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14 Federal Trade Commission

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 San Francisco Division

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18 FEDERAL TRADE COMMISSION,

Cv Case No. **12 2631**

19 Plaintiff,

20 v.

**COMPLAINT FOR PERMANENT
INJUNCTION AND OTHER EQUITABLE
RELIEF**

21 DR PHONE COMMUNICATIONS, INC.,
22 also d/b/a DRphonecom.com, and

23 DAVID ROSENTHAL, individually and as an
24 officer of DR Phone Communications, Inc.,

25 Defendants.

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27 Plaintiff, the Federal Trade Commission ("FTC"), for its Complaint against defendants
28 DR Phone Communications, Inc. and David Rosenthal (collectively "Defendants"), alleges:

FILED
2012 MAY 22 P 12:01
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
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SUMMARY OF THE CASE

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2 1. This case concerns Defendants' deceptive marketing of prepaid telephone
3 calling cards in violation of the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 ("FTC
4 Act"). Defendants have deceived and continue to deceive consumers by: (1) misrepresenting
5 the number of calling minutes consumers will obtain using Defendants' prepaid calling cards;
6 and (2) failing to disclose or disclose adequately fees that reduce the number of calling minutes
7 available to consumers using Defendants' prepaid calling cards.

8 2. The FTC brings this action under Section 13(b) of the FTC Act, 15 U.S.C.
9 § 53(b), to obtain temporary, preliminary, and permanent injunctive relief, rescission or
10 reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten
11 monies, and other equitable relief for Defendants' acts or practices in violation of Section 5(a)
12 of the FTC Act, 15 U.S.C. § 45(a).

JURISDICTION AND VENUE

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14 3. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C.
15 §§ 1331, 1337(a) and 1345, and 15 U.S.C. §§ 45(a) and 53(b).

16 4. Venue in this District is proper pursuant to 28 U.S.C. §§ 1391(b) and (c), and 15
17 U.S.C. § 53(b).

INTRADISTRICT ASSIGNMENT

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19 5. Defendants have conducted a substantial course of business in the county of San
20 Francisco, and therefore assignment to this Division is proper.

PLAINTIFF

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22 6. Plaintiff, the FTC, is an independent agency of the United States Government
23 created by statute. 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the FTC Act, 15
24 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce.
25 The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to
26 enjoin violations of the FTC Act and to secure such other equitable relief as may be appropriate
27 in each case, including rescission or reformation of contracts, restitution, the refund of monies
28 paid, and the disgorgement of ill-gotten monies. 15 U.S.C. § 53(b).

DEFENDANTS

1
2 7. Defendant DR Phone Communications, Inc. ("Corporate Defendant"), also
3 doing business as DRphonecom.com, is a New York corporation with its registered address and
4 principal place of business at 401 Broadway, Suite 2504, New York, New York, 10162.
5 Corporate Defendant transacts or has transacted business in the Northern District of California
6 and throughout the United States. At all times material to this Complaint, acting alone or in
7 concert with others, Corporate Defendant has created, advertised, marketed, distributed, or sold
8 prepaid calling cards to consumers throughout the United States.

9 8. Defendant David Rosenthal ("Rosenthal") is the founder, president, and Chief
10 Executive Officer of Corporate Defendant. Rosenthal has the authority to control Corporate
11 Defendant's marketing of prepaid calling cards, handles Corporate Defendant's financial
12 affairs, routinely transfers money out of corporate bank accounts to personal accounts,
13 commingles personal expenses with corporate expenditures, and personally profits from the
14 deception alleged herein. At all times material to this Complaint, acting alone or in concert
15 with others, Rosenthal has formulated, directed, controlled, had the authority to control, or
16 participated in the acts and practices of DR Phone Communications, Inc., including the acts and
17 practices set forth in this Complaint. Rosenthal resides in New York City, in the state of New
18 York and, in connection with the matters alleged herein, transacts or has transacted business in
19 this district and throughout the United States.

COMMERCE

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21 9. At all times material to this Complaint, Defendants have maintained a
22 substantial course of trade in or affecting commerce, as "commerce" is defined in Section 4 of
23 the FTC Act, 15 U.S.C. § 44.
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DEFENDANTS' BUSINESS PRACTICES

10. A prepaid calling card is a retail product that enables the purchaser to make domestic or international telephone calls by prepaying a specified dollar amount for a specified number of calling minutes.

11. Prepaid calling cards are especially popular with members of immigrant communities, many of whom depend on prepaid calling cards to stay in touch with family and friends outside the United States.

12. Defendants market and sell prepaid calling cards, which they distribute to Internet retailers, sub-distributors, and retail stores nationwide for resale to consumers.

13. Defendants' prepaid calling cards are often sold to consumers in grocery and convenience stores, and at kiosks in other retail establishments.

14. Defendants also sell prepaid calling cards directly to consumers over the Internet, including, but not limited to, on the website *www.drphone.com.com*.

15. Defendants' prepaid calling cards are typically sold in face-value denominations of \$5.

16. The Corporate Defendant is not registered as a telecommunications carrier with the Federal Communications Commission.

17. Defendants purchase telecommunications service for their prepaid calling cards from service providers including, but not limited to, Dollar Phone Enterprise, Inc., Excite Telecom, Union Telecard Alliance, Central Alliance Telecard, and Aerotel USA, LLC.

Defendants' Marketing of Their Prepaid Calling Cards

18. Defendants market their prepaid calling cards under a variety of brand names, including, but not limited to: "Super Clean," "Cheap Talk," "1¢ Per Minute World," "Call Me," "Go Green," "Beautiful Asia," "Boss New York," "Cheese Burger Delux," "Energy Phone Card NY," "First Call Asia," "Global Call," "I Love Money," "INC Los Angeles," "LA X-Clusive," "Peace Call," "Pearls of Africa," "South Seas China N.Y.," "Super Quick," "Unlimited Talk," "Vietnam Best," and "World Link."

1 19. Defendants frequently market their prepaid calling cards for use in making calls
2 to destinations throughout the world, including, but not limited to, Cambodia, China, Guam,
3 India, Indonesia, Japan, Laos, Malaysia, Mexico, Myanmar, the Philippines, Saipan, Singapore,
4 South Korea, Taiwan, Thailand, and Vietnam.

5 20. Defendants market their prepaid calling cards to consumers through point-of-
6 sale posters, which they display on their website and distribute to sub-distributors and to retail
7 stores for display at the point of sale.

8 21. A typical poster for one of Defendants' calling cards includes the name of the
9 prepaid calling card (*e.g.*, "Call Me") and Defendants' corporate name, website address, and
10 logo.

11 22. Defendants' posters prominently display the number of calling minutes that the
12 advertised prepaid calling cards offer to specified destinations using large and colorful text
13 "bubbles." Each bubble contains the name of a particular calling destination (*e.g.*, "China")
14 and a representation of the number of calling minutes a consumer will receive for that
15 destination using the advertised prepaid calling card of a specified dollar face-value (*e.g.*, "per
16 \$5"). In numerous instances, the text bubbles displaying the calling minutes to particular
17 destinations are in large font and are emphasized through the use of bright color and prominent
18 placement on the posters. These posters are often displayed behind the sales counters of retail
19 stores, where consumers can see only the advertised minutes per card.

20 23. In numerous instances, in addition to such text bubbles, Defendants' posters also
21 display a table listing various international calling destinations, along with representations as to
22 the number of calling minutes a consumer will receive when calling each destination using the
23 advertised calling card of a specified dollar face-value.

24 24. In numerous instances, Defendants' posters also make representations about
25 fees, such as: "No Connection Fee," "No Fees," "True Minutes," and "No Maintenance Fee."
26 These representations appear at or near the top of the posters in large, bold font.

27 25. In spite of the prominent representations concerning no fees, the posters also
28 disclose, in tiny font at the bottom of the poster, that fees may reduce available calling minutes.

1 These disclosures are in contrast to the large and prominent display of calling minutes provided
2 for a specified dollar amount and the promise of no fees, and are neither prominent nor
3 adequate to fully disclose the actual minutes provided by the cards. These disclosures provide
4 only vague and inadequate information about the true costs and fees for the use of the cards.

5 For example, the English-language disclosure on the "Call Me" poster states in relevant part:

6 Surcharges and fees will affect actual number of minutes
7 delivered. International calls made to cellular phones and calls
8 via toll free numbers are billed at higher rates. Rates and fees are
9 subject to change without notice. Weekly maintenance fee and
10 network fee per call may apply. A payphone surcharge applies
11 per call. Card has no cash value and is not-refundable. Card is
12 valid for 3 months after first use.

11 Similarly, the disclosure on the "1¢ World" poster states in relevant part:

12 International calls made to cellular phones and calls via toll free
13 numbers are billed at higher rates. Services fees and other
14 charges may apply. Calls made from US payphone will have a
15 per call fee applied. Application of surcharges and fees may have
16 an effect of reducing total minutes on cards. Prices are subject to
17 change without notice. This card has no cash value. Card expires
18 3 Months after first use or 12 months after activation.

17 26. In addition to their point-of-sale posters, Defendants also advertise on the
18 Internet to market their prepaid calling cards, including but not limited to, on their website,
19 *www.drphonecom.com*. Like their posters, Defendants' website advertising typically offers
20 either no disclosures or vague, inadequate disclosures about the fees and charges associated
21 with their cards. Although the website contains statements that disclose that fees may reduce
22 available calling minutes, these disclosures are neither prominent nor adequate to fully disclose
23 actual minutes provided by the cards.

24 **Defendants' Prepaid Calling Cards**

25 27. Defendants' prepaid calling cards are printed on laminated paper and generally
26 come in two detachable portions: a top portion, or "tear-away," and a bottom portion, which is
27 the calling card. The back of Defendants' calling cards typically includes a scratch off area
28

1 which hides a personal identification number ("PIN") and contains local access numbers, a toll-
2 free access number, a customer service number, and the telecommunication provider's name.

3 28. In numerous instances, although the back of the tear-away of Defendants'
4 calling cards displays disclosures regarding fees and charges, these disclosures are difficult to
5 read because they are written in tiny font sizes, and they do not adequately disclose the true
6 costs and fees associated with the use of the prepaid calling cards. For example, the disclosures
7 on the tear-away of the "Call Me" card state in relevant part:

8 This card expires 3 months from first use, prices and fees are
9 subject to change without notice. Payphone surcharge of 99 cents
10 applies with payphone usage. Rates are higher when using 800
11 Access. Weekly maintenance fee may apply. Local or regional
12 company charges may apply.

13 **Using Defendants' Prepaid Calling Cards**

14 29. To make a phone call using one of Defendants' prepaid calling cards, a
15 consumer must first dial one of the access phone numbers printed on the card, enter the PIN
16 unique to the card and, when prompted, enter the phone number of the party the consumer is
17 trying to reach. After the consumer enters the PIN and destination phone number, an automated
18 voice (known in the industry as a "voice prompt") typically announces how much calling time
19 is on the card. For each subsequent phone call the consumer makes using the card and
20 associated PIN, the voice prompt announces the remaining minutes on the card.

21 30. Since at least September 2010, in numerous instances, the calling minutes
22 actually delivered to consumers by Defendants' prepaid calling cards were substantially fewer
23 than what was promised by Defendants in marketing, advertising, and promoting their cards.

24 31. The FTC purchased samples of Defendants' prepaid calling cards in San
25 Francisco in September 2010 and November 2011 for testing. In 169 tests of Defendants' cards
26 that were conducted between September 17, 2010 and December 30, 2011, all 169 -- or 100% --
27 of Defendants' cards failed to deliver the number of prominently advertised minutes on
28 Defendants' point-of-sale posters. Defendants' cards delivered an average of only 40.42% of
the prominently advertised minutes. Fifty-two of the tested cards delivered less than 25% of
the prominently advertised minutes, and 25 cards delivered less than 5% of the prominently

1 advertised minutes. The worst card delivered less than 1% of the prominently advertised
2 minutes.

3 32. For example, a poster advertising Defendants' "Call Me" cards promised that
4 with a \$5 card, consumers would obtain 70 minutes of call time to landlines in the Philippines.
5 Yet in a test of one of Defendants' "Call Me" cards, multiple calls to a landline in the
6 Philippines provided a total of only 30 minutes and 18 seconds of call time.

7 33. In another example, a poster advertising Defendants' "Cheap Talk" cards
8 promised that with a \$5 card, consumers would obtain 75 minutes of call time to landlines in
9 the Philippines. Yet in a test of one of Defendants' "Cheap Talk" cards, a single call to a
10 landline in the Philippines provided only 39 minutes and 7 seconds of call time.

11 VIOLATIONS OF THE FTC ACT

12 34. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive
13 acts or practices in or affecting commerce."

14 35. Misrepresentations or deceptive omissions of material fact constitute deceptive
15 acts or practices prohibited by Section 5(a) of the FTC Act.

16 36. As set forth below, Defendants, individually or in concert with others, have
17 violated Section 5 of the FTC Act.

18 **Count I**

19 **Deception—Misrepresentations Regarding Number of Calling Minutes**

20 37. In numerous instances, in connection with the advertising, marketing,
21 promotion, offering for sale, or sale of prepaid calling cards, Defendants have represented,
22 directly or indirectly, expressly or by implication, that consumers who purchase Defendants'
23 prepaid calling cards will receive a specified number of calling minutes to specific destinations.

24 38. The representation set forth in Paragraph 37 is false, misleading, and not
25 substantiated at the time the representation is made, or any combination of the foregoing.
26 Defendants' prepaid calling cards generally do not deliver the promised number of calling
27 minutes.
28

1 39. Therefore, the making of the representation as set forth in Paragraph 37 of this
2 Complaint constitutes a deceptive act or practice in or affecting commerce in violation of
3 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

4 **Count II**
5 **Deception—Failure to Disclose Fees**

6 40. In numerous instances, in connection with the advertising, marketing,
7 promotion, offering for sale, or sale of prepaid calling cards, Defendants have represented,
8 directly or indirectly, expressly or by implication, that consumers who purchase Defendants'
9 prepaid calling cards will receive a specified number of calling minutes to specific destinations.

10 41. In numerous instances in which Defendants have made the representation set
11 forth in Paragraph 40, Defendants have failed to disclose or disclose adequately to consumers
12 that fees will reduce the value of the prepaid calling cards, which in turn will reduce the number
13 of calling minutes provided to call specific destinations.

14 42. This additional information, described in Paragraph 41, would be material to
15 consumers in deciding whether to purchase Defendants' prepaid calling cards.

16 43. Defendants' failure to disclose or disclose adequately the material information
17 described in Paragraph 41 in light of the representation described in Paragraph 40 constitutes a
18 deceptive act or practice in or affecting commerce in violation of Section 5 of the FTC Act, 15
19 U.S.C. § 45(a).

20 **CONSUMER INJURY**

21 44. Consumers have suffered and will continue to suffer substantial injury as a result
22 of Defendants' violations of the FTC Act. In addition, Defendants have been unjustly enriched
23 as a result of their unlawful acts or practices. Absent injunctive relief by this Court, Defendants
24 are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

25 **THIS COURT'S POWER TO GRANT RELIEF**

26 45. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant
27 injunctive and such other relief as the Court may deem appropriate to halt and redress violations
28 of any provision of law enforced by the FTC. The Court, in the exercise of its equitable

1 jurisdiction, may award ancillary relief, including rescission or reformation of contracts,
2 restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and
3 remedy any violation of any provision of law enforced by the FTC.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiff, the FTC, pursuant to Section 13(b) of the FTC Act, 15 U.S.C.
6 § 53(b), and the Court's own equitable powers, requests that the Court:

7 A. Award Plaintiff such preliminary injunctive and ancillary relief as may be
8 necessary to avert the likelihood of consumer injury during the pendency of this action and to
9 preserve the possibility of effective final relief, including, but not limited to, a temporary
10 restraining order, a preliminary injunction, an accounting of assets, and appointment of a
11 temporary monitor;

12 B. Enter a permanent injunction to prevent future violations of the FTC Act by
13 Defendants;

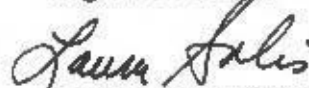
14 C. Award such relief as the Court finds necessary to redress injury to consumers
15 resulting from Defendants' violations of the FTC Act, including, but not limited to, rescission
16 or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-
17 gotten monies; and

18 D. Award Plaintiff the costs of bringing this action, as well as such other and
19 additional relief as the Court may determine to be just and proper.

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21 Dated: May 22, 2012

22 Respectfully Submitted,

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25 ROBERT J. SCHROEDER
26 Regional Director

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