

an order should not be made pending the determination of this action (1) enjoining defendant from altering, transferring, emulating or manipulating the ESNs of cellular telephones and altering or destroying any records, computer disks, and other information that relates to the altering, transferring, emulating or manipulating of cellular telephones or servicing of clients or responses to inquiries about such altering, transferring, emulating or manipulating on cellular telephones; (2) permanently enjoining defendant from altering, transferring, emulating or manipulating the ESNs of cellular telephones and altering or destroying any records, computer disks, and other information that relates to the altering, transferring, emulating or manipulating of cellular telephones or servicing of clients or responses to inquiries about such altering, transferring, emulating or manipulating on cellular telephones; (3) declaring: a) defendant's altering, transferring, emulating or manipulating ESNs is a violation of the FCC's ESN orders and regulations; b) the use of emulated or altered telephones is a violation of the FCC's ESN Orders and regulations; c) NYNEX Mobile has the right and the obligation to determine the names of all customers who have had their cellular telephone altered, transferred, emulated

or manipulated so as to advise and notify the customer that the use of altered, transferred, emulated or manipulated telephones is a violation of the FCC's ESN Orders and regulations; and d) defendant has no right to alter, transfer, emulate or manipulate cellular telephones of NYNEX Mobile customers; (4) granting NYNEX Mobile the reasonable and necessary attorney's fees incurred by NYNEX Mobile for bringing this action; and (5) granting plaintiff such other and further relief as may be just and proper in the circumstances.

Sufficient reason appearing therefor, it is ordered that, pending the hearing and determination of this motion, defendant, CELLULAR EMULATION SYSTEMS, INC., is hereby enjoined from ~~altering, transferring, emulating or manipulating the ESNs of cellular telephones and altering or destroying any records, computer disks, and other information that relates to the altering, transferring, emulating or manipulating of cellular telephones or servicing of clients or responses to inquiries about such altering, transferring, emulating or manipulating on cellular telephones.~~ And it is further

JAP

ORDERED, that personal service of a copy of this order and annexed affidavits upon defendant or their counsel on or before

500 o'clock in the afternoon, June 10, 1995, shall be deemed good and sufficient service thereof.

Dated: New York, New York

A bond in the amount of \$100 shall be posted with the Clerk of the Court by June 15, 1995

Loretta A. Preska
United States District Judge

Issued: June 9, 1995
12:20 pm

NYLDS01\1843-1

Exhibit A

Exhibit B

COMPLAINT

United States District Court

95 CV 4338
JUDGE PRESKA
NEW YORK

SOUTHERN

DISTRICT OF

NYNEX MOBILE COMMUNICATIONS
COMPANY,

SUMMONS IN A CIVIL ACTION

v.

CASE NUMBER:

CELLULAR EMULATION SYSTEMS, INC.,

TO: (Name and Address of Defendant)

CELLULAR EMULATION SYSTEMS, INC.
52 Quail Run Drive
Deer Park, New York 11729

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

CAROL R. ABRAMSON, ESQ.
Attorney for plaintiff
NYNEX Mobile Communications Company
1095 Avenue of the Americas, 39th floor
New York, New York 10036
(212) 395-0198

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JAMES M. PARKISON

CLERK

DATE

JUN X 9 1995

BY DEPUTY CLERK

CRA:jjc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
NYNEX MOBILE COMMUNICATIONS COMPANY, Docket No:

Plaintiff,

- against -

CELLULAR EMULATION SYSTEMS, INC.,

Defendant.
-----X

OFFICE
COPY

**PLAINTIFF'S ORIGINAL COMPLAINT AND
REQUEST FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION**

PARTIES AND JURISDICTION

1. Plaintiff, NYNEX MOBILE COMMUNICATIONS COMPANY ("NYNEX MOBILE"), is a corporation incorporated in the State of Delaware and authorized to do business in the State of New York.

2. CELLULAR EMULATION SYSTEMS, INC. ("CELLULAR EMULATION") is a corporation incorporated and doing business in the State of New York.

3. This Court has jurisdiction over this matter pursuant to 29 U.S.C. §1331 (Federal Question Jurisdiction) because the action involves claims arising under the laws of the United States. Pursuant to 47 U.S.C. §401(b), NYNEX MOBILE seeks to

prohibit defendant from violating orders (collectively the "ESN Orders") of the Federal Communications Commission now codified at 47 C.F.R. 22.919(a).

VENUE

Venue is proper in this district because a substantial part of the events giving rise to NYNEX Mobile's claim occurred in this district. 28 U.S.C. §1391(b)(2).

SUMMARY OF ALLEGATIONS

4. Pursuant to 47 U.S.C. §401(b) and Rule 65(b) of the Federal Rules of Civil Procedure, NYNEX MOBILE seeks a temporary restraining order, preliminary injunction and, ultimately, a permanent injunction barring defendant from violating the FCC's ESN Orders. Furthermore, pursuant to 28 U.S.C. 2201(a), NYNEX MOBILE seeks an order from the court declaring the rights and obligations of the parties, specifically stating defendants cannot alter, transfer, emulate or manipulate the ESN of cellular telephones in violation of the FCC's ESN Orders. Pursuant to 28 U.S.C. 2202, NYNEX MOBILE seeks recovery of its reasonable and necessary attorneys' fees incurred by prosecution of this action.

FACTUAL BACKGROUND

5. NYNEX MOBILE is licensed by the Federal Communications Commission ("FCC") to be a cellular telephone carrier in certain geographic regions including the State of New York.

6. CELLULAR EMULATION is not licensed by the FCC to be a cellular telephone carrier.

7. Defendant is engaged in the process of altering, manipulating or emulating the Electronic Serial Numbers on cellular telephones in violation of the FCC's ESN Orders.

8. 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.

9. The Electronic Serial Number ("ESN") is a 32 bit binary number that uniquely identifies a cellular mobile transmitter to a cellular system. It is separate and distinct from the phone's 10-digit telephone number. One purpose of the ESN in a cellular telephone is similarly to the Vehicle Identification Number in an automobile. Specifically, it uniquely identifies the equipment to assist in recovery, if it is stolen. More importantly, the ESN is designed to identify an authorized subscriber and enable

cellular licensees, like NYNEX MOBILE, to authorize system usage and to properly bill for calls made to and from a cellular telephone.

10. The alteration of a cellular telephone's ESN allows a person to simulate the signal of a different cellular telephone. This process, called emulation, allows one cellular phone to emulate, or imitate, another cellular phone. This allows a person to make a call on one cellular telephone while actually charging the call to another. Alteration of an ESN facilitates fraudulent and unauthorized cellular calls. An unauthorized user of a cellular phone that has an altered ESN can make numerous local and long distance calls and have the charges billed to a totally unsuspecting cellular customer. Alternatively, ESN alteration enables one cellular phone to emulate another cellular phone beyond the detection abilities of cellular licensees. This enables a customer to use more than one telephone for the same telephone number, thereby avoiding monthly access charges charged by NYNEX MOBILE and other licensees. By altering an ESN, a customer can fraudulently avoid paying the monthly access charge for multiple cellular phones, resulting in a significant loss of revenues to NYNEX MOBILE.

11. As more fully described in the affidavit of John F. Talt, (annexed hereto as Exhibit "A"), CELLULAR EMULATION has been engaged in the unauthorized practice of altering, transferring, emulating, or manipulating the ESN of cellular telephones to emulate other phones subscribed to NYNEX MOBILE. Specifically, at the beginning of May 1995, for the sum of \$289.95, Alan Gedachian, President of CELLULAR EMULATION altered an ESN on a cellular phone to emulate a NYNEX MOBILE subscribed phone.

FCC REGULATIONS

12. On May 4, 1981, the FCC released an Order entitled "An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Part 2 and 22 of the Commission's Rule Relative to Cellular Communications Systems," 86 F.C.C.2d 469 (1981) in which it, among other things, adopted technical specifications for the use of cellular telephones, including a requirement that each phone have a unique ESN. See 86 F.C.C.2d at 508 & n.78, 573, and 593. This FCC Order (the "First ESN 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.) A copy of this First ESN

Order is attached as Exhibit "B." On September 9, 1994, the FCC released an Order entitled "Revision of Part 22 of the Commission Rules Governing the Public Mobile Services." This FCC Order (the "Second ESN Order") was published in the Federal Register on November 17, 1994 (59 Fed. Reg. 59502). (The First ESN Order and Second ESN Order are collectively referred to herein as the ESN Orders.) A copy of the Second ESN Order is attached hereto as Exhibit "C."

13. In response to and FCC Notice of Proposed Rule Making, released June 12, 1992, 7 F.C.C. Rcd. 3658, and published in the Federal Register July 1, 1992 (57 Fed. Reg. 29260), C2+ Technology, a company that altered ESNs, requested the FCC to amend the Commission's rules and allow companies to market ancillary cellular equipment that emulates ESNs for the purpose of allowing more than one cellular telephone to have the same telephone number. See paragraph 67 of Exhibit "C."

14. The FCC specifically rejected the proposed amendment of the emulator. The Commission wrote:

"Further, we conclude that the practice of altering cellular phones to "emulate" ESNs without receiving the permission of the relevant cellular licensee should not be allowed because (1) simultaneous use of cellular telephones fraudulently emitting the same ESN without the licensee's permission could cause problems in some cellular systems such as erroneous tracking or billing; (2) 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 (3) such altered phones not authorized by the carrier, would therefore not fall within the licensee's blanket license, and thus would be unlicensed transmitters in violation of Section 303 of the Act."

See paragraph 60 of Exhibit "C."

15. The Commission further concluded:

"Nevertheless, with regard to existing equipment, we conclude that cellular telephones with altered ESNs do not comply with the cellular system compatibility specification¹ and thus may not be considered authorized equipment under the original type acceptance. Accordingly, a consumer's knowing use of such altered equipment would violate our rules. We further believe 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 our rules. Thus, we advise all cellular licensees and subscribers that the use of the C2+ altered cellular telephones constitutes a violation of the Act and our rules."

See paragraph 62² (emphasis added).

In conclusion, in its Second ESN Order, the FCC clearly stated (1) use of altered cellular telephones constitutes a violation of both the Communications Act of 1934, as amended, and the First ESN Order as codified in Commission rules, and (2) any

¹ See previous 47 CFR §22.915, which became new 47 CFR §22.933, adopted in the Second ESN Order.

² The Second ESN Order also revised §22.919(c), effective January 1, 1995, to require all manufacturers of cellular telephone to design their telephones such that any attempt to remove, tamper with, or change the ESN chip, will render the mobile transmitter inoperative. Thus, in new telephones, NYNEX Mobile and other cellular licensees should not be plagued with companies that alter ESNs in violation of the law. Any attempt to alter the ESN will render the cellular telephone inoperable.

company that knowingly alters cellular telephones is "aiding in the violation of our [FCC] rules."

REQUEST FOR TEMPORARY RESTRAINING ORDER

16. Pursuant to 47 U.S.C. §401(b) and Rule 65(b) of the Federal Rules of Civil Procedure, NYNEX Mobile seeks a temporary restraining order from the court asking the court (1) to enjoin defendant from altering, transferring, emulating or manipulating the ESNs of cellular telephones and (2) that all records, computer disks, and other information concerning altered telephones be preserved in their current state. As shown by the affidavits and evidence attached hereto and incorporated herein, NYNEX Mobile would show immediate and irreparable injury will occur to NYNEX Mobile if an order enjoining defendant from altering, transferring, emulating or manipulating the ESNs is not granted. Specifically, as shown by the affidavit of Gary Sutcliffe, Project Manager - Technology of NYNEX Mobile, NYNEX Mobile would show that it has no way of monitoring altered telephones and will continue to suffer fraudulent and unauthorized use of air time and theft of air time unless this order is granted. Furthermore, without records from defendant indicating the names of customers who have received altered telephones NYNEX Mobile does not have a way to monitor the unauthorized use of cellular telephones or notify specific customers that they are using cellular telephones in an unauthorized manner. NYNEX Mobile would show that it has no way of monitoring altered telephones and will continue to suffer

fraudulent and unauthorized use of air time and theft of air time unless this order is granted. Furthermore, without records from defendants indicating the names of customers who have received altered telephones, NYNEX Mobile does not have a way to monitor the unauthorized use of cellular telephones or notify specific customers that they are using cellular telephones in an unauthorized manner.

17. In addition, 47 U.S.C. §401(b) states:

"(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission 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 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."

18. In South Central Bell Telephone Company v. Louisiana Public Service Commission, 744 F.2d 1107 (5th Cir. 1984) vacated on other grounds 106 S.Ct. 2284, the Fifth Circuit, interpreting §401(b), stated:

"Under §401(b), a party seeking enforcement of an FCC declaration may obtain an injunction upon a finding that (1) the declaration is an FCC "order" within the meaning of the Act, (2) the order was regularly made and duly served upon the defendant, (3) the defendant is in disobedience of the order, and (4) the party seeking the injunction has been injured by the defendant's disobedience."

Id. at 1114-1115.

19. An FCC declaration is an "order," if the "agency acts in accordance with its legislatively delegating rule making authority" and intends it to be binding on all applicable persons. Id. at 1115. On their face, the ESN Orders are "orders" prohibiting individuals, inter alia, from using cellular phones with altered ESNs or from altering ESNs in cellular phones.

20. In order to show that an order was duly served, the Fifth Circuit has stated:

"Thus, the requirement of "due service" is met if the defendant in a §401(b) proceeding received notice legally sufficient to make the order enforceable. Under the APA [Administrative Procedures Act], a rule is enforceable once it is published in the Federal Register. 5 U.S.C. §552(a)(1). The Supreme Court has held that appearance of a rule in that publication constitutes legal notice to the general public."

Id. at 1119 (cites omitted). The FCC adopted the ESN Orders pursuant to lawful notice and rule making proceedings under the APA, and the referenced ESN Orders were published in the Federal Register.

21. NYNEX Mobile, through the affidavits and Exhibits attached hereto and incorporated herein, has shown that the defendants have violated "orders" of the FCC which have been "duly served" upon the defendants. Because NYNEX Mobile has been

injured by defendant's disobedience, it is entitled to a temporary restraining order prohibiting the altering, transferring, emulating or manipulating of ESNs of cellular telephones and enjoining defendant from altering or destroying any records relating to the altering, emulating, transferring or manipulating of ESNs.

In early 1995, Houston Cellular Telephone Company brought an action virtually identical to this one against two ESN emulators. The action, Houston Cellular Telephone Company v. John C. Nelson, et al. (Civil Action H-95-617) was brought in the United States District Court for the Southern District of Texas, Houston Division.

22. The Court, by order dated March 15, 1995, granted a permanent injunction (annexed hereto as Exhibit "E") holding as follows:

"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. Merritt, 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. [defendant emulators] 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); Gresham v. Windrush 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."

REQUEST FOR PRELIMINARY AND PERMANENT INJUNCTION

23. By way of this Complaint, NYNEX Mobile asks the court to set a date, within ten (10) days of the signing of the temporary restraining order, for hearing on the preliminary injunction. At the same time, NYNEX Mobile asks the court to order defendant to produce certain records relating to the altering, transferring, emulating or manipulating of cellular telephones, the servicing of clients, and/or responses to inquiries about such altering, transferring, emulating or manipulating on cellular telephone to the court for in camera inspection and safekeeping. In particular, plaintiff asks for the following records:

- (1) All lists, files, records or other information containing names, addresses and/or telephone numbers of individuals or entities for whom defendant altered, transferred, emulated or manipulated the electronic serial number of cellular telephones from January 1, 1990 to the present.
- (2) All advertisements, brochures or other documents which advertised services defendant provide to the public for

altering, transferring, emulating or manipulating the electronic serial number of cellular telephones.

- (3) Documents in defendant's possession which identify other individuals or entities which provide services which alter, transfer, emulate or manipulate the electronic serial numbers of cellular telephones.
- (4) Documents which evidence any previous or current business relationship or dealings with the entity C2+ Technology.

24. Furthermore, after the preliminary injunction hearing, NYNEX Mobile asks for a trial at the earliest possible setting in order to permanently enjoin defendant from (1) altering, transferring, emulating or manipulating the ESN on cellular telephones, and (2) altering or destroying any record that relates to the altering, transferring, emulating or manipulating of cellular telephones, or the servicing of clients or responses to inquiries about such altering, transferring, emulating or manipulating on cellular telephones.

REQUEST FOR DECLARATORY RELIEF PURSUANT TO 28 U.S.C. 2201 ET SEQ.

25. Pursuant to 28 U.S.C. 2201(a), NYNEX Mobile seeks a judgment from this court declaring the rights and obligations of NYNEX Mobile and the defendant. Specifically, NYNEX Mobile asks the court to declare:

- a. Defendant's altering, transferring, emulating or manipulating ESNs is a violation of the FCC's ESN Orders and regulations and aids and assists others in violating the FCC's ESN Orders and regulations.

- b. The use of emulated or altered telephones is a violation of the FCC's ESN Orders and regulations.
- c. NYNEX Mobile has the right and the obligation to determine the names of all customers who have had their cellular telephones altered, transferred, emulated or manipulated so as to advise and notify the customer that the use of altered, transferred, emulated or manipulated telephones is a violation of the FCC's ESN Orders and regulations.
- d. Defendant has no right to alter, transfer, emulate or manipulate cellular telephones of NYNEX Mobile customers.

26. Pursuant to 28 U.S.C. 2202, NYNEX Mobile seeks reimbursement of the reasonable and necessary attorneys' fees incurred by NYNEX Mobile for bringing this declaratory judgment action.

WHEREFORE, NYNEX Mobile prays for relief as follows:

- a) For a temporary restraining order enjoining defendant from altering, transferring, emulating or manipulating the ESNs of cellular telephones and requiring defendant to preserve all records, computer disks and other information concerning altered telephones in their current state;
- b) For a permanent injunction enjoining defendant from (1) altering, transferring, emulating, or manipulating the ESN on

cellular telephones or (2) altering or destroying any record that relates to the altering, transferring, emulating, or manipulating of cellular telephones or the servicing of clients or responses to inquiries about such altering, transferring, emulating or manipulating of cellular telephones;

c) For a declaratory judgment declaring:

(1) Defendant's altering, transferring, emulating or manipulating ESNs is a violation of the FCC's ESN Orders and regulations and aids and assists others in violating the FCC's ESN Orders and regulations;

(2) The use of emulated or altered telephones is a violation of the FCC's ESN Orders and regulations;

(3) NYNEX Mobile has the right and the obligation to determine the names of all customers who have had their cellular telephones altered, transferred, emulated or manipulated so as to advise and notify the customer that the use of altered, transferred, emulated or manipulated telephones is a violation of the FCC's ESN Orders and regulations; and

(4) Defendant has no right to alter, transfer, emulate or manipulate cellular telephones of NYNEX Mobile's customers.

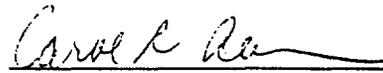
d) For attorneys fees.

e) For the costs and disbursements of this action.

f) And for such other and further relief as the court
deems just and proper.

Dated: New York, New York
June 5, 1995

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NYNEX MOBILE COMMUNICATIONS COMPANY
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1095 Avenue of the Americas
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(212) 395-0198
File No:



CAROL R. ABRAMSON (CRA-2144)

Exhibit A

