

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA,
OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF LEGAL AFFAIRS,

Plaintiff,

vs.

CASE NO. _____

BUONGIORNO USA, INC.,

Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

Plaintiff, State of Florida, Office of the Attorney General, Department of Legal Affairs (the "Attorney General"), sues Defendant, Buongiorno USA, Inc., and alleges:

NATURE OF THE ACTION

1. This is an action for permanent injunctive relief and damages in excess of \$15,000.00, exclusive of interest, costs and attorney's fees, brought pursuant to Chapter 501, Part II, Florida Statutes (2007).

2. Attorney General Bill McCollum has determined that this enforcement action serves the public interest, as required by Section 501.207(2), Florida Statutes.

3. The statutory violations alleged herein occurred in numerous judicial circuits in the State of Florida. Venue is proper as this circuit has jurisdiction over multi-circuit matters brought by the Department of Legal Affairs, State of Florida pursuant to the provisions of Chapter 501, Part II, Florida Statutes.

THE PARTIES

4. The Attorney General is the enforcing authority for Chapter 501, Part II, Florida Statutes (the "Florida Deceptive and Unfair Trade Practices Act," hereinafter FDUTPA).

5. Defendant Buongiorno USA, Inc. ("Buongiorno") is a Florida corporation doing business at 235 Lincoln Road, Suite 400, Miami Beach, Florida 33139. Buongiorno also does business under the names "Dirty Hippo," "Blinko," and under other fictitious names.

FACTUAL ALLEGATIONS

6. Buongiorno develops and distributes products for mobile phones. These products, also known as ringtones, wallpaper, horoscopes, and other similar products, are usefully referred to as "mobile content." Via the internet, Buongiorno sells mobile content to consumers, including Florida residents, for use on their cellular phones and receives revenue for those sales by billing consumers through a consumer's wireless carrier. Since 2004, Buongiorno's charges have appeared on the monthly cell phone bills of thousands of Florida consumers.

7. Buongiorno's products were represented to be "Free", "Complimentary," and otherwise without charge without also, through those representations, providing clear and conspicuous disclosures to consumers that by accepting their "Free" offer they will be signed up for a costly subscription, and will be billed for this subscription on their monthly cell phone bill. Consumers, including minor children, were deceived by Buongiorno's practice of using the word "free" and its synonyms to represent the availability of its mobile content.

8. Beginning in or about June 2004, thousands of Florida consumers placed orders on Buongiorno's internet web pages for these "Free" products. At all times material to this action, Buongiorno and its advertisers did not clearly or conspicuously disclose in their advertising and order webpages that:

- a. the consumer would be enrolled into a subscription plan;
- b. the cost of the subscription plan;
- c. that the recurring monthly charges would be added to a consumer's cell phone bill;
- d. that the charges would continue until the consumer cancelled the plan; and
- e. how to cancel the plan.

Buongiorno also imposed numerous other material terms and conditions that were not clearly or conspicuously disclosed.

9. Many minor children with mobile phones have purchased Buongiorno products through webpages utilizing this deceptive advertising. Buongiorno enrolled these children into subscription plans which are, in fact, prenotification negative option contracts. Buongiorno then billed the account holders, i.e., the parent(s), for these unauthorized charges. In many instances, despite the fact that parents sought to void the contracts entered into by their children, Buongiorno continued to bill for these unauthorized charges.

10. Consumers were also charged by Buongiorno if those consumers were in possession of a recycled phone number, e.g., a cellphone number previously belonging to an individual billed by Buongiorno. Those consumers were simply enrolled, or

“crammed,” into Buongiorno’s subscription plans.

11. Buongiorno knew or should have known that its charges were unauthorized because Buongiorno’s advertising and billing practices were audited by wireless carriers such as AT&T. Buongiorno was aware that these program audits revealed that it was engaged in advertising and marketing practices that are likely to mislead a consumer acting reasonably in response to this advertising, to the consumer’s detriment. Nevertheless, Buongiorno continued to offer its mobile content on webpages that deceptively use the word “free” and its synonyms without also clearly and conspicuously disclosing all material terms and conditions attached to a consumer’s receipt of the “free” item.

12. Buongiorno knew or should have known that its charges were unauthorized because Buongiorno has been, and continues to be, contacted by thousands of irate consumers who had been billed for unauthorized charges. Consumers contacted Buongiorno seeking an explanation of the nature and origin of the subscription plan charges and to request removal and refund of such charges. Buongiorno often passed the consumer calls off to the wireless carrier or another entity without resolution. In many instances, Buongiorno responded to calls it received from account holders by indicating that it had no control over the charges and therefore could not stop or cancel them and that the wireless carrier only had such authority.

COUNT I
VIOLATIONS OF CHAPTER 501.201, ET.SEQ.
THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

13. The Attorney General repeats and realleges each and every allegation contained in paragraphs 1-12.

14. Section 501.204(1) of the Florida Deceptive and Unfair Trade Practices Act (the "Act") provides that "unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

15. Defendant's acts in connection with the sale of cell phone subscription plans involve the conduct of trade or commerce as defined in § 501.203(8), Fla. Stat.

16. Pursuant to § 501.207(1)(c), Fla. Stat., the Attorney General is authorized to seek damages and other statutory relief on behalf of consumers who have been damaged by violations of the Act. Consumers have suffered actual damages due to Defendant's violations of the Act.

17. As set forth in paragraphs 1-12, *supra*, Buongiorno has willfully engaged in and continues to engage in unconscionable acts or practices; has willfully engaged in and continues to engage in representations, acts, practices or omissions that are material, and that are likely to deceive consumers acting reasonably under the circumstances; and/or has willfully committed and continues to commit acts or practices in the conduct of trade or commerce that offend established public policy and are immoral, unethical, oppressive, unscrupulous or substantially injurious to Florida consumers. Thus, Defendants have willfully engaged in unconscionable, unfair or deceptive acts or practices in the conduct of any trade or commerce in violation of §

501.204(1), Fla. Stat.

18. Violations of the Act may also be based upon “[a]ny rules promulgated pursuant to the Federal Trade Commission Act ... [t]he standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts ... [or] [a]ny law, statute, rule, regulation or ordinance which proscribes unfair methods of competition, or unfair, deceptive or unconscionable acts or practices.” § 501.203(3)(a)-(c), Fla. Stat. The solicitation practices of Defendant Buongiorno further violate the Act because such practices are also prohibited by § 817.41(1), Fla. Stat., 16 C.F.R. § 425.1(a)(“Use of Prenotification Negative Option Plans”), 16 C.F.R. § 251.1(“Guide Concerning the Use of the Word “Free” and Similar Representations”) and § 817.415, Fla. Stat. (the “Florida Free Gift Advertising Act”).

Prayer for Relief

WHEREFORE, the Attorney General prays for judgment:

- a. Awarding the Attorney General actual damages on behalf of consumers injured by the unconscionable, unfair or deceptive acts or practices of Defendant, pursuant to § 501.207(1)(c), Fla. Stat.;
- b. Assessing civil penalties against Defendant up to the maximum amount permitted by §§ 501.2075 or 501.2077, Fla. Stat., as applicable, for each violation of the Act;
- c. Enjoining the Defendant from engaging in deceptive advertising and marketing practices, as described above;
- d. Requiring that Defendant disgorge all revenues generated as a result of their unconscionable, unfair or deceptive acts or practices set forth herein;
- e. Awarding reasonable attorneys’ fees and costs to the Attorney General, pursuant to

§§501.2105 and 501.2075, Fla. Stat.;

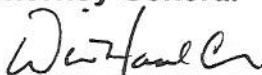
f. Any such other and further relief as the Court may deem just and proper, including injunctive or declaratory relief and/or relief pursuant to § 501.207(3), Fla. Stat.

Demand for Jury Trial

The Attorney General demands a trial by jury on all issues so triable.

Respectfully submitted,

BILL McCOLLUM
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