United States District Court
Southern District of Texas
Houston Division

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

MAR 17 1995

Michael N. Milby, Clerk

HOUSTON CELLULAR TELEPHONE COMPANY,	§	
Plaintiff,	§	
versus	§	CIVIL ACTION H-95-617
JOHN C. NELSON, Doing Business as Both Cell Time Cellular and Action Cellular and DANNY HART, Doing Business as Action Cellular and ACTION CELLULAR EXTENSION, Inc.,	§	
Defendants.	§	

PERMANENT INJUNCTION

A. *Findings.*

Based on the stipulations and evidence, the court makes these findings:

1. John C. Nelson, Jr., who has done business as Call Time Cellular and who is a representative of Action Cellular Extensions, Inc., has engaged in the emulation of the electronic serial numbers of cellular telephones since August 9, 1994.

2. Daniel K. Hart, as a representative of Action Cellular Extensions, Inc., has engaged in the emulation of the electronic serial numbers of cellular telephones since December 15, 1994.

3. Action Cellular Extensions, Inc., has engaged in the emulation of the electronic serial numbers of cellular telephones since December 15, 1994.

4. On May 4, 1981, after notice in the Federal Register, the Federal Communications Commission issued the Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment to Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems. (86 F.C.C. 2d 469 (1981). It adopted the technical specifications for cellular telephones that each telephone have a unique electronic serial number. This order was published in the

Federal Register on May 21, 1981 (46 Fed. Reg. 27655) with corrections on June 16, 1981 (46 Fed. Reg. 31417).

5. On September 9, 1994, after notice in the Federal Register, the FCC issued the Revision of Part 22 of the Commission Rules Governing the Public Mobile Services (9 FCC Rcd 6513 (1994). This FCC order was published in the Federal Register on November 17, 1994 (59 Fed. Reg. 59502).

6. Houston Cellular has suffered irreparable damage as a consequence of defendants' emulation of the electronic serial numbers of cellular telephones for which it is the carrier. The defendants' actions have deprived Houston Cellular of monthly access charges and other per unit charges its customers would owe for additional connections.

7. Although the damage is describable, Houston Cellular cannot reliably quantify it, making the legal remedy inadequate.

8. The acts of the defendants are analogous to their having installed unauthorized access to a cable television network. This piracy injures the utility and its legitimate customers.

9. No unrepresented third-party nor any diffuse public interest is adversely affected by the restrictions this injunction imposes on Nelson and Hart.

B. *Conclusions.*

1. The FCC orders were regularly made, published in the Federal Register, and served on defendants by publication. 5 U.S.C. § 552(a)(1). *See also, Fed. Crop Ins. v. Merrill*, 332 U.S. 380, 384-85 (1947).

2. These orders adopted by the FCC constitute orders within the meaning of § 401(b) (47 U.S.C. § 401(b)) of the Communication Act of 1934.

3. Emulation of the electronic serial numbers of cellular telephones by Nelson, Hart, and Action Cellular Extensions, Inc., violates the two FCC orders.

4. Section 401(b) of the Communication Act of 1934 expressly authorizes injunctive relief for a party injured by disobedience of an FCC order. The prerequisite of irreparable injury need not be established where such injunctive relief is expressly authorized by statute. *United States v. Hayes Int'l Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969); *Graham v. Windwah Partners*, 730 F.2d 1417, 1423 (11th Cir. 1984). Although Houston Cellular need only demonstrate that it has been injured to satisfy this standard, having found that it was in fact irreparably injured by defendants' acts and in an amount not susceptible to calculation, the court concludes that injunctive relief is available at common law.

C. *Injunction.*

Based on these findings and conclusions, John C. Nelson, Jr., Daniel K. Hart, and Action Cellular Extensions, Inc., are enjoined permanently from emulating electronic serial numbers of cellular telephones for which Houston Cellular is the carrier.

This restriction binds them and all those who may knowingly act in concert with them, including employees, agents, and consumers.

1. Specifically, the defendants are enjoined from altering, transferring, emulating or manipulating electronic serial numbers of cellular telephones for which Houston Cellular is the carrier except in strict compliance with the FFC orders.

2. The defendants shall produce immediately to Houston Cellular these documents, including those seized by the United States Marshal and others in their possession or within their access:

   A. All lists, files, records, or other information containing names, addresses, or telephone numbers of entities for whom they altered, transferred, emulated, or manipulated the electronic serial numbers of cellular telephones from January 1, 1990, to March 15, 1995.

   B. All advertisements, brochures, or other documents that advertised services to the public for altering, transferring, emulating, or manipulating the electronic serial numbers of cellular telephones.

   C. Documents in their possession that identify other entities which offer services to alter, transfer, emulate or manipulate the electronic serial numbers of cellular telephones.

   D. Documents evincing a business relation or transaction with Technology, Inc.

   E. A complete copy of all data on any storage medium, including paper-based, fixed-disk, and removable-disk data (hard, removable, floppy, optical, and tape drives and RAM). Houston Cellular will reimburse the defendants for copying costs incurred in producing a hard copy.

3. With the exception of Houston Cellular subscribers' service orders or contracts, the defendants are entitled to retain the originals of those documents, providing Houston Cellular with photocopies. The defendants may retain photocopies of the Houston Cellular subscribers' service orders or contracts only for the purpose of assisting in re-emulation. The defendants will surrender to Houston Cellular all photocopies at the completion of the re-emulation or upon written request of Houston Cellular.

4. This order does not require that the defendants produce C2+ Technology, Inc., proprietary information, equipment, or accessories in any form.

5. This is a final judgment. The court retains jurisdiction to enforce the injunction and the settlement from which it arose.

Signed March 15, 1995, at Houston, Texas.

Lynn N. Hughes
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED

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U.S. DISTRICT COURT
EASTERN DISTRICT OF MO
ST. LOUIS

SOUTHWESTERN BELL MOBILE SYSTEMS, INC.,

Plaintiff,

v.

CELL PHONE EXTENSIONS, INC.,

Defendant,

CYBERTEL CORPORATION, General Partner of CYBERTEL CELLULAR TELEPHONE COMPANY,

and

AMERITECH MOBILE COMMUNICATIONS, INC.,

Plaintiff-Intervenors,

v.

CELL PHONE EXTENSIONS, INC.,

Defendant.

No. 4:95-CV-796-CAS

DELIVERED MAY 25 1995

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter is before the Court on plaintiff Southwestern Bell Mobile Systems' and plaintiff-intervenors CyberTel Corporation, General Partner of CyberTel Cellular Telephone Company and Ameritech Mobile Communications, Inc.'s (collectively "plaintiffs") separate, but substantially similar, pleadings entitled "Original Complaint and Request for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction" and "Complaint in Intervention"; and defendant Cell Phone Extensions, Inc.'s ("CPE") motion to dismiss.

The parties submitted evidence at a hearing conducted on May 18, 1995, and May 19, 1995. This hearing was originally designated as a hearing on plaintiffs' motions for preliminary injunction. At the conclusion of the hearing, CPE requested that trial of the case be advanced and consolidated with trial on the merits as permitted by Rule 65, Fed.R.Civ.P.

Based upon the pleadings and evidence in support thereof submitted by the parties, the Undersigned finds:

1. Plaintiffs are licensed by the Federal Communications Commission (FCC) to provide cellular communications services in the St. Louis metropolitan area.

2. CPE is a Missouri corporation having its principal office in Des Peres, Missouri. CPE is not licensed by the FCC to operate a cellular telephone network.

3. On September 9, 1994, the FCC published its Report and Order No. 94-210 pertaining to the revision of Part 22 of the FCC's rules. The Report and Order was published in full in the Federal Communications Commission Reporter at 9 FCC Rcd No. 23. Notice of the Report and Order and the Final Rules adopted pursuant to Report and Order No. 94-210 were published in the Federal Register on November 17, 1994.

4. Since 1981, the FCC has continuously required that each cellular telephone have a unique Electronic Serial Number ("ESN") assigned to it by its manufacturer. Originally, this requirement was found at Section 2.3.2 of the FCC's Mobile Station-Land Station Compatibility Specification adopted in FCC Rule 22.915 (now 47

C.F.R. § 22.933.. See 46 F.R. 27665 (May 21, 1981). The Requirement is now also set forth at 47 C.F.R. § 22.919 (1995) adopted pursuant to the Report and Order No. 94-210.

5. Licensed operators of cellular networks, such as plaintiffs, authorize their subscribers to use specific cellular telephones on the operator's network and assign a Mobile Identification Number ("MIN") to each of the subscribers to their service. The subscriber's authorized cellular telephone is programmed to respond to the assigned MIN. Licensed cellular network operators, including plaintiffs, rely on the uniqueness of the ESN and MIN in each cellular telephone to enable the operators to accurately transmit calls between callers and their intended recipients and to accurately bill subscribers for their use of the cellular network.

6. Plaintiffs each contract with their subscribers that only one cellular telephone will be programmed to respond to the MIN assigned to the subscriber by the cellular network operator. CPE's president, Raymond Kohout, has entered into agreements with plaintiffs which so provide, and both of CPE's employees (Todd Maleki and Susan Murphy) have entered such agreements with each plaintiff.

7. CPE was organized for the specific purpose of marketing a service by which a cellular telephone's factory assigned and installed ESN is removed from the cellular telephone and replaced with the ESN assigned to a cellular telephone that has been activated for use on plaintiffs' cellular networks. The cellular

telephone with the altered ESN is programmed with the MIN assigned to a cellular subscriber. The altered cellular telephone then "emulates" a cellular telephone authorized for use on a cellular network. In exchange for this "emulation" service, CPE charges a fee, generally Two Hundred Fifty Dollars ($250.00).

8. Prior to the time CPE commenced its operations (in March 1995), CPE's president, Raymond Kohout, was aware of the FCC's Rule relating to ESN's in cellular telephone and the FCC's conclusion, stated in a January 15, 1993, letter, that:

> It is a violation of Section 22.915 of the Commission's Rules for an individual or company to alter or copy the ESN of a cellular telephone so that the telephone emulates the ESN of any other cellular telephone. Moreover, it is a violation of the Commission's Rules to operate a cellular telephone that contains an altered or copied ESN.

9. After CPE commenced operations and began soliciting customers for its "emulation" service, plaintiff Southwestern Bell Mobile Systems Inc.'s attorney's provided written notice to CPE that such emulation is prohibited by the FCC's Rules.

10. CPE persisted in advertising and in providing emulation services to its customers. Prior to the entry of the Temporary Restraining Order in this action, CPE had emulated the cellular telephones of at least 29 subscribers to the cellular telephone services of plaintiffs. Although CPE claims to have ceased to provide emulation services upon service of the temporary restraining order entered in this case, CPE has continued, even through the hearing in this matter, to publicly advertise the availability of such services from it and to identify customers for

whom emulations will be performed in the event that CPE is no longer enjoined from providing such service.

11. Plaintiffs have been and are being injured as a result of CPE's emulation of the ESNs and MINs of cellular telephones authorized by plaintiffs for use on their cellular networks in that:

A. plaintiffs' cellular networks are being used by unauthorized transmitters (cellular telephones) in violation of the terms of plaintiffs' licenses from the FCC;

B. plaintiffs are being deprived of activation fees, monthly access fees and air time charges to which they are entitled for the use of their cellular networks, and their costs of operation are increased; and

C. the goodwill of plaintiffs with their customers is being adversely affected.

12. The injuries that have been, are being and will be sustained by plaintiffs are not quantifiable with reasonable certainty.

Conclusions of Law

Plaintiffs seek injunctive relief and bring this action pursuant to 47 U.S.C. § 401(b) and Federal Rule of Civil Procedure 65. 47 U.S.C. §401(b) provides:

> (b) If any person fails or neglects to obey any order of the [FCC] other than for the payment of money, while the same is in effect, the [FCC] or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in

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disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

CPE moves to dismiss the complaints, arguing (i) the Court lacks subject matter jurisdiction, and (ii) plaintiffs cannot establish an entitlement to injunctive relief under Database Systems, Inc. v. C. L. Systems, Inc., 640 F.2d 109 (8th Cir. 1981).

A complaint is not to be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The allegations of the complaint must be assumed to be true and construed in the plaintiff's favor. Scheuer v. Rhodes, 416 U.S. 232, 236 (1976). The issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence in support of his claims. Id.

In its motion to dismiss, CPE asserts that this Court lacks jurisdiction because plaintiffs are seeking to enforce rules promulgated by FCC and not "orders" as provided in Section 401(b). In support of this assertion, CPE relies upon New England Tel & Tel. Co. v. Public Utilities Commission of Maine, 742 F.2d 1, 2-9 (1st cir. 1984), cert. denied, 476 U.S. 1174 (1986). There, the First Circuit held that an order resulting from a rulemaking proceeding is not a reviewable order under Section 401(b). However, numerous other circuits have reached the opposite conclusion. These courts have found that such an order is

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reviewable under section 401(b). See Alltel Tennessee, Inc. v. Tennessee Public Service Comm'n, 913 F.2d 305, 308 (6th Cir. 1990); Hawaiian Tel. Co. v. Public Util. Comm'n, 827 F.2d 1264, 1270-72 (9th Cir. 1987), cert. denied, 487 U.S. 1213 (1988); Chesapeake & Potomac Tel. Co. v. Public Serv. Comm'n, 748 F.2d 879, 880-81 (4th Cir. 1984), vacated and remanded for proceedings consistent with Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 445 (1986); South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n, 744 F.2d 1107, 1115 (5th Cir. 1984), vacated and remanded for consideration in light of Chesapeake & Potomac, 476 U.S. 1166 (1986); Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 740 F.2d 566, 571 (7th Cir. 1984); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 738 F.2d 901 (8th Cir. 1984), vacated and remanded for consideration in light of Chesapeake & Potomac, 476 U.S. 1167 (1986). This Court will follow the majority of circuits. "Congress, rather than attempting to limit §401(b) exclusively to adjudicatory orders, intended that a broad range of orders be reviewable under §401(b)." Alltell Tennessee, Inc., 913 F.2d at 308. The instant FCC rules clearly prohibit emulating the ESN's of cellular telephones. Therefore, the Court finds the rules are a reviewable and enforceable orders under section 401(b)

Alternatively, CPE has moved to dismiss arguing that plaintiffs cannot satisfy the traditional prerequisites for injunctive relief under Dataphase. This Court finds that the Dataphase test is not applicable in this case. Plaintiffs may enforce the instant FCC order under section 401(b) through

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injunctive relief if the order was (i) regularly made; (ii) duly served; (iii) disobeyed by CPE; and (iv) plaintiffs were thereby injured. See Southwestern Bell Tel. Co., 738 F.2d at 908. "Only the statutory criteria need be satisfied and that the traditional equitable standard is not applicable where, as in this case, we have a clear violation of a self executing order of an administrative agency, see 47 U.S.C. § 408, which is accorded the same preemptive effect as a federal statute." Id. (citations omitted).

Based upon the findings of fact above, the Court determines that plaintiffs have a right to injunctive relief under 47 U.S.C. § 401(b). Specifically, the Court concludes (i) the FCC's Order was regularly made and duly served upon CPE; (ii) the emulation of the ESNs of cellular telephones and the use of cellular telephones with altered ESNs violates the FCC's Report and Order No. 94-210 and FCC regulation 22-919 adopted pursuant to such Report and Order, and by emulating cellular telephones, CPE is knowingly disobeying such Order; (iii) unless CPE is enjoined, it will continue to violate such Order; and (iv) plaintiffs have been thereby injured. Therefore, defendant's motion to dismiss will be denied, and plaintiffs will be granted injunctive relief.

Accordingly,

IT IS HEREBY ORDERED that CPE's motion to dismiss, filed May 17, 1995, is **DENIED**.

IT IS FURTHER ORDERED that:

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1. CPE, its officers, agents, servants, employees and attorneys and those persons in active participation with them who receive actual notice of this Order by personal service or otherwise, are hereby permanently enjoined from altering, transferring, emulating or manipulating the ESNs on cellular telephones.

2. The bonds posted by or on behalf of plaintiffs, pursuant to Orders previously issued by the Court, are released and discharged.

3. Plaintiffs are hereby released from the restrictions previously imposed on the use of information obtained in discovery concerning the identities of CPE's customers and its vendors.

4. Plaintiffs shall recover their costs from CPE.

5. Final Judgment is entered accordingly.

CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 24th day of May, 1995.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BELLSOUTH MOBILITY, INC., a Georgia Corporation; GTE MOBILNET, INC., a Delaware Corporation; CONTEL CELLULAR, INC., a Delaware Corporation,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	FILE NO. CV-95-C-0162-S
C-TWO PLUS TECHNOLOGY, INC., an Alabama Corporation,	)	
Defendant.	)	

FIRST AMENDED COMPLAINT

Plaintiffs BellSouth Mobility, Inc. ("BellSouth Mobility"), GTE Mobilnet, Inc. ("GTE Mobilnet"), and Contel Cellular, Inc. ("Contel Cellular") (hereinafter collectively referred to as "Plaintiffs"), hereby file this First Amended Complaint for declaratory judgment and injunctive relief against the Defendant C-Two Plus Technology, Inc. ("C-Two"), and allege as follows:

PARTIES AND JURISDICTION

Plaintiff BellSouth Mobility is a citizen and resident of the State of Georgia, being a corporation organized and existing under the State of Georgia and having its principal place of business in Atlanta, Georgia. BellSouth Mobility is licensed by the Federal Communications Commission ("FCC") to be a cellular telephone carrier in certain geographic regions.

EXHIBIT A

Plaintiff GTE Mobilnet is a citizen and resident of the States of Delaware and Georgia, being a corporation organized and existing under the laws of the State of Delaware and with its principal place of business in Atlanta, Georgia. GTE Mobilnet is licensed by the FCC to be a cellular telephone carrier in certain geographic regions.

Plaintiff Contel Cellular is a citizen and resident of the States of Delaware and Georgia, being a corporation organized and existing under the laws of the State of Delaware and with its principal place of business in Atlanta, Georgia. Contel Cellular is licensed by the FCC to be a cellular telephone carrier in certain geographic regions.

Defendant C-Two is a citizen and resident of the State of Alabama, being a corporation organized and existing under the laws of the State of Alabama and having its principal place of business in the State of Alabama. C-Two is in the business of:

a. altering a cellular telephone's unique Electronic Serial Number (hereinafter "ESN") to match another cellular telephone's unique ESN; and/or,

b. altering a cellular telephone's transmission of its ESN to mimic another cellular telephone's unique ESN; and/or,

c. producing software to allow itself and/or others to alter a cellular telephone's unique ESN or alter the transmission of a cellular telephone's ESN to match or mimic another cellular telephone's unique ESN; and/or,

d. producing hardware to allow itself and/or others to alter a cellular telephone's unique ESN or alter the transmission of a cellular telephone's ESN to match

or mimic another cellular telephone's unique ESN; and/or,

e. selling or otherwise transferring software which allows others to alter a cellular telephone's unique ESN or alter the transmission of a cellular telephone's ESN to match or mimic another cellular telephone's unique ESN; and/or,

f. selling or otherwise transferring hardware which allows others to alter a cellular telephone's unique ESN or alter the transmission of a cellular telephone's ESN to match or mimic another cellular telephone's unique ESN.

This action involves an amount in controversy that exceeds $50,000, exclusive of interest and costs.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (Federal Question Jurisdiction) because the action involves claims arising under the laws of the United States.

In addition, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 (Diversity Jurisdiction) because the action is between citizens of different states and the amount in controversy exceeds $50,000, exclusive of interest and costs.

FACTS COMMON TO ALL COUNTS

A cellular telephone is a wireless transmitter and receiver that allows a person to place and receive telephone calls without being connected directly to the wire-lined telephone system.

When a person makes a cellular telephone call, the cellular telephone transmits three signals to the local cellular carrier: (i) the number dialed, (ii) the telephone's ESN, which is the unit's manufacturer-installed serial number, and (iii) the telephone's Mobile Identification Number (hereinafter "MIN"), which is the unit's assigned ten-digit telephone number.

The ESN and generally the MIN are unique to each cellular telephone so that the cellular telephone carriers can identify which cellular telephone places which calls.

If a person makes a call within a subscriber's home territory, the home cellular carrier can verify whether the telephone's ESN and MIN match before the carrier completes the call. However, if the person makes the call outside of the subscriber's home territory, the local carrier cannot confirm the validity of the telephone's ESN and MIN.

Instead, the local cellular carrier generally forwards the telephone's ESN and MIN to a nationwide verification service, which confirms the validity of the ESN and MIN. This verification can sometimes take as long as an hour to complete. Consequently, a cellular telephone that emits an altered ESN can "trick" the cellular telephone system into processing its calls as if the calls were being placed by a different cellular telephone.

Thus, a person using a cellular telephone with an altered ESN has a large window of opportunity to commit fraud on the local cellular carrier by charging his calls to a non-existent telephone or to a different telephone without that subscriber's authorization.

This deception also disrupts cellular telephone service, increases billing errors, diminishes the quality of service, deprives carriers of monthly per telephone revenues, and devalues the cellular telephone industry's goodwill. See, e.g., FCC Report and Order, Adopted August 2, 1994, & Released September 9, 1994, ¶ 60 (attached).

Since at least October, 1991, the FCC's position has been that "[p]hones with altered ESNs do not comply with the Commission's rules and any individual or company operating such phones or performing such alterations is in violation of Section 22.915 of the Commission's rules and could be subject to appropriate enforcement action." FCC Public Notice of October 2, 1991, Report No. CL-92-3 (attached); see also FCC Letter from John Cimko to Michael Altschul dated January 15, 1993 (attached).

The FCC recently refined this position by amending its rules on August 2, 1994, so as to restate and again make clear that every cellular telephone must have a unique ESN. Public Mobile Services, 59 Fed. Reg. 59,564 (1994) (to be codified at 47 C.F.R. § 22.919).

In promulgating these rules, the FCC specifically stated that "any individual or company that knowingly alters cellular telephones to cause them to transmit an ESN other than the one originally installed by the manufacturer is aiding in the violation of [the FCC's] rules." Moreover, the FCC specifically referenced C-Two when it advised "all cellular licensees and subscribers that the use of the C2+ altered cellular telephones constitutes a violation of the Act and [the FCC's] rules." FCC Report and Order, Adopted August 2, 1994, & Released September 9, 1994, ¶ 62 (attached).

The FCC further concluded that altering a cellular telephone to "emulate" the ESN of another telephone should not be allowed because (i) the simultaneous use of phones emitting the same ESN could create problems in some cellular systems; (ii) "fraudulent use of such phones without the licensee's permission could deprive cellular carriers of monthly per telephone revenues to which they are entitled;" and (iii) unauthorized, altered cellular telephones would fall outside of the licensee's blanket license and would be unlicensed transmitters in violation of 47 U.S.C. § 301. FCC Report and Order, Adopted August 2, 1994, & Released September 9, 1994, ¶ 60 (attached).

Likewise, in October, 1994, Congress passed the Communications Assistance for Law Enforcement Act which, among other things, amended 18 U.S.C. § 1029 to make it a felony to knowingly and with intent to defraud use, produce, traffic in, control or have custody of, or possess (i) a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications services, or (ii) hardware or software used for altering or modifying telecommunications instruments to obtain unauthorized access to telecommunications services.

C-Two is collaterally estopped from litigating certain issues in this case because the United States District Court for the Southern District of Texas has already made specific conclusions on these issues in an action involving at least one agent of C-Two. See Houston Cellular Tel. Co. v. Nelson, Civ. Action No. H-95-617 (S.D. Tex. March 15, 1995) (attached); see also Complaint filed in Houston Cellular (attached). The Houston Cellular court's conclusions were final. No one has appealed the court's conclusions, and the time to appeal has now passed. In addition, the Houston Cellular Permanent Injunction prohibits, by its own terms, the conduct of C-Two that is at issue in this case. C-Two has been or should be enjoined from violating the FCC's rules orders pursuant to 47 U.S.C. §401(b) and other applicable authorities.

COUNT ONE

Plaintiffs incorporate by reference paragraphs 1 to 20.

This is a claim pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57 to have this Court issue a declaratory judgment holding that C-Two's conduct prior to December 31, 1994, violated the FCC's rules (as those rules existed until December 31, 1994) and order any other necessary or proper relief based on such declaratory judgment because there exists a substantial and actual controversy between the parties.

Before December 31, 1994, C-Two violated Section 22.915 of the FCC's rules by altering cellular telephones' unique ESNs or altering the transmission of cellular telephones' ESNs to match or mimic other cellular telephones' ESNs.

As a result, Plaintiffs ask this Court to issue a declaratory judgment holding that C-Two's conduct violated the FCC's rules (as those rules existed until December 31, 1994) and order any other necessary or proper relief based on such declaratory judgment.

COUNT TWO

Plaintiffs incorporate by reference paragraphs 1 to 20.

This is a claim pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57 to have this Court issue a declaratory judgment holding that C-Two's conduct violates the FCC's current rules and order any other necessary or proper relief based on such declaratory judgment because there exists a substantial and actual controversy between the parties.

Since the promulgation of the FCC's current rules, C-Two has violated the FCC's mandate by knowingly altering cellular telephones' unique ESNs or altering the transmission of cellular telephones' ESNs to match or mimic other cellular telephones' ESNs.

As a result, Plaintiffs ask this Court to issue a declaratory judgment holding that C-Two's conduct violates the FCC's current rules and order any other necessary or proper relief based on such declaratory judgment.

COUNT THREE

Plaintiffs incorporate by reference paragraphs 1 to 20.

This is a claim in equity to have this Court issue an injunction requiring C-Two to cease and desist altering cellular telephones' unique ESNs or altering the telephones' transmission of their ESNs to match or mimic other cellular telephones' ESNs.

Since the promulgation of the FCC's current rules, C-Two has violated the FCC's mandate by knowingly altering cellular telephones' unique ESNs or altering the transmission of cellular telephones' ESNs to match or mimic other cellular telephones' ESNs.

The continued violation of the FCC's current rules will irreparably harm Plaintiffs by, among other things, increasing fraud, disrupting service, increasing billing errors, diminishing the quality of service, depriving carriers of monthly per telephone revenues, and devaluing the cellular telephone industry's goodwill.

As a result, Plaintiffs ask this Court to use its inherent powers of equity to order C-Two to cease and desist violating the FCC's mandate.

COUNT FOUR

Plaintiffs incorporate by reference paragraphs 1 to 20.

This is a claim pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57 to have this Court issue a declaratory judgment holding that C-Two's conduct constitutes a civil conspiracy to violate 47 U.S.C. § 301 and order any other necessary or proper relief based on such declaratory judgment because there exists a substantial and actual controversy between the parties.

Title 47 U.S.C. § 301 proscribes the use or operation of any unlicensed transmitter.

A cellular telephone that has had its ESN altered is an unlicensed transmitter. See FCC Report and Order, Adopted August 2, 1994, & Released September 9, 1994, ¶ 60 (attached). Thus, the use or operation of such altered cellular telephone violates 47 U.S.C. § 301.

C-Two has conspired with others to violate 47 U.S.C. § 301 by doing such acts, as averred more fully in paragraph 4, supra, that enable itself and/or others to use or operate an unlicensed transmitter, i.e. a cellular telephone with an altered ESN.

As a result, Plaintiffs ask this Court to issue a declaratory judgment holding that C-Two's conduct constitutes a civil conspiracy to violate 47 U.S.C. § 301 and order any other necessary or proper relief based on such declaratory judgment.

COUNT FIVE

Plaintiffs incorporate by reference paragraphs 1 to 20.

This is a claim in equity to have this Court issue an injunction requiring C-Two to cease and desist its participation in a civil conspiracy that violates 47 U.S.C. § 301.