

STATE OF SOUTH DAKOTA  
COUNTY OF HUGHES

IN CIRCUIT COURT  
SIXTH JUDICIAL CIRCUIT

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WEGNER AUTO COMPANY, INC., a South  
Dakota corporation, and the SOUTH DAKOTA  
PUBLIC UTILITIES COMMISSION, an agency of  
the State of South Dakota,

Plaintiffs,

vs.

LES SUMPTION d/b/a S&S Communications and  
S&S COMMUNICATIONS, a South Dakota general  
partnership,

Defendants.

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CIV 09-483

**APPLICATION FOR  
DEFAULT JUDGMENT AND  
APPOINTMENT OF  
RECEIVER; MOTION TO  
DISMISS REQUEST FOR  
COSTS, DISBURSEMENTS  
AND ATTORNEY FEES**

Plaintiffs, Wegner Auto Company, Inc. ("Wegner Auto") and the South Dakota Public Utilities Commission ("Commission"), hereby make application to the Court for entry of judgment by default in the above-entitled action pursuant to SDCL 15-6-55(b), 49-13-24 and 49-13-27.

1. Plaintiffs commenced this action on November 18, 2009. Clair R. Gerry, attorney for Defendants, admitted service of the Summons and Complaint on November 20, 2009. Mr. Gerry was authorized to admit service on Defendants' behalf.

2. The Notice and Admission of Service of Summons and Complaint by Mail stated in the last paragraph: "If you do complete and return this form, you or the above-named Defendants must answer within thirty days. If you fail to do so, judgment by default may be taken against your clients, the above-named Defendants, for the relief demanded in the Complaint."

3. Defendants have filed neither an answer nor any other pleading in this case other than the Admission of Service of Summons and Complaint by Mail (see attached Affidavit in Support of Motion to Join as Parties Plaintiff and Application for Default Judgment).

4. As described in detail in the Complaint, the Commission's Order Granting Motions to Consolidate; Motions to Dismiss; Motions to Dismiss in Part; and Motion for Summary Disposition, issued on November 10, 2008 in Docket CT05-005 attached to the Complaint as Exhibit A (the "Damages Order") awarded damages to 132 Damages Awardees jointly, collectively totaling \$471,890.98 for basic damages, plus prejudgment interest through the hearing date of October 21, 2008, in the amount of \$295,654.88, for a total award of damages plus prejudgment interest through the date of October 21, 2008, in the amount \$767,545.86.

5. The Motion for Summary Disposition, including the Exhibits thereto, (attached to and filed with the Complaint as Exhibit D) and related Motions to Consolidate, Dismiss and Dismiss in Part filed by Commission Staff in Docket CT05-005, contain a detailed explanation of the bases for the Damages Awards and for the consolidation, denial and dismissal of certain of the claims for damages in whole or in part.

6. In the Damages Order, the Commission provided detailed factual findings and conclusions of law supporting its decision, which Defendants did not contest before the Commission or on appeal. There is an ample factual and legal basis for the Court to enter judgment by default in this case. There are no facts known to the Plaintiffs to justify not entering a default judgment in this case.

7. Defendants have neither paid anything to the Commission in satisfaction of the damages awarded in the Damages Order, nor given any indication to the Plaintiffs that they intend to pay the damages awarded or the interest accrued thereon. As stated in the Complaint, this action is brought pursuant to SDCL 49-13-24 and 49-13-27 to obtain a judgment against Defendants, jointly and severally, and in favor of Damages Awardees jointly.

8. For the reasons set forth in Complaint paragraphs 26 through 29, the Court's grant of permission to Plaintiffs to levy execution on the monetary judgment awarded by the Court in this action against the assets of Defendant Les Sumption, personally, without having to first exhaust levy against partnership assets, is an appropriate exercise of the Court's equitable powers under SDCL 48-7A-307(4). Plaintiffs' direct levy against Defendant Sumption's assets is also justified under SDCL 48-7A-307(5) to the extent that the actions described in the Complaint giving rise to the Damages Awards were the actions of Defendant Sumption in his personal capacity.

9. As described in paragraphs 30 through 32 of the Complaint, in order to facilitate the intent of SDCL 49-13-27, it is appropriate for the Court to appoint a receiver pursuant to SDCL 21-21-4 to act on behalf of all Damages Awardees jointly in any execution on the judgment and administration and equitable distribution of any recovery that may be had on the judgment in accordance with the apportionment and disbursement methods of the Damages Order. The Commission is the appropriate entity to serve as a receiver in this instance, having performed a similar custodial function successfully in Docket TC05-047 in obtaining, apportioning and disbursing the proceeds of bonds and other security posted by Defendants for the benefit of customers of S&S Communications. The Commission would perform this function without cost to the Damages Awardees, except for any netting associated with execution related sales and the like. In the event that the Court does not appoint the Commission as a receiver in this case involving its own Damages Order, it is nevertheless appropriate for the Court to appoint a receiver to perform that function on behalf of Damages Awardees.

10. Plaintiffs also waive and move the Court to dismiss Plaintiffs' request in the Complaint for costs, disbursements and attorney fees.

WHEREFORE, Plaintiffs request that the Court enter judgment by default against

Defendants, jointly and severally, as follows:

1. Approving and adopting the Commission's Order Granting Motions to Consolidate; Motions to Dismiss; Motions to Dismiss in Part; and Motion for Summary Disposition, issued on November 10, 2008 in Docket CT05-005 ("Damages Order") as the judgment of the Court, including, but not limited to, the Damages Order's:

- (a) award of monetary damages in favor of Plaintiffs, jointly, in the amount of \$471,890.98, plus prejudgment interest through July 13, 2007, in the amount of \$235,402.02, plus prejudgment interest, at the statutory rate of ten percent simple per annum, on the \$471,890.98 in total unrecovered damages from July 14, 2007, through the date of entry of judgment in the amount of \$153,461.47 as of October 12, 2010, the hearing date before the Court on this Application, for a total judgment of damages plus prejudgment interest of \$860,760.47 (see Affidavit of Jon Thurber in Support of Application for Default Judgment and Prejudgment Interest Calculation);
- (b) Approved Damages Awards and Approved Judgment Fractions for all Approved Damages Awards; and
- (c) mechanism for apportioning and disbursing collection and recovery on the judgment among the Approved Damages Awards.

2. Appointing the Commission as post-judgment receiver pursuant to SDCL 21-21-4 to undertake and carry out such levy of execution on the judgment as may be feasible and prudent on behalf of Plaintiffs, jointly, and to administer and disburse any funds or other property collected or received on behalf of Plaintiffs, jointly, in accordance with the Damages Order.

3. Granting permission pursuant to SDCL 48-7A-307(4) to the post-judgment receiver,

if any, appointed by the Court to act on behalf of the Plaintiff Damages Awardees or, if a post-judgment receiver is not appointed, to the Plaintiff Damages Awardees themselves, jointly, to levy execution on the judgment against Defendant Les Sumption's personal assets without first having to exhaust execution against the partnership Defendant S&S Communications.

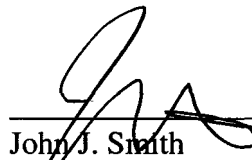
4. For such other and further relief as the Court may deem just and proper.

Dated this 21<sup>st</sup> day of September, 2010.



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