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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

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.; VOICE DISTRIBUTORS, INC.; TELECOM
EXPRESS, INC.; LUCAS FRIEDLANDER; MOSES
GREENFIELD; NICKOLAS GULAKOS; and
FRANK WENDORFF,

Defendants.

**PLAINTIFF FEDERAL TRADE COMMISSION'S MEMORANDUM OF LAW
IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION WITH OTHER EQUITABLE RELIEF**

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INTRODUCTION¹

Plaintiff Federal Trade Commission (“FTC”) moves this Court for a temporary restraining order (“TRO”) and preliminary injunction with other equitable relief to put an immediate end to deceptive business practices that have defrauded consumers of millions of dollars. Individual Defendants Nickolas Gulakos, Moses Greenfield, Lucas Friedlander, and Frank Wendorff together operate a common enterprise that distributes prepaid calling cards through corporate defendants Alternatel, Inc., G.F.G. Enterprises LLC, also d/b/a Mystic Prepaid, Voice Prepaid, Inc., Voice Distributors, Inc., and Telecom Express, Inc. Defendants market their cards to recent immigrants in Florida, New Jersey, Pennsylvania, Massachusetts, New Hampshire, and Rhode Island, who rely on such cards to call friends and family outside the United States. In marketing their cards, Defendants represent that consumers will receive a specific number of calling minutes to particular international destinations. These representations are false: consumers who purchase Defendants’ cards typically receive far fewer minutes than Defendants advertise. In addition, Defendants fail to disclose, or to disclose adequately, the fees associated with their cards. Defendants’ conduct violates Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce.

Defendants have continued their deceptive conduct despite an investigation into the marketing practices of one of the defendants — Alternatel — initiated by the Florida Attorney General in July 2007;² a private lawsuit alleging deceptive marketing practices by three of the

¹The FTC submits three volumes of exhibits in support of this motion, which include declarations and attachments thereto. Exhibits are cited with the abbreviation “FTC Ex.” followed by the exhibit number. Declarations are then cited by paragraph number, while attachments to declarations are cited by letter and page number.

²FTC Ex. 1, ¶ 44, Att. KK, p. 638; *see also* Press Release, “McCollum Issues Subpoenas to Prepaid Calling Card Industry,” dated July 27, 2007, *available at*

(continued...)

defendants — Voice Prepaid, Voice Distributors, and Nickolas Gulakos — filed in June 2007;³ and a private lawsuit alleging fraudulent marketing practices by a telecommunications service provider owned by another defendant — Moses Greenfield — filed in March 2007.⁴

Notwithstanding this scrutiny of their marketing practices, Defendants have continued their deceptive conduct.

Accordingly, entry of the requested TRO and preliminary injunction is necessary to prevent Defendants from continuing to defraud consumers during the pendency of this case. Presented with nearly identical evidence of violations of the FTC Act by a different prepaid calling card distributor, a federal district court in New Jersey recently entered a TRO comparable to the order the FTC seeks here. *See FTC v. Clifton Telecard Alliance*, No. 2:08-cv-01480-PGS-ES (D.N.J. TRO entered Apr. 1, 2008).⁵ As in *Clifton*, immediate entry of a TRO is necessary here to prevent further harm to consumers.

STATEMENT OF FACTS

I. THE DEFENDANTS

Defendants are a common enterprise of five companies that distribute prepaid calling cards and four individual defendants who own and/or manage the corporate defendants.

²(...continued)

<http://myfloridalegal.com/newsrel.nsf/newsreleases/79D5F12C92A5BE4585257321006423E6>.

³*IDT Telecom, Inc. v. Voice Distributors, Inc.*, Civil No. 07-2465 (Mass. Super. Ct. filed June 28, 2007) (“Voice Prepaid Litigation”); FTC Ex. 1, ¶ 43, Att. HH, pp. 530-59.

⁴*IDT Telecom, Inc. v. CVT Prepaid Solutions, Inc.*, No. 2:07-CV-01076-SDW-MCA (D.N.J. filed Mar. 8, 2007) (“Dollar Phone Litigation”); FTC Ex. 1, ¶¶ 10, 41, Att. G, AA, pp. 62, 343, 345, 355.

⁵FTC Ex. 1, ¶ 102, Att. JJ, pp. 574-85.

Defendant **Alternatel, Inc. (“Alternatel”)**, is a Florida corporation with its principal place of business in Pembroke Pines, Florida.⁶ Defendant **G.F.G. Enterprises LLC, also d/b/a Mystic Prepaid (“Mystic Prepaid”)**, is a New Jersey limited liability company with its principal place of business in Hoboken, New Jersey.⁷ Defendants **Voice Prepaid, Inc., Voice Distributors, Inc., and Telecom Express, Inc.** (collectively “**Voice Prepaid**”) are Massachusetts corporations with their principal place of business in Medford, Massachusetts.⁸

Defendant **Nickolas Gulakos** is an officer, director, and 50% owner of Alternatel;⁹ he is also the founder, sole owner, and President of Voice Prepaid,¹⁰ and an owner and Member/Manager of Mystic Prepaid.¹¹ Defendant **Moses Greenfield** is an officer, director, and 50% owner of Alternatel,¹² as well as an owner and Member/Manager of Mystic Prepaid.¹³ Additionally, Greenfield is the founder and CEO of non-party Dollar Phone Corporation (“Dollar Phone”), the telecommunications service provider for the majority of Alternatel, Mystic Prepaid,

⁶FTC Ex. 1, ¶ 4, Att. A, p. 28.

⁷FTC Ex. 1, ¶¶ 6, 23, Att. C, N, pp. 48-50, 194.

⁸FTC Ex. 1, ¶¶ 7-9, 21, Att. D, E, F, L, pp. 52, 56, 58, 60, 188.

⁹FTC Ex. 1, ¶¶ 4, 41, Att. A, Z, BB, pp. 32, 34, 285, 419.

¹⁰FTC Ex. 1, ¶¶ 7-9, 41, Att. D, E, F, Z, BB, pp. 52, 56, 58-61, 286, 419.

¹¹FTC Ex. 1, ¶¶ 6, 41, Att. C, BB, pp. 48, 419. Mystic Prepaid is a limited liability company rather than a corporation. Accordingly, its principals are identified as “Members” and its directors as “Managers.”

¹²FTC Ex. 1, ¶¶ 4, 41, Att. A, BB, pp. 31, 419.

¹³FTC Ex. 1, ¶¶ 6, 41, Att. C, BB pp. 48, 419.

and Voice Prepaid calling cards.¹⁴ Defendant **Lucas Friedlander** is an owner, a Member/Manager, and the Chief Operating Officer of Mystic Prepaid as well as Controller of Voice Prepaid.¹⁵ Defendant **Frank Wendorff** is President and Chief Operating Officer of Alternatel,¹⁶ and has been a signatory on a bank account of Telecom Express, Inc., one of the Voice Prepaid companies.¹⁷

II. DEFENDANTS' DECEPTIVE BUSINESS PRACTICES

Defendants develop, design, create, market, and distribute their own prepaid calling cards.¹⁸ Defendants sell their cards on a wholesale basis to a network of sub-distributors and to small retail outlets, such as grocery and convenience stores, gas stations, and newsstands.¹⁹ Consumers then purchase Defendants' cards from such retailers.²⁰ Defendants' cards generally

¹⁴FTC Ex. 1, ¶¶ 10, 13, 41, 46-66, 78, 80, 82-85, Att. G, J, Z, BB, LL-TTT, pp. 62, 149-84, 285-86, 418, 639-75; FTC Ex. 2, ¶¶ 6, 15-16, Att. A-C, pp. 5-8; FTC Ex. 3, ¶¶ 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36.

¹⁵FTC Ex. 1, ¶¶ 6, 23, 24, Att. C, N, O, Z, pp. 48, 50, 194, 211, 304.

¹⁶FTC Ex. 1, ¶¶ 4, 25, Att. A, P, pp. 28, 30, 31, 212.

¹⁷FTC Ex. 1, ¶ 33, Att. W, p. 271.

¹⁸FTC Ex. 1, ¶¶ 41, 43, Att. Z, FF, pp. 293, 501.

¹⁹FTC Ex. 1, ¶¶ 41, 43, 45, Att. Z, FF, pp. 285, 501; FTC Ex. 4, ¶ 4; FTC Ex. 5, ¶¶ 4-6; FTC Ex. 6, ¶ 3; FTC Ex. 7, ¶ 3.

²⁰FTC Ex. 1, ¶ 45; FTC Ex. 4, ¶ 4; FTC Ex. 6, ¶ 3; FTC Ex. 7, ¶ 3.

retail for between \$2 and \$10.²¹ In 2006 and 2007, Defendants took in over \$72 million from the sale of prepaid calling cards just through their Voice Prepaid bank accounts.²²

Although Defendants do not provide the underlying telecommunications service for their calling cards — which they pay third parties to provide — it is Defendants that design, print, and market their cards.²³ As Voice Prepaid has admitted in court filings:

Voice Prepaid is engaged in the business of developing, creating, **marketing** and distributing prepaid telephone calling cards Voice Prepaid purchases long-distance telephone minutes from a connection service provider and then distinguishes this relatively fungible service by developing original designs, names and marks that it incorporates into its prepaid calling cards. Voice Prepaid incurs the costs of designing, printing, shipping, and **marketing** these original works and then sells the prepaid telephone cards through a network of local sub-distributors * * * **Based upon Voice Prepaid's industry knowledge and skill, it [has] targeted certain key demographics, identified popular international calling destinations, negotiated rates for minutes with Dollar Phone for these destinations, and developed original designs, names and marks for its prepaid telephone cards.**²⁴

²¹FTC Ex. 1, ¶¶ 45-66, Att. LL-TTT, pp. 639-75; FTC Ex. 4, ¶¶ 4, 6-7; FTC Ex. 5, ¶¶ 4-6, Att. C, p. 6; FTC Ex. 6, ¶ 3; FTC Ex. 7, ¶ 3.

²²FTC Ex. 1, ¶ 40.

²³FTC Ex. 1, ¶ 43, Att. FF, p. 501. The corporate defendants are not telecommunications carriers. FTC Ex. 1, ¶ 43, Att. FF, II, pp. 501, 563. Dollar Phone, which is owned by Defendant Moses Greenfield, is the telecommunications provider for the majority of Defendants' calling cards. FTC Ex. 1, ¶¶ 10, 13, 41, 46-66, 78, 80, 82-85, Att. G, J, Z, BB, LL-TTT, pp. 62, 149-84, 285-86, 418, 639-75; FTC Ex. 2, ¶¶ 6, 15-16, Att. A-C, pp. 5-8; FTC Ex. 3, ¶¶ 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36.

²⁴FTC Ex. 1, ¶ 43, Att. FF, p. 501 (emphasis added). Voice Prepaid made this representation in a brief filed in the Voice Prepaid Litigation, *see supra* note 3. In that lawsuit, IDT, a prepaid calling card company, alleges that Voice Prepaid has engaged in deceptive marketing practices in violation of the Massachusetts state consumer protection statute.

Defendants' cards typically display the name or logo of Alternatel, Mystic Prepaid, or Voice Prepaid along with one of a wide variety of Defendants' "brand" names, including: "Aló Mamá," "Tree Monkey," "Rey de Florida," "Taco Libre," "Oi Brasil," "Coffee Time Call Me Time," "Dangerous Minutes!," "Mama Africa," "Martini," "Voz Do Brasil," and "Nigeria Connect."²⁵ Although Alternatel, Mystic Prepaid, and Voice Prepaid operate in different geographic regions,²⁶ they often sell the same brands of cards, to which Voice Prepaid owns the trademark.²⁷ For example, Alternatel, Mystic Prepaid, and Voice Prepaid each distribute "Aló Mamá," "Tree Monkey," and "Coffee Time Call Me Time" cards in their respective geographic regions. Whether distributed by Alternatel, Mystic Prepaid, or Voice Prepaid, Defendants' cards, and the marketing materials for the cards, are nearly indistinguishable in appearance.²⁸

²⁵FTC Ex. 1, ¶¶ 47, 49, 51, 52, 53, 56, 63, 65, Att. MM, PP, UU, WW, XX, EEE, NNN, RRR, pp. 640, 643, 644, 648, 650, 651, 658, 668, 673.

²⁶Alternatel distributes prepaid calling cards in Florida, Mystic Prepaid distributes prepaid calling cards in New Jersey and Philadelphia, Pennsylvania, and Voice Prepaid distributes prepaid calling cards in Massachusetts, New Hampshire, and Rhode Island. FTC Ex. 1, ¶¶ 41, 43, 45, Att. Z, BB, FF, pp. 285, 417, 419, 501-02; FTC Ex. 4, ¶ 4; FTC Ex. 5, ¶¶ 4-6; FTC Ex. 6, ¶ 3; FTC Ex. 7, ¶ 3.

²⁷In addition to owning the trademarks for a number of the brand names of the calling cards sold by Alternatel, Mystic Prepaid, and Voice Prepaid, Voice Prepaid also owns the copyrights to the artwork used in marketing a number of these cards. FTC Ex. 1, ¶¶ 11-12, 14-20, Att. H, I, K, pp. 63-149, 185-86.

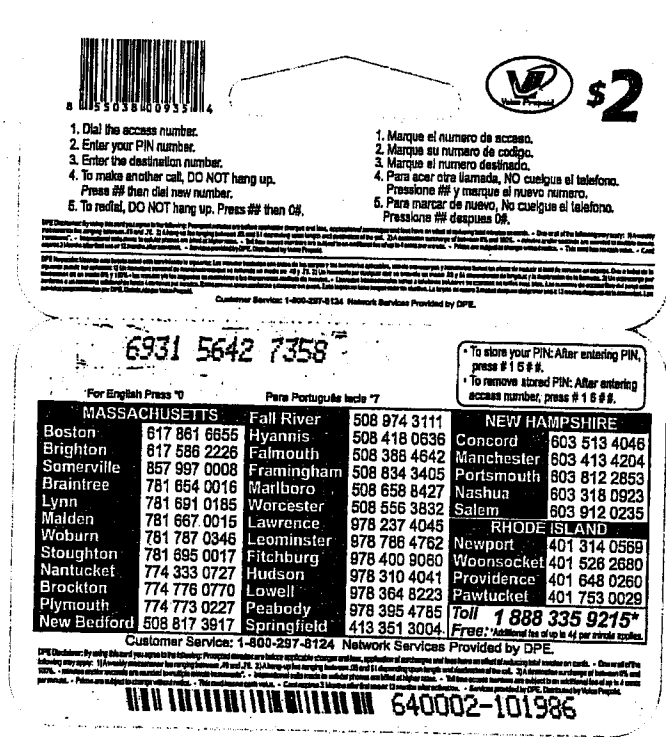
²⁸The cards differ in appearance only in that they display the corporate logo of the particular company distributing the card (e.g., the Voice Prepaid "Tree Monkey" card displays a "VP" logo, the Mystic Prepaid "Tree Monkey" card displays an "MP" logo, and the Alternatel version of the card has an "Alternatel" logo). FTC Ex. 1, ¶ 51, Att. UU, pp. 648 (Voice Prepaid Tree Monkey card); FTC Ex. 1, ¶ 58, Att. GGG, p. 660 (Alternatel Tree Monkey card); FTC Ex. 1, ¶ 62, Att. LLL, p. 666 (Mystic Prepaid Tree Monkey card).

A. Defendants' Cards

Below is a photocopy of one of Defendants' calling cards²⁹:



Front of Card (actual size)



Back of Card (actual size)

The card is printed on laminated paper and, as shown here, contains two detachable portions: a top portion, or “hang tag,” and a bottom portion, which is the calling card itself. The front of the card displays the relevant corporate logo (here, the “VP Voice Prepaid” logo) and the brand name of the card (here, “Tree Monkey”). As with most of Defendants’ cards, as shown above, the back of the hang tag includes directions for how to use the card in both English and Spanish and the relevant corporate logo. The back of the hang tag and/or the back of the card itself also includes disclosures in small print regarding fees and charges. Although the

²⁹FTC Ex. 1, ¶ 51, Att. UU, p. 648.

instructions are usually provided in both English and Spanish, these disclosures are in many cases provided in English only.³⁰ The disclosures typically state:

By using this card you agree to the following: Prompted minutes are before applicable charges and fees, application of surcharges and fees have an effect of reducing total minutes on cards. One or all of the following may apply: 1) A weekly maintenance fee ranging between .49 and .79. 2) A hang-up fee between .05 and \$1 depending upon length and destination of the call. 3) A destination surcharge of between 0% and 100% –minutes and/or seconds are rounded to multiple minutes increments. –International calls made to cellular phones are billed at higher rates. –Toll free access numbers are subject to an additional fee of up to 4 cents per minute. –Prices are subject to change without notice. –This card has no cash value. –Card expires 3 months after first use or 12 months after activation.³¹

B. Using Defendants' Cards

Defendants' calling cards work as follows: A consumer dials an "access number" printed on the back of the card.³² A recorded message then prompts the consumer to enter the card's Personal Identification Number ("PIN"), which is printed on the card.³³ Next, the consumer typically hears a voice response-generated statement of the monetary value of the card.³⁴ The consumer then enters the phone number he or she is trying to reach and hears an automated

³⁰FTC Ex. 1, ¶¶ 47-48, 50, 52-55, 59, 61-64, Att. MM, OO, SS, WW, YY, AAA, CCC, III, JJJ, LLL, NNN, PPP, pp. 640, 642, 646, 650, 652, 654, 656, 662, 663, 666, 668 (examples of cards with instructions in English and Spanish and English-only disclosures); FTC Ex. 1, ¶¶ 51, 58, Att. UU, GGG, pp. 648, 660 (cards with disclosures in English and Spanish).

³¹FTC Ex. 1, ¶¶ 47, 52-54, Att. MM, WW, YY, AAA, pp. 640, 650, 652, 654.

³²FTC Ex. 1, ¶ 73.

³³FTC Ex. 1, ¶ 73.

³⁴FTC Ex. 1, ¶ 73.

“voice prompt” announcing the number of minutes of time ostensibly available on the card.³⁵

After the call is connected and before the card’s value is exhausted, the caller typically receives a warning telling him or her that there is one minute of calling time remaining.³⁶ The call is cut off once the card has no remaining value.³⁷

C. Defendants’ Advertising

To advertise their cards, Defendants use posters displayed at the point of sale and mass media advertising, such as television and radio ads.³⁸ Whatever the medium, Defendants’ advertising targets recent immigrants and emphasizes the number of calling minutes purportedly provided by Defendants’ cards.³⁹

For example, Defendants urged Latinos to buy the Voice Prepaid “Dangerous Minutes!” card in a radio advertisement highlighting the number of calling minutes consumers would purportedly obtain. During the ad, music plays in the background while a male voice says in Spanish:

Latinos of the world! Latinos of the world! New England! Want to live dangerously! Voice Prepaid, the company that brings you the best cards like: Mass Connection, Bean Town, Coffee Time and Voz du Brazil. Now brings you the Dangerous Minutes! calling card! With a dangerous number of minutes. Dangerous Minutes! Dangerous Minutes! The card with the motorcycle. **With Dangerous Minutes you will receive: 270 minutes to the**

³⁵FTC Ex. 1, ¶ 73.

³⁶FTC Ex. 1, ¶ 74.

³⁷FTC Ex. 1, ¶ 74.

³⁸*See, e.g.*, FTC Ex. 1, ¶¶ 29-30, 41, 45, Att. S-U, Z, pp. 238-52, 293; FTC Ex. 4, ¶ 4; FTC Ex. 6, ¶ 4; FTC Ex. 7, ¶ 4.

³⁹FTC Ex. 1, ¶ 41, Att. CC, p. 445.

Dominican Republic, 405 Medellin, 650 for Bogota, Colombia, 120 for El Salvador and 100 for Guatemala. Run! Don't walk to your local store and tell them that you need your Dangerous Minutes! From the Dangerous Minutes card! The calling card with the motorcycle and no connection fees! **With Dangerous Minutes you will receive: 270 minutes to the Dominican Republic, 405 Medellin, 650 for Bogota, Colombia, 120 for El Salvador and 100 for Guatemala.** From Voice Prepaid! The company that always has the best cards!⁴⁰

In marketing their cards, Defendants also rely heavily on colorful posters displayed on the windows and walls of the stores where Defendants' cards are sold.⁴¹ The posters range in size from 8.5 x 11 inches to 11 x 17 inches and many proclaim in large type "No Connection Fee!" or "The Most Minutes!!!"⁴² In addition, Defendants' posters ordinarily contain large and colorful text "bubbles" containing the name of calling destinations and representations as to the number of calling minutes a consumer will purportedly receive in calling a destination using the advertised calling card of a specified dollar value (*e.g.*, "per \$5"). The representations in the text bubbles are in large font (approximately 32-point font) and are emphasized through the use of color and placement. In addition to the text bubbles, Defendants' posters contain a table listing numerous additional calling destinations and representations as to the number of calling minutes consumers will purportedly receive in calling them using the advertised calling card.⁴³

⁴⁰FTC Ex. 1, ¶¶ 30-31, Att. T, U, pp. 249-52 (translated from Spanish) (emphasis added).

⁴¹*See, e.g.*, FTC Ex. 1, ¶ 45; FTC Ex. 4, ¶ 4; FTC Ex. 6, ¶ 4; FTC Ex. 7, ¶ 4.

⁴²*See, e.g.*, FTC Ex. 1, ¶¶ 46, 59, 61, Att. ZZ, DDD, HHH, KKK, pp. 653, 657, 661, 664.

⁴³FTC Ex. 1, ¶¶ 46, 52, 58-59, 61, Att. PP, VV, FFF, HHH, KKK, p. 643, 649, 659, 661, 665.

In contrast to the large and conspicuous claims about the number of calling minutes that dominate Defendants' posters, the bottom of the posters contain fee disclosures in much smaller print. Such disclosures are often provided in English only and state:

By using this card you agree to the following: Prompted minutes are before applicable charges and fees, application of surcharges and fees have an effect of reducing total minutes on cards. One or all of the following may apply: 1) A weekly maintenance fee ranging between .49 and .79. 2) A hang-up fee between .05 and \$1 depending upon length and destination of the call. 3) A destination surcharge of between 0% and 100%. – minutes and/or seconds are rounded to multiple minutes increments. – International calls made to cellular phones are billed at higher rates. – Toll free access numbers are subject to an additional fee of up to 4 cents per minute. – Prices are subject to change without notice. – This card has no cash value. – Card expires 3 months after first use or 12 months after activation.⁴⁴

D. Defendants' Misrepresentations About the Number of Calling Minutes

Extensive testing of Defendants' cards conducted by FTC investigators and an outside firm retained by the FTC demonstrate that Defendants routinely misrepresent the number of calling minutes their cards provide. *In 87 tests conducted between December 13, 2007 and April 17, 2008, Defendants' cards on average delivered only 50.4% of the advertised minutes.*⁴⁵

The FTC used "multiple-call" and "single-call" testing methods: in multiple-call testing, the tester depleted a prepaid calling card by making a series of calls,⁴⁶ whereas in single-call testing, the tester attempted to exhaust the value of the card in a single call. Single-call testing is

⁴⁴FTC Ex. 1, ¶¶ 61-61, Att. KKK, MMM, pp. 664-65, 667. In some cases, this disclaimer is preceded by the language "DPE Disclaimer." FTC Ex. 1, ¶ 63, Att. OOO, p. 669.

⁴⁵FTC Ex. 1, ¶ 101.

⁴⁶FTC Ex. 1, ¶ 68; FTC Ex. 8, ¶ 9. All multi-call tests of a card were made on one day. Thus, unlike the typical caller, the test calls were not affected by the "weekly fee" of 49 to 79 cents.

the most generous way to measure how many minutes of calling time a card provides because it avoids hefty “hang-up” and “maintenance” fees. But single-call testing does not capture the typical consumer experience because most consumers use calling cards to make multiple calls.⁴⁷

The results of both the multiple-call and single-call testing show that Defendants’ cards do not deliver the number of minutes promised in their posters. Seventy-seven of the 87 tested cards, or 88.5% of Defendants’ tested cards, failed to deliver the number of minutes advertised on point-of-sale posters.⁴⁸ Notably, *none* of the 42 cards subjected to multiple-call testing delivered the advertised minutes. On average, the cards subjected to multiple-call testing delivered only 35.3% of advertised minutes. Only ten of the 45 cards subjected to single-call testing delivered the advertised minutes. On average, the cards subjected to single-call testing delivered only 64.3% of advertised minutes.⁴⁹

For example, on January 24, 2008, an FTC investigator tested Defendants’ \$2 “Martini” card which, according to Defendants’ poster displayed at the point of sale, provides 360 calling minutes to Panama City, Panama. The investigator received only 23 minutes on a single call to Panama City.⁵⁰

⁴⁷See FTC Ex. 1, ¶ 41, Att. DD, p. 445 (“approximately 70-80% of consumers who purchase these cards use them for multiple calls”).

⁴⁸FTC Ex. 1, ¶ 101.

⁴⁹A spreadsheet containing the combined results for the tests conducted by FTC investigators and the outside firm can be found at FTC Ex. 1, ¶ 101, Att. WWW, pp. 680-682. The internal testing results can be found at FTC Ex. 1, ¶ 96-97, Table 4, and the external testing results can be found at FTC Ex. 8, Att. C, pp. 20-37.

⁵⁰FTC Ex. 3, ¶¶ 15-16.

In another example, on March 10, 2008, an FTC investigator tested Defendants' \$2 "Coffee Time, Call Me Time" card which, according to Defendants' poster displayed at the point of sale, provides 320 calling minutes to Rio de Janeiro, Brazil. The investigator received only 70 minutes over seven calls to Rio de Janeiro, Brazil.⁵¹

Similarly, on March 28, 2008, an outside firm retained by the FTC tested Defendants' \$2 "Coffee Time, Call Me Time" which, according to Defendants' poster displayed at the point of sale, would deliver 33 calling minutes to Guatemala City, Guatemala. The tester found that a single call to Guatemala City cut off after 16 minutes.⁵²

E. Misrepresentations Are an Integral Part of Defendants' Business Practices

Emails between Voice Prepaid and CVT Prepaid Solutions ("CVT"), a telecommunications service provider, demonstrate that providing advertisements that misrepresent the number of minutes provided by their calling cards is an integral part of Defendants' business practices.⁵³ For example, in an email discussion on September 26, 2006 between CVT and Defendants Gulakos and Friedlander concerning a poster for a Voice Prepaid card, CVT told Friedlander and Gulakos that it would deliver 24 minutes for calls to Cape Verde using a \$5 card.⁵⁴ In response, Friedlander sent an email to CVT, copying Gulakos, in which he

⁵¹FTC Ex. 3, ¶¶ 27-28.

⁵²FTC Ex. 8, ¶ 8, Att. C, p. 32.

⁵³These emails were produced by Voice Prepaid in response to a third-party subpoena in the Dollar Phone Litigation, *see supra* note 4. FTC Ex. 1, ¶ 42. In that case, IDT, a prepaid calling card company, sued a handful of its competitors, including Dollar Phone, challenging their marketing practices under the Lanham Act and the New Jersey state consumer protection statute.

⁵⁴FTC Ex. 1, ¶ 42, Att. EE, p. 494.

wrote, “*24" delivered? Or prompted? if it's 24" delivered, let's put 36" on poster. If it's only delivering 18" then 32".*”⁵⁵ Similarly, a January 31, 2007 email from CVT to Gulakos attached new rates for calling destinations and stated “I have no problem increasing the *Poster* minutes for D.R. but I [sic] going to need to keep the *delivered* minutes the same — let me know if you're ok with that.”⁵⁶ Gulakos made no objection to this proposal. Instead, he asked whether CVT could provide a certain number of minutes for calls to Ecuador and Haiti in voice prompts, to which CVT responded,⁵⁷ “Nick, anything can be done, but like the DR thing the *delivered* minutes will remain the same.”⁵⁸

ARGUMENT

In light of Defendants’ egregious practices, the FTC seeks a TRO and a preliminary injunction that: (1) enjoins Defendants from misrepresenting the number of calling minutes actually provided by their cards and failing to disclose or disclose adequately the fees associated with use of their cards; and (2) appoints a temporary monitor. As set forth below, and supported by the FTC’s three volumes of evidence, there is ample basis for such an order.

I. IMMEDIATE ENTRY OF A TRO IS NECESSARY TO PROTECT CONSUMERS

Where, as here, the defendants have engaged in deceptive practices in violation of Section 5 of the FTC Act, Section 13(b) of the FTC Act, 45 U.S.C. § 53(b), authorizes the “FTC to seek, and the district courts to grant, preliminary and permanent injunctions” against such

⁵⁵FTC Ex. 1, ¶ 42, Att. EE, p. 494 (emphasis added).

⁵⁶FTC Ex. 1, ¶ 42, Att. EE, p. 499 (emphasis added).

⁵⁷FTC Ex. 1, ¶ 42, Att. EE, p. 498.

⁵⁸FTC Ex. 1, ¶ 42, Att. EE, p. 498 (emphasis added).

practices. *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996). In determining whether to grant a TRO or preliminary injunction under Section 13(b), “a district court must (1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities.” *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1217 (11th Cir. 1991). Unlike private litigants, “the FTC need not prove irreparable harm.” *Id.* at 1218. Nor must the FTC prove harm to the public interest, which is presumed. *See, e.g., FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346 (9th Cir. 1989).⁵⁹ The FTC “meets its burden on the ‘likelihood of success’ issue if it shows preliminarily, by affidavits or other proof, that it has a fair and tenable chance of ultimate success on the merits.” *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978) (citation omitted). Finally, in balancing the equities, private concerns may be considered, but public equities must receive far greater weight. *See, e.g., FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1030-31 (7th Cir. 1988).

A. The Evidence Shows that the FTC is Likely to Succeed on the Merits

To establish that a defendant has engaged in a deceptive act or practice under Section 5 of the FTC Act, the FTC must show that: “(1) there was a representation; (2) the representation was likely to mislead consumers acting reasonably under the circumstances; and (3) the representation was material.” *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003). As with material misrepresentations, material *omissions* violate the FTC Act. *See, e.g., Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1154 (9th Cir. 1984); *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th

⁵⁹In cases brought by the FTC, numerous judges in this District have issued TROs (often on an *ex parte* basis) that include the appointment of receivers, asset freezes, and other ancillary relief. *See, e.g., FTC v. Fidelity ATM, Inc.*, No. 06-81101-Civ-Hurley/Hopkins (S.D. Fla. TRO issued Nov 29, 2006); *FTC v. Nationwide Connections, Inc.*, No. 06-80180-Civ-Ryskamp (S.D. Fla. TRO issued Feb. 27, 2006); *FTC v. USA Beverages*, No. 05-61682-Civ-Lenard/Klein (S.D. Fla. TRO issued Nov. 4, 2005).

Cir. 1950); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999)

(“Misrepresentations or omissions of material facts made to induce the purchase of goods or services constitute deceptive acts or practices that violate § 5(a) of the FTC Act.”). Defendants have engaged in deceptive acts or practices in two ways, by: (1) falsely representing the number of minutes consumers will receive when using Defendants’ calling cards, and (2) failing to disclose or to disclose adequately the fees associated with Defendants’ cards.

The FTC need not prove that these misrepresentations and omissions were done with an intent to deceive, or were made in bad faith. *See, e.g., FTC v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1202 (10th Cir. 2005); *FTC v. Wolf*, 1996 WL 812940, at *5 (S.D. Fla. Jan. 31, 1996) (“A company that deceives consumers through reckless, even simply negligent, disregard of the truth may do just as much harm as one that deceives consumers knowingly.”). Nor does the FTC need to show actual reliance by consumers; it is enough that the representations were likely to be relied on by ordinary consumers. *See, e.g., FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1868 (2007); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991) (“the FTC need merely show that the misrepresentations or omissions were of a kind usually relied upon by reasonable and prudent persons, that they were widely disseminated, and that the injured consumers actually purchased the defendants’ product.”) (citation omitted).

1. Defendants Falsely Represent the Number of Calling Minutes

There is overwhelming evidence that Defendants misrepresent the number of minutes consumers will receive when using Defendants’ cards. Defendants design, print, and distribute posters advertising that their cards will provide a specified number of minutes in calls to

particular international destinations.⁶⁰ With rare exception, these representations are false. Extensive testing of Defendants' cards between December 13, 2007 and April 17, 2008 demonstrates that Defendants routinely advertise their cards as delivering a number of minutes that their cards fail to provide. ***On average, the 87 tested cards delivered only 50.4% of advertised minutes.***⁶¹ Seventy-seven of the 87 cards failed to provide the number of advertised minutes.⁶² Twenty-three of the tested cards delivered less than 25% of the advertised minutes, and some cards delivered as little as 5.4% of the advertised minutes.⁶³

In addition, there is powerful evidence that misrepresentations about the number of calling minutes are central to Defendants' business practices. As discussed above, Defendants openly admit in emails with CVT, one of their telecommunications providers, that if a card delivers 24 calling minutes, Defendants will state in the poster that it delivers 36 minutes; and if a card delivers 18 minutes, Defendants will advertise that it delivers 32 minutes.⁶⁴

⁶⁰FTC Ex. 1, ¶¶ 41, 43 45-46, 52, 58-59, 60, Att. Z, FF, PP, VV, ZZ, DDD, FFF, HHH, KKK, pp. 293, 501, 643, 649, 653, 657, 659, 661, 664; FTC Ex. 4, ¶ 4; FTC Ex. 6, ¶ 4; FTC Ex. 7, ¶ 4.

⁶¹FTC Ex. 1, ¶ 101, Att. WWW, pp. 680-82.

⁶²FTC Ex. 1, ¶ 101, Att. WWW, pp. 680-82.

⁶³FTC Ex. 1, ¶ 101, Att. WWW, pp. 680-82. In testing Defendants' cards, the FTC compared the number of delivered minutes to the number of minutes advertised in posters displayed at the point of sale, rather than in mass media advertisements. However, the FTC tested the Voice Prepaid "Dangerous Minutes!" card to the Dominican Republic and Guatemala, two of the locations mentioned in the radio advertisement quoted above. In these tests, the FTC received only approximately **20%** of the minutes promised in the radio advertisement. FTC Ex. 1, ¶ 101, Att. WWW, p. 681.

⁶⁴FTC Ex. 1, ¶ 42, Att. EE, p. 494.

