

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

CLUB TEXTING, INC. d/b/a
EZ TEXTING, INC.

Plaintiff,

v.

T-MOBILE USA, INC.

Defendant.

JUDGE CASTEL

10 CIV 7205
Civil Action No.

COMPLAINT

COMES NOW, Club Texting, Inc. d/b/a EZ Texting, Inc. ("EZ Texting"), by its undersigned counsel, and brings this Complaint against T-Mobile USA, Inc. ("T-Mobile") and, in support of thereof, states as follows:

FILED
U.S. DISTRICT COURT
2010 SEP 1
PM 2:17
N.Y.

INTRODUCTION

1. This is an action seeking declaratory, injunctive relief, and damages arising from T-Mobile's unlawful decision to block its customers from exchanging text message calls to EZ Texting through EZ Texting's "short code," which is akin to a telephone number for text message calls. EZ Texting's short code allows cell phone users to exchange text messages with EZ Texting's customers, who include businesses and non-profits.

2. T-Mobile has blocked its customers from exchanging text messages with EZ Texting's customers because T-Mobile subjectively does not approve of one of the thousands of lawful businesses and non-profits served by EZ Texting. In response, and regardless of the merits of T-Mobile's objections, EZ Texting ended its business relationship with that entity. Despite EZ Texting's immediate acquiescence, T-Mobile began blocking and continues to block

text messages to and from EZ Texting. No T-Mobile customer can send or receive text messages to EZ Texting's customers.

3. As a result of T-Mobile's past and on-going blocking, EZ Texting's business is being irreparably harmed. The ability to exchange text messages with cell phone users is vital to EZ Texting's business. The thousands of EZ Texting's customers, businesses and non-profits, that rely on EZ Texting for text message calling cannot communicate with T-Mobile's cell phone users. Past blocking cannot be undone, and the harm from that blocking is irreparable. If EZ Texting's short code remains blocked, the businesses and non-profits will end their contracts with EZ Texting. T-Mobile's customers will also quit trying to contact EZ Texting, thereby diminishing the value of EZ Texting's business. EZ Texting has been and continues to be irreparably damaged by T-Mobile's unlawful blocking.

PARTIES

4. EZ Texting is a New York corporation with its principal place of business at 244 Fifth Ave, Suite A224, New York, NY 10001.

5. T-Mobile is a Delaware corporation with its principal place of business at Bellevue, Washington.

JURISDICTION AND VENUE

6. This Court has original subject matter jurisdiction over the claims set forth in this Counterclaim pursuant to 28 U.S.C. §§ 1331 and 1338, 47 U.S.C. § 207, and 15 U.S.C. §§ 4 and 15. The matter in controversy relates to rights identified by federal statute, and thus arises under federal statutory and common law, and the amount in controversy exceeds the sum specified in 28 U.S.C. § 1337. This Court has supplemental jurisdiction over the pendant state-

law claims under 28 U.S.C. § 1367. Plaintiff's claim for declaratory relief is cognizable under 28 U.S.C. §§ 2201 and 2202.

7. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c) because T-Mobile does business in this District, and is subject to personal jurisdiction here.

FACTS

A. EZ Texting's Business

8. EZ Texting provides and implements interactive text messaging promotions, and its business model depends on "short codes" being connected to various wireless service providers, including T-Mobile.

9. EZ Texting's short code is essentially a six digit telephone number (313131) which allows cell phone users to send text message calls to EZ Texting's customers. EZ Texting may also use the short code to contact cell phone users who have expressed an interest in EZ Texting's marketing by "opting in" to EZ Texting's short code. In other words, EZ Texting does not send text messages to cell phone users unless they have asked to receive them. And, a cell phone user can request EZ Texting stop sending text messages at any time.

10. A variety of businesses and non-profits use EZ Texting's software to market their products and services to existing and potential customers with text messages. For example, a party rental company may advertise to a potential customer to text "PARTY" to 313131 to receive information about the rental services provided. A church could send its schedule to a cell phone user who texted "CHURCH" to 313131. Again, cell phone users only receive text message calls from EZ Texting's customers after they affirmatively request that such text messages be sent to them. Moreover, consumers can stop receiving these messages whenever

they want. T-Mobile does not claim that EZ Texting has sent unwanted text messages from any business or non-profit.

11. These businesses and non-profits enter into contracts with EZ Texting who helps them design and monitor their marketing campaigns to ensure they comply with the myriad wireless service providers' guidelines and rules. EZ Texting has created software which allows the businesses and non-profits to set up the text messages they will send in response to a cell phone user's text message to them.

12. EZ Texting has a rigorous screening process to ensure that the businesses and non-profits that use EZ Texting to send text messages are doing so in compliance with all applicable laws and regulations.

13. T-Mobile has never claimed that any text message sent by an EZ Texting customer violates any law or government regulation.

B. The Wireless Service Providers

14. The wireless service providers do not link directly with short code holders like EZ Texting. Instead, their agents, known as "aggregators," are usually connected to companies like EZ Texting. Thus, EZ Texting's network is thus indirectly interconnected with T-Mobile for purposes of exchange text message calls.

15. The aggregator at issue in this case for T-Mobile is Open Market, Inc. ("Open Market"). EZ Texting connects through a company called 4INFO, Inc. ("4INFO") who then connects to Open Market.

16. In other words, EZ Texting is connected to 4INFO who connects to Open Market who then connects to T-Mobile.

17. EZ Texting has been indirectly connected to T-Mobile for over three years. T-Mobile has never blocked EZ Texting before now.

C. Unlawful Blocking By T-Mobile

18. Starting on or about Friday, September 10, 2010, T-Mobile began illegally blocking its customers from sending or receiving text messages to or from EZ Texting.

19. EZ Texting contacted T-Mobile, Open Market, and 4INFO to determine the reason T-Mobile was blocking text messages to and from EZ Texting.

20. The stated reason was that T-Mobile did not approve of EZ Texting's business relationship with the website <http://legalmarijuanadispensary.com> (the "website"). This website was using EZ Texting to send and receive text messages in relation to information on the website regarding accessing legal medical marijuana in California. Text messages concerning this website were only sent to cell phone users who specifically requested information from the website. EZ Texting believed the website was acceptable under all applicable laws and regulations, and therefore its association with EZ Texting would not be protested by any wireless service provider.

21. This stated reason confirmed what EZ Texting had heard earlier through industry contacts: that T-Mobile had learned of the website, did not approve of the website, and was planning on blocking text messages to and from EZ Texting because of it.

22. Regardless of the merits of T-Mobile's disapproval of the website, EZ Texting immediately had the website remove its short code and related webpage to avoid blocking by T-Mobile. EZ Texting also suspended the customer in question's use of EZ Texting's 313131 short code. This occurred on or about Thursday, September 9, 2010, even before T-Mobile began blocking.

23. Even though EZ Texting had immediately terminated its relationship with the website at issue, T-Mobile began blocking all text messages to and from all of EZ Texting's customers on or about Friday, September 10, 2010.

24. Despite EZ Texting's efforts to have its indirect interconnection with T-Mobile unblocked, T-Mobile has refused.

25. T-Mobile has stated that it will not stop blocking text messages exchanged with EZ Texting over the existing indirect interconnection facilities. Rather, T-Mobile has directed that EZ Texting start this indirect interconnection process from scratch, even though EZ Texting has been interconnected with T-Mobile for over three years for purposes of exchanging text messages. Re-doing this process to create new indirect interconnection facilities would take approximately six months and create significant, needless expense for EZ Texting. During this six month period (or perhaps even longer), text messages to and from EZ Texting's customers would remain blocked by T-Mobile.

26. Upon information and belief, T-Mobile has not subjected any other mobile marketing company similar to EZ Texting to such a burdensome process.

27. Upon information and belief, T-Mobile is connected to a number of other companies similar to EZ Texting such as Twitter (twitter.com), Clickatell (Pty) Ltd (clickatell.com), TextMarks, Inc. (TextMarks.com), 4INFO, Inc. (4info.com), Opt It, Inc. (Optit.com), Tatango, Inc. (Tatango.com), DoCircle, Inc. dba Trumpia (Trumpia.com), Izig.com, Prot texting.com, Involvemobile.com, and mobileStorm (mobileStorm.com).

28. Other wireless service providers were also aware of the website, but none have blocked EZ Texting based on it.

D. Irreparable Harm

29. EZ Texting is being irreparably harmed by T-Mobile's past and on-going blocking.

30. A T-Mobile customer that is blocked cannot access content which they desire. Access to that content later is not a substitute for earlier blocked content.

31. T-Mobile customers will stop sending EZ Texting text messages when they are blocked.

32. The business and non-profits that use EZ Texting to send and receive text messages will stop using EZ Texting if they cannot be reached by T-Mobile's customers.

33. EZ Texting will not be able to attract new business because of T-Mobile's blocking.

34. EZ Texting will be put out of business if businesses and non-profits do not use EZ Texting's services.

35. The value of EZ Texting's short code, and therefore EZ Texting's business, will also be irreparably damaged if cell phone users, businesses, and non-profits view it as subject to blocking by T-Mobile.

COUNT I

(Unlawful Call Blocking – Telecommunications Act of 1996, 47 U.S.C. § 201)

36. Plaintiff re-alleges and incorporates the allegations of paragraphs 1 through 35, above.

37. EZ Texting's business of providing businesses and non-profits with interactive text messaging mobile marketing software and programs depends on its network being interconnected with the various wireless or cell phone carriers, including T-Mobile. EZ

Texting indirectly interconnects through third-party vendors called “aggregators” who in turn connect to the wireless carriers or cell phone providers.

38. T-Mobile is maintaining a block on the exchange of text message calls with EZ Texting.

39. T-Mobile, as a cellular phone company, is deemed a common carrier under the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. As such, it is obligated to engage only in just and reasonable practices involving its communications services pursuant to, *inter alia*, Section 201 of the Telecommunications Act.

40. The Federal Communications Commission has held that a text message is a call. *See e.g., Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (deferring to Federal Communications Commission’s determination that a text message is a call for purposes of the Telephone Consumer Protection Act, 47 U.S.C. § 227).

41. T-Mobile’s blocking of its consumers’ text messages to and from EZ Texting violates the Telecommunications Act’s anti-call blocking policy, 47 U.S.C. § 201. *See e.g., Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, 22 FCC Rcd 11629 (2007) (prohibiting common carriers from call blocking).

42. A private right of action exists for claims brought against a common carrier for violation of 47 U.S.C. § 201. Pursuant to Sections 206 and 207 of the Telecommunications Act, 47 U.S.C. §§ 206, 207, EZ Texting seeks the recovery of damages resulting from T-Mobile’s call blocking actions, as alleged above. The precise amount of said damages is not known with certainty, but on information and belief exceeds \$75,000 exclusive of attorney’s fees and costs.

43. Such actions also threaten EZ Texting with irreparable harm to its business and market position. The dollar value of such harm is difficult to ascertain and money damages are inadequate to remedy same, and therefore EZ Texting is entitled to preliminary and permanent injunctive relief against such actions.

COUNT II
(Tortious Interference With Contractual Relations)

44. Plaintiff re-alleges and incorporates the allegations of paragraphs 1 through 43, above.

45. EZ Texting has contracts with many businesses and non-profits to serve as their mobile marketing partner for text message exchange. EZ Texting helps create mobile marketing campaigns for its business and non-profit partners to enable customers to reach them using text messages. EZ Texting also gives the businesses and non-profits access to EZ Texting's software to create, receive, and send these text messages over EZ Texting's short code. These business and non-profit contracts are vital to EZ Texting's business.

46. T-Mobile had knowledge of EZ Texting's contracts. T-Mobile knows that EZ Texting provides businesses and non-profits with the use of EZ Texting for text message exchange. The businesses and non-profits often put EZ Texting's short code on their websites. T-Mobile reviews websites advertising EZ Texting's short code to determine whether it approves of the business or what is being advertised over the short code. T-Mobile reviews text messages to EZ Texting's customers to determine whether T-Mobile approves of the content of those text messages.

47. T-Mobile is maintaining a block on the exchange of text message calls with EZ Texting.

48. Thus, T-Mobile knows about EZ Texting's contracts with its business and non-profit partners.

49. T-Mobile is blocking text messages to and from EZ Texting with the intent to interfere with EZ Texting's contracts with its business and non-profit partners who were using EZ Texting for lawful mobile marketing purposes.

50. EZ Texting has been damaged by T-Mobile's intentional interference with EZ Texting's contracts in amount to be determined at trial.

COUNT III

(Unlawful Discrimination – Telecommunications Act of 1996, 47 U.S.C. § 202(a))

51. Plaintiff re-alleges and incorporates the allegations of paragraphs 1 through 50, above.

52. EZ Texting's business of providing businesses and non-profits with interactive text messaging mobile marketing software and programs depends on its short code being interconnected with the various wireless or cell phone carrier networks, including T-Mobile. EZ Texting interconnects indirectly through third-party vendors called "aggregators" who in turn connect to the wireless carriers or cell phone providers.

53. T-Mobile is maintaining a block on the exchange of text message calls with EZ Texting.

54. T-Mobile, as a cellular phone company, is deemed a common carrier under the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. As such, it is obligated to provide all persons access to its services on a nondiscriminatory basis pursuant to, *inter alia*, Section 202(a) of the Telecommunications Act.

55. T-Mobile's refusal to exchange text messages with EZ Texting violates the Telecommunications Act's nondiscrimination policy, 47 U.S.C. § 202(a).

56. A private right of action exists for claims brought against a common carrier for violation of 47 U.S.C. § 202(a). Pursuant to Sections 206 and 207 of the Telecommunications Act, 47 U.S.C. §§ 206, 207, EZ Texting seeks the recovery of damages resulting from T-Mobile's discriminatory actions, as alleged above. The precise amount of said damages is not known with certainty, but on information and belief exceeds \$75,000 exclusive of attorney's fees and costs.

57. Such actions also threaten EZ Texting with irreparable harm to its business and market position. The dollar value of such harm is difficult to ascertain and money damages are inadequate to remedy same, and therefore EZ Texting is entitled to preliminary and permanent injunctive relief against such actions.

COUNT IV
(Illegal Restraint of Trade – Sherman Antitrust Act, 15 U.S.C. § 1)

58. Plaintiff re-alleges and incorporates the allegations of paragraphs 1 through 57, above.

59. In an effort to further its unlawful call blocking and discriminatory policy of blocking text messages to and from EZ Texting, T-Mobile has coerced EZ Texting's aggregator, Open Market (and thus 4INFO) to refuse to connect EZ Texting to the T-Mobile network, which constitutes a coerced agreement in unreasonable restraint of trade in violation of Section One of the Sherman Antitrust Act, 15 U.S.C. § 1.

60. Upon information and belief, T-Mobile and Open Market have communicated with each other on or about September 10, 2010 and subsequently, and T-Mobile has told Open Market (and thus 4INFO) to refuse to connect EZ Texting to the T-Mobile network. Open Market has agreed.

61. As a proximate result thereof, EZ Texting has suffered antitrust damage, that is, damage of the type intended to be proscribed by the antitrust laws, in that EZ Texting is less able to compete effectively in the relevant market for provision of mobile marketing and advertising services, and competition therein has been harmed. The amount of said damages is uncertain, but on information and belief exceeds \$75,000 exclusive of attorney's fees and costs.

62. Such actions also threaten EZ Texting with irreparable harm to its business and market position. The dollar value of such harm is difficult to ascertain and money damages are inadequate to remedy same, and therefore EZ Texting is entitled to preliminary and permanent injunctive relief against such actions.

63. Pursuant to 15 U.S.C. § 15, EZ Texting seeks the recovery of treble damages resulting from T-Mobile's unlawful and coerced agreement.

COUNT V
(Declaratory Judgment)

64. Plaintiff re-alleges and incorporates the allegations of paragraphs 1 through 63, above.

65. A present, actionable and justiciable controversy exists with respect to the legal rights between the parties. Such controversy arises under the Federal Communications Act, 47 U.S.C. §§ 201, *et seq.*; Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.*; and under the laws of the United States. Litigation between the parties is unavoidable.

66. T-Mobile's blocking of text messages to and from EZ Texting is an ongoing and repeated practice.

67. On information and belief, absent a declaratory judgment, T-Mobile will continue its wrongful practice of blocking text messages to and from EZ Texting.

68. It would be unduly burdensome and inefficient for Plaintiff to bring new actions for damages each time T-Mobile blocks text messages to and from EZ Texting.

69. Accordingly, Plaintiff is entitled to a declaratory judgment and such further relief based upon that declaratory judgment as the Court deems proper, pursuant to 28 U.S.C. §§ 2201 and 2202, determining that :

- a. Plaintiff may send lawful content to T-Mobile's customers regardless of T-Mobile's approval of the content of those text messages; and
- b. T-Mobile cannot block text messages to and from EZ Texting based on the lawful content of EZ Texting's text messages.

COUNT VI
(Injunctive Relief)

70. Plaintiff re-alleges and incorporates the allegations of paragraphs 1 through 69, above.

71. EZ Texting requests that this Court preliminarily and permanently enjoin T-Mobile from blocking text messages to and from EZ Texting.

72. EZ Texting faces immediate and irreparable harm if blocking by T-Mobile continues.

73. A T-Mobile customer that is blocked cannot access content which they desire. Access to that content later is not a substitute for earlier blocked content.

74. T-Mobile customers will stop sending EZ Texting text messages when they are blocked.

75. The business and non-profits that use EZ Texting to send and receive text messages will stop using EZ Texting if they cannot be reached by T-Mobile's customers.

76. EZ Texting will not be able to attract new business because of T-Mobile's blocking.

77. EZ Texting will be put out of business if businesses and non-profits do not use EZ Texting's services.

78. The value of EZ Texting's short code, and therefore EZ Texting's business, will also be irreparably damaged if cell phone users, businesses, and non-profits view it as subject to blocking by T-Mobile.

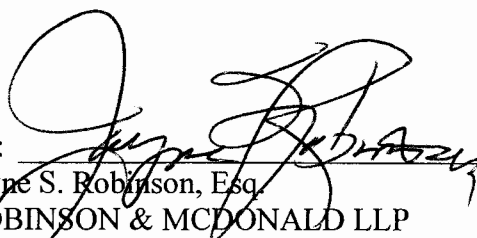
WHEREFORE, Plaintiff prays that this Court:

- a) Preliminarily and permanently enjoin T-Mobile from blocking text messages to and from EZ Texting;
- b) Award Plaintiff damages for call blocking in amount to be determined at trial;
- c) Award Plaintiff damages for tortious interference with contractual relations in amount to be determined at trial;
- d) Award Plaintiff damages for discrimination in amount to be determined at trial;
- e) Award Plaintiff damages for antitrust violations in amount to be determined at trial;
- f) Award Plaintiff treble damages and attorneys' fees and costs for antitrust violations in amount to be determined at trial;
- g) Issue a declaratory judgment that Plaintiff may send lawful content to T-Mobile's customers regardless of T-Mobile's approval of the content of those text messages; and T-Mobile cannot block text messages to and from EZ Texting short code based on the content lawful of EZ Texting's text messages;

- h) Preliminary and permanent injunctive relief against T-Mobile's illegal call blocking of EZ Texting;
- i) Preliminary and permanent injunctive relief against T-Mobile's illegal discrimination and denial of service to EZ Texting;
- j) Preliminary and permanent injunctive relief against T-Mobile's coercion of aggregators and refusal to provision EZ Texting's "short codes" or to carry programs or content from EZ Texting over T-Mobile's wireless network.
- k) Tax the costs, fees, and expenses of this action to T-Mobile, including the reasonable attorneys' fees and expert witness fees of Plaintiff pursuant to 47 U.S.C. § 206 and to the extent permitted by law;
- l) Award such other and further relief as the Court deems just and proper.

September 17, 2010.

Respectfully submitted,


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(PLACE AN X IN ONE BOX ONLY)

ORIGIN

- 1 Original Proceeding
- 2a. Removed from State Court
- 2b. Removed from State Court AND at least one party is pro se.
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from (Specify District)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judge Judgment

(PLACE AN X IN ONE BOX ONLY)

BASIS OF JURISDICTION

IF DIVERSITY, INDICATE CITIZENSHIP BELOW. (28 USC 1322, 1441)

- 1 U.S. PLAINTIFF
- 2 U.S. DEFENDANT
- 3 FEDERAL QUESTION (U.S. NOT A PARTY)
- 4 DIVERSITY

CITIZENSHIP OF PRINCIPAL PARTIES (FOR DIVERSITY CASES ONLY)

(Place an [X] in one box for Plaintiff and one box for Defendant)

CITIZEN OF THIS STATE	PTF DEF [] []	CITIZEN OR SUBJECT OF A FOREIGN COUNTRY	PTF DEF [] []	INCORPORATED and PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE	PTF DEF [] []
CITIZEN OF ANOTHER STATE	[] []	INCORPORATED or PRINCIPAL PLACE OF BUSINESS IN THIS STATE	[] []	FOREIGN NATION	[] []

PLAINTIFF(S) ADDRESS(ES) AND COUNTY(IES)

Club Texting, Inc. d/b/a EZ Texting, Inc.
244 Fifth Ave, Suite A224
New York, NY 10001

New York County

DEFENDANT(S) ADDRESS(ES) AND COUNTY(IES)

T-Mobile USA, Inc.
12920 SE 38th St.
Bellevue, Washington 98006

DEFENDANT(S) ADDRESS UNKNOWN

REPRESENTATION IS HEREBY MADE THAT, AT THIS TIME, I HAVE BEEN UNABLE, WITH REASONABLE DILIGENCE, TO ASCERTAIN THE RESIDENCE ADDRESSES OF THE FOLLOWING DEFENDANTS:

Check one: THIS ACTION SHOULD BE ASSIGNED TO: WHITE PLAINS MANHATTAN
(DO NOT check either box if this a PRISONER PETITION.)

DATE
9/17/12
RECEIPT #

SIGNATURE OF ATTORNEY OF RECORD
Jaime Robinson

ADMITTED TO PRACTICE IN THIS DISTRICT
[] NO
[X] YES (DATE ADMITTED Mo. 4 Yr. 1980)
Attorney Bar Code #5481

Magistrate Judge is to be designated by the Clerk of the Court.

MAG. JUDGE PECK

Magistrate Judge _____ is so Designated.

Ruby J. Krajick, Clerk of Court by _____ Deputy Clerk, DATED _____

UNITED STATES DISTRICT COURT (NEW YORK SOUTHERN)