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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ANAMIRIA MADRIGAL, individually)
and doing business as Aztek)
Cellular, a sole proprietorship;)
and AZTEK CELLULAR, INC.,)
Plaintiffs,)
v.)
NEW CINGULAR WIRELESS SERVICES,)
INC., a corporation; and AT&T)
MOBILITY, LLC, a corporation,)
Defendants.)

1:09-cv-0033 OWW SMS
ORDER AFTER SCHEDULING
CONFERENCE

I. Date of Scheduling Conference.
April 15, 2009.

II. Appearances Of Counsel.
Cornwell & Sample, LLP by Stephen R. Cornwell, Esq., and
Judith M. Harless, Esq., appeared on behalf of Plaintiffs.

Kohut & Kohut LLP by Donald P. Wagner, Esq., appeared on
behalf of Defendants.

III. Summary of Pleadings.

Plaintiffs' Factual Contentions:

1. On or about April 1, 2002, Plaintiffs entered into an

1 Exclusive Dealer Agreement ("Agreement") with AT&T Wireless
2 Services, Inc. Under the terms of this Agreement, Plaintiffs
3 were authorized to market wireless products and service to
4 existing and potential customers of AT&T Wireless. They opened
5 several retail locations under the name Aztek Cellular from which
6 they offered, sold, and distributed the goods and services of
7 AT&T Wireless to consumers.

8 2. The Agreement by its terms provided that AT&T Wireless
9 would train Plaintiffs on how to properly offer and sell its
10 products and service; and Plaintiffs were required to solicit
11 business strictly in accordance with AT&T Wireless's established
12 procedures. All prices and terms for wireless service were
13 established by AT&T Wireless. AT&T Wireless also provided
14 promotional literature for Plaintiffs' stores, and Plaintiffs
15 agreed to maintain an adequate stock of AT&T Wireless brochures
16 and other advertising materials to meet any customer needs. Any
17 telemarketing or internet advertising program devised by
18 Plaintiffs required AT&T Wireless's written approval prior to
19 use. The Agreement further provided that AT&T Wireless
20 authorized Plaintiffs to represent themselves to the consuming
21 public as an "Authorized Dealer" of AT&T Wireless and to use its
22 trademarks, service marks, trade names, logos, or similar
23 markings. Plaintiffs were permitted to use such marks in their
24 advertising.

25 3. In exchange for these rights as well as other benefits
26 and compensation, Plaintiffs granted to AT&T Wireless a purchase
27 money security interest (i) in any and all equipment they
28 purchased from AT&T Wireless; (ii) in any accounts created for or

1 from the sale, lease, license, exchange, or other disposition of
2 equipment by Plaintiffs; and (iii) in any proceeds of such
3 equipment or accounts. Plaintiffs further agreed to pay any
4 charges billed to them for promotional materials that AT&T
5 provided. They also incurred expenses for themselves and all
6 their employees to attend out-of-town mandatory AT&T training,
7 and they were required to carry insurance at their own expense
8 naming AT&T as an additional insured against any claims of
9 injury, including injuries arising from AT&T's own products.

10 4. Plaintiffs also agreed that they would not solicit,
11 sell, or offer any like goods and services of any competitor of
12 AT&T Wireless during the term of the Agreement, and that they
13 would not lease, sublease, or otherwise provide space at any of
14 their retail locations to any competitive service provider or
15 seller. Similarly, Plaintiffs were prohibited from sharing any
16 resources with a provider or seller of any competitive service.
17 In connection with the Agreement, Plaintiffs were given a copy of
18 a Manual of Dealer Policies. They also were allowed access to
19 certain proprietary information of AT&T Wireless which they
20 agreed they would keep confidential.

21 5. During the operative term of the Agreement, Plaintiffs
22 experienced notable financial success. They opened a total of
23 nine retail outlets which they operated under the name Aztek
24 Cellular. They focused their marketing on the large local
25 Hispanic community, and their stores generated basic monthly
26 commissions totaling hundreds of thousands of dollars.

27 6. Despite Plaintiffs' success, Plaintiff Madrigal
28 experienced instances when she was treated negatively by AT&T

1 because she was a woman among mainly male dealers and because she
2 was Hispanic. For example, and in particular, in 2001, AT&T
3 initially refused to contract with Madrigal directly, but
4 required instead that a qualified male be named as the dealer on
5 her business. Thereafter, even when she was allowed to contract
6 in her own name, she was isolated from other participants at
7 dealer conventions, and AT&T personnel would not converse with
8 her or address her inquiries. The AT&T employee specifically
9 charged with developing Hispanic marketing refused to assist her
10 and told her pointedly that she was on her own to develop
11 marketing plans for the Hispanic community in Fresno.
12 Thereafter, AT&T account executives disparaged Madrigal's
13 Hispanic market and contended it was creating friction for
14 Plaintiffs with AT&T, despite the fact that Plaintiffs were
15 experiencing excellent financial results at each of their
16 numerous retail outlets.

17 7. In about 2005, AT&T Wireless merged with Cingular
18 Wireless. To bridge the change in compensation strategies that
19 arose as a result of the merger, Cingular introduced a program of
20 Special Promotional Incentives Funds ("SPIFs"). As former AT&T
21 Wireless customers were successfully migrated to Cingular and/or
22 additional data features were sold to those customers, Plaintiffs
23 earned SPIFs as incentive compensation for achieving targeted
24 sales opportunities.

25 8. Calculations of SPIFs that had been earned was a
26 complicated process, and Cingular frequently was delayed in
27 providing accurate and complete SPIF accountings and payments to
28 Plaintiffs. By the fall of 2005, Plaintiffs calculated that

1 Cingular owed them more than \$2,000,000 in unpaid SPIFs and
2 improperly calculated commissions. In response to their demands
3 for payment, Cingular offered to settle up the account for
4 \$475,000. Plaintiffs refused, since Cingular had no accounting
5 reflecting their own calculations were in error. Cingular then
6 reduced its offer to \$435,000, again without any supporting
7 documentation. When Plaintiffs again refused to compromise their
8 claim, instead of paying what was owed, Cingular sent them a
9 notice of termination of their dealership. Cingular also made a
10 final offer to settle the disputed SPIFs and commissions for only
11 \$149,275.

12 9. The notice of termination was completely unexpected and
13 contrary to the renewal terms that Plaintiffs already had been
14 given. The term of the original Agreement was two years with
15 automatic one-year extensions if not otherwise terminated by
16 either of the parties. When the Agreement came up for renewal in
17 2004 and 2005 it was renewed. In the fall of 2005, Plaintiffs
18 were informed the Agreement would be renewed again in 2006.
19 Instead, on December 24, 2005, Defendants served Plaintiffs with
20 a 90-day written notice of termination.

21 10. Defendants took back Plaintiffs' dealership on or about
22 April 1, 2006. They made no effort at that time to buy back any
23 of Plaintiffs' inventory or to compensate them for the value of
24 their business or the funds they had invested in the authorized
25 dealership.

26 Plaintiffs' Legal Contentions:

27 1. That Defendants are the agents, employees, alter egos,
28 and/or successors of each other and of AT&T Wireless Services,

1 Inc.

2 2. That Plaintiffs are "persons" who were granted a
3 "dealership" as those terms are defined in California Civil Code
4 § 81.

5 3. That Plaintiffs were discriminated against because of
6 Plaintiff Madrigal's sex, color, race, ancestry, and national
7 origin in violation of California Civil Code § 51.

8 4. That Plaintiffs' Exclusive Dealer Agreement and its
9 various renewals constituted a franchise pursuant to California
10 Business & Professions Code § 20000 et seq.

11 5. That Defendants' termination and refusal to renew
12 Plaintiffs' Exclusive Dealer Agreement was unlawful pursuant to
13 the California Franchise Relations Act.

14 6. That Plaintiffs' Exclusive Dealer Agreement and its
15 various renewals constituted a franchise pursuant to New York
16 General Business Code § 681.

17 7. That Defendants' termination and refusal to renew
18 Plaintiffs' Exclusive Dealer Agreement was unlawful pursuant to
19 the New York Franchise Law.

20 8. That Plaintiffs have been damaged by the conduct of
21 Defendants.

22 9. That Plaintiffs are entitled to damages.

23 10. That Plaintiffs are entitled to the fair repurchase
24 value of all the resalable inventory they had at the time of
25 termination.

26 11. That Plaintiffs are entitled to attorneys' fees
27 pursuant to California Civil Code § 86 and New York General
28 Business Law § 691.

1 12. That Defendants' conduct in their relations with
2 Plaintiffs was unfair, unlawful, and fraudulent and constituted
3 unfair competition pursuant to California Business & Professions
4 Code § 17200 et seq.

5 13. That Plaintiffs are entitled to restitution of their
6 wrongfully withheld funds and disgorgement of Defendants' profits
7 acquired as a result of their unfair, illegal, and fraudulent
8 business acts and practices.

9 14. That Plaintiffs complied with all the terms of their
10 Exclusive Dealer Agreement and the Manual of Dealer Policies
11 provided to them by Defendants during the term of their franchise
12 dealership.

13 15. That Defendants failed to comply with all the terms
14 required of them by Plaintiffs' Exclusive Dealer Agreement and by
15 their own Manual of Dealer Policies during the term of
16 Plaintiffs' franchise dealership.

17 16. That Plaintiffs adequately complied with the
18 arbitration provisions of the Exclusive Dealer Agreement.

19 17. That Defendants waived any rights they had to
20 arbitrate any claims or causes of action set forth in the First
21 Amended Complaint for Damages.

22 18. That the arbitration provisions of the Exclusive
23 Dealer Agreement violate California's public policy and are not
24 enforceable by a court in California regardless of whether
25 California or New York law applies.

26 19. That the arbitration provisions of the Exclusive Dealer
27 Agreement do not apply to Plaintiffs' statutory claims for
28 relief.

1 20. That Plaintiffs' suit is not barred in whole or in part
2 by any previous agreements.

3 21. That none of Plaintiffs' claims or damages is barred by
4 the passage of time, either by way of contract terms or statutory
5 terms.

6 22. That Plaintiffs are entitled to a jury trial on their
7 dealership and franchise claims for relief.

8 Defendants' Factual Contentions:

9 1. Defendants contend that the Exclusive Dealer Agreement
10 expired and that it was not terminated for reasons related to the
11 gender, race or ethnicity of Ms. Madrigal. Defendants further
12 contend that Plaintiffs owe an as yet undetermined amount in
13 excess of \$149,000 to them for product sold to them, for loans
14 and dealer advances made to them, and pursuant to Ms. Madrigal's
15 personal guarantee. Moreover, Defendants contend that most of
16 the claims made here by Plaintiffs are barred by the contractual
17 limitation provisions of the Agreement and by virtue of separate
18 settlement agreements between the parties entered into during the
19 course of their business dealings.

20 Defendants' Legal Contentions

21 1. Defendants dispute the legal contentions of Plaintiffs,
22 including any contention that Plaintiffs are entitled to any
23 amount in damages. Defendants further contend:

24 a. To the extent Plaintiffs attempt to state claims
25 under either the California or New York franchise laws, those
26 claims are barred by the express terms of the Exclusive Dealer
27 Agreement.

28 b. The entire matter must be arbitrated by the

1 Plaintiffs pursuant to their arbitration clause contained in the
2 Exclusive Dealer Agreement.

3 c. The Exclusive Dealer Agreement expired pursuant to
4 its terms.

5 d. Defendants had no obligation, contractual or
6 otherwise, to renew the Exclusive Dealer Agreement.

7 e. Plaintiffs owe an amount to be determined at
8 arbitration or trial, but believed to be in excess of \$149,000 to
9 Defendants.

10 f. Plaintiffs breached the Exclusive Dealer Agreement
11 by failing to arbitrate their claims pursuant to the arbitration
12 clause in the Agreement and by failing to honor the 180-day
13 contractual limitation period.

14 IV. Orders Re Amendments To Pleadings.

15 1. A First Amended Complaint for Damages was filed March
16 5, 2009, pursuant to stipulation of the parties. Defendants
17 timely answered the original complaint and that answer is deemed
18 responsive to the First Amended Complaint pursuant to the Court's
19 March 4, 2009, order on the stipulation. The parties do not
20 contemplate further amendments to the pleadings at this time.

21 V. Factual Summary.

22 A. Admitted Facts Which Are Deemed Proven Without Further
23 Proceedings.

24 1. Anamiria Madrigal is an individual doing business
25 in the Eastern District of California, Fresno Division, as Aztek
26 Cellular, a sole proprietorship.

27 2. Plaintiff, Aztek Cellular, Inc., is a corporation
28 incorporated under the laws of the State of California.

1 3. New Cingular Wireless Services, Inc., is a
2 Delaware corporation and AT&T Mobility, LLC, is a Delaware
3 corporation. In the event there is any difference in the true
4 state of incorporation, Defendants reserve the right to
5 substitute the true state of incorporation.

6 4. On or about April 1, 2002, Plaintiff Madrigal
7 entered into an Exclusive Dealer Agreement with AT&T Wireless.

8 5. Plaintiffs opened several retail locations under
9 the name Aztek Cellular from which they offered, sold, and
10 distributed the goods and services of AT&T Wireless to consumers.

11 6. Plaintiffs were given a copy of a Manual of Dealer
12 Policies.

13 7. The term of the original Exclusive Dealer
14 Agreement was two years with automatic one-year extensions if not
15 otherwise terminated by either of the parties.

16 8. When the Exclusive Dealer Agreement came up for
17 renewal in 2004 and 2005 it was renewed.

18 9. In 2005, AT&T Wireless merged with Cingular
19 Wireless.

20 10. On December 24, 2005, Defendants served Plaintiffs
21 with a 90-day written notice of termination.

22 11. The termination date was on or about April 1,
23 2006.

24 B. Contested Facts.

25 1. All other factual matters are disputed, including
26 the following:

27 a. Whether there are any earned but unpaid
28 commissions or other earnings that Defendants owe Plaintiffs.

1 b. Whether Defendants treated Plaintiffs
2 differently than other authorized dealers and, if so, if the
3 differences related to or were motivated by Plaintiff Madrigal's
4 sex, color, race, ancestry, and/or national origin.

5 c. Whether Defendants offered to renew
6 Plaintiffs' Exclusive Agreement in the fall of 2005.

7 d. Whether Defendants gave Plaintiffs notice of
8 termination of Plaintiffs' Exclusive Dealer Agreement to get
9 leverage in negotiations over Plaintiffs' claim for earned but
10 unpaid commissions and other earnings.

11 e. Whether the parties intended to create a
12 franchise relationship between them.

13 f. Whether the Exclusive Dealer Agreement
14 created a franchise relationship between the parties.

15 VI. Legal Issues.

16 A. Uncontested.

17 1. Jurisdiction exists under 28 U.S.C. § 1332.

18 2. Venue is proper under 28 U.S.C. § 1391.

19 3. The contract has a choice of law provision that
20 chooses the substantive law of the State of New York. Plaintiffs
21 contend that both the laws of the State of California and New
22 York apply in this diversity action. This matter will be
23 resolved by motion.

24 4. There is a written Exclusive Dealer Agreement, the
25 original is dated April 1, 2002, and certain renewals. The
26 parties do not dispute the genuineness and authenticity of that
27 contract and its renewals.

28 5. Plaintiff was furnished a Manual of Dealer

1 Policies by AT&T Mobility. The parties do not dispute its
2 authenticity.

3 B. Contested.

4 All other legal issues relating to both liability and
5 damages are disputed, including the following:

6 1. Whether Defendants are the agents, employees,
7 alter egos, and/or successors of each other and of AT&T Wireless
8 Services, Inc.

9 2. Whether Plaintiffs are "persons" who were granted
10 a "dealership" as those terms are defined in California Civil
11 Code § 81.

12 3. Whether Plaintiffs were discriminated against
13 because of Plaintiff Madrigal's sex, color, race, ancestry, and
14 national origin in violation of California Civil Code § 51.

15 4. Whether Plaintiffs' Exclusive Dealer Agreement and
16 its various renewals constituted a franchise pursuant to
17 California Business & Professions Code § 20000 et seq.

18 5. Whether Defendants were required to renew
19 Plaintiffs' Exclusive Dealer Agreement pursuant to the California
20 Franchise Relations Act.

21 6. Whether Plaintiffs' Exclusive Dealer Agreement and
22 its various renewals constituted a franchise pursuant to New York
23 General Business Code § 681.

24 7. Whether Defendants were required to renew
25 Plaintiffs' Exclusive Dealer Agreement pursuant to the New York
26 Franchise Law.

27 8. Whether either California or New York franchise
28 law applies to this case as the Agreement specifically states

1 that no franchise relationship existed.

2 9. Whether Plaintiffs have been damaged by the
3 conduct of Defendants.

4 10. Whether Defendants have been damaged by the
5 conduct of Plaintiffs.

6 11. Whether Plaintiffs are entitled to damages.

7 12. Whether Plaintiffs are entitled to the fair
8 repurchase value of all the resalable inventory at the end of the
9 parties' relationship.

10 13. Whether Plaintiffs are entitled to attorneys fees
11 pursuant to California Civil Code § 86 and New York General
12 Business Law § 691.

13 14. Whether Defendants' conduct in their relations
14 with Plaintiffs was unfair, unlawful, and fraudulent and
15 constituted unfair competition pursuant to California Business &
16 Professions Code § 17200 et seq.

17 15. Whether Plaintiffs are entitled to restitutionary
18 damages from Defendants.

19 16. Whether Plaintiffs complied with all the terms of
20 the Exclusive Dealer Agreement and the Manual of Dealer Policies
21 during the term of the parties' relationship.

22 17. Whether Defendants complied with all the terms of
23 the Exclusive Dealer Agreement and the Manual of Dealer Policies
24 during the term of the parties' relationship.

25 18. Whether some or all of Plaintiffs' claims are
26 excused for any reason from arbitration.

27 19. Whether Defendants waived any rights they had to
28 arbitrate any claims or causes of action set forth in the First

1 Amended Complaint for Damages.

2 20. Whether the arbitration provisions of the
3 Exclusive Dealer Agreement violate California's public policy and
4 are not enforceable by a Court in California regardless of
5 whether California or New York law applies.

6 21. Whether the arbitration provisions for the
7 Exclusive Dealer Agreement do not apply to Plaintiffs' statutory
8 claims for relief.

9 22. Whether Plaintiffs' suit is not barred in whole or
10 in part by any previous agreement.

11 23. Whether any of Plaintiffs' claims arising before
12 March, 2005, survive the parties' Settlement Agreement and accord
13 and satisfaction.

14 24. Whether any of Plaintiffs' claims are barred by
15 the passage of time.

16 25. Whether Plaintiffs are entitled to a jury trial on
17 their dealership and franchise claims for relief.

18 26. Whether Plaintiff Madrigal has any standing to
19 assert the claims made in this case because Defendants contend
20 the claims, if any, belong solely to Aztek Cellular and that such
21 claims have not been assigned to Madrigal.

22 VII. Consent to Magistrate Judge Jurisdiction.

23 1. The parties have not consented to transfer the
24 case to the Magistrate Judge for all purposes, including trial.

25 VIII. Corporate Identification Statement.

26 1. Any nongovernmental corporate party to any action in
27 this court shall file a statement identifying all its parent
28 corporations and listing any entity that owns 10% or more of the

1 party's equity securities. A party shall file the statement with
2 its initial pleading filed in this court and shall supplement the
3 statement within a reasonable time of any change in the
4 information.

5 IX. Further Scheduling Conference.

6 1. The parties believe it is in their best interests that
7 the motion to compel arbitration be first resolved, prior to the
8 further scheduling of this case.

9 2. The parties shall, following the Court's ruling on the
10 motion to compel arbitration, in the event the motion is denied,
11 contact the courtroom deputy and obtain a date for a further
12 scheduling conference.

13
14
15 IT IS SO ORDERED.

16 Dated: April 16, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE