

Darby Drug Co., 601 F.2d 631, 644 (2d Cir. 1979) (explaining that a plaintiff can prove irreparable injury by showing that "its interim damages cannot be calculated with sufficient accuracy to make damages an adequate substitute"). Because NYNEX Mobile cannot determine which, or how many, of its customer have had their phones "emulated," it is impossible to calculate how much in per-telephone access charges the Company has lost. Similarly, because there is no way to prevent individual customers from continuing to have their phones "emulated," it is not possible to determine the losses that NYNEX Mobile will suffer as a result of impermissible emulation from now until the time of trial. See 7 (Part 2) Moore's Federal Practice ¶ 65.04[1], at 65-71 ("Losses which are not capable of being calculated or measured will usually be found to constitute irreparable injury.")

Beyond pecuniary loss, continued emulation of ESNs will cause continued interference with NYNEX Mobile's operations. Emulated "extension" phones will continue to mask fraudulently "cloned" phones, significantly weakening efforts to curtail theft of cellular services and to apprehend the criminals responsible.<sup>1</sup>

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<sup>1</sup> By inhibiting efforts to stop "cloning," the defendant's emulation activities cause NYNEX Mobile additional, unquantifiable, pecuniary loss.

The proliferation of emulated "extension" phones will also continue to tax NYNEX Mobile's system capacity, adversely affecting the quality of service for the Company's customers.

Second, given the defendant's certain violation of the ESN orders, there can be little question about NYNEX Mobile's likelihood of success on the merits. The ESN orders prohibit precisely the activity in which defendant is engaged. Two courts have already issued injunctions in precisely the same circumstances. In order to satisfy the "likelihood of success" requirement, a plaintiff "need not show that success is an absolute certainty. he need only make a showing that the probability of his prevailing is better than fifty percent." Wali v. Coughlin, 754 F.2d 1015, 1025 (2d Cir. 1985). Where, as here, defendant's conduct so clearly contravenes the language and intent of an agency's regulations, the plaintiff's likelihood of success is actually closer to a certainty than to the fifty percent minimally required.

**CONCLUSION**

For the foregoing reasons, plaintiff respectfully requests that this Court grant plaintiff's application for a temporary restraining order, preliminary injunction and permanent injunction.

Dated: New York, New York  
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irreparable injury is made at the time that the preliminary injunction motion is made, not when the action is commenced.<sup>74</sup>

In limited situations preliminary injunctions may issue without a showing of irreparable injury. If the preliminary injunction is sought under a statute which expressly authorizes such relief, irreparable injury need not be demonstrated and it is sufficient to show that the statutory conditions have been met.<sup>75</sup> Similarly, irreparable injury will be

mental opportunities, the balance of hardships favored the government which alleged permanent harm to fragile desert resources); *Dan River, Inc. v. Icahn* (CA4th, 1983) 701 F.2d 278 (preliminary injunction which prevented defendant from taking over plaintiff corporation was improperly granted, when the loss of opportunity was an irreparable injury to the defendant and the plaintiff alleged only speculative injury); *Machlett Laboratories, Inc. v. Techny Industries, Inc.* (CA7th, 1981) 665 F.2d 795 (preliminary injunction preventing the defendant from manufacturing or selling x-ray machines was improperly granted, when the order would terminate the defendant's business and any injury to the plaintiff could be compensated by monetary damages).

<sup>74</sup> *SI Handling Systems, Inc. v. Heisley* (CA3d, 1985) 753 F.2d 1244 (since a preliminary injunction is determined on the threat of irreparable injury at the time the motion is made, it was irrelevant that the motion for preliminary relief was made seven months after the action commenced).

<sup>75</sup> *F.D.I.C. v. Faulkner*, 991 F.2d 262 (5th Cir. 1993) (in upholding preliminary injunction freezing assets under Taxpayer Recovery Act, 12 U.S.C. § 1821(d)(19), court of appeals stated that "[s]ince the preliminary injunction provisions of the TRA remove the equitable requirement of irreparable injury, we see no reason to apply to

those provisions the corresponding equitable principle that an injunction may not issue to protect a legal remedy"); *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195 (10th Cir. 1992) (court of appeals upheld injunction obtained under the Taxpayer Recovery Act, 12 U.S.C. § 1821(d)(19), which expressly held that Rule 65 should be applied "without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate"); *Burlington Northern v. Department of Revenue*, 934 F.2d 1064 (9th Cir. 1991) (denial of preliminary injunction reversed and matter remanded for further consideration; court of appeals noted that no irreparable injury need be shown to justify injunction entered under provision of Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503); *United States v. FDIC*, 881 F.2d 207 (5th Cir. 1989), *cert. denied*, 493 U.S. 1072, 110 S. Ct. 1118, 108 L. Ed. 2d 788 (1990) ("if a statutory violation is involved and the statute by necessary and inescapable inference requires injunctive relief, the movant is not required to prove the injury and public interest factors"; court of appeals upheld preliminary injunction entered in favor of government prohibiting judgment creditor from lien on bank property, applying the mandate of 12 U.S.C. § 91); *United States v. Odessa Union*

*(Text continued on page 65-80)*

Warehouse Co-Op, 833 F.2d 172 (9th Cir. 1987) (reversing denial of preliminary injunction, and holding that FDA was "not required to show irreparable injury" in enjoining sale and movement of moldy, insect-contaminated wheat, applying 21 U.S.C. § 332(a)); South Central Bell Telephone Co. v. Louisiana Public Service Commission (CA5th, 1984) 744 F.2d 1107, 1120 (preliminary injunction requiring a state utility commission to grant an increase in intrastate telephone rates was properly granted, even in the absence of a showing of irreparable injury, when expressly authorized by applicable federal statute; "[i]t is well established, however, that when, as is the case here, an injunction is expressly authorized by statute, and the statutory conditions are met, the usual prerequisite of irreparable injury need not be met"); Illinois Bell Telephone Co. v. Illinois Commerce Commission (CA7th, 1984) 740 F.2d 566 (preliminary injunction requiring a state commission to obey an FCC order was properly granted, even in the absence of irreparable injury, since irreparable injury is not required when an action is brought to prevent the violation of a federal statute which expressly authorizes such relief); Atchison, Topeka & Santa Fe Railway Co. v. Lennen (CA10th, 1981) 640 F.2d 255 (it was error for the district court to deny a preliminary injunction against violation of the Interstate Commerce Code because the plaintiffs failed to show irreparable injury when they had a reasonable likelihood of success on the merits of proving the violations; if Congress has expressly authorized the courts to grant preliminary injunctive relief, only violation of the statute, not irreparable injury, need be demon-

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strated); Securities & Exchange Comm'n v. Management Dynamics, Inc. (CA2d, 1975) 515 F.2d 801, citing Treatise (when the preliminary injunction is a creature of statute, proof of irreparable injury is not required and only statutory requirements for relief must be satisfied); United States v. Capetto (CA7th, 1974) 502 F.2d 566, cert denied (1975) 420 US 925, 95 S Ct 1121, 43 L ed2d 395 (preliminary injunction may be granted under civil remedies of Organized Crime Control Act without any showing of irreparable injury, as intended by Congress); United States Postal Service v. Barmish (CA3d, 1972) 466 F.2d 804 (preliminary injunction in an action to enjoin delivery of mail did not require demonstration of irreparable injury, since common law standards do not apply when relief is expressly authorized by statute); Securities & Exchange Comm'n v. American Realty Trust (ED Va 1977) 429 F Supp 1148 (when preliminary injunction is issued under statute, only statutory conditions for relief need be shown, not irreparable injury); Securities & Exchange Comm'n v. General Refractories Co. (D DC 1975) 400 F Supp 1248 (standard for preliminary injunction is quite different under statute and common law and no irreparable injury need be shown); Securities & Exchange Comm'n v. J & B Industries, Inc. (D Mass 1974) 388 F Supp 1082 (injunctive relief under the securities laws does not require demonstration of irreparable injury but only a prima facie showing that the statute has been violated); United States v. Caribbean Ventures, Ltd. (D NJ 1974) 387 F Supp 1256 (showing of irreparable injury is not needed in granting a preliminary injunction where the violation

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presumed in copyright and trademark actions when a prima facie case of infringement has been made,<sup>76</sup> and such harm may be inferred from

of a federal statute is shown); Securities & Exchange Comm'n v. R.J. Allen & Associates, Inc. (SC Fla 1974) 386 F Supp 866 (no irreparable injury need not be demonstrated for a preliminary injunction sought under particular provisions of the securities laws since statutory provisions for such relief are quite different from common law standards).

*Cf.* Commodity Futures Trading Commission v. Hunt (CA6th, 1979) 591 F2d 1211 (district court erred in denying injunctive relief against defendants to bar future violations of CFTC rules when past violations were demonstrated; statutory injunctions do not issue on traditional equity standards and only a reasonable likelihood of future violations was needed to support injunctive relief when past violations were shown). See also United States v. Spectro Foods Corp. (CA3d, 1976) 544 F2d 1175, citing Treatise (although irreparable injury was not required for the grant of portions of a preliminary injunction which were addressed to particular violations of the Federal Food, Drug & Cosmetics Act, it was error for the district court to issue portions of the preliminary injunction which did not address particular violations of the statute without finding irreparable injury).

But see United States v. Nutriology, Inc., 982 F.2d 394 (9th Cir. 1992) (recognizing general proposition, but holding that where government had not shown "an undisputed statutory violation" of food and drug laws but only a "colorable evidentiary showing," there would be no presumption of irreparable injury); Cool Fuel, Inc. v. Connett (CA9th, 1982) 685 F2d

309 (preliminary injunction, enjoining the IRS from collecting a deficiency for failure to comply with statutory notice provision, was properly denied since payment of the tax, followed by a refund suit, gave plaintiff an adequate remedy at law; although the statute made provision for a preliminary injunction, it did not abolish the requirements of irreparable injury and no adequate legal remedy).

But *cf.* Interstate Commerce Commission v. Baltimore & Annapolis R.R. (D Md 1974) 64 FRD 337, citing Treatise (in denying preliminary injunction, the court noted that although the irreparable injury requirement may be modified by statute, such injury may still be considered as a significant factor in granting preliminary relief).

<sup>76</sup> Apple Computer, Inc. v. Franklin Computer Corp. (CA3d, 1983) 714 F2d 348, cert denied (1984) 104 S Ct 976, 79 L ed2d 158 (irreparable injury need not be shown, and is presumed, in a copyright action when the plaintiff has made out a prima facie case of infringement); Standard & Poor's Corp. v. Commodity Exchange, Inc. (CA2d, 1982) 683 F2d 704 (preliminary injunction can be granted in a trademark case upon a showing of likelihood of confusion of sponsorship, which presumes the findings of irreparable injury and likelihood of success on the merits); Grolier, Inc. v. Educational Reading Aids Corp. (SD NY 1976) 417 F Supp 665 (irreparable injury presumed when the plaintiff showed probability of success on the merits in a copyright infringement action); Cynthia Designs, Inc. v. Robert Zentall, Inc. (SD NY 1976) 416 F Supp 510 (in a copyright infringement

a violation of a restrictive covenant.<sup>77</sup> Courts may also issue injunctive relief in protection of their jurisdiction without satisfying the irreparable injury requirement.<sup>78</sup>

Although the public interest will not be as important as the other preliminary injunction factors in actions which involve only private interests,<sup>79</sup> it will be prominently considered in actions which implicate

action, a preliminary injunction will issue if the plaintiff shows a probability of success on the merits, and irreparable injury will be presumed); *PPS, Inc. v. Jewelry Sales representatives, Inc.* (SD NY 1975) 392 F Supp 375 (detailed showing of irreparable injury is not required when the plaintiff has made a prima facie showing of copyright infringement). See also *Coca-Cola, Inc. v. Tropicana Products, Inc.* (CA2d, 1982) 690 F2d 312 (in a Lanham Act action for false advertising, evidence that a significant number of consumers would be misled and that sales would shift from the plaintiff to the defendant was sufficient to show irreparable injury).

<sup>77</sup> See *Overholt Crop Ins. Serv. Co. v. Travis*, 941 F.2d 1361 (8th Cir. 1991) (in the context of a permanent injunction restraining defendant insurance representative from violating non-competition covenant, court of appeals held that district court did not abuse its discretion in applying Minnesota law to infer irreparable harm from breach of restrictive covenant).

<sup>78</sup> See *In re Martin-Trigona* (CA2d, 1984) 737 F2d 1254 (district court properly enjoined a plaintiff, with a lengthy history of bringing actions for the sole purpose of harassment, from commencing any harassing or vexatious litigation in federal court without leave of the court; since the district court had the inherent power to issue orders to protect its jurisdiction, the traditional standards of injunctive re-

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lief, irreparable injury and an inadequate remedy at law, were not applicable).

See also *Pavilonis v. King* (CA1st, 1980) 626 F2d 1075 (the district court dismissed on its own motion a series of virtually identical complaints, in which the plaintiff alleged in vague and conclusory terms that various state and local officials had violated her constitutional rights; although the order was proper in this exceptional situation, the court of appeals emphasized that it was an exception to the general rule of free access to the courts).

*Cf. Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205 (D.C. Cir. 1989) (although refusing to uphold injunction designed to offset allegedly unfair effects of previous injunction entered by Bermuda court in parallel securities litigation, court of appeals noted that "[c]ourts need not stop to find all the usual prerequisites for equitable relief when they are acting to 'protect their jurisdiction from conduct which impairs their ability to carry out Article III functions' " [citation omitted]).

<sup>79</sup> See *Continental Group, Inc. v. Amoco Chemicals Corp.* (CA3d, 1980) 614 F2d 351 (reversing the grant of a preliminary injunction enforcing a covenant not to compete, when the district court erroneously emphasized the public interest of protecting property rights; the public interest does not involve the vindication of abstract principles, such as the enforcement of

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government policy or regulation or other matters of public concern. Courts have accorded considerable weight to the policies of Congress, the executive branch or local government in particular areas such as the environment<sup>\*0</sup> patent law,<sup>\*1</sup> the conduct of foreign affairs,<sup>\*2</sup>

contract obligations, but specific acts, usually within disputes concerning government agencies or regulation, which presumptively benefit the public and should not be halted until the merits of the action are determined). *Cf. Yakus v. United States* (1944) 321 US 414, 64 S Ct 660, 88 L ed 834 (courts may go much further in granting and withholding equitable relief in furtherance of the public interest than when only private interests are involved); *Brown & Williamson Tobacco Co. v. Engman* (CA2d, 1975) 527 F2d 1115, cert denied (1976) 426 US 911, 96 S Ct 2237, 48 L ed2d 837 (courts may go further in both granting and denying injunctive relief in furtherance of the public interest than when only private interest are involved; denying motion to stay accrual of statutory penalties during pendency of action by cigarette companies against FTC determinations). However, the public interest may be a factor in the preliminary injunction determination, even in an action between private parties, if the matter has a substantial impact upon the general public. See *Mississippi Power & Light Co. v. United States Gas Pipe Line Co.* (CA5th, 1985) 760 F2d 618 (affirming a preliminary injunction which required a utility to reduce its prices when the plaintiff's claim was supported by the contract and the public would be irreparably harmed by overcharges; although the action concerned a private contract, it was proper to consider harm to the general public, which had a strong interest in the

prices charged). See also *Machlett Laboratories, Inc. v. Techny Industries, Inc.* (CA7th, 1981) 665 F2d 795 (preliminary injunction preventing the defendant from selling or manufacturing x-ray machines was improperly granted, in part, because the removal of competition in this area would disserve the public interest in low cost health care).

<sup>\*0</sup> *American Motorcyclist Ass'n v. Watt* (CA9th, 1983) 714 F2d 962 (preliminary injunction preventing implementation of an environmental plan by the federal government was properly denied when the defendant government alleged permanent harm to fragile desert resources, and in light of Congress' expression of concern for the protection of the California desert). See also *Piedmont Heights Civic Club v. Moreland* (CA5th, 1981) 637 F2d 430 (preliminary injunction against highway construction for alleged non-compliance with environmental law was properly denied when, although the plaintiffs might suffer some harm, this was outweighed by the harm caused to the public by traffic and safety hazards on overcrowded highways).

<sup>\*1</sup> *Eli Lilly & Co. v. Premo Pharmaceutical Laboratories, Inc.* (CA3d, 1980) 630 F2d 120 (preliminary injunction properly granted in an action concerning the validity of a patent where the plaintiff showed irreparable injury and the order would serve the public interest as recognized by Congress in its enactment of the patent laws).

government procurement,<sup>83</sup> and law enforcement.<sup>84</sup> Other areas in which the courts have used the public interest to guide their determination of preliminary injunction motions are set forth in the note.<sup>85</sup>

<sup>82</sup> *Adams v. Vance* (CA DC, 1977) 570 F2d 950. See discussion in n 54, *supra*.

<sup>83</sup> *Cincinnati Electronics Corp. v. Kleppe* (CA6th, 1975) 509 F2d 1080 (preliminary injunction properly denied in an action brought by an unsuccessful bidder for a government contract since, even if plaintiff were to prove that the contract had been illegally awarded, this did not demonstrate that the plaintiff had the right to have the contract awarded to it, and the public interest was best served by granting declaratory rather than injunctive relief so as to avoid disruption of the government procurement process); *Gould, Inc. v. Chafee* (CA DC, 1971) 450 F2d 667 (interference with the government's procurement process was a factor in denying preliminary injunction); *Union Carbide Corp. v. Train* (SD NY 1977) 73 FRD 620 (the public interest in avoiding disruption in the government procuring and contracting process, and in improvements to sewage treatment plants under federal law, militated against granting a preliminary injunction to an unsuccessful bidder).

<sup>84</sup> *Spiegel v. City of Houston* (CA5th, 1981) 636 F2d 997 (although plaintiff met all the requirements for injunctive relief against police methods of enforcing obscenity laws which decreased patronage of his theater, the preliminary injunction granted by the district court was reversed when it was overbroad and would have hindered legitimate law enforcement to the detriment of the public interest). See also *Godine v. Lane* (CA7th, 1984) 733 F2d 1250

(preliminary injunction requiring prison officials to take certain steps to protect protective custody inmates from the general prison population was improperly granted when the burden placed on state officials, which outweighed any harm to the plaintiffs, was a disservice to the public interest).

<sup>85</sup> *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746 (9th Cir. 1991) (although government's breach of confidentiality in employment discrimination matter may have constituted violation of "clean hands" prerequisite to equitable relief, the "compelling governmental and public interest in eradicating unlawful employment discrimination and in vindicating the rights of victims of such illegal practices" warranted departure from "clean hands" doctrine and hence government was entitled to preliminary injunction restraining the alteration or movement by defendants of certain business records pertaining to allegedly discriminatory practices); *Federal Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554 (5th Cir. 1987) (noting that "[t]he general flexibility of equitable powers is enhanced where, as here, the public interest is at stake," court of appeals upheld preliminary injunction freezing assets of allegedly wrongdoing officers and directors of savings and loan; court also cited the public interest as one factor justifying "the court's reliance on some hearsay evidence at the preliminary injunction stage"); *United States v. Odessa Union Warehouse Co-Op*, 833 F.2d 172 (9th Cir. 1987) (noting that "[t]he public interest is an important consideration in the exercise of equitable discretion in the enforcement of statutes" and

Since the purpose of a preliminary injunction is to preserve the status quo pending determination of the merits of the action,<sup>86</sup> a mandatory, as opposed to a prohibitory, injunction is often disfavored.<sup>87</sup> However,

further noting that "the public . . . has a strong interest in consuming unadulterated wheat," court of appeals reversed district court's denial of preliminary injunction sought by FDA to restrict the sale and movement of allegedly contaminated wheat, and held that the "hardship to be faced by the general public in the absence of injunctive relief . . . must be weighed in the balance of hardships on remand"); *Regents of University of California v. American Broadcasting Co.* (CA9th, 1984) 747 F2d 511 (preliminary injunction in antitrust action, which barred a college from prohibiting the telecast of one of its football games solely on the basis of its exclusive contract with a competing television network, was in the public interest since it gave effect to consumer demand for a particular game); *Standard & Poor's Corp. v. Commodity Exchange, Inc.* (CA2d, 1982) 683 F2d 704 (preliminary injunction prohibiting certain futures trading was in the public interest, since it prevented injury to traders, which would be difficult to remedy if the plaintiff ultimately prevailed on the merits); *Otero Sav. & Loan Ass'n v. Federal Reserve Bank* (CA10th, 1981) 665 F2d 275 (preliminary injunction prohibiting the Federal Reserve from refraining from clearing plaintiff bank's checks was in the public interest, since the public would suffer from the disruption and confusion that the interruption in plaintiff's service would cause); *Carey v. Klutznick* (CA2d, 1980) 637 F2d 834 (preliminary injunction against the Census Bureau was proper when the plaintiff state and city showed that

the 1980 census would result in an undercount of their populations and deprive them of congressional representation and federal funds, which the public interest mandates be fairly apportioned on accurate census data); *Exxon Corp. v. FTC* (CA DC, 1978) 589 F2d 582, citing *Treatise* (preliminary injunction against disclosure to Congress of confidential information filed with the FTC by the plaintiff was properly denied, since there was no significant private interest to balance against the clear public interest in maximizing the investigatory powers of Congress); *Gulf King Shrimp Co. v. Wirt* (CA5th, 1969) 407 F2d 508 (in light of the strong national policy in support of child labor laws, injunction was proper against a violation of those laws even when such violations had ceased at the time of the action).

<sup>86</sup> See n 1, *supra*.

<sup>87</sup> See *Stanley v. University of Southern California*, 13 F.3d 1313 (9th Cir. 1994) (court of appeals determined that injunction sought to compel university to reinstate plaintiff as head coach of women's basketball team at an increases salary was mandatory, not prohibitive, and affirmed the denial of motion for the injunction, noting that such an injunction should be denied unless the facts and law clearly favor the movant); *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096 (10th Cir. 1991) (court of appeals vacated preliminary injunction requiring credit card company to issue 1.5 million credit cards, noting that mandatory injunctions are "disfavored" and "more burdensome than prohibitory injunctions because they affirmatively re-

such an order may be issued when necessary to protect the movant<sup>88</sup> although it may require a greater demonstration of need than otherwise is required.<sup>89</sup> Where appropriate, a preliminary injunction may require

quire the nonmovant to act in a particular way, and as a result they place the issuing court in a position where it may have to provide ongoing supervision to assure that the nonmovant is abiding by the injunction"); *Newman v. State of Alabama* (CA11th, 1982) 683 F2d 1312, cert denied (1983) 460 US 1083, 103 S Ct 1773, 76 L ed2d 346 (mandatory injunction was improper when it interfered unnecessarily in the state's criminal justice system and other remedies were available); *Harris v. Wilters* (CA5th, 1979) 596 F2d 678 (only rarely is the issuance of a mandatory preliminary injunction proper; denial of preliminary injunction requiring the state to provide funds for the legal assistance of a condemned prisoner was proper when the prisoner might obtain declaratory relief and his execution was stayed pending the outcome of that action); *Burns v. Paddock* (CA7th, 1974) 503 F2d 18 (district court did not err in denying a preliminary injunction which would have been mandatory in nature, when the plaintiffs had not established the prerequisites for preliminary relief); *Exhibitors Post Exchange, Inc. v. National Screen Service Corp.* (CA5th, 1971) 441 F2d 560 (a mandatory preliminary injunction should be granted only in rare instances when the facts and law clearly favor the movant; affirming denial of preliminary injunction against the refusal of defendants to sell to plaintiffs); *Tyson v. Norton* (D Conn 1975) 390 F Supp 545 vacated in part on other grounds (CA2d, 1975) 523 F2d 972 (mandatory preliminary injunction which would have required substantial

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changes in the administration of a federal program was inappropriate at a preliminary stage of the action); *Interstate Commerce Comm'n v. Baltimore & Annapolis R.R. Co.* (D Md 1974) 64 FRD 337, citing *Treatise* (since a preliminary injunction is to preserve the status quo, a mandatory order should not be issued lightly and was denied when not demanded by the circumstances)

<sup>88</sup> *Ferry-Morse Seed Corn Co. v. Food Corn, Inc.* (CA8th, 1984) 729 F2d 589, 593 (preliminary injunction requiring defendant to deliver seed corn to the plaintiff as per their contract was proper, when the corn was unique and the plaintiff was in danger of losing its favorable marketing position upon which, at the defendant's inducement, it had spent large sums of money; although a mandatory preliminary injunction is not favored, one will issue when the status quo "is a condition not of rest, but of action, and the condition of rest (in this case the refusal to deliver the seed corn) will cause irreparable harm"). *Cf. Productos Carnic, S.A. v. Central American Beef & Seafood Trading Co.* (CA5th, 1980) 621 F12d 683 (affirming preliminary injunction enjoining the movement of beef claimed by the plaintiff; since the meat was perishable, the court ordered that it be sold and the proceeds placed in an interest-bearing account).

<sup>89</sup> *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096 (10th Cir. 1991) (in vacating preliminary injunction requiring credit card company to issue 1.5 million credit cards, court of appeals noted that a mandatory injunc-

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the expenditure of money by a party.<sup>90</sup>

tion is "disfavored" and hence "the movant must show that on balance, the four factors [required to be established for a preliminary injunction] weigh heavily and compellingly in his favor"); *Johnson v. Kay*, 860 F.2d 529 (2d Cir. 1988) (when the preliminary injunction is mandatory "a somewhat higher standard is applied, under which the movant must show a 'substantial' [emphasis in original] likelihood of success on the merits, rather than merely a likelihood of success; in instant matter, the higher standard was inapplicable because the injunction "actually only required the [defendant] union to do what it should have done earlier," namely opening "channels of communication" allowing plaintiff union president to disseminate dissenting views on referendum issue); *Jacobsen & Co. v. Armstrong Cork Co.* (CA2d, 1977) 548 F.2d 438 (affirming preliminary injunction requiring the defendant in an antitrust action to sell products to the plaintiff on non-discriminatory terms; although a mandatory preliminary injunction requires a greater showing than does an ordinary one—extreme or very serious damage—the district court properly found that such a showing was made). See also *Abdul Wali v. Coughlin* (CA2d, 1985) 754 F.2d 1015 (although a preliminary injunction prohibiting prison officials from interfering with the delivery of a report critical of a state prison to inmate was held to be a prohibitory injunction rather than a mandatory one, a more stringent standard was required when it would grant the plaintiffs substantially all of the relief they ultimately sought; preliminary injunc-

tion proper when this standard was met).

<sup>90</sup> *Johnson v. Kay*, 860 F.2d 529 (2d Cir. 1988) (requiring union to pay for mailings disseminating dissenting views on referendum issues); *Friends for All Children v. Lockheed Aircraft Corp.* (CA DC, 1984) 746 F.2d 816 (affirmed grant of preliminary injunction, issued after partial summary judgment established defendant's liability but before the amount was determined, requiring defendant to set up a fund for the examination of children injured in the crash of an airplane it manufactured; although preliminary equitable relief is ordinarily inappropriate in an action for monetary damages, that rule should not be applied where liability has already been determined, since slavish adherence to such a rule would be inconsistent with the deep-rooted power of equity to do what is necessary and appropriate to achieve justice); See also *United States v. Price* (CA3d, 1982) 688 F.2d 204 (although the court of appeals affirmed the denial of a mandatory preliminary injunction that would have complicated and delayed the litigation, it noted that the district court took too limited a view of its remedial powers, since an equity court can fashion any remedy necessary and appropriate to do justice, including the expenditure of money); *United States v. Bedford Associates* (CA2d, 1980) 618 F.2d 904 (a preliminary injunction, prohibiting the owners of buildings rented to the government from terminating services or denying the government access to them properly, required the government to pay utility costs as a condition precedent to interim relief).

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

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- )  
 Intervenor, )  
 v. )  
 CELL PHONE EXTENSIONS, INC., )  
 Defendant. )

FILED

MAY 24 1995

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

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 Red 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. § 22.9331. See 46 F.R. 27663 (May 21, 1981). The Requirement is now also set forth at 47 C.F.R. § 22.919 (1988), adopted pursuant to the Report and Order No. 84-210.

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 its 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

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 Dagoberto 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, 415 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

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 Utils. 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. 1155 (1986); Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 740 F.2d 556, 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. 1157 (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)." Alltel Tennessee, Inc., 913 F.2d at 306. 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 Daraphase. This Court finds that the Daraphase test is not applicable in this case. Plaintiffs may enforce the instant FCC order under section 401(b) through

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. "[O]nly 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:

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.

  
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CHARLES A. SHAW  
UNITED STATES DISTRICT JUDGE

Dated this 24th day of May, 1995.



United States District Court  
Southern District of Texas  
Houston Division

7  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
ENTERED

MAR 17 1995

HOUSTON CELLULAR  
TELEPHONE COMPANY,

Plaintiff,

versus

JOHN C. NELSON, Doing Business as Both  
Call Time Cellular and Action Cellular and  
DANNY HART, Doing Business as  
Action Cellular and  
ACTION CELLULAR EXTENSIONS, Inc.,

Defendants.

Michael N. Andy, Clerk

CIVIL ACTION H-95-617

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 3 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