

**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

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GUSTAVO R. CALDERON, individually, and  
AIRBORNE BEEPERS & VIDEO, INC.,  
an Illinois Corporation,

Plaintiffs,

**Case No.: 02 C 9134**

v.

**Judge: John F. Grady**

Cingular Wireless, Inc., SBC Communications Inc.,  
and Bell South Corporation,

**Magistrate Judge: Bobrick**

Defendants.

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**VERIFIED AMENDED COMPLAINT**

Plaintiffs come to this Court in good faith and allege as follows:

**NATURE OF THE ACTION**

1. Plaintiff Calderon brings this action under 42 U.S.C. §§ 1981 and 1982, and under the Fifth and Fourteenth Amendments of the United States Constitution, and the Plaintiffs jointly bring several state law claims.

2. Defendants, Cingular Wireless Inc. and its parent companies SBC Communications and Bell South Corporation (“Cingular”), have been engaged in a widespread pattern and practice of discrimination against blacks and minorities. This discrimination has been against employees of Cingular and Dealers who contract to do business with Cingular. Cingular discriminates against all blacks and minorities regardless of whether they are employees or Dealers who contract to do business with it.

3. Cingular systematically fails to uphold its contractual obligations with black and minority Dealers, while not doing the same with white Dealers. This is in violation

of 42 U.S.C § 1981. Cingular has never sold a “sales and service contract” to a black Dealers; it discriminates against and is extremely reluctant to make a sale and service contract with minorities, while an overwhelming number of Dealers with a sale and services contract are white.

4. Cingular refuses to rent or sell certain cellular phones under the “sale and services” contract to Blacks on the basis of race. This is in violation of 42 U.S.C. § 1982. Cingular has consistently used its corporate power to keep black and minority Dealers within their geographical area in which blacks and minorities reside; relying on a so called “three-mile-rule.” It prohibits black and minority Dealers from expanding outside the black and minority areas not allowing them to become a sale and service Dealer. While at the same time, it does not prohibit white Dealers from expanding into black or minority geographic areas by allowing them to become a sale and service Dealer. This refusal to contract with and to sell or rent to Blacks and minorities is in violation of both §§ 1981 and 1982.

#### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331, 1343(a)(4); 42 U.S.C. §§ 1981 & 1982; and the Fifth and Fourteenth Amendments to the United States Constitution. Supplemental Jurisdiction for the state law claims exists under 28 U.S.C. § 1367(a). All parties are domiciled or doing business in this venue and the causes of action arose within this venue.

## **THE PARTIES**

6. Plaintiff Gustavo R. Calderon is an individual who is the majority stockholder in the basis whom of the other Plaintiff, AIRBORNE BEEPERS & VIDEO, INC., an Illinois Corporation. The Defendant, Cingular Wireless, is a corporation that sells cellular telephones, which is a joint venture between the two parent companies: defendants SBC Communications Inc., and Bell South Corporation,

## **STATEMENT OF FACTS**

7. On December 1, 1997, Plaintiff Gustavo R. Caldron, a Mexican national and owner of Airborne Beepers and Video Inc., entered into a three-year contract with Defendants known as the *Authorized Dealer Agreement*. Defendants' agents who made this agreement were, Bob Nelson, Jim Moen, Lauren Whiddon, Todd Flack and Brian Klamer. This agreement defined the nature and scope of the relationship that exist between Calderon and the Defendants.

8. The Agreement provided that the plaintiffs will be paid certain commission and residuals (royalty payments) based on the number of customers the plaintiffs obtains. If the plaintiffs obtain more than 50 customers per month they will receive an additional \$5 bonus for each customer and \$10 bonus per customer when the total activation's per month exceed 80 per month.

9. Cingular management, including Bob Nelson, Jim Moen, Jim Anerberg and Brain Klamer, among others, recognized plaintiffs' success in their business. Such success made by a White Dealer would qualify them to receive a "Sales and Service" contract. The expressed requirement for Dealers to become a "Sales and Service

Representative” is to have "an average of 75 contracted new lines a month for over one year."

10. There are no Blacks with Cingular who have received a sales and service contract. And it is very rare for minority Dealers to be given a sales and service contract. By not receiving a sales and service contract plaintiffs were limited in their expansion and could not grow out of his minority neighborhood. For example, the dealers earn less on each sale that's made and the monthly residuals are less, yet these dealers were required to perform at the same level as a sales and service dealers.

**A. The above named Cingular managers discriminated against Plaintiff**

**Calderon by:**

- a) Cingular withholding approval for Plaintiff and other minority Dealers to open new sites in non-minority areas;
- b) Cingular failed to make prompt and complete repairs to the phones sold to plaintiffs' customers;
- c) Cingular provided free dealer lines and unlimited a time to White Dealers, but not to plaintiff and other minority Dealers;
- d) Cingular did provide the same quality of telephones as compared to the white dealers, but the service they provided in the minority areas was very poor;
- e) Cingular provided inventory to white dealers and its own stores before Plaintiff; thus leaving plaintiff without product to sell.

- f) Cingular arbitrarily changes the method of paying commission. They have also changed method of payment from credit, to cash on delivery, however white dealers maintained line credit;
- g) Cingular, through its agents Bob Nelson, Jim Moen, Lisa Furey, Lauren Whiddon and others, would approve plaintiff as agent and a prospective location while simultaneously approving other sales and service agents in the same location; thus causing plaintiff to loose location.
- h) Cingular required plaintiff to submit supporting paperwork in order to receive commissions and residuals and it would deny payment for the slightest infraction;
- i) Cingular improperly billed customers who signed up through plaintiff and provided improper service, which caused many customers to cancel their service;
- k) Cingular consistently fails to credit over billed customers, even after plaintiff and customers demand credit, thus, causing customers to cancel, and Plaintiffs to receive charge back.
- l) Cingular allows "non-authorized retail outlets" to directly compete with plaintiffs within plaintiffs geographic area in breach of said contract;
- m) Cingular refuses to pay plaintiff commission due to its own software glitches, notwithstanding the fact that they obtained new customers;
- n) Cingular denied plaintiffs request to open locations in "economically advantaged" areas due to its three-mile rule guideline;
- o) Cingular denied designating plaintiff as a "Sale and Service center."
- p) Cingular fails to promote plaintiffs store locations in its advertising, on the Internet and in its 800 numbers.

q) Cingular requires minorities to pay for building out their own stores, and requests them to pay for the new look fixtures while for the white sales and service Cingular pays for build outs, and loan them the money for the fixtures.

r) Defendants discriminate against minorities in the following manner; when Mike Moss ( Gold Coast Beepers) was in business he tried to sell competitor prepaid products he received a notice of breach of contract from Cingular, but when Alpha Wireless purchased his stores and started selling competitor products Lauren Whiddon testified that those type of sales weren't in breach of contract. Plaintiffs have always been denied as Mike Moss to sell competitor prepay products.

s) Plaintiff has always been told that if he closes down any stores, or activations decline he would lose his residual, and dealership. Defendants have allowed white sales and service centers to sell to each other, and then operate unauthorized and kept their residual.

t) Defendants placed Plaintiffs as well as Plaintiffs customers he activated on a credit watch list; thus causing Plaintiffs to lose customers.

11. When Plaintiffs had some credit line, Cingular manager Laura Price required them to pay for the products received within 30 days, but Cingular managers would not pay them their commission or residuals for over 180 days. White Dealers were paid their commission and residuals within 30 days by Pat Chozack and were granted in excess of 120 days to pay for products supplied by Cingular.

## **BREACH OF CONTRACT**

12. Despite repeated demands, since January 1, 2002, the Defendants failed to pay plaintiffs commissions and residuals that were earned pursuant to the *Authorized Dealer Agreement*. Defendants also failed to pay commissions to plaintiffs for the sale of insurance coverage offer to customers.

13. Pursuant to the Authorized Dealer Agreement if the customer does not maintain his or her telephone service for more than 180 days, then the defendants would impose a "charge back" fee on the plaintiffs to reimburse the defendants commission and residuals. However, the defendants breached his agreement for the following reasons:

- a) the defendants cause the customers to terminate their service because of overcharging the customers and failed to provide the expected service;
- b) the defendants failed to properly fix the customers' phones within a reasonable amount of time;
- c) the defendants imposed the charge back fee on customers who reinstated their service within the hundred and 180 days and failed to pay plaintiff commission and residuals for those customers;
- d) The defendants failed to provide a list of those customers who terminated and reinstated their service within the 180 days.

14 Defendants breached the Authorized Dealer Agreement with both Plaintiffs failing to give earned commission when consumers, who failed to stay active for minimum of 181 days and were later reinstated; Cingular consistently excluded or failed to identify Plaintiffs' stores in their advertisements; Cingular authorized currency exchanges as dealers within the Plaintiffs' geographic area, which reduced their market

share; Cingular permitted unauthorized Dealers to sell Cingular products by supplying such products to “sales and service centers” that in turn supply unauthorized Dealers.

15. Cingular made numerous errors on customers bill, which resulted in customers terminating their contract and Cingular forcing Plaintiffs to pay charge-backs. Cingular refused Plaintiffs’ request to audit their accounting records.

16. Defendants refused Plaintiffs’ request to audit its records. Cingular had changed some of the customer’s numbers or cellular phone units without revealing the change to Plaintiffs. Plaintiffs had to pay charge-backs and they lost their commission and residuals for these customers.

17. Defendants have allowed new dealers to open within the same geographical area of Plaintiffs store locations; defendant Lauren Whiddon testified that anytime a request is received to open within a established site, the established dealer has first right.

**COUNT ONE**  
**FIRST CAUSE OF ACTION**  
**DISCRIMINATION IN CONTRACTUAL RELATIONSHIP, 42 U.S.C § 1981**

18. Plaintiffs repeat paragraphs 1 through 16 as though stated herein.

19. Plaintiff Calderon is a Mexican national and members of a racial minority group.

20. Defendants’ intent was to discriminate against Plaintiff Calderon on the basis of his race and national origin.



21. The discrimination enumerated above related to the making, performing and modifying a contract, as set forth above and in the common law fraud cause of action.

**COUNT TWO**  
**SECOND CAUSE OF ACTION**  
**DISCRIMINATION IN SALE & RENT, 42 U.S.C § 1982**

22. Plaintiffs repeat paragraph 1 through 20 as though stated herein.

23. Plaintiff Calderon is a Mexican national and members of the racial minority group.

24. Defendants intentionally discriminated against Calderon by refusing to rent or sell to them certain cellular phones under the “sale and services” contract on the basis of race and national origin.

25. The discrimination enumerated above concerns the selling and renting of certain cellular phones under the "sale and services" contract, as set forth above and in the common law fraud cause of action below.

**COUNT THREE**  
**THIRD CAUSE OF ACTION**  
**COMMON LAW FRAUD**

26. Plaintiffs repeat paragraph 1 through 24 as though stated herein.

27. The following are false statements of material facts made by Cingular’s managers Mr. Robert Nelson, Jim Moen, Brian Klamer, and Lauren Whiddon; they knew that the statements were false; they made the statements to induce Plaintiffs to act; the Plaintiffs acted in reliance on the truth of the statements; and damages resulted from such reliance.

28. There are five incidents that constitute common law fraud and/or a breach of contract.

29. **FIRST**, in 1997, Plaintiffs entered in a contract with Cingular, specifically with Mr. Robert Nelson, Jim Moen, Brian Klamer, and Ron Foster was a witness. The terms of the contract were that Plaintiffs would start as exclusive prepaid dealer, and convert over to sales and service provided 75 numbers per month were activated. Cingular promised to promote Plaintiff to “Sales and Service” Dealer if he achieves the required rate of sale.

30. However, Mr. Nelson, Mr. Moen, and Mr. Klamer knew that their statements to promote Plaintiff to Sales and Service, if he meets the requirements, was false and they made this state to induce Plaintiffs to remain in a depressed minority areas. Plaintiff, in reliance on this false statement, did not expand.

31. Plaintiff was able to get over 75 contract lines of service per month for more than one year. Yet when they demanded to be promoted to Sales and Services, the following Cingular representatives denied their demand: Shelly Boersma, Jim Anetsburger, Bob Nelson, Lauren Whiddon, Jim Moen, and Brian Klamer.

32. **SECOND**, Jim Moen and Bob Nelson expressed to Plaintiffs and that they would receive the same equipment and service pricing as Cingular gives to its internal distribution channels. This was witnessed and implied by account executives: Ron Foster. It was later discovered by other Dealers that Cingular was not giving the same equipment and service pricing to their

Dealers as to Cingular's internal distribution channels. Cingular later admitted that it did not provide the same equipment and service pricing.

33. **THIRD**, these same individuals also expressed to Plaintiffs that since they were exclusive agent they would be on the "support number system." This is a system where a customers calling Cingular for the location of a store that sells its products, Cingular would give all the stores within a zip code. However, Plaintiffs' stores were not listed. Cingular management knew that Plaintiffs' location would not be listed and made this false statement to induce Plaintiffs to renew their contract with Cingular.

34. **FOURTH**

Defendants Jim Moen, and Bob Nelson expressed to Plaintiff that Cingular products would only be sold through exclusive agents, and only exclusive agents earn residual, and co-op. Cingular knew these statements to be false and were said to induce Plaintiffs to renew their contract.

35. After the Plaintiffs complained about the above and demanded that Cingular remedy the matter, the above named Cingular's managers commenced a concerted effort to put Plaintiffs out of business. They first withheld the sale to Plaintiffs of desperately needed equipment during a peak time of the year. Second, they withheld earned commission and residuals. Third, they did not properly service Plaintiffs' customers by not repairing their phone, by making many errors on their bills and by not providing a

proper service. This caused many terminations of service before the 180 days period, which permitted Cingular to impose a “charge-back” fee against Plaintiffs.

36. Many of these customers restored their service before the 180 days and or their charge-back, however, Cingular did not refund these “charge-backs” to Plaintiffs, nor did it give the earned commission and residuals for these customers. The above named Cingular managers withheld hundreds of thousands of dollars from Plaintiffs; the exact amount cannot be known without reviewing Cingular’s records.

#### **FIFTH**

37. Defendants Bob Nelson, Jim Moen, Brian Klamer, and Ron Foster as witness informed Plaintiffs that his store would be included in full page advertisements as the sales and service agents, Defendants required Plaintiffs to make advance payments from his commissions and co-op to help pay for the ads. Plaintiff’s stores were never listed.

38. As a result of defendants’ Common Law Fraud/Breach of Contract, Plaintiffs were unable to expand or grow their business. Plaintiffs lost profits, commissions and residuals. Plaintiffs were irreparably damaged.

#### **COUNT FOUR** **FOURTH CAUSE OF ACTION** **BREACH OF CONTRACT**

39. Plaintiffs repeat paragraph 1 through 37 as though stated herein.

40. In 1997, Plaintiffs entered into a contract with the defendants entitled Authorizes Dealer Agreement, whereby the Cingular provided cellular phones and Plaintiffs sold the phones and receive profit and commissions.

41. Since April 2003, Defendants continued to breach of *Authorized Dealer Agreement* by: failing to pay commissions and residuals to Plaintiffs, failing to extend credit and provide inventory to Plaintiffs, and failing to provide regular reports and financial statements.

42. The Plaintiffs and Defendants entered into a contractual agreement with respect to the statements made in the pleadings set forth in the above common law fraud cause of action. Defendants breached said contract by not fulfilling its contractual obligations, as set forth above.

**COUNT FIVE**  
**FIFTH CAUSE OF ACTION**  
**BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALINGS**

43. Plaintiffs repeat paragraphs 1 through 40 as though stated herein.

44. In 1997, plaintiffs entered into a covenant of good faith and fair dealings with Cingular by entering into a contract with it, entitled Authorizes Dealer Agreement, whereby Cingular provided cellular phones and Plaintiffs sold these phones and receive profits and commission.

45. Since March 1, 2003 defendants continued to breached said covenant by not paying Plaintiffs' their commission and residuals, and by not allowing Plaintiffs to become sale and service representatives, and by canceling Plaintiffs credit line, which permits them to keep inventory in their stores, and by discriminating against him on the basis of their race.

46. The Plaintiffs and Defendants entered into a covenant of good faith and fair dealings with respect to the statements made in the pleadings set forth in the above

common law fraud cause of action. Defendants breached said covenant of good faith and fair dealings by not fulfilling its obligations, as set forth above.

**COUNT SIX**  
**SIXTH CAUSE OF ACTION**  
**VIOLATION OF THE ILLINOIS FRANCHISE DISCLOSURE ACT**

47. Plaintiffs repeat paragraphs 1 through 44 as though stated herein.
48. The Plaintiffs entered into an agreement with defendants whereby, defendants would grant them the right to engage in selling its wireless phone and service, under a plan that Cingular prescribes. Plaintiffs could only sell Cingular products, within a three-mile-radius from any pre-existing sales and service centers.
49. Plaintiffs operated their business pursuant to the trademark, trade name, logotype and advertisement of Cingular.
50. Plaintiffs had to pay SBC, and Cingular Wireless \$1000 for the right to engage in the business of selling Cingular's product and services. Plaintiffs had to pay one dollar per customer, or phone that was activated.
51. Plaintiffs were required to secure a surety bond in the amount of 5,000.00 dollars in favor of SBC, and Cingular Wireless to continue to sell products.
52. Defendants violated the Illinois Franchise Disclosure Act for the reasons set forth above and for terminating Plaintiffs' business without good cause.

**DAMAGES**

53. As a direct result of Cingular's conduct Plaintiffs, lost wages and had their careers irreparably damaged. They have suffered embarrassment, humiliation, and loss of

enjoyment of life, inconvenience, and other non-pecuniary losses. Plaintiffs seek relief that includes, but not limited to, back pay, front pay, lost benefits, lost future earnings, and compensatory damages for pain-and-suffering in the amount of ten million dollars (\$10,000,000). Plaintiffs' also seek attorney's fees pursuant to 42 U.S.C. § 1988, and equitable relief in an injunction prohibiting defendant's discriminatory conduct, together with such other further relief that this court deems **just and proper**.

54. As a direct result of defendant's conduct Plaintiffs lost profits and commission and had their business irreparably damaged. They have suffered embarrassment, humiliation, loss of enjoyment of life, inconvenience, and other non-pecuniary losses. Plaintiffs seek relief and includes, but not limited to, their earned commissions and residuals, lost future earnings, compensatory damages for pain-and-suffering in the amount of one hundred million dollars (\$100,000,000).

55. Since the defendant's conduct was intentional and it had prior warnings regarding such conduct, punitive damages is appropriate in this case to deter Cingular and other defendants similarly situated from repeating such conduct. Thus, Plaintiffs seek \$500 million in punitive damages.

**JURY TRIAL IS DEMANDED**

Respectfully submitted,

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