

**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**

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Plaintiff Federal Trade Commission (“FTC”) respectfully submits this sur-reply.

ARGUMENT

I. THE MOVANTS HAVE WAIVED ANY OBJECTION TO VENUE.

In their reply brief, the Movants abandon their argument that this Court cannot exercise personal jurisdiction over them under the Florida long arm statute or the Due Process Clause. They instead present a wholly new theory, namely, that the Court may not exercise personal jurisdiction over them because venue assertedly does not lie in this District. A party may not raise new issues in a reply brief,¹ and such a “bait and switch” of the grounds for a motion is plainly improper. In addition, if a party moves to dismiss a claim for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2) and does not at that time also move to dismiss for improper venue under Rule 12(b)(3), the party waives any objection to venue.² Accordingly, the Movants have waived their newfound venue argument.

II. VENUE AND SERVICE OF PROCESS ARE DISTINCT UNDER SECTION 13(B).

In incorrectly asserting that Section 13(b) of the FTC Act requires that a suit must “first” be brought where the defendant “resides or transacts business, or wherever venue is proper under section 1391 of title 28” before the FTC may avail itself of nationwide service of process, Defs. Reply at 2, the Movants ignore the plain language of Section 13(b), which states:

Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28. In addition, the court may, if the court determines that the interests of justice require that any

¹ See, e.g., *Al-Amin v. Smith*, 511 F.3d 1317, 1336 n.38 (11th Cir. 2008) (citing cases); *Caldwell v. Jones*, 513 F. Supp. 2d 1000, 1012 (N.D. Ind. 2007); *Fisher v. Kansas*, 487 F. Supp. 2d 270, 278 (E.D.N.Y. 2007).

² FED. R. CIV. P. 12(g)(2); FED. R. CIV. P. 12(h)(1); see also *Lipofsky v. N.Y. State Workers Comp. Bd.*, 861 F.2d 1257, 1258 (11th Cir. 1988); *Harris Corp. v. Nat’l Iranian Radio & Television*, 691 F.2d 1344, 1349 (11th Cir. 1982).

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).⁴ Nor have any of the courts that have enforced the nationwide service of process provision under Section 13(b) of the FTC Act read a venue requirement into the provision.⁵

³ “Venue is distinct from jurisdiction. Venue may be proper or improper, independent of questions of subject matter or personal jurisdiction.” *Driscoll v. New Orleans Steamboat Co.*, 633 F.2d 1158, 1159 n.1 (5th Cir. Jan. 8, 1981).

⁴ *See* 15 U.S.C. § 22 (Clayton Act); 15 U.S.C. § 78aa (SEC Act).

⁵ *See* FTC Mem. of Law In Opp’n to Mot. to Dismiss [D.E. 38] at 5-6 (citing cases).

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).⁷ 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 Movants 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.⁸ 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 *Voice Prepaid* owns the trademarks and/or copyrights.⁹ The FTC has thus more than established a prima facie case that all defendants have transacted business in this District.¹⁰

⁶ The Movants erroneously assert that the FTC has "conceded" that the Movants have not transacted business in this District. Defs. Reply Br. at 1. In fact, the FTC has consistently maintained that all defendants have transacted business in this District. *See, e.g.*, FTC Mem. of Law in Opp'n to Mot. to Dismiss [D.E. 38] at 11; Compl. [D.E. 1] ¶¶ 4, 6-12.

⁷ Under Section 13(b), venue is appropriate as to a defendant if: (1) the defendant resides or transacts business in the district; (2) venue is proper under 28 U.S.C. § 1391, or (3) venue is proper as to one defendant and the interests of justice require adding another defendant as a party, irrespective of whether venue is otherwise proper. 15 U.S.C. § 53(b)(2).

⁸ *See, e.g.*, FTC Ex. 9; FTC Ex. 1, ¶¶ 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).

⁹ Gulakos has admitted this. *See* Defs. Mot. to Dismiss, Ex. A [D.E. 24-2] ¶ 11. Thus, even absent the common enterprise, Voice Prepaid has transacted business in this District by authorizing Alternatel to market prepaid calling cards displaying brand names and artwork that belong to Voice Prepaid.

¹⁰ Without an evidentiary hearing on a challenge to venue, "'the plaintiff must present only a prima facie showing of venue.' Further, '[t]he facts as alleged in the complaint are taken as true to the extent they are uncontroverted by defendants' affidavits.' When affidavits conflict, the court is inclined to give greater weight to the plaintiff's version of the jurisdictional facts and to construe such facts in the light most favorable to the plaintiff." *Home Ins. Co. v. Thomas Indus., Inc.*, 896 F.2d 1392, 1355 (11th Cir. 1990) (citations omitted).

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).¹¹ 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 nationwide service of process provision to Section 13(b) for the express purpose of allowing the FTC to join individuals and companies based in multiple jurisdictions in a *single* action.¹²

The only argument the Movants offer as to why the interests of justice do not require this case to proceed in this Court against all defendants is that Alternatel has, since the entry of the TRO, entered into an assurance of voluntary compliance (“AVC”) with the Florida Attorney General. Defs. Reply at 9. However, as a matter of law, the AVC does not, as the Movants appear to suggest, moot the FTC’s claims against Alternatel.¹³ The egregious nature of

¹¹ Venue also comports with 28 U.S.C. § 1391(b)(2), which allows a civil action to be brought in “a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.” One member of the common enterprise, Alternatel, is a Florida corporation that markets and sells cards in this District. Therefore, a substantial part of the events giving rise to the FTC’s claims occurred in this District.

¹² *See* S. Rep. No. 103-130, at 15-16, *reprinted in* 1994 U.S.C.C.A.N. 1776 (“[T]his section amends section 13 of the FTC Act to permit defendants from different districts to be brought into FTC actions in Federal district court One of the greatest difficulties identified by the FTC in combating consumer fraud is its inability to sue multiple defendants in a variety of jurisdictions [T]he Committee believes that the expansion of venue and service of process in the reported bill should assist the FTC in its overall efforts.”).

¹³ *See, e.g., Ala. v. U.S. Army Corp. of Eng’rs*, 424 F.3d 1117, 1131 (11th Cir. 2005) (“Voluntary cessation of a challenged practice will only moot a case if ‘subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.’”) (citations omitted).

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.¹⁴ 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 no other 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 this case 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 active corporations. FTC Ex. 1, ¶¶ 6, 8-9, Att. C, E, F, pp. 48-51, 58-61. In any event, the Movants cite no cases suggesting that venue (or personal jurisdiction) depends on whether a defendant is actively doing business, and undersigned counsel are aware of none.

¹⁶ See *McCaskey v. Continental Airlines, Inc.*, 133 F. Supp. 2d 514, 526 (S.D. Tex. 2001); *FS Photo, Inc. v. PictureVision, Inc.*, 48 F. Supp. 2d 442, 448 (D. Del. 1999).

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 C. Kestenbaum
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