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.
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PLAINTIFF FEDERAL TRADE COMMISSION'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS UNDER RULES 12(b)(7), 12(b)(1), AND 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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Plaintiff Federal Trade Commission ("FTC") respectfully submits this opposition to the motions to dismiss of Alternatel, Inc., G.F.G. Enterprises LLC, also d/b/a Mystic Prepaid, Voice Prepaid, Inc., Voice Distributors, Inc., Telecom Express, Inc., Moses Greenfield, Nickolas Gulakos, Lucas Friedlaender, and Frank Wendorff (collectively "Defendants").[1]

INTRODUCTION[2]

On May 23, 2008, the Court issued a temporary restraining order ("TRO") upon notice to Defendants and after a hearing in which all parties appeared. In granting the TRO, the Court found that there was good cause to believe that Defendants: (1) misrepresent the number of calling minutes that their prepaid calling cards will provide in calls to specific countries; and (2) fail to disclose, or to adequately disclose, fees that reduce the value of Defendants' prepaid calling cards, TRO [D.E. 25], Findings, ¶ 3. In their motions to dismiss, Defendants do not dispute the overwhelming evidence of wrongdoing on which the Court's findings are based. Instead, they rehash the argument they made at the TRO hearing: that the FTC's lawsuit cannot proceed because the FTC has not and cannot name as defendants the companies that provide telecommunications service for Defendants' calling cards. According to Defendants, such companies must be joined under Federal Rule of Civil Procedure 19, but cannot be, because the FTC Act does not apply to "common carriers subject to the Acts to regulate commerce," 15 U.S.C. § 45(a)(2), which includes the Communications Act of 1934. 15 U.S.C. § 44. In granting

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[1] Alternatel and Moses Greenfield jointly moved to dismiss under Fed. R. Civ. P. 12(b)(7), 12(b)(1), and 12(b)(6). [D.E. 48]. The other defendants have filed three separate motions in which they adopt the arguments made by Alternatel and Greenfield. [D.E. 50, 51, 52]. This brief responds to all four motions.

[2] Citations to FTC exhibits are to the three volumes of exhibits the FTC submitted in support of its TRO motion [D.E. 8-10, 19], as well as FTC Exhibit 10, filed herewith.

the TRO, the Court soundly rejected this argument. As explained below, Defendants' current motion provides no justification for the Court to reach a different conclusion now.

Alternatel also seeks dismissal of the case on the basis that it has, after the Court issued the TRO, entered into an "Assurance of Voluntary Compliance" with the Florida Attorney General. However, such voluntary discontinuation of challenged conduct does not deprive a court of subject matter jurisdiction unless the defendant shows that it is absolutely clear that there is no reasonable possibility that the unlawful conduct will recur. Alternatel cannot make such a showing in light of the egregious nature of its violations of the FTC Act, its brazen disregard for the law while under investigation by the Florida Attorney General, and its and the other defendants' disregard of this Court's TRO.

Finally, Defendants incorrectly assert that the Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6). The crux of Defendants' argument is that the Complaint fails to make sufficiently individualized allegations against each defendant. As explained below, the Eleventh Circuit has rejected just such an argument. Nor can Defendants demonstrate that the Complaint fails to provide adequate notice to them of the FTC's claim that they should be held jointly and severally liable under the common enterprise doctrine.

Accordingly, the Court should deny Defendants' motions to dismiss.

ARGUMENT

I. DEFENDANTS HAVE FAILED TO SHOW THAT THE COMMON CARRIERS ARE NECESSARY OR INDISENSABLE PARTIES.

Under Federal Rule of Civil Procedure 19, which governs the mandatory joinder of nonparties, courts employ a two-part test. "The first question," under Rule 19(a), is whether the nonparty is "necessary," *i.e.*, "whether complete relief can be afforded in the present procedural posture, or whether the nonparty's absence will impede either the nonparty's protection of an

interest at stake or subject parties to a risk of inconsistent obligations." *U.S. v. Rigel Ship Agencies, Inc.*, 432 F.3d 1282, 1291 (11th Cir. 1999) (internal quotation and citation omitted). If a court concludes the nonparty is not necessary, that is the end of the inquiry. *Id.* If, however, the nonparty should be joined but cannot be (such as where the nonparty is beyond the court's jurisdiction), then the court must inquire whether, applying the factors in Rule 19(b), the litigation may continue nonetheless, or whether the nonparty is "indispensable." *See, e.g.*, *Challenge Homes, Inc. v. Greater Naples Care Ctr.*, 669 F.2d 667, 669 (11th Cir. 1982). Defendants erroneously assert that the FTC has the burden of disproving the need to join an absent party. Alternatel Br. [D.E. 48] at 8 n.5. In fact, under Rule 19, it is the movant that bears the burden of proving that a nonparty must be joined. *See W. Peninsular Title Co. v. Palm Beach Cnty.*, 41 F.3d 1490, 1492 (11th Cir. 1995); *BFI Waste Sys. of N. Am., Inc. v. Broward Cnty.*, 209 F.R.D. 509, 514 (S.D. Fla. 2002); *Ship Const. & Funding Servs. (USA), Inc. v. Star Cruises PLC*, 174 F. Supp. 2d 1320, 1325 (S.D. Fla. 2001).

A. Defendants Have Failed to Show That The Common Carriers Are Necessary.

Defendants have failed to show that the common carriers that provide telecommunications service for Defendants' prepaid calling cards (hereinafter "carriers") must be joined under Rule 19(a). This case concerns ***Defendants'*** violations of Section 5 of the FTC Act, 15 U.S.C. § 45(a), through ***Defendants'*** advertising of ***Defendants'*** calling cards. The Court has found the FTC is likely to succeed in establishing that Defendants have engaged in deceptive acts and practices in violation of the FTC Act by: (1) misrepresenting the number of calling minutes provided by their cards; and (2) failing to adequately disclose the fees and charges associated with their cards. TRO [D.E. 25], Findings, ¶ 3.

It is uncontested that Defendants sell on a wholesale basis prepaid calling cards that bear ***Defendants' own*** corporate and brand names, which ***Defendants*** create and advertise. As Voice Prepaid has admitted:

> 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**.[3]

Likewise, Dollar Phone, which provides telecommunications service for the vast majority of the corporate defendants' cards,[4] has disavowed any responsibility for advertising. Rather, according to Dollar Phone, it is "independent distributors," like the corporate defendants, that advertise and promote prepaid calling cards for which Dollar Phone is the carrier. As the lawyer representing Alternatel and Moses Greenfield in this action explained to the Florida Attorney General in the course of her representation of Dollar Phone:

> **Dollar Phone does not advertise, promote, or market prepaid calling cards. Instead, Dollar Phone provides access to telecommunications services through independent distributors that advertise, promote, and distribute prepaid calling cards**.

[3] FTC Ex. 1, ¶ 43, Att. FF, p. 501 (emphasis added).

[4] FTC Ex. 10, Att. B, pp. 10, 12-17 (identifying Dollar Phone as sole company from which Alternatel obtains telecommunications services); FTC Ex. 1, ¶¶ 41, Att. BB, pp. 418 (counsel for Dollar Phone representing to court that Dollar Phone supplies service for over 90% of Voice Prepaid cards).

> The advertisement appearing in DFPL-002209 represents a **unique** circumstance in which Dollar Phone participated in the development of promotional material.[5]

Defendants erroneously assert that "[m]uch of the conduct that the FTC charges," such as the call rates and surcharges and fees, "is the conduct of the telecommunications carriers." Alternatel Br. at 4. In fact, the FTC does not challenge the legality of the fees that are imposed or the rates that are charged, but, rather, challenges ***Defendants***' deceptive affirmative claims about calling rates (*i.e.*, the number of calling minutes) and their failure to disclose adequately surcharges and fees associated with their cards. To illustrate, the Complaint does not allege that it is unlawful to sell a calling card that provides 24 minutes of calling time to Guatemala, but, rather, that Defendants have violated the FTC Act by advertising that a calling card will provide 52 minutes of calling time to Panama, when it delivers only 24 minutes. Compl. [D.E. 1] ¶ 44. To remedy this deceptive conduct, the Complaint seeks: (1) a permanent injunction enjoining future deceptive behavior by Defendants in marketing prepaid calling cards; and (2) equitable monetary relief from Defendants.

The dispositive question is whether the Court can provide complete relief "among existing parties." FED. R. CIV. P. 19(a)(1). In making this determination, "'pragmatic concerns, especially the effect on the parties and the litigation,' control." *Challenge Homes, Inc. v. Greater Naples Care Ctr.*, 669 F.2d 667, 669 (11th Cir. 1982) (citation omitted). Defendants

[5] Letter from Mary Ellen Callahan to Florida Attorney General, dated Mar. 13, 2008, FTC Ex. 10, Att. A, p. 4 (emphasis added). *See also* FTC Ex. 1, ¶ 41, Att. AA, pp. 358-60 (Abraham Greenfield, Dollar Phone executive and brother of Moses Greenfield, testifying that Dollar Phone's distributors, not Dollar Phone, typically design and create calling cards and posters); Att. BB, pp. 416-17 (counsel for Moses Greenfield in this action, explaining to a federal court, in the course of his representation of Dollar Phone, Dollar Phone's limited role in marketing cards distributed by Voice Prepaid and other companies).

have offered no legitimate reason why, without joinder of Dollar Phone or the other carriers, the Court cannot provide the relief sought by the Complaint, or why this relief will be incomplete.[6] Their chief argument is that the carriers are the true "bad actors" here, and thus that any order against Defendants will be ineffective. Alternatel Br. at 5. Defendants have failed to offer a shred of evidence in support of this assertion, which rings hollow in light of incriminating e-mails that show Defendants are a driving force behind the deceptive marketing of their cards.[7] That is not to say that Dollar Phone and other carriers are not also involved in the deceptive conduct. They may well be. But that would merely make them akin to joint tortfeasors. And, "[i]t has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990) (per curiam) (citations omitted). "The Advisory Committee Notes to Rule 19(a) explicitly state that 'a tortfeasor with the usual "joint-and-several" liability is merely a permissive party to an action against another with like liability.'" *Id.* (citations omitted); *see also MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 946 (11th Cir. 1999) (citing cases).

Likewise, Defendants' contention that the Court cannot provide effective relief because "the same cards" could be sold by "other distributors not party to this action" is unavailing.

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[6] Notably, Defendants have not asserted that the other criteria under Rule 19(a)(2) have been met, *i.e.*, that a nonparty claims an interest relating to the subject of the action and is so situated that disposing of the action may: (i) as a practical matter impede or impair the absent person's ability to protect that interest; or (ii) leave an existing party subject to a substantial risk of double, multiple, or otherwise inconsistent obligations because of the interest. Accordingly, the FTC does not address these factors in this brief.

[7] FTC Ex. 1, ¶ 42, Att. EE, p. 494 (e-mail from Friedlaender to CVT, a telecommunications carrier, in which he wrote "24" delivered? Or prompted? ***if it's 24" delivered, let's put 36" on poster***. ***If it's only delivering 18" then 32"***.") (emphasis added); FTC Ex. 1, ¶ 42, Att. EE, p. 499 (e-mail from CVT to Gulakos saying "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," to which Gulakos made no objection) (emphasis added).

Alternatel Br. at 5. First, this assertion is perplexing because Defendants have offered no evidence that other distributors are creating advertisements for Defendants' cards. To the extent, however, that Defendants mean to suggest that the FTC cannot take action against them unless it stops ***all*** unlawful conduct in the prepaid calling card industry, they are mistaken. Rule 19 does not preclude law enforcers from suing ***individual*** law violators unless they sue ***every*** unlawful actor; if it did, law enforcement would grind to a halt.[8]

In sum, the carriers are not necessary parties under Rule 19(a). By definition, they are, therefore, also not indispensable under Rule 19(b).

B. Defendants Have Failed to Show That The Carriers Are Indispensable.

Even if the carriers were necessary and could not be joined,[9] equity and good conscience would not dictate dismissal of this action. To the contrary, the public interest in halting Defendants' unlawful conduct mandates that this case proceed.

Under Rule 19(b), the Court must decide whether, "in equity and good conscience," the case may proceed with the existing parties, based on its consideration of the following:

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[8] Nor is there any relevance or merit to Defendants' assertion that the TRO, or any permanent injunction that may issue, will be ineffective because it cannot bind the carriers. Alternatel Br. at 5-6. Although the issue is not ripe, it is worth noting that, under Rule 65, every injunction binds any person with "actual notice" of the injunction that is "in active concert or participation" with the parties or the parties' officers, agents, servants, employees, or attorneys. FED. R. CIV. P. 65(d)(2)(C). The Court's power to enforce an injunction against such nonparties derives from its inherent authority to prevent a defendant from nullifying its orders by carrying out prohibited acts through nonparty aiders and abettors, regardless of whether such nonparties could have been sued in the original proceeding. *See, e.g., U.S. v. Barnette*, 129 F.3d 1179, 1185 n.10 (11th Cir. 1997); *Waffenschmidt v. MacKay*, 763 F.2d 711, 714-17 (5th Cir. 1985); *JTH Tax, Inc. v. Lee*, 540 F. Supp. 2d 642, 647 (E.D. Va. 2007) (citing cases).

[9] For purpose of this motion, the FTC assumes that the carriers for Defendants' prepaid calling cards cannot be joined as parties because Section 5 of the FTC Act does not apply to "common carriers subject to the acts to regulate commerce," 15 U.S.C. § 45(a)(2), which Section 4 of the FTC Act, 15 U.S.C. § 44, defines to includes the Communications Act of 1934.

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures;
> (3) whether a judgment rendered in the person's absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

FED. R. CIV. P. 19(b). Defendants have failed to establish that any of these factors supports a determination that the carriers are indispensable.

First, Defendants have not identified how they or the carriers would be prejudiced by allowing this case to proceed when this case challenges ***Defendants'*** marketing practices. Participation by the carriers in that deception would merely make them akin to joint tortfeasors, which, under the controlling precedent cited above, does not make them indispensable parties.

Second, because there is no prejudice to Defendants or the carriers, there is no need for the Court to take special measures to mitigate such prejudice.

Third, a judgment against Defendants alone will be adequate. Defendants' purchase of the telecommunications service for their calling cards from nonparties does not diminish the Court's power to require Defendants to make honest and complete representations to consumers about what consumers will get if they purchase Defendants' cards.

Fourth, under Rule 19(b)(4), a party is not indispensable if dismissal of the action would leave the plaintiff without an adequate remedy. *See, e.g., Gardiner v. Virgin Islands Water & Power Auth.*, 145 F.3d 635, 643 (3d Cir. 1998). Defendants suggest that the possibility that the Federal Communications Commission ("FCC") could bring an action against the carriers, or that the Florida Attorney General could bring a lawsuit to enforce its recent settlement with Alternatel, provides the FTC an adequate remedy in the event of dismissal of this case. Alternatel Br. at 9-10. However, under Rule 19(b)(4), the question is not whether ***any*** plaintiff

will have an adequate remedy if the action is dismissed, it is whether ***the*** plaintiff — here, the FTC — will have an adequate remedy if a case is dismissed. In any event, the theoretical possibility of legal action by the FCC against the carriers is not an adequate substitute for the FTC's case against Defendants for ***their*** unlawful conduct. Nor is the Florida settlement, which names only Alternatel, affects only marketing directed at Florida consumers or that arises in Florida, and does not provide restitution or disgorgement, an adequate substitute for the final relief sought here: a nationwide injunction against all defendants and an order requiring payment of restitution and/or disgorgement. Thus, equity and good conscience not only permit, but require, that this case proceed.

C. Defendants Are Not Common Carriers And Cannot Escape Liability for Their Deceptive Practices Under The Common Carrier Exemption to the FTC Act.

As noted above, he FTC Act does not apply to "common carriers subject to the Acts to regulate commerce," 15 U.S.C. § 45(a)(2), which includes the Communications Act of 1934, as amended, 15 U.S.C. § 44. Defendants admit that they are not common carriers,[10] but argue that they are "so intertwined with the underlying carrier" that they should be "subject to the same jurisdiction" as the carriers. Alternatel Br. at 7. This argument, though it appears in the Rule 19 discussion in Alternatel's brief, has nothing to do with joinder or Rule 19.[11] Instead, what Defendants are actually arguing is that they should escape liability for their deceptive practices

[10] Alternatel Br. at 4 (conceding that "none" of the defendants "are the common carrier service providers that offer the underlying telecommunications service for the prepaid calling cards"); Wendorff Aff. [D.E. 49] ¶ 5 ("Alternatel is not a common carrier service provider that offers the underlying telecommunications service for prepaid calling cards."); FTC Ex. 1, ¶ 43, Att. II, p. 563 (Voice Prepaid admitting that it does not provide telecommunications services for its cards).

[11] Defendants' assertion that they are "so intertwined" with the common carriers also belies their claim that this case concerns the "***independent*** conduct of the[] telecommunications carriers" whom they "cannot control." Alternatel Br. at 5 (emphasis added).

under the common carrier exemption to the FTC Act, despite their admission that they are not common carriers. There is no legal basis for this remarkable proposition.

To the contrary, the Second Circuit has rejected the argument that a non-common carrier that acts in concert with a common carrier is exempt from the FTC Act. *See FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 58-59 (2d Cir. 2006) (holding that involvement of common carriers in unlawful billing scheme did not exempt non-common carrier defendants from FTC Act). Ignoring this precedent, Defendants incorrectly assert that they should be exempt from the FTC Act because the FCC has "used its jurisdiction to protect consumers and regulate the prepaid calling card industry both with regard to distributors *and* telecommunications carriers." Alternatel Br. at 7. However, all the prepaid calling card decisions cited by Defendants in which the FCC has exercised jurisdiction involved companies that, unlike Defendants, provided the telecommunications service for the calling cards. Alternatel Br. at 7, 9-10.[12] Further, Defendants erroneously assert that *Blackstone Calling Card, Inc.*, 22 FCC Rcd 13031 (Enf. Bureau 2007), "indicat[ed] the FCC's authority to issue citations and forfeitures against prepaid calling card distributors." Alternatel Br. at 10. In fact, *Blackstone* reached the opposite conclusion: *Blackstone* held that, because a prepaid calling card distributor did not provide the telecommunications service for its cards, it was ***not*** subject to FCC regulatory obligations. 22 FCC Rcd at 13032, ¶ 4.[13]

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[12] Indeed, these cases all involved "prepaid calling card providers," which the FCC has defined as "any entity that provides telecommunications service to consumers through the use of a prepaid calling card." 47 C.F.R. § 64.5000. Thus, Defendants do not meet the FCC's definition of "prepaid calling card providers."

[13] In addition, the Communications Act provides that a telecommunications carrier "shall be treated as a common carrier under this Act ***only to the extent*** that it is engaged in providing telecommunications service." 47 U.S.C. § 153(44) (emphasis added).

Nor can Defendants evade the FTC Act under the guise of being "agents" of the carriers. Such an argument has been soundly rejected. *See FTC v. Am. Std. Credit Sys., Inc.*, 874 F. Supp. 1080, 1086 (C.D. Cal. 1994) (exemption of banks from FTC Act does not apply to agents of a bank).[14] In any event, Defendants offer no evidence of an agency relationship, and a federal district court has specifically rejected the argument that Voice Prepaid is Dollar Phone's agent.[15] Consistent with that ruling, Alternatel's contract with Dollar Phone disclaims any agency relationship.[16]

II. THE FTC'S CLAIMS PRESENT A LIVE, JUSTICIABLE DISPUTE.

Defendants assert that, because Alternatel has entered into an Assurance of Voluntary Compliance with the Florida Attorney General after the Court issued the TRO, the FTC's claims are now moot. This argument fails as a matter of law.[17]

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[14] In this regard, Defendants cite 47 U.S.C. § 217, Alternatel Br. at 7 n.4. However, that provision merely states that a common carrier can be held liable for the acts of its agents that violate the Communications Act. It does not state or imply that an agent of a common carrier assumes the status of a common carrier under the Communications Act.

[15] *See* FTC Ex. 1, ¶ 41, Att. BB, pp. 437-38 (finding that Voice Prepaid is a customer of Dollar Phone, not its agent or assign). This ruling was made in a Lanham Act lawsuit brought by IDT Telecom, Inc. against Dollar Phone and a number of other prepaid calling card providers. *IDT Telecom, Inc., et al. v. CVT Prepaid Solutions, Inc., et al.*, No. 2:07-CV–01076-SDW-MCA (D.N.J.). Dollar Phone argued unsuccessfully that its settlement with IDT of the Lanham Act case prohibited IDT from separately suing Voice Prepaid because Voice Prepaid was allegedly Dollar Phone's "agent" and "assign." FTC Ex. 1, ¶ 41, Att. BB, p. 417.

[16] FTC Ex. 10, Att. B, p. 17 ("The Parties to this Agreement are independent contractors. Neither Party is an agent or representative of the other . . . . This Agreement shall not be interpreted or construed to create an association, agency relationship, joint venture or partnership.").

[17] The Assurance of Voluntary Compliance names only Alternatel. The other corporate defendants do not assert that the Assurance of Voluntary Compliance binds them, nor do they explain how it moots the FTC's claims against them. Accordingly, the FTC here addresses only the argument that the Assurance of Voluntary Compliance moots the FTC's claims against Alternatel.

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). The Eleventh Circuit has stressed the "formidable" and "heavy" burden that a defendant faces in demonstrating that challenged conduct cannot reasonably be expected to recur. *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184 (11th Cir. 2007). Only where a defendant shows that it is "***absolutely clear*** that the allegedly wrongful behavior could not reasonably be expected to recur," may a case be dismissed as moot. *Friends of the Earth*, 528 U.S. at 189 (emphasis added).

Alternatel has not come close to satisfying this formidable burden. At the outset, the Assurance of Voluntary Compliance does not provide restitution to consumers or require Alternatel to disgorge its ill-gotten gains.[18] Such equitable monetary relief is a critical component of the final relief sought by the FTC's Complaint. For this reason alone, the FTC's claims against Alternatel cannot be dismissed. *See, e.g.*, *FTC v. Nat'l Urological Group, Inc.*, No. 1:04-CV-3294-CAP, 2008 WL 2414317, at *32 n.27 (N.D. Ga. June 8, 2008); *FTC v. Accusearch, Inc.*, No. 06-CV-105-D, 2007 WL 4356786, at *9 (D. Wyo. Sept. 28, 2007). The Assurance of Voluntary Compliance also falls short of the permanent relief sought by the FTC in other significant ways. As its name indicates, it is a ***voluntary*** promise to comply with Florida's consumer protection statute. Notably, it applies to Alternatel's marketing activities only to the

[18] The Assurance of Voluntary Compliance only requires Alternatel to pay $70,000 to the Florida Attorney General to compensate for the costs of the investigation and monitoring over the next three years. Ex. A to Alternatel Mot. to Dismiss [D.E. 48-2], ¶ 71. By contrast, through their Voice Prepaid bank accounts alone, Defendants took in over $72 million from the sale of prepaid calling cards in 2006-2007. FTC Ex. 1, ¶ 40.

extent they are directed at Florida consumers or arise from Alternatel's promotion of cards originating from Florida. Ex. A to Alternatel Mot. to Dismiss, ¶ 87.[19] The FTC, by contrast, seeks a nationwide injunction. Likewise, under the Assurance of Voluntary Compliance, Alternatel merely has agreed that Alternatel's violations of the settlement will be prima facie evidence of a violation of the Florida Deceptive and Unfair Trade Practices Act, should the Florida Attorney General initiate such a suit. *Id.* ¶ 89. This aspect of the agreement, moreover, ***applies only to violations that occur in the first four years*** the Assurance of Voluntary Compliance is in effect. *Id.* A permanent injunction, by contrast, would last indefinitely and, if violated, would put Alternatel in contempt of court. *See Am. Credit Sys.*, 874 F. Supp. at 1087 (where prohibition on challenged conduct did not carry penalty of contempt of court, FTC's claim for injunction was not moot). Given these limitations to the Assurance of Voluntary Compliance, Alternatel cannot demonstrate that it is absolutely clear that there is no reasonable possibility that its deceptive conduct will recur.

In addition, the Eleventh Circuit has instructed courts to consider three factors that strongly counsel against a finding that the FTC's claims against Alternatel are moot. First, the Eleventh Circuit has held that courts should consider "whether the challenged conduct was isolated or unintentional, as opposed to a continuing and deliberate practice." *Sheely*, 505 F.3d at 1184. Here, the evidence shows that Alternatel and the other defendants engaged in a pattern of egregious violations of the FTC Act, by routinely misrepresenting the number of calling minutes their calling cards provide and failing to adequately disclose the fees and charges

[19] Alternatel admits that it currently has two clients with retail stores outside Florida. Aff. of Frank Wendorff [D.E. 49] ¶ 2. What is more, Alternatel is not barred from expanding its business outside Florida.

associated with their cards. In the FTC's tests, Defendants' calling cards delivered only **50.4%** of advertised minutes on average. FTC Ex. 1, ¶ 101, Att. WWW, pp. 680-82. Among the corporate defendants, Alternatel's cards fared the worst, delivering only **35.9%** of advertised minutes on average. *Id.* Alternatel's past unlawful conduct "gives rise to the inference that there is a reasonable likelihood of future violations." *SEC v. R.J. Allen & Assoc., Inc*., 386 F. Supp. 866, 877 (S.D. Fla. 1974) (citations omitted).

Significantly, Alternatel flouted the law despite its knowledge that it was being investigated by the Florida Attorney General concerning its marketing practices: the FTC's testing occurred ***after*** Alternatel received a subpoena from the Florida Attorney General.[20] That Alternatel continued to engage in deceptive conduct despite its awareness of an investigation by the Florida Attorney General underscores the need for a permanent injunction. *See FTC v. Nat'l Prize Info. Group Corp.*, No. 2:06-cv-01305-RCJ-PAL, 2006 WL 3234360, at *7 (D. Nev. Nov. 2, 2006) (defendant's continued violations of FTC Act after learning of government investigation demonstrated need for injunction).

Even now, after this Court's entry of a TRO and Alternatel's agreement to the Assurance of Voluntary Compliance, Alternatel and the other defendants have not discontinued their deceptive practices. The TRO enjoins Defendants from, among other things, "making any representations, explicitly or by implication, concerning . . . the value of a Prepaid Calling Card, while failing to make a clear and prominent disclosure of all material limitations on the use of such Prepaid Calling Card, including, but not limited to, the existence and specific amount of any

[20] The FTC's tests of Defendants' calling cards were conducted between December 13, 2007 and April 17, 2008. FTC Ex. 1, ¶ 97; FTC Ex. 8, ¶ 8. The Florida Attorney General first issued a subpoena to Alternatel on July 23, 2007. FTC Ex. 10, ¶ 1.

fees or charges that will be assessed in connection with use of such Prepaid Calling Card." TRO [D.E. 25] at 5. Despite this clear mandate in the TRO, the Monitor has reported that Alternatel and the other defendants have taken no steps to halt the sale to consumers of their prepaid calling cards containing the very inadequate disclosures at issue in the FTC's TRO motion where such cards had already been sent to sub-distributors or retailers when the TRO was entered. *See* First Report of Monitor [D.E. 53] at 8; *see also id.* at 6 n.2, 13. As a consequence, consumers who purchase Alternatel's and the other defendants' calling cards have apparently continued to be charged fees that Defendants have failed to adequately disclose.[21] In addition, the Monitor also has reported (and the FTC concurs) that Alternatel's and the other defendants' new disclosures suffer many of the same deficiencies as their original disclosures, and, thus, violate the TRO. *See* First Report of Monitor at 9-10, 13. Alternatel's failure to comply with the TRO — which had already been in effect 40 days as of the filing of the Monitor's report — coupled with its brazen disregard of the law during the Florida Attorney General's investigation, demonstrates that it cannot be trusted to comply with the FTC Act.

Second, the Eleventh Circuit has instructed courts to consider whether a defendant's discontinuation of challenged conduct stems from a "genuine change of heart rather than [a] desire to avoid liability." *Sheely*, 505 F.3d at 1186; *id.* at 1184. Here, there is no question that Alternatel entered into the Assurance of Voluntary Compliance to prevent the Florida Attorney

[21] Alternatel asserts that it has told the Monitor that "all advertised and prompted minutes [are] being provided" since the entry of the TRO. Mot. of Alternatel and Greenfield for Clarification, Objections to the First Rep. of the Temp. Monitor [D.E. 61] at 10. However, Alternatel has not asserted that, since the entry of the TRO, consumers are no longer charged the fees that remain inadequately disclosed on Defendants' cards. In addition, Defendants have opposed any testing by the Monitor that would enable her to report on whether consumers are in fact receiving all the calling minutes promised by Defendants. [D.E. 59, 60].

General from suing it, *i.e.*, to avoid liability, rather than due to a "genuine change of heart" about the importance of dealing honestly with consumers.

Third, the Eleventh Circuit has directed courts to consider "whether, in ceasing the conduct, the defendant has acknowledged liability." *Sheely*, 505 F.3d at 1184. In the Assurance of Voluntary Compliance, Alternatel expressly denies "any wrongdoing or liability of any kind whatsoever arising from the sale, distribution, marketing, promotion and/or servicing of Prepaid Calling Cards." Ex. A to Alternatel Mot. to Dismiss, ¶ 78. The Eleventh Circuit has held that such a failure by a defendant to acknowledge wrongdoing "ensures that a live dispute between the parties remains." *Sheely*, 505 F.3d at 1187.[22]

III. THE COMPLAINT SATISFIES RULES 8 AND 12(B)(6).

For their final argument, Defendants assert that the FTC's Complaint must be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. Alternatel Br. at 17-20. This argument lacks any merit.

In considering a Rule 12(b)(6) motion, courts must "accept[] all well-pleaded factual allegations as true" and draw "all inferences to be drawn therefrom, in the light most favorable to the plaintiff." *Weissman v. Nat'l Ass'n of Secs. Dealers, Inc.*, 468 F.3d 1306, 1310 (11th Cir. 2006). As Defendants acknowledge, Alternatel Br. at 19, Rule 12(b)(6) must be read in conjunction with Rule 8, which requires only a "short and plain statement showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Rule 8 further dictates that "[e]ach

[22] Gulakos and Friedlaender erroneously assert that, if the FTC's claims against Alternatel are dismissed as moot, the claims against them, Voice Prepaid, Voice Distributors, Telecom Express, and Mystic Prepaid should be dismissed because they would then assertedly lack minimum contacts with the State of Florida. Gulakos Mot. [D.E. 50] at 5-6; Friedlaender Mot. [D.E. 52] at 3. The FTC has previously explained why, under binding precedent, this argument lacks any basis. *See* FTC Br. Opposing Rule 12(b)(2) Mot. to Dismiss [D.E. 38] at 7-12.

allegation must be simple, concise, and direct." FED. R. CIV. P. 8(d)(1). Under liberal principles of notice pleading, a plaintiff need not detail the facts on which a claim for relief is based, but must only provide a statement sufficient to put the opposing party on notice of the claim. *See, e.g.*, *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512-13 (2002).

These well-settled principles remain in full force following *Bell-Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), on which Defendants rely. Alternatel Br. at 19-20. Both *Twombly*, 127 S. Ct. at 1965, 1966, and the subsequently-decided *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam), reiterate the traditional Rule 8 standard. *Twombly* merely clarified that a complaint must "raise a right to relief above the speculative level on the assumption that the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 127 S. Ct. at 1965; *see also Watts v. Fla. Int'l Univ.*, 495 F.3d 1295, 1295-96 (11th Cir. 2007) (applying *Twombly*).

A. The Complaint Amply Alleges Claims For Relief Against All Defendants.

The Complaint more than satisfies these liberal requirements of notice pleading. Count I alleges that Defendants have falsely represented the number of calling minutes that their calling cards provide in violation of Section 5 of the FTC Act. Compl. ¶¶ 47-49. Count II alleges that Defendants fail to disclose, or adequately disclose, the fees and charges associated with their calling cards in violation of Section 5 of the FTC Act. Compl. ¶¶ 50-53. Defendants do not contest that the Complaint sufficiently pleads the elements of the Complaint's two counts. Rather, they assert that the Complaint is deficient because it fails to make ***individualized*** allegations against each of the defendants. Alternatel Br. at 18. However, it is well established that, "[w]hen multiple defendants are named in a complaint, the allegations can be and usually are to be read in such a way that each defendant is having the allegation made about him individually." *Crowe v. Coleman*, 113 F.3d 1536, 1539 (11th Cir. 1997). This makes particular

sense where, as here, the corporate defendants are alleged to engage in the same deceptive conduct and to operate as a common enterprise. It would be wholly redundant (and would serve no purpose) for the Complaint to contain identical paragraphs for each of the corporate defendants alleging that, for example, each company markets calling cards, falsely represents the number of calling minutes, and fails to adequately disclose the cards' fees and charges.[23]

B. The Complaint Properly Alleges A Common Enterprise.

Defendants' assertion that the Complaint fails to adequately allege a common enterprise is also unavailing. "When determining whether a common enterprise exists, courts look to a variety of factors, including: common control, the sharing of office space and officers, whether business is transacted through 'a maze of interrelated companies,' the commingling of corporate funds and failure to maintain separation of companies, unified advertising, and evidence which 'reveals that no real distinction existed between the Corporate Defendants.'" *FTC v. Wolf*, No. 94-8119-Civ-Ferguson, 1996 WL 812940, at *7 (S.D. Fla. Jan. 31, 1996) (citations omitted).

[23] Defendants erroneously assert that the Complaint must allege each individual defendant's own "wrongdoing." Alternatel Br. at 18 n.8. Under the FTC Act, an individual defendant is liable for injunctive relief if he "directly participated" in a corporate defendant's unlawful practices ***or*** "had authority to control" the corporate defendant. *E.g.*, *FTC v. Bay Area Bus. Council*, 423 F.3d 627, 636 (7th Cir. 2005); *FTC v. Freecom Comm'cns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005). "An individual's status as a corporate officer gives rise to a presumption of ability to control a small, closely-held corporation." *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1270 (S.D. Fla. 2007) (internal quotations and citation omitted). In this regard, the Complaint alleges that each individual defendant has (1) served as an officer of one or more of the corporate defendants, and (2) "formulated, directed, controlled, had the authority to control, or participated in the acts and practices" of the corporate defendants alleged in the complaint. Compl. ¶¶ 9-12. The Complaint thus states a claim for an injunction against the individual defendants. To obtain restitution or disgorgement from the individual defendants, the FTC will be required to prove that they "knew or should have known" that the corporate defendants engaged in the wrongful conduct. *See, e.g., FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1996). The allegations that the corporate defendants routinely engaged in deceptive practices while the individual defendants were at the helm of these companies gives rise to the reasonable inference that they knew or should have known of the deceptive practices.

Courts, however, do not require the existence of each and every one of these factors in finding a common enterprise. Instead, "'the pattern and framework of the whole enterprise must be taken into consideration.'" *Nat'l Urological Group*, 2008 WL 2414317, at *6 (citation omitted).

Moreover, at the pleading stage, there is no requirement that a complaint set forth every fact indicating that corporations operate as a common enterprise. To the contrary, a complaint is sufficient so long as it puts the opposing party on notice of the claim. *Swierkiewicz*, 534 U.S. at 512-13. The FTC's Complaint's allegation that the corporate defendants "have operated as a common business enterprise while engaging in the deceptive acts and practices alleged in this complaint," Compl. ¶ 13, provides fair notice to Defendants that the FTC seeks to hold them jointly and severally liable under the common enterprise doctrine. In addition, the FTC's Complaint alleges that the corporate defendants (1) have common ownership and control, Compl. ¶¶ 9-12,[24] and (2) sell and market nearly identical calling cards under the same brand names, Compl. ¶ 22, *i.e.*, sell cards using shared trademarks and copyrights. Allegations of such common ownership and control and shared use of corporate assets create the reasonable inference that the corporate defendants are, despite their nominal separation, operating as a common enterprise. No further allegations are required. *See FTC v. AmeriDebt, Inc.*, 343 F.

[24] Specifically, the Complaint alleges that: (1) Gulakos is the founder, sole owner, and President of Voice Prepaid, Compl. ¶ 11, (2) he and Greenfield jointly own Alternatel, (3) both serve as officers of Alternatel, and (4) both own and serve as officers of Mystic Prepaid. Compl. ¶¶ 9-11. The Complaint further alleges that Friedlaender is both an owner and officer of Mystic Prepaid and the Controller of Voice Prepaid. Compl. ¶ 9. Likewise, the Complaint alleges that Wendorff is the President and Chief Operating Officer of Alternatel. Compl. ¶ 12. The Complaint also alleges that these four individual defendants "formulated, directed, [and] controlled . . . the acts and practices of Alternatel, Mystic Prepaid, and Voice Prepaid, including the acts and practices alleged in this complaint." Compl. ¶¶ 9-12.

Supp. 2d 451, 462-63 (D. Md. 2004) (holding FTC complaint adequately alleged common enterprise).

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motions to dismiss.

Dated: July 21, 2008

Respectfully submitted,

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Certificate of Service

I hereby certify that on **July 21, 2008**, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will send a notice of electronic filing to all counsel of record, as set forth on the attached service list.

/s/ Janis C. Kestenbaum
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