

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

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KEMPNER MOBILE ELECTRONICS,)
INC., an Illinois corporation,)

Plaintiff,)

v.)

SOUTHWESTERN BELL MOBILE)
SYSTEMS, LLC, d/b/a CINGULAR)
WIRELESS f/k/a SOUTHWESTERN)
BELL MOBILE SYSTEMS, INC. d/b/a)
CELLULAR ONE-CHICAGO)

Defendant.)

Case No. 02 CH 8976

Judge Azra Jaffe

FIRST AMENDED VERIFIED COMPLAINT

Plaintiff Kempner Mobile Electronics, Inc., by its attorneys, for its First Amended Verified Complaint against Defendant Southwestern Bell Mobile systems, LLC d/b/a Cingular Wireless, states as follows:

PARTIES

1. Kempner Mobile Electronics, Inc. ("Kempner") is an Illinois corporation with its principal place of business at 4722 West Touhy Avenue, Lincolnwood, Cook County, Illinois.

2. Southwestern Bell Mobile Systems, LLC d/b/a Cingular Wireless ("Cingular") is on information and belief a limited liability company organized and existing under the laws of the State of Delaware. Cingular's principal place of business is located at 2000 West Ameritech Center Drive, Hoffman Estates, Cook County, Illinois.

Prior to a merger between SBC Communications and Bell South Corporation on or about

January 14, 2001, Cingular was known as Southwestern Bell Mobile Systems, Inc. d/b/a Cellular One-Chicago.

JURISDICTION AND VENUE

3. The Court has jurisdiction to hear this matter pursuant to the powers granted to it by the Illinois Constitution.

4. Venue is appropriate in this county pursuant to 735 ILCS 5/2-101 as the cause of action arose from transactions or some part thereof that occurred in Cook County and Cingular is a resident of Cook County, Illinois.

COMMON FACTS

5. Cingular has for a number of years and under various corporate identities provided cellular telephone services in various parts of the United States, including the metropolitan Chicago area.

6. For a number of years Cingular's business practice was to utilize and encourage independent dealers to market and sell its cellular telephone products and services to consumers.

7. Kempner has for a number of years been a dealer of among other things cellular telephone products and services.

8. In December 1993, Kempner executed an agreement with one of Cingular's predecessors and became an authorized sales and service center. Kempner has continuously since December 1993 operated its sales and service center at 4722 West Touhy Avenue, Lincolnwood, Cook County, Illinois from which Kempner marketed and sold Cingular cellular telephone products and services.

9. In approximately April 1996, Kempner and one of Cingular's predecessors executed that certain Authorized Agency Agreement between Southwestern Bell Mobile Systems, Inc. d/b/a Cellular One – Chicago and Kempner Mobile Electronics, Inc. (the "1996 Agreement"). A copy of the 1996 Agreement is attached as Exhibit 1.

10. In December 1999 or January 2000, Kempner and one of Cingular's predecessors executed that certain Authorized Agency Agreement between Southwestern Bell Mobile Systems, Inc. d/b/a Cellular One – Chicago and Kempner Mobile Electronics, Inc. (the "1999 Agreement"). A copy of the 1999 Agreement is attached as Exhibit 2.

11. The 1996 Agreement and the 1999 Agreement set forth many of the terms by which Kempner operated as an authorized sales and service center for Cingular. These agreements also incorporated by reference Cingular's Administrative Procedures Manual. In addition, Cingular adopted and Kempner accepted certain business practices developed from time to time during the relationship which encouraged dealerships like Kempner to make additional investments to expand its business with Cingular. The 1996 Agreement and the 1999 Agreement were drafted by Cingular. (The 1996 Agreement and the 1999 Agreement, and the other terms and business practices incorporated therein are sometimes hereinafter referred to as the "Agreements")

12. As an authorized sales and service center for Cingular, Kempner agreed, among other things, to market cellular telephone products and services on behalf of Cingular. For its part, Cingular agreed, among other things, to compensate Kempner in accordance with the terms of the Agreements, to support Kempner's ability to sell

Cingular cellular telephone products and services, and to apply its business practices to Kempner on a fair and non-discriminatory basis. By virtue of being a sales and service center, Kempner was accorded various benefits, including but not limited to the cooperative marketing efforts of Cingular's corporate accounts group.

13. The Agreements contain an implied covenant of good faith and fair dealing which required that Cingular act reasonably and with proper motive, and not act arbitrarily, capriciously, or in a manner inconsistent with Kempner's reasonable expectations.

14. The Agreements provided that Cingular's approval was required for Kempner to expand its business to additional locations, but that this consent could not be unreasonably withheld.

15. The Agreements prevented any entity from opening a store or other sales location for the sale of Cingular cellular telephone products and services within a three-mile radius of the Kempner store location. In addition, Kempner and such entities were prohibited from opening a store or other sales location within a three-mile radius of any other store that marketed and sold Cingular cellular telephone products and services (other than to replace an existing store location). The purpose of these restrictions was to protect and encourage the investment of time and money in the establishment of new business locations, and to permit and encourage the development of a customer base at locations such as Kempner's.

16. Kempner developed customers for the purchase of cellular telephone products and services and delivered those customers to Cingular pursuant to the Agreements. These customers would not have become known to Cingular but for the

efforts of Kempner. In contracting with such customers for the benefit of the relationship, Kempner supplied the consideration for and earned the right to residual compensation for the duration of that customer's affiliation with Cingular, and developed the reasonable expectation of a continuing business relationship with those customers with which Cingular was obliged not to interfere.

17. The Agreements included periodic schedules which set the compensation that Cingular would pay Kempner ("Commission Addendums"). Cingular represented, and Kempner relied on the representation that these periodic schedules were uniform as to compensation paid among all sales and service centers and provided for a monthly residual payment of no less than five percent of the revenue generated pursuant to customer service contracts. Most recently, for each customer that Kempner signed up to Cingular's cellular telephone service, Kempner was entitled to receive and Cingular was obliged to pay a monthly residual of approximately two dollars and forty cents (\$2.40) for the duration of the customer relationship without interference from Cingular.

18. Commencing at an unknown point in time, and contrary to its obligations to Kempner and others, Cingular determined to change its existing distribution practices without regard to Kempner's rights under the Agreements, the course of conduct developed over time between the parties, or its obligation of good faith and fair dealing by implementing an overall scheme and a series of actions which has had and continues to have the purpose and effect of eviscerating the Agreements and jeopardizing the investment of Kempner earlier encouraged by Cingular. These actions included, but are and were not limited to the following:

A. Cingular intentionally and unjustifiably interfered with Kempner's relationship with the customers Kempner had originated by contacting consumers who had originally purchased a Cingular cellular telephone product and signed up for Cingular cellular telephone service through Kempner while such customers' contracts were still in effect and offering to allow such consumers to upgrade their cellular telephone products directly from Cingular without providing Kempner the opportunity to sell the equipment to the customer on the same terms. When such consumers upgraded their cellular telephone equipment directly from Cingular, Cingular "purged" such customers from Cingular's records as a Kempner-originated customer and terminated Kempner's monthly residuals for those customers.

B. In April 1998, Cingular opened a sales kiosk at the Lincolnwood Town Center shopping mall that was within three miles of the Kempner store at 4722 West Touhy Avenue, and immediately began marketing and selling Cingular cellular telephone products and services. Cingular took this action within one year of prohibiting Kempner from expanding its business by marketing and selling Cingular cellular telephone products and services from a similar sales kiosk at the very same Lincolnwood Town Center shopping mall. Cingular's actions violated the terms and provisions of its own Administrative Procedures incorporated by reference into the Agreements.

C. In September 2000, Cingular opened a sales location at 4730 West Dempster Street in Skokie that was also within three miles of the Kempner

location at 4722 West Touhy Avenue. In doing so, Cingular violated the terms and provisions of its own Administrative Procedures incorporated by reference into the Agreements.

D. Cingular repeatedly and arbitrarily refused to give its approval to additional locations identified by Kempner for the expansion of Kempner's business to establish new and maintain existing customers for the sale of cellular telephone products and services.

E. Cingular failed to deliver to Kempner the same level of pricing and equipment discounts that Cingular offered its internal channels of distribution, despite making affirmative representations to the contrary. As recently as May 8, 2001, Laren Whiddon, Vice-President and General Manager of Cingular, represented to Scott Kempner of Plaintiff, Kempner, that Kempner had access to the same level of pricing and equipment discounts as Cingular's internal channels of distribution. Similar representations had been repeatedly made to Kempner by representatives of Cingular throughout the term of the Agreements. The representations made by Whiddon and the other representatives of Cingular were false and Whiddon and each of the other representatives of Cingular knew at the time the representations were made that they were false. On information and belief, internal documentation at Cingular states specifically that certain pricing levels are available only at Cingular's points of distribution.

F. Cingular published “bait and switch” advertisements designed to attract the attention of Kempner’s customers and then switch that customer to accept services on terms and conditions more favorable to Cingular. Beginning as early as March 31, 2000, Cingular represented to Kempner that one of the benefits of being a sales and service center was Kempner’s inclusion in the promotional advertising prepared and distributed by Cingular showing that the terms offered in that advertising would be available to customers who patronized Kempner. However, the benefits represented were not delivered. For example, sometime prior to January 31, 2002, Cingular prepared and distributed newspapers of general circulation in the Chicago area including but not limited to the Chicago Sun Times an advertisement indicating that new or existing customers who engaged Cingular cellular telephone service and executed a contract providing for a continuous term of such services would receive a free Nokia 5165 IRDB portable telephone. Kempner’s business location was published in this advertisement. On January 31, 2002, Gene R. Hyman, a regular customer of Kempner responding to the advertisement, had a telephone conversation with “Jennifer” at Cingular where Mr. Hyman indicated his intention to avail himself of the offer published in the newspaper by activating Cingular cellular telephone services through Kempner. Cingular’s representative Jennifer directed Mr. Hyman not to patronize Kempner but rather to activate service at the Cingular point of distribution at 3333 West Touhy Avenue because he would not be able to receive a free

Nokia 5165 IRDB portable telephone if he activated Cingular cellular telephone service through Kempner, despite the advertised solicitation. On information and belief, similar examples of this conduct have occurred repeatedly and continuously since at least March 31, 2000.

G. Cingular diverted potential customers from Kempner and misdirected those customers to Cingular. At all times relevant, Cingular has maintained 1-800 and 1-866 telephone numbers for support and referral of customers. The system is supposed to indicate for the benefit of customers and dealers like Kempner, through the telephonic input of zip code numbers, the identity of authorized sales and service locations for products and cellular telephone services offered by Cingular. Beginning at least at the time of Cingular's establishment of a company-owned location at 253 Old Orchard Center, Skokie, Illinois, the identity of Kempner's location in nearby Wilmette, Illinois, is indicated to a caller accessing the 1-866 support number as "Jillian Wireless" in "Roadhouse, Illinois." The location of the Cingular-owned store at 253 Old Orchard Center contained in the same listing is correctly identified. Kempner repeatedly complained to Cingular about the erroneous misidentification of Kempner in the 1-866 support number system. Cingular repeatedly and falsely represented to Kempner that the identity of store locations in the 1-866 support number system had been corrected. For example, On May 8, 2001, Laren Whiddon of Cingular represented to Scott Kempner of Kempner that Cingular was then currently reviewing the store listings on the support number system and making the

necessary revisions. On information and belief, these statements were untrue, the Cingular representatives, including Whiddon, knew at the time they were made that they were untrue, and to this day, the 1-866 support number system continues to misidentify Kempner. This misidentification has the purpose and effect of diverting potential customers from Kempner to Cingular-owned points of distribution.

H. Cingular failed to pay Kempner the commissions and monthly residual payments due under the Agreements, and failed to make payments within the time periods established by the Agreements.

I. Cingular failed to reimburse Kempner for out of pocket costs related to the substitution by Cingular of its trademarks, service marks, trade names and insignia which Kempner was required to utilize following the merger between SBC Communications and Bell South Corporation as required by the Agreements.

19. Kempner has fully performed in good faith all of its legally required obligations under the 1996 Agreement and the 1999 Agreement.

20. Various provisions of the Agreements, and particularly paragraphs 4(j) and 20 thereof, purport to restrict Kempner's ability to compete with Cingular in the market for cellular telephone products and services during and after the term of the Agreements. These provisions required that, so long as Cingular abided by the terms of the Agreements, to the extent Kempner sold cellular telephone products and services, Kempner did so exclusively on behalf of Cingular and would refrain from expanding its business by offering the products and services of Cingular's competitors. These

provisions further provided that, except in the event of a breach of the Agreements by Cingular, Kempner was prohibited from offering the products and services of Cingular's competitors for a period of one year following termination of the Agreements.

21. Cingular recognized that the scope of the restrictions on Kempner's activities contained in the Agreements were legally suspect, so Cingular included in the Agreements a savings clause which permitted the offensive provisions to be excised, with the remaining provisions of the Agreements being valid and enforceable. By virtue of Cingular's breach of the Agreements, the provisions of paragraphs 4(j) and 20 thereof became unenforceable against Kempner, but the remaining provisions of the Agreements endured.

22. So long as Cingular abided by the terms of the Agreements, and continued to support and encourage Kempner's development of a customer base for the mutual benefit of Kempner and Cingular, the restrictions contained in paragraphs 4(j) and 20 of the Agreements arguably had a legitimate business purpose of protecting the investment of time and effort that each had devoted to the relationship; however, once Cingular breached the Agreements and embarked on its scheme to destroy these relationships, the purported business purpose of the restrictions evaporated and they became naked restraints of trade. Therefore, the restrictions contained in paragraphs 4(j) and 20 of the Agreements are not only unenforceable against Kempner because of Cingular's breach of the Agreements, but also because these provisions constitute unenforceable restraints of trade in that, among other things:

- A. Cingular has no legitimate protectable interest in and no near-permanent relationship with customers for cellular telephone services and products. Such

customers often switch suppliers without regard to purported goodwill allegedly associated with various marks owned by Cingular.

- B. Kempner has a legitimate and protectable interest in its customers by reason of the time, effort and expense invested in the development of its customers, and Kempner has cultivated near-permanent relationships with these customers. Kempner provides demonstrations of cellular telephone products and services, and trains customers in the use of cellular telephone products and services. Section 4(g) of the Agreements provides that those persons who purchase or lease cellular telephone products from Kempner are customers of Kempner.
- C. The purported restrictions are not necessary in their full extent for the protection of Cingular. On information and belief, Cingular does not impose such restrictions on other Cingular points of distribution that compete with Kempner, including but not limited to A.B.T. Electronics and Circuit City.
- D. There has been a failure of the consideration allegedly supporting Kempner's agreement to these restrictions. The advertising that Cingular promised Kempner was deceptive in that it falsely stated to customers that advertised terms and conditions were available from Kempner. Moreover, any purported value associated with the use of Cingular's marks has been substantially diluted by Cingular's permitted use of these marks on a discriminatory, non-exclusive basis to other points of distribution. Cingular did not impart to Kempner any specialized or technical knowledge of the cellular industry not generally available or otherwise known to Kempner.

- E. The purported restrictions are oppressive to Kempner. Cingular has for a number of years interfered with Kempner's ability to conduct business under the guise of marketing cellular telephone services, while simultaneously preventing Kempner from offering competing services pursuant to these purported restrictions. The inclusion of these illegal provisions in the Agreements has diminished the value of Kempner's business.
- F. The purported restrictions are harmful to the public because they restrict competition. Competition by Kempner would not impair the operation of Cingular beyond that which would arise from the competition of an unrelated third party with similar marketing skills. The fact that Cingular does not impose these restrictions on all points of distribution demonstrates that the restrictions on Kempner serve no purpose other than to restrain competition.

23. Because the restrictions contained in paragraphs 4(j) and 20 of the Agreements were unenforceable, Kempner had the right to expand its business by offering the service of competing providers of cellular telephone products and services, while simultaneously adhering to the enforceable provisions of the Agreement. Beginning in 1999, Kempner was repeatedly approached by providers of other cellular telephone products and services competitive with Cingular and offered the opportunity to affiliate with these alternate providers on terms more favorable than that afforded Kempner under the Agreements. In reliance on the false statements made to Kempner by Cingular, Kempner refrained from exercising its rights to expand its business until May, 2002. Cingular knew that Kempner would rely on its false statements and

intended that Kempner would do so. As a result of that reliance in refraining from exercising its rights to expand, the value of Kempner's business has been diminished.

24. Beginning in May, 2002, in order to attempt to rectify the injury suffered as a result of Cingular's scheme, to mitigate its damages, and to exercise its rights by virtue of the unenforceability of the illegal restrictions contained in the Agreements, Kempner began to expand its business by offering cellular telephone products and services marketed by providers other than Cingular. On or about June 20, 2002, Cingular notified Kempner that it would terminate the Agreements as a result of Kempner's exercise of its right to expand its business, effective July 21, 2002. On information and belief, this attempted termination is the culmination of Cingular's scheme, whereby Kempner was induced to invest in and develop a customer base which resulted in substantial benefits to Cingular, without being told of Cingular's true intention to misappropriate those customers and eliminate the commissions and residuals that Kempner had earned, while wrongfully denying Kempner permission to establish additional locations. Simultaneously, Cingular placed in Kempner's contracts overbroad and illegal restrictions purely for their *in terrorem* effect to deter Kempner from exercising its right to expand its business despite Cingular's intention to breach and attempts to conceal its repeated breaches of the Agreements. This scheme had the purpose and effect of inducing Kempner to initially bear the economic risks associated with the development of the market for the sale of cellular telephone products and services, and then permitting Cingular to capitalize on the success Kempner had realized and to deny Kempner the benefits of that success by preventing Kempner from

further expansion while gradually misappropriating Kempner's customer base and terminating Kempner's residual commissions. This scheme placed Kempner in the untenable position of being unable to continue to operate and expand its business on behalf of Cingular because of Cingular's interference, and unable to operate and expand its business on behalf of other providers of cellular telephone products and services because of Cingular's threats to enforce the illegal restrictions contained in the Agreements. When Kempner finally exercised the only alternative available to it, Cingular acted by attempting to terminate the Agreements, attempting to cut off payment of Kempner's residual commissions, and attempting to eliminate Kempner as a competitive threat.

COUNT I

(Declaratory Judgment Pursuant to 735 ILCS 2/701)

25. Plaintiff Kempner repeats and realleges the allegations of paragraphs 1 through 24 as if fully set forth herein.

26. Cingular's actions as described above constitute a breach of its obligations under the Agreements, as well as the duty of good faith and fair dealing inherent between all contracting parties and inherent in the Agreements. As a result of these breaches, the restrictions contained in paragraphs 4(j) and 20 of the Agreements are unenforceable against Kempner.

27. The restraints on competition contained in paragraphs 4 (j) and 20 of the Agreements are also void as against public policy. These provisions serve no purpose other than to restrict competition and to encourage Cingular to unfairly and unilaterally modify the terms of its business relationship with Kempner while purporting

to deny Kempner the ability to offer its services to competing providers of cellular telephone products and services. In addition, Cingular has provided no substantial consideration for Kempner's adherence to these terms and has enforced these terms on a discriminatory basis, permitting other providers of Cingular's cellular telephone service to ignore them or to operate in their absence. On information and belief, Cingular uses the discriminatory enforcement of these provisions as a ruse for terminating contracts with distributors in order to avoid the payment of earned residual commissions.

Accordingly, Kempner asserts that it is not bound by the unenforceable terms of either Agreement, including but not limited to the exclusivity provisions of paragraphs 4(j) and 20. As a result of Cingular's conduct and the facts and circumstances of this case, there is no construction of these provisions that could be enforced consistent with applicable legal principles.

28. As a result of Cingular's threatened termination of the Agreements and other actions, there exists a ripe controversy regarding Kempner's rights and Cingular's obligations under the Agreements.

29. Pursuant to Section 2-701 of the Code of Civil Procedure, this Court is authorized to declare the rights and liabilities of the parties and to adjudicate and enforce by appropriate remedy such rights and liabilities. Kempner requires relief and a declaration of its rights and Cingular's obligations under the Agreements, including but not limited to:

- B. A declaration that the exclusivity and anti-competitive provisions of paragraphs 4(j) and 20 of each of the Agreements are void and unenforceable

by Cingular, but that the remaining provisions of the Agreements remain valid and enforceable;

- C. A declaration that Kempner's right to receive residual commissions under the terms of the Agreements accrues upon origination of a customer by Kempner for the purchase of Cingular cellular telephone services and continues for so long as such customer remains a subscriber for Cingular cellular telephone;
- D. An injunction to prevent Cingular from terminating the Agreements prior to their expiration on December 31, 2002, and preventing Cingular from terminating Kempner's right to receive residual commissions for so long as such commissions accrue;
- E. An award of damages sufficient to compensate Kempner for the illegal actions of Cingular, and the diminution of the value of Kempner's business.

COUNT II

(Injunction)

30. Plaintiff Kempner repeats and realleges paragraphs 1 through 24 as if fully set forth herein.

31. Cingular has threatened to enforce the illegal and anti-competitive provisions of the Agreements against Kempner, and to terminate Kempner's ability to receive residual commissions. Kempner is informed and believes that Cingular intends to do so as soon as July 21, 2002.

32. Unless Cingular is enjoined from enforcing the illegal provisions of the Agreements, Kempner will suffer irreparable injury, for which there is no adequate

remedy at law. Kempner enjoys significant goodwill and ongoing relationships with its existing customers as the result of the time, money and effort invested in customer development. If the illegal provisions of the Agreements are enforced, even on a temporary basis, these relationships will be destroyed and cannot easily be recreated.

33. Unless Cingular is enjoined from terminating the 1999 Agreement prior to its expiration on December 31, 2002, Kempner will suffer irreparable injury, for which there is no adequate remedy at law. As a result of Kempner's reliance on the fraudulent inducements of Cingular, Kempner has been prevented from developing the revenue stream that otherwise would have been generated from competing providers of cellular telephone services, and Kempner requires the remaining term of the 1999 Agreement in order to be placed in a position remotely similar to that which it would have been in had Cingular not deceived Kempner. If Kempner's revenue stream from Cingular is terminated before Kempner has the opportunity to establish a competitive position, there is a substantial likelihood that Kempner would go out of business, the fruits of Cingular's illegal scheme will be realized, and the damages for such loss may not be not readily susceptible to calculation. This Court has the power to fashion an equitable remedy which will relieve Kempner from the consequences of Cingular's fraud.

COUNT III

(Breach of Contract - Store at Lincolnwood Town Center)

34. Plaintiff Kempner repeats and realleges the allegations of paragraphs 1 through 24 as if fully set forth herein.

35. In April 1997, Kempner opened a sales kiosk at the Lincolnwood Town Center, a shopping center located in Lincolnwood, Cook County, Illinois, for the purpose of selling paging products and services.

36. Prior to April 1997, Kempner had requested that Cingular authorize Kempner to market and sell Cingular cellular telephone products and services at the kiosk at Lincolnwood Town Center.

37. Cingular refused to grant Kempner authority to sell Cingular cellular telephone products and services at the kiosk at Lincolnwood Town Center. Such refusal was unreasonable and violated the terms of the Agreements which permitted such expansion by Kempner.

38. In April 1998, Kempner closed its sales kiosk at the Lincolnwood Town Center.

39. At no time during the period from April 1997 through April 1998 would Cingular grant Kempner authority to sell Cingular cellular products or services at the sales kiosk at Lincolnwood Town Center.

40. In September 1998, Cingular opened a company owned kiosk at the Lincolnwood Town Center.

41. From and after September 1998, Cingular sold Cingular cellular telephone products and services from the company owned sales kiosk at Lincolnwood Town Center. Cingular did so despite the fact that Cingular refused to grant Kempner the authority to take the very same action.

42. The Agreements provide that Cingular is obligated to, among other things, establish administrative procedures and guidelines for the sale of Cingular cellular

telephone services. One administrative procedure established by Cingular is that no entity may open a sales location for the sale of Cingular cellular telephone services and equipment within a three mile radius of any other sales location for the sale of Cingular cellular telephone services and equipment.

43. The Cingular owned sales kiosk at Lincolnwood Town Center was located within a three-mile radius of Kempner's sales location at 4722 West Touhy Avenue, Lincolnwood, Illinois.

44. Kempner has been damaged by Cingular's breach of its obligations under the Agreements and by Cingular's operation of the company owned sales kiosk at Lincolnwood Town Center.

COUNT IV

(Breach of Contract – Skokie Store)

45. Plaintiff Kempner repeats and realleges the allegations of paragraphs 1 through 24 as if fully set forth herein.

46. In September 2000, Cingular opened a company owned sales store at 4730 West Dempster Street, Skokie, Cook County, Illinois, for the purpose of selling Cingular cellular telephone products and services to consumers.

47. The Cingular sales store at 4730 West Dempster Street in Skokie is located within a three-mile radius of Kempner's sales location at 4722 West Touhy Avenue, Lincolnwood, Illinois.

48. The Agreements provide that Cingular is obligated to, among other things, establish administrative procedures and guidelines for the sale of Cingular cellular telephone services. One administrative procedure established by Cingular is that no

entity may open a sales location for the sale of Cingular cellular telephone services and equipment within a three mile radius of any other sales location for the sale of Cingular cellular telephone services and equipment.

49. The Cingular owned sales store at 4730 West Dempster Street in Skokie was located within a three-mile radius of Kempner's sales location at 4722 West Touhy, Lincolnwood, Illinois.

50. Kempner has been damaged by Cingular's breach of its obligations under the Agreements and by Cingular's operation of the company owned sales store at 4730 West Dempster Street in Skokie.

COUNT V

(Breach of Contract – Accounting of Commissions And Residuals)

51. Plaintiff Kempner repeats and realleges the allegations of paragraphs 1 through 24 as if fully set forth herein.

52. The Agreements, and each Commission Addendum provides for the payment of commission and residual income to Kempner. Commissions are to be paid within fifteen (15) days of activation. Residuals are to be paid within forty-five (45) days after the end of each calendar month.

53. On information and belief, Cingular has breached the Agreements by failing to pay commissions when due. Kempner has demanded payment of the sums due and owing, but Cingular has failed and refused to pay said amounts or to account for sums due.

54. Kempner has been damaged by Cingular's breach of contract, but is unable to determine the extent of its losses without an accounting from Cingular of the sums due and owing.

COUNT VI

(Breach of Contract - Failure To Reimburse Expenses)

55. Plaintiff, Kempner repeats and realleges the allegations of paragraphs 1 through 24 as if fully set forth herein.

56. The Agreements each provide that Cingular will reimburse Kempner for out of pocket costs related to the substitution by Cingular of its trademarks, service marks, trade names and insignia which Kempner is required to utilize.

57. As a result of the merger between SBC Communications and Bell South Corporation, many of the trademarks, service marks, trade names and insignia utilized by Cingular were changed and Kempner was required to implement these changes.

58. Kempner has incurred out of pocket costs as a result of these changes. In accordance with the Agreements, Kempner has demanded that Cingular reimburse Kempner for these costs, but Cingular has failed and refused to do so.

59. As a result of Cingular's breach of contract, Kempner has incurred damages which are estimated to total \$4,500.00.

60. Plaintiff, Kempner, repeats and realleges the allegations of Paragraph 1 through 24 as if fully set forth herein.

61. The false statements that Cingular made to Kempner as a part of Cingular's scheme to defraud Kempner were material and included the following:

- A. Cingular falsely represented to Kempner that Kempner had access to the same level of pricing and equipment discounts as Cingular's internal channels of distribution;
- B. Cingular falsely represented to Kempner that the terms offered in the joint promotional advertising required by the Agreements would be available to customers who patronized Kempner;
- C. Cingular falsely represented to Kempner that Cingular was then currently reviewing the store listings on the support number system and making the necessary revisions.

62. The Cingular representatives who made the representations to Kempner knew at the time that representations were made that they were false. Whiddon and the other Cingular representatives made these false statements to Kempner in order to induce Kempner to refrain from exercising its right to expand its business by offering the cellular telephone products and service of other providers, and to conceal from Kempner the fact that Cingular had breached the Agreements, rendering the illegal provisions of the Agreements unenforceable against Kempner.

63. Kempner in fact relied on the statements of Whiddon and other Cingular representatives by refraining from exercising its right to expand his business by offering the cellular telephone products and services of other providers.

64. Kempner has been damaged as a result of its reasonable reliance on the fraudulent statements made by Whiddon and the other Cingular representatives in that Kempner has lost the profits that it would have had it expanded its business by selling to customers the cellular telephone products and services of providers who competed with Cingular. As a result, the value of Kempner's business has been diminished.

65. The actions of Cingular were intentional and malicious, thereby entitling Kempner to an award of punitive damages to punish Cingular and deter others from similar conduct in the future,

COUNT VIII

(Illinois Consumer Fraud and Deceptive Business Practices Act)

66. Plaintiff, Kempner, repeats and realleges the allegations of Paragraphs 1 through 24 as if fully set forth herein.

67. The Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et. seq. ("CFA") prohibits unfair methods of competition and unfair or deceptive acts or practices.

68. Cingular violated Section 2 of the CFA [815 ILCS 505/2] by, among other things:

- A. Falsely representing to Kempner that Kempner had access to the same level of pricing and equipment discount as Cingular's internal channels of distribution.
- B. Publishing advertisements in newspapers of general circulation containing Kempner's business address and offering terms and conditions of sale unavailable at Kempner's location without clearly indicating to consumers that such terms and conditions will not be honored for purchases from Kempner.
- C. Falsely representing to Kempner that Cingular was then currently reviewing the store listings on the support number system and making the necessary revisions. ILCS 505/10a(c) Kempner is entitled to an award of attorneys fees.

69. These statements were made in a course of conduct involving trade or commerce and related to consumer protection issues because it enabled Cingular to obtain business from customers that would otherwise have been directed to its competitors on terms more favorable to the customer.

70. Cingular intended that Kempner would rely on the deception by refraining from exercising its right to expand its business by offering the cellular telephone products and service of other providers, and to conceal from Kempner the fact that Cingular had breached the Agreements, rendering the illegal provisions of the Agreements unenforceable against Kempner.

71. Kempner suffered actual damages as a result of Cingular's violation of the CFA and brings this claim under 815 ILCS 505/10a. Pursuant to 815 ILCS 505/10a(c) Kempner is entitled to an award of attorney's fees.

72. The actions of Cingular were intentional and malicious, thereby entitling Kempner to an award of punitive damages to punish Cingular and deter others from similar conduct in the future.

COUNT IX

(Violation of Illinois Franchise Disclosure Act)

73. Plaintiff, Kempner, repeats and realleges the allegations of Paragraphs 1 through 24 as if fully set forth herein.

74. The 1999 Agreement constituted the sale of a franchise to Kempner in that:

- a. Kempner was granted the right to engage in business of offering, selling or distributing goods or services under a marketing plan or system prescribed or suggested in substantial part by Cingular; and
- b. The operation of Kempner's business pursuant to this plan or system was substantially associated with Cingular's trademark service, trade name, logo type advertising or other commercial symbols designating Cingular; and
- c. Kempner was granted the right to engage in this business and was required to pay indirectly a sum in excess of \$500.00 by, among other things, procuring insurance coverage in excess of 1 million dollars protecting Cingular.

75. On information and belief, the Cingular franchise sold to Kempner was unregistered, and its sale therefore violated 815 ILCS 705/5(1).

76. Cingular failed to deliver to Kempner a disclosure statement meeting the requirements of the Illinois Franchise Disclosure Act, and therefore violated 815 ILCS 705/5(2).

77. Cingular violated 815 ILCS 705/6 by, among other things, falsely representing to Kempner that Cingular would cooperate with Kempner to grow Kempner's customer base when Cingular actually intended to steal as many customers as possible from Kempner and drive Kempner out of business. Pursuant to 815 ILCS 705/5(2) Cingular was required to disclose to Kempner all of its business practices and the details regarding the operation of its franchise contracts and to clearly disclose to Kempner that Cingular intended to target customers developed by Kempner and to market directly to those customers in a manner that would deprive Kempner of commissions and residual revenues, while preventing Kempner from expanding its business. Had Cingular made these disclosures to Kempner, Kempner would not have entered into the 1999 Agreement.

78. Kempner has been damaged by Cingular's violation of the Illinois Franchise Disclosure Act in that Kempner has expended great sums of money to develop and maintain a customer base, only to have those customers and the commission and residual revenue which they generate misappropriated by Cingular. As a consequence, the value of Kempner's business has been diminished. Pursuant to 735 ILCS 705/26, Kempner is entitled to recover the costs of this action and reasonable attorneys fees.

(Intentional Interference With Prospective Economic Advantage)

79. Plaintiff, Kempner, repeats and realleges the allegations of Paragraphs 1 through 24 as if fully set forth herein.

80. At all times, Kempner had a reasonable expectation of maintaining a continuing business relationship and of an economic advantage derived from its relationship with customers that it originated for cellular telephone services provided by Cingular. Pursuant to the scheme described herein, Cingular intentionally and unjustifiably interfered with Kempner's relationship with the customers Kempner had originated in a manner that induced or caused a breach or termination of the expectancy.

81. Cingular was aware of Kempner's expectancy. The Agreements and each periodic Commission Addendum identified Kempner's continuing interest in residual income derived from the customers it had originated.

82. Kempner has been damaged by the intentional and unjustified interference of Cingular with its reasonable expectation of a prospective economic advantage because it has lost residual income that it would otherwise be paid.

Kempner is unable to determine the amount of these damages without an accounting of the residuals due.

83. The actions of Cingular were intentional and malicious, thereby entitling Kempner to an award of punitive damages to punish Cingular and deter others from similar conduct in the future.

WHEREFORE, Kempner Mobile Electronics, Inc. prays that the Court find in its favor and enter judgment against Southwestern Bell Mobile Systems d/b/a Cingular Wireless as follows:

PURSUANT TO COUNT I:

- A. In favor of Kempner declaring that Kempner is no longer bound by the unenforceable restrictions contained in the Agreements; and
- B. In favor of Kempner declaring that Kempner has a right under the Agreements to receive residual commissions for customers originated by Kempner for so long as such customer remains a subscriber for Cingular cellular telephone services; and
- C. In favor of Kempner prohibiting Cingular from terminating the Agreements prior to their expiration on December 31, 2002; and
- D. In favor of Kempner awarding damages for Cingular's illegal conduct; and
- E. For such other and additional relief as the Court deems just and appropriate;

PURSUANT TO COUNT II:

- F. For an order temporarily, preliminarily and permanently enjoining, restraining and prohibiting Cingular from enforcing the provisions of paragraph 4(j) and paragraph 20 of the Agreements; and
- G. For an order temporarily, preliminarily and permanently enjoining, restraining and prohibiting Cingular from terminating the 1999 Agreement prior to its expiration on December 31, 2002; and
- H. For an injunction temporarily, preliminary and permanently enjoining, restraining and prohibiting Cingular from failing to pay residual commissions to Kempner for so long as such commissions accrue; and
- I. For such other and additional relief as this Court deems just and appropriate.

PURSUANT TO COUNT III:

- J. In favor of Kempner and against Cingular in an amount to be proven at trial but no less than \$1,200,000;
- K. In favor of Kempner for prejudgment interest at the statutory rate because the sum owed is certain;
- L. In favor of Kempner for post judgment interest at the statutory rate;
- M. In favor of Kempner and against Cingular for attorney fees and costs;
- N. For such other and additional relief as the Court deems just and appropriate;

PURSUANT TO COUNT IV:

- O. In favor of Kempner and against Cingular in an amount to be proven at trial but no less than \$560,000;
- P. In favor of Kempner for prejudgment interest at the statutory rate because the sum owed is certain;
- Q. In favor of Kempner for post judgment interest at the statutory rate;
- R. In favor of Kempner and against Cingular for attorney fees and costs;
- S. For such other and additional relief as the Court deems just and appropriate;

PURSUANT TO COUNT V:

- T. In favor of Kempner and against Cingular in an amount to be proven at trial as shown by the requested accounting;
- U. In favor of Kempner for prejudgment interest at the statutory rate because the sum owed is certain;
- V. In favor of Kempner for post judgment interest at the statutory rate;
- W. In favor of Kempner and against Cingular for attorney fees and costs;
- X. For such other and additional relief as the Court deems just and appropriate;

PURSUANT TO COUNT VI:

- Y. In favor of Kempner and against Cingular in an amount to be proven at trial but no less than \$4,500.00;
- Z. In favor of Kempner for prejudgment interest at the statutory rate because the sum owed is certain;
- AA. In favor of Kempner for post judgment interest at the statutory rate;
- BB. In favor of Kempner and against Cingular for attorney fees and costs;
- CC. For such other and additional relief as the Court deems just and appropriate;

PURSUANT TO COUNT VII:

- DD. In favor of Kempner and against Cingular in an amount to be proven at trial but no less than \$10,000,000;
- EE. In favor of Kempner and against Cingular in an amount to be proven at trial for punitive damages;
- FF. In favor of Kempner for post judgment interest at the statutory rate;
- GG. In favor of Kempner and against Cingular for attorney fees and costs;

- HH. For such other and additional relief as the Court deems just and appropriate;

PURSUANT TO COUNT VIII:

- II. In favor of Kempner and against Cingular in an amount to be proven at trial but no less than \$10,000,000;
- JJ. In favor of Kempner and against Cingular in an amount to be proven at trial for punitive damages;
- KK. In favor of Kempner for post judgment interest at the statutory rate;
- LL. In favor of Kempner and against Cingular for attorney fees and costs;
- MM. For such other and additional relief as the Court deems just and appropriate;

PURSUANT TO COUNT IX:

- NN. In favor of Kempner and against Cingular in an amount to be proven at trial but no less than \$5,000,000;
- OO. In favor of Kempner for post judgment interest at the statutory rate;
- PP. In favor of Kempner and against Cingular for attorney fees and costs;
- QQ. For such other and additional relief as the Court deems just and appropriate;

PURSUANT TO COUNT X:

- RR. In favor of Kempner and against Cingular in an amount to be proven at trial as shown by the requested accounting;
- SS. In favor of Kempner and against Cingular in an amount to be proven at trial for punitive damages;
- TT. In favor of Kempner for post judgment interest at the statutory rate;
- UU. In favor of Kempner and against Cingular for attorney fees and costs;
- VV. For such other and additional relief as the Court deems just and

appropriate.

Respectfully submitted,
Kempner Mobile Electronics, Inc.

By:



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