

**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'S SUR-REPLY
IN OPPOSITION TO THE RULE 12(B)(2) 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**

JANIS CLAIRE KESTENBAUM
(Special Bar No. A5501213)
ROBERTO ANGUIZOLA
(Special Bar No. 0616761)
FEDERAL TRADE COMMISSION

Plaintiff Federal Trade Commission (“FTC”

other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

15 U.S.C. § 53(b)(2).

Nothing in Section 13(b) disturbs the well-settled distinction between venue and personal jurisdiction.³ To the contrary, Congress has expressly provided that under Section 13(b), a person, partnership, or corporation may be added as a party *without regard to whether venue is otherwise proper in the district in which the suit is brought* if the “interests of justice” require.

15 U.S.C. § 53(b)(2) (emphasis added). This sentence, which appears before the sentence authorizing nationwide service of process, makes abundantly clear that venue is not a condition precedent to Section 13(b)’s nationwide service of process provision.

Significantly, the FTC Act does not contain the “such cases” language relied on by those courts that have found venue to be a condition precedent to personal jurisdiction under the Clayton Act and SEC Acts. See, e.g., *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 421 (2d Cir. 2005). Likewise, the Clayton Act and SEC Act do not contain a provision comparable to the “interests of justice” venue provision of Section 13(b).

III. VENUE IS PROPER IN THIS DISTRICT AS TO ALL DEFENDANTS.

A. All Defendants Have Transacted Business in This District.⁶

All defendants have transacted business in this District, which is an independent basis for venue under Section 13(b). 15 U.S.C. § 53(b)(2) Although the corporate defendants are based in different states and sell cards in different geographic regions, they have overlapping ownership and control and constitute a common enterprise engaged in the deceptive marketing of prepaid calling cards. The defendants have not controverted the substantial evidence of the corporate defendants' common ownership and control, commingling of corporate funds, and marketing of prepaid calling cards using shared trademarks and copyrights. It is also uncontested that Alternatel regularly sells prepaid calling cards in Florida that display brand names (e.g., "Tree Monkey") and artwork to which *Noice Prepaid*

B. Venue Is Proper Under the “Interests of Justice” Provision of Section 13(b).

Venue is also proper under the “interests of justice” provision of Section 13(b)¹. This provision “permit[s] defendants from different districts to be brought into FTC actions in Federal district court, without regard to whether the parties reside or transact business in the district in which the suit is brought.” S. Rep. No. 103-130, at 5 (1993), reprinted in 1994 U.S.C.C.A.N. 1776. The Movants would require the FTC to file three separate lawsuits, in Florida, Massachusetts, and New Jersey, to challenge the marketing practices of the defendants. Defs. Reply at 7. But in 1993, Congress added both the “interests of justice” venue provision and the

Alternatel's (and the other defendants') violations of the FTC Act, which continued even after the defendants knew of the Florida Attorney General's investigation, shows a likelihood of future violations and a need for permanent injunctive relief. In addition, the AVC applies only to Alternatel's marketing to Florida consumers, whereas the FTC seeks a nationwide injunction. Nor does the AVC provide equitable monetary relief, a key component of the final relief sought by the FTC.¹⁵

C. In the Alternative, Venue Is Proper Under the "Fallback" Provision.

In the alternative, venue is proper in this District under the "fallback" venue provision, 28 U.S.C. § 1391(b)(3), which states that a civil action may be brought in "a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought." The fallback venue provision applies unless there is another district in which the plaintiff can bring its "action," i.e., all claims against all defendants.¹⁶ Under the Movants' own logic, there is no single district where all the defendants could be sued under Section 13(b), and thus, the fallback venue provision authorizes its base to proceed in this District against Alternatel, which is undisputedly "found" in this District, and all other defendants.

CONCLUSION

The Court should deny the motion to dismiss.

¹⁴ Defs. Ex. A & B to Reply Br. [D.E. 40-2, D.E. 40-3].

¹⁵ The Movants also argue that this Court lacks venue over several corporate defendants because they have allegedly ceased doing business. Defs. Reply. at 10. This assertion conflicts with statements made on Voice Prepaid's website as recently as April of 2008, FTC Ex. 1, ¶ 21, Att. L, p. 188, as well as the most recent corporate registrations filed with Massachusetts and New Jersey, which indicate that Voice Distributors, Telecom Express, and Mystic Prepaid are corporations. FTC Ex. 1, ¶¶ 6, 8-9, Att. C,

Dated: July 10, 2008

Respectfully submitted,
/s/ Janis Claire Kestenbaum
JANIS CLAIRE KESTENBAUM
(Special Bar No. A5501213)

Certificate of Service

I hereby certify that on ~~July 10, 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 via transmission of

SERVICE LIST

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