

**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.

ECF

Civil Action No. 1:10-cv-07205-PKC

**REPLY MEMORANDUM IN SUPPORT OF  
MOTION FOR PRELIMINARY INJUNCTION**

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d/b/a EZ Texting, Inc. ("EZ Texting")*

## I. PRELIMINARY STATEMENT

T-Mobile is unlawfully blocking its customers' text message calls with EZ Texting through EZ Texting's "short code," a telephone number for such calls. T-Mobile attempts to justify its blocking by relying upon guidelines published by the Mobile Marketing Association ("MMA"). T-Mobile never cites any authority for why these guidelines even apply to EZ Texting, or explains how T-Mobile enforced the guidelines in anything but an arbitrary manner, as ample evidence rebuts T-Mobile's claim that it – or any other wireless carrier – applies the wireless-carriers' "guidelines" in the way T-Mobile has here. EZ Texting faces the imminent destruction of its business, and T-Mobile's opposition neither provides any legal support for its blocking nor explains how it would be harmed if it stopped blocking the willing communication exchanges between its customers and EZ Texting's customers. An injunction should issue.

## II. ARGUMENT

### A. EZ Texting faces irreparable harm if T-Mobile is not enjoined.

T-Mobile unpersuasively argues that EZ Texting has not shown a sufficient threat of irreparable harm caused by T-Mobile's unlawful blocking. EZ Texting operates in a highly competitive business where speed and ubiquity matter most. Its competitors offer customers the ability to get their mobile-marketing campaigns "up and running in minutes"<sup>1</sup> and tout connections with the nation's largest four wireless carriers, T-Mobile included, which together account for 93% of the mobile market.<sup>2</sup> T-Mobile's unlawful blocking has now denied EZ Texting and its customers access to over 30 million subscribers, materially damaging its

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<sup>1</sup> Second Neman Decl. ¶ 13 (citing Mobivity, <http://www.mobilemarketing.net> (last visited Sept. 23, 2010) (claiming that they have an "instant set up" and "you're up and running in minutes!")) (filed herewith).

<sup>2</sup> See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, including Commercial Mobile Services*, WT Docket No. 09-66, Fourteenth Report, FCC 10-81, 2010 WL 2020768, \*5 (rel. May 20, 2010).

addressable market. Customers unsatisfied with EZ Texting's now-limited reach can simply move to one of EZ Texting's competitors "in minutes."

A mobile marketer's business is not marketable if it cannot promise access to *at least* the customers of the four major carriers. Second Neman Decl. ¶ 18. EZ Texting therefore cannot attract new business or retain existing business if it is cut off from such a large portion of the market. *Id.* EZ Texting's thousands of customers can simply stop using EZ Texting's 313131 short code to operate their mobile marketing campaigns. *Id.* In this industry, contracts between the clients and mobile marketers like EZ Texting are usage-based, pay-as-you-go contracts, such that they can migrate to any other mobile marketer's short code easily, quickly, and at low cost. *Id.* Thus, EZ Texting cannot know if existing or potential customers are avoiding EZ Texting's service because of T-Mobile's blocking. EZ Texting has shown irreparable harm. *Id.*

T-Mobile's first unpersuasive argument is its unexplained assertion that "T-Mobile's termination of the 313131 short code can be remedied through an award of monetary damages to compensate for any lost revenues from plaintiff's T-Mobile's customers." Opp. 12. T-Mobile, however, never explains how those monetary damages could be calculated. When, as here, damages will be difficult, if not impossible, to prove at trial, injunctive relief is particularly appropriate.<sup>3</sup>

There are obvious categories of damages that neither party can readily ascertain. First, as has already occurred with legalmarijuanadispenary.com, one or more of EZ Texting's customers have already stopped communicating with the entire mobile community via 313131,

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<sup>3</sup> See, e.g., *Warner-Lambert Co. v. Northside Development Corp.*, 86 F.3d 3, 8 (2d Cir. 1996) (irreparable harm requirement may be met by showing that harm is unquantifiable in monetary terms); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996) (irreparable harm may be met upon showing that, absent restraining order, movant "would lose incalculable revenues and sustain harm to its goodwill"); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009) ("While RoDa provided all of the funds to purchase the property – a large but quantifiable amount of money – RoDa has been denied unfettered ownership of that property, resulting in delays, missed opportunities, and, *most importantly, unquantifiable damages.*") (emphasis added).

making it essentially impossible to know how many communications would have been made between EZ Texting's customers and the entire wireless consumer market had T-Mobile not engaged in its censorship campaign here. Like the rest of the industry, EZ Texting's customer contracts are based on the volume of messages they exchange via EZ Texting's short code, so EZ Texting's damages are real and accruing, but difficult, if not impossible, to calculate. Second, neither party can readily calculate how many additional T-Mobile users would have begun communicating with 313131 after T-Mobile began blocking. Finally, it is not readily provable how many potential EZ Texting customers are now choosing to use one of its competitors now that it cannot provide access to the full mobile community.

T-Mobile then attempts to minimize EZ Texting's threat of irreparable harm by arguing that severing all communications between T-Mobile's 30 million customers and EZ Texting's "only one short code" cannot "drive [EZ Texting] out of business." Opp. 12. That assumption is directly at odds with the realities of this market. As Mr. Neman explained in his original declaration, EZ Texting's competitors, who likewise have "only one short code," can provide access to *all* of the nation's major carriers. Neman Decl. ¶¶ 8, 13, 44 (ECF No. 14). No business or non-profit seeking to launch a mobile marketing campaign is likely to choose the mobile marketer who cannot assure access to *30 million* wireless users when so many others can. The amount of commerce that would have been exchanged between EZ Texting's 313131 short code and T-Mobile's *30 million customers* but for T-Mobile's censorship campaign is not readily ascertainable. *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1186 (2d Cir.1995) ("Major disruption of a business can be as harmful as its termination and thereby constitute irreparable injury."). Once again, common sense belies T-Mobile's glib denials of the harm it is causing and will continue to cause EZ Texting if its censorship is not enjoined.

T-Mobile next erroneously argues that the inevitable loss of EZ Texting's goodwill with its current and prospective customer base is too "speculative" to support a finding of irreparable harm. Opp. 13. T-Mobile again portrays the law as far too callous: a movant need not suffer financial ruin before it can receive injunctive relief. That is particularly true when the threatened damage is to a company's goodwill, which is inherently difficult to value and repair.<sup>4</sup>

Finally, contrary to T-Mobile's assertion that EZ Texting caused its own harm by not following the MMA guidelines, those guidelines do not provide T-Mobile the right to block EZ Texting's text messages. T-Mobile concedes that it has "no direct contractual relationship with ... EZ Texting." Opp. 7 (citing Espinoza Dec. ¶ 13). Thus, T-Mobile and EZ Texting clearly never agreed that that document would govern their relationship. Instead, T-Mobile claims that "aggregators are obligated under T-Mobile's rules and guidelines to ensure that sub-aggregators and third-party content providers, such as EZ Texting, comply with the MMA Best Practices, as well as T-Mobile's rules and guidelines." *Id.* Thus, T-Mobile appears to claim that it is a third-party beneficiary of EZ Texting's contracts with 4INFO and Open Market.

But if T-Mobile seeks to enforce a third-party contract, EZ Texting's contracts with both 4INFO and Open Market provide that the services may not be terminated unless and until written notice of the breach is provided and a 30-day opportunity-to-cure period expires. *See* Second Neman Decl. ¶ 19. So if T-Mobile wants to step into those contracts as a third-party beneficiary, it is obligated to adhere to *all* of the terms and conditions of those contracts, including the notice-

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<sup>4</sup> *See, e.g., Echo Design Group, Inc. v. Zino Davidoff S.A.*, 283 F. Supp. 2d 963, 968 (S.D.N.Y. 2003) (explaining that, because damage to reputation is difficult to prove or quantify, such damage is considered strong evidence of irreparable harm); *United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 741-42 (8th Cir. 2002) (affirming district court's finding of irreparable harm as a result of potential loss of reputation and goodwill, and explaining threat is not speculative because of lack of complaints where it might take months for loss of goodwill to become manifest).

and-opportunity-to-cure provisions, which T-Mobile clearly did not honor.<sup>5</sup> EZ Texting has shown actual, imminent, and substantial harm as a result of T-Mobile's blocking.

**B. EZ Texting has a substantial likelihood of success on the merits of its claims.**

T-Mobile incorrectly claims that EZ Texting must show a "clear" or "substantial" likelihood of success on the merits to obtain a "mandatory" preliminary injunction because EZ Texting seeks to restore the status quo to September 9, 2010, before T-Mobile precipitously blocked EZ Texting. Opp. 14. In advocating for this heightened standard, T-Mobile seeks to take advantage of its own unlawful, recent acts, turning the injunction standard on its head. The "mandatory" preliminary injunction standard is inapplicable here.<sup>6</sup> Nevertheless, EZ Texting has shown a clear, substantial likelihood of success on the merits.

**1. EZ Texting has a meritorious claim under 47 U.S.C. § 201.**

EZ Texting is likely to succeed on the merits of its Communications Act claims regarding T-Mobile's unjust and unreasonable call-blocking practices. T-Mobile argues – without the support of any FCC or judicial precedent – that text messages are "information services," such that its blocking of its customers' and EZ Texting's communications is not regulated by Title II of the Communications Act. Opp. 14-18. But T-Mobile's argument ignores existing FCC authority, which unequivocally holds that text messages are calls under provisions of Title II of the Communications Act.<sup>7</sup> T-Mobile concedes that the "telecommunications service" and

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<sup>5</sup> *Baill Banking Corp. v. UPG, Inc.*, 985 F.2d 685, 697 (2d Cir. 1993) (third party beneficiary possesses no greater right to enforce agreement than do parties to the contract); *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310, 313 (2d Cir. 1990) (third party beneficiaries "step into the shoes of the promisee").

<sup>6</sup> Courts in the Southern District of New York have suggested that the mandatory injunction standard advocated by T-Mobile is appropriate where restoring the status quo is particularly difficult. *See e.g., Lincoln Cercpac v. Health and Hospitals Corp.*, 920 F.Supp. 488, 494 (S.D.N.Y. 1996). Here, of course, all T-Mobile must do is re-establish the connection that existed before it began blocking, a connection about which no one had ever complained. T-Mobile makes no claim that re-establishing the connection would be difficult or burdensome.

<sup>7</sup> *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14115 ¶ 165 (2003) ("This [prohibition] encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls..."); *Satterfield v. Simon & Schuster, Inc.*, 569

“information service” dichotomies are mutually exclusive. *Opp.* 15 n. 10. Accordingly, since the FCC has placed text messages under the rubric of Title II regulation in § 227, the FCC would essentially need to reverse itself to rule that a text message is not a “telecommunications service” subject to Title II regulation. Once in Title II, text messages should be treated as subject to all of Title II, including §§ 201 and 202.<sup>8</sup>

T-Mobile does not seriously dispute that call blocking is forbidden by the FCC.<sup>9</sup> And, again, the FCC has already held that a text message is a call under a related portion of Title II of the Communications Act, 47 U.S.C. § 227. The natural presumption in statutory interpretation is to accord a common interpretation across statutory sections.<sup>10</sup> If a text message is a call for one section of Title II of the Communications Act, *i.e.*, § 227, which also deals with consumer protection, it should likewise be regarded as a call for purposes of §§ 201 and 202 of the Act, the

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F.3d 946, 954 (9th Cir. 2009) (affirming FCC’s determination that a text message is a call for purposes of § 227); *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1009 (N.D. Ill. 2010) (same).

<sup>8</sup> To the extent the Court finds that the FCC’s existing authority treating text messages as calls is either not dispositive or sufficiently applicable to resolve the matter here, the Court should restore the parties’ status quo by enjoining T-Mobile’s further blocking of EZ Texting’s short code and refer the issue of the regulatory classification of text messages to the FCC for resolution under the primary jurisdiction doctrine.

<sup>9</sup> T-Mobile instead argues that “Section 201 does not prevent a carrier from denying or terminating service, but rather imposes a reasonableness requirement upon any decision to deny such services.” *Opp.* 18. Certainly, the MMA guidelines cannot justify blocking when there has been no consumer complaint and no harm to T-Mobile’s network. T-Mobile does not identify any consumer complaints about an unwanted text message from an EZ Texting customer. T-Mobile never claims that it would have disapproved of any of the (legitimate) uses to which EZ Texting put its short code. Can T-Mobile credibly claim that the short code could only be used for events at bars and clubs, but could not be used for other lawful businesses, churches, and non-profits? Instead of maintaining the existing, non-harmful connection and allowing EZ Texting to update its program brief, if that’s what T-Mobile wanted, T-Mobile instead blocked the short code completely. T-Mobile’s reliance on the MMA guidelines is also not reasonable because, as demonstrated below, T-Mobile has not consistently enforced those guidelines against other mobile marketing companies. T-Mobile is wielding the MMA guidelines to block whomever it likes, not based on any consistent principle.

<sup>10</sup> See, e.g., *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995) (“The 1933 [Securities] Act, like every Act of Congress, should not be read as a series of unrelated and isolated provisions. Only last Term we adhered to the “normal rule of statutory construction” that “identical words used in different parts of the same act are intended to have the same meaning.”) (quoting *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332, 342, (1994), and citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

cornerstones of the FCC’s regulatory authority to prohibit common carriers’ unjust, unreasonable, and discriminatory practices.

Because text messages are calls already regulated under Title II of the Act, T-Mobile’s blocking of the text messages at issue here is flatly precluded by long-standing FCC precedent under coordinate sections of Title II of the same Act. EZ Texting has shown a substantial likelihood of success on the merits of its Communications Act claims.<sup>11</sup>

**2. EZ Texting has a meritorious claim under 47 U.S.C. § 202.**

EZ Texting has also asserted a meritorious claim for § 202 discrimination against T-Mobile. T-Mobile is subjecting a particular person, EZ Texting, to undue and unreasonable prejudice and disadvantage. *See* 47 U.S.C. § 202(a). T-Mobile claims that it treats all of its mobile marketing partners the same, but this statement is belied by common industry practice, including T-Mobile’s own practices. T-Mobile also claims that EZ Texting was required to update its program brief every time it added a customer to its shared short code. Opp. 10. But this is not common industry practice and T-Mobile never enforced this purported requirement until it learned about the website at issue here. *See* Second Neman Decl. ¶¶ 4-7.

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<sup>11</sup> T-Mobile’s argument that text messages are an “information service” is both unpersuasive and wholly unsubstantiated. The FCC never has made such a finding. T-Mobile argues that text messages are an “information” or “enhanced” service based on a “net protocol conversion.” Opp. 16-17. But T-Mobile never establishes that there actually is a *net* protocol conversion provided for these calls by identifying the applicable protocol at either end of the call. Nor does T-Mobile prove that *it* – as opposed to EZ Texting, an aggregator, and/or the end user’s mobile device – is actually the entity providing that conversion, another necessary condition for a *regulatory* finding of the enhanced services exemption. The authority T-Mobile cites confirms that a carrier cannot convert a telecommunications service into an information service when there is no *net* protocol conversion in the call, even if it performs the conversion. Opp. 17 n.12 (citing *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd. 7457 (2004)).

Moreover, under the FCC’s decisions, not every net protocol conversion results in an information service. *See Implementation of the Non-Accounting Safeguards in Sections 271 and 272 of the Communications Act of 1934*, Order on Reconsideration, 12 FCC Rcd. 2297, 2298-99 ¶ 2 (1997). The FCC has consistently held that transitions to new technologies, such as the conversion from analog to digital, while involving net protocol conversions, do not result in an information services classification; it has likewise held that conversions conducted to make different communications equipment interoperable – such as making an SMS call from a cell phone compatible with a computer application – are likewise not “enhanced” services. *In re the Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act*, 11 FCC Rcd. 21905 ¶ 106 (1996).



First, shared short codes are common in the industry and numerous mobile marketing companies use shared short codes without ever asking T-Mobile for permission for each program, which T-Mobile claims is required here. The best example is the website Twitter, which allows anyone to sign up for a Twitter account, including businesses and non-profits, and instantly send text messages to T-Mobile users over Twitter's short code (40404) without Twitter ever seeking approval from T-Mobile or any other carrier. *See* Second Neman Decl. ¶ 12; *see also* Unger Decl., Ex. B. Twitter works instantly after registering, and thus there can be no possibility that Twitter submits for T-Mobile's approval each new twitter user. Opp. 6. In fact, a T-Mobile customer can text "follow weedmaps" to Twitter's short code and exchange text messages with the *very website at issue in this case*. *See* Second Neman Decl. ¶ 12. That is no different from texting "weedmaps" to EZ Texting's short code, yet T-Mobile treats Twitter and EZ Texting differently. Twitter's exact same actions have not resulted in the termination of Twitter's short code by T-Mobile, while EZ Texting's has. This is discriminatory treatment.

Many other mobile marketing companies offer the instant ability to connect to T-Mobile's customers without seeking T-Mobile's approval of these programs.<sup>12</sup> Indeed, when Mobile Commons, a mobile marketing company similar to EZ Texting, faced blocking by Sprint and OpenMarket, Mobile Commons' Mr. Alpert filed declarations with the FCC and in a New York case against OpenMarket explaining that shared short codes were widely used and the industry standard was to submit a program brief for approval once, without ever needing to

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<sup>12</sup> That EZ Texting's competitors do not seek approval for additional programs is borne out by the common industry practice of EZ Texting – and its numerous competitors – advertising and ensuring that customers will have their new mobile marketing program operable in a matter of days, if not hours – substantially shorter than the several months T-Mobile's program approval process typically takes. *See* Second Neman Decl. ¶ 13 (citing Call-Em-All (whose previous customer boasts, "In less than 15 minutes they completed my 10,000 texts and calls! That included the setup time too. Call-Em-All is fast and efficient, that's for sure."); Mobivity (claiming that they have an "instant set up" and "you're up and running in minutes!"); TXT Impact (asserting that, "You can be up and running with a Shared short code number with-in [a] few minutes not months."); mobileStorm, (contending that with a

update it. See Declaration of Jed Alpert ¶¶ 12-13, FCC Docket WT 08-7 (filed Mar. 15, 2010) (“In my experience a program brief is filed when a short code is first aggregated with the carriers. This brief covers all potential uses of the short code and almost never requires updating.”) (attached as Tab A)<sup>13</sup>; see also *Mobile Commons, Inc. v. OpenMarket Inc.*, Index No. 600989/2010-E, Redacted Affidavit of Jed Alpert ¶¶ 12, 22, 24 (N.Y. Sup. Ct. Apr. 18, 2010) (attached as Tab B).

Further, EZ Texting will proffer additional testimony at the hearing demonstrating that T-Mobile never requires mobile marketers like EZ Texting to update their program briefs once they are submitted. This supposed requirement to update a program brief is rarely used, and then only as a tool by the wireless carriers to discriminate among mobile marketing companies. It provides an expedient, but unlawful excuse by T-Mobile to shut down a mobile marketer, and constitutes discriminatory treatment. No other carrier has taken issue with EZ Texting’s supposed failure to follow the MMA guidelines, even though all the other major carriers were presumably alerted to EZ Texting’s relationship with the website at issue.

Finally, even if the MMA guidelines were relevant to this case, T-Mobile admits that the webpage which was included with EZ Texting’s original application, [texttype.com](http://texttype.com), included information about how its service could be used “to update consumers and members on events and happening at various venues, schools, churches, etc.” Opp. 10, n.2. That original application also included a clear reference to EZ Texting’s other webpage, [eztexting.com](http://eztexting.com), which T-Mobile’s lawyers were able to easily find and use to show the multiple lawful uses of EZ Texting’s short code. Yet T-Mobile simultaneously claims that the original application didn’t

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shared short code, “...within 10 seconds, that keyword is live and can receive texts from any carrier in the United States.”).

<sup>13</sup> Available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020397340> (last visited Sept. 23, 2010).

include these very uses despite the reference to that website. Again, this just demonstrates that T-Mobile is attempting to use the MMA guidelines as a tool to block a lawful short code, not for any legitimate concerns about what the short code was being used for.<sup>14</sup>

**C. The balance of hardships tips decidedly in EZ Texting's favor.**

T-Mobile claims that hardship would result in maintaining a connection that it had maintained for three years without incident, asserting it could not protect its “network, customers, and brand” from EZ Texting’s “unauthorized” use of its short code to send and receive text messages from lawful businesses and non-profits. Yet T-Mobile never reveals a single customer complaint, or a technical problem that its network faces, or how its brand would be better protected by censoring its customers’ text messages. T-Mobile’s own blocking has caused more harm to its customers and brand than any EZ Texting messages voluntarily exchanged with T-Mobile’s customers ever could. T-Mobile’s customers are blocked from text messages they want. Content is censored. EZ Texting faces the destruction of its business. T-Mobile cannot credibly claim the balance of harm tips in its favor by a return of the status quo in place for three years without incident.

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<sup>14</sup> EZ Texting asserted alternative claims for tortious interference and antitrust in its complaint. Although T-Mobile claims it acted independently in censoring EZ Texting’s short code, the Declaration of Shane Neman shows that numerous conversations took place between OpenMarket and T-Mobile involving EZ Texting. Neman Decl. ¶¶ 23-27 (ECF No. 14). Because T-Mobile did not act independently, EZ Texting has stated a claim. Further, EZ Texting states a claim for tortious interference because T-Mobile has intentionally interfered with EZ Texting’s contracts with EZ Texting’s customers and its aggregators, 4INFO and OpenMarket. T-Mobile does not deny that EZ Texting’s customers either have or may terminate their contractual relationships with EZ Texting based on T-Mobile’s censorship. EZ Texting did not base its request for injunctive relief on these claims.

Dated: New York, New York,  
September 24, 2010

Respectfully submitted,

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d/b/a EZ Texting, Inc.*

**TAB A**

## Declaration of Jed Alpert

I, Jed Alpert, declare as follows:


1. I have been involved in the text and mobile messaging industry for nine years.
2. I am the Co-founder and Chief Strategy Officer for Mobile Commons.
3. Mobile Commons has been in business for three years.
4. Mobile Commons provides a software platform to businesses and nonprofits, which allows them to easily implement mobile applications that integrate text, web, and voice with their overall communication strategy.
5. A short code is a five or six digit number used for text-based services.
6. Each short code must be individually registered with each individual wireless carrier. This process is called "aggregation."
7. It is complicated, expensive, and time consuming to lease and aggregate a short code.
8. Mobile Commons has a number of shared short codes it has already acquired and aggregated available for use by its customers.
9. Many organizations prefer to use a shared short code because using an existing shared short code is significantly less expensive and faster than implementing a new code.
10. With a shared short code, organizations are given a specific term ("keyword") to publicize but are not the only organization using the actual short code. For example, an environmental organization might tell supporters to text "GREEN" to 12345 while a public health department might tell the public to text "FLU" to the same 12345 short code. Based on the texted term, Mobile Commons can correctly differentiate why the individual has texted that code.
11. A program brief is a detailed description of how a short code will be used.
12. In my experience a program brief is filed when a short code is first aggregated with the carriers.
13. This brief covers all potential uses of the short code and almost never requires updating.

14. Catholic Relief Services (CRS) is the international humanitarian agency of the US Catholic Community.
15. Shortly after the recent earthquake in Haiti CRS activated a relief effort to assist victims.
16. OpenMarket is a short code aggregator.
17. Short code aggregators serve as an intermediary between wireless carriers and text messaging platforms.
18. There are about seven carrier-approved aggregators and the carriers require that mobile platforms go through them rather than directly with the carriers.
19. Among other services, short code aggregators often help draft applications, suggest effective ways to present proposals to wireless carriers, and generally guide users through the short code process.
20. Aggregators are dependent on having strong and semi-exclusive relationships with each carrier.
21. It is not in the aggregators' commercial interests to push back against carriers in support of any individual service.
22. A text to give donation program allows a mobile phone user to text a keyword to a short code and have a donation charged to that user's phone bill
23. Carriers limit text to donations at either \$5 or \$10.
24. Carriers prevent recipient organizations from sending donors additional information via text message.
25. A text to call program allows a mobile phone user to text a keyword to a short code, receive a message back that contains a number to call or ask for text reply which will thus initiate a voice call from the recipient organization back to that donor.
26. Once the caller is connected with the organization, the organization has the opportunity to describe its program, offer volunteer opportunities, offer help to someone who reaches out for help, and take a donation.
27. There is no limit to the size of a donation given through a text to call program.
28. On January 12, 2010 an earthquake struck Haiti.

29. On or about January 16, 2010 CRS contacted Mobile Commons about a text to call donation program in support of CRS' Haitian relief program.
30. On January 16, 2010 Mobile Commons launched a text to call donation program.
31. On January 19, 2010 OpenMarket communicated to me that Sprint intended to shut off the shared short code used by CRS unless the text to call program was terminated.
32. I requested that OpenMarket provide me with a written declaration of Sprint's intent.
33. After much back and forth OpenMarket told me that Sprint was upset that Mobile Commons had not filed a program brief for the CRS program.
34. OpenMarket informed me that Sprint had agreed to delay shutting off our short code until it had reviewed the program brief.
35. Mobile Commons has never before been asked to file a program brief after a short code has been aggregated.
36. On January 22, 2010 Mobile Commons received a general notice from OpenMarket that all text message-related fundraising programs required per-program, per-carrier approval.
37. This is the first such demand for per-program, per-carrier approval I have ever seen.
38. I understand this requirement grants carriers sole discretion as to the contents of a properly opted into text message, as well as the ability to reject a program for any reason.
39. Granting carriers sole discretion to arbitrarily deny text message programs will have a chilling effect on innovation in this market.
40. On January 26, 2010 Mobile Commons filed a detailed program brief with OpenMarket.
41. On February 17, 2010 I was notified by OpenMarket that Sprint had formally rejected the CRS text to call program.
42. As a result, if I do not close the program within 40 days of receiving the notice Sprint intends to block access to my short code on the Sprint network.
43. If my short code is blocked by Sprint no program using it will be able to access Sprint customers.



44. This is true even if customers have opted into a program that relies on the short code.
45. Even if Sprint were to reverse its decision, I would not recommend that a customer promote a similar campaign in the future for fear of it being similarly disrupted.
46. I believe the ongoing uncertainty created by this decision will prevent innovation from occurring because of the investment risk to customers.
47. I expect that as this incident becomes known in the industry, other businesses that help businesses and non-profits design and implement campaigns will be similarly reluctant to create innovative text message programs.



Jed Alpert  
March 15, 2010

**TAB B**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

----- X  
MOBILE COMMONS, INC. :

Petitioner, :

-against- :

OPENMARKET INC. :

OpenMarket. :

----- X

Index No. 600989/2010-E

AFFIDAVIT OF JED ALPERT

STATE OF NEW YORK )  
 ) ss.:  
COUNTY OF NEW YORK )

JED ALPERT, being duly sworn, deposes and says:

The Short Code Industry

1. I am a Co-Founder and Chief Strategy Officer for Mobile Commons. I have been involved in the text and mobile messaging industry for nine years. Mobile Commons has been in business for three years.

2. Wireless network service providers, such as Sprint, Verizon and T-Mobile (collectively, "Carriers"), enable customers to send and receive messages via short message and multimedia message services ("SMS" and "MMS," respectively), also known colloquially as "text messaging." One type of text messaging involves the use of "short codes," which are five or six digit numbers designed to facilitate large-scale text messaging by organizations or businesses with individual customers. A wireless customer can text a short code for numerous purposes, such as donating to charitable causes, voting, entering contests, sending alerts, and requesting information. Each short code can be used in myriad ways via the use of "keywords." Different keywords can be texted to the same short code, each of which results in different

consequences. For example, a wireless customer could text the word "TAXES" to the short code 99999 to receive an immediate telephone call from a registered tax preparer, while texting the word "DIMES" would give \$10 to medical research.<sup>1</sup>

3. Short codes must be separately leased from, and registered with, each individual Carrier in a complicated, expensive and time consuming process known as "aggregation." Because of the difficulty of this process, Carriers require that all applications for short codes be made through approximately a half dozen industry intermediaries called "Aggregators." OpenMarket is one such Aggregator. Aggregators often help organizations draft applications for short codes, suggest effective ways to present proposals to wireless carriers, and generally guide users through the short code application process. One component in that application process is the completion of a Short Code Program Summary, also known as a "program brief," which provides a general description of the scope, duration and purpose for which a short code is sought.

4. Notwithstanding the involvement of Aggregators, the process of obtaining a short code is still too onerous for many organizations to undertake on their own. Consequently, such organizations often look to other entities called Application Service Providers ("ASPs"). ASPs navigate the process of obtaining short codes from Aggregators and then provide short code connectivity to organizations for the sake of expedience and economy. It is common industry practice for ASPs to provide access to the same short code to multiple customers through the use of different keywords. Thus, possession of one short code by an ASP may be sufficient to support the needs of dozens of customers. Short codes devoted to the needs of multiple

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<sup>1</sup> These are fictitious examples.

customers are called “shared short codes.” The use of shared short codes has been a common, and universally accepted, industry practice for many years.

**Mobile Commons and Its Business**

5. Mobile Commons is an ASP that holds approximately ten short codes, two of which are shared short codes that may be used by customers for a limited time and on short notice, for much less cost and inconvenience than would be involved if they leased full-time access directly from an Aggregator. The vast majority of Mobile Commons’s customers are charities and other non-profit organizations that serve the public interest. They include the American Association of Retired Persons (“AARP”), Habitat for Humanity, City Harvest, Oxfam, the International Rescue Committee, the March of Dimes, the Children’s Aid Society, and many others. Some Mobile Commons customers have a short code dedicated exclusively to them, while others use shared short codes. Numerous other ASPs also use shared short codes.

**The Enrollment Agreement**

6. In March 2007, Mobile Commons entered into an Enrollment Agreement with OpenMarket. (A copy of the Enrollment Agreement is attached as Exhibit A.) [REDACTED]

[REDACTED] Mobile Commons has operated all of its short codes through OpenMarket. [REDACTED]

[REDACTED]

[REDACTED]

7. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

8. [REDACTED]

9. Mobile Commons fully complied with the Enrollment Agreement and paid all required fees.

**The Relationship Between OpenMarket and Mobile Commons**

10. At the outset of the parties' relationship, Mobile Commons disclosed the nature of its business to OpenMarket, and the ways in which Mobile Commons intended to use the short code connectivity and hosting provided by OpenMarket. Specifically, Mobile Commons personnel repeatedly informed OpenMarket, both orally and in writing, that they routinely made use of shared short codes, and OpenMarket acknowledged its understanding of this practice. (A copy of an E-mail from Jed Alpert to Kelly Hackman, dated July 10, 2007, is attached as Exhibit B. A copy of an e-mail from Cristina Milford to Ben Stein, dated Mar. 29, 2010, is attached as Exhibit C.)

11. Indeed, when OpenMarket aggregated short code 30644, it advised Mobile Commons about the content of the program brief, to ensure that it could be used as a shared short

code (that is, one which would be used by more than one of Mobile Commons's customers). OpenMarket advised Mobile Commons that the program brief for 30644 should specify the ways in which the code might be used by Mobile Commons and its customers. (A copy of the First Program Brief for Short Code 30644 is attached as Exhibit D.) Thus, the program brief stated that 30644 might be used for "[v]oting," "[a]lerts," "[q]uery [s]ervice[s]," "[i]nteractive TV," "[i]nteractive [r]adio," "[i]n [v]enue," "[c]ontest[s]," "[t]ext-to-Jumbotron" and "[o]ther." (Ex. D at 2.) These encompassed the ways in which Mobile Commons anticipated, and advised OpenMarket, that its customers would use the short code. In the initial program brief, Mobile Commons provided specific detail only with respect to the first program it intended to operate, namely, a program on behalf of the American Friends Service Committee. (Ex. D at 2.)

12. The program brief for 30644 was approved by all Carriers and was used by dozens of Mobile Commons clients over the ensuing years, with the full knowledge of OpenMarket. At no time did OpenMarket complain that Mobile Commons used 30644, or any other short code, improperly. Nor did OpenMarket ever suggest that it was improper to operate shared short codes, or request that Mobile Commons modify its program brief for 30644 to reflect more accurately the uses to which the code was being put. Indeed, those uses were already reflected accurately in the existing program brief, which had been prepared based on OpenMarket's advice.

### **The Catholic Relief Services Controversy**

13. On January 12, 2010 an earthquake occurred in Haiti that received extensive coverage by news media in the United States. On or about January 16, 2010, the organization Catholic Relief Services ("CRS") requested assistance from Mobile Commons in developing and implementing a "text to call" donation program, pursuant to which CRS would text interested

individuals with an alert containing a specific keyword to send if they wanted to be contacted by an operator who would accept pledges. Mobile Commons launched such a program for CRS the same day on shared short code 30644.

14. On January 19, 2010 OpenMarket suddenly informed Mobile Commons that one Carrier, Sprint, intended to shut off the 30644 short code unless the CRS program was terminated. Mobile Commons repeatedly requested that OpenMarket or Sprint provide written notice of Sprint's supposed intent to terminate and the reasons for it, but no such written notice was ever received. Instead, after a lengthy series of exchanges, OpenMarket stated Sprint was upset that Mobile Commons had not filed a modified program brief for 30644 before commencing the CRS program. According to OpenMarket, Sprint would agree to delay shutting off the 30644 short code until Mobile Commons was given an opportunity to modify its program brief.

15. Prior to this communication from OpenMarket, purportedly on behalf of Sprint, OpenMarket had never asked Mobile Commons to file a modified program brief for any shared short code. The request came as a surprise to Mobile Commons, because the CRS program had done nothing more than send an "alert[]," which was one of the applications set forth in the existing program brief. (Ex. D at 2-3.) Accordingly, the CRS program was within the parameters of the approved program, and nothing more was required. Nonetheless, in an attempt to resolve the issue, Mobile Commons did as requested and filed a revised program brief on January 26, 2010. (A copy of the Second Program Brief for Short Code 30644 is attached as Exhibit E.)

16. In addition, on January 22, 2010, OpenMarket sent Mobile Commons a notice, addressed to customers, stating that all text message-related fundraising programs required per-



program, per-carrier approval. This was the first time any such claim or suggestion had been made by OpenMarket.

17. On February 10, 2010, representatives of Mobile Commons and OpenMarket participated in a conference call to discuss developments concerning the CRS matter. During that call, OpenMarket's representatives stated that ninety percent of their customers used shared short codes and acknowledged that they had no intention of putting them out of business, or of terminating their access to short codes. Yet, a week later on February 17, 2010, OpenMarket informed Mobile Commons that Sprint had formally rejected the modified program brief for 30644 and that it had to terminate the CRS program on the Sprint network within 40 days. As far as Mobile Commons is aware, Sprint was the only Carrier to reject the modified program brief.

18. Wholly apart from the controversy over the CRS program, during February and March, 2010, Mobile Commons and OpenMarket engaged in extensive negotiations to revise and extend the Enrollment Agreement to provide better pricing to Mobile Commons due to increased message volume. (Copies of certain e-mails concerning these negotiations are attached as Exhibit F.)

19. On March 24, 2010 an article appeared in the *New York Times* describing Sprint's rejection of the CRS program brief. (A copy of the *New York Times* Article, dated Mar. 24, 2010, is attached as Exhibit G.) The article suggested certain individuals at CRS were extremely displeased with Sprint for rejecting the program. (Ex. G.) The following day, two public interest organizations—Public Knowledge and Free Press—sent a letter to the Federal Communication Commission ("FCC") outlining a series of regulatory and constitutional objections to Sprint's handling of the CRS program, and urging the Commission to adopt a more stringent regulatory

framework for text messaging services. (A copy of the Letter from H. Feld and M. Chris Riley to J. Genachowski, dated Mar. 25, 2010, is attached as Exhibit H.) I submitted a supporting declaration that was attached to that letter. (A copy of the Declaration of Jed Alpert, dated Mar. 15, 2010, is attached as Exhibit I.) After the New York Times article about the controversy was published, Sprint stated publicly that it had no intent to terminate the CRS program.

**OpenMarket Retaliates by Terminating Mobile Commons's Access to All Short Codes**

20. On or about March 10, 2010, I understand that Jay Emmett, General Manager of OpenMarket, telephoned Anthony Risicato, CEO of Mobile Commons, and demanded to know “[w]hat the f--- is going on? Why is the press calling my CEO?” After the appearance of the *New York Times* article on March 24, OpenMarket ceased all substantive communication with Mobile Commons concerning the parties’ contract negotiations, despite repeated queries from Mobile Commons and attempts to get the conversations re-started. (Copies of certain e-mails in which Mobile Commons attempted to get a response from OpenMarket are attached as Exhibit J.)

21. On April 14, 2010, having been frustrated by OpenMarket’s lack of communication, Mobile Commons entered into an agreement to move all of its short codes to another Aggregator.

22. In the evening of April 15, 2010, without any prior notice, OpenMarket sent a letter to Mobile Commons announcing that all of its connectivity services (and the Enrollment Agreement) would be terminated effective April 16 (the “Termination Letter”). (A copy of the Termination Letter is attached as Exhibit K.) The Termination Letter did not state that Mobile Commons had ever breached any specific provision of the Enrollment Agreement (nor has OpenMarket ever made such a claim). (Ex. K.) Rather, the Termination Letter asserted that

Mobile Commons had violated the Enrollment Agreement by “adding/changing originally approved carrier programs . . . without filing the required program briefs, or amendments to those existing program briefs.”<sup>2</sup> Essentially, the Termination Letter claimed that Mobile Commons had operated 30644 as a shared short code without filing required modifications to its program brief for each use. (Ex. K.) OpenMarket’s assertion that Mobile Commons breached the Enrollment Agreement by operating a shared short code was baseless, and moreover, contradicted a three-year course of dealing between the parties, as well as OpenMarket’s previous advice and representations to Mobile Commons. And OpenMarket’s list of “[p]artial [e]xamples” of “unapproved use” contained a number of keywords from programs that had long been terminated, including “Debt” and “IOH.” At no time prior to the Termination Letter did OpenMarket inform Mobile Commons that it viewed these programs, or any other action, as a breach of the Enrollment Agreement.

23. The Termination Letter further asserted that Mobile Commons’s purported breach caused OpenMarket to “breach its agreement(s) with the effected carriers over whose network[s] programs associated with the Short Code 30644 are operating.” (Ex. K.) This too is false. On April 15, the very same day the Termination Letter was sent, Sprint sent a letter to OpenMarket headed “*URGENT MATTER[,] IMMEDIATE REPLY REQUESTED.*” (Emphasis in original.) (A copy of the Letter from Mark Yarskosky to Jay Emmet, dated Apr. 15, 2010, is attached as Exhibit L.) The letter stated that “Sprint requests that OpenMarket make an additional effort to contact Mobile Commons . . . Sprint believes that it is appropriate to make an additional effort to provide Mobile Commons the opportunity to bring usage of its leased short

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<sup>2</sup> Although the Termination Letter alleged that Mobile Commons violated the Agreement with respect to short code 60344, it appears that this is a typo as Mobile Commons has never been involved with any such short code. OpenMarket apparently meant to refer to short code 30644.

codes into compliance . . . .” (Ex. L.) Sprint has also expressly acknowledged—in correspondence with the FCC *that specifically concerned Mobile Commons and CRS*—that short codes *can* be used on a shared basis. (A copy of the Letter from C. McKee to J. Genachowski, dated April 2, 2010, is attached as Exhibit M. The relevant portion can be found in footnote 6.)

24. Notwithstanding that OpenMarket was aware from the outset of the parties’ relationship that Mobile Commons shared short codes across its customers, it made no attempt to discuss its purported concerns with Mobile Commons prior to sending the Termination Letter. Nor did OpenMarket give Mobile Commons any opportunity to “cure” any perceived deficiencies in its program. Instead, in a blatant breach of the Enrollment Agreement, OpenMarket abruptly terminated the entire Agreement—and connectivity on every single short code that OpenMarket provided to Mobile Commons—on less than 24 hours’ notice, alleging a specious violation of that Agreement.

25. At approximately 11:00 a.m. on April 16, 2010, less than 24 hours after its purported “notice,” OpenMarket terminated all connectivity to Mobile Commons. Despite repeated efforts to contact it to negotiate a resolution of the matter, both directly and through counsel, OpenMarket has refused to communicate with Mobile Commons since sending the Termination Letter.

#### **Mobile Commons Faces an Imminent Threat of Irreparable Harm**

26. As a result of OpenMarket’s termination of its service on April 16, 2010, Mobile Commons’s operations have been effectively shut down. Without the connectivity which OpenMarket terminated, the company is unable to provide the full services it promised to its 100-plus customers. Currently, Mobile Commons is not able to provide any short code access to its clients at all, and neither outgoing nor incoming texts can be sent or received. To cite but one

example, next week Mobile Commons is supposed to assist a major media client in conducting a television text program that is expected to draw over 500,000 responses in one day alone. That project will be impossible without short code access.

27. Mobile Commons is working vigorously to remedy the situation and provide short code service to its customers as quickly and completely as possible. According to Carrier guidelines, it will take up to six weeks to complete the transition to another Aggregator, although Mobile Commons is making every effort to expedite this process.

28. The consequences of this abrupt and complete termination of short code connectivity for Mobile Commons's business are dire. Mobile Commons must be able to provide immediate and continuous service to its customers. An inability to do so will inevitably result in the loss of those customers, in whom the company has invested significant time and resources. (Indeed, many customers may already have made alternative arrangements given the service disruption that has continued since April 16.) Once these customers leave Mobile Commons, it will be very difficult to convince them to return because customers incur significant costs and expend significant effort when they switch. This will significantly and irreparably destroy Mobile Commons's client base. Indeed, if the situation is not remedied, Mobile Commons will lose most, if not all, of its current customers within days and could cease to operate as a going concern within weeks.

29. Further, many Mobile Commons clients rely overwhelmingly on it for critical communications support in connection with programs vital to the public interest. For example:

- Client National Safe Place uses Mobile Commons to allow abused and at risk children to text in their location and receive the address of the closest National Safe Place shelter.

- Client Intelecare uses Mobile Commons to send alerts to patients regarding the type, dosage and timing of potentially life saving medications.
- Client Alexandria Virginia Office on Women uses Mobile Commons to communicate with women about health and substance abuse issues.

All of these services have been interrupted by OpenMarket's unjustified and unlawful conduct, thus putting Mobile Commons's client relationships (and critical public interests) under direct and imminent threat.

30. In addition, the termination of service has caused and will continue to cause irreparable harm through loss of customer confidence and trust, loss of revenue from existing and prospective customer relationships, loss of goodwill and loss of business reputation. Until OpenMarket's actions, Mobile Commons was a growing company, and was adding new customers each month. But a continued shutdown of the company's short code service will eviscerate its ability to recruit and retain new customers.

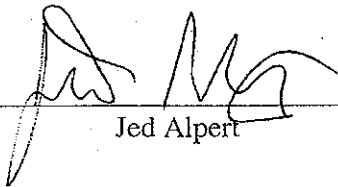
31. The economic consequences of this unlawful shutdown have already been massive. Mobile Commons is now suffering material revenue loss every day due to continuous platform down time, and is being deprived of the cash flow it needs to continue operations.

32. Mobile Commons is in an early stage of business development, and has only raised an initial round of financing. OpenMarket's termination of services to Mobile Commons has triggered immediate revenue loss, and materially harmed the company's ability to maintain and grow revenues. These factors, together with the potential collapse of its client base, will pose significant hurdles to the attraction of new capital investments. In addition, if Mobile Commons suffers an inability to follow through on its business plan for a period of days or

weeks due to OpenMarket's termination of service, its ability to convince investors that it is an attractive investment opportunity will be significantly hampered.

33. In sum, OpenMarket's termination of service threatens the viability of Mobile Commons's business. If service is not restored imminently, Mobile Commons will suffer devastating consequences in terms of loss of customers, revenue, goodwill, business reputation, and ability to obtain future financing.

34. [REDACTED] Mobile Commons intends to commence an arbitration against OpenMarket in the near future through the American Arbitration Association. However, I understand the arbitration process requires time and Mobile Commons needs immediate relief to save its business.

  
\_\_\_\_\_  
Jed Alpert

Sworn to before me  
this 18th day of April, 2010

  
\_\_\_\_\_  
Notary Public

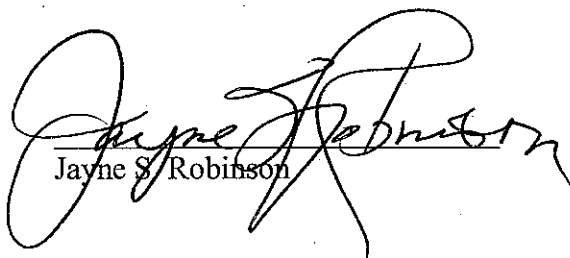
REGINA VULLIJE  
Notary Public, State of New York  
No. 01906100007  
Qualified in Queens County  
Commission Expires March 8, 2012





CERTIFICATE OF SERVICE

I, JAYNE S. ROBINSON, hereby certify that on September 24, 2010, a copy of the foregoing Reply Memorandum in Support of Motion for Preliminary Injunction was filed electronically. Notice of this filing will be sent by e-mail by operation of the Court's electronic filing system to all parties, who may access this filing through the Court's system.

  
Jayne S. Robinson