

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

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.

CIV 09-483

COMPLAINT

1. Plaintiff Wegner Auto Company, Inc. ("Wegner Auto") is a South Dakota business corporation with its address at 330 West Sioux Avenue, Pierre, SD 57501-3139.

2. Plaintiff South Dakota Public Utilities Commission ("Commission") is an agency of the state of South Dakota created by SDCL 49-1-8. The South Dakota Attorney General, through its Special Assistant Attorney General assigned to the Commission, joins in instituting this action at the request of the Commission pursuant to SDCL 1-11-1 and 49-1-14.

3. This action is brought pursuant to SDCL 49-13-24 to obtain enforcement in the form of a monetary judgment for the damages and pre-judgment interest thereon awarded by the Commission against Defendants and in favor of Wegner Auto and the 131 other persons who filed formal complaints with the Commission against Defendants and were awarded damages ("Damages Awardees") by 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 (the "Damages Order") attached hereto as Exhibit A.

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.
FILED

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Judy Alderson Clerk
By _____ Deputy

4. The Commission is a proper party to this action as the state agency (i) that is charged with the duty and authority to regulate telecommunications companies providing services in this state in order to protect the interests of consumers and the public, including the Damages Awardees, and (ii) that issued the Damages Order pursuant to the authority vested in it by SDCL Ch. 49-13. The Commission joins as a party to this action solely in its sovereign capacity to enforce and administer its lawful Damages Order and in a custodial capacity with respect to Damages Awardees' interests in any recovery that may be had as a result of this action. The Commission asserts no pecuniary or property interest of its own in any recovery as a consequence of a judgment entered in this matter.

5. Simultaneously with the filing and service of this Complaint, Plaintiffs also filed and served on Defendants a Motion to Join as Parties Plaintiff. The purpose of this motion is to join as co-plaintiffs the 131 Damages Awardees other than Wegner Auto pursuant to SDCL 49-13-27 and 15-6-19. Should the Court grant the Motion to Join as Parties Plaintiff, the remaining 131 Damages Awardees will also be Plaintiffs in this Complaint and in other subsequent pleadings and motions in this case.

6. Wegner Auto is a resident of Hughes County, South Dakota. The contract with S&S that gave rise to Wegner Auto's complaint and Damages Award was executed in Pierre, Hughes County, South Dakota, and was to be performed by the provision of telecommunications service to Wegner Auto at its business location in Pierre. The Damages Awardees are located throughout the state of South Dakota, with their service addresses and contract execution and performance locations in at least 37 counties in South Dakota. In addition to Wegner Auto, at least six other Damages Awardees are located in Hughes County, with their contract execution and performance locations also in Hughes County. Hughes County is a proper venue for this action pursuant to SDCL 15-5-5.

7. Defendant Les Sumption is a resident of Brown County, South Dakota, with his

address at 39452 Country Drive, Bath, SD 57427 and is, and was during the entirety of the period covering the events giving rise to the Damages Order, an owner and principal of a for-profit business known as S&S Communications. In 1989, "S&S Communications" was registered as a fictitious name for Les Sumption and Matt Swearingen in Brown County, South Dakota. Although this registration was not renewed, Defendants continued to utilize the name "S&S Communications" during the entirety of the period covering the events giving rise to the Damages Order.

8. To the best knowledge and belief of Plaintiffs, Defendant S&S Communications ("S&S") was a South Dakota general partnership pursuant to SDCL 48-7A-202 during the entirety of the period covering the events giving rise to the Damages Order. At all times during the events herein, S&S maintained its principal place of business in Aberdeen, Brown County, South Dakota. Matt Swearingen and Defendant Les Sumption were the partners in S&S during the entirety of the period covering the events giving rise to the Damages Order. To the best knowledge and belief of Plaintiffs, Matt Swearingen and Defendant Les Sumption were the only partners in S&S. Plaintiffs lack sufficient knowledge to allege whether or not S&S has formally dissolved as a partnership; however, based upon the Voluntary Surrender Agreement executed by S&S dated March 19, 2004, (attached hereto as Exhibit B), to the best knowledge and belief of Plaintiffs, S&S surrendered all of its assets to Aberdeen Finance Corporation and ceased all operations and business activities as a going concern.

9. Matt Swearingen, Defendant Les Sumption's partner in S&S, is not named as a party defendant in this Complaint because in paragraph 5. of the conclusions and ordering section of the Damages Order, he was dismissed as a respondent in Docket CT05-005 due to his discharge in bankruptcy.

10. Throughout the period of the actions and events that gave rise to the damage awards

assessed against Defendants in the Damages Order for which Plaintiffs seek enforcement through a judgment, S&S was a "telecommunications company" within the meaning of SDCL 49-31-1(28). Through S&S Communications, Defendants sold and provided pre-paid inter-exchange and wireless telecommunications services to hundreds of customers within the state of South Dakota, including the Damages Awardees, over a period of several years.

11. On December 21, 2000, the Commission issued an Order Granting Certificate of Authority to S&S Communications in Docket TC00-114. S&S had been providing pre-paid telecommunications services pursuant to long-term contracts for a period of years prior to receiving a certificate of authority in violation of SDCL 49-31-3. In large measure because of its dependence on long-term, high-dollar pre-paid contracts, the Commission granted the certificate of authority to S&S subject to strict conditions, including the condition that S&S maintain one-hundred percent bond coverage for the unearned portion of pre-paid contract amounts.

12. On March 20, 2003, the Commission in Docket TC02-166 issued an Order Granting Amended Certificate of Authority which prohibited S&S from offering pre-paid phone services or from accepting deposits or pre-payments from customers. This order was issued pursuant to a stipulation between Commission staff and S&S as a result of the parties' mutual recognition of the fact that S&S was in material breach of the condition that it maintain one hundred percent bond coverage of the unearned portion of customer pre-payments.

13. On or about June 3, 2003, S&S ceased providing phone service to its customers, almost all of whom had pre-paid for their service. At this time, S&S had contracted to provide telecommunications services in South Dakota to over 650 customers, including Damages Awardees, who had over \$2,000,000 in pre-payments remaining on account with S&S. These customers were located throughout South Dakota, including at least seven in Hughes County.

14. On August 28, 2003, following a two day hearing conducted on June 30 and July 2, 2003, the Commission issued its Findings of Fact, Conclusions of Law and Notice of Entry of Order in Docket TC02-166 (the "Revocation Order"). In this decision, the Commission revoked S&S's certificate of authority and levied civil fines against S&S pursuant to SDCL 49-31-38 totaling \$13,400 for numerous violations of Commission orders and statutes. The specific violations and fine amounts are set forth in Conclusions of Law 6 and 7 of the Revocation Order.

15. On July 19, 2005, the Commission filed a Complaint in Hughes County Circuit Court, docketed as CIV05-236, to obtain a judgment to enforce the fines levied in the Revocation Order. On June 7, 2006, a Default Judgment, dated May 31, 2006 by the Court, was entered against Defendants and Matt Swearingen for \$13,400, the amount of the fine levied by the Commission in Docket TC02-166. Notice of Entry of Judgment in CIV05-236 was served on Defendants and Matt Swearingen on June 7, 2006.

16. On May 24, 2007, following a hearing held on May 8, 2007, the Commission issued its Findings of Fact and Conclusions of Law; Notice of Entry of Order in Docket TC05-047 ("Bond Proceeds Order"). This decision was not appealed. In the Bond Proceeds Order, the Commission approved the disbursement of proceeds of bonds and other security received by the Commission following S&S's cessation of service. Pursuant to the Bond Proceeds Order, the Commission disbursed \$196,208.42 in bond and letter of credit proceeds to customers of S&S, including most of the Damages Awardees. Bond proceeds were not disbursed to those Damages Awardees whose contracts were solely for wireless service since the bonds were issued to secure performance under a landline certificate of authority.

17. The Damages Order that is the subject of this Complaint is the final decision on the 145 formal complaints filed with the Commission by customers of S&S, including the Damages

Awardees, which were consolidated into Docket CT05-005 by the Order Granting Motion to Consolidate issued by the Commission on May 17, 2005 (attached hereto as Exhibit C). The consolidation of the S&S complainants was sought by Commission Staff and approved by the Commission both to achieve a workable, orderly and equitable process for hearing and deciding the complaints and also to cause any ensuing enforcement proceeding in circuit court to be brought pursuant to the joinder and joint recovery provisions of SDCL 49-13-27 to ensure that any recovery under the judgment would be equitably apportioned and shared by all Damages Awardees.

18. The consolidated complaints in Docket CT05-005 were brought on for decision before the Commission by a Motion for Summary Disposition (Motion) filed by the Commission's staff on September 15, 2008 (attached hereto as Exhibit D (Exhibits H, I and J to the Motion are limited to links to the Commission's docket files for Dockets TC02-166, TC05-047 and CIV05-236 due to the voluminous documents contained in these case files). The Commission held a hearing on the Motion for Summary Disposition on October 21, 2008. Neither Defendants nor any complainant filed a responsive pleading or appeared at the hearing. Following the hearing on November 10, 2008, the Commission issued the Damages Order.

19. The Damages Order awarded damages to 132 Damages Awardees, 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. The Damages Order also established an Approved Damages Award and Approved Judgment Fraction for each damages award to a Damages Awardee. See ordering paragraphs 2 – 8 on pp. 6 and 7 of the Damages Order and Motion Exhibit C (Revised 10/16/08). Four of the Damages Awardees received two Approved Damages Awards and one Damages Awardee received three Approved Damages Awards. These

multiple Approved Damages Awards occurred due to multiple discrete damages claims asserted by such Damages Awardees that required separate treatment and computations for such awards.

20. The Damages Order set January 1, 2009, as the time limit by which Defendants were to pay the total damages awarded plus prejudgment interest as provided in SDCL 49-13-14 and 49-13-24. Defendants have neither paid any of the damages awarded in the Damages Order nor given any indication to the Commission that they intend to pay the damages.

21. The prejudgment interest calculation method approved by the Commission in ordering paragraph 7 of the Damages Order involved two separate calculations for two different periods of time, the results of which up to the hearing date of October 21, 2008, are set forth on Motion Exhibit C (Revised 10/16/09) (see Damages Award conclusions paragraph 26).

22. The first of these prejudgment interest calculations involves the period between the cessation of service by S&S and the date bond and other security proceeds were paid out to the Damages Awardees, thus reducing the loss amounts sustained by Damages Awardees after such date. This calculation applies the statutory prejudgment simple interest rate to the approved Net Claim Amount, totaling \$572,444.50 for all Damages Awardees, over the period from June 3, 2003, the date of S&S's cessation of service, to July 13, 2007, the date of bond proceeds distribution. This amount, totaling \$235,402.02 for all Damages Awardees, remains unchanged after the October 21, 2008, hearing date.

23. The second calculation applies the statutory prejudgment simple interest rate to the Approved Damages Awards – which is the Net Claim Amounts less the bond proceeds received, and totals \$471,890.98 for all Damages Awardees – over the period from July 14, 2007, until the sooner to occur of payment by Defendants or the entry of judgment by the Court in this proceeding. As of the hearing date of October 21, 2008, this prejudgment interest accrual totaled \$60,246.86.

24. Defendants are jointly and severally liable to the Damages Awardees for the total amount of the Approved Damages Awards plus prejudgment interest pursuant to SDCL 48-7A-306 and/or other applicable law.

25 The Damages Order establishes an Approved Judgment Fraction for each Approved Damages Award based upon the ratio of such Approved Damages Award to the total Approved Damages Awards and provides that any recovery under the Damages Order or a resulting judgment thereon will be apportioned to Approved Damages Awards based upon the Approved Judgment Fractions. Damages Order conclusions 8., 10. and 11. This was ordered so that any recovery would be equitably shared by all Damages Awardees in proportion to their Approved Damages Awards.

DIRECT LEVY AGAINST PARTNER ASSETS

26. At the time the Revocation Order was issued, S&S had been operating at a loss on an accrual basis for a lengthy period of time, was insolvent and owed its creditors, including the Damages Awardees, all of whom had pre-paid for telephone service, millions of dollars which it was unable to repay.

27. To finance its operations, S&S took out loans from Aberdeen Finance Corporation that totaled in excess of the liquidation value of S&S's total assets. These loans were secured by perfected security interests in all of S&S's assets. As alleged above in paragraph 6., Plaintiffs lack sufficient knowledge to allege whether or not S&S has formally dissolved as a partnership; however, based upon the Voluntary Surrender Agreement executed by S&S dated March 19, 2004, (attached hereto as Exhibit B), to the best knowledge and belief of Plaintiffs, S&S has surrendered all of its assets to Aberdeen Finance Corporation and ceased all operations and business activities as a going concern.

28. S&S's remaining partnership assets subject to execution, if any exist at all, are

patently insufficient to satisfy a judgment in the amount of the total damages awarded to Damages Awardees plus prejudgment interest, and the Damages Awardees are entitled to relief under SDCL 48-7A-307(4) on that basis and should be permitted to levy execution against the personal assets of Defendant Les Sumption without having to first levy execution against the partnership's assets.

29. Based on S&S's conduct toward its customers and the Commission for which the fines were assessed in the Revocation Order and the damages awarded to Damages Awardees in the Damages Order, the grant of permission to levy execution of any monetary judgment awarded by the Court against Defendant Les Sumption personally, without having to first exhaust levying against partnership assets, is an appropriate exercise of the Court's equitable powers under SDCL 48-7A-307(4).

APPOINTMENT OF COMMISSION AS RECEIVER

30. As stated in paragraph 4., the Commission has joined as a party Plaintiff in this action solely in its sovereign capacity to enforce and administer its lawful Damages Order and in a custodial and administrative capacity with respect to Damages Awardees' interests in any recovery that may be had as a result of this action. The Commission asserts no pecuniary or property interest of its own in any recovery as a consequence of a judgment entered in this matter.

31. Given that there are 132 Damages Awardees with 138 Approved Damages Awards, the only feasible means of "carrying the judgment into effect" in accordance with the Damages Order and effecting an equitable and practical administration of any recovery in the best interests of Damages Awardees is for the Court to appoint a post-judgment receiver pursuant to SDCL 21-21-4.

32. The Commission is not a "party or person interested" in the subject of this action within the meaning of SDCL 21-21-7, and as the governmental agency responsible for issuing the Damages Order and for custody and equitable disbursement of proceeds received for the benefit of

customers pursuant to SDCL 49-31-117 and ch. 1-26, the Commission is an appropriate person to be appointed as a receiver pursuant to SDCL 21-21-4.

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, as follows:

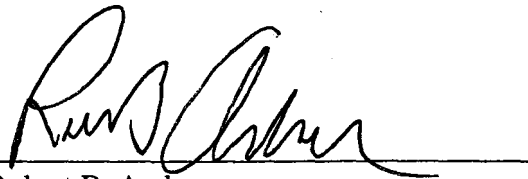
1. Approving and adopting the Commission's Order Granting Motions to Consolidate; Motions to Dismiss; Motions to Dismiss in Part; and Motion for Summary Disposition, issued on November 10, 2008 in Docket CT05-005 ("Damages Order") as the judgment of the Court, including, but not limited to, the Damages 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, on the \$471,890.98 in total unrecovered damages from July 14, 2007, through the date of entry of judgment;
 - (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, 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. Allowing the taxation and collection of Plaintiff Wegner Auto's and the other Plaintiff Damages Awardees' costs and disbursements as allowed by law, including attorney fees to extent allowed by SDCL 49-13-26.

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

Dated this 18th day of November, 2009.



Robert B. Anderson
May, Adam, Gerdes & Thompson
P.O. Box 160
Pierre, SD 57501-0160
ph. (605) 224-8803
fax (605) 224-6289
email rba@magt.com

Attorney for Plaintiff Wegner Auto Company, Inc.



John J. Smith
Special Assistant Attorney General
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
ph. (605) 773-3201
fax (605) 773-3809
email john.j.smith@state.sd.us

Attorney for Plaintiff, South Dakota Public
Utilities Commission