, in any act, practice, or course of business that constitutes or results in the commission of, or an attempt to commit, a fraud or deception on any person in connection with the offer or sale of the services of the credit repair organization." 15 U.S.C. § 1679b(a)(4).

Even assuming *arguendo* Defendants only agreed to provide services consisting of "access" to a back portal, which were provided "simultaneously" with Plaintiff's payment of the setup fee, this simultaneous provision of services also violates the CROA. The CROA provides:

> No services may be provided by any credit repair organization for any consumer--
>
> **(1)** unless a written and dated contract (for the purchase of such

> services) which meets the requirements of subsection (b) has been signed by the consumer; or
> **(2) before the end of the 3-business-day period beginning on the date the contract is signed**.

15 U.S.C. § 1679d(a) (emphasis added). Both of these requirements—the contract disclosure requirement and the three-day waiting period—must be satisfied before services may be performed. *U.S. v. Cornerstone Wealth Corp.*, No. 3:98-0601, 2006 WL 522124, at *3 (N.D. Tex. Mar. 3, 2006) ("a CRO cannot legally provide credit repair services until the consumer has signed a written and dated contract that meets the requirements of § 1679d(b) *and* three business days have elapsed after the date the contract is signed" (italics in original)).

Defendants admit that they did not wait three business days to provide services, but instead "instantaneously performed its agreed-to service – access to the secure back portal" upon Plaintiff's payment of the $400 setup fee. (Def.'s Br. at 10.) Even if the Court went beyond the allegations of the Complaint at this demurrer stage, Defendants' instantaneous provision of such "services" (*i.e.* access) at the time of signing violates the CROA. *See* 15 U.S.C. § 1679d(a)(2).

ii. The Credit Repair Contract Contains an Illegal Waiver of Rights

Significantly, Defendants fail to address a key violation in the Credit Repair Contract—the inclusion of an illegal waiver of rights. The CROA provides that "[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this subchapter shall be treated as a violation of this subchapter." 15 U.S.C. § 1679f(b); *see also DuCharme v. Heath*, No. 10-02763, 2010 WL 5211502, at *4 (N.D. Cal. Dec. 16, 2010) (contract that precluded consumers from directly contacting credit bureaus was illegal waiver of rights under § 1679f(b)).

The Credit Repair Contract includes an expansive release—releasing Credit Exterminators from "all matters of actions, causes of action, suits, proceedings, debts, dues, contracts, judgments,

damages, claims, and demands whatsoever in law or equity, for or by reason of any matter, cause, or things whatsoever as based on the circumstances of this contract." (Ex. 1 at ATTERBURY0010.) Quite apart from the extraordinary and deceptive tactic of a business demanding a broad release of future misconduct, *ex ante*, Defendants have not even attempted to justify this clear violation of the CROA. This is yet another reason to overrule Defendants' preliminary objections.

iii. The Credit Repair Contract Fails to Include All Required Disclosures

Defendants contend that its Credit Repair Contract contains all of the required CROA disclosures. (Def.'s Br. at 11-12.) A thorough examination of the contract belies this assertion.

The CROA provides that "[n]o services may be provided by any credit repair organization for any consumer--(1) unless a written and dated contract (for the purchase of such services) which meets the requirements of subsection (b) has been signed by the consumer." 15 U.S.C. § 1679d(a). In turn, subsection (b) requires a host of specific terms and conditions be stated in specified ways—everything from the name of the credit repair organization to the consumer's right to cancel. *See* 15 U.S.C. § 1679d(b). A credit repair organization is strictly liable for failure to provide the required disclosures in the specified format. *McDaniel*, 2012 WL 13102240, at *15 (granting summary judgment on CROA disclosure violation).

Here, the Credit Repair Contract does not identify "the credit repair organization's name[.]" 15 U.S.C. § 1679d(b)(3). Instead, the Credit Repair Contract confusingly names both Earn Company and Credit Exterminators. (Compl. ¶ 39.) Defendants *now* claim that the credit repair organization is "Earn Finance Company LLC," (Def.'s Br. at 4), but "Earn Finance" appears nowhere in the contract. Defendants' failure to identify the organization violates the CROA.

The CROA requires that the Credit Repair Contract state "the total amount of all payments to be made by the consumer to the credit repair organization or to any other person." 15 U.S.C. § 1679d(b)(1). Instead of doing this, the contract forces the consumer to try to calculate the "total" amount after scouring multiple pages of the contract. No "total" appears anywhere.

The CROA requires that the Credit Repair Contract state "an estimate of—(i) **the date by which the performance of the services** (to be performed by the credit repair organization or any other person) **will be complete**; or (ii) **the length of the period necessary** to perform such services." 15 U.S.C. § 1679d(b)(2)(B) (emphasis added). The Credit Repair Contract does not state "the date" in which the performance of services "will be complete." *See id.* Nor does it provide an estimate of the time period necessary to perform such services. Indeed, the Credit Repair Contract builds in an oppressive auto-renewal provision that automatically renews the contract "for successive periods equal to the Term"—and "Term" is ambiguously defined as "monthly, quarterly, semiannually or annually (collectively referred to as 'Term' or 'Terms')." (Ex. 1 at ATTERBURY0009.)

The CROA requires the Credit Repair Contract contain "a conspicuous statement in bold face type, in immediate proximity to the space reserved for the consumer's signature on the contract, which reads as follows: 'You may cancel this contract without penalty or obligation at any time before midnight of the 3rd business day after the date on which you signed the contract. See the attached notice of cancellation form for an explanation of this right.'" 15 U.S.C. § 1679d(b)(4). The instant Credit Repair Contract does not set forth this statement conspicuously and in bold face type (Ex. 1 at ATTERBURY0011), and it does not refer to an "attached notice of cancellation form for an explanation of this right." Instead, the notice of right to cancel is improperly embedded in Defendants' Credit Repair Contract.

Relatedly, the Credit Repair Contract does not contain a notice of cancellation in duplicate form, or in bold face type, or one that is separate from the Credit Repair Contract. 15 U.S.C. § 1679e(b). Instead, a single purported "Notice of Right to Cancel" is embedded and part of the Credit Repair Contract. (Ex. 1 at ATTERBURY0011). Defendants admit that the embedded notice of cancellation is not in bold face type. (Def.'s Br. at 12.)

The CROA requires credit repair organizations to provide a separate disclosure of rights. 15 U.S.C. 1679c(b). The Credit Repair Contract is not accompanied by a "separate" written disclosure of rights as set forth in 15 U.S.C. 1679c. Instead, the statement of rights is embedded and part of the Credit Repair Contract. (Ex. 1 at ATTERBURY0010-11).

All of these failures, omissions, and inconsistencies violate the CROA's contract disclosure requirements, barring Defendants from providing any services. 15 U.S.C. § 1679d(a).

Oddly, Defendants contend that "the conspicuousness of these disclosures" is demonstrated by the fact that Plaintiff signed an acknowledgment form. (Def.'s Br. at 13.) But Defendants cannot force the consumer to contractually disclaim having received conspicuous disclosures, or to contractually waive her right to proper contractual disclosures, as such an attempt to obtain a contractual waiver would necessarily constitute an illegal attempt to waive CROA rights. *See* 15 U.S.C. § 1679f(b). Regardless, the propriety or conspicuousness of any disclosures depends on Defendants' adherence to the CROA requirements, not on a generic acknowledgement provision signed by a consumer. Defendants' Credit Repair Contract violates the CROA, as the Complaint clearly avers.

iv. The Nondisclosure Agreement is an Attempt to Waive CROA Rights

Defendants argue that "[n]othing in the NDA waives any of Plaintiff's rights under the CROA." (Def.'s Br. at 12.) This argument is a red herring. The CROA prohibits "[a]ny **attempt**

by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this subchapter[.]" 15 U.S.C. § 1679f(b) (emphasis added). "Attempt" is defined as "[t]he act or an instance of making an effort to accomplish something, esp. without success." Attempt, Black's Law Dictionary (11th ed. 2019). The vaguely worded NDA is such an "attempt," as it purportedly prohibits Plaintiff from disclosing "all personal or professional information" received from Sprinkle of Jesus, Casey Olivera, Rattray, and Morris, and it entitles Sprinkle of Jesus to seek "an immediate injunction enjoining any breach" of that agreement. (Ex. 1 at ATTERBURY0004-5.)

Precluding a consumer from speaking to third parties (such as credit bureaus or regulators) violates the CROA. *See DuCharme*, 2010 WL 5211502, at *4. Defendants have a practice of using broadly worded NDAs to silence victims (*i.e.*, their consumer clients) with threats of litigation. (Compl. ¶¶ 52, 59.) Defendants' attempt to silence and dissuade Plaintiff from exercising her rights through this expansive NDA itself violates the CROA. 15 U.S.C. § 1679f(b). More than that, the practice is itself seedy and overbearing. What legitimate consumer-facing business seeks to employ the harsh club of an NDA to silence its consumer clients from discussing their finances?

v. The Credit Repair Contract is Void and Unenforceable

The CROA provides that "[a]ny contract for services which does not comply with the applicable provisions of this subchapter-- (1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person." 15 U.S.C. § 1679f(c). It follows that Defendants' Credit Repair Contract is void and unenforceable, subjecting Defendants to liability for damages under the CROA. *See* 15 U.S.C. § 1679g(a)(1). (Compl. ¶ 2.)

C. Defendants Are Liable Under the CROA Even If They Did Not Have Direct Contact with Plaintiff

Defendants contend that Defendants Sprinkle of Jesus, Casey Olivera, Rattray, and Morris

must be dismissed because they did not have any "direct" contact with Plaintiff and were not parties to the Credit Repair Contract. (Def.'s Br. at 13.) But this is a fact-bound claim, beyond the four-corners of the Class Complaint, and cannot be considered on demurrer. *Com. by Shapiro v. UPMC*, 208 A.3d 898, 912 (Pa. 2019) (refusing to consider extrinsic evidence on preliminary objections). Moreover, Defendants fail to cite any authority requiring dismissal on these grounds.

Defendants' argument belies both the plain language of the CROA and the factual allegations in the Complaint. The CROA does not predicate liability on "direct" contact, being a party to a credit repair contract, or even being a credit repair organization. *See Perry*, 2011 WL 3204818, at *4 (defendants who advertised but did not actually perform credit repair services could be liable because they were connected to the CROA violations).

First, while some CROA prohibitions are directed only to "credit repair organizations," and others directed more broadly to "persons,"[2] the CROA's civil liability provision allows a damages suit against "[a]ny person who fails to comply with any provision of this subchapter," without limitation. *See* 15 U.S.C. § 1679g(a)(1). "[T]he legal use of the term 'person' encompasses a broader range of individuals and entities than the term 'credit repair organization.'" *Poskin v. TD Banknorth, N.A.*, 687 F. Supp. 2d 530, 543 (W.D. Pa. 2009) (denying summary judgment; finding defendant could be liable as a "person" even if it is not a credit repair organization); *Stith v. Thorne*, No. 06-00240, 2006 WL 5444366, at *10 (E.D. Va. Oct. 30, 2006) ("the scope of the CROA encompasses more than merely credit repair organizations").

Although "person" is undefined, the term "credit repair organization" is defined as:

> 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 money or other valuable consideration, for the express or implied purpose of--
>
> **(i)** improving any consumer's credit record, credit history, or credit

[2] *Compare* 15 U.S.C. § 1679b(b) *with* 15 U.S.C. §§ 1679b(a), 1679f(b).

> rating; or
> **(ii)** providing advice or assistance to any consumer with regard to any activity or service described in clause (i)

15 U.S.C. § 1679a(3)(A). The CROA "does not require an entity to actually 'provide' the services listed, . . . the entity need only 'represent' that it can or will provide such services." *Cortese v. Edge Sols., Inc.*, No. 04-0956, 2007 WL 2782750, at *7 (E.D.N.Y. Sept. 24, 2007); *Parker v. 1-800 Bar None, a Fin. Corp.*, No. 01-4488, 2002 WL 215530, at *3 (N.D. Ill. Feb. 12, 2002) (same).

Defendants are all credit repair organizations under the CROA. (Compl. ¶¶ 1, 14-15, 17, 19, 21-24, 74.) Plaintiff alleges that "Defendants are a combination of corporate entities and their owners, agents, and employees who hold themselves out as providing credit repair services to consumers in exchange for money, or who have contracted with consumers seeking credit repair services." (*Id.* ¶ 1.) "Numerous videos and photos posted publicly to Instagram and other online social media show Olivera, Morris, April, and Rattray representing that they can or will provide advice or assistance to consumers regarding their credit in exchange for purchasing a plan." (*Id.* ¶ 21.)[3] All Defendants charged and received money before "fully" performing the agreed-to credit repair services, (*id.* ¶¶ 55, 75-76), which violates the CROA's prohibition on advance payments. 15 U.S.C. § 1679b(b). Defendants all engaged in conduct subjecting themselves to liability as "credit repair organizations" under the CROA. (*Id.* ¶ 74.)

Second, Defendants also violated CROA prohibitions that apply to "persons." (*Id.* ¶ 73.) The CROA makes it unlawful for any "person" to "engage, **directly or indirectly**, in any act, practice, or course of business that constitutes or results in the commission of, or an attempt to commit, a fraud or deception on any person in connection with the offer or sale of the services of

[3] It is well established that "the Internet is an instrumentality and channel of interstate commerce," *United States v. MacEwan*, 445 F.3d 237, 245 (3d Cir. 2006), so Defendants' advertisements on social media satisfy the interstate commerce requirement.

the credit repair organization." 15 U.S.C. § 1679b(a)(4) (emphasis added). Plaintiff alleges that "[i]n connection with the offer or sale of credit repair organization services, Defendants directly or indirectly engaged in acts, a practice, or a course of business that constitutes a deception on consumers and an attempt to commit a deception on consumers, in violation of the CROA," which "includes but is not limited to Defendants' use of illegal form credit repair contracts to steal upfront fees from consumers that Defendants were not legally permitted to charge or receive." (Complaint ¶ 76.) Additionally, the CROA prohibits "[a]ny attempt by **any person** to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this subchapter[.]" 15 U.S.C. § 1679f(b) (emphasis added). Defendants violated the CROA by using form contracts that attempted to waive Plaintiff's CROA rights. (Compl. ¶¶ 77, 37, 52.)

In sum, Plaintiff alleges that each Defendant individually violated the CROA through their own affirmative use of illegal credit repair contracts and their charging/receipt of money before the performance of any services. Even Defendants' "indirect involvement" in this predatory scheme is sufficient to impose liability. *See Stith*, 2006 WL 5444366, at *10; *Perry*, *supra*.

However, in their final argument, Defendants contend that the individual defendant "April" Olivera must be dismissed because she was allegedly "acting on behalf of Earn Company/Credit Exterminators[.]" (Def.'s Br. at 15.) This argument is yet another a red herring.

Under the "participation theory" of corporate liability, "[t]he general, if not universal, rule is that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor." *Wicks v. Milzoco Builders, Inc.*, 470 A.2d 86, 90 (Pa. 1983). But corporate agents are <u>not absolved</u> from liability merely on account of the fact that they were acting on behalf of a principal. "It has long been a basic tenet of agency law that '[a]n agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the

principal or on account of the principal.'" *Cosmas v. Bloomingdales Bros.*, 660 A.2d 83, 88 (Pa. Super. 1995). "Whether an employee is or is not acting within the scope of his or her employment, therefore, is only relevant in determining whether the employer can be secondarily liable for the employee's tort. In either case, the employee himself remains liable for his own torts." *Id.* at 89; *see also Wicks*, 470 A.2d at 89 n.5 (same). And, of course, the existence of one's agency is "ordinarily one of fact for the jury to determine." *Consol. Rail v. Ace Prop.*, 182 A.3d 1011, 1027 (Pa. Super. 2018).

Here, all Defendants took part in this credit repair scheme by using illegal credit repair contracts and stealing upfront fees from consumers. (Compl. ¶¶ 75-83.) In other words, all Defendants personally participated in the wrongful conduct alleged, and did so knowingly, intentionally, and willfully. (*Id.* ¶¶ 82-83.)

Additionally, the Court may find owners of the corporate Defendants personally liable under the alter ego theory. Owners of a corporation may be personally liable for the acts of agents where the owners "have used the corporate form merely as a vehicle by which they seek to engage in illegal or improper acts with impunity." *Wicks*, 470 A.2d at 89; *see also Good v. Holstein*, 787 A.2d 426, 430 (Pa. Super. 2001) (corporate form disregarded).

At this stage, there is ample basis to disregard Defendants' corporate form in light of the allegations that Defendants engaged in a deceptive course of business through an unincorporated association of individuals and businesses. Specifically, Plaintiff alleges that Defendants operate under several names and pseudonyms, including "the nonexistent, unincorporated association called the Earn Company"—"of which the other Defendants are members, agents, and/or employees." (Compl. ¶¶ 1, 7.) Plaintiff also alleges that Defendants engaged in a course of business that constitutes a deception on consumers, which includes using "illegal form credit repair

contracts to steal upfront fees from consumers that Defendants were not legally permitted to charge or receive." (*Id.* ¶ 76.) Defendants did so knowingly, willfully, and intentionally. (*Id.* ¶¶ 82-83.) Under these circumstances, affording any weight to Defendants' corporate form(s) would only serve to insulate the owners and shareholders from the tortious acts of a criminal enterprise. At the very least, further discovery on this issue is warranted, as these agency issues may not be resolved on Preliminary Objections.

D. Plaintiff has Statutory Standing under the CROA

Recycling an argument from their time in federal court, Defendants argue that Plaintiff lacks standing to file suit because she purportedly was not injured. (Def.'s Br. at 7-9.) This argument is frivolous. Plaintiff alleges that she paid Defendants nearly $2,000 pursuant to an illegal (and void) credit repair contract, including $400 in illegal upfront fees that she was required to pay before the performance of any services. (Compl. ¶¶ 28-29, 55). Plaintiff has standing to recover these actual damages. 15 U.S.C. § 1679g(a)(1)(A). Plaintiff also has standing to seek a declaration that Defendants' illegal Credit Repair Contracts are void. *See* 15 U.S.C. § 1679f(c) ("Any contract for services which does not comply with the applicable provisions of this subchapter--(1) shall be treated as void").

And crucially, even ignoring Plaintiff's out-of-pocket loss, Defendants fundamentally misunderstand standing jurisprudence in Pennsylvania state courts, which is distinct from and less stringent than the federal court Article III standing requirement. *See Johnson v. Am. Standard*, 8 A.3d 318, 328 n.9 (Pa. 2010) ("While standing in a federal court is derived from the United States Constitution, the same is not true in Pennsylvania, as the Pennsylvania Constitution contains no reciprocal Article III requirement."). In Pennsylvania, individuals may seek recourse for any legal injury: "Every person for a legal injury done him in his lands, goods, person, or reputation shall

have remedy by due course of law, and right and justice administered without sale, denial or delay." 42 Pa. C.S. § 5101.[4]

"At its most basic level, standing merely 'denotes the existence of a legal interest.'" *Com. v. Janssen Pharmaceutica, Inc.*, 8 A.3d 267, 277 (Pa. 2010). "The General Assembly has frequently enacted statutes conferring standing on particular individuals or entities in specific situations." *Id.* at 274 (collecting statutes). The Superior Court has explained that the "traditional standing requirements apply only when a specific statutory provision for standing is lacking." *Milby v. Pote*, 189 A.3d 1065, 1076–77 (Pa. Super. 2018). When the General Assembly has conferred standing by statute, the question becomes whether "the interest the plaintiff seeks to protect is arguably within the zone of interests to be protected by the statute." *Id.*

Here, the CROA affords consumers like Plaintiff standing to recover damages whenever "[a]ny person . . . fails to comply with any provision of this subchapter," and Congress mandated a minimum damages award in such cases. 15 U.S.C. § 1679g(a)(1). Specifically, the CROA states that "[a]ny person who fails to comply with any provision of this subchapter with respect to any other person shall be liable to such person in an amount equal to the sum of the amounts determined under each of the following paragraphs . . . (A) [actual damage] or (B) any amount paid by the person to the credit repair organization." 15 U.S.C. § 1679g(a)(1) (underlines added). Plaintiff paid nearly $2,000 to Defendants for the performance of credit repair services. (Compl. ¶¶ 28-29, 55). Because Defendants "fail[ed] to comply" with the CROA, Plaintiff plainly has standing to seek the amounts she paid to Defendants, as Congress unambiguously intended consumers like Plaintiff to recover for these CROA violations regardless of the actual injury experienced. Plaintiff is precisely the type of "person" the CROA was designed to protect by affording a minimum

[4] The Committee Comment explains that § 5101 "Expresses in statutory language the constitutional right to a remedy for legal injury." Committee Comment, Pa. Bar Assoc.'s Special Committee on the Judicial Code, Title 42.

damage award. Plaintiff has standing to recover damages under the CROA.

The few cases Defendant relies upon are inapposite.[5] In *Treski*, the plaintiffs under a Pennsylvania auto insurance policy sought to hold defendant insurance companies liable for "failing to advise them that their election of full tort might not be honored by a New Jersey court sometime in the future." *Treski v. Kemper Nat. Ins. Companies*, 674 A.2d 1106, 1112 (Pa. Super. 1996). Indeed, the New Jersey intermediate appellate court had ruled in a precedential opinion that the insurance coverage *would* be honored. *Id.* at 1113. By contrast, here, Plaintiff has already been injured because she paid nearly $2,000 toward a void credit repair contract. Plaintiff has not sued for some future contingent harm. The violation is complete, and the damage is done.

V. RELIEF

This Court should overrule Defendants' preliminary objections so as to allow the parties to continue discovery into each Defendants' involvement in this sham credit repair operation.

Respectfully submitted:

Date: 6/1/2021

/s/ Andrew M. Milz

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[5] Defendants cite two federal cases discussing the requirements of Article III standing in federal courts, but these cases are of no help here because the prudential standing doctrine in Pennsylvania is distinct, as discussed *supra*.

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CHRISTINA ATTERBURY, Individually and on behalf of all others similarly situated, Plaintiff, v. EARN COMPANY, et al. Defendants	**COURT OF COMMON PLEAS PHILADELPHIA COUNTY** CIVIL ACTION APRIL TERM 2021 NO. 00637

CERTIFICATE OF SERVICE

I, ANDREW M. MILZ, hereby certify that on the date indicated below, the within Opposition to Defendant's Preliminary Objections were filed electronically and are available for viewing and downloading through the electronic filing system, and were served via email notification through the Court's notification system upon the following counsel of record:

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