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WESTERN DISTRICT OF LOUISIANA

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

US UNWIRED INC.,)
LOUISIANA UNWIRED L.L.C.,)
TEXAS UNWIRED, and GEORGIA PCS)
MANAGEMENT, L.L.C.,)

Plaintiffs,)

v.)

SPRINT CORPORATION, SPRINT)
SPECTRUM, L.P., WIRELESSCO, L.P.,)
SPRINTCOM, INC., and NEXTEL)
COMMUNICATIONS, INC.)

Defendants.)

CV05-1084

Case No. _____

JUDGE MINALDI

MAGISTRATE JUDGE WILSON

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION AGAINST SPRINT**

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Plaintiffs US Unwired Inc. and its subsidiary Louisiana Unwired, L.L.C. (collectively, "US Unwired") seek to preliminarily enjoin Sprint Corporation ("Sprint") from consummating its proposed merger with Nextel Communications, Inc. ("Nextel") pending the trial of this action. Consummation of the merger will immediately place Sprint in competition with US Unwired in areas where Sprint has given US Unwired exclusive rights to own, build, operate and manage a wireless network. Without a preliminary injunction, US Unwired's entire business will be jeopardized.

INTRODUCTION

As this Court is aware from the parallel pending litigation, US Unwired is an "Affiliate" of Sprint. In a series of contracts with Sprint beginning in June 1998 (the "Agreements"), US Unwired, through subsidiaries, agreed to construct, manage and operate portions of the Sprint PCS wireless network in large swathes of Louisiana, Arkansas, Texas, Georgia, and in other states (the "Service Areas"). In return, Sprint granted US Unwired the exclusive right to operate the Sprint PCS wireless network in those areas and agreed that it would not own, build, operate, or manage any other wireless network in those areas during the up to 50 year terms of the Agreements. In reliance on that commitment, US Unwired has invested over \$600 million to build and establish a wireless network for Sprint in the Service Areas. US Unwired has offered Sprint services in its exclusive Service Areas since 1998.

Sprint's proposed merger with Nextel changes the situation dramatically and now makes acute the need for a preliminary injunction against Sprint. Immediately upon consummation of the merger, Sprint will own and assume operation of the extensive Nextel network. Sprint's ownership and operation of the rival Nextel network will violate US Unwired's exclusive territory rights because that network currently operates in the exclusive US Unwired Service Areas where Sprint is currently prohibited from operating.

Despite the imminence of the merger and the certain violation of US Unwired's exclusivity rights, Sprint has not made arrangements to divest the pertinent Nextel properties or to discontinue operations there. To the contrary, Sprint repeatedly has announced to the public and to federal regulatory agencies that it intends to operate the former Nextel network seamlessly and immediately after the merger, thereby competing with US Unwired for wireless customers in the same areas in which it gave US Unwired exclusive rights.

Indeed, Sprint's violation of US Unwired's rights is brazen. In its proxy statement soliciting shareholder approval for the merger, Sprint essentially has admitted that the merger will violate the exclusivity provisions it has with the Affiliates, including US Unwired:

Sprint is subject to exclusivity provisions and other restrictions under its arrangements with the Sprint PCS Affiliates. Continued compliance with those restrictions may limit Sprint Nextel's ability to achieve synergies and fully integrate the operations of Sprint and Nextel, and Sprint or Sprint Nextel could incur significant costs to resolve issues related to the merger under these arrangements . . . Three of the Sprint PCS Affiliates [including US Unwired] have arrangements that do not expressly define the network covered by the exclusivity agreements and as a result these Sprint PCS Affiliates might contend that Sprint Nextel would be in breach of these provisions upon completion of the merger.

(See App. 1, Piper Decl. ¶ 9 & Ex. 2, Proxy Stmt. at 33.)¹

The stakes are enormous and time is short. Sprint has set a shareholder's meeting to approve the merger on July 13, 2005. Upon consummation of its merger with Nextel, Sprint will immediately become one of US Unwired's largest and most capable competitors. US Unwired could stand competition from Nextel; what it cannot stand is competition from a Nextel that is operated by its supposed long-term partner, Sprint. Without a preliminary injunction, US Unwired will be irreparably harmed because the illegal competition from Sprint will jeopardize

¹ Citations to "App. ___" are to US Unwired's Separate Appendix, Volumes I and II.

the value of hundreds of millions of dollars US Unwired has invested to develop a network specifically tailored to Sprint's technology.

STATEMENT OF FACTS

Background – Sprint Enters Into Agreements With US Unwired To Build A Network For Sprint.

The Court will be familiar with much of the background of this dispute. In the 1990s, Sprint Corporation, Sprint Spectrum, WirelessCo, and SprintCom (collectively, "Sprint") obtained licenses from the Federal Communications Commission ("FCC") for the purpose of establishing a nationwide personal communications services network (the "Sprint PCS Network") to provide seamless, integrated voice and data services to customers using wireless technology. (App. 1, Piper Decl. ¶ 2 & App. 2, Sprint's Answer in Case No. CV 03-1326 ¶ 16.) As a condition of obtaining the licenses, the FCC required Sprint to construct a certain percentage of its national wireless services network within five years. (App. 1, Piper Decl. ¶ 2 & App. 2, Sprint's Answer in Case No. CV 03-1326 ¶ 17.) Because Sprint did not have the financial or other resources to construct that network, Sprint elected to build and operate its own network in the higher-volume urban areas and separately to contract with third parties (the "Affiliates") to construct, operate, manage, and maintain portions of the Sprint PCS Network in the lower-density, rural areas.

To implement its strategy, Sprint divided the United States into various geographic "Service Area Networks." (App. 1, Piper Decl. ¶ 2 & App. 2, Sprint's Answer in Case No. CV 03-1326 ¶ 19.) In each area, Sprint delegated to one of its third-party Affiliates the exclusive responsibility for constructing, operating and maintaining the Sprint PCS Network in each designated Service Area Network not serviced by Sprint. (*Id.*) In return, Sprint granted the

Affiliate the exclusive right to own, build, operate, and manage a wireless network in that Service Area for the entire term of the agreement. (*Id.*)

Beginning in 1998, US Unwired, through its subsidiaries, Louisiana Unwired and Texas Unwired, entered into a series of agreements with Sprint to build a wireless network for Sprint. In June 1998, Louisiana Unwired, L.L.C. ("Louisiana Unwired") entered into a Sprint PCS Management Agreement with Sprint Spectrum L.P. and SprintCom, Inc. covering eleven Service Areas in Louisiana ("1998 Louisiana Agreement"). (App. 1, Piper Decl. ¶ 3 & Ex. 1, 1998 Louisiana Agreement, Exhibit 2.1, Build Out Plan.) Between 1999 and 2000, US Unwired, through its subsidiaries, entered into three other similar agreements covering other Service Areas. (App. 1, Piper Decl. ¶ 4.)

As required by the Agreements, US Unwired spent hundreds of millions of dollars to build the wireless networks for Sprint in the exclusive Service Areas. (*Id.* at ¶ 5.) As of 2000, US Unwired had raised approximately \$600 million of debt and equity capital to finance the construction and operation of Sprint networks in the Service Areas managed by Louisiana Unwired and Texas Unwired. (*Id.*) Likewise, US Unwired extensively marketed, promoted, and sold Sprint products and services in its Service Areas. (*Id.*) For example, since 1998, US Unwired expended more than \$200 million in advertising and promoting the Sprint PCS trademark. (*Id.*)

Today, US Unwired operates several Sprint PCS Affiliates, including Louisiana Unwired, Texas Unwired, and Georgia PCS. (*Id.* at ¶ 7.) Through those Sprint PCS Affiliates, US Unwired is authorized to market and sell wireless products and services without competition from Sprint in a total of 48 markets, currently serving over 500,000 Sprint PCS customers, in a 179,000 square mile area covering portions of Alabama, Arkansas, Florida, Georgia, Louisiana,

Mississippi, Oklahoma, Tennessee, and Texas. (*Id.*) US Unwired also currently operates approximately 37 retail outlets and kiosks under the Sprint PCS trademark. (*Id.*) As a result of those marketing efforts, the number of Sprint PCS customers in US Unwired's Service Areas has increased significantly over the course of the last seven years. (*Id.*)

Sprint Grants Exclusive Rights To US Unwired Under the 1998 Louisiana Agreement.

The 1998 Louisiana Agreement was the first agreement executed between US Unwired and Sprint. In the 1998 Louisiana Agreement, as in each of the other three Agreements, US Unwired agreed "to help construct, operate, manage and maintain for Sprint PCS a portion of the Sprint PCS Network." (App. 1, Piper Decl. ¶ 3 & Ex. 1, 1998 Louisiana Agreement at 2.)

In return for US Unwired's outlay of resources to build and operate a network for Sprint, Sprint granted US Unwired the exclusive right to own, operate, build and manage a wireless network and offer Sprint-branded products in each of the US Unwired Service Areas. (App. 1, Piper Decl. ¶ 3 & Ex. 1, 1998 Louisiana Agreement § 2.3.) The 1998 Louisiana Agreement provides:

Manager [Louisiana Unwired] will be the only person or entity that is a manager or operator for Sprint PCS with respect to the Service Area and *neither Sprint PCS nor any of its Related Parties will own, operate, build or manage another wireless mobility communications network in the Service Area so long as this agreement remains in full force and effect*

(*Id.*; emphasis added.) The 1998 Louisiana Agreement defines a "Related Party" as any person or business entity that Sprint PCS "directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with" Sprint PCS. (App. 1, Piper Decl. ¶ 3 & Ex. 1, 1998 Louisiana Agreement, Schedule of Definitions at 8.) Since Sprint Corporation directly or indirectly controls Sprint Spectrum and SprintCom (App. 2, Sprint's Answer in Case No. CV 03-1326 ¶¶ 9, 10), it is plainly a Related Party.

The Agreement prohibits the recovery of consequential or lost-profit damages, (App. 1, Piper Decl. ¶ 3 & Ex. 1, 1998 Louisiana Agreement § 17.14), and instead provides for injunctive relief to prevent breaches of the Agreement:

Each party agrees with the other party that the party would be irreparably damaged if any of the provisions of this agreement were not performed in accordance with their specific terms and that monetary damages alone would not provide an adequate remedy. Accordingly, in addition to any other remedy to which the non-breaching party may be entitled, at law or in equity, *the non-breaching party will be entitled to injunctive relief to prevent breaches of this agreement* and specifically to enforce the terms and provisions of this agreement.

(App. 1, Piper Decl. ¶ 3 & Ex. 1, 1998 Louisiana Agreement § 17.6.)

**Sprint Agrees To Acquire Nextel
And Seeks Shareholder Approval For The Merger.**

On December 15, 2004, Sprint and Nextel announced they had agreed to merge. (App. 3, Application for Transfer of Control at 1; *see also* App. 1, Piper Decl. ¶ 8 & Ex. 2, Proxy Stmt. at Annex A, Merger Agreement.) Upon consummation of the merger, Nextel will be a wholly owned subsidiary of Sprint, and Sprint will be renamed Sprint Nextel Corporation. (App. 3, Application for Transfer of Control at 1, n.1; *see also* App. 1, Piper Decl. ¶ 9 & Ex. 2, Proxy Stmt. at 83.) Nextel's current wholly owned subsidiaries will survive as wholly owned subsidiaries of Sprint Nextel. (App. 3, Application for Transfer of Control at 3.) Moreover, Nextel currently owns 32% of the outstanding stock in Nextel Partners, Inc. ("Nextel Partners"), which operates under the Nextel brand name and provides wireless communications services under its own network in mid-sized and smaller markets throughout the United States. (App. 1, Piper Decl. ¶ 9 & Ex. 2, Proxy Stmt. at 104-05.) As a result of the merger, Sprint will own that 32% of Nextel Partners and Nextel Partners will also become a Related Party under the US

Unwired Agreements and be prohibited from operating a competing wireless network in the US Unwired Service Areas.

Nextel and Nextel Partners currently operate wireless networks in nine of the eleven exclusive Service Areas covered by the 1998 Louisiana Agreement. (App. 1, Piper Decl. ¶ 11 & Exs. 3 and 4.) Indeed, there is an 81.8% overlap between US Unwired's networks and the networks of Nextel and Nextel Partners' in the Service Areas covered by the 1998 Louisiana Agreement. (*Id.*)

Sprint has announced no plans to divest the overlapping Nextel operations or to discontinue them. (*Id.* at ¶ 10.) Rather, Sprint has made clear that upon consummation of the merger, Sprint Nextel will operate Nextel's and Nextel Partners' existing networks, including those portions of the Nextel and Nextel Partners networks that overlap with US Unwired's network in the exclusive Service Areas covered by the 1998 Louisiana Agreement. (App. 3, Application for Transfer of Control at 4, 23-24; *see also* App. 1, Piper Decl. ¶ 9 & Ex. 2, Proxy Stmt. at 28.)

On June 13, Sprint mailed its proxy statement to solicit shareholder approval of the merger. (App. 1, Piper Decl. ¶ 9.) The shareholder vote is scheduled for July 13, 2005. (*See* App. 1, Piper Decl. ¶ 9 & Ex. 2, Proxy Stmt. at 106.) Assuming approval by shareholders, the merger may be consummated immediately upon receipt of regulatory approvals, which Sprint says are expected by August 2005. (App. 1, Piper Decl. ¶ 9.) In its proxy statement, Sprint acknowledged that its operation of Nextel's network is likely to infringe on US Unwired's (and other Affiliates') exclusive rights by operating Nextel service in the exclusive Service Areas:

Three of the Sprint PCS Affiliates [including US Unwired] have arrangements that do not expressly define the network [in terms of

licensed spectrum]² covered by the exclusivity agreements and as a result these Sprint PCS Affiliates might contend that *Sprint Nextel would be in breach of these provisions upon completion of the merger*. . . . Although Sprint may from time to time engage in discussions with Sprint PCS Affiliates regarding these matters, there is no assurance that these arrangements can be renegotiated with them on favorable terms or that waivers of the restrictions under those arrangements can be obtained.

(App. 1, Piper Decl. ¶ 9 & Ex. 2, Proxy Stmt. at 33, emphasis added.)

ARGUMENT

The purpose of a preliminary injunction is to preserve the status quo until a final judgment. *Wenner v. Texas Lottery Comm.*, 123 F.3d 321, 326 (5th Cir. 1997); *see also Griffin v. Box*, 910 F.2d 255, 263 (5th Cir. 1990) (noting that maintaining the status quo is “the central purpose of a preliminary injunction”). A preliminary injunction should issue where, as here, the moving party establishes: (i) that it has a substantial likelihood of success on the merits; (ii) that failure to grant the injunction will result in irreparable injury; (iii) that the threatened injury outweighs any damage that the injunction may cause the opposing party; and (iv) that the injunction will not disserve the public interest. *Dent Zone Network, LLC v. Heritage Admin. Co.*, 87 Fed. Appx. 341 (5th Cir. 2004); *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997); *Allied Mktg. Group, Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 809 (5th Cir. 1989). As demonstrated in sections I through IV below, US Unwired easily satisfies the four factors required for an injunction.

² The 1998 Louisiana Agreement prohibits Sprint from operating in US Unwired’s Service Areas a “wireless mobility communications network,” but does not otherwise define that term. As a result, the 1998 Louisiana Agreement covers any wireless network operating on any spectrum. In contrast, the Texas Unwired Agreement, the 1999 Louisiana Agreement, and the Georgia PCS Agreement all define the term “wireless mobility communications network” to mean only a wireless network operating on the 1900 MHz spectrum. Nextel’s network currently operates on the 800 MHz spectrum. US Unwired seeks preliminary relief only pursuant to the 1998 Louisiana Agreement.

I. US UNWIRED WILL SUCCEED ON THE MERITS OF ITS CLAIM THAT SPRINT BREACHED THE 1998 LOUISIANA AGREEMENT THROUGH ANTICIPATORY REPUDIATION.

To obtain a preliminary injunction, the moving party must show a likelihood of success on the merits of its claim. *Allied Mktg. Group, Inc.*, 878 F.2d at 809. A likelihood of success need not be one of absolute certainty. *Cho v. Itco, Inc.*, 782 F. Supp. 1183, 1185 (E.D. Tex. 1991). Rather, “[i]t is enough that the movant has raised questions going to the merits so serious, substantial, and doubtful as to make them fair ground for litigation and thus for more deliberate investigation.” *Id.*

Here, Sprint’s contractual violation is all but certain. Under the doctrine of breach by anticipatory repudiation, a party breaches its contract when it expresses its intent to violate a material term of the contract. *Mar-Kay Plastics, Inc. v. Alco Standard Corp.*, 825 S.W.2d 381, 384 (Mo. Ct. App. 1992) (“[A] party to a contract repudiates that contract by manifesting, by words or conduct, a positive intention not to perform.”)³; *see also Fertel v. Brooks*, 832 So. 2d 297, 305-06 (La. Ct. App. 2002) (“The doctrine of anticipatory breach of contract ‘applies when an obligor announces he will not perform an obligation which is due sometime in the future.’”); Restatement (Second) of Contracts § 250.

By proceeding with the Nextel merger and unequivocally stating its intention to own and operate Nextel’s network post-merger in the exclusive areas covered by the 1998 Louisiana Agreement, Sprint has committed an anticipatory breach of a material term of the 1998 Louisiana Agreement. Section 2.3 of that Agreement expressly provides that “neither Sprint PCS nor any of its Related Parties will own, operate, build or manage another wireless

³ Each of the Agreements provides: “The internal laws of the State of Missouri (without regard to principles of conflicts of law) govern the validity of this agreement, the construction of its terms, and the interpretation of the rights and duties of the parties.” (App. 1, Piper Decl. ¶ 3 and Ex. 1, 1998 Louisiana Agreement §17.12.)

mobility communications network in the Service Area so long as this agreement remains in full force and effect.” (App. 1, Piper Decl. Ex. 1, 1998 Louisiana Agreement § 2.3.) Nextel’s network operates in the exclusive US Unwired Service Areas covered by the 1998 Louisiana Agreement and clearly falls within the plain meaning of the term “wireless mobility communications network.” Therefore, as Sprint effectively concedes in its proxy statement, Sprint’s plan to operate Nextel’s wireless network violates the 1998 Louisiana Agreement. (App. 1, Piper Decl. ¶ 9 & Ex. 2, Proxy Stmt. at 33.)

II. US UNWIRED WOULD SUFFER IMMEDIATE IRREPARABLE HARM IF AN INJUNCTION DOES NOT ISSUE.

To obtain a preliminary injunction, a party must also show irreparable harm. *Lakedreams v. Taylor*, 932 F.2d 1103, 1109 (5th Cir. 1991). Irreparable harm occurs when “economic rights are especially difficult to calculate,” *id.*, or where the moving party has no adequate remedy at law. *Valley*, 118 F.3d at 1055-56; *FoodComm Int’l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003). Even if a party has some theoretical remedy at law, that remedy is nevertheless considered “inadequate” where it is seriously deficient as compared to the harm suffered. *Foodcomm Int’l*, 328 F.3d at 304.

As demonstrated below, Sprint’s breach of contract by operating a competing wireless network in US Unwired’s territories irreparably harms US Unwired in at least two ways. *First*, it leaves US Unwired without an adequate remedy at law because the parties’ Agreement precludes recovery of consequential or lost-profit damages for breach of contract; for that reason, the Agreement expressly provides that the non-breaching party is entitled to injunctive relief to prevent breaches. *Second*, Sprint’s breach of US Unwired’s exclusivity rights, as with almost all breaches of exclusivity provisions, will irreparably injure US Unwired by harming its competitive position in the marketplace, destroying its opportunity to market a unique product,

and injuring the goodwill that it enjoys from its customers as a result of its exclusive arrangement with Sprint.

A. US Unwired Does Not Have An Adequate Remedy At Law.

US Unwired has no adequate remedy at law for Sprint's breach of US Unwired's exclusivity because, among other reasons, US Unwired cannot recover consequential or lost-profit damages flowing from that breach. As the Court is well aware, the 1998 Louisiana Agreement provides that:

NO PARTY WILL BE LIABLE TO THE OTHER PARTY FOR SPECIAL, INDIRECT, INCIDENTAL, EXEMPLARY, CONSEQUENTIAL OR PUNITIVE DAMAGES, OR LOSS OF PROFITS, ARISING FROM THE RELATIONSHIP OF THE PARTIES OR THE CONDUCT OF BUSINESS UNDER, OR BREACH OF, THIS AGREEMENT . . .

(App. 1, Piper Decl. ¶ 3 & Ex. 1, 1998 Louisiana Agreement § 17.14, emphasis in original.)

Accordingly, even if damages from Sprint's breach were readily calculable (which they are not), the Agreement expressly prohibits US Unwired from recovering the only types of damages -- consequential and lost profit damages -- that could even begin to make US Unwired whole for its loss of exclusivity. As a result, US Unwired does not have an adequate remedy at law to protect itself from the imminent harm it will face if Sprint is allowed to operate Nextel's network in competition with US Unwired.

For that reason, the parties stated explicitly in the Agreement that they did not have an adequate remedy at law for breaches and that injunctive relief therefore should issue to prevent breaches. Section 17.6 of the Agreement states that "[e]ach party agrees with the other party that the party would be irreparably damaged if any of the provisions of this agreement were not performed in accordance with their specific terms and that monetary damages would not provide an adequate remedy. Accordingly, . . . the non-breaching party will be entitled to

injunctive relief to prevent breaches of this agreement.” (See App. 1, Piper Decl. ¶ 3 & Ex. 1, 1998 Louisiana Agreement § 17.6.) Thus, it could not be more clear or explicit that US Unwired does not have an adequate remedy at law and that it does have a right to an injunction.

B. Breach Of A Non-Compete Or Exclusivity Clause Constitutes Irreparable Harm.

Even in the absence of those express provisions in the Agreement, it is clear that US Unwired will be irreparably harmed because Sprint is violating its promise of exclusivity. It is axiomatic that breach of an exclusivity clause or non-compete provision almost always constitutes irreparable injury and warrants injunctive relief. See, e.g., *Vais Arms, Inc. v. Vais*, 383 F.3d 287 (5th Cir. 2004) (enjoining seller of firearm manufacturer business from competing with buyer in violation of non-compete agreement); *Shred-It USA, Inc. v. Mobile Data Shred*, 202 F. Supp. 2d 228, 233 (S.D.N.Y. 2002) (noting that violation of a non-compete clause generally results in incalculable damages warranting finding of irreparable harm); *Walgreen Co. v. Sara Creek Property Co. B.V.*, 966 F.2d 273, 279 (7th Cir. 1992) (“[I]njunctive relief to enforce exclusivity clauses are quite likely to be justifiable by just the considerations present here -- damages are difficult to estimate with any accuracy and the injunction is a one-shot remedy requiring no continuing judicial involvement.”); *J.C. Penney Co. v. Giant Eagle, Inc.*, 813 F. Supp. 360, 369 (W.D. Pa. 1992) (“[I]rreparable harm is almost inherent in such a situation”).

Among other reasons, a breach of an exclusivity or non-compete provision creates irreparable harm because, due to the nature of an exclusivity or non-compete right, such a breach causes a plaintiff to lose:

- its competitive position in the marketplace, see, e.g., *Basiccomputer Corp. v. Scott*, 973 F.2d 507, 511-12 (6th Cir. 1992); *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 592 (8th Cir. 1984);

- its opportunity to market a unique product, *see, e.g., Tom Doherty Assocs., Inc. v. Savan Int'l N.V.*, 60 F.3d 27, 37-39 (1995); *Nemer Jeep-Eagle v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 435 (2d Cir. 1993); or
- goodwill with its customers, *see, e.g., Score Board, Inc. v. Upper Deck Co.*, 959 F. Supp. 234, 240 (D. N.J. 1997).

As demonstrated below, US Unwired will suffer each of these harms as a result of Sprint's operation of a competing network in US Unwired's exclusive territories.

1. US Unwired will lose its competitive position in the marketplace.

One type of irreparable harm that naturally flows from a breach of exclusivity is that a plaintiff loses its competitive position in the marketplace. *See, e.g., Basiccomputer Corp.*, 973 F.2d at 511-12; *Ferry-Morse Seed Co.*, 729 F.2d at 592; *Shred-It USA, Inc.*, 202 F. Supp. 2d at 233. Here, the merger between Sprint and Nextel, and Sprint's post-merger operations of Nextel's network, permanently will harm and diminish US Unwired's competitive position in the marketplace because US Unwired will now have to compete with Sprint, its supposed ally under the 1998 Louisiana Agreement, for wireless sales in US Unwired's "exclusive" territory. US Unwired has invested hundreds of millions of dollars in building a wireless network in the US Unwired Service Areas that works seamlessly with Sprint's network. (App. 1, Piper Decl. ¶ 5.) US Unwired also has invested substantial sums to maintain and operate that network, as well as to advertise and market Sprint's products. (*Id.*) In return for US Unwired's substantial assistance and investment, Sprint granted US Unwired exclusive rights to sell Sprint PCS service in the US Unwired Service Areas. (App. 1, Piper Decl. Ex. 1, 1998 Louisiana Agreement § 2.3.)

Sprint now seeks to dismantle the protections of exclusivity that induced US Unwired's huge investments and its decision to forego other business opportunities, including the development of a wireless network under its own name in the 1990s. Sprint's proposed merger with Nextel will undermine US Unwired's competitive position in the marketplace by,

among other things, introducing another provider of Sprint-branded wireless service in the exclusive Service Areas to compete for a finite number of wireless customers. And the fact that Sprint will not have to pay a management fee to US Unwired for customers who enroll on the new Sprint Nextel network or who continue service on that network will create an incentive for Sprint to divert marketing attention away from US Unwired's network to the new Sprint Nextel network.

US Unwired's competitive position in the marketplace also will be harmed by the fact that, upon consummation of the merger, US Unwired's business will be subject to the control of its new competitor, Sprint Nextel. As this Court is well aware from the pending RICO litigation, Sprint currently has substantial control over US Unwired's products, pricing, services, cash, and customer information. Once Sprint has acquired Nextel and operates Nextel's network in competition with US Unwired, Sprint will be positioned to favor the development of its Nextel line of products at US Unwired's expense. Sprint will have every incentive to favor its 100% owned Nextel distribution chain rather than to channel products through US Unwired for which Sprint must pay US Unwired significant sums.

2. US Unwired will lose the opportunity to distribute a unique product.

Breaches of exclusivity or non-compete provisions also create irreparable harm because they result in a party's loss of the right to distribute or market a unique product. *See, e.g., Reuters Ltd. v. United Press Int'l*, 903 F.2d 904, 908 (2d Cir. 1990) (finding irreparable injury, in form of harm to business reputation and loss of customers, from breach of contract to supply foreign newspapers); *Vais Arms, Inc.*, 383 F.3d at 295-96. Loss of an exclusive right to distribute a unique product can disrupt and cripple a business that has designed itself around sale of that particular product in reliance on the knowledge that it will be the only provider of that product in the area. *Nemer Jeep-Eagle*, 992 F.2d at 435 ("Major disruption to a business can be

as harmful as termination, and a ‘threat to the continued existence of a business can constitute irreparable injury.’”); *Green Stripe, Inc. v. Berny’s Internacionale, S.A.*, 159 F. Supp. 2d 51, 56-57 (E.D. Pa. 2001).

Upon consummation of the merger, US Unwired (by Sprint’s own admission) will lose its exclusive right to distribute a unique product (Sprint wireless service and products) because Sprint will be selling competing wireless services under the Sprint name in the same areas. As a nationally advertised brand with distinctive service features, Sprint PCS is plainly a unique product. Since 1998, US Unwired has forgone all other business opportunities and realigned itself to market and sell Sprint’s wireless products in reliance on the knowledge that it would be the only provider of those products in the exclusive Service Areas for up to 50 years. Sprint’s breach of exclusivity will destroy US Unwired’s advantage of being the only distributor of Sprint wireless products and will immeasurably disrupt US Unwired’s business.

3. US Unwired’s goodwill will be irreparably harmed if Sprint is allowed to compete directly with US Unwired.

Harm to goodwill also constitutes irreparable injury. *Tom Doherty Assocs.*, 60 F.3d at 37-39; *Basicomputer Corp.*, 973 F.2d at 512 (“The loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute.”); *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (finding it sufficient for issuance of injunction that plaintiff sought to protect “advertising efforts and goodwill”); *Nat’l Kitchen Prods. v. Kelmort Trading & Co.*, No. 91 Civ. 7540, 1992 WL 18805 at *1 (S.D.N.Y. Jan. 24, 1992) (“Irreparable injury may consist in the actual or threatened loss of a business’ good will and ability to compete.”). Goodwill is the “favorable consideration shown by the purchasing public to goods known to emanate from a particular source.” *White Tower Sys. v. White Castle Sys. of Eating Houses Corp.*, 90 F.2d 67,

69 (6th Cir. 1937). Put another way, goodwill “represents the capacity to earn profits in excess of the normal rate of return due to establishment of a favorable community reputation and consumer identification of the business name.” *North Clackamas Comm. Hosp. v. Harris*, 664 F.2d 701, 706 (9th Cir. 1980).

Courts routinely hold that exclusive distributors (like US Unwired) realize goodwill from the products they distribute. *See, e.g., Score Board, Inc.*, 959 F. Supp. at 240 (holding that exclusive rights licensee’s goodwill would be irreparably harmed if defendant was allowed to sell same product); *Pepsi-Cola Bottling Co. of Pittsburgh v. Pepsico, Inc.*, 175 F. Supp. 2d 1288, 1295 (D. Kan. 2001) (denying defendant’s motion to dismiss complaint because plaintiff adequately alleged irreparable harm by alleging that defendant’s infringement on plaintiff’s exclusive rights area damaged plaintiff’s goodwill); *see also Fireworks Spectacular, Inc. v. Premier Pyrotechnics, Inc.*, 86 F. Supp. 2d 1102, 1108 (D. Kan. 2000) (holding that breach of a covenant not to compete damages a plaintiff’s goodwill because of the “extreme difficulty and uncertainty in restoring goodwill among the customers and regaining the business of customers who are being, and will be, induced away or lost by the plaintiff”).⁴ As the Third Circuit observed, it “is quite apparent that an exclusive distributor for a large geographic area would be affected quite seriously by the value of the good will inherent in the trade-mark.” *Norman M. Morris Corp. v. Hess Bros., Inc.*, 243 F.2d 274, 278-79 (3d Cir. 1957).

Sprint’s operation of a competing post-merger network will destroy the goodwill that US Unwired has invested over \$600 million (and many years of effort) to develop. By doing nothing more than operating the competing network, Sprint may prove attractive to customers in

⁴ Indeed, courts routinely find that violation of a covenant not to compete damages a plaintiff’s goodwill. *See Basicomputer Corp.*, 973 F.2d at 512; *Rent-A-Center, Inc.*, 944 F.2d at 603; *Mowhawk Maint. Co. v. Kessler*, 52 N.Y.2d 276, 419 N.E.2d 324 (N.Y. App. 1981).

the market for wireless service under the Sprint name. Moreover, as discussed above, Sprint will have both the ability (through control of US Unwired's pricing, cash and customer information) and incentive (to avoid paying US Unwired management fees) to divert customers or resources from US Unwired to Sprint Nextel.

C. The Irreparable Harm To US Unwired Is Imminent.

A court should grant a preliminary injunction particularly where (as here) "the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." *Shred-It USA, Inc.*, 202 F. Supp. 2d at 233; *Minnesota Mining And Mfg. Co. v. Francavilla*, 191 F. Supp. 2d 270, 277 (D. Conn. 2002). On June 13, 2005, Sprint began soliciting proxies for stockholder approval at a July 13, 2005 meeting. The merger will be consummated immediately upon receipt of regulatory approvals, which are expected by August 2005.⁵ (App. 1, Piper Decl. ¶ 9.) Accordingly, the harm to US Unwired is imminent. *Id.*

III. THE IRREPARABLE HARM TO US UNWIRED OUTWEIGHS THE HARM THAT THE INJUNCTION WOULD CAUSE TO SPRINT.

In considering whether to issue a preliminary injunction, the Court also must weigh the harm to US Unwired against the potential harm to Sprint if the injunction issues. *Allied Mktg. Group*, 878 F.2d at 809; *Valley*, 118 F. 3d at 1051. Here, the balance of the equities favors granting an injunction because US Unwired only seeks to maintain the status quo. *Griffin*,

⁵ On June 2, 2005, after efforts to resolve the issue with Sprint through business channels had failed, US Unwired filed with the FCC an Informal Request for Commission Action alerting the FCC to the issue of US Unwired's exclusive Service Areas and asking the FCC to require that Sprint and Nextel modify the terms of their merger so as to divest the overlapping Nextel properties. (*See generally* App. 4, US Unwired's Informal Request for Commission Action.) On June 10, Sprint filed its response to US Unwired's request. In that response, Sprint argued that the exclusivity issue is a private contractual dispute and suggests that a court is the more appropriate forum for US Unwired to obtain relief. (App. 5, Reply to Informal Request of US Unwired Inc. for Commission Action at 3.) We note that Sprint's response does not deny that the merger will result in a breach of US Unwired's exclusivity rights.

910 F.2d at 263 (noting that maintaining the status quo is “the central purpose of a preliminary injunction.”).

At present, US Unwired is the only entity allowed to act on Sprint’s behalf to sell wireless service and products in the US Unwired exclusive Service Areas. The merger between Sprint and Nextel will destroy that exclusivity and undermine years of US Unwired’s substantial investments. Indeed, since the merger announcement, Sprint already has taken significant steps to begin competing with US Unwired once the merger is consummated, including announcing that Sprint products will be available in Nextel stores in direct violation of the Agreement and making plans to develop a wireless handset that is capable of accessing both Sprint’s and Nextel’s networks. (App. 3, Application For Transfer Of Control at 6, 25.)

Conversely, Sprint suffers no cognizable harm from the issuance of an injunction because an injunction only keeps Sprint from doing that which it cannot do already -- compete directly with US Unwired. The fact that Sprint’s attempted merger with Nextel may be inconvenienced or delayed until it makes the needed modifications to the structure of the merger or arranges to divest certain Nextel properties operating in the US Unwired Service areas is irrelevant because that inconvenience is something that Sprint brought squarely upon itself by: (i) intentionally entering into an agreement that it knew would violate the exclusivity provisions it has with US Unwired and (ii) refusing to discuss meaningfully or resolve the issue despite numerous attempts by US Unwired to do so. *See, e.g., J.C. Penney Co.*, 813 F. Supp. at 370 (holding that the “harm [the defendant would] suffer is a result of self-inflicted wounds sustained when it deliberately made a conscious business decision to [violate an exclusive rights agreement].”); *Athlete’s Foot Mktg. Assocs. v. Zell Inv., Inc.*, No. A. 00-186, 2000 WL 426186, at *12 (W.D. Pa. Feb. 17, 2000) (“Any hardship which results [to violator of non-compete

covenant] is not 'undue' because [defendant] is merely having to live up to the terms of its [agreement]"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Napolitano*, 85 F. Supp. 2d 491, 497-98 (E.D. Pa. 2000) ("Significantly, any harm to [defendant] would be self-inflicted; he anticipated that [plaintiff] immediately would seek to enforce its unambiguous employment contract, and chose to breach it nevertheless.").

IV. AN INJUNCTION SERVES THE PUBLIC INTEREST.

Finally, a court must consider the effect of a preliminary injunction on the public interest. In this case, a preliminary injunction serves the public interest for at least two reasons. First, it is well established that there is a strong public interest in the enforcement of contracts. *J.C. Penney Co.*, 813 F. Supp. at 371; *Green Stripe, Inc.*, 159 F. Supp. 2d at 57. That is particularly true in cases where (as here) the defendant gave the plaintiff the exclusive right to market the defendant's product, and the plaintiff contributed valuable resources to the goodwill of that product. *See, e.g., Score Board, Inc.*, 959 F. Supp. at 240.

Second, a preliminary injunction will serve the public interest by preserving the status quo and ensuring no disruption of service to Nextel's customers. Under the status quo, both Sprint and Nextel's customers continue to receive uninterrupted service. But if the Court permits the merger to be consummated and thereafter concludes -- as it must -- that Sprint is violating the exclusivity provisions of the 1998 Louisiana Agreement and that an injunction is appropriate, thousands of customers who currently receive Nextel service in the areas covered by the 1998 Louisiana Agreement could "go dark" and lose their cell phone service. That risk can easily be avoided by maintaining the status quo until the Court decides the merits of US Unwired's claims.

REQUEST FOR HEARING

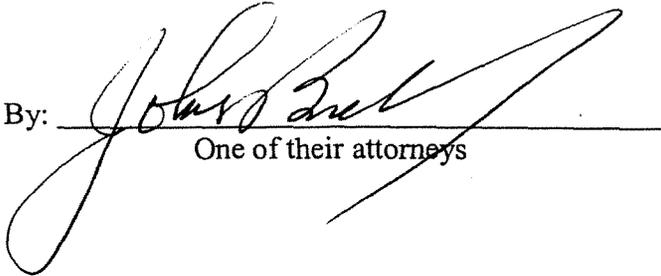
US Unwired respectfully requests a hearing on all issues presented herein.

CONCLUSION

For the foregoing reasons, US Unwired, Louisiana Unwired, Texas Unwired, and Georgia PCS respectfully request that this Court grant their Motion for Entry of a Preliminary Injunction, and enter an Order enjoining the Defendants from proceeding with the Sprint-Nextel merger.

Respectfully Submitted,

US UNWIRED INC.
LOUISIANA UNWIRED L.L.C.

By: 
One of their attorneys

Dated: June 21, 2005

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