

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

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AMERICAN CONSUMER CREDIT	)	
COUNSELING, INC.	)	
	)	
Plaintiff,	)	Civil Action No. 16-12170
	)	
v.	)	Hearing Requested
	)	
AMERICAN CONSUMER CREDIT,	)	
LLC.	)	
	)	
Defendant.	)	
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**PLAINTIFF’S MEMORANDUM IN SUPPORT OF  
MOTION FOR PRELIMINARY INJUNCTION**

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**PLAINTIFF’S MEMORANDUM IN SUPPORT OF  
MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff American Consumer Credit Counseling, Inc. (ACCC) submits this memorandum in support of its Motion for Preliminary Injunction against Defendant American Consumer Credit, LLC (ACC Florida), filed herewith.

**INTRODUCTION**

Plaintiff ACCC is a nonprofit organization dedicated to providing financial and debt counseling and education to needy individuals and families. It has used its AMERICAN CONSUMER CREDIT COUNSELING and ACCC marks (the Marks) for more than two decades, has incontestable federal registrations for the Marks, and has built an outstanding reputation. Defendant ACC Florida uses the infringing marks AMERICAN CONSUMER CREDIT and ACC for similar and overlapping services, leading to at least 25 recent instances of

Plaintiff ACCC	Defendant ACC Florida
ACCC	ACC
AMERICAN CONSUMER CREDIT COUNSELING	AMERICAN CONSUMER CREDIT

confusion, including a misdirected complaint to the Better Business Bureau, and a Massachusetts resident who misdirected her confidential credit reports. These activities cause irreparable injury to Plaintiff ACCC’s reputation because ACC Florida has such a poor reputation its own customers have labeled it a “scam” or “fraud,” and uses the marks along with untrue statements intended to establish false trust with consumers, trading off Plaintiff ACCC’s reputation. Plaintiff ACCC seeks a preliminary injunction to enjoin Defendant ACC Florida’s infringement and to stop the immediate and irreparable injury to ACCC’s reputation.



## STATEMENT OF FACTS

### I. Plaintiff ACCC's Marks AMERICAN CONSUMER CREDIT COUNSELING and ACCC, and Its Website Address CONSUMERCREDIT.COM

Since its incorporation in 1992, Plaintiff ACCC, a Massachusetts non-profit corporation based in Newton, has provided confidential counseling regarding credit, debt, housing, bankruptcy, student loans, and financial education. ACCC's non-profit community service mission is to provide financial and debt counseling and education to needy individuals and families nationwide. Declaration of Steven R. Trumble in Support of Plaintiff's Motion for Preliminary Injunction (Trumble Decl.) (attached hereto) ¶ 2.

ACCC describes its mission on its website, at [consumercredit.com](http://consumercredit.com), a website address it has used since 1996 in connection with the Marks:

*Nonprofit Consumer Credit Counseling, Debt Management, and Debt Consolidation* American Consumer Credit Counseling (ACCC) provides nonprofit credit counseling, debt management plans, debt consolidation and financial education services to consumers nationwide. Our certified and professionally trained credit counseling team assists consumers by providing workable solutions for their financial problems. We offer debt relief to individuals and families that are suffering from stress related to credit card debt by providing effective credit counseling, helping to consolidate debt, and advising on debt management.

\*\*\*

ACCC strives to develop a greater community of financially responsible individuals and families that will thrive for generations to come. Through collaboration with community partners and financial institutions, ACCC is dedicated to providing unsurpassed financial education and services to those who need it most.

Trumble Decl. ¶¶ 3, 4, 12; Exs. 3, 4.

ACCC has become one of the nation's leading providers of financial education and counseling services, providing a non-profit community service alternative to for-profit debt-reorganization companies. It has clients in every state, is authorized to do business in all 50

states, and is specifically licensed to provide debt management services in every state that requires such a license. ACCC has helped over 560,000 clients in its 20-plus years of providing services. Just last year, ACCC served over 55,000 clients, and over 40,000 clients year-to-date. ACCC typically provides its services via telephone and the Internet, as well as via in-person educational seminars at its offices and elsewhere. Trumble Decl. ¶ 5.

ACCC is also approved by the U.S. Department of Justice Executive Office of the United States Trustee and several federal bankruptcy courts to provide pre-bankruptcy and post-bankruptcy debtor education in 49 states, and by the U.S. Department of Housing and Urban Development to perform pre-purchase and post-purchase housing counseling, debt management, mortgage delinquency and default resolution, and homebuyer education programs, as well as home equity conversion mortgage counseling. Trumble Decl. ¶ 6.

Since its founding, all ACCC's services have always been provided in connection with its marks AMERICAN CONSUMER CREDIT COUNSELING and ACCC. *Id.* ¶ 7. ACCC also owns incontestable Federal Registration Nos. 3,253,648 for AMERICAN CONSUMER CREDIT COUNSELING, and 2,366,063 for ACCC. Exs. 1 (registrations), 2 (incontestable status); Trumble Decl. ¶ 11. Both incontestable registrations are for "credit and debt inquiry and consultation services, debt and credit counseling; debt repayment planning and scheduling; debt consolidation services; educational services, namely conducting seminars, workshops, and individual instruction in the field of credit, debt, and money management." Ex. 1. No one else has a valid registration for AMERICAN CONSUMER CREDIT COUNSELING or AMERICAN CONSUMER CREDIT in any field, or for ACCC in the same or similar field. Declaration of Kerry L. Timbers in Support of Plaintiff's Motion for Preliminary Injunction (Timbers Decl.) (attached hereto) ¶ 27; Ex. 49.

ACCC has made substantial investments in the Marks. All of ACCC's advertising features the Marks, and, for example, from January 2013 through September 2016, ACCC spent millions of dollars in online advertising and marketing in connection with the Marks. As a result, ACCC is very well known in the industry, and is frequently quoted in national media, including most recently in articles by, for example, Forbes, Fox News, Los Angeles Times, Money magazine, USA Today, US News, and the Wall Street Journal. Trumble Decl. ¶ 8. *See* <http://www.consumercredit.com/about-us/media-mentions/2016-media-mentions.aspx>.

Plaintiff ACCC has developed a stellar reputation, and is a Better Business Bureau (BBB) accredited business with the BBB's highest rating, A+. *Id.* ¶ 9; Ex. 5. This reputation is critical to ACCC's success, as ACCC's services are highly trust based. Clients seeking help from ACCC are particularly vulnerable, as they may be desperate to find ways to pay their bills, keep their homes, protect their credit ratings, and/or avoid bankruptcy. They routinely share their most confidential information with ACCC, including their social security numbers, dates of birth, bank and credit account numbers, income and credit histories, and credit reports. Federal and state laws understandably enforce requirements to ensure that ACCC safeguards the security and confidentiality of this information. Clients also share with ACCC many other types of highly sensitive information that bears on their financial situation, including information regarding medical disabilities, accidents, substance abuse, incarceration, marital separation and divorce, lawsuits, tax issues, loss of loved ones, bankruptcy, assets and liabilities, retirement savings, and spending habits. ACCC's business model is focused on building trust with its clients and potential clients, and for this reason ACCC's stellar reputation is its most important asset. ACCC's Marks -- AMERICAN CONSUMER CREDIT COUNSELING and ACCC -- are symbols of that reputation. Trumble Decl. ¶ 9.

ACCC's reputation, as embodied in ACCC's Marks, is the most important driver of ACCC's growth. Unlike for-profit corporations, ACCC's business goals do not include maximizing revenue or profit generation, and many of ACCC's services are provided to the public for free. ACCC's community outreach focus is on providing its greatly needed services to as many people as possible. ACCC reaches more people by being more visible, having more renown, and by having a better reputation. Thus, any harm to its reputation results not so much in a loss of profit as in harm to its central community outreach mission. *Id.* ¶ 10.

## **II. Defendant ACC Florida's Infringing Use of AMERICAN CONSUMER CREDIT and ACC Marks, and Its Use of ACONSUMERCREDIT.COM**

### **A. Defendant ACC Florida's Infringement**

Defendant ACC Florida, based in the Daytona Beach, Florida greater metropolitan area, was incorporated in 2013 by Dana Micallef. Ex. 29. ACC Florida prominently uses the marks AMERICAN CONSUMER CREDIT and ACC, on its website at [aconsumercredit.com](http://aconsumercredit.com), which appears to have gone live in January 2013:



Ex. 30 (website home page); Ex. 31 (registration information); Ex. 37 (archive.org “Wayback Machine” calendar showing first save of [aconsumercredit.com](http://aconsumercredit.com)). The web address, [aconsumercredit.com](http://aconsumercredit.com), is nearly identical to Plaintiff's [consumercredit.com](http://consumercredit.com). In addition, ACC Florida has shortened its name to “American” on at least one occasion in its advertising. Ex. 44 at 86 (7/5/2016 tweet, “American can now cancel their contract for good.”).

Defendant ACC Florida's website says it provides consumers with services related to timeshares:

**We are an ATTORNEY-STAFFED Timeshare Release agency, serving consumers since 2004.** Our team of experts have helped hundreds of timeshare owners cancel their contracts and understand their legal consumer rights. We will help you eliminate your high maintenance fees or mortgage and explain your options so you can safely cancel your timeshare burden.

Ex. 30 (bold red emphasis in original).

However, Defendant ACC Florida also often emphasizes its services in the context of counseling in the fields of credit and debt management, especially as related to retirement planning and bankruptcy -- services provided by Plaintiff ACCC for over two decades. For example, a brochure available on the website also says: “Since 2004, American Consumer Credit has been the leading attorney-staffed financial counseling team responsible for helping hundreds of families resolve their timeshare obligation for good.”

[https://aconsumercredit.com/wp-content/uploads/2016/08/American-Consumer-Credit-](https://aconsumercredit.com/wp-content/uploads/2016/08/American-Consumer-Credit-Timeshare-Education.pdf)

[Timeshare-Education.pdf](https://aconsumercredit.com/wp-content/uploads/2016/08/American-Consumer-Credit-Timeshare-Education.pdf), Ex. 32, third page (emphasis added).<sup>1</sup> ACC Florida’s website also has

information about financial and retirement planning, [https://aconsumercredit.com/personal-](https://aconsumercredit.com/personal-finance/timeshare-contact-can-impact-financial-planning-retirement/)

[finance/timeshare-contact-can-impact-financial-planning-retirement/](https://aconsumercredit.com/personal-finance/timeshare-contact-can-impact-financial-planning-retirement/), Ex. 33; and avoiding

bankruptcy, [https://aconsumercredit.com/cancel-my-timeshare/avoid-filing-bankruptcy-](https://aconsumercredit.com/cancel-my-timeshare/avoid-filing-bankruptcy-timeshare/)

[timeshare/](https://aconsumercredit.com/cancel-my-timeshare/avoid-filing-bankruptcy-timeshare/), Ex. 34. ACC Florida’s Twitter feed for the past two months has over a dozen tweets

making reference to budgeting and financial planning (including as related to retirement planning

and divorce), protecting credit, and avoiding bankruptcy.<sup>2</sup> ACC Florida also provides “monthly

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<sup>1</sup> Although ACC Florida claims to have been in business “since 2004,” ACC Florida was formed in 2013, Ex. 29, its website domain name [aconsumercredit.com](https://aconsumercredit.com) was created on January 7, 2013, Ex. 30, and there is no evidence of ACC Florida’s website or social media presence before 2013. Ex. 37; Timbers Decl. ¶¶ 7, 8, 15. Plaintiff ACCC is unaware of any evidence Defendant ACC Florida existed or provided any services prior to 2013.

<sup>2</sup> E.g., “[P]rotects your credit” (10/14/16, Ex. 43 at 2); “expenses complicate your retirement” (9/29/16, Ex. 43 at 17); “bad choice for a long term investment” (9/25/16, Ex. 43 at 19); “10 Financial Myths” (9/24/16, Ex. 43 at 20); “Protect your credit rating” (9/21/16, Ex. 43 at 22);

credit monitoring,” its “newest benefit and service we are offering our clients at an additional fee.” Ex. 22, next to last page (letter from ACC Florida to customer, 9/12/16).

In addition, from at least September 22, 2012 until at least April 8, 2016, ACC Florida used the web address consumeraide.org, on which it prominently used the AMERICAN CONSUMER CREDIT mark in connection with offering “consumer education and fraud alerts” and “contract disputes and restitution from Fraud,” and described itself as “A Consumer Advocacy Group.” Ex. 36 (archive.org copies of website home page from 5/28/2013, 2/22/2016, 4/8/2016); Ex. 37 (archive.org page showing dates of archived web pages).

ACC Florida has customers throughout the country, as evidenced by two dozen instances of actual confusion (discussed below) from customers in Massachusetts, Arizona, California, Florida, Illinois, Indiana, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas, Utah, and even Calgary, Canada. Exs. 6-28.

#### **B. There Have Been At Least 25 Recent Instances of Actual Confusion**

There have been at least two dozen recent instances of actual confusion in which customers of ACC Florida from throughout the country mistakenly contact ACCC via email:

6/2/16, Janet, North Las Vegas, NV (Ex. 6)	7/12/16, 7/13/16 and 7/14/16, Henry and Jennifer, Calgary, BC, Canada (Ex. 7)
7/12/16, Donna, unknown state (Ex. 8)	7/14/16, Carlos, El Paso, TX (Ex. 9)
7/14/16, Aaron, unknown state (Ex. 10)	7/24/16, Joseph, Phoenix, AZ (Ex. 11)
7/25/16, Beverly, Brooklyn, NY (Ex. 12)	7/30/16, Brian, unknown state (Ex. 13)
8/8/16, Rudy, Mount Dora, FL (Ex. 14)	8/8/16, Robert and Susan, Rockford, IL (Ex. 15)
8/21/16, Kimberly, Chula Vista CA (Ex. 16)	8/23/16, Joseph, Glen Mills, PA (Ex. 17)

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“**Bankruptcy** should be your last option” (9/18/16, Ex. 43 at 25); “no longer makes **financial sense**” (9/16/16, Ex. 43 at 26); “your **budget**” (9/14/16, Ex. 43 at 30); “**bankruptcy**” (9/9/16, Ex. 43 at 34); “challenges of **retirement planning**” (9/3/16, Ex. 43 at 37); “**financial freedom**” (9/2/16, Ex. 43 at 38), “**Financial Planning and Your Retirement**” (9/1/16, Ex. 43 at 39); “**Retirement planning**” (8/27/16, Ex. 43 at 42); “long term **investment**” (8/23/16, Ex. 44 at 47); “protect your **credit rating**” (8/20/16, Ex. 44 at 50).

8/29/16, Paul and Barbara, Midvale, UT (Ex. 18)	8/29/16, Francine, unknown state (Ex. 19)
8/30/16, Laura, Thomasville, NC (Ex. 20)	8/30/16, Gary, Maineville, OH (Ex. 21)
9/14/16, Mary, Mansfield, MA (Ex. 22)	9/22/16, Tanica, Vineland, NJ (Ex. 23)
9/22/16, Elizabeth, Las Vegas, NV (Ex. 24)	9/27/16, John, French Lick, IN (Ex. 25)
10/3/16, Julian, Grayson CA (Ex. 26)	10/4/16, Shirley, unknown state (Ex. 27)
10/12/16 Don, Henderson, NV (Ex. 28)	10/18/16 Penny, Monroe, WA (Ex. 54)

These emails from confused consumers attached account statements and discussed legal strategy, and one from a Mansfield, Massachusetts resident even attached confidential credit reports. Ex. 22. In addition, a customer mistakenly posted a Better Business Bureau complaint against ACCC on October 25, 2016, as the text of the complaint clearly shows the customer is actually discussing ACC Florida, not ACCC. Ex. 55; Trumble Decl. ¶ 15.

### C. ACC Florida's Unsavory Reputation and Questionable Business Practices

ACC Florida is viewed by some of its customers as a fraud or scam operation, its website contains several false statements, and it appears to be advertising and providing legal services throughout the country without appropriate licensing.

Fraud/Scam Reputation. The Better Business Bureau reports disturbing complaints of customers describing ACC Florida a “fraud,” “scam,” “fly by night,” “lying” and “vampires” (emphasis added below):

- “Sounds like another **fraud** company. They need to be made to pay out of their pocket and then go to prison” (11/20/13, Ex. 38 at 5)
- “I called and talked with Dana Micalles [sic] (who said he was President of American Consumer Credit, LLC), after listening to him rant for 15-mins ... If this guy doesn't get me my full refund, **I will seek legal action,**” “They are **lying** ... **American Consumer Credit, LLC is lying** ... So again, **they lie!**” (9/14/16, Ex. 38 at 5-6)
- “I am looking for this company to have a decreased rating on bbb. It now has A+ which is beyond me as this is evidently a **scam/fraud!**”, “the first thought in my head was this is a **fly by night** agency. I also felt bullied by \*\*\*\*, and the again, by Sean the ‘supervisor/manager.’ **They called me rude** ... To say the least, this company MAY be legit, but they are certainly **NOT professional**” 5/16/16, Ex. 38 at 6-7)

- “I realized that they are a **scam**, ... your office is a **fraud** and should be taken of the internet ... Still waiting for a call back from this **SCAM** operation ... I would like to know if these kind of **vampires** can get away with the practice they have been doing thus far ... Clearly this attorney cannot personally get involved in these written communication (sic) because he is **hiding behind** a very good **scammer/partner**” ... It is near the end of 2015 and still **lying** all the way” (4/14/16, Ex. 38 at 9-10, 12)
- “I had had enough of **deceit and run-around** from ACC ... Mr. \*\*\*\*\* stated at that time how **I did not have the means to pursue him legally**. He then began to make reference to all the assets he currently has including but not limited to multiple businesses, yachts, etc. I also was told by Mr. \*\*\*\*\* that **I would not see a dime of my money**” (9/19/14, Ex. 38 at 18)
- “I **complained to the Attorney General of Florida** at which time Mr. \*\*\*\* called ‘crying’ and asking that I remove the complaint.... If this is a reputable company why **can’t they give me an honest answer**” (8/14/14, Ex. 39 at 7)
- “I believe that this is **another scam** ... Does American Consumer Credit not take responsibility for the agreement with us ...? ... It was American Consumer Credit that made a cold call to us ...,” (5/15/14, Ex. 39 at 9, 13)

ACC Florida also has a complaint on scamguard.com, in which a customer sought a refund and said it “**would like them prosecuted** if they are found to be doing anything illegal,” and gave a recommendation of “stay away.” Ex. 40 (emphasis added).

Poor BBB Rating. Defendant ACC Florida is not accredited by the Better Business Bureau, and has a poor C+ rating. Ex. 50 at 1. In addition, the BBB reports: “Based on BBB review the company has a pattern of complaints indicating delays or failure to issue refunds according to its terms,” and that “It has come to BBB's attention that the business is demanding that a customer withdraw a complaint filed through BBB as a condition of resolving the complaints. BBB does not withdraw complaints under these circumstances.” *Id.* at 2. Indeed, one customer actually included a “release” form from ACC Florida demanding that the BBB complaint be withdrawn as a condition of a refund. Ex. 38 at 12-13 (“The Client hereby agrees to immediately remove its complaint from the Better Business Bureau and any other complaints



it has lodged against ACC or its affiliates. If this portion is not satisfied Client will not be eligible for a refund.”).

False Claim to Better Business Bureau A+ Rating. On its current Facebook and Yelp pages, ACC Florida falsely claims “Our 12 Year Established BBB Rated A+ team of counselors will help you ....” Ex. 41 (Facebook); Ex. 42 (Yelp) at 2. At least one customer actually relied on this, noting in her BBB complaint: “I am looking for this company to have a decreased rating on bbb. It now has A+ which is beyond me as this is evidently a scam/fraud.” Ex. 38 at 6. This is clearly intended to establish false trust among potential customers, or to trade off Plaintiff ACCC’s real A+ rating.

False Claim of Being A “Consumer Advocacy Group”. Defendant ACC Florida has also called itself “A Consumer Advocacy Group,” Ex. 36, falsely suggesting it is something other than a for-profit enterprise that charges people for its services. This appears intended to establish false trust on the part of potential customers, who may believe they are dealing with a non-profit group with consumer advocacy goals, like ACCC, as opposed to a for-profit business.

False Claim of “Staff of Attorneys”. Defendant ACC Florida also repeatedly claims to have a “staff” of attorneys. Ex. 30 (“attorney-staffed agency”); Ex. 35 (“Our ... Attorneys act quickly”). However, it appears ACC Florida merely uses a single outside attorney, not a “staff” of in-house attorneys. This statement falsely characterizes ACC Florida as being more substantial than it really is, and is clearly intended to establish false trust in the minds of potential customers.

Advertising and Provision of Legal Services Without a License. ACC Florida is advertising, soliciting and providing legal services throughout the country without proper licensing, including through cold calls to potential clients, Ex. 39 at 13 (“cold call to us”), Ex. 53

(Complaint regarding telephone solicitation), its website, Exs. 30, 32-35, and social media sites, including Facebook (Ex. 41), Yelp (Ex. 42), Google+ (Ex. 46), and Pinterest (Ex. 47). ACC Florida's Twitter feed from May 14 to October 15, 2016, has over two dozen instances of claims to provide legal services.<sup>3</sup> This national advertising and solicitation, along with actual evidence of clients throughout the country, indicates that ACC Florida is advertising, soliciting and providing legal advice throughout the country, despite the fact that ACC Florida's only self-described "staff attorney," Michael Saracco, is licensed to practice only in Florida. Ex. 48.

False Statement: "Established" in 2004. Although it undoubtedly was incorporated in 2013, Ex. 29, ACC Florida repeatedly claims to have been "established" in 2004. Ex. 30 (website home page), Ex. 32 (brochure), Ex. 35 (website "about us"), Ex. 41 (Facebook), Ex. 42 (Yelp). While companies are often founded shortly before incorporation, it is unlikely that it was founded 9 years prior to incorporation, and 9 years prior to having a web site. No evidence of any activity can be found prior to 2013. The false claim to longevity is clearly aimed at establishing false trust among potential customers, who are not looking for a "fly by night" outfit, as one unsatisfied customer labeled ACC Florida. BBB complaint dated 5/16/2016 (Ex. 38 at 6-7).

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<sup>3</sup> "Confidential and understanding **legal advice**" (5/20/16, Ex. 45 at 120); "Our **legal service**" (9/18/16, Ex. 43 at 26); "We are a **legal team** that provides assistance to consumers" (9/18/16, Ex. 43 at 25); "Our **legal team and services**" (7/31/16, Ex. 44 at 66); "the right **legal help**" (9/23/16, Ex. 43 at 21); "**#legal assistance**" (10/3/16, Ex. 43 at 13); "**Legal services** to end #timeshare contracts" (7/12/16, Ex. 45 at 102); "Our reputable legal team" (10/12/16, Ex. 43 at 5); "Compassionate **legal ... professionals**" (9/19/16, Ex. 43 at 23); "Our team of **#legal professionals**" (8/2/16, Ex. 44 at 63); "Our **legal team**" (10/13/16, Ex. 43 at 4; 8/31/16, *id.* at 40; 8/9/16, Ex. 44 at 59; 8/2/16, Ex. 44 at 63; 7/13/16, Ex. 44 at 79; 6/6/16, Ex. 45 at 108; 6/3/16 and 6/2/16, Ex. 45 at 109; 5/31/16, Ex. 45 at 121); "talk to a **legal team**" (10/8/16, Ex. 43 at 8); "the attorney on staff that will be working with you" (8/13/16, Ex. 44 at 55); "we provide **legal solutions**" (7/14/16, Ex. 44 at 78); and "**legal options**" (9/29/16, Ex. 43 at 17; 9/26/16, Ex. 43 at 18; 9/12/16, Ex. 43 at 31; 6/10/16, Ex. 45 at 104; 5/24/16, Ex. 45 at 117). (Emphasis added).

ACC Florida's Owner and Manager. ACC Florida touts Mr. Dana Micallef, its founder and manager, in its advertising. For example, in its Yelp profile, ACC Florida says: "With 13 years in business, Mr. Micallef created the Timeshare Resort Release process ..." Ex. 42. In this highly trust-based field, any potential customer seeking to know more about Mr. Micallef by performing a Google search will immediately learn that he has an unsavory history, with numerous arrests from 2009, 2010 and 2011, for:

- burglary with a firearm
- robbery
- theft
- failure to appear
- aggravated battery
- battery
- disorderly intoxication

Ex. 51. All this information, complete with mugshots, is readily available for free on the internet for potential customers and clients to find, Ex. 52 (first page of Google search results, showing six of Mr. Micallef's mug shots directly above a link to ACC Florida's website),<sup>4</sup> and all of these incidents took place during the period when ACC Florida claims it was providing services to consumers. This taints ACC Florida, and more importantly ACCC as well due to confusion caused by ACC Florida's infringement of the Marks.

Refusal to Respond to Demand Letters. Between August 2015 and August 2016, ACCC's counsel sent 4 letters and emails to ACC Florida and made two telephone calls to ACC Florida's attorney, Mr. Saracco. ACC Florida replied to one of the emails on August 15, 2016 stating "we are currently working on a solution," and then went silent. ACC Florida has not responded to ACCC's latest cease and desist letter of August 19, 2016. Timbers Decl. ¶ 3.

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<sup>4</sup> This information is relevant not for whether or not Mr. Micallef committed any crime, but because consumers searching for help and confused by ACC Florida's infringement may lead them erroneously believe Mr. Micallef is associated with Plaintiff ACCC, based on simple internet search results linking Mr. Micallef's mugshots to ACC Florida.

## ARGUMENT

Defendant ACC Florida's use of AMERICAN CONSUMER CREDIT, AMERICAN and ACC must stop immediately in order to protect against consumer confusion and to preserve ACCC'S reputation and good will in ACCC's incontestable federally registered marks AMERICAN CONSUMER CREDIT COUNSELING and ACCC. In determining whether to issue a preliminary injunction, a court must consider: (1) the moving party's likelihood of success on the merits; (2) whether the moving party will be irreparably injured by denial of relief; (3) the balance of equities between the parties; and (4) the public interest in the outcome. *Equine Technologies, Inc. v. Equitechnology, Inc.*, 68 F.3d 542, 544 (1st Cir. 1995) Consideration of these factors makes clear that a preliminary injunction should be issued preventing ACC Florida from further infringement of the AMERICAN CONSUMER CREDIT COUNSELING and ACCC trademarks.

### **I. ACCC's Strong Likelihood of Success on the Merits on its Trademark Infringement Claims**

ACCC owns the marks AMERICAN CONSUMER CREDIT COUNSELING and ACCC based on its incontestable federal registrations and its use of the Marks in commerce since at least as early as 1992. *See Volkswagenwerk Aktiengesellschaft v. Wheeler*, 814 F.2d 812, 815 (1st Cir.1987) (prior rights established based on use of unregistered mark in commerce); *Borinquen Biscuit Corp. v. M.V. Trading Corp.*, 443 F.3d 112, 117 (1st Cir. 2006) (unregistered marks eligible for protection from infringement). Plaintiff ACCC has used these marks throughout the country, including in Florida, and that use has been significant, resulting in over 560,000 people helped by ACCC in its over two decades of providing services. In addition to its common law trademark rights arising from its extensive use of the Marks, ACCC's incontestable U.S. federal trademark registrations are conclusive evidence of the validity and ownership of the

marks and the exclusive right to use the marks, 15 U.S.C. § 1057(b), and specifically that the marks are distinctive. *Borinquen.*, 443 F.3d at 117. The registrations also provide constructive notice to others -- including ACC Florida -- of ACCC's claim of ownership to the Marks. 15 U.S.C. § 1072.

The infringement of a federally registered trademark is prohibited by 15 U.S.C. § 1114, and infringement of common law trademark rights is prohibited by 15 U.S.C. §1125(a), where likelihood of confusion would result. *Equine*, 68 F.3d at 542. In analyzing likelihood of confusion, the First Circuit considers the following factors: (1) the similarity of the marks; (2) the similarity of the goods and services; (3) the relationship between the parties' channels of trade; (4) the relationship between the parties' advertising; (5) the classes of prospective consumers; (6) evidence of actual confusion; (7) the defendant's intent in adopting the mark; and (8) the strength of the plaintiff's mark. *Keds Corp. v. Renee Int'l Trading Corp.*, 888 F.2d 215, 222 (1st Cir. 1989). This extends "beyond the exact product to include related products or services," and "extends beyond simply source confusion to include confusion as to sponsorship, affiliation, endorsement, or connection." *Polar Corp. v. PepsiCo, Inc.*, 789 F. Supp. 2d 219, 228, 232-32 (D. Mass. 2011) (Saylor, J).

**A. ACCC's Marks and ACC Florida's Infringing Marks Are Confusingly Similar**

Defendant ACC Florida has chosen marks that are nearly identical to ACCC's Marks. AMERICAN CONSUMER CREDIT is the same as ACCC's mark AMERICAN CONSUMER CREDIT COUNSELING, except for the omission of the last word, "counseling," and ACC Florida sometimes shortens this to the one word AMERICAN in its advertising. Ex. 44 at 86. *Polar*, 789 F. Supp. 2d at 229 (shortening of mark likely to cause confusion). Similarly, ACC is identical to ACCC, except for the last C. Both marks look and sound nearly identical to the

consumer. *Equine Techs., Inc. v. Equitechnology, Inc.*, 68 F.3d 542, 546 (1st Cir. 1995) (mark must be considered in its entirety with a view towards what purchasing public would think).

**B. The Parties Offer Similar and Overlapping Services in the Same Channels of Trade to the Same Class of Consumers**

ACCC and ACC Florida provide similar and overlapping services. As their respective websites and Internet advertising show, ACCC and ACC Florida both offer to provide advice and education on financial planning, retirement planning, credit counseling and bankruptcy counseling, and ACC Florida's timeshare cancelation services and credit monitoring services are wholly encompassed by ACCC's broad "credit and debt inquiry and consultation services" and "debt and credit counseling" services in its federal registrations. Ex. 1. Both parties' services are aimed at the same general consumer population and are advertised the same way on the Internet, and both provide their services nationwide via telephone and electronic communications.

There is a strong likelihood of confusion where parties services overlap and are provided to the same class of consumers using the same channels of trade. *Boston Athletic Assn. v. Sullivan*, 867 F.2d 22, 30 (1st Cir. 1989); *Equine*, 68 F.3d at 546 (finding likelihood of confusion where "the parties present their products ... to the same target groups of consumers"). *Polar*, 789 F. Supp. 2d at 237 (overlap in channels of trade, classes of purchasers and advertising methods weighs in favor of likelihood of confusion). "The goods need only be sufficiently related that consumers would be likely to assume, upon encountering the goods under similar marks, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source." *In re Genghis Grill Franchise Concepts, LP*, 2013 WL 5407258 (TTAB Jul. 2, 2013) (internal citations omitted).

**C. There is Clear Evidence of Actual Confusion**

The actual confusion that has already arisen - including a misdirected BBB complaint -- strongly supports Plaintiff ACCC's claims that the marks are confusingly similar and deceive consumers. Actual confusion is "the best evidence of possible future confusion." *Borinquen*, 443 F.3d at 120. "Actual confusion is such persuasive evidence of the likelihood of confusion that even a minimal demonstration of actual confusion may be significant." *Copy Cop, Inc. v. Task Printing, Inc.*, 908 F. Supp. 37, 45 (D. Mass. 1995) (internal citations omitted). Since June 2016 there have been at least two dozen instances of actual consumer confusion throughout the United States, including in Massachusetts, and these instances of confusion are ongoing. Exs. 6-26, 54 (June 2 through October 18, 2016).

**D. Defendant ACC Florida's Intent in Adopting the AMERICAN CONSUMER CREDIT and ACC Marks, In Connection With Its Use of ACONSUMERCREDIT.COM and Its False Statements, Supports a Finding of Infringement**

While evidence of bad faith is not required in a trademark infringement case, *Star Financial Services, Inc., v. Aastar Mortgage Corp.*, 89 F.3d 5, 11 (1st. Cir. 1996), here there is strong evidence ACC Florida knew of ACCC and intentionally seeks to trade off its goodwill. ACC Florida did not begin its infringement until 2013, over 20 years after ACCC's use began, and well after ACCC's 2000 federal registration of the mark ACCC and 2007 registration of the mark AMERICAN CONSUMER CREDIT COUNSELING. Significantly, ACC Florida has not one, but many key points of manufactured similarity with ACCC's Marks, domain name, and business, all aimed at trading off ACCC's goodwill:

Plaintiff ACCC	Defendant ACC Florida
ACCC	ACC
AMERICAN CONSUMER CREDIT COUNSELING	AMERICAN CONSUMER CREDIT
consumercredit.com	aconsumercredit.com
actual BBB A+ rating	<b>False</b> BBB A+ rating
actual 20+ year longevity	<b>False</b> 13 year longevity
actual consumer advocacy	<b>False</b> "Consumer Advocacy Group"

Defendant ACC Florida chose not one but two names that are nearly identical to Plaintiff ACCC's names, and uses a nearly identical web address. In addition, ACC Florida has made sure to pitch its services in the context of providing financial planning, retirement planning and bankruptcy counseling, all services provided by ACCC. ACC Florida has also attempted to mimic ACCC by falsely claiming a BBB A+ rating, impressive longevity, and consumer advocacy, all traits ACCC in fact has but ACC Florida does not. These actions suggest that not only did ACC Florida know of ACCC, it actually seeks to emulate ACCC, through use of trademarks, its website address, and false statements on its website, to trade off ACCC's fame and reputation. *Boston Athletic*, 867 F.2d at 34-35 (in cases of intentional copying, "there is an unmistakable aura of deception," and "second comer will be presumed" to intend confusing similarity and to succeed in such confusion).

#### **E. ACCC's Marks Are Very Strong**

Factors useful in determining the strength of marks include "the length of time the mark has been used, the trademark holder's renown in the industry, the potency of the mark in the product field (as measured by the number of similar registered marks), and the trademark holder's efforts to promote and protect the mark." *Borinquen*, 443. F.3d at 121. Here, ACCC



has used its mark nationwide for over two decades, has reached and served over half a million consumers, is routinely quoted in the national press, and has spent millions of dollars promoting its marks. No other company has a valid registration for AMERICAN CONSUMER CREDIT COUNSELING, AMERICAN CONSUMER CREDIT or ACCC in a similar field. In light of this, Plaintiff ACCC's AMERICAN CONSUMER CREDIT COUNSELING and ACCC marks are undoubtedly very strong. *Copy Cop, Inc. v. Task Printing, Inc.*, 908 F. Supp. 37, 46 (lack of other parties' valid registrations supported finding of "overwhelming strength" of mark").

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Because every *Keds* likelihood of confusion factor is strongly in favor of Plaintiff ACCC, it is clear ACCC has established a likelihood of confusion and thus a strong likelihood of success on the merits.

## **II. ACCC Will Suffer Irreparable Harm in the Absence of Immediate Injunctive Relief**

Plaintiff ACCC is irreparably harmed if ACC Florida's infringement of ACCC'S Marks is not enjoined. In the First Circuit, there is a substantial body of law holding that irreparable harm is presumed as a matter of law whenever a plaintiff in a trademark infringement action showed a likelihood of success on the merits. *Societe des Produits Nestle, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 640 (1st Cir. 1992) ("irreparable harm flows from an unlawful trademark infringement as a matter of law"). Even without the presumption, it is clear that Defendant ACC Florida's infringing use irreparably injures ACCC by the loss of its right to protect its reputation and the ability to control the use of its mark. *Calamari Fisheries, Inc. v. The Village Catch, Inc.*, 698 F.Supp. 994, 1014 (D. Mass. 1988). This is especially true in light of Defendant ACC Florida's very bad reputation, its being labeled as a "scam" and "fraud" by many of its own customers, and its poor C+ BBB rating. Defendant ACC Florida also has questionable business practices, including false statements on its website and in its advertising, likely illegal practices

regarding the advertising, solicitation and practice of law in states outside Florida,<sup>5</sup> and management by someone with an unsavory past that is readily found in a basic Google search -- all of which, because of confusion, inappropriately tarnish ACCC's hard-earned reputation as well. *See Curves Intern. v. Fox*, No. 12-12250, 2013 WL 1946826, \*2 (D. Mass. May 9, 2013) (Stearns, J.) (*citing K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 915 (1st Cir. 1989) (“[H]arm to goodwill, like harm to reputation, is the type of harm not readily measurable or fully compensable in damages”)). In addition, because Plaintiff ACCC is a nonprofit organization whose mission does not focus on revenue, such harm cannot be compensated through payment of damages. *Cumulus Media, Inc., v. Clear Channel Communications, Inc.*, 2001 WL 34104923, \*5 (N.D. Fla. Nov. 1, 2001) (“Such unauthorized use by Defendant of Plaintiff's identity cannot be compensated for adequately or accurately in money damages.”).

### **III. The Balance of Equities Favors Plaintiff ACCC**

In light of the irreparable injury that will be suffered by ACCC and its likelihood of success on the merits, the balance of equities favors ACCC. ACCC's decades of use of the Marks, heavy investment in promoting the Marks, and stellar reputation, and the harm that will come to ACCC from being confused with ACCC Florida's poor reputation and questionable business practices, as well as the fact that actual confusion is already happening, heavily outweighs ACC Florida's interest in using a mark that is causing confusion among consumers

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<sup>5</sup> Massachusetts Rule of Professional Conduct Rule 7.2(d) requires advertising to contain the name of the lawyer, which the ACC Florida Twitter tweets fail to do. Rule 7.3(a) prohibits cold call solicitations like those here. To the extent ACC Florida is providing legal advice and its website contains false statements in connection with that advice (such as false statements about ACC Florida's BBB rating, its “staff of attorneys,” or when it was founded), that is a violation of Rule 7.1, which requires such statements to be truthful. If ACC Florida's “staff of attorneys” is not licensed to practice in Massachusetts, that is likely a violation of Rule 5.5, and if those attorneys share fees with ACC Florida that is likely a violation of Rule 5.4, which prohibits sharing of fees with non-lawyers. Other states undoubtedly have similar rules.

and tarnishing ACCC's reputation. *Calamari Fisheries*, 698 F. Supp. at 1015 (balance of harm in favor of plaintiff where defendants "would merely be required to use a different name, *not* to stop doing business or make any other changes"); *Curves Intern.*, 2013 WL 1946826, at \*2 (any hardship suffered by defendant from injunction was precipitated by own infringement); *Boathouse Group, Inc. v. Tigerlogic Corp.*, 777 F. Supp. 2d 243, 254 (D. Mass. 2013) (Gorton, J.) (actual confusion, loss of control over reputation favored plaintiff in balance of equities). Enjoining Defendant ACC Florida's infringement will simply work to restore ACCC's right to be free from confusion and tarnishment.

#### **IV. An Injunction against Defendant ACC Florida is Consistent with the Public Interest**

Providing trademarks with the greatest protection that can be given serves the public interest because it allows the public to depend on the constancy of the quality of the goods and services it seeks. *Volkswagenwerk*, 814 F.2d at 820. Thus, "in trademark cases, the public interest almost always favors granting otherwise appropriate injunctions." *Polar*, 789 F. Supp. 2d at 240. This is especially true here, where confusion is causing people to misdirect their most confidential information, including credit reports. In the instant case, public confusion has already resulted and will continue to result from ACC Florida's infringing conduct unless this Court enjoins that conduct. Therefore, this Court should enjoin ACC Florida from using the AMERICAN CONSUMER CREDIT and ACC marks.

#### **CONCLUSION**

For the foregoing reasons, this Court should grant Plaintiff ACCC's Motion for Preliminary Injunction and issue an order allowing the relief described in the proposed order filed simultaneously herewith.

Dated: October 28, 2016

Respectfully submitted,

AMERICAN CONSUMER CREDIT  
COUNSELING, INC.

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**CERTIFICATE OF SERVICE**

I certify that this document will be served on the registered agent of American Consumer Credit, LLC along with service of the Complaint by hand delivery.

/s/ Kerry L. Timbers

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