UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

Case No. 08-21433-CIV-Jordan/McAliley

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ALTERNATEL, INC.; G.F.G. ENTERPRISES LLC, also d/b/a MYSTIC PREPAID; VOICE PREPAID, INC.; TELECOM EXPRESS, INC.; VOICE DISTRIBUTORS, INC.; LUCAS FRIEDLAENDER; MOSES GREENFIELD; NICKOLAS GULAKOS; and FRANK WENDORFF,

Defendants.

Plaintiff Federal Trade Commission ("FTC") respectfully submits this memorandum of law in opposition to the motion to dismiss under Rule 12(b)(2) of the Federal Rules of Civil Procedure filed by Defendants G.F.G. Enterprises LLC, also d/b/a Mystic Prepaid, Voice Prepaid, Inc., Voice Distributors, Inc., Telecom Express, Inc., and Lucas Friedlaender (collectively the "Movants").[1]

INTRODUCTION

The Movants' contention that this Court lacks jurisdiction over them is fatally flawed because it rests on the misapprehension that the Florida long-arm statute is the basis for the Court's personal jurisdiction in this matter. In fact, the statutory basis for the Court's personal jurisdiction is Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which authorizes nationwide service of process, and renders the Florida long-arm statute irrelevant to this case. In addition, with respect to the Due Process limits on this Court's exercise of jurisdiction over the Movants, the operative question is not, as the Movants contend, whether they have minimum contacts with the State of Florida, but whether they have minimum contacts with the ***United States***. Here, the defendants, including the Movants, have chosen to do business together to market prepaid calling cards in Florida, Massachusetts, New Hampshire, New Jersey, Pennsylvania, and Rhode Island as well as over the Internet. There is therefore no question that the Movants have more than sufficient contacts with the United States to satisfy Due Process. Nor have the Movants met their burden of presenting compelling evidence that litigating this case in Florida would be so gravely burdensome as to be unconstitutional. The Movants have similarly failed to show that the purported burden on them from litigating in this Court outweighs the federal interest in

[1] Defendants Alternatel, Inc., Nickolas Gulakos, Moses Greenfield, and Frank Wendorff have not challenged the Court's personal jurisdiction over them.

maintaining this action in this Court against all the defendants. Accordingly, the motion to dismiss should be denied.

BACKGROUND[2]

The defendants market and sell on a wholesale basis prepaid calling cards that bear their own brand names (*e.g.*, "Tree Monkey" and "Aló Mamá") and corporate logos.[3] Defendant **Alternatel, Inc.** ("Alternatel") is a Florida corporation based in Pembroke Pines, Florida.[4] Defendant **G.F.G. Enterprises LLC, also d/b/a Mystic Prepaid** ("Mystic Prepaid"), is New Jersey limited liability company based in Hoboken, New Jersey.[5] Defendants **Voice Prepaid, Inc., Voice Distributors, Inc., and Telecom Express, Inc.** (collectively "Voice Prepaid") are Massachusetts corporations based in Medford, Massachusetts.[6]

Although the corporate defendants are based in different states, they have overlapping ownership and control. Defendant

with their cards. On May 23, 2008, the Court issued a temporary restraining order ("TRO")

are wrong. The applicable statutory provision authorizing service of process on the Movants is the statute cited as the basis fo

Civ. 04-377-JD, 2005 WL 2319944, *1 (D.N.H. Sept. 22, 2005); *FTC v. Bay Area Bus. Council, Inc.*, No. 05 C 2889, 2003 WL 21003711, *2 (N.D. Ill. May 1, 2003).

Likewise, in construing other statutes, the Eleventh Circuit and numerous other courts of appeals have interpreted language that is identical to the relevant language in Section 13(b) of the FTC Act to authorize nationwide service of process. *See, e.g., U.S. SEC v. Carrillo*, 115 F.3d 1540, 1544 & n.4 (11th Cir. 1997) (Securities and Exchange Commission Act, 15 U.S.C. § 78aa, which permits service of process on a defendant in any district "of which the defendant is an inhabitant ***or wherever the defendant may be found***," authorizes nationwide service of process) (emphasis added); *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 665 n.15 (6th Cir. 2005) (same); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002) (same); *Trust Co. of La. v. N.N.P. Inc.*, 104 F.3d 1478, 1486-87 (5th Cir. 1997) (same); *Peay v. Bell-South Med. Assistance Plan*, 205 F.3d 1206, 1210 (10th Cir. 2000) (ERISA, 29 U.S.C. § 1132(e)(2), which provides that "process may be served in any other district where a defendant resides ***or may be found***," authorizes nationwide service of process) (emphasis added); *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1414 (9th Cir. 1989) (Clayton Act, 15 U.S.C. § 22, which provides that "all process in [anti-trust actions] may be served in the district of which [the corporation-defendant] is an inhabitant, or ***wherever it may be found***," authorizes nationwide service of process) (emphasis added).

The Eleventh Circuit has specifically held that where, as here, a "federal statute provides for nationwide service of process," the federal statute — and not a state long-arm statute — "becomes the statutory basis for personal jurisdiction."

In such a case, so long as the defendants are doing business in the United States, as they undisputedly are here,[20] the statutory basis for personal jurisdiction over them is satisfied. *See Republic of Panama*, 119 F.3d at 942 ("Because the First American defendants are domestic

determining whether a defendant has "purposefully availed" himself of the forum, "the proper forum for minimum contacts analysis is the ***United States***," not the state where the federal court sits. *Carrillo*, 115 F.3d at 1544 (emphasis added). In such cases, a court must "examine a defendant's ***aggregate contacts with the nation as a whole*** rather than his contacts with the forum state in conducting the Fifth Amendment analysis." *Republic of Panama*, 119 F.3d at 947 (emphasis added); *accord, e.g.*, *Pinker*, 292 F.3d at 369; *Busch v. Buchman, Buchman & O'Brien Law Firm*, 11 F.3d 1255, 1258 (5th Cir. 1994); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993); *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1085 (1st Cir. 1992); *Go-Video*, 885 F.2d at 1414. Significantly, "[b]ecause minimum contacts with the United States — the relevant sovereign — satisfy the

1. The Movants Have Failed to Offer Compelling Evidence of Constitutionally Significant Inconvenience.

The Movants have failed to satisfy their burden of presenting compelling evidence that litigating this action in Miami would impose such grave burdens as to put them at a severe disadvantage relative to the FTC. Their sole argument is that it would be inherently inconvenient for the Movants, because they are based in New Jersey and Massachusetts, to defend a case filed in Florida. Mtn. to Dismiss at 13. However, the Eleventh Circuit has flatly rejected the notion that requiring a defendant to cross state lines to defend an action rises to the level of a "constitutionally significant inconvenience." *Republic of Panama*, 119 F.3d at 946. As it has explained, "a defendant's contacts with the forum state play no magical role in Fifth Amendment analysis . . . . There is nothing inherently burdensome about crossing a state line." *Id.* That is due, in part, to the fact that, "'[m]odern means of communication and transportation have lessened the burden of defending a lawsuit in a distant forum.'" *Id.* at 947-48 (quoting *Chase & Sanborn Corp. v. Granfinanciera, S.A.*, 835 F.2d 1341, 1346 (11th Cir. 1988), *rev'd on other grounds sub. nom, Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989)).

The Eleventh Circuit has "emphasize[d] that it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern." *Id.* at 947. Plainly, this is not such a case. The defendants have chosen to do business together to market prepaid calling cards in Florida, among other East Coast states.[25] Under a long line of cases, the corporate defendants

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defendant's minimum contacts with the United States are dispositive under the Fifth Amendment and obviate the need for any further inquiry as to the fairness or reasonableness of requiring a defendant to defend in the forum. *See Busch*, 11 F.3d at 1258; *Go-Video*, 885 F.2d at 1416; *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987).

[25] Bank records and other evidence demonstrate that Alternatel, Mystic Prepaid, and Voice Prepaid are commonly controlled, share officers and owners, commingle corporate funds, and engage in advertising using shared trademarks and copyrights. *See, e.g.*, FTC Ex. 9; FTC Ex. 1,
Footnote continued on next page

should therefore be held accountable as a common enterprise for their deceptive conduct, despite that they are organized as separate corporate entities.[26] Moreover, as a consequence of their participation in a common enterprise that markets prepaid calling cards in Florida and elsewhere, ***all*** the defendants have directly or indirectly transacted business in Florida.[27] Under these circumstances, the Movants cannot demonstrate that litigating this case in Florida would offend the Fifth Amendment.

2. The Federal Interest in Litigating this Action Against All the Defendants in this Court Strongly Outweighs Any Burden on the Movants.

Finally, even if the Movants had made a compelling showing of constitutionally significant inconvenience, this Court's exercise of personal jurisdiction would still be appropriate

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¶¶ 4-9, 11-12, 14-20, 33, 34, Att. A-F, H-I, K, W, X, pp. 28-61, 63-148, 185-86, 271, 273-77 (check nos. 1089, 2111, 2116, 2265 & 2428).

[26] *See, e.g., Zale Corp. & Corrigan-Republic, Inc. v. FTC*, 473 F.2d 1317, 1321-22 (5th Cir. 1973); *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973); *Del. Watch Co. v. FTC*, 332 F.2d 745, 746-47 (2d Cir. 1964); *CFTC v. Int'l Berkshire Group Holdings, Inc.*, No. 05-61588, 2006 WL 3716390, *7 (S.D. Fla. Nov. 3, 2006); *FTC v. AmeriDebt, Inc.*, 343 F. Supp. 2d 451, 462-63 (D. Md. 2004); *FTC v. Capital Choice Consumer Credit, Inc.*, No. 02-21050 CIV, WL 5149998, *23-24 (S.D. Fla. Feb. 20, 2004); *FTC v. JK Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1201-02 (C.D. Cal. 2000); *FTC v. Para-Link, Inc.*, No. 8:00-CV-2114-T-17E, 2000 WL Th8084 *23& Cn. (DMD. Fla. Nov. 321,2000);

because the federal interest in litigating this dispute in this Court against all the defendants greatly outweighs the purported burden on the Movants.

The Eleventh Circuit has held that, in evaluating the federal interest, courts should examine "the federal policies advanced by the statute, the relationship between nationwide service of process and the advancement of these policies, the connection between the exercise of jurisdiction in the chosen forum and the plaintiff's vindication of his federal right, and concerns of judicial efficiency and economy." *Republic of Panama*, 119 F.3d at 948. Notably, in cases like this one in which Congress has provided for nationwide service of process, the Eleventh Circuit has specifically directed courts to "presume that nationwide personal jurisdiction is necessary to further congressional objectives." *Id.*

This presumption applies with particular force here. The Movants would require the FTC to file three separate lawsuits — one in Florida, one in Massachusetts, and one in New Jersey — to challenge the marketing practices of companies with common ownership and control that have used the same deceptive means to market many of the same calling cards. As discussed above, that is precisely the result that Congress sought to avoid when it amended Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), by adding the provision for nationwide service of process. *See supra* page 5. Requiring the FTC to file multiple lawsuits against the defendants would strongly disserve the significant federal interests in judicial economy and efficient and effective law enforcement actions by the FTC. Accordingly, the federal interests served by allowing this Court to exercise jurisdiction over all the defendants powerfully outweigh any burden on the Movants. For this reason as well, the Movants' Due Process argument fails.

CONCLUSION

For the foregoing reasons, the Court should deny the motion to dismiss of Defendants G.F.G. Enterprises LLC, also d/b/a Mystic Prepaid, Voice Prepaid, Inc., Voice Distributors, Inc., Telecom Express, Inc., and Lucas Friedlaender.

Dated: June 9, 2008

Respectfully submitted,

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Certificate of Service

I hereby certify that on **June 9, 2008**, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Janis C. Kestenbaum
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SERVICE LIST

***FTC v. Alternatel, Inc., et al.,* Case No. 08-21433-CIV-JORDAN/McALILEY**

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