

**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.

Civil Action No. 10-CIV-7205

**MEMORANDUM IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND
APPLICATION FOR PRELIMINARY INJUNCTION**

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Club Texting, Inc. d/b/a EZ Texting, Inc. (“EZ Texting”), by its undersigned counsel, moves for a temporary restraining order against T-Mobile USA, Inc. (“T-Mobile”) and states as follows:

I. RELIEF REQUESTED

EZ Texting requests an Order ruling that:

- A. T-Mobile is enjoined from blocking text messages to and from EZ Texting;
- B. granting EZ Texting such other and further relief as the Court shall deem just and equitable.

II. PRELIMINARY STATEMENT

This action arises 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 is a mobile marketing company that uses a short code (313131) to send text messages to cell phone users who request them from businesses and non-profits who use EZ Texting’s services. EZ Texting’s short code allows cell phone users to exchange text messages with EZ Texting’s customers.

On or about Friday, September 10, 2010, T-Mobile started blocking its customers from exchanging text messages with EZ Texting’s customers because T-Mobile subjectively did 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 suspended the customer in question’s use of EZ Texting’s 313131 short code. Despite EZ Texting’s immediate acquiescence to T-Mobile’s objections, 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.

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. EZ Texting's customers are already complaining to EZ Texting about their inability to exchange text messages with T-Mobile's customers. 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. Therefore, EZ Texting has been and continues to be irreparably damaged by T-Mobile's unlawful blocking.

III. STATEMENT OF FACTS

This Statement of Facts is based on the Complaint and Declaration of Shahriyar Neman filed herewith. EZ Texting was formed in 2006 and 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. 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.

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.

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.

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

EZ Texting's business depends on being connected to the wireless service providers. 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.

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. In other words, EZ Texting is connected to 4INFO who connects to Open Market who then connects to T-Mobile. EZ Texting has been indirectly connected to T-Mobile for over three years. T-Mobile has never blocked EZ Texting before now.

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

The stated reason was that T-Mobile did not approve of EZ Texting’s business relationship with the website <http://legalmarijuanadispatch.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. EZ Texting had been working with this website for over a year before T-Mobile’s current objections arose. 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.

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. 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.

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

Despite EZ Texting's efforts to have its indirect interconnection with T-Mobile unblocked, T-Mobile has refused. 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. Upon information and belief, T-Mobile has not subjected any other mobile marketing company similar to EZ Texting to such a burdensome process.

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, Protexting.com, Involvemobile.com, and mobileStorm (mobileStorm.com). Other wireless service providers were also aware of the website, but none have blocked EZ Texting based on it.

EZ Texting is being irreparably harmed by T-Mobile's past and on-going blocking. EZ Texting faces immediate irreparable harm because T-Mobile customers cannot exchange text messages with EZ Texting's customers. 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. Over the several days during which T-Mobile has maintained the blocking, EZ Texting has received numerous complaints from its customers about their inability to exchange text messages with T-Mobile's customers.

In addition to the current on-going irreparable harm, T-Mobile customers will stop sending EZ Texting text messages when they are blocked. EZ Texting's customers are already complaining to EZ Texting about their inability to exchange text messages with T-Mobile's customers. The business and non-profits that use EZ Texting to send and receive text messages will likely stop using EZ Texting if they cannot be reached by T-Mobile's customers. EZ Texting will not be able to attract new business because of T-Mobile's blocking. EZ Texting will be put out of business if businesses and non-profits do not use EZ Texting's services. 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.

IV. STANDARD FOR GRANTING A TEMPORARY RESTRAINING ORDER

To receive a temporary restraining order or a preliminary injunction, the movant must make a showing of: "(1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor." *NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 476 (2d. Cir.2004); *Monserate*

v. New York State Senate, 599 F.3d 148, 154 (2d Cir. Mar. 16, 2010). The standard for a temporary restraining order is the same as for a preliminary injunction in the Second Circuit. *Jackson v. Johnson*, 962 F. Supp. 391, 392 (S.D.N.Y. 1997).

The movant does not need to provide evidence guaranteeing a verdict in his favor but, rather, only must establish a reasonable probability of success. *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995); *see also Oburn v. Shapp*, 521 F.2d 142, 148 (3d Cir. 1975) (“It is not necessary that the moving party’s right to a final decision after trial be wholly without doubt; rather, the burden is on the party seeking relief to make a prima facie case showing a reasonable probability that it will prevail on the merits.”). When applying this standard, a district court may rely on the complaint, declarations and other hearsay as such evidence is appropriate given the character and objectives of an injunction proceeding. *Levi Strauss*, 51 F.3d at 985.

V. ARGUMENT

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

EZ Texting’s entire business is based on the ability of its customers to exchange text message calls to the customers of wireless service providers like T-Mobile. T-Mobile is maintaining a block on text messages to and from EZ Texting’s short code (313131). A short code is essentially a telephone number for text message calls. T-Mobile’s unlawful blocking is presently and irreparably harming EZ Texting by foreclosing T-Mobile’s customers from exchange text messages with EZ Texting’s customers using the 313131 short code.

Four wireless service providers control the vast majority of the wireless telecommunications market, with T-Mobile controlling approximately 15% of that market. *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, *2 & *5 (rel. May 20, 2010). T-Mobile’s unlawful blocking of EZ Texting precludes EZ Texting and its current and prospective customers from reaching those millions of T-Mobile customers, and likewise those millions of T-Mobile customers cannot reach EZ Texting’s customers. Even the loss of contact with a portion of the overall cell phone user population is irreparable harm. *See e.g., Donohue v. Paterson*, Nos. 1:10-CV-00543, 10-CV-00544, 1:10-CV-00546 , 1:10-CV-00549, 2010 WL 2134140, *3 (N.D.N.Y. May 12, 2010) (“Plaintiffs meet their burden of showing that the permanent 20% loss in salary or wages that directly follows from the furlough plan constitutes irreparable harm.”).

An irreparable harm is a harm for which “a monetary award cannot be adequate.” *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir.1979). Here, EZ Texting cannot be compensated by the loss of goodwill when its customers cannot exchange text messages with T-Mobile’s customers. Blocking, once done, cannot be undone. Moreover, EZ Texting’s entire business will fail because it cannot send or receive text messages from one of the nation’s largest wireless service providers. Not only are *all* of EZ Texting’s current customers incapable of reaching a significant share of the nation’s wireless users over EZ Texting’s short code, prospective customers are highly unlikely to engage EZ Texting in light of its inability – caused directly by T-Mobile’s unlawful blocking – to provide access to T-Mobile’s millions of customers.

As the Second Circuit has explained, the “loss of ... an ongoing business representing many years of effort and the livelihood of its ... owners, constitutes irreparable harm” that cannot be fully compensated by monetary damages. *See Roso-Lino Beverage Distributors, Inc. v. Coca-*

Cola Bottling Co. of New York, Inc., 749 F.2d 124, 125-26 (2d Cir.1984); *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 435 (2d Cir. 1993) (“a threat to the continued existence of a business can constitute irreparable injury”). EZ Texting has been connected with T-Mobile for over three years, and is being irreparably harmed by T-Mobile’s blocking. The businesses and non-profits that use EZ Texting to send and receive text messages cannot reach T-Mobile’s customers. They will likely cease doing business with EZ Texting if they learn that EZ Texting is blocked by T-Mobile. EZ Texting’s customers will abandon EZ Texting and move to other businesses.

This claim of irreparable harm is not unduly speculative, but rather an immediate and directly foreseeable harm caused by T-Mobile’s unlawful blocking. Over the several days during which T-Mobile has maintained the blocking, EZ Texting has received numerous complaints from its customers about their inability to exchange text messages with T-Mobile’s customers. Besides the immediate harm that EZ Texting is experiencing because of T-Mobile’s blocking, EZ Texting should not have to wait until its business is destroyed to show the harm caused by T-Mobile’s blocking. Moreover, the burden on T-Mobile is extraordinarily inconsequential in comparison – all T-Mobile must do is maintain service to EZ Texting’s number to allow to allow EZ Texting’s and T-Mobile’s respective customers to communicate with each other, which is precisely what T-Mobile was doing before it started unlawfully blocking EZ Texting’s entire service.

The purpose of injunctive relief is to preserve the rights of the parties pending final disposition of their dispute. *See Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985). While T-Mobile may claim it has the right to block *all* of EZ Texting’s text messages because of some subjective concerns over the content of a single user’s messages (which contained no

illegal or objectionable content), the Court should preserve the status quo until that claim is decided. EZ Texting should not have to experience total blocking and face the destruction of its business in the face of T-Mobile's arbitrary blocking. The Court should issue a temporary restraining order enjoining T-Mobile's blocking text messages to and from EZ Texting.

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

EZ Texting has asserted several claims against T-Mobile, each of which EZ Texting is likely to establish successfully. This factor therefore also supports the Court's entry of a temporary restraining order and a preliminary injunction.

First, EZ Texting has asserted a meritorious claim under the Communications Act, 47 U.S.C. § 201, *et seq.*, regarding T-Mobile's unlawful call blocking practices. The Federal Communications Commission ("FCC") has repeatedly prohibited call blocking for any reason, and yet this is precisely the action that T-Mobile has taken against EZ Texting. *See, e.g., Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, 22 FCC Rcd 11629, 11631 ¶ 6 (2007) (reaffirming prohibition against call blocking by any carrier: "Commission precedent provides that no carriers ... may block, choke, reduce or restrict traffic in any way."); *Blocking Interstate Traffic in Iowa*, FCC 87-51, Memorandum Opinion and Order, 2 FCC Rcd 2692 (1987).¹ Thus, through its undisputed call-blocking of communications to or from EZ Texting, T-Mobile is engaged in an unjust and unreasonable practice under sections 201 and 202 of the Communications Act that the FCC has specifically forbidden carriers from doing.

Second, by blocking EZ Texting's text messages, T-Mobile has also violated the FCC's nondiscrimination policy and 47 U.S.C. § 202(a)'s prohibition against "unjust or unreasonable

¹ The FCC 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) (affirming FCC's determination that a text message is a call for purposes of the Telephone Consumer Protection Act, 47 U.S.C. § 227).

discrimination in ... practices ... or services” and against “subject[ing] any particular person [or] class of persons ... to any undue or unreasonable prejudice or disadvantage.” 47 U.S.C. § 202(a). As the FCC and D.C. Circuit have explained, while wireless carriers may have more flexibility in pricing their services than certain classes of wireline carriers may enjoy, wireless carriers are still *common* carriers and thus subject to the same robust prohibition against unlawful customer discrimination that applies to all carriers, wireless and wireline alike. “As common carriers under [47 U.S.C.] § 332, CMRS providers still have duties. They cannot - as the [FCC] put it - refuse ‘to deal with any segment of the public whose business is the “type normally accepted.”’ [] They cannot decline ‘to serve any particular demographic group (e.g. customers who are of a certain race or income bracket).’” *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) (internal citations omitted) (quoting *Orloff v. Vodafone Airtouch Licenses LLC d/b/a Verizon Wireless*, 17 FCC Rcd. 8987, 8997, 2002 WL 992190 (2002)).

Here, it is undisputed that T-Mobile is the only wireless carrier that has blocked EZ Texting’s communications (both willing communications from T-Mobile’s own customers to EZ Texting’s customers, and from EZ Texting’s customers to T-Mobile’s customers). EZ Texting’s messages are the “type normally accepted” – and are in fact accepted – by every other wireless carrier in the country. Thus, having blocked T-Mobile’s millions of customers from communications with EZ Texting’s various customers – whether that be the local pizza shop advertising sales, a church distributing its services schedule, or a non-profit organizing its community outreach program – T-Mobile has engaged in the “unreasonable discrimination” and inflicted on EZ Texting the “unreasonable prejudice or disadvantage” that § 202(a) was specifically enacted to prevent.

- C. Alternatively, EZ Texting has raised sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tips decidedly in EZ Texting's favor.**

At the very least, EZ Texting has raised serious questions about the legal ability of a wireless service provider, T-Mobile, to block its customers from exchanging text messages with EZ Texting's customers. Even though T-Mobile is a common carrier obligated to comply with the Telecommunications Act and the FCC's regulations regarding call blocking and nondiscrimination, T-Mobile apparently takes a novel view that it may flout its obligations and unilaterally decide what companies its customers may or may not exchange text messages with. This is a fair ground for litigation given the Telecommunications Act's prohibitions on unjust, unreasonable, and discriminatory practices. And as explained above, the balance of hardship tips decidedly in EZ Texting's favor because it is experiencing irreparable harm and faces the destruction of its business, while T-Mobile must simply do what it had been doing for the past three years, allow its customers to exchange text messages with EZ Texting's customers.

VI. CONCLUSION

For all of the foregoing reasons, EZ Texting respectfully requests that the Court grant its motion for a Temporary Restraining Order and for a Preliminary Injunction.

September 17, 2010

Respectfully submitted,

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