

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JONATHAN MINTZ, Acting Commissioner of the
Department of Consumer Affairs of the City of New
York, and the CITY OF NEW YORK,

Plaintiffs,

05 CV 7100 (KMK)

-against-

("Action 1")

NEXTEL COMMUNICATIONS, INC

Defendant.

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JONATHAN MINTZ, Acting Commissioner of the
Department of Consumer Affairs of the City of New
York, and the CITY OF NEW YORK,

Plaintiffs,

05 CV 7130 (KMK)

-against-

("Action 2")

SPRINT SPECTRUM, L P

Defendants

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SPRINT NEXTEL CORPORATION,

Plaintiff,

05 CV 7812 (KMK)

-against-

("Action 3")

JONATHAN MINTZ, Acting Commissioner of the
Department of Consumer Affairs of the City of New
York, and the CITY OF NEW YORK

Defendants

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SETTLEMENT AGREEMENT

Now this 19th day of April 2006, come the parties Jonathan Mintz, the Commissioner
of Consumer Affairs for New York City (the "Department of Consumer Affairs" or

"Department"), by and through the undersigned Assistant Corporation Counsel for New York City, and Nextel Communications, Inc. ("Nextel"), Sprint Spectrum, L.P. ("Sprint") and Sprint Nextel Corp. ("Sprint Nextel"), through counsel of record (collectively, the "Parties") and state as follows:

WHEREAS, this Agreement is made and entered into by the Parties; and

WHEREAS, the Department filed suit against Nextel in the case styled *Mintz v. Nextel Communications, Inc.*, No. 05 CV 7100, currently pending in federal district court for the Southern District of New York, claiming violations of New York City's Consumer Protection Law ("CPL"), Administrative Code § 20-700 *et seq.*, and Title 6, Chapter 5 of the Rules of New York City ("R C N Y") ("CPL Rules"), specifically Sections 5-09 and 5-12. The complaint alleges that certain advertisements for Nextel-branded phones and mobile telephone services do not comply with the CPL and 6 R C N Y §§ 5-09 and 5-12; and

WHEREAS, the Department filed suit against Sprint in the case styled *Mintz v. Sprint Spectrum L.P.*, No. 05 CV 7130, currently pending in federal district court for the Southern District of New York, claiming violations of the CPL and Sections 5-06 and 5-09 of the CPL Rules. The complaint alleges that certain advertisements for Sprint-branded phones and mobile telephone services do not comply with the CPL and 6 R C.N.Y §§ 5-06 and 5-09; and

WHEREAS, Sprint Nextel filed suit against the Department in the case styled *Sprint Nextel Corp v Mintz*, No. 05 CV 7812, claiming violations of Article I, § 8 and Amendments 1 and 14 to the United States Constitution. The complaint seeks a declaratory ruling that the CPL's definition of "deceptive trade practices" and certain of the CPL Rules are unconstitutional, void, and of no effect; and

WHEREAS, the lawsuits filed by the Department and Sprint Nextel, identified above, collectively shall be referred to in this Agreement as "The Lawsuits;" and

WHEREAS, Sprint Nextel believes that its advertising has always been accurate and complete, and has always clearly and conspicuously disclosed all material terms and conditions, and Sprint Nextel specifically denies that it has violated any law and denies any liability in this matter. The Department also acknowledges that Sprint Nextel has not been adjudicated to have engaged in any violation of law, regulation, or rule; and

WHEREAS, the Department asserts that neither the CPL nor the CPL Rules are unconstitutional, and Sprint Nextel acknowledges that no court has concluded that the CPL's definition of "deceptive trade practices" and 6 R C N Y §§ 5-06, 5-09, and 5-12 are unconstitutional; and

WHEREAS, the Department asserts that *The New York Times* is a newspaper that is principally targeted to New York City and Sprint Nextel alleges that *The New York Times* is not principally targeted to New York City because of its belief that, *inter alia*, the majority of subscribers to *The New York Times* are domiciled outside of New York City; and

WHEREAS, the Department has alleged that certain independent retailers advertising for business in New York City have disseminated advertising for Sprint Nextel products and services that may be in violation of some of New York City's CPL and CPL Rules; and

WHEREAS, Sprint Nextel asserts that Sprint Nextel does not have the ability to control these separate and independent companies and that these independent retailers, and not Sprint Nextel, are ultimately responsible for ensuring that their advertising complies with all applicable laws, regulations, and rules; and

WHEREAS, Sprint Nextel does, however, affirm that it has the ability to monitor these independent retailers and enforce Sprint Nextel's contractual rights; and

WHEREAS, the Parties wish to resolve their differences amicably and without the additional time and expense attendant to litigation;

NOW, THEREFORE, having mutually agreed to the terms of this Agreement and acknowledging the exchange of valuable consideration referenced herein, it is hereby agreed by and between the Parties as follows:

I. DEFINITIONS

For purposes of this Agreement, the following definitions shall apply:

A "Clear and conspicuous" and "clearly and conspicuously" mean that the statement, representation, or term is so presented as to be easily read, readily apparent, and understood. Factors to be considered for this purpose include, but are not limited to, type size, font, color, contrast, and location within a printed advertisement and proximity to the offer to which it applies.

B "Material" information is information that is likely to affect a consumer's decision to purchase the advertised product or service.

C "Retailer" means one or more persons, a corporation, a partnership, or other entity, as the case may be, who is authorized by Sprint Nextel to advertise or promote Sprint Nextel products and services in New York City.

D "Cited Retailer" means Retailers who, on or about December 6, 2005, received DCA citations alleging violations of the CPL and CPL Rules in connection with their advertising of Sprint Nextel products and services. The Department's citations allege violations the same or similar to those alleged against Sprint Nextel. The six Retailers are:

American Connections, LLC (CL 73970); Choice Products & Services, Inc., (CL 73971); Mobileistic, Inc., (CL 73972); Smart Phone, LLC (CL 73973); Wireless Channels New York, Inc (CL 73974); and Wireless World Bronx, Inc. (CL 73975)

II. GENERAL PROVISIONS

A. Advertising. Sprint Nextel is committed to full and fair disclosure in its advertising and routinely monitors its advertising and advertising placed by independent retailers that feature Sprint Nextel products and services to ensure compliance with Sprint Nextel standards. Toward these ends, Sprint Nextel agrees to comply with the CPL and CPL Rules in advertisements placed by Sprint Nextel in newspapers and magazines principally targeted to New York City (e.g., *The Daily News, The New York Post, Metro New York, El Diario, New York Newsday, New York Sun, The New York Observer, Crains New York, AM New York, The Amsterdam News, New York Magazine, and Time Out New York*), and in *The New York Times*. Sprint Nextel also agrees to use its best efforts to ensure that retailers who advertise in newspapers and magazines principally targeted to New York City and in *The New York Times* disseminate truthful and non-misleading advertisements for Sprint Nextel products and services. Without limiting these obligations, Sprint Nextel acknowledges and agrees to the following with regard to the advertisements described in this paragraph:

1 Sprint Nextel advertisements that include the term "*FREE*" will clearly and conspicuously disclose any material limitations that apply to that offer.

2 If Sprint Nextel includes a phrase, such as "*Phones starting at \$XX*" or "*Plans starting at \$XX*," in an advertisement for two or more similar products or services, Sprint Nextel agrees to clearly and conspicuously disclose the highest price proximate to the lowest price, or the average price for such products or services

3 All material facts, terms, limitations, conditions, restrictions, or exclusions made in a Sprint Nextel advertisement that relate to an offer for a Sprint Nextel service or product will be clearly and conspicuously disclosed

4 A Sprint Nextel advertisement will not include one or more footnotes that alone or in combination, in fact, contradict a principal message of the advertisement. Statements made in such footnotes may clarify or further explain a message of the advertisement.

5 Sprint Nextel agrees to notify its Retailers who advertise in newspapers and magazines principally targeted to New York City and in *The New York Times* that advertising copy provided by Sprint Nextel to these Retailers must be used in a manner consistent with the terms of this Agreement. Sprint Nextel will monitor these Retailers' advertisements of Sprint Nextel products and services, in accordance with subparagraph 6 below. If and when Sprint Nextel learns that a Retailer is acting in violation of the requirements of this Agreement, Sprint Nextel will take appropriate steps in an effort to bring its Retailers into compliance with all relevant advertising laws and rules.

6 Sprint Nextel also agrees to the following monitoring and enforcement procedures related to the separate and independent marketing activities of Retailers who advertise in newspapers and magazines principally targeted to New York City and in *The New York Times*:

a Within fifteen (15) days of the Effective Date of this Agreement, Sprint Nextel will notify these Retailers in writing of the advertising

requirements set forth in this Agreement and provide them with a copy of this Agreement

b Sprint Nextel also will notify these Retailers and future Retailers who advertise in newspapers and magazines principally targeted to New York City and in *The New York Times* in writing that they must comply with the requirements set forth in this Agreement

c Sprint Nextel will affirmatively remind these Retailers of their contractual obligations with Sprint Nextel, which include compliance with all relevant federal and state laws and regulations. Current Sprint Nextel Retailers that advertise in newspapers and magazines principally targeted to New York City and in *The New York Times* will have forty-five (45) days from the date of execution of this Agreement to bring their advertising into compliance. The Department specifically reserves the right to take any and all appropriate action against any advertisements by Sprint Nextel Retailers in newspapers and magazines principally targeted to New York City and in *The New York Times* that do not comply with the terms of this Agreement after the expiration of the forty-five (45) day grace period that is set forth herein.

d Sprint Nextel will investigate complaints made to it by consumers or regulatory agencies regarding these Retailers' advertising, and will take appropriate action against any such Retailer that it has found to be in violation of the requirements of this Agreement. Appropriate action may include retraining and other disciplinary measures.

accordance with the substantive law of the State of New York, without regard to its conflict of laws and/or choice of laws provisions

E. Entire Agreement. This Agreement contains the full, complete, and integrated statement of each and every term and provision agreed to by and among the Parties and supersedes any prior writings or Agreements between or among the Parties, which prior Agreements may no longer be relied upon for any purpose. This Agreement shall not be orally modified in any respect and can be modified only by the written Agreement of the Parties supported by acknowledged written consideration. In the event a dispute arises between the Parties over the meaning, scope, or intent of this Agreement, the Parties agree that prior drafts, notes, memoranda, discussions, or any other oral communications or documents regarding the negotiations, meaning, or intent of this Agreement shall not be offered or admitted into evidence.

F. Joint Drafting. This Agreement shall be deemed to have been jointly drafted by the Parties.

G. Release. The Parties acknowledge that execution of this Agreement constitutes a complete settlement and release by the Parties of all claims, causes of action, damages, fines, costs, and penalties that were asserted or could have been asserted by Sprint Nextel or the Department on or prior to the effective date of this Agreement against the Department or Sprint Nextel and/or any of Sprint Nextel's respective past and/or present parents, subsidiaries, affiliates, representatives, predecessors, successors, administrators, employees, shareholders, officers, directors, attorneys, agents, servants, and/or assigns (each a "Releasee") that were or could have been raised that relate to or are based on the subject matter of The Lawsuits (each a "Released Claim"). In addition, upon execution of this

Agreement, and upon the execution of Assurances of Discontinuance with each separate Cited Retailer, the Department agrees to withdraw the citations issued to the Cited Retailers, and it agrees that it will not issue any Notices or any other type of complaint for similar alleged advertising violations against Retailers for activity prior to the effective date of this Agreement

H. Severability. If a court of competent jurisdiction declares any provision of this Agreement invalid or determines that any of the provisions encompassed by this Agreement are unconstitutional, then any such provisions so affected will become void, but the remainder of the Agreement shall remain in place.

III. OTHER PROVISIONS

A Settlement Amount: Sprint Nextel shall, within fifteen (15) business days of execution of this Agreement, deliver to the Department a payment by check payable to the Department in the amount of \$295,000 00, as follows: (1) \$ 125,000 00 shall be for settlement of the Lawsuit against Sprint, for costs and expenses incurred by the Department in the investigation and prosecution of the Lawsuit against Sprint, and settlement of all advertising charges under the CPL or CPL Rules that the Department could have brought against Sprint as part of Sprint Nextel on or before the date of execution of this Agreement; (2) 100,000 00 shall be for settlement of the Lawsuit against Nextel, for costs and expenses incurred by the Department in the investigation and prosecution of the Lawsuit against Nextel, and settlement of all advertising charges under the CPL or CPI Rules that the Department could have brought against Nextel as part of Sprint Nextel on or before the date of execution of this Agreement; and (3) \$70,000.00 shall be for settlement of citations issued against the six Cited Retailers Sprint Nextel understands and agrees that these matters shall not be considered

resolved until this Agreement has been fully executed and the settlement amount stated herein is paid in full

B. **Inadvertent Error:** Inadvertent error that results in a temporary failure to comply during a period of otherwise sustained compliance will not constitute failure to comply with this Agreement. Sprint Nextel shall have the burden of proving to DCA that the non-compliance was a result of inadvertent error. Sprint Nextel does not waive its right to raise as a defense in any future actions, that any alleged failure to comply with this Agreement was a result of inadvertent error.

C. **Effective Date:** Unless otherwise specified herein, the obligations set forth in this agreement shall be effective as of the date of execution of this Agreement.

D. **Binding Agreement:** This settlement agreement is binding on the parties hereto and their respective successors, heirs, legal representatives, and assigns.

IV. DISMISSAL

Upon execution of this Agreement and payment of the sum set forth above, the Department shall execute and file a Dismissal with Prejudice and without costs in the pending Lawsuits, as shown by Exhibits A and B, and Sprint Nextel shall execute and file a Dismissal with Prejudice and without costs in the pending lawsuit, as shown by Exhibit C, incorporated herein by this reference.

Agreed to by:

Accepted for
Michael Cardozo, Esq
Corporation Counsel of the City of New York; and

Jonathan Mintz

Commissioner of the New York City Department of Consumer Affairs
by:



[Redacted]
Senior Assistant Corporation Counsel
New York City Law Department
100 Church Street
New York, NY 10007-2601

Date: 4/17/06



Staff Counsel
New York City Department of Consumer Affairs
42 Broadway
New York, NY 10004

Date: 4/18/06



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Date: 4-10-06

