

**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 OPPOSITION TO DEFENDANTS
G.F.G ENTERPRISES LLC, ALSO D/B/A MYSTIC PREPAID, VOICE PREPAID, INC.,
TELECOM EXPRESS, INC., AND VOICE DISTRIBUTORS, INC.'S EMERGENCY
MOTION TO STAY DISCOVERY AND FOR A PROTECTIVE ORDER PENDING
ADJUDICATION OF POTENTIALLY DISPOSITIVE MOTION TO DISMISS**

Plaintiff Federal Trade Commission ("FTC") respectfully submits this memorandum of law in opposition to the emergency motion to stay discovery and for a protective order under Federal Rule of Civil Procedure 26(c) and Local Rules 7.1(E) and 26.1(H) filed by Defendants G.F.G. Enterprises LLC, also d/b/a Mystic Prepaid, Voice Prepaid, Inc., Telecom Express, Inc., and Voice Distributors, Inc. (collectively the "Movants").¹

¹ Defendants Alternatel, Inc., Lucas Friedlaender, Moses Greenfield, Nickolas Gulakos, and Frank Wendorff have not joined the motion to stay discovery.

INTRODUCTION

The Movants have not and cannot satisfy their burden of showing good cause why this Court should take the unusual step of staying discovery pending the resolution of the Movants' Motion to Dismiss Under Rule 12(b)(2) for Lack of Personal Jurisdiction [D.E. 24] ("Motion to Dismiss"). Indeed, a discovery stay in this case is particularly inappropriate because: (1) the Movants' Motion to Dismiss is so patently without merit that the Movants have abandoned the grounds for that motion; and (2) it would be contrary to, and as a practical matter would derail, the Movants' own agreement to a scheduling order that requires the rapid completion of discovery (by October 31, 2008) in time for a consolidated preliminary injunction hearing and trial on the merits scheduled to commence the week of December 15, 2008 (the "trial").

PROCEDURAL HISTORY

On May 19, 2008, the FTC filed its complaint and moved for entry of a temporary restraining order ("TRO") and a preliminary injunction against defendants 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 (collectively the "Defendants"). In its complaint, the FTC charges that the Defendants have engaged in deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by: (1) misrepresenting the number of calling minutes provided by the Defendants' prepaid calling cards and (2) failing to disclose, or to adequately disclose, fees and charges associated with their cards.

On May 23, 2008, the Court issued a TRO against all the Defendants, finding that the FTC had demonstrated a likelihood of success on the merits and that entry of a TRO would be in the public interest. TRO, Findings, ¶¶ 2-5 [D.E. 25]. In entering the TRO, the Court also found

that it had subject matter jurisdiction over the FTC's lawsuit and that there was good cause to believe that it had personal jurisdiction over all of the Defendants. TRO, Findings ¶ 1. The TRO also authorized the parties to conduct expedited discovery and required the parties to respond to expedited discovery requests within five (5) calendar day from the date of service. TRO, XI.B-C, at 10. In the TRO, the Court also set a hearing on the FTC's motion for preliminary injunction for the 4th and 5th days of June, 2008. The Court subsequently extended the TRO by agreement of the parties and continued the preliminary injunction until August 8, 2008 [D.E. 32]. And, as noted, at the urging of the parties, it has since scheduled the trial for the week of December 15, 2008.

Also on May 23, 2008, the Movants and Lucas Friedlaender filed a motion to dismiss for lack of personal jurisdiction based on the Florida long-arm statute and the Due Process Clause of the Fourteenth Amendment [D.E. 24]. In response [D.E. 38], the FTC argued that the Florida long-arm statute is irrelevant to this case and that the statutory basis for the Court's personal jurisdiction is the statute cited in the FTC's complaint, Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). When confronted with their error, the Movants abandoned their original argument and instead presented a wholly new theory in their reply brief, namely, that the Court lacks personal jurisdiction over them because venue assertedly does not lie in this District. The FTC sought and was granted leave to file a sur-reply responding to the Movants' new arguments by July 10, 2008, which is being filed concurrently with this memorandum of law.

On June 9, 2008, after conducting a conference of the parties under Rule 26(f), the parties jointly filed a Scheduling Report ("Scheduling Report") [D.E. 37]. Counsel for the Movants actively participated in the Rule 26(f) conference of the parties and signed the Scheduling Report, which included a Joint Proposed Scheduling Order. In the Scheduling Report, the parties

requested the consolidation of the hearing on the FTC's motion for preliminary injunction with the final trial on the merits. The parties also requested discovery, to be completed by October 31, 2008, so that this case could be set for trial the week of December 15, 2008. On July 1, 2008, the Court issued a Scheduling Order [D.E. 54] granting the parties' requests, and therefore requiring that all discovery, including expert discovery, be completed by October 31, 2008, and consolidating the hearing on the FTC's motion for preliminary injunction with the final trial on the merits, scheduling for the week of December 15, 2008,

On June 20, 2008, the FTC served interrogatories and document requests on each of the corporate defendants. As reflected in its discovery requests, *see* Mot., Ex. A [D.E. 44-2], the FTC elected not to invoke the expedited discovery provisions of the TRO and instead requested that responses to its document requests and interrogatories be made within (30) days as ordinarily required under Rules 33 and 34 of the Federal Rules of Civil Procedure.

ARGUMENT

I. THE MOVANTS HAVE FAILED TO SHOW GOOD CAUSE FOR STAYING DISCOVERY

The Movants have failed to demonstrate the requisite good cause for staying discovery pending the resolution of their Motion to Dismiss. Normally, discovery commences after the parties have conferred under Rule 26(f), and the pendency of a motion to dismiss will not justify a stay of discovery. FED. R. CIV. P. 26(d); *see also* S.D. Fla. L.R., app. A. at 105. While the Court may issue a protective order staying discovery "for good cause" under Rule 26(c), "[s]uch motions for stay are generally denied except where a specific showing of prejudice or burdensomeness is made, or where a statute dictates that a stay is appropriate or mandatory." S.D. Fla. L.R., App. A. at 105; *see Gannon v. Flood*, No. 08-60059-CIV, 2008 WL 793682, at *1 (S.D. Fla. Mar. 24, 2008). No statute requires a stay in this case. Therefore, the Movants bear

the burden of showing good cause for a protective order staying discovery. *S.K.Y. Mgmt. LLC v. Greenshoe, Ltd.*, No. 06-21722-CIV, 2007 WL 201258, at *1 (S.D. Fla. Jan. 24, 2007); *In re Winn Dixie Stores*, No. 3:04-cv-194-J-33MCR, 2007 WL 1877887, at *1 (M.D. Fla. Jun. 28, 2007).

A discovery stay is appropriate only in unusual circumstances, such as where the Court makes a preliminary review of the complaint and finds that the plaintiff has filed an “especially dubious” claim that if disposed of by the motion would save needless and extensive discovery. *In re Winn Dixie*, 2007 WL 1877887, at *2 (citing cases including *Chudasma v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997) (holding that courts should dispose of dubious claims before discovery costs become burdensome)). Here, however, the FTC’s claims are well founded and, in entering a TRO against all of the Defendants, the Court has already determined that the FTC is likely to succeed on the merits.

The Movants offer only one ground for their motion to stay, namely that a stay is proper because “discovery will become unnecessary” once their Motion to Dismiss is determined. Mot. at p. 3. The Movants’ confidence in their Motion to Dismiss is surprising in light of the fact that they abandoned the basis for their motion to dismiss for lack of personal jurisdiction in their reply brief. FTC Sur-Reply at 1. What is more, under Rules 12(g)(2) and 12(h)(1), they have waived the venue argument raised for the first time in their reply brief, by failing to raise it in their original motion. In any event, as the FTC has explained, venue is proper in this District as to all Defendants. FTC Sur-Reply, at 3-5. Under these circumstances, a stay of discovery would be grossly inappropriate. *S.K.Y. Mgmt.*, 2007 WL 201258, at *2.

In addition, without identifying any particular discovery requests that are objectionable, the Movants make a blanket assertion that the FTC’s discovery requests “are extremely

burdensome” and will require them to “expend significant time and expense to compile the requested information and documents.” Mot. at p. 2.² The mere fact that responding to discovery requests is time consuming is not a basis for seeking a complete stay of discovery. *See S.K.Y. Mgmt.*, 2007 WL 201258, at *2. Claims of the undue burden of discovery can be raised by Defendants in the context of answering and objecting to, if appropriate, any specific discovery requests Defendants believe are unduly burdensome or otherwise objectionable during the normal course of discovery.

II. A DISCOVERY STAY WOULD DERAIL THE DISCOVERY SCHEDULE AGREED TO BY THE MOVANTS.

In addition, a discovery stay would run directly contrary to the discovery schedule agreed to by all parties, including the Movants, during the parties’ Rule 26(f) conference. The Movants had filed their Motion to Dismiss before the scheduling conference. Instead of indicating that they believed a stay of discovery would be appropriate, the Movants agreed to consolidate the hearing on the FTC’s motion for a preliminary injunction with a trial on the merits to commence no later than mid-December. This approach contemplated the completion of discovery at a rapid pace — within four months — which affords no time to waste. A discovery stay would likely make it impractical to complete discovery by October 31, 2008 and would likely have the effect of derailing the parties’ agreement in their Rule 26(f) conference, which the Court relied on in issuing the Scheduling Order. For this reason alone, the Court can and should exercise its discretion and deny the motion for stay. *Cf. Chrysler Int’l Corp. v. Chemaly*, 280 F.3d 1358,

² The Movants also argue that they have only been allotted five days to respond to the FTC’s discovery requests. However, as noted above and as reflected in the FTC’s discovery requests, Mot., Ex. A [D.E. 44-2], the FTC chose not to invoke the expedited discovery provisions of the TRO and instead requested that responses to its document requests and interrogatories be made within thirty days as ordinarily required under Rules 33 and 34 of the Federal Rules of Civil Procedure.

1360 (11th Cir. 2002) (“district courts must have discretion and authority to ensure that their cases move to a reasonably timely and orderly conclusion”).

CONCLUSION

For the foregoing reasons, the Court should deny the emergency motion to stay discovery and for a protective order filed by Defendants G.F.G. Enterprises LLC, also d/b/a Mystic Prepaid, Voice Prepaid, Inc., Telecom Express, Inc., and Voice Distributors, Inc.

Dated: July 10, 2008

Respectfully submitted,

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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 Notices of Electronic Filing generated by CM/ECF.

/s/ Janis Claire Kestenbaum
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Court-Appointed Monitor