
IN THE ILLINOIS APPELLATE COURT
FOR THE FIRST DISTRICT

iPCS Wireless, Inc., a Delaware Corporation,)	
)	
Plaintiff-Appellee,)	
)	On Appeal from the Circuit
v.)	Court of Cook County,
)	County Department,
Sprint Corporation, a Kansas corporation,)	Chancery Division
WirelessCo L.P., a Delaware limited)	
partnership, Sprint Spectrum L.P., a Delaware)	
limited partnership, SprintCom, Inc., a Kansas)	Case No. 05 CH 11792
Corporation, and Sprint Communications)	
Company L.P., a Delaware limited partnership,)	Honorable Thomas P. Quinn,
)	Judge Presiding
Defendants-Appellants.)	

**BRIEF OF PLAINTIFF-APPELLEE
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INTRODUCTION

Sprint's opening brief misses the point of the circuit court's 25-day bench trial and judgment. This case is not about Sprint's ownership of the Nextel network in the abstract. Rather, it is about Sprint's real-world attempt to *use* the Nextel network to compete directly against Sprint's own "Affiliate," iPCS Wireless, Inc. ("iPCS") – *after* iPCS had spent hundreds of millions of dollars building the Sprint network and name in the exclusive territory granted by Sprint to iPCS, and *after* iPCS had staked its entire business on Sprint's repeated commitment that iPCS would *be* Sprint in that area. After analyzing the parties' agreements, observing their witnesses, and weighing a voluminous record of evidence, the circuit court concluded that Sprint's actions and threatened conduct would not only breach the agreements but also vitiate their essential purpose.

In those agreements, iPCS agreed to build and operate Sprint's wireless network, and promote and sell Sprint products, in rural areas of four states. iPCS has spent over \$300 million carrying out those duties. In return, the agreements give iPCS "Exclusivity of Service Area." But in 2005, Sprint merged with iPCS's rival, Nextel. It began to compete directly and "aggressively" against iPCS in iPCS's Service Area, using the powerful Sprint brand – the same brand that iPCS uses and *must* use under its agreements – to promote Nextel. Sprint contends it may thus vitiate iPCS's exclusivity simply because Nextel's network uses a different frequency (800 MHz) and transmission technology than that of iPCS and Sprint (1900 MHz). Sprint's claim relies primarily on a clause that prohibits Sprint from owning or operating a wireless network at 1900 MHz in iPCS's service area. Sprint claims this *prohibition* gives it an *unambiguous* and unfettered *right* to compete directly against – or even destroy – iPCS in its service area, by using any frequency other than 1900 MHz.

On summary judgment, however, the circuit court found that the meaning of the clause relied upon by Sprint was ambiguous. The court then conducted a 25-day bench trial to determine the intent of the parties. Based on the agreements and the evidence, the circuit court held that the parties did not intend to permit Sprint to compete with its affiliate. Indeed, the court found, iPCS would never have agreed to undertake the massive investment involved in building Sprint's wireless network "unless [iPCS] was assured that there would be no competition from [Sprint] in the service area." A5.

Sprint's main argument on appeal is that the circuit court should not have held a trial or considered evidence at all. As shown below, however, the circuit court correctly found the Agreements to be ambiguous, and its consideration of extrinsic evidence to resolve the parties' dispute was entirely proper.

The circuit court then turned to the task of formulating an appropriate remedy. The court found that regulating Sprint's conduct to ensure compliance (and protect iPCS from further breaches) would require continuous judicial supervision of Sprint's operations. A9. To grant more meaningful and enforceable relief, the court entered a prohibitory injunction directing Sprint to cease using the Nextel network in its Affiliate iPCS's service area within 180 days. A12. The circuit court's remedy fits easily within its ample discretion. And although Sprint now claims surprise, Sprint knew all along that its ownership of the Nextel network in iPCS's service area was at risk. At the outset of the case, Sprint acknowledged in open court that "we have a problem in this particular territory that we have to deal with, if you rule against us" (as the court did). Indeed, Sprint actively *planned* to "carve off the Nextel properties" in iPCS territory as a fallback position if it did not like the price of a negotiated solution to the parties' dispute.

ISSUES PRESENTED FOR REVIEW

- I. Whether the circuit court properly considered extrinsic evidence to determine the parties' intent and resolve the parties' dispute over the meaning of their Agreements.
- II. Whether the circuit court's finding, that the manner in which Sprint threatened to use the Nextel network to compete against its Affiliate iPCS in iPCS's service area would breach the Agreements, is against the manifest weight of the evidence.
- III. Whether the court correctly held that Sprint would breach its Agreements if it disclosed confidential information about iPCS to iPCS's competitor, Nextel.
- IV. Whether the injunctive relief granted by the circuit court was an abuse of the wide discretion afforded an equitable court in fashioning a remedy.

STATEMENT OF FACTS

I. The Purpose Of The Parties' Bargain.

Sprint's Plan To Recruit "Affiliates." In the late 1990s, Sprint embarked on an ambitious plan to launch the country's first nationwide digital wireless network. Trial Transcript, S.R. vols. 3-10 ("Tr.") 2949. Through entities known as "Sprint PCS," Sprint had obtained from the Federal Communications Commission ("FCC") licenses to use the 1900 MHz spectrum for wireless mobile service. Tr. 1510, 2841-44.¹ Before obtaining these 1900 MHz licenses, Sprint owned licenses to use the 800 MHz spectrum; because the FCC rules at the time prohibited parties from owning licenses to both frequencies in the same area, Sprint had to divest its 800 MHz licenses. Tr. 2908-10; PX-63.

¹ Wireless phones transmit and receive signals at a radio frequency measured in megahertz ("MHz"). The FCC grants each wireless company a license to use a different range or "spectrum" of frequencies in a given geographic area.

Sprint deemed that building in major cities “would take all of the capital we felt it was prudent to spend directly.” Tr. 2847-48. But Sprint recognized that urban coverage alone would not be adequate. To expand its coverage, Sprint decided to enlist “Affiliates”: companies that would build and manage local networks and handle local promotion in rural areas while Sprint kept the largest (and most profitable) markets for itself. Tr. 1287-88, 2847-48, 2950-51. Sprint deemed it would “sell more in the major cities” that it kept for itself if customers “knew that secondary cities, like downstate Illinois, were also going to be covered and their phones would work” when they traveled there. Tr. 2848. Further, Sprint expected the Affiliates’ “local market knowledge” to yield “successful sales in the affiliate territories.” C05640; see also Supp. App. (“SA”) 73. Sprint “expected the Affiliates to advertise locally” and “promote the [Sprint] brand,” and it sought to “benefit from the increased brand awareness” and the “add[ed] value to Sprint” the Affiliates would generate. Tr. 2953; see also Tr. 2851.

Sprint’s Commitments To The Affiliates. To recruit Affiliates, Sprint conducted a series of presentations. Tr. 83, 87-98, 1290-92; SA1. And to help the Affiliates attract financing, Sprint gave similar presentations to prospective investors and lenders. Tr. 155-59, 1209, 1212, 1225-28, 1237-65; SA15 & SA50. Sprint portrayed its plan as an “attractive opportunity for Affiliates” to “[l]everage Sprint and Sprint PCS brands and advertising.” SA57; Tr. 1243-44, 1255. Sprint told Affiliate lenders “that the affiliate has full and exclusive right to use the Sprint PCS brand.” Tr. 1258; SA59.

Sprint’s commitment of its name was emblematic of its fundamental vow that “Sprint PCS is fully committed to the Affiliate” and that the “Affiliate is Sprint PCS in their Service Area.” SA59 (emphasis in original). Sprint committed that “Sprint PCS is restricted from competing with the Affiliate[s]” and “has not ‘held out’ spectrum to

compete” against them. SA59. Sprint told iPCS lenders and investors that its “strategic and business interests” would be “completely aligned” with iPCS. SA58. iPCS’s CEO received the same message in negotiating with Sprint: that iPCS “would be Sprint.” Tr. 86; see also, *e.g.*, Tr. 89, 90, 101, 123.

iPCS is one of Sprint’s Affiliates. It was formed in January 1999 – the same time it became an Affiliate (PX-13.17 at 78; Tr. 154) – and “its sole purpose in life was . . . to be a Sprint affiliate” (Tr. 108). iPCS owns and operates wireless facilities in rural Illinois, Iowa, Michigan, and Nebraska, serving approximately 300,000 subscribers. Tr. 171, 183. “All of [iPCS’s] revenues are as a result of being a Sprint affiliate.” Tr. 259. iPCS does not have any other business.

The Parties’ Agreements. In January 1999, iPCS executed a set of related Agreements – a Management Agreement (JX-1), a Services Agreement (JX-6), and two Trademark Agreements (JX-4 & 5) – with various Sprint entities. Tr. 140. By then, Sprint had acquired the entities known as Sprint PCS, such that “Sprint owned its entire wireless business,” and Sprint PCS was “the brand name by which Sprint’s wireless business was known in the industry.” Tr. 1285-86. The Management Agreement has a 50-year term: a 20-year base term plus three 10-year renewals. JX-1 §§ 11.1-11.2.

Sprint’s “overview” of the “deal structure” was that it would “provide[] spectrum, brand, national advertising” while iPCS “constructs, manages, and operates local network.” SA9; see also A24 § 1.1. iPCS would obtain 92 percent of wireless revenues in its service area, giving 8 percent to Sprint. Tr. 150-51, 1956; JX-1 § 10.1.1.

Sprint’s Mr. Blessing, an architect of the Affiliate Program, acknowledged that Sprint’s “conception” was that “the affiliates would be Sprint in their territory” and “would do business as Sprint.” Tr. 2922-23. The Agreements thus require iPCS to

“construct facilities and operate” in accordance with requirements established by Sprint PCS. A23 recital G. iPCS was also required to promote Sprint’s wireless offerings under the Sprint and Sprint PCS brand names. A30 § 5.1(b). To carry out that requirement, iPCS received a license to use those brands in its territory. JX-4 recitals & § 1.1(a).

iPCS’s Commitment To Sprint. Building a new wireless network requires a “huge” up-front investment. Tr. 198, 1206. The network includes numerous towers, located throughout the service area, that communicate with wireless phones. Tr. 165. The towers are connected by transmission lines and by switches (computers that route calls). *Id.* Each switch costs upwards of \$10 million, and each tower costs approximately \$250,000. Tr. 167, 169-70. In addition, designing this infrastructure requires a specialized engineering study. Tr. 166-68.

iPCS had to incur all of these costs before it had a network and before it could recruit customers. Tr. 169. For its first two years of operations, iPCS was deploying huge amounts of capital, while its revenues were “virtually zero” (Tr. 198) because “[y]ou have to have the network before you can sell to the subscribers” (Tr. 334; see also PX-664). The Agreements acknowledge that “[t]he construction and operation of the Service Area Network requires a substantial financial commitment” by iPCS. A25 § 1.7.

iPCS’s commitment is particularly substantial, because it was not building just any wireless network. Rather, Sprint insisted that iPCS build its local network to Sprint’s specifications and do business under Sprint’s name. A24 § 1.2; A25 § 2.1 & A30 § 5.1(b). From an economic perspective, iPCS’s assets are “sunk investments.” Tr. 2080. Because iPCS’s facilities were built to be part of Sprint’s business, they would have “significantly less” value in “any alternative use” or to anyone other than Sprint. Tr. 2084. Thus, once iPCS built the network it was “out on a limb” and “locked into” its

relationship with Sprint. Tr. 2087. At that point, Sprint would have an incentive to hold iPCS “over a barrel” to extract better terms for itself. *Id.*

Sprint’s Commitment To Protect iPCS’s Investment. Of course, an Affiliate like iPCS would not incur such large sunk costs – much less found its entire business on a relationship with Sprint, as iPCS has done – without protection against future misconduct by Sprint. Tr. 2088. Rather, an Affiliate would require “assurances that the means by which Sprint could come in later and compete against an affiliate would be foreclosed” and “that the value of their investment will not be undermined by competition after the fact.” Tr. 2099-2100, 2101. In negotiating with Sprint, iPCS told Sprint “that it was absolutely critical to us that we be exclusive in the territory” and “that we can’t be competing with Sprint.” Tr. 112. And as described above, Sprint pledged that Sprint PCS “is restricted from competing with [iPCS].”

As detailed in the Argument below, the Agreements reflect these assurances. We discuss three examples briefly here. First, Section 2.3 of the Management Agreement begins with the bold-type heading “**Exclusivity of Service Area.**” A26. The first sentence contains three independent clauses. A59. The first (“Clause 1”) states that “Manager [iPCS] will be the only person or entity that is a manager or operator for Sprint PCS with respect to the Service Area.” *Id.* Clause 2 provides that “neither Sprint PCS nor any of its Related Parties will . . . own, operate, build, or manage another wireless mobility communications network . . . in the Service Area.” *Id.* Clause 3 adds that “neither Sprint PCS nor any of its Related Parties will . . . sell Sprint PCS Products and Services in the Service Area.” *Id.* Section 2.3 then sets out three exceptions to exclusivity, (a), (b), and (c), relating to “national accounts” customers, resellers, and the use of fixed wireless facilities in providing landline phone service. A26.

Next, Section 12.2 of the same Agreement protects “Confidential Information” (A33), defined broadly as “any . . . information disclosed by one party to the other party pursuant to the [Agreements]” subject only to a few “specifically excluded” exceptions (A39) not at issue here. Section 12.2 imposes three obligations on “each of the parties.” A33 § 12.2(a). First, they “must . . . keep confidential . . . all Confidential Information disclosed by the other party . . . in connection with this agreement.” *Id.* Second, they must “not disclose to others” such information. *Id.* Third, they may “use” information “only for the purposes authorized in this agreement.” *Id.*

Finally, the Agreements contain an implied covenant of good faith that prevents either party from denying the other the fruits of the bargain. Argument Section II.B. The Management Agreement reiterates that “[e]ach party must perform its obligations under this agreement in a diligent, legal, ethical, and professional manner.” A25 § 1.8.

II. iPCS Performs Its Side Of The Bargain.

Pursuant to the Agreements, iPCS made enormous investments in its local Sprint business. iPCS devoted approximately \$348 million to “building out the network” in its territory. Tr. 338; PX-662. iPCS also invested heavily in promoting Sprint products and services, spending approximately \$49 million to that end. Tr. 341-42; PX-657. iPCS manages retail stores and employs numerous dealers and sales agents. Tr. 233, 245, 246.

Initially, Sprint directed iPCS to use and promote both the Sprint and Sprint PCS names. Tr. 264 & SA151. In 2002, Sprint told iPCS “to drop the ‘Sprint PCS’ and just use ‘Sprint.’” Tr. 264-65; see SA151. iPCS “use[s] the Sprint brand” in “all of its advertising” to “leverage off of the strength of the brand.” Tr. 906-07. iPCS’s stores are Sprint stores, and its employees carry Sprint business cards. Tr. 233-34; SA160-61 (photos). iPCS is “prohibited” from putting its own name on the business. Tr. 234. As

iPCS's CEO explained, from the customers' perspective, "[t]hey are dealing with Sprint." Tr. 235.

iPCS's efforts have helped build the Sprint brand and increase sales. Tr. 251. And the Affiliate Program has achieved Sprint's goals. Today, due in large part to the efforts of iPCS and other Affiliates, Sprint boasts a nationwide network, and its brand is among the industry leaders. Tr. 2951 & SA153. Sprint itself has described the Affiliate Program as "extremely successful." SA16; Tr. 1240.

III. Sprint's Conduct Triggering The Lawsuit.

Sprint Announces Its Merger With Nextel. Since iPCS built its network, Nextel has been one of its chief competitors. Tr. 475, 489, 1518, 1573; see also PX-671. Nextel offers a competing product or service against virtually all of the many iPCS/Sprint offerings, which take over 60 pages to list. Tr. 273-79. Nextel operates stores in iPCS territory – in some cases, near or next door to the Sprint stores managed by iPCS. Tr. 255, 258, 845-47, 875, 879; SA160-61 (photos). While Nextel's network uses a different frequency and transmission technology from that of iPCS, iPCS and Nextel are direct competitors. Tr. 475, 489, 1518, 1573.

On December 15, 2004, Sprint announced that it would merge with Nextel. See DX-58 at 4, 83. Before the merger announcement, Sprint made a presentation to Nextel acknowledging a "[n]eed for structural separation of [Nextel] and [Sprint] operations" to avoid breaching its Affiliate agreements. SA170; see also Tr. 1531-32. Nevertheless, Sprint made plans to fully integrate the two operations. Tr. 1309-24, 1497-1500.

After the merger announcement, Sprint's chief integration officer Mr. Nielsen informed iPCS. Tr. 352-53, 1537-38. iPCS's CEO testified that Mr. Nielsen acknowledged that "it was not a matter of . . . if Sprint was going to breach the

agreements with the affiliates, but when,” because “the actions they were going to be taking would cause the breach.” Tr. 353-54.

Sprint Delays Resolution Of Its Breach. Initially, Sprint assured iPCS that it sought to negotiate “a fair solution.” Tr. 353. At Sprint’s request, iPCS and other Affiliates gave Sprint a list of “key terms” (Tr. 356-57), topped by the concern that the parties reach agreement before the Sprint-Nextel merger closed (PX-275 at 199; Tr. 373). Sprint presented iPCS with two proposals, including one in which Sprint would sell the Nextel assets in iPCS’s service area to iPCS. SA194-95, SA207-08; Tr. 363. Sprint developed a detailed plan to implement the sale. SA196-98.

Nevertheless, Sprint’s “primary goal” was not so much to reach agreement but “to get to merger closing without any injunction or merger disruption.” Tr. 1569-71 & 1859. Sprint reviewed an internal analysis code-named “Project Europe,” which concluded it would be “a whole lot cheaper to acquire the affiliates in a situation in which you [Sprint] breached your contract.” Tr. 1696-97; see also PX-232 at 175-76. Moreover, Sprint contemplated that it could divest or “carve off” Nextel’s operations in Affiliate territories as a fallback if it did not like the “economics” of a negotiated resolution. Tr. 1699.

Sprint thus decided “to slow down” the negotiations with the Affiliates. Tr. 1582; see also PX-311 at 25255. After weeks of “silence and uncertainty” from Sprint, the Affiliates “express[ed] concern about what Sprint was doing with them.” Tr. 1591, 1595; see also SA211 (relaying Affiliate concerns that “Sprint is backing us into a corner”).

Sprint’s Plan To Compete Against Its Affiliate, iPCS. Until the merger, Sprint nationally promoted only the Sprint-branded wireless products and services that iPCS sold. Tr. 296. Sprint’s “ads were clearly Sprint, just Sprint, and so [iPCS] got all of the benefit of [Sprint’s] branding and advertising.” Tr. 237. But after announcing the

merger, Sprint plotted a very different course. As Sprint's CEO acknowledged, Sprint planned to compete – “aggressively” – against its Affiliates, using the Nextel network. C05226; see also Tr. 1256-58, 1704-05, 1934-35, 2955. Further, Sprint decided to turn the force of its name to benefit Nextel. Sprint's studies showed the Sprint brand enjoyed “[b]roader market awareness” than Nextel. SA153; see also Tr. 1703. Accordingly, Sprint moved Nextel under the umbrella of the Sprint brand. SA154; Tr. 264-65.

Sprint then used the Sprint brand to promote both Sprint and Nextel under the theme “Sprint Together With Nextel.” Tr. 152, 238, 296; PX-547 at 13484; *e.g.*, SA155-59 (ads). Sprint also planned to place its brand on Nextel stores. Outside the Affiliate territories, Sprint was “re-branding” Nextel stores. Tr. 1499. Sprint prepared to perform the same makeover for the Nextel stores in Affiliate territories. Tr. 1499-1500.² As Sprint's integration officer succinctly put it: “Today Nextel is Sprint.” Tr. 1705.

IV. Proceedings In The Circuit Court.

Pre-Trial Proceedings. Faced with Sprint's delays and Sprint's imminent breach, iPCS filed suit on July 15, 2005 for declaratory and injunctive relief, including “a declaration that Sprint's post-merger ownership, management and operation of the Nextel network in [iPCS's] Service Area, in the manner announced by Sprint to date, will breach [iPCS's] Management Agreement.” SA236 ¶ 1(a). iPCS sought, among other things, to enjoin Sprint “from managing and operating the Nextel network in [iPCS's] Service Area in a manner that will breach [iPCS's] Management Agreement.” SA233 ¶ 1(a).

iPCS also moved for a TRO to restrain the merger. Sprint opposed the motion, acknowledging in open court the risk it was taking: that if the circuit court later “rule[d] against us” on the merits, “[t]hen we have a problem in this particular territory that we

² As described below, Sprint agreed to forbear from doing so pending trial and appeal.

have to deal with.” SA248. The parties then agreed that iPCS would not seek a TRO or preliminary injunction if Sprint would forbear from taking certain actions. SA250-70. This 14-page “Forbearance Agreement” includes over 30 separate prohibitions on Sprint. *Id.* The agreement itself has expired (SA259); however, Sprint has committed to honor the agreement pending this appeal as a condition of staying the circuit court’s judgment.

Sprint then moved for summary judgment, arguing that Section 2.3 of the Management Agreement was unambiguous. A2-3. Clause 2 of Section 2.3 prohibits Sprint from owning a “wireless . . . network” in the 1900 MHz range. Sprint contended that this prohibition meant it could compete against iPCS however it pleased so long as it used a different frequency. *Id.* The court, however, rejected Sprint’s argument, “disagree[d] with [Sprint’s] position that the Management Agreement is unambiguous” (A3) and found it to be “unclear” whether Clause 2 “was meant to be a limitation on [iPCS’s] rights” (A2-3). Accordingly, the court directed that extrinsic evidence “must be weighed before a determination can be made.” A3. The court also granted iPCS’s motion for an order protecting confidential information. See Argument Section III *infra*.

The Court’s Holding On Liability. The circuit court then conducted a 25-day bench trial. A4. It heard testimony from 11 witnesses, encompassing over 3,600 pages of transcripts. The court received over 330 exhibits into evidence, along with designations from 55 deposition transcripts. After weighing the language and purpose of the Agreements, along with extrinsic evidence of the parties’ intent, the court concluded that the Agreements did not permit Sprint to compete directly against its Affiliate iPCS.

The circuit court explained that Sprint’s construction would defeat the Agreements’ purpose, as iPCS “would never have spent over \$300,000,000 in construction costs unless it was assured that there would be no competition from [Sprint]

in the service area.” A5. Likewise, the court reasoned, “Sprint could not realistically believe that affiliates or investors would have supported the affiliate program” if Sprint were allowed to operate a competing network. A6. The court noted that Section 2.3 contained express exceptions to exclusivity, such as Section 2.3(c), which authorizes Sprint to operate a “fixed line service.” A5. By contrast, Section 2.3 did not contain any such “specific exception” authorizing wireless competition outside the 1900 MHz frequency. *Id.* Turning to extrinsic evidence of intent, the court cited “Sprint’s presentations to investors and the affiliates,” which “stated that the affiliate would be ‘Sprint’ in the service area and that the affiliate has access to *all* spectrum available to Sprint.” *Id.* (emphasis in original). The court also noted the testimony of a Sprint witness “that Sprint did not expect to compete with the affiliates when it entered into the . . . Agreements.” A6.

The circuit court observed that it “is obvious” that Sprint would not “purchase a competitor and then allow that competitor to independently compete against Sprint.” A6. The court thus held that Sprint could not “compete with an entity [iPCS] that Sprint has described as ‘Sprint PCS in their Service Area’” and entered judgment for iPCS. *Id.*

The Court’s Remedy. The circuit court then turned to “[t]he more difficult task” of “determining the appropriate form of relief” to enforce its holding. A6. iPCS’s complaint sought (among other things) to enjoin Sprint “from managing and operating the Nextel network in [iPCS’s] Service Area in a manner that will breach [iPCS’s] Management Agreement.” SA233 ¶ 1(a). iPCS also requested an injunction that would contain numerous restrictions on Sprint’s conduct: *e.g.*, “prohibit[ing] Sprint from using the Nextel wireless business to compete with iPCS in iPCS’s service area.” A8.

The court found, however, that such an injunction would require the courts “to continuously supervise the operations of a multi-billion dollar corporation.” *Id.* Further, the wireless market is “constantly evolving,” such that the courts would be “continuously called upon to determine if a new activity constitutes a forbidden competition.” A8-9. Thus, after considering objections from Sprint, the court’s judgment directed Sprint to “cease owning, operating, and managing the Nextel wireless network in the [iPCS] Service Area” within 180 days. A12.

GOVERNING LAW AND STANDARD OF REVIEW

On substantive matters, the Management Agreement provides that Kansas law governs “the interpretation of the [parties’] rights and duties.” A63 § 17.12.1. “Illinois has recognized the validity of an express choice of law provision.” *Hartford v. Burns Int’l Sec. Servs., Inc.*, 172 Ill. App. 3d 184, 187 (1st Dist. 1988). Thus, Kansas law controls on substantive issues, including the consideration of parol evidence, because “[t]he parol evidence rule is not a rule of evidence but a rule of substantive law.” *Champaign Nat’l Bank v. Landers Seed Co.*, 165 Ill. App. 3d 1090, 1095 (4th Dist. 1988).

On procedural matters – here, the deference to be accorded the circuit court’s judgment – Illinois law applies as the law of the forum. The court’s finding of ambiguity “presents a question of law to be decided . . . from an examination of the instrument as a whole” which is reviewed “independently” on appeal. *Installco, Inc. v. Whiting Corp.*, 336 Ill. App. 3d 776, 783 (1st Dist. 2002). However, “[t]he circuit court’s determination of the intent of the parties will not be disturbed on review unless it is contrary to the manifest weight of the evidence.” *Id.* “[A] decision is against the manifest weight of the evidence only when an opposite conclusion is clearly evident.” *Finnerty v. Personnel Bd.*, 303 Ill. App. 3d 1, 11 (1st Dist. 1999). “[T]he reviewing court views the evidence in

the light most favorable to the appellee” (*In re Marriage of de Bates*, 212 Ill. 2d 489, 516 (2004)) and “assume[s] that all issues and controverted facts were found in favor of the prevailing party” (*Nemeth v. Banhalmi*, 125 Ill. App. 3d 938, 959 (1st Dist. 1984)).

As for the injunction that the court granted to enforce its holding, “[c]ourts of equity possess broad, inherent and discretionary powers in the manner of granting relief.” *Daniels v. Anderson*, 162 Ill. 2d 47, 62 (1994). Thus, “[a] reviewing court will only overturn a circuit court’s grant of an injunction where there has been a manifest abuse of discretion.” *Brown v. Murphy*, 278 Ill. App. 3d 981, 995 (1st Dist. 1996).

ARGUMENT

Under controlling Kansas law, the “cardinal rule” of construction “is to ascertain the intention of the parties and to give effect to that intention.” *Mobile Acres, Inc. v. Kurata*, 508 P.2d 889, 894 (Kan. 1973). The parties’ intent is “determined by looking at the language employed and taking into consideration all the circumstances and conditions which confronted the parties when they made the contract.” *Galindo v. City of Coffeyville*, 885 P.2d 1246, 1253 (Kan. 1994). In addition, “contracting parties are presumed to contract with reference to the existing law” so that all existing applicable laws “at the time a contract is made become a part of it.” *Anderson v. Nat’l Carriers, Inc.*, 727 P.2d 899, 903 (Kan. 1986). “The contract must be interpreted as a whole . . . and to achieve a reasonable interpretation.” *Coble v. Scherer*, 598 P.2d 561, 565 (Kan. App. 1979). “[R]easonable rather than unreasonable interpretations are favored by the law,” while “[r]esults which vitiate the purpose or reduce the terms of the contract to an absurdity should be avoided.” *Arnold v. S.J.L. Corp.*, 822 P.2d 64, 67 (Kan. 1991).

The Agreements here, construed together and as a whole, not only support but compel the circuit court’s conclusion that iPCS’s right to be and compete as Sprint is

critical to the parties' relationship. A5, A6. After assembling a full evidentiary record, the court properly ascertained the parties' intent to protect that right "by looking at the language employed" in the Agreements and "taking into consideration all the circumstances and conditions which confronted the parties" (*Galindo*, 885 P.2d at 1253). It correctly determined that the parties did not intend, much less authorize, the direct competition Sprint planned, as such competition would have "vitiat[e] the purpose" of the Agreements (*Arnold*, 822 P.2d at 67). The court's judgment "give[s] effect to [the parties'] intention" by enjoining Sprint's breach. *Mobile Acres*, 508 P.2d at 894.

I. The Circuit Court Correctly Considered Extrinsic Evidence Of Intent To Resolve The Parties' Dispute As To The Meaning Of The Agreements.

A. Extrinsic Evidence Is Admissible To Construe The Ambiguous Agreements, Irrespective Of A Contractual Integration Clause.

Sprint contends (at 25-28) that an integration clause bars any consideration of extrinsic evidence. But Sprint vastly overstates the significance of that clause. "[A]n integration clause does not change what a court may consider in construing a contract. An integration clause bars *changing* the terms of a contract. *The fact that the terms are final does not resolve what the terms mean.*"³ *Or. Trail Elec. Consumers Coop., Inc. v. Co-Gen Co.*, 7 P.3d 594, 603 n.10 (Or. App. 2000); see also *Souder v. Tri-County Refrigeration Co.*, 373 P.2d 155, 159 (Kan. 1962) ("There is a wide distinction between an attempt to contradict the terms of a written instrument and to explain the circumstances and conditions under which it was executed and delivered"). The Kansas case that Sprint cites (at 27) is consistent with those principles, holding only that an integration clause bars parol evidence "for the purpose of *varying or contradicting* the writing." *Prophet v. Builders, Inc.*, 462 P.2d 122, 125 (Kan. 1969). Sprint's lead case,

³ Emphases in quoted material have been added unless otherwise stated.

Air Safety, Inc. v. Teachers Realty Corp., 185 Ill. 2d 457 (1999), merely holds that under Illinois law, an integration clause bars the use of parol evidence to determine whether a “facially unambiguous” contract is ambiguous (*id.* at 463), and thus has no bearing here, where the circuit court correctly held that the Agreements were ambiguous.

B. The Circuit Court Correctly Rejected Sprint’s Contention That The Agreements Unambiguously Permit Sprint To Compete Against iPCS.

1. The “Wireless . . . Network” Phrase Is Not An Unambiguous License For Sprint To Compete Against Its Affiliate.

Sprint’s principal argument rests on its interpretation of a four-word phrase (“wireless mobility communications network”) found in Section 2.3 of the Management Agreement. A26, A59. Section 2.3 begins with three independent clauses. A59. Clause 1 states that iPCS “will be the only person or entity that is a manager or operator for Sprint PCS with respect to the Service Area.” *Id.* Clause 2 adds that “neither Sprint PCS nor any of its Related Parties will . . . own, operate, build, or manage another wireless mobility communications network . . . in the Service Area.” *Id.* Clause 3 states that Sprint will not “sell Sprint PCS Products and Services” in that area. *Id.* Section 2.3 then sets out three exceptions to exclusivity, (a), (b), and (c), that permit Sprint to sell to national accounts and resellers, and that authorize Sprint to use fixed wireless facilities in providing fixed line phone service. A26. None of these exceptions authorizes Sprint to compete with iPCS by using a frequency other than 1900 MHz.

Sprint relies primarily on the “wireless . . . network” phrase in Clause 2, so much so that Sprint lists Clause 2 first in its brief (at 20) even though it does not come first in the contract. Clause 2 prohibits Sprint from owning or using a “wireless mobility communications network” (A59 § 2.3), which is described as “operating in the 1900 MHz spectrum range” (A67). As the circuit court properly recognized, the parties’

dispute (and the contractual ambiguity) center on what Clause 2 *means* in the context of Sprint's actual and threatened conduct: whether it "was meant to be a limitation on [iPCS's] rights" and thus limited all iPCS's rights to a single frequency. A2-3.

Even looking at Clause 2 alone, two possible meanings are evident. iPCS maintains that Clause 2 means exactly what it says – that Sprint may *not* "own, operate, build, or manage another wireless . . . network" in the 1900 MHz range – without any impact on iPCS's other contract rights. Sprint contends that Clause 2 means something very different: a license that says Sprint *may* engage in any conduct it wants in iPCS's service area so long as it operates *outside* 1900 MHz. Under Sprint's theory, Sprint could sell competing phones called Sprint, flood iPCS's territory with competing stores that look just like those run by iPCS, run anti-iPCS ads, steal every iPCS customer (current or prospective) and drive iPCS out of business, simply by turning the frequency knob.

The circuit court correctly held that it is "unclear . . . whether the definition of 'wireless mobility communications network' as a system operating in the 1900 MHz spectrum range was meant to be a limitation on [iPCS's] rights" the way Sprint suggests. A2-3. On its face, Clause 2 neither empowers Sprint nor limits iPCS. Just the opposite: Clause 2 is a restriction on *Sprint* and a *right* for iPCS. It does not say that Sprint can do anything, and it does not even mention (much less authorize) the conduct at issue, *e.g.* selling competing products under the same Sprint brands that iPCS must use, promoting an iPCS competitor, or "re-branding" stores to look like those run by iPCS.

Sprint's position, then, is that Clause 2 says one thing (a negative prohibition) but means another (an affirmative authorization). Even if Sprint's reading were reasonable, it is not the only reasonable interpretation, and it is certainly not the unambiguously correct one. It is at least equally reasonable to say, as iPCS does, that Clause 2 means *only* what

it says: that Sprint may not have a wireless network in the 1900 MHz range. The ambiguity within Clause 2 itself is sufficient to support the circuit court’s conclusion that it is “unclear” whether Clause 2 “was meant to be a limitation on plaintiff’s rights” (A2-3), as opposed to a simple prohibition on Sprint that gives added protection to iPCS. Under these circumstances, the law is clear that the circuit court properly considered extrinsic evidence to determine the parties’ intent. See *Mobile Acres*, 508 P.2d at 894 (“[A] contract is ambiguous when the words used to express the meaning and intention of the parties . . . may be understood to reach two or more possible meanings.”).

2. Clause 2 Is Also Ambiguous When One Considers iPCS’s Rights Under Clauses 1 and 3.

Under Kansas law, “the meaning of a written contract should not be ascertained by a critical analysis of a single or isolated provision” as Sprint seeks to do here, “but by a consideration of all the pertinent provisions.” *Hall v. Mullen*, 678 P.2d 169, 175 (Kan. 1984). Here, a consideration of all the pertinent provisions in Section 2.3 reinforces the circuit court’s holding that it is “unclear” whether the “wireless . . . network” phrase in Clause 2 “was meant to be a limitation on [iPCS’s] rights.” A2-3.

Clause 1 of Section 2.3 makes iPCS “the only person or entity that is a manager or operator for Sprint PCS” in its area. A59. It is iPCS’s interpretation that, by making iPCS the only manager and operator “for Sprint PCS,” Clause 1 gives iPCS the exclusive right to be Sprint in the Service Area. The Agreements make Sprint PCS synonymous with “Sprint” as far as wireless mobile services are concerned. Together, Sprint PCS and Sprint are the “Brands” and “Licensed Marks” (A39; A41, JX-4 Recitals & § 1.1(a)) that identified Sprint’s wireless mobile business. Under iPCS’s reading, all three clauses of Section 2.3 have independent, and harmonious, meanings. Clause 1 gives iPCS the

exclusive right to be Sprint, while Clauses 2 and 3 prohibit Sprint from taking actions that would undermine iPCS's right to be Sprint.

Sprint's position is that Clause 2 unambiguously gives Sprint the right to compete against iPCS so long as Sprint uses a frequency other than 1900 MHz. But such competition would destroy the right given to iPCS in Clause 1: the right to be Sprint in the Service Area. Thus, Sprint is forced to contend that Clause 1 *unambiguously* has the same meaning that Sprint gives to Clause 2 – that Sprint may do whatever it wants outside 1900 MHz – even though it does not use the same words. In this vein, Sprint strains to recast Clause 1's reference to Sprint PCS into a meaningless repeat of the “wireless . . . network” phrase of Clause 2. In addition to identifying Sprint PCS as the brand name for Sprint's wireless business, the Agreements identify Sprint PCS as a group of entities related to Sprint Corporation. A66. Those entities are described as “License holders or signatories to the Management Agreement.” *Id.* Ignoring the “signatories” language, Sprint asserts (at 24) that the “Licenses” were for the 1900 MHz spectrum and suggests that the reference to the *entities* was really a reference to that spectrum.

But the parties knew how to say “wireless . . . network” and “1900 MHz,” and they did not use either term in Clause 1. More fundamentally, Sprint's reading would make Clause 1 superfluous, a position Sprint knows to be wrong. Sprint Br. 20 (“meaning and effect must be given to every term and provision”). Further, Sprint's argument ignores the second meaning that the Agreements give to Sprint PCS: that Sprint PCS is the Brand name for Sprint's wireless business (A39). At most, Sprint's theory means that Section 2.3, as a whole, has two possible meanings and is ambiguous.

3. The Agreements As A Whole Further Support The Circuit Court's Finding Of Ambiguity.

Sprint's attempt to transform Clause 2 from a negative prohibition into an affirmative authorization to compete with its Affiliates also fails when one reads Clause 2 within the Agreements as a whole. Where the Agreements license Sprint actions or limit iPCS's rights, particularly under Section 2.3, they do so affirmatively, in separate subsections clearly denominated as exceptions. Sprint, a sophisticated party that was represented by counsel, could have easily drafted such an express exception for frequencies other than 1900 MHz, just as the parties exempted national accounts in Section 2.3(a), resellers in Section 2.3(b), and "fixed" wireless operations in Section 2.3(c). A26. It did not. Thus, as the circuit court recognized, "the reference to the 1900 MHz spectrum range is not a specific exception to ¶ 2.3" in sharp contrast to the affirmative authorization for Sprint to operate "a fixed line service" in Section 2.3(c). A5. Given the lack of such affirmative authorization in Clause 2, the court was quite correct to conclude it was unclear whether Clause 2 was meant to be a limit on iPCS's rights. See *Wright v. Shepherd*, 66 P.3d 921, 925 (Kan. App. 2003) (rejecting broker's claim to commission because broker "could have easily included a provision in the listing agreement providing for such a possibility"); *Stevens v. Farmers Elevator Mut. Ins. Co.*, 415 P.2d 236, 240 (Kan. 1966) ("Had the defendant intended the bond period thus to be limited, a provision to such effect could easily have been included in the bond").

In fact, the express limits that are in the Agreements would be meaningless if iPCS's rights were already limited *sub silentio* to 1900 MHz. Section 2.3(c)'s exception for fixed wireless facilities that do not operate at 1900 MHz would be superfluous if Section 2.3 already excluded everything outside 1900 MHz. Similarly, Clause 3 prevents Sprint from selling "Sprint PCS Products and Services" (A59) which contains an express

exception for landline phone service (A49). That exception would be superfluous if Section 2.3 applied only to wireless services at 1900 MHz.

Likewise, where the Agreements authorize iPCS to compete with Sprint outside 1900 MHz, they do so affirmatively, while protecting the parties' joint business. Section 3.2 of the Management Agreement permits iPCS to sell products other than "Sprint PCS Products and Services," but protects against "consumer confusion" and gives Sprint the right to object to any products or services that are "confusingly similar" to those offered by Sprint and iPCS. SA112-13. Sprint's assertion of "symmetry" (at 31) simply highlights the absence of any symmetrical authorization going its way.

Sprint only makes its own case weaker by citing the unpublished trial court opinion in *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 1997 WL 525873 (Del. Ch. Aug. 13, 1997). There, the contracts affirmatively authorized both parties to "engage in or possess an interest in other business ventures of every kind and description" other than 800 MHz service, a provision that was critical on appeal. *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 993 (Del. 1998). No such affirmative authorization appears in the Agreements here.

4. The Legal Restrictions On Spectrum Ownership At The Time Of The Agreements Confirm The Circuit Court's Finding Of Ambiguity.

As the preceding sections make clear, the circuit court's finding of ambiguity stems from Sprint's attempt to transform the negative prohibition of Clause 2 into an affirmative authorization to compete against iPCS outside 1900 MHz. The governing law at the time of the Agreements, which is incorporated into those Agreements, reinforces the court's finding of ambiguity.

The FCC's rules at the time limited (to 45 MHz) the amount of spectrum for which Sprint could hold licenses. 59 Fed. Reg. 59945-01 (Nov. 1, 1994); 47 C.F.R.

§ 20.6 (eff. 1994-2003); PX-12.14 at 6. Because Sprint owned licenses to 30 MHz of spectrum in the 1900 MHz range for most of the country (Tr. 2842), it would not have been able to acquire a significant competitor that operated in some other spectrum range (Tr. 262). For example, if the 2005 merger of Sprint's and Nextel's holdings had occurred at the time of the Agreements, it would have exceeded the 45-MHz limits in the vast majority of U.S. markets. See PX-682 at 3686-3700. Moreover, at the time of the Agreements all of Sprint's wireless mobile licenses were at 1900 MHz. Tr. 1510. Indeed, before the Agreements were signed, the FCC ordered Sprint to "divest its prohibited cellular interests" in the 800 MHz range as a condition of obtaining the 1900 MHz licenses it used for the Sprint network. *In re Request of WirelessCo. L.P.*, 10 FCC Rcd. 11111, ¶ 4 (Sept. 21, 1995). Thus, iPCS had access to all spectrum then available to Sprint. SA59.

Sprint's theory thus presumes that the parties unambiguously agreed to authorize Sprint to compete using spectrum that Sprint was not licensed to use at the time of the Agreements, and where the FCC's rules imposed significant legal obstacles to obtaining a license. That premise conflicts with the rules of contract interpretation and with the Agreements. Under Kansas law, all existing and relevant laws "at the time a contract is made become a part of it and must be read into it as if an express provision to that effect were inserted therein." *Anderson*, 727 P.2d at 903. The Agreements reinforce that principle by stating the parties' agreement "to comply with all applicable FCC rules governing the License" and their intent that "each party's obligations . . . be in compliance with the FCC rules." SA135 § 16.2, SA136 § 16.2(c).

The better reading of Clause 2 is that it does not authorize Sprint to compete at some spectrum other than 1900 MHz, but simply prohibits Sprint from owing a network

within the 1900 MHz spectrum, thereby reinforcing iPCS's other contract rights to be free from competition. Thus, the circuit court correctly cited iPCS's "access to *all* spectrum available to Sprint" at the time of the Agreements in rejecting Sprint's claim that Clause 2 authorized Sprint to compete outside 1900 MHz. A5 (emphasis in original). At a minimum, the intent of Clause 2 is ambiguous, confirming the court's holding that it is "unclear" whether that clause "was meant to be a limitation on [iPCS's] rights." A2-A3.

C. This Court May Sustain The Circuit Court's Decision To Consider Extrinsic Evidence On The Alternative Ground Of Enforcing The Agreements' Express And Implied Covenants Of Good Faith.

As shown above, the circuit court's consideration of extrinsic evidence was proper, because the meaning of the contractual terms asserted by Sprint was ambiguous. In the alternative, this Court may also affirm the circuit court's consideration of extrinsic evidence on an independent ground: the doctrine of good faith.

The covenant of good faith and fair dealing prohibits Sprint from doing "anything which will have the effect of destroying or injuring the right of [iPCS] to receive the fruits of the contract." *Bonanza, Inc. v. McLean*, 747 P.2d 792, 801 (Kan. 1987). "Every contract implies good faith and fair dealing between the parties." *Id.* Thus, provisions that are "essential in carrying out [the Agreements'] purpose may be implied" even if "not specifically mentioned in a written contract," and they "are as binding as if written therein." *Id.* The Management Agreement reaffirms each party's duty to perform "in a diligent, legal, ethical, and professional manner." A25 § 1.8.

Sprint is well aware of these covenants and the principle that extrinsic evidence is properly admitted to enforce them. That's how it lost a Delaware case involving similar Affiliate agreements. *Horizon Pers. Commc'ns, Inc. v. Sprint Corp.*, No. 1518-N, 2006 WL 2337592 (Del. Ch. Aug. 4, 2006). There, the court concluded that the agreements on

their face did not resolve the key issue – whether Sprint “has the unfettered right to use the Sprint brand and marks on its 700-900 MHz spectrum . . . products and services in Plaintiffs’ Service Areas” (*id.* at *13) – and turned to “the protections of the duty of good faith and fair dealing” to resolve that issue (*id.* at *12). “[B]ased on the language of the Agreements and other relevant evidence” (*id.* at *13), the Delaware court held that the covenant of good faith prohibited Sprint from competing against the Affiliates in the manner it planned (*id.* at *1, *16, *25), notwithstanding Sprint’s claim that its contracts unambiguously authorized it to compete outside 1900 MHz (*id.* at *13).

While Sprint (at 23-24) lifts dictum from the Delaware decision in an attempt to portray its loss as a victory, the court’s holding destroys Sprint’s attempt to disregard extrinsic evidence of intent. The court held it could “consider extrinsic evidence to determine whether [Sprint’s] proposed conduct will violate the implied duty of good faith and fair dealing.” *Horizon*, 2006 WL 2337592, at *14 n.129; see also *Souder*, 373 P.2d at 159-60; *Horizon Holdings, LLC v. Genmar Holdings, Inc.*, 244 F. Supp. 2d 1250, 1268 (D. Kan. 2003) (applying Delaware law) (extrinsic evidence “is entirely relevant to whether defendants breached the covenant of good faith”). Thus, the Delaware court not only considered but also relied on extrinsic evidence, as the circuit court did here. *Horizon*, 2006 WL 2337592, at *14. The same principles of good faith provide an independent basis supporting the consideration of extrinsic evidence here.

II. The Weight Of The Evidence Supports The Circuit Court’s Conclusion That Sprint Breached Its Agreements By Competing Directly Against iPCS.

After determining it was appropriate to consider extrinsic evidence of the parties’ intent, the circuit court conducted a 25-day trial where 11 witnesses testified and over 330 documents were admitted into evidence. Based on that record, the court correctly held that Sprint’s attempt to compete directly against iPCS (and Sprint’s theory that the

Agreements authorized such competition) would “vitiating the purpose” of the Agreements and reduce them “to an absurdity.” *Arnold*, 822 P.2d at 67. Unless iPCS was “assured that there would be no competition from [Sprint],” it would never have made the massive financial commitment to Sprint that the Agreements required it to make. A5. The court then rightly found that iPCS *was* assured that there would be no competition from Sprint. The circuit court’s findings support its judgment on two independent contractual bases: (A) a proper construction of Section 2.3, and (B) the covenant of good faith.

A. Under A Proper Construction Of The Agreements, iPCS Is Protected Against Direct Competition From Sprint.

1. The Record Establishes That Section 2.3 Protects iPCS’s Right To Be Sprint In Its Service Area, And Refutes Sprint’s Theory That It Has The Right To Compete Against iPCS.

As discussed above, iPCS construes Section 2.3 as protecting iPCS’s right to be Sprint by making iPCS the “only person or entity” to have that right in the Service Area (Clause 1) and prohibiting Sprint actions that would undermine that right (Clauses 2 and 3). By contrast, Sprint argues that Section 2.3 gives *Sprint* the right to compete against (even destroy) its Affiliate iPCS so long as it uses a frequency other than 1900 MHz. Read in light of the Agreements as a whole and the “circumstances and conditions” when they were signed (*Galindo*, 885 P.2d at 1253), iPCS’s reading is the only proper one.

As Sprint’s architect of the Affiliate Program testified, Sprint’s own “conception” of the bargain “was that the affiliates would be Sprint in their territory” and “would do business as Sprint.” Tr. 2922-23. Affiliates such as iPCS “opened stores” and “did advertising . . . in the name of Sprint PCS, so the average end user did not know that they were giv[en] service by an affiliate rather than by Sprint,” a result “similar to the way many franchise arrangements work among hotels or fast food restaurants.” Tr. 2849.

The circuit court correctly understood that the cornerstone of the bargain was that iPCS would be “Sprint PCS in the service area.” A4. The Agreements require iPCS to build the Sprint network and brands under Sprint’s exacting specifications for network design (A25 § 2.1) and marketing (A30 § 5.2). iPCS not only may but “*must* use the [Sprint] Brands exclusively” in marketing Sprint PCS Products and Services. A30 § 5.1(b). The objective is “to ensure uniform and consistent operation of all wireless systems” and “uniform and consistent” marketing under the Sprint Brands. A24 § 1.2.

iPCS’s right and duty to be Sprint reflect a basic *quid pro quo* that was intended to benefit both parties. As Sprint pledged, iPCS would benefit from competing *as* Sprint and thus gaining the “[I]everage” of the Sprint brands. SA57; Tr. 1243-44, 1254-55. But Sprint would also benefit, by inducing iPCS to make the “substantial financial commitment” of building Sprint’s network in rural areas. A25 § 1.7. iPCS generates “add[ed] value to Sprint” (Tr. 2953) by advertising locally in Sprint’s name.

Thus, the essence of the parties’ bargain is that in the Service Area iPCS undertook the obligations of being Sprint (the cost of building Sprint’s network and promoting Sprint’s brands) in exchange for the right to be Sprint (the benefits of competing under Sprint’s brand name). Clause 1 reflects – and protects – iPCS’s right to be Sprint by making iPCS “the *only . . . manager or operator for Sprint PCS.*” A59. The Agreements expressly tie “Sprint PCS” to Sprint and to the principal benefit of being Sprint: the “Brands” and “Licensed Marks” (A39; A41, JX-4 Recitals & § 1.1(a)) by which Sprint’s wireless business was known and that iPCS is to use in being Sprint.

The Agreements also identify Sprint PCS as a group of entities (A66), and iPCS’s status as the only manager and operator for those entities reinforces iPCS’s exclusive right to be Sprint. By the time the Agreements were signed, Sprint had absorbed those

entities, making them just “a business unit of Sprint Corporation.” Tr. 2914-15. Sprint’s witnesses thus acknowledged that Sprint PCS was “the brand name by which Sprint’s wireless business was known in the industry” (Tr. 1286) and that “Sprint PCS referred to the wireless mobile telephone business of Sprint Corporation” (Tr. 2917-18; see also *id.* at 2916, 2921-22). Sprint drove home that Sprint PCS is Sprint when it dropped the Sprint PCS name and told iPCS to be and compete as Sprint. Tr. 264-65 & PX-667.

Further, in the circuit court, Sprint admitted that iPCS is right and that Sprint PCS is Sprint. In discussing the Agreements’ provisions on confidentiality, Sprint relied (SA273) on Section 1.9.2, which states that “*Sprint PCS* owns the information regarding the Customers” (A58 § 1.9.2). Sprint correctly understood that provision to mean that “this customer information belongs to *Sprint*.” SA273 (C06231).

Sprint has also admitted that Sprint PCS is Sprint under Section 12.2, which calls for Sprint PCS – as a “part[y]” to the Agreements – to receive Confidential Information about iPCS and “not disclose” that information “to others.” A33 § 12.2; A44 (defining “parties” to mean iPCS and Sprint PCS). In reality, *Sprint Corporation* – *not* the entities formally titled Sprint PCS – has received and processed iPCS’s information. Thus, Sprint’s own witness admitted that the “parties” in Section 12.2 “include[] Sprint itself.” Tr. 3211-12. Conversely, if Sprint PCS did *not* mean “Sprint,” Section 12.2 would be reduced to an absurdity. The Sprint PCS entities had (and have) no employees (Tr. 3246-48), so they could not process information by themselves, and Section 12.2 would bar them from disclosing the information to “others” – including Sprint Corporation. In Sprint’s words, it would be “absurd[]” to limit Sprint PCS to “the Sprint entities that are parties to the contract,” as that “would render performance impossible.” C06493.

2. Sprint's Theory Would Vitiating The Agreements' Purpose.

Ignoring its own admissions that Sprint PCS means Sprint, Sprint contends on appeal that Sprint PCS means only "1900 MHz," and that iPCS can act only as a manager and operator for that frequency. But Sprint is missing the point. The issue here is not which network *iPCS* has the right to operate. Regardless of what frequency Sprint uses to compete, it is still competing directly against iPCS, and Sprint's use of the Sprint brand still strengthens iPCS's competitor and harms iPCS. The question, then, is whether the Agreements authorize *Sprint* to eviscerate iPCS's unquestioned right to be Sprint (at the only frequency Sprint was licensed to use when the Agreements were signed) by using the same Sprint name to promote directly competing products (that operate at a frequency Sprint was *not* licensed to use when the Agreements were signed). As shown above, Sprint's testimony and conduct refute Sprint's theory and support iPCS's interpretation that Section 2.3 protects iPCS's right to be the exclusive manager and operator for Sprint PCS, "the wireless mobile telephone business of Sprint Corporation."

More fundamentally, Sprint's theory would vitiate the purpose of the Agreements. In essence, Sprint is saying that iPCS shouldered the *burden* of being Sprint, but at the same time agreed to hand over the *benefit* of being Sprint to a competitor. As Sprint's witness agreed, today Nextel has "the benefit of the Sprint brands and all the goodies" that come with being Sprint – indeed, "[t]oday Nextel *is* Sprint." Tr. 1705.

The circuit court recognized that such competition would vitiate the purpose of the Agreements. iPCS "would never have spent over \$300,000,000 in construction costs unless it was assured that there would be no competition from [Sprint] in the service area," and Sprint could not "realistically believe that affiliates or investors would have supported the affiliate program" if Sprint could operate a competing network. A5-A6.

The record fully supports the court’s findings. Dr. Debra Aron, an expert communications economist, explained that a rational investor would not go “out on a limb” as iPCS has done without “assurances that the means by which Sprint could come in later and compete . . . would be foreclosed.” Tr. 2087, 2099-2100. Likewise, iPCS’s CEO testified that “exclusivity was crucial” to iPCS in negotiating the Agreements. Tr. 102. Conversely, if Sprint had asserted any right to compete against iPCS later, “[t]he meeting would have been over,” and “there’s no way we would have signed the agreement.” Tr. 102-03. iPCS “never would have been able to raise any money” to fund construction as “no one would have been willing to put up the capital in a situation where Sprint, the big mother ship, in a sense, could come in and compete with us in our same territory.” Tr. 92. Sprint’s prime initiator of the Affiliate Program testified that Sprint itself understood “that if the affiliates didn’t get exclusivity, they wouldn’t be able to raise the money they needed to build the network” and Sprint would not achieve the “rapid expansion of coverage” it sought from their efforts. Tr. 2945.

3. Both Parties Intended To Protect iPCS From Competition By Sprint.

As shown above, iPCS’s protection from competition was essential to the Agreements’ very existence. The parties’ intent to give iPCS such protection is equally clear: from (1) Sprint’s own pre-litigation admissions, (2) the parties’ negotiations, and (3) their conduct in the course of performing their duties under the Agreements.

Sprint’s Admissions. In describing the Affiliate Program, Sprint pledged that iPCS “is Sprint PCS in their Service Area.” SA59 (emphasis in original). An integral part of that commitment is protection against competition: “Sprint PCS is restricted from competing with [iPCS].” *Id.* Sprint specifically assured iPCS that it would *not* face competition from another spectrum, because “Sprint PCS has not ‘held out’ spectrum to

compete.” SA59. Likewise, Sprint knew it could not compete under the Sprint name. Sprint assured iPCS’s lenders that iPCS had “*exclusive* representation of the Sprint PCS brand in the local market,” and the “*full and exclusive right to use the Sprint PCS brand*” (SA58-59; Tr. 1256, 1258). Sprint reaffirmed the Affiliates’ “[f]ull and exclusive representation” of the brand in describing the Affiliate Program to its dealers. SA71. Similarly, Sprint’s witness acknowledged that Sprint did not “anticipate at the time that [it] entered into the affiliate agreements that just seven years into that long-term relationship Sprint would be competing head to head with its affiliates.” Tr. 2960.

On appeal, Sprint tries (at 33-34) to disavow its own representations as “PowerPoint presentations” and “generalized summaries.” Sprint misapprehends the nature of appellate review. The circuit court, which observed the witnesses and evidence firsthand, was entitled to credit Sprint’s pre-litigation admissions and discredit Sprint’s post-litigation spin. On appeal, this Court must “view[] the evidence in the light most favorable to the appellee” (*de Bates*, 212 Ill. 2d at 516), not the light preferred by Sprint.

Contract Negotiations. Protecting iPCS’s right to be Sprint was also a focal point of the parties’ negotiations. iPCS’s CEO sent Sprint a memo reminding Sprint that iPCS “should not have to bear the risk of possibly competing against other Sprint PCS services while the agreement is in effect” because it was “making a very large investment and a very substantial commitment to Sprint PCS.” SA85. In the ensuing conversation with Sprint, iPCS reiterated “that it was absolutely critical to us that we be exclusive in the territory, that we can’t be competing with Sprint,” and that “it didn’t matter what technology or what came down we had to be exclusive in the territory.” Tr. 112.

Sprint’s representative, Andy Buffmire, reassured iPCS “that we are exclusive in the territory” (Tr. 113) – a point iPCS’s CEO documented by writing “Andy [Buffmire]

says we already have” the exclusivity iPCS sought, in the margin of his copy of the memo to Sprint (SA90, Tr. 115). Mr. Buffmire also “assured [iPCS] that we were exclusive to both the Sprint and the Sprint PCS brand” (Tr. 117) – a commitment iPCS’s CEO documented with the note “Sprint or Sprint PCS brand” (SA90). As the negotiations proceeded, Sprint “reassur[ed] us over and over that we were Sprint in the territory, that we had all the exclusivity rights that . . . we needed,” and that those rights were “already embodied in the contract.” Tr. 122-23.

At the time, iPCS anticipated “[t]here will probably be some language changes” to confirm Sprint’s pledge of exclusivity. PX-75 at 2. iPCS was right. Sprint proposed language that barred it from selling “Sprint PCS Products and Services” (Tr. 123, 133; PX-73; PX-79) to “ensure that, yes, we do have exclusivity to everything” (Tr. 132-33). The parties thus added Clause 3 to Section 2.3. Tr. 133-35. These “oral agreements and memoranda indicating what the parties intended and understood the agreement to contain” were “properly admitted to explain the ambiguous [Agreements]” and they “make abundantly plain the accuracy of the trial court’s interpretation.” *Kansas State Bank & Trust Co. v. DeLorean*, 640 P.2d 343, 349 (Kan. App. 1982).

The Parties’ Conduct. Kansas law also recognizes that “[i]f parties to a contract, subsequent to its execution, have shown by their conduct that they have placed a common interpretation on the contract, this interpretation will be given great weight.” *Cline v. Angle*, 532 P.2d 1093, 1097-98 (Kan. 1975). Here, the parties’ conduct reaffirms their common intent to protect iPCS from competition.

As shown above, Sprint assured iPCS’s investors and lenders of iPCS’s broad protection from competition. Sprint even enforced iPCS’s protection when a competitor, Qwest, tried using the Sprint brand to promote wireless offerings. Tr. 482-84. iPCS

objected that Qwest's usage violated iPCS's "exclusive rights to the Sprint PCS brand in our Territory." SA147; see also Tr. 483-84, 1935-36. Sprint's head of the Affiliate Program at the time (Mr. Bottoms) responded by letter, agreed that iPCS had the "exclusive right to market and advertise Sprint-branded products," and stated that Qwest would cease using the Sprint brands in iPCS territory. SA150; Tr. 1937-38; C04943.

Even after it decided to merge, Sprint acknowledged the "need for structural separation" of Nextel and Sprint, due to its contractual commitment that the "Affiliates will be the only manager/operator for [Sprint] PCS" in their areas. SA170. Sprint realized its Affiliates, including iPCS, "hold their exclusivity rights in high regard" and knew those rights would likely "be violated Day 1-ish" by Sprint's planned integration. PX-354 at 9252. Sprint then proposed a "sales agency" to iPCS that would have allowed Sprint to rebrand the Nextel stores in iPCS territory as Sprint stores (which it later planned to do without iPCS's consent). At trial, Sprint's prime initiator of the Affiliate Program testified that Sprint would *have* to get iPCS's consent, as Sprint's plan would require iPCS to "give up" its exclusive right to operate Sprint stores. Tr. 2991.

4. Sprint's Selective Snippets Of Evidence Do Not Affect The Vast Record Supporting The Circuit Court's Conclusion.

Against the deluge of evidence supporting the circuit court's judgment, Sprint's drips of evidence fall far short of meeting the "manifest weight of the evidence" standard. First, the parties knew that competitors used frequencies other than 1900 MHz when the Agreements were formed (Sprint Br. 8-9), and the evidence as a whole shows the parties' intent to join forces against those outsiders. There is no evidence that Sprint intended to join one of those competitors and turn against iPCS. And while the parties may have been aware of mergers generally (*id.* at 9), there is no evidence that Sprint intended to merge with a competitor and then use that competitor's frequency to compete against

iPCS, or that iPCS intended to allow such competition. Given the FCC's restrictions on spectrum licenses at the time the Agreements were reached, iPCS's CEO testified he did not have "any reason" to believe Sprint would even merge with a competitor. Tr. 262-63.

Next, Sprint (at 34) cites the deposition of an iPCS witness (who did not negotiate the Agreements) for the proposition that the Sprint-Nextel merger did not violate Section 2.3. But at trial, the witness explained he was referring only to Clause 2. Tr. 1158-59. More importantly, Sprint's citation is a red herring: the parties' dispute here is not whether Clause 2 standing alone bars mergers. Sprint's position is that Clause 2 affirmatively authorizes Sprint to compete against its Affiliate iPCS. iPCS's position is that Section 2.3 and the Agreements as a whole prevent such competition.

iPCS's 2004 proposal to clarify language in Section 2.3 of the Management Agreement (Sprint Br. 35) simply confirms its intent under the Agreements as written: to receive broad protection against competition by Sprint. iPCS made that proposal in response to *Sprint's* invitation for clarifying language. Tr. 313; PX-154. If anything, iPCS's proposed clarification confirms that the Agreements as written were ambiguous.

More fundamentally, the question on appeal is not whether Sprint can scrape together some evidence to support its case, but whether the trial court's decision is against the manifest weight of the evidence as a whole. After all, "where the testimony is contradictory, the trial judge as the trier of fact is in a position superior to a court of review to observe the conduct of the witnesses while testifying, to determine their credibility, and to weigh the evidence and determine the preponderance thereof." *Greene v. City of Chicago*, 73 Ill. 2d 100, 110 (1978). The trial court's conclusion must be upheld unless the opposite conclusion is clearly evident. Sprint cannot meet that burden.

B. The Court May Also Affirm The Circuit Court's Judgment In Favor Of iPCS Under The Alternative Ground Of Good Faith.

As demonstrated above, this Court should affirm the circuit court's judgment in favor of iPCS based on a proper construction of the parties' Agreements. Moreover, the Court may also affirm the judgment on the alternative ground of enforcing the covenant of good faith, which iPCS argued below (C6566-67, C6376-69). See *Rodriguez v. Sheriff's Merit Comm'n*, 218 Ill. 2d 342, 357 (2006) ("[A] reviewing court can sustain the decision of the circuit court on any grounds which are called for by the record"). The covenant of good faith prevents Sprint from "destroying or injuring" iPCS's right "to receive the fruits of the contract." *Bonanza*, 747 P.2d at 801. As the Delaware court held with respect to similar Affiliate agreements, Sprint's attempt to compete directly against its Affiliates "would deny Plaintiffs the benefit of the bargain they struck with Sprint" and thus violate Sprint's duty of good faith. *Horizon*, 2006 WL 2337592, at *15-*16.

The Delaware court held that when the parties entered into their agreements they did not anticipate (much less intend) that Sprint would someday compete directly against its Affiliates. *Id.* at *12. The court cited Sprint's presentations to Affiliate investors – the same presentations the circuit court cited here – which assured them "that the Affiliates would benefit from their '[e]xclusive representation of the Sprint PCS brand in the local market' and 'that Sprint PCS is restricted from competing with the Affiliate[s].'" *Id.* at *14. The Delaware court noted that at the time of the agreements, the Affiliates "had access to all of Sprint's spectrum and effectively were Sprint" in their areas (*id.*) just as the circuit court found here. The Delaware court also credited testimony that the Affiliates "could not have 'raise[d] a single dime' if [their] investors had known that Sprint believed it had the right to compete with [them]" (*id.*), which tracks the circuit court's holding here that iPCS "would never have spent over

\$300,000,000 in construction costs” unless it was assured there would be no competition from Sprint in the service area (A5).

The same analysis, coupled with the circuit court’s factual findings, support judgment in favor of iPCS here. To be sure, the Delaware court chose a different remedy, attempting to regulate numerous aspects of Sprint’s operations to ensure contractual compliance. *Horizon*, 2006 WL 2337592, at *25. Here, however, the circuit court recognized that such a remedy would require constant judicial supervision. A9. Thus, it exercised its equitable discretion and chose the more effective and enforceable approach of enjoining Sprint’s use of the small portion of the Nextel network that lies in iPCS’s service area. See Section IV *infra*.

III. The Circuit Court Correctly Held That Sprint Cannot Disclose Confidential Information About iPCS To iPCS’s Competitor.

The Agreements require iPCS to share with Sprint a panoply of sensitive, confidential information, including “upcoming marketing and promotion campaigns” (SA122 § 6.3) and forecasts of “important business metrics” (A56 § 1.6). Sprint also provides billing and customer care services, giving it information on iPCS customers. See SA123 § 8.1(b); JX-6 § 1.1. As a result, Sprint knows who iPCS’s most profitable customers are, when their contracts expire, and how to reach them: information that no rational business would divulge to a competitor. Tr. 281-82, 290, 2149, 3219-20.

Section 12.2 of the Management Agreement protects “all Confidential Information disclosed by” iPCS “in connection with this agreement.” A33; see also JX-6 § 5.2 (Services Agreement). Before trial, the circuit court granted partial summary judgment to iPCS and entered an order stating that the agreement “would be breached if confidential information were disclosed” to “any person or entity involved in the

operation of Nextel’s network.” A2. Sprint did not seek reconsideration or clarification. Sprint now challenges the order, but its late-blooming arguments lack merit.

The Court’s Order Is Clear. There is no basis for Sprint’s contention (at 37) that the court’s order is “ill-defined.” The phrase Sprint criticizes – “confidentiality wall” – does not even appear in the court’s order. Sprint lifted it out of context from iPCS’s complaint (SA236 ¶ 1(c)). The court’s order clearly states that the “Management Agreement would be breached if confidential information were disclosed” to “any person or entity involved in the operation of Nextel’s network.” A2. “Confidential information” is a defined term in Sprint’s Agreements (A39), and Sprint obviously knows which persons or entities are “involved in the operation of Nextel’s network.” Indeed, Sprint lived under the circuit court’s order for months before trial without seeking clarification.

Sprint’s “Ownership” Argument. Sprint is wrong to contend (at 37) that its ownership of *some* confidential information (on iPCS customers) allows it to disclose or use such data without restriction. First, Sprint’s argument comes far too late. Sprint did not make that argument before the circuit court entered the pre-trial summary judgment order that Sprint challenges, even though iPCS’s summary judgment motion clearly covered “*iPCS customer data*” and “*information about iPCS’s customers.*” C1695-96.

Moreover, Sprint’s *post hoc* attack is as meritless as it is untimely. Under Sprint’s theory, customer information is unprotected and Sprint can do *anything* it wants with such information, even distribute it to a competitor’s sales force (which it is doing now). The Agreements refute Sprint’s view. Sprint owns only the customer information that it “accesses, monitors, compiles, records or receives” (A58 § 1.9.2) and it receives such access only because (i) it has access to iPCS facilities under the Management Agreement (JX-1 §§ 9.5-9.6), and (ii) it performs customer care services under the Management and

Services Agreements (SA123 § 8.1(c); JX-6 § 1.1). While Sprint PCS and thus Sprint have formal ownership of the customer information (A58 § 1.9.2), it is still “disclosed by [iPCS] to [Sprint] in connection with this agreement” and still protected (A33 § 12.2(a)). Indeed, in the same sentence that says “Sprint PCS owns the information,” Section 1.9.2 admonishes that “Sprint PCS may use the information” only “*so long as the use would be in accordance with [the] agreements*” (language that Sprint’s brief ignores). A58 § 1.9.2. Disclosing information on iPCS’s customers to an iPCS competitor – for use in the sale of competing products – is not “in accordance” with the Management Agreement.

Sprint’s Inadequate Procedures. Sprint’s improper disclosures refute its contention (at 38-39) that its procedures are “effective.” In addition to giving confidential information about iPCS customers to Nextel salespeople (Tr. 3238-40), Sprint distributes confidential information about iPCS’s business to managers that serve Nextel as well as Sprint (Tr. 1862). Sprint argued in the circuit court that such disclosure is permissible, because Sprint is aggregating the information with confidential data from other Affiliates. SA274. But the Agreements make no exception for “aggregated” information, and Sprint admitted that aggregated information “remains ‘confidential.’” *Id.*; see also Tr. 1634. Further, the record refutes Sprint’s premise that aggregation conceals iPCS’s data. Sprint has acquired almost all the other Affiliates, and its witness admitted that iPCS now represents the “overwhelming majority” of the aggregate data (Tr. 1665), making it “much easier” to identify iPCS’s specific information, such that Sprint “would have to revisit” its scheme (Tr. 1835-36).

Even the protections Sprint *has* attempted are hardly “effective.” Sprint failed to implement elementary controls, like having employees sign a confidentiality agreement (or read Section 12.2 of the Management Agreement) before seeing iPCS data. Tr. 3207-

11, 3226-27. Later this year, Sprint will implement a unified billing system for Sprint and Nextel that will “provide access to account information for *all* subscribers.” Tr. 3234 & PX-720. Sprint understood that it “better do something” to protect information for iPCS customers, but had no specific plan. Tr. 3235, 3237.

IV. The Circuit Court Acted Well Within Its Discretion In Fashioning Injunctive Relief Against Sprint’s Breach.

The circuit court’s injunction fits comfortably within its “broad, inherent and discretionary powers in the manner of granting relief.” *Daniels*, 162 Ill. 2d at 62. The court considered an injunction regulating numerous aspects of Sprint’s conduct – *e.g.*, marketing, use of the Sprint brands, and disclosure of confidential information. A6-10. Certainly, the court could have entered such an injunction, but such a course would have forced the courts “to continuously supervise the operations of a multi-billion dollar corporation” in the “constantly evolving” field of wireless communications. A9. The court chose the more direct course of ordering Sprint to cease owning and using the Nextel network in iPCS’s service area within 180 days. A12.

The record fully supports the court’s reasoning. The parties had to develop a 14-page Forbearance Agreement just to regulate Sprint’s conduct between the filing of the Complaint and trial. SA250. That agreement encompasses subjects from “handset logistics” to “customer care and telemarketing” and “national accounts” programs, just to name a few. SA253, 254, 256 (§§ 2.1(c), 2.1(f), 2.8). Its detail is excruciating, addressing “signage (inside and outside), uniforms, business cards, point-of-sale materials, collateral, and displays” and use of “the red diamond or the new yellow ‘pin drop’ logo.” SA 255 § 2.5. Even with this detail, and even though the parties operated under the agreement for a short time, there were numerous disputes as to whether specific Sprint acts violated the agreement. Tr. 3125-27. Supervising Sprint’s use of confidential

information would be even more daunting as iPCS and the courts have no way to know what Sprint is doing behind its closed doors. Tr. 773.

A permanent injunction regulating Sprint's activities for the rest of the Agreements' 50-year term would have been even more complex. Numerous other disputes are already brewing. As noted above, Sprint will soon implement a unified billing system for Sprint and Nextel, posing challenges for confidentiality that Sprint had not even begun to consider. Tr. 3234 & PX-720. Further, Sprint was preparing to use the "G Block" of 1900 MHz licenses it acquired from Nextel. Tr. 3331, 3342. The circuit court correctly found that the "constantly evolving" wireless market would lead to more disputes in which the courts would be "continuously called upon to determine if a new activity constitutes a forbidden competition." A9.

Sprint (at 41) mischaracterizes the court's analysis as a "convenience" test. In reality, the court applied the established principle of ensuring that its remedy is practicable and effective. In *ILG Indus., Inc. v. Scott*, 49 Ill. 2d 88 (1971), the circuit court held that the defendant improperly copied certain components of a fan by stealing secret drawings. It enjoined defendant from selling the entire fan, not just the pirated components. The Illinois Supreme Court affirmed, because "[f]rom a practical viewpoint, it would be most difficult to enforce an injunction" limited to the components, and it would be "an insurmountable task" to determine whether specific fans "came from the [stolen] drawings." *Id.* at 95-96. Thus, "[i]t seems illusory to suggest that anything less would have been adequate to protect the plaintiff." *Id.* at 95.

The legal principle that favors prohibitory injunctions over mandatory injunctions (Sprint Br. 40) reinforces the circuit court's discretion. The injunction here *is* prohibitory. It tells Sprint *not* to use the Nextel network in iPCS's service area after 180

days. A12. Any affirmative actions to carry out that order are left to Sprint. Courts favor such prohibitory injunctions for the precise reasons given by the circuit court here: because mandatory injunctions would require “protracted supervision and direction.” A8.

A. Sprint Anticipated, And Affirmatively Contemplated, That It Might Have To Cease Owning The Nextel Network In iPCS’s Service Area.

Sprint next complains that the court granted relief that was not requested in iPCS’s Complaint. But “the prayer for relief” in a complaint “does not limit the relief obtainable.” 735 ILCS 5/2-604. Rather, the court may enter relief not prayed for so long as the adverse party is “protect[ed] . . . against prejudice by reason of surprise.” *Id.* “[P]rotecting” the adverse party means “to protect against a complete change in the theory of the case and in the type of relief sought.” S.H.A. ch. 110, ¶ 2-604 (practice notes).

Sprint cannot show a “complete change” here. From day one, iPCS sought to enjoin Sprint “from managing and operating the Nextel network in [iPCS’s] Service Area in a manner that will breach [iPCS’s] Management Agreement.” SA233 ¶ 1(a). And from day one, Sprint understood the consequences of such an injunction. When Sprint opposed a TRO that would have blocked its merger with Nextel, Sprint openly acknowledged that if the merger took place (as it has), “[t]hen we have a problem in this particular territory that we have to deal with, if you rule against us on the exclusivity provision” (as the court later did). SA248. Sprint’s post-trial brief recognized that one of iPCS’s “central claims” was that Sprint’s “*ownership and operation* of the Nextel network in iPCS’s territory . . . violates exclusivity rights conferred on iPCS by Section 2.3 of its . . . Management Agreement.” SA272. Sprint’s reply brief similarly stated that iPCS sought “injunctive relief prohibiting Sprint Nextel from . . . using the Nextel iDEN network . . . in iPCS’s territory.” C06255.

Even before iPCS filed suit, Sprint anticipated the partial “divestiture” that it now claims to be a surprise. Sprint’s own witness admitted at trial that (i) Sprint “would be willing” to divest the Nextel properties in iPCS territory and (ii) divestiture was “possible.” Tr. 1700. Sprint considered “carv[ing] off the Nextel properties in the affiliate territories” as a fallback if it did not like the “economics” of negotiating new agreements (or acquiring the Affiliates outright). *Id.* In fact, Sprint *proposed* a sale of Nextel assets in iPCS territory (to iPCS), and developed a detailed plan to implement the sale. SA196-98; Tr. 363. Sprint can hardly claim surprise when the court chose a solution *Sprint* proposed and that Sprint said it “would be willing” to live with. Tr. 1700.

B. The Circuit Court Correctly Found That iPCS Will Suffer Irreparable Harm Absent Injunctive Relief.

The circuit court correctly found that iPCS’s “on-going damages” from Sprint’s breaches “are incalculable” (thus, irreparable at law). A10. “The loss of a competitive position is an intangible but real damage” that supports an injunction, and it is “not readily measurable.” *Petrzilka v. Gorscak*, 199 Ill. App. 3d 120, 125 (2d Dist. 1990).

Sprint’s breaches have caused iPCS the “loss of a competitive position.” First, being “Sprint” no longer helps iPCS compete against Nextel; it helps Nextel compete against iPCS. Sprint chose to place its brand on Nextel precisely because Sprint was a stronger brand. Sprint’s course diverts “customers that would otherwise go to iPCS” because the Sprint name “attract[s] customers that would otherwise have been attracted to Sprint stores.” Tr. 2108, 2162. Second, Sprint is misleading consumers by telling them that Sprint and Nextel are one (SA155-59) and that Sprint phones are available at Nextel stores or vice versa (Tr. 923-26, PX-56.70 & PX-56.64). In iPCS’s territory, those messages are false because Sprint and Nextel remain competitors and do not sell each other’s products. Tr. 914-15, 924-26, 2157-58. Sprint’s false signals lead consumers

“into the wrong store . . . expecting products that aren’t available to them.” Tr. 2157-58. Sprint itself “was concerned that inconsistent brands . . . and inconsistent availability of plans and products in affiliate territories versus Sprint territories would cause confusion among new and existing customers.” Tr. 1670-71, 1683-85; see SA189. Sprint’s plan to “rebrand” the Nextel stores into Sprint stores that look exactly like iPCS’s stores threatened to magnify these harms. Tr. 234, 255-58, 2786-87.

Sprint is thus simply wrong to contend (at 43-44) that iPCS did not prove that Sprint’s breaches caused harm. Moreover, injunctive relief is designed to prevent future harm. “There is no requirement that a court must wait until an injury occurs before granting relief.” *Armour & Co. v. United Am. Food Processors, Inc.*, 37 Ill. App. 3d 132, 137 (1st Dist. 1976). Further, courts enjoin unlawful competition precisely because “[t]he loss of a competitive position” is “intangible” and “not readily measurable” or provable. *Petrzilka*, 199 Ill. App. 3d at 125; see also *Falcon, Ltd. v. Corr’s Natural Beverages, Inc.*, 165 Ill. App. 3d 815, 820-21 (1st Dist. 1987). Similarly, as to confidential information, “irreparable injury” does not require proof of “any aggressive solicitation” of a plaintiff’s customers, or “any customer defection and monetary loss.” *Armour*, 37 Ill. App. 3d at 137. The threat of disclosure is harm enough, as confirmed by the Agreements, which prevent unauthorized disclosure as well as misuse. A33 § 12.2.

The evidence also refutes Sprint’s suggestion (at 43) that iPCS has somehow benefited from competition by Sprint and Nextel. Sprint’s own witness admitted that competition from Sprint “would be devastating to [an Affiliate’s] business.” Tr. 1688. Sprint’s argument here stems from a disingenuous misreading of iPCS’s financial results. True, iPCS has more customers today than it did in 2004, but iPCS was *in bankruptcy* in 2004. Tr. 219-20, 335, 340, 344. iPCS’s post-bankruptcy improvements came *in spite*

of, not because of, Sprint's breaches, as iPCS more than doubled its retail stores and vastly increased its investment in advertising and network quality. Tr. 224-30, 344-46, 789-90, 843-44. There is no way to tell how much better iPCS would have done had Sprint not supported iPCS's competitor. Tr. 790-91. Plus, the harm of Sprint's breaches thus far has been mitigated by the parties' Forbearance Agreement. Tr. 2254, 2330, 3522-23. Thus, the evidence supports the finding that iPCS "has suffered and will continue to suffer damage." A10. Sprint's numbers game confirms that the circuit court was correct in finding such harm to be "incalculable." *Id.*

C. Before The FCC, Sprint Itself Disavowed Its "Public Interest" Claim.

Sprint claims (at 45) that "a vast array of public services will be harmed" if it has to obey the circuit court's order. Sprint itself disavowed any such "public interest" when it sought FCC approval of the Sprint-Nextel merger. One Affiliate sought to block the merger based on its "exclusive rights to operate the Sprint PCS wireless network" in its territory. *In re Applications of Nextel Commc'ns, Inc. & Sprint Corp.*, 20 FCC Rcd. 13967, ¶ 180 (Aug. 8, 2005). The Affiliate warned that if it prevailed "Sprint would be forced to discontinue service" to Nextel customers in that area. *Id.* Far from asserting that the Affiliate's suit raised any public concern, Sprint told the FCC *not* to get involved because the dispute was "a private contractual matter." *Id.* The FCC agreed that the Affiliate's exclusivity claim was "a private contractual dispute that is *not relevant to our public interest analysis.*" *Id.* ¶ 181. As the FCC explained, "*a court, and not the Commission, is the proper forum to resolve such disputes.*" *Id.* ¶ 181 n.428.

D. Sprint Is In No Position To Seek A "Balance Of Harms."

It is equally baseless for Sprint to claim that the court should have balanced Sprint's claimed hardship from compliance with the Agreements against the harm to

iPCS from Sprint's breach. First, "[c]ourts do not 'balance the harms' where defendants acted despite knowledge of the plaintiff's rights and understood the possible consequences" as Sprint did here. *Liebert Corp. v. Mazur*, 357 Ill. App. 3d 265, 287 (1st Dist. 2005). Sprint stalled negotiations with the Affiliates and proceeded with its integration plans despite knowing that iPCS and other Affiliates "hold their exclusivity rights in high regard" and that those rights would "likely . . . be violated Day 1-ish." PX-354 at 9252. Sprint placed its name on the Nextel business knowing its course would likely "cause confusion among new and existing customers" in Affiliate territories. Tr. 1670-71, 1683-85; see also SA189. Sprint integrated its business with Nextel knowing it would be "problematic" to protect the Affiliates' confidential information. SA186.

Despite knowing of these issues, Sprint deliberately delayed judicial resolution until after the merger closed. Sprint decided "to slow down the pace of [its] negotiations with the affiliates" (Tr. 1582) even though iPCS and the other Affiliates conveyed their need to "[h]ave an agreement in place prior to the Sprint-Nextel merger date" (PX-275 at 199). The circuit court thus correctly saw that any complexity resulting from a post-merger court order "is really not plaintiff's problem." A9-10. Instead, it is the result of Sprint's own delay and Sprint's own choice. "[A]fter a suit for injunction has been filed," a defendant "acts at his peril and subject to the power of the court to compel a restoration of the status quo ante, or to grant such other relief as may be proper." *Gribben v. Interstate Motor Freight Sys. Co.*, 18 Ill. App. 2d 96, 102-03 (1st Dist. 1958). Sprint itself understood at the outset of the case that "we" – Sprint – "have a problem in this particular territory that we have to deal with, if you rule against us." SA248. In Sprint's own words, "we will deal with that problem when and if it arises." *Id.*

Second, Sprint’s claim of hardship relies heavily on affidavits it dumped into the circuit court’s record after trial over iPCS’s objection (C6528, S.R. vol. 4 at 221-26), and without giving iPCS any opportunity for cross-examination or response. “[A]ffidavits offered to establish the truth of a matter at issue . . . should not be considered” on appeal, even if they were submitted to the trial court, “unless subject to some sort of adversarial examination.” *Balmoral Racing Club, Inc. v. Illinois Racing Bd.*, 151 Ill. 2d 367, 400 (1992). “It would be a miscarriage of justice, a violation of basic due process protections,” to allow Sprint “to append” such “unexamined affidavit[s]” to the record. *Id.* at 401.

Finally, Sprint’s claimed hardship is greatly exaggerated. The injunction affects only a small portion of Sprint’s national network, comprising less than 1.5 percent of its nearly 50 million subscribers (PX-12.17 at 1 & Sprint Br. 45). By contrast, Sprint’s breaches threaten iPCS’s entire business. Any balance of harms would favor iPCS.

CONCLUSION

iPCS respectfully submits that the judgment of the circuit court be affirmed.

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CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341

I, Demetrios G. Metropoulos, an attorney, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the appendix, is 50 pages.

Demetrios G. Metropoulos

CERTIFICATE OF SERVICE

I, Demetrios G. Metropoulos, an attorney, hereby certify that I caused the original and nine copies of the Response Brief of Plaintiff-Appellee iPCS Wireless, Inc. to be filed on March 8, 2007 with:

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I also caused three copies of the Brief of Plaintiff-Appellee to be deposited in the mail, postage prepaid, at 71 South Wacker Drive, Chicago, Illinois, 60606, before 5:00 p.m. on March 8, 2007, addressed to each person listed on the attached service list.

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