

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No.: 07-CIV-23348 COOKE/BANDSTRA

TRACFONE WIRELESS, INC., a Delaware corporation,

Plaintiff,

v.

MIRANDA HOLDINGS CORP., a Florida corporation, d/b/a Incomtel,
JEREMY LARA, individually, and d/b/a CELLPHONES WHOLESALE, INC., a Florida
corporation,
PABLO MARTIN AVELLANEDA, individually,
JOHN DOES 1-50, and XYZ COMPANIES 1-50,

Defendants.

FINAL JUDGMENT AND PERMANENT INJUNCTION AGAINST DEFENDANTS

Plaintiff, TracFone Wireless, Inc. (“TracFone”), brought the above-captioned lawsuit against Defendants, Miranda Holdings Corp., a Florida corporation, d/b/a Incomtel (“Miranda”), Jeremy Lara, individually and d/b/a Incomtel (“Lara”), Cellphones Wholesale, Inc., a Florida corporation (“CWI”), and Pablo Martin Avellaneda (“Avellaneda”) (Miranda, Lara, CWI, and Avellaneda are collectively referred to as “Defendants”), alleging that the Defendants are engaged in an unlawful enterprise involving the acquisition, sale and alteration of large quantities of TracFone and TracFone’s NET10 branded prepaid wireless telephones (“TracFone/NET10 Prepaid Phones” or “Phones”) purchased from various retail outlets such as Wal-Mart, Target and Sam’s Club, the solicitation and payment of others to bulk purchase TracFone/NET10 Prepaid Phones for Defendants’ benefit, computer hacking and erasing or otherwise disabling the prepaid software (“TracFone/NET10 Prepaid Software”) installed in the Phones essential for consumers to access TracFone’s prepaid wireless network, or reselling the Phones to others who disable the software, and ultimately selling the altered Phones as new under TracFone’s trademarks for the unauthorized use outside of the TracFone prepaid wireless system for profit (the “Bulk Resale Venture”).

TracFone/NET10 Prepaid Phones are sold subject to terms and conditions (“Terms and

Conditions”) which conspicuously restrict and limit the sale and use of TracFone/NET10 Prepaid Phones. These Terms and Conditions are set forth in printed inserts that are included in the packaging with every TracFone Phone, and are also available to the public on TracFone’s website. The Terms and Conditions are also referenced in printed warnings that are placed on the outside of the retail packaging of the Phones. The Terms and Conditions and language on the packaging constitute a valid binding contract.

Pursuant to the Terms and Conditions and the language on the packaging, purchasers of TracFone/NET10 Prepaid Phones agree: (a) to use the Phones only in conjunction with the TracFone/NET10 prepaid wireless service; (b) not to tamper with or alter TracFone/NET10 Prepaid Phones or the Phones’ software, enter unauthorized PIN numbers in the Phones, engage in any other unauthorized or illegal use of the Phones or the TracFone/NET10 service, or assist others in such acts; and (c) not to export any TracFone/NET10 Prepaid Phones outside of the TracFone/NET10 wireless system coverage area (“Coverage Area”). In violation of the Terms and Conditions, TracFone alleges that Defendants have, among other things, unlawfully exported TracFone/NET10 Prepaid Phones to foreign countries outside of the Coverage area or knowingly facilitated others who have done so; facilitated others to use the Phones without the TracFone/NET10 prepaid wireless service; and altered TracFone/NET10 Prepaid Phones and the Phones’ software or facilitated others who have done so.

As a result of Defendants’ alleged involvement in the Bulk Resale Venture, TracFone asserted claims against the Defendants for breach of contract; federal trademark infringement under 15 U.S.C. § 1114; federal unfair competition under 15 U.S.C. § 1125(a); common law unfair competition; contributory trademark infringement; copyright infringement under Title 17 of the United States Code; circumvention of copyrighted software protection systems and trafficking in circumvent technology under 17 U.S.C. § 1201, *et. seq.* as a violation of the Digital Millennium Copyright Act (“DMCA”); unfair competition and false advertising under Fla. Stat. 501.204;; civil conspiracy; conspiracy to induce breach of contract; and unjust enrichment.

Accordingly, it is hereby, **ORDERED, ADJUDGED** and **DECREED** that:

1. This Court has jurisdiction over all the parties and all of the claims set forth in TracFone’s complaint.
2. The Complaint states valid claims upon which relief may be granted against the

Defendants for: breach of contract; federal trademark infringement under 15 U.S.C. § 1114; federal unfair competition under 15 U.S.C. § 1125(a); common law unfair competition; contributory trademark infringement; copyright infringement under Title 17 of the United States Code; circumvention of copyrighted software protection systems and trafficking in circumvent technology under 17 U.S.C. § 1201, *et. seq.* as a violation of the DMCA; unfair competition and false advertising under Fla. Stat. 501.204;; civil conspiracy; conspiracy to induce breach of contract; and unjust enrichment.

3. The permanent injunction will not disserve the public interest.

4. The parties, in their Amended Stipulation for Entry of Final Judgment and Permanent Injunction Against Defendants, have stipulated and agreed:

That the Terms and Conditions constitute a valid binding contract enforceable against Defendants. That (a) facilitating others to use TracFone/NET10 Prepaid Phones in conjunction with service providers other than TracFone, (b) tampering with or altering TracFone/NET10 Prepaid Phones or the Phones' software, entering unauthorized PIN numbers in the Phones for purposes of unlocking or reflashing the Phones, or facilitating others in such acts, and/or (c) exporting TracFone/NET10 Prepaid Phones outside of the Coverage Area, or assisting others in such acts, respectively, constitute independent breaches of contract for which TracFone is entitled to relief.

That Defendants' participation in the Bulk Resale Venture has caused substantial and irreparable harm to TracFone, and will continue to cause substantial and irreparable harm to TracFone unless enjoined.

TracFone is entitled to injunctive relief and damages on the claims set forth in the Complaint.

On November 27, 2006, the Librarian of Congress, upon the recommendation of the Register of Copyrights, issued a Final Rule setting forth six (6) classes of copyrighted works

that are exempt from the provisions of the DMCA, including: Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network. 71 Fed. Reg. 68472 (Nov. 27, 2006) (amending 37 C.F.R. § 201.40(b)). This new exemption does not absolve the Defendants of liability for their violations of the DMCA as alleged in TracFone's complaint, because the Defendants' conduct as alleged in this case does not come within the scope of the new exemption. The Defendants' purchase and resale of the TracFone handsets was for the purpose of reselling those handsets for a profit, and not "for the sole purpose of lawfully connecting to a wireless telephone communication network." Because the exemption does not apply to the conduct alleged in this case, there is no need for the Court to address the validity of the exemption or the circumstances surrounding its enactment.

5. Final judgment is hereby entered, jointly and severally, against Defendants, Miranda Holdings Corp., a Florida corporation, d/b/a Incomtel, Jeremy Lara, individually and d/b/a Incomtel, Cellphones Wholesale, Inc., a Florida corporation, and Pablo Martin Avellaneda, and in favor of the Plaintiff, TracFone Wireless, Inc., on all of the claims set forth in TracFone's complaint, in the principal amount of FIVE MILLION DOLLARS AND ZERO CENTS (\$5,000,000.00), which shall bear interest at the legal rate, for which let execution issue forthwith.

6. If after the Judgment is satisfied, it is discovered that the parties to this action have violated the terms of this Permanent Injunction, the Court will order the payment of compensatory damages to TracFone Wireless, Inc. in the amount of FIVE THOUSAND

DOLLARS AND ZERO CENTS (\$5,000.00) for Each TracFone/NET10 handset that a Defendant is found to have purchased, sold or unlocked in violation of this Injunction. The Court finds that these amounts are compensatory and will serve to compensate TracFone for its losses in the event a Defendant violates the terms of this Permanent Injunction after the monetary portion set forth in paragraph 10 of the Final Judgment herein has been satisfied.

7. Defendants, and each and all of his, her and its past and present respective officers, directors, successors, assigns, parents, subsidiaries, affiliates, related companies, predecessors-in-interest, agents, employees, heirs, personal representatives, beneficiaries, relatives, and all other persons or entities acting or purporting to act for him/her/it or on his/her/its behalf, including but not limited to any corporation, partnership, proprietorship or entity of any type that is in any way affiliated or associated with any Defendant or any Defendant's representatives, agents, assigns, parent entities, employees, independent contractors, associates, servants, affiliated entities, and any and all persons and entities in active concert and participation with any Defendant who receive notice of this Order, shall be and hereby are

PERMANENTLY ENJOINED from:

- a. purchasing and/or selling any wireless mobile phone that they know or should know bears any TracFone Trademark, any other trademark owned or used by TracFone, or any other model of wireless mobile phone sold or marketed by TracFone ("TracFone/NET10 Handsets"). Specifically, the Defendants are enjoined from purchasing and/or selling all models of TracFone/NET10 Handsets currently offered for sale by TracFone, or that may be offered for sale in the future, as listed and updated from time to

time on TracFone's and NET10's websites,

http://tracfone.com/activation_pick_brand.jsp and www.net10.com,

including without limitation the following TracFone/NET10 handsets:

Motorola W370

Motorola C261

Motorola C139

Motorola V176

Motorola V170

Motorola V171

Motorola C155

Motorola C343

Nokia 2126

Nokia 2126i

Nokia 2600

Nokia 1100

Nokia 1112

Nokia 1600

Nokia 2285

LG 3280

LG CG225

LG 1500

- b. reflashing and/or unlocking of any TracFone/NET10 Handset;
- c. accessing, altering, erasing, tampering with, deleting or otherwise disabling TracFone's proprietary prepaid cellular software contained within any and all models of TracFone/NET10 Handsets;
- d. facilitating or in any way assisting other persons or entities who Defendants know or should know are engaged in reflashing and/or unlocking TracFone/NET10 Handsets and/or hacking, altering, erasing, tampering with, deleting or otherwise disabling the software installed in TracFone/NET10 Handsets;
- e. facilitating or in any way assisting other persons or entities who Defendants know or should know are engaged in any of the acts prohibited under this permanent injunction including, without limitation, the buying and/or selling of unlocked TracFone/NET10 Handsets; and
- f. knowingly using the TracFone Trademarks or any other trademark owned or used by TracFone, or that is likely to cause confusion with TracFone's Trademarks, without TracFone's prior written authorization.

8. The address of Defendant, Miranda Holdings Corp., a Florida corporation, is 10900 NW 21st Street, Suite 170, Miami, Florida 33172.

9. The address of Defendant, Jeremy Lara, individually and d/b/a Incomtel, is 10900 NW 21st Street, Suite 170, Miami, Florida 33172.

10. The address of Defendant, Cellphones Wholesale, Inc., a Florida corporation, is 5800 Logan Drive, Plano, Texas 75094.

11. The address of Defendant, Pablo Martin Avellaneda, is 10900 NW 21st Street, Suite 170, Miami, Florida 33172.

12. The address of Plaintiff, TracFone Wireless, Inc. is 9700 NW 112th Avenue, Miami, Florida 33178.

13. The Court retains jurisdiction over this matter and the parties to this action in order to enforce any violation of the terms of this Permanent Injunction by a finding of contempt. The prevailing party in any proceeding to enforce compliance with the terms of this Permanent Injunction shall be entitled to an award of its attorneys' fees and costs.

All pending motions are denied as moot, and the Clerk shall close this case.

DONE and ORDERED in chambers, Miami, Florida, this 29th day of July 2008.



MARCIA G. COOKE
United States District Judge

Copies furnished to:

The Hon. Ted E. Bandstra

Counsel of Record