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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Cellco Partnership d/b/a Verizon
Wireless,

Plaintiff,

vs.

Jason Hope, et al.,

Defendants.

No. CV11-432-PHX-DGC

**DEFENDANTS'
FIRST AMENDED
COUNTERCLAIM**

Come now Defendants and Counter-Plaintiffs Cylon, LLC, Text Charge, LLC,
Eye Level Holdings, LLC, New Economic Order, LLC, Saguaro Media, LLC, New EIN,

1 LLC, Ink Sign Holdings, LLC, Yellow Ball Holdings, LLC, Message Plan, LLC,
2 FYISMS.COM, LLC, MYTXTSMS.COM, LLC, Standard Plan, LLC, Standard
3 Message, LLC, SMS City, LLC, City-O-Games.Com, LLC, Hot-Hot-News.Com, LLC,
4 WorldTxts.Com, LLC, TopicText.Com, LLC, All-Game-Cheats.Org, LLC, News Alerts,
5 LLC (collectively referred to herein as “Defendants,” “Counter-Plaintiffs” and/or
6 “JAWA”), and file the following First Amended Counterclaim against Plaintiff and
7 Counter-Defendant Cellco Partnership d/b/a Verizon Wireless (“Verizon”):

8 I. INTRODUCTION

9 1. JAWA is a job creator and currently employs approximately 240 people in
10 and around the Scottsdale, Arizona area. Many of these employees are highly-skilled
11 software engineers, graphic artists, programmers, writers and editors who develop
12 exclusive content for JAWA’s products. Verizon has done business with JAWA for the
13 past four years. Verizon charges JAWA thirty percent (30%) of collected customer fees,
14 resulting in Verizon’s receipt of over \$30 million since 2008.

15 2. Suddenly and without warning, on March 7, 2011, Verizon and its claimed
16 "partner," the Texas Attorney General, filed similar injunction actions against JAWA and
17 individuals associated therewith claiming that the defendants were engaged in a "complex
18 scam." The lawsuits neither identified a flood of, nor even a single, customer complaint,
19 hardly surprising given JAWA’s "no questions asked guaranteed refund policy." Indeed,
20 Verizon’s preemptive legal filing violates the parties’ course of dealings and Verizon’s
21 own audit practices. Verizon’s published practices allow for 10 business days to cure the
22 type of violations alleged in its complaint.

23 3. The Verizon lawsuit purports to demonstrate deceptive JAWA web pages,
24 but at least one of the screen shots depicted has been manipulated and distorted, effecting
25 a fraud on the Court. *See Defendants’ Motion to Strike Paragraph 76 of Plaintiff’s*
26 *Complaint for Fraud* which is being filed contemporaneously herewith.

27 4. Verizon was not content to let the litigation run its course, but rather set
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1 about to economically strangle JAWA by cutting off all sources of its funding and to ruin
2 its business by a series of malicious disparagements to the world-wide press and others.
3 For example, it instructed four companies known as Aggregators to freeze all funds they
4 held which were owed to JAWA for its products. *See Exhibit 1* (Motricity Letter). The
5 Aggregators (and Verizon) are withholding approximately \$19 million in charges for
6 messaging services JAWA *has already provided* and for which its customers have been
7 billed.

8 5. Verizon also instructed the Aggregators that they "must prevent" new
9 customers from signing up for JAWA's services and "by the end of the day tomorrow"
10 must "opt out" all existing customers, meaning that those customers subscribing to
11 JAWA's services would be cut off without notice and without consent. Verizon has
12 ordered the Aggregators to "terminate all of the short codes on its platform to ensure that
13 all messaging and premium charges are stopped." The net effect of these actions has
14 been to stop all JAWA's domestic revenue from all sources and to reduce JAWA's cash
15 flow to nearly zero, thus imperiling the jobs, livelihoods, health insurance and other
16 benefits of over 240 employees currently at work in JAWA's Scottsdale, Arizona facility.

17 6. Verizon went further and distributed a press release which stated that
18 JAWA was engaged "in an ongoing scheme... to defraud Verizon and its customers."
19 The press release described Texas Attorney General Greg Abbott as "a strong partner in
20 shutting down this fraudulent activity." The Texas Attorney General has since disavowed
21 any "partnership" with Verizon.

22 7. Verizon also called on its competitors to "quickly follow and put a stop to
23 this fraud and ensure all mobile customers are protected."

24 8. JAWA's business practices are not fraudulent. This is a relatively new
25 industry that is evolving, with constant improvements in business practices, technology,
26 and quality of its product. Verizon has willingly accepted and retained the profits over
27 the last four years from what it now describes as a "criminal enterprise" even though,
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1 during this time, it audited these practices. With the tremendous increase in business
2 volume, Verizon not only seeks to give advantage to JAWA's competitors but also take
3 for itself an even greater slice of the lucrative Premium SMS (short message service)
4 business, not being content with the substantial profit it is currently earning from
5 JAWA's business. It may also be seeking to divert public regulatory attention from its
6 recent record \$25 million fine from the Federal Communications Commission for its
7 \$1.99 per customer "mystery charge" for data and the payment of \$52 million in refunds
8 to its customers.

9 9. JAWA asks the court to enjoin Verizon and parties acting in concert with it,
10 such as the Aggregators, from continuing to withhold monies that JAWA has already
11 earned, from blocking new customer acquisitions and from effecting the forced "opt out"
12 of existing customer subscribers. JAWA has provided millions of customers with
13 services and products for which they have paid without complaint. Nonetheless, Verizon
14 and certain Aggregators, at Verizon's direction, continue to wrongfully withhold the
15 money that rightly belongs and should be immediately paid to JAWA. In addition,
16 JAWA seeks a preliminary injunction in accord with Paragraph 49 herein.

17 **II. PARTIES, JURISDICTION, AND VENUE**

18 10. Counter-Plaintiff Eye Level Holdings, LLC is organized under Delaware
19 law and is comprised of two members, New Economic Order, LLC and Saguaro Media,
20 LLC. New Economic Order, LLC is comprised of one member, Jason Hope, a citizen of
21 Arizona. Saguaro Media, LLC is comprised of one member, the Green Door Trust. The
22 trustees of the Green Door Trust are Wayne Destefano, a citizen of Arizona, and Jennifer
23 DeStefano, husband and wife, and residents of Arizona.

24 11. Counter-Plaintiff New Economic Order, LLC is organized under Delaware
25 law and is comprised of one member, Jason Hope, a resident of Arizona.

26 12. Counter-Plaintiff Saguaro Media, LLC is organized under Delaware law
27 and is comprised of one member, the Green Door Trust. The trustees of the Green Door
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1 Trust are Wayne DeStefano and Jennifer DeStefano, residents of Arizona.

2 13. Counter-Plaintiff Cylon, LLC is no longer an existing entity. Through a
3 merger, Cylon, LLC became Eye Level Holdings, LLC. Eye Level Holdings, LLC is
4 comprised of two members, New Economic Order, LLC and Saguaro Media, LLC. New
5 Economic Order, LLC is comprised of one member, Jason Hope, a resident of Arizona.
6 Saguaro Media, LLC is comprised of one member, the Green Door Trust. The trustees of
7 the Green Door Trust are Wayne DeStefano and Jennifer DeStefano, residents of
8 Arizona.

9 14. Counter-Plaintiff SMS City, LLC is organized under Delaware law and is
10 comprised of one member, Pegasus Blue Holdings, LLC. Pegasus Blue Holdings, LLC is
11 comprised of one member, Eye Level Holdings, LLC. Eye Level Holdings, LLC is
12 comprised of two members, New Economic Order, LLC and Saguaro Media, LLC. New
13 Economic Order, LLC is comprised of one member, Jason Hope, a resident of Arizona.
14 Saguaro Media, LLC is comprised of one member, the Green Door Trust. The trustees of
15 the Green Door Trust are Wayne DeStefano and Jennifer DeStefano, residents of
16 Arizona.

17 15. Counter-Plaintiff Standard Plan, LLC is organized under Delaware law and
18 is comprised of one member, New EIN, LLC. New EIN, LLC is comprised of one
19 member, Eye Level Holdings, LLC. Eye Level Holdings, LLC is comprised of two
20 members, New Economic Order, LLC and Saguaro Media, LLC. New Economic Order,
21 LLC is comprised of one member, Jason Hope, a resident of Arizona. Saguaro Media,
22 LLC is comprised of one member, the Green Door Trust. The trustees of the Green Door
23 Trust are Wayne DeStefano and Jennifer DeStefano, residents of Arizona.

24 16. Counter-Plaintiff Worldtxts.com, LLC is organized under Delaware law
25 and is comprised of one member, Square Landing, LLC. Square Landing, LLC is
26 comprised of one member, Eye Level Holdings, LLC. Eye Level Holdings, LLC is
27 comprised of two members, New Economic Order, LLC and Saguaro Media, LLC. New
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1 Economic Order, LLC is comprised of one member, Jason Hope, a resident of Arizona.
2 Saguario Media, LLC is comprised of one member, the Green Door Trust. The trustees of
3 the Green Door Trust are Wayne DeStefano and Jennifer DeStefano, residents of
4 Arizona.

5 17. Counter-Plaintiff Mytxtsms.com, LLC is organized under Delaware law
6 and is comprised of one member, Forward Signs, LLC. Forward Signs, LLC is
7 comprised of one member, Eye Level Holdings, LLC. Eye Level Holdings, LLC is
8 comprised of two members, New Economic Order, LLC and Saguario Media, LLC. New
9 Economic Order, LLC is comprised of one member, Jason Hope, a resident of Arizona.
10 Saguario Media, LLC is comprised of one member, the Green Door Trust. The trustees of
11 the Green Door Trust are Wayne DeStefano and Jennifer DeStefano, residents of
12 Arizona.

13 18. Counter-Plaintiff Text Charge, LLC is organized under Delaware law and
14 is comprised of one member, Square Landing, LLC. Square Landing, LLC is comprised
15 of one member, Eye Level Holdings, LLC. Eye Level Holdings, LLC is comprised of
16 two members, New Economic Order, LLC and Saguario Media, LLC. New Economic
17 Order, LLC is comprised of one member, Jason Hope, a resident of Arizona. Saguario
18 Media, LLC is comprised of one member, the Green Door Trust. The trustees of the
19 Green Door Trust are Wayne DeStefano and Jennifer DeStefano, residents of Arizona.

20 19. Counter-Plaintiff Fyisms.com, LLC is organized under Delaware law and is
21 comprised of one member, Forward Signs, LLC. Forward Signs, LLC is comprised of
22 one member, Eye Level Holdings, LLC. Eye Level Holdings, LLC is comprised of two
23 members, New Economic Order, LLC and Saguario Media, LLC. New Economic Order,
24 LLC is comprised of one member, Jason Hope, a resident of Arizona. Saguario Media,
25 LLC is comprised of one member, the Green Door Trust. The trustees of the Green Door
26 Trust are Wayne DeStefano and Jennifer DeStefano, residents of Arizona.

27 20. Counter-Plaintiff News Alerts, LLC is organized under Delaware law and
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1 is comprised of one member, New Ein, LLC. New Ein, LLC is comprised of one
2 member, Eye Level Holdings, LLC. Eye Level Holdings, LLC is comprised of two
3 members, New Economic Order, LLC and Saguario Media, LLC. New Economic Order,
4 LLC is comprised of one member, Jason Hope, a resident of Arizona. Saguario Media,
5 LLC is comprised of one member, the Green Door Trust. The trustees of the Green Door
6 Trust are Wayne DeStefano and Jennifer DeStefano, residents of Arizona.

7 21. Counter-Plaintiff Message Plan, LLC is organized under Delaware law and
8 is comprised of one member, Shmooz Holdings LLC. Shmooz Holdings LLC is
9 comprised of one member, Eye Level Holdings, LLC. Eye Level Holdings, LLC is
10 comprised of two members, New Economic Order, LLC and Saguario Media, LLC. New
11 Economic Order, LLC is comprised of one member, Jason Hope, a resident of Arizona.
12 Saguario Media, LLC is comprised of one member, the Green Door Trust. The trustees of
13 the Green Door Trust are Wayne DeStefano and Jennifer DeStefano, residents of
14 Arizona.

15 22. Counter-Plaintiff Standard Message, LLC is organized under Delaware law
16 and is comprised of one member, Narrow Line, LLC. Narrow Line, LLC is comprised of
17 one member, Eye Level Holdings, LLC. Eye Level Holdings, LLC is comprised of two
18 members, New Economic Order, LLC and Saguario Media, LLC. New Economic Order,
19 LLC is comprised of one member, Jason Hope, a resident of Arizona. Saguario Media,
20 LLC is comprised of one member, the Green Door Trust. The trustees of the Green Door
21 Trust are Wayne DeStefano and Jennifer DeStefano, residents of Arizona.

22 23. Counter-Plaintiff City-O-Games.com, LLC is organized under Delaware
23 law and is comprised of one member, Pegasus Blue Holdings, LLC. Pegasus Blue
24 Holdings, LLC is comprised of one member, Eye Level Holdings, LLC. Eye Level
25 Holdings, LLC is comprised of two members, New Economic Order, LLC and Saguario
26 Media, LLC. New Economic Order, LLC is comprised of one member, Jason Hope, a
27 resident of Arizona. Saguario Media, LLC is comprised of one member, the Green Door
28

1 Trust. The trustees of the Green Door Trust are Wayne DeStefano and Jennifer
2 DeStefano, residents of Arizona.

3 24. Counter-Plaintiff All-Game-Cheats.org, LLC is organized under Delaware
4 law and is comprised of one member, Circular 411, LLC. Circular 411, LLC is
5 comprised of two members, New Economic Order, LLC and Saguaro Media, LLC. New
6 Economic Order, LLC is comprised of one member, Jason Hope, a resident of Arizona.
7 Saguaro Media, LLC is comprised of one member, the Green Door Trust. The trustees of
8 the Green Door Trust are Wayne DeStefano and Jennifer DeStefano, residents of
9 Arizona.

10 25. Counter-Plaintiff Hot-Hot-News.com, LLC is organized under Delaware
11 law and is comprised of one member, Yellow Ball Holdings, LLC. Yellow Ball
12 Holdings, LLC is comprised of one member, Eye Level Holdings, LLC. Eye Level
13 Holdings, LLC is comprised of two members, New Economic Order, LLC and Saguaro
14 Media, LLC. New Economic Order, LLC is comprised of one member, Jason Hope, a
15 resident of Arizona. Saguaro Media, LLC is comprised of one member, the Green Door
16 Trust. The trustees of the Green Door Trust are Wayne DeStefano and Jennifer
17 DeStefano, residents of Arizona.

18 26. Counter-Plaintiff Topictext.com, LLC is organized under Delaware law and
19 is comprised of one member, Pupik Holdings, LLC. Pupik Holdings, LLC is comprised
20 of one member, Eye Level Holdings, LLC. Eye Level Holdings, LLC is comprised of
21 two members, New Economic Order, LLC and Saguaro Media, LLC. New Economic
22 Order, LLC is comprised of one member, Jason Hope, a resident of Arizona. Saguaro
23 Media, LLC is comprised of one member, the Green Door Trust. The trustees of the
24 Green Door Trust are Wayne DeStefano and Jennifer DeStefano, residents of Arizona.

25 27. Counter-Plaintiff Yellow Ball Holdings, LLC is organized under Delaware
26 law and is comprised of one member, Eye Level Holdings, LLC. Eye Level Holdings,
27 LLC is comprised of two members, New Economic Order, LLC and Saguaro Media,
28

1 LLC. New Economic Order, LLC is comprised of one member, Jason Hope, a resident
2 of Arizona. Saguario Media, LLC is comprised of one member, the Green Door Trust.
3 The trustees of the Green Door Trust are Wayne DeStefano and Jennifer DeStefano,
4 residents of Arizona.

5 28. Counter-Plaintiff New EIN, LLC is organized under Delaware law and is
6 comprised of one member, Eye Level Holdings, LLC. Eye Level Holdings, LLC is
7 comprised of two members, New Economic Order, LLC and Saguario Media, LLC. New
8 Economic Order, LLC is comprised of one member, Jason Hope, a resident of Arizona.
9 Saguario Media, LLC is comprised of one member, the Green Door Trust. The trustees of
10 the Green Door Trust are Wayne DeStefano and Jennifer DeStefano, residents of
11 Arizona.

12 29. Counter-Plaintiff Ink Sign Holdings, LLC is organized under Delaware law
13 and is comprised of one member, Eye Level Holdings, LLC. Eye Level Holdings, LLC
14 is comprised of two members, New Economic Order, LLC and Saguario Media, LLC.
15 New Economic Order, LLC is comprised of one member, Jason Hope, a resident of
16 Arizona. Saguario Media, LLC is comprised of one member, the Green Door Trust. The
17 trustees of the Green Door Trust are Wayne DeStefano and Jennifer DeStefano, residents
18 of Arizona.

19 30. Plaintiff and Counter-Defendant Cellco Partnership d/b/a Verizon Wireless
20 (“Verizon”) is a Delaware general partnership with its principal place of business in
21 Basking Ridge, New Jersey. Verizon Communications, Inc. and Vodafone Group Plc, a
22 British entity, indirectly own all interest in Verizon Wireless. The direct corporate
23 parents of Verizon Wireless are: Bell Atlantic Mobile Systems, Inc., a Delaware
24 corporation with its principal place of business in New Jersey, GTE Wireless
25 Incorporated, a Delaware corporation with its principal place of business in New Jersey;
26 and PCS Nucleus, L.P., Denver Place, a Delaware limited partnership with its principal
27 place of business in Colorado, which is composed of Vodafone Americas Inc., a
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1 Delaware corporation with its principal place of business in Colorado, and JV Partner
2 Co., L.L.C., a Delaware limited liability company, with its principal place of business in
3 Colorado. This Court has personal jurisdiction over Verizon who has availed itself of the
4 this Court's jurisdiction and submitted thereto by initiating this civil action. Verizon may
5 be served through its counsel of record.

6 31. In this action, there is complete diversity between JAWA and Counter-
7 Defendant and the amount in controversy exceeds the sum of \$75,000, exclusive of
8 interest and costs. As such, this Court has subject matter jurisdiction over this matter
9 pursuant to 28 U.S.C. § 1332. Additionally, the Court has supplemental jurisdiction
10 under 28 U.S.C. § 1367 because the causes of action asserted herein are compulsory
11 counterclaims under Rule 13 of the Federal Rules of Civil Procedure which arise out of
12 the same case and controversy made the basis of Plaintiff's Complaint.

13 32. Venue is likewise proper in this action over the counter-claims herein
14 asserted pursuant to 28 U.S.C. § 1391(b) and 18 U.S.C. § 1965 because there is personal
15 jurisdiction over Plaintiff and a substantial part of the events and omissions giving rise to
16 JAWA's claims occurred within this district.

17 **III. BACKGROUND**

18 **Premium Text Messaging**

19 33. JAWA is in the business of providing premium text messaging services and
20 content ("PSMS")¹ to the public, including customers of Verizon. JAWA's content and
21 services are distributed over the Internet, including mobile devices and also through SMS
22 text messaging. SMS Aggregators have direct relationships with wireless carriers such as
23 Verizon, and these relationships are governed by contractual agreements by and between
24 the SMS Aggregators and the wireless carriers which are, in whole or in part, for the
25 benefit of JAWA. SMS Aggregators facilitate the receipt and delivery of wireless
26 customers' messages to JAWA. The wireless customers are charged access to JAWA's

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28 ¹ Premium SMS is the terminology used to describe messaging services for which a customer pays a charge in
addition to the standard per text message charge, if any, applicable under the customer's wireless carrier rate plan.

1 content and services by placement of a charge on their cellular bill. The wireless
2 customer pays the wireless carrier who, in turn, deducts its fees and passes on the
3 remainder to the SMS Aggregators.

4 34. The SMS Aggregators subsequently collect funds from the wireless
5 carriers, including Verizon, and distribute the funds to JAWA pursuant to contractual
6 agreements by and between JAWA and the SMS Aggregators. Because of the billing
7 cycle and the collection and distribution of the monies from the wireless carrier to the
8 SMS Aggregator, there is a delay between the time an individual is charged for the SMS
9 service provided by JAWA and the time JAWA receives payment for such services from
10 the SMS Aggregator of at least seventy-five days.

11 **Critical Role of SMS Aggregators**

12 35. The crux of JAWA's business is its relationships and agreements with SMS
13 Aggregators: OpenMarket, Motricity, Ericsson IPX ("IPX"), and mBlox. Without the
14 SMS Aggregators, JAWA could neither deliver its content or services to the public nor
15 collect revenue for those who have used their products or services. The SMS
16 Aggregators, sometimes referred to as mobile transaction hubs, enable the delivery of the
17 wireless customer's messages to JAWA customers, generate and transmit charge records
18 to the customer's carrier so that the PSMS recurring or one-time charges appear on the
19 customer's monthly billing, and manage the settlement process through which the carrier
20 and the SMS Aggregator each receive a portion of the revenue, with the balance being
21 remitted to JAWA. SMS Aggregators also help launch PSMS campaigns by facilitating
22 the wireless carriers' approval of short codes (five-digit numbers assigned to the content
23 provider's services) to be used on their networks.

24 36. The business relationships between and among JAWA, Verizon, and the
25 SMS Aggregators have been very cooperative and successful over the years. While they
26 vary in size, OpenMarket, Motricity, IPX, and mBlox collectively possess market power
27 in the product market for mobile messaging, delivery and payment services. Customer
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1 complaints concerning JAWA have been handled between the wireless carrier and
2 JAWA. Moreover, JAWA has a “no questions asked” refund policy for its customers and
3 it processes customer refunds immediately.

4 **Verizon’s Multi-Front Assault**

5 37. Verizon has recently unleashed a carefully orchestrated and vicious attack
6 on JAWA and those associated with JAWA. Verizon is considered the largest wireless
7 carrier in North America based on the number of subscribers. Verizon is utilizing its
8 enormous market power, the media, public officials, and the judicial systems to engage in
9 a bare-knuckles attempt to destroy JAWA’s legitimate business and the jobs of 240
10 employees through a campaign of business disparagement, false and defamatory
11 statements, distortions, fraud, and tortious interference with JAWA’s business
12 relationships:

- 13 a. **Enlisting Its Direct Competitors to Refuse to Deal with JAWA.** Prior to
14 the recent service disruption caused by Verizon, JAWA’s revenues
15 generated by customers of Verizon approximated \$75 million during the
16 past twelve months. Not content simply to refuse to allow its subscribers to
17 access JAWA’s premium messaging services, Verizon has gone above and
18 beyond, actively and publicly encouraging its direct competitors to deny
19 their subscribers the ability to continue their recurring PSMS subscription
20 services and to block the acquisition of new subscribers. Specifically, on
21 March 8, 2011, Verizon issued a press release published in a PR Newswire
22 release and on Verizon’s website. In the release, Verizon “urge[d] our
23 competitors to quickly follow and put a stop to this fraud and ensure all
24 mobile customers are protected.”
- 25 b. **Pursuit of Unmeritorious Litigation and Enlisting Texas Attorney**
26 **General Support.** Prior to the filing of this lawsuit, Verizon had not
27 provided JAWA with any notice or complaint or concern regarding the
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1 matters raised in its complaint. On the very same date as this lawsuit was
2 filed, the Texas Attorney General initiated a state court action in Austin,
3 Texas, again seeking immediate, extraordinary injunctive relief and
4 alleging essentially the same facts Verizon raised in this civil action. The
5 Texas action seeks, among other remedies, disgorgement of JAWA's
6 proceeds from what the Attorney General alleges was fraudulent activity
7 and an injunction that would effectively terminate JAWA's business. Like
8 this Court, the Texas state court declined to grant the broad proposed terms
9 of temporary restraining order, limiting the relief granted to a standard
10 preservation of evidence order and protections against fraudulent transfers.
11 Significantly, the Texas Attorney General's petition cites no customer
12 complaint charging that the customer was signed up for JAWA's messaging
13 services without authorization or that they were dissatisfied with the
14 product and were refused a refund.

- 15 c. **Interference with SMS Aggregator Relationships.** At or about the same
16 time as the lawsuits were filed, Verizon, acting as judge, jury, sheriff, and
17 executioner, formally contacted each of the SMS Aggregators with whom
18 JAWA has contracts, demanding agreement to a series of steps designed to
19 shut down JAWA's business. Specifically, Verizon demanded that the
20 SMS Aggregators: (1) immediately cease doing business with JAWA; (2)
21 prevent all Verizon customers from signing up for JAWA's messaging
22 services; (3) force an "opt out" of all Verizon customers currently
23 subscribing to JAWA's messaging services; (4) cease forwarding JAWA's
24 billing records to Verizon for inclusion in Verizon's bills (5) resubmit
25 previous billing records, removing from those records all amounts for
26 JAWA's messaging services, and (6) withhold all payments owing to
27 JAWA for charges collected from Verizon customers. Verizon's draconian
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1 demands were reinforced with demands for indemnification and threats to
2 hold the SMS Aggregators liable for any customer refunds Verizon decides
3 to make. As a result of Verizon's tactics, three of the four United States
4 SMS Aggregators (OpenMarket, IPX, and mBlox) have buckled under the
5 immense pressure applied by Verizon and complied with its demands.
6 These SMS Aggregators comprise approximately 75% of JAWA's
7 business. The fourth SMS Aggregator, Motricity, has partially cut off
8 JAWA from distributing its product and services. Additionally, payments
9 for JAWA's services are not being forwarded as required under JAWA's
10 contractual agreements with the SMS Aggregators. Specifically, Verizon is
11 withholding payments that it has already billed and/or collected from its
12 wireless customers who have opted to use JAWA's services, and the SMS
13 Aggregators, at Verizon's direction, are likewise withholding payments
14 lawfully belonging to JAWA for its messaging services. Verizon further
15 advised the SMS Aggregators they would be responsible to pay for refunds
16 to JAWA's customers, even if those customers had not previously raised a
17 complaint or requested a refund.

- 18 d. **Interference with JAWA's Existing Subscriber Relationships.** In yet
19 another effort to ruin JAWA's legitimate business, Verizon has initiated a
20 program soliciting its customers to submit refund claims for charges related
21 to JAWA's messaging services. Indeed, Verizon has even created a
22 website for this purpose. Not content to force its customers to be
23 unsubscribed to JAWA's services, Verizon invites customers – who had no
24 complaints about JAWA's services – to request a refund of past charges.
25 Having communicated to the SMS Aggregators that they will be held
26 financially accountable for any amounts Verizon refunds through its
27 program, at least one SMS Aggregator has already served JAWA with a
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1 demand for indemnification. Not satisfied with press releases and website
2 postings, Verizon has indicated that it intends to make contact with
3 individual customers who subscribed to any JAWA messaging product,
4 again soliciting their submission of refund requests, regardless of their lack
5 of previously indicated dissatisfaction.

- 6 e. **Public Attack in the Press.** In addition to attempting to conspire with its
7 direct competitors and interfering with JAWA's relationships with SMS
8 Aggregators, Verizon is also disparaging JAWA in the industry and in the
9 national press for no legitimate reason. On or about March 8, 2011,
10 Verizon issued a press release concerning this case. Verizon sent the press
11 release to PR Newswire, which is an organization that distributes news,
12 press releases, and multi-media content to media, consumers and investors
13 who access the content via the Internet, e-mail, satellite, equities terminals
14 (such as Bloomberg and Reuters), and direct feeds into newsroom editorial
15 systems. Verizon's press release alleged defendants were engaged in an
16 "ongoing scheme that used Premium SMS campaigns to defraud Verizon
17 Wireless and its customers." The press release also said, "The Texas
18 Attorney General also filed a similar suit against the same defendants on
19 Monday. Verizon Wireless assisted and supported the Texas prosecutors in
20 their investigation. 'Texas Attorney General Greg Abbott has been a strong
21 partner in shutting down this fraudulent activity. Verizon Wireless also is
22 suing Jason Hope and his associates and co-conspirators who established
23 this intricate fraudulent enterprise,' said Steve Zipperstein, general counsel
24 and vice president of legal and external affairs, Verizon Wireless. 'As our
25 work in the judicial system continues, I urge our competitors to quickly
26 follow and put a stop to this fraud and ensure all mobile customers are
27 protected.'" *Id.* (emphasis added). This release alone demonstrates
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1 Verizon's malice toward JAWA and its intent to drive JAWA out of
2 business not only through coordinated and meritless litigation, but also by
3 wrongfully interfering with JAWA's contractual and business relationships
4 and by attempts to convince other entities not to do business and not allow
5 their customers to do business with JAWA.

- 6 f. **Summary.** In short, Verizon's intention to visit financial ruin on JAWA
7 is unmistakable and its plan to accomplish this fatal injury is
8 comprehensive. Remarkably, Verizon has unleashed this blitz without any
9 regulator or court having found fault with any of JAWA's customer
10 acquisition processes, its "opt out" procedures, its customer service
11 delivery or its prompt refund methods.

12 38. Consequently, in the course of only several days, Verizon has prevented
13 most of JAWA's product offerings from reaching its wireless customers through the SMS
14 Aggregators. Without justification or cause, Verizon has stopped JAWA's customers
15 from receiving products they want and paid for. Moreover, Verizon's actions have
16 essentially stopped JAWA's revenue stream by impeding JAWA's ability to attract new
17 customers and preventing JAWA from receiving payments from existing customers.
18 JAWA therefore files this First Amended Counterclaim requesting temporary and
19 permanent injunctive relief to prevent Verizon from continuing to interfere with JAWA's
20 contractual and business relationships, disparaging JAWA in the marketplace, and
21 withholding (or causing others to withhold) monies lawfully belonging to JAWA for
22 services rendered.

23 IV. CAUSES OF ACTION

24 A. **Count 1: Tortious Interference with Contract and Business Expectancies.**

25 39. JAWA re-alleges Paragraphs 1 through 38 as though fully set forth here.

26 40. JAWA has valid and subsisting contracts and business relationships with
27 the SMS Aggregators, with other wireless carriers, and with wireless customers who have
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1 opted to access and use JAWA's services. Specifically, JAWA has contracts with
2 wireless customers and separate written contracts with each of the SMS Aggregators: (1)
3 Motricity Master Services Agreement and all schedules and addendums thereto; (2)
4 OpenMarket Commercial Services Agreement and all schedules and addendums thereto;
5 (3) IPX Service Agreement and all schedules and addendums thereto; and (4) mBlox
6 Master Services Agreement and all schedules and addendums thereto. Verizon had
7 knowledge of these contractual and/or business relationships and intentionally interfered
8 with those contracts and relationships. Such interference was wrongful, improper and
9 without justification or excuse and has resulted in the disruption and/or breach of
10 JAWA's contractual and business relationships for which JAWA has suffered irreparable
11 harm and its damages in excess of \$75,000, exclusive of interests and costs.

12 **B. Count 2: Business Disparagement/Injurious Falsehood.**

13 41. JAWA re-alleges Paragraphs 1 through 38 as though fully set forth here.

14 42. Verizon has knowingly (or in reckless disregard of the truth) published
15 false statements of fact about and disparaging to JAWA to third parties with malice,
16 without privilege, and with the intention to harm JAWA'S pecuniary interests.
17 Specifically, JAWA complains of the following false statements made by Verizon: (1)
18 statements in the press release accusing JAWA of an "ongoing scheme that used
19 Premium SMS campaigns to defraud Verizon Wireless and its customers" and further
20 maligning JAWA as an "intricate fraudulent enterprise" in a conspiracy with Defendant
21 Jason Hope (Doc. #32-4, p.2-3) ; and (2) statements in its March 8, 2011 letter to
22 Motricity that JAWA is "perpetrating a massive fraud scheme" and engaged in deceptive
23 "to frustrate the efforts of [Verizon] to discover its fraudulent scheme." (Doc. #32-1, pp.
24 2-5). As a result of Verizon's malicious conduct, JAWA has been irreparably harmed
25 and has sustained compensatory and special damages, including lost business and profits
26 to such a degree that JAWA's continued corporate existence is in jeopardy.

1 **C. Count 3: Breach of Contract.**

2 43. JAWA re-alleges Paragraphs 1 through 38 as though fully set forth here.

3 44. There is an agreement entitled Advanced Messaging Agreement for
4 Marketing Messaging Hubs (the "Agreement") by and between Verizon and the SMS
5 Aggregators, such as Motricity, OpenMarket, IPX and mBlox, which governs, among
6 other things, the collection and distribution of the charges incurred by wireless customers
7 for JAWA'S products and services. The Agreement indicates an intent by the parties to
8 benefit JAWA or a class of persons including JAWA and, as such, JAWA is a third-party
9 beneficiary under the Agreement. By arbitrarily and wrongfully withholding charges
10 billed to and collected from Verizon customers and ordering the SMS Aggregators to
11 cease conducting business with JAWA in any capacity, Verizon has breached the
12 Agreement. Consequently, JAWA has suffered irreparable harm and incurred
13 substantial, debilitating damages in excess of \$75,000, exclusive of interests and costs.

14 **D. Count 4: Constructive Trust.**

15 45. JAWA re-alleges Paragraphs 1 through 38 as though fully set forth here.

16 46. Verizon has billed and collected charges incurred its wireless customers for
17 the products and services already provided by JAWA. Through fraud, misrepresentation,
18 concealment and/or other unconscionable means described above, Verizon is wrongfully
19 withholding funds that, in equity, belong to JAWA. In so doing, Verizon is unjustly
20 enriched at JAWA's expense. JAWA asks this Court to impose a constructive trust
21 against Verizon and over the funds Verizon has improperly and unfairly withheld from
22 JAWA.

23 **V. PRELIMINARY INJUNCTIVE RELIEF**

24 47. Whether to grant or deny a motion for a preliminary injunction is within the
25 Court's discretion. *See Miss Universe, Inc. v. Flesher*, 605 F.2d 1130, 1132-33 (9th Cir.
26 1979). To obtain a preliminary injunction, the moving party must show "that he is likely
27 to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
28

1 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in
2 the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 10
3 (2008). The moving party has the burden of proof on each element of the test. *See*
4 *Environmental Council of Sacramento v. Slater*, 184 F. Supp. 2d 1016, 1027 (E.D. Cal.
5 2000).

6 48. In seeking injunctive relief, JAWA seeks only to preserve the *status quo*
7 *ante litem*, that is, "the last uncontested status which preceded the pending controversy."
8 *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (quoting *Tanner*
9 *Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir.1963); in turn quoting
10 *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir.1958)).
11 As a court of equity, this Court has wide discretion in formulating an interlocutory
12 injunction. *See Inland Steel Co. v. United States*, 306 U.S. 153, 156, 59 S.Ct. 415 (1939).
13 In this case, the last uncontested status before the present controversy was the status of
14 the parties as of March 6, 2011, when JAWA was able to operate its business with their
15 customers, Verizon, other carriers, and the Aggregators – and to be compensated for their
16 services. The relief JAWA seeks is plainly within the Court's discretion. For example,
17 in *Hilo v. Exxon Corp.*, 997 F.2d 641, 642-43, 647 (9th Cir. 1993), the Ninth Circuit
18 affirmed the district court's issuance of an injunction ordering Exxon to reinstate service
19 station franchise agreements that it had terminated, and reversed and remanded for
20 further findings the district court's denial of injunctive relief as to service station
21 franchisees who had been informed their franchises would not be renewed.² Here,
22 JAWA simply seeks to continue to serve their customers – none of whom have
23 complained about JAWA's services – through the conclusion of this litigation.

24 49. JAWA will likely suffer irreparable harm if the following injunctive relief
25 is not issued while this suit is pending:

26 _____
27 ² Although the statute at issue in *Hilo* makes the grant of preliminary injunctive relief mandatory, the standard for
28 the issuance of injunctive relief is essentially equivalent to the Ninth Circuit's "sliding scale" standard. *Compare*
Hilo, 997 F.2d at 643-47 with *Alliance for the Wild Rockies v. Cottrell*, 2011 WL 208360, *3-*7 (9th Cir. Jan. 25,
2011).

- 1 a. Verizon is enjoined from withholding monies collected from Verizon
2 wireless customers for charges already incurred by those customers having
3 accessed and used JAWA's products and services and directing the SMS
4 Aggregators to withhold the same. Alternatively, Verizon should be
5 ordered to tender the monies it has withheld into the Court's registry
6 pending a resolution of the claims asserted herein and/or further orders of
7 this Court.
- 8 b. Verizon and any third parties in active concert, privity, or participation with
9 Verizon are enjoined as follows:
- 10 i. Verizon shall cause to be reactivated all short codes associated with
11 JAWA's messaging services and shall discontinue any actions
12 preventing use or renewal of those short codes;
- 13 ii. Verizon shall not cause or direct others to cause an opt out by any
14 individual subscriber to any of JAWA's messaging service unless
15 the individual subscriber requests to opt out;
- 16 iii. Verizon shall not contact wireless customers who have subscribed to
17 any of JAWA's messaging service for the purpose of inviting such
18 customers to opt out of or seek a refund of charges for JAWA's
19 messaging services;
- 20 iv. Verizon shall not withhold payments collected from wireless
21 customers for JAWA's messaging service charges or direct any SMS
22 aggregators to withhold payments to JAWA and shall reverse any
23 prior instructions regarding the withholding of funds that otherwise
24 would have been paid to JAWA in the settlement process;
- 25 v. Verizon shall not refuse to accept billing records from SMS
26 aggregators which contain charges to wireless customers for
27 JAWA's one-time or recurring charges for messaging services and
28

1 Verizon shall reverse any prior instructions that no such records be
2 submitted or that prior records be resubmitted removing JAWA's
3 messaging service charges.

4 vi. Verizon shall not take any action in interference with JAWA's
5 existing relationships with subscribers to its messaging services and
6 shall not take any action in interference with the relationships JAWA
7 had with any SMS aggregators prior to Verizon's filing of this
8 Lawsuit;

9 vii. Verizon shall not solicit its competitors (a) to disable JAWA's
10 ability to deliver messaging services to existing wireless customers
11 or (b) to interfere with JAWA's ability to acquire additional wireless
12 customers as subscribers to its messaging services.

13 50. JAWA has no adequate remedy at law because any legal remedy for
14 damages is merely illusory and ineffective. In short, Verizon's tortious and unlawful
15 conduct threatens JAWA's corporate existence which is sufficient to establish irreparable
16 harm. *See, e.g., American Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d
17 1470, 1474 (9th Cir. 1995) (providing that "[t]he threat of being driven out of business is
18 sufficient to establish irreparable harm."). Furthermore, the injunctive relief requested by
19 JAWA is appropriate where, as here, Verizon has arbitrarily and improperly stopped
20 payment to JAWA for services and content that were properly submitted.

21 51. There is a substantial likelihood that JAWA will prevail on the merits on
22 both its counterclaims and in defense of the allegations raised in Verizon's Original
23 Complaint which JAWA will set forth by separate application and memorandum in
24 support thereof.

25 52. The harm faced by JAWA outweighs the harm that would be sustained by
26 Verizon if the preliminary injunction were granted. Indeed, the balance of the hardships
27
28

1 tips in favor of JAWA considering the substantial loss of revenue stream and the resulting
2 inability of JAWA to continue its business operations.

3 53. The issuance of a preliminary injunction would not adversely affect the
4 public policy or the public interest. Public policy does not favor allowing a party to
5 avoid its obligations under a contract particularly where, as here, the other factors
6 favoring injunctive relief are satisfied. Moreover, the public would benefit by the return
7 of JAWA'S products and services to the marketplace.

8 54. JAWA is willing to post bond in the amount the court deems appropriate.

9 55. The Court has tentatively set an evidentiary hearing on the parties'
10 respective applications for preliminary injunction for April 13, 2011. After hearing the
11 evidence presented in furtherance of JAWA's application, JAWA requests that this Court
12 to issue a preliminary injunction against Verizon.

13 **VI. PERMANENT INJUNCTION**

14 56. JAWA asks the Court to set its application for injunctive relief for a full
15 trial on the issues in this application and, after the trial, to issue a permanent injunction
16 against Verizon.

17 **VII. EXEMPLARY DAMAGES**

18 57. Verizon's actions, as described herein, were committed willfully and with
19 reckless disregard for JAWA's rights. JAWA is entitled to recover exemplary damages
20 in addition to their actual damages.

21 **VIII. CONCLUSION AND PRAYER**

22 **WHEREFORE**, JAWA respectfully requests the following:

23 58. The Court grant a preliminary injunction pending the trial on the merits and
24 that, at a final hearing, a permanent injunction be granted and a writ of injunction issued
25 commanding Verizon, its agents, servants, employees, attorneys, and all parties in privity
26 with them to be permanently enjoined as set forth above in Paragraph 49, including all
27 subparts.

1 59. At a final hearing, Verizon be ordered to:

2 (a) Pay to JAWA such damages as JAWA has sustained as a consequence
3 of Verizon's wrongful acts;

4 (b) Account for and return to JAWA all monies, gains, profits, and
5 advantages obtained by Verizon due to Verizon's wrongful acts;

6 (c) Pay to JAWA exemplary and additional damages;

7 (d) Pay to JAWA pre-judgment and post-judgment interest at the highest
8 rate allowed by law;

9 (e) Pay to JAWA all costs and attorneys' fees of this action; and

10 (f) Pay to JAWA such other and further relief as may be deemed proper.

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Paul Kipp Charlton, Esq.	paul.charlton@gknet.com, gjk@gknet.com
Lindi Michelle Weber, Esq.	lindi.weber@gknet.com, jk@gknet.com
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Sandra J. Millor, Esq.	smillor@kasowitz.com

By: /s/ Douglas F. Behm

EXHIBIT 1



March 8, 2011

VIA E-MAIL & OVERNIGHT COURIER

Mr. Ryan K. Wuerch
Motricity, Inc.
601 108th Avenue, NE
Suite 900
Bellevue, Washington 98004

Re: Termination of Short Codes, Customer Refunds and Breach of Agreement

Dear Mr. Wuerch:

We are writing to notify you of a disturbing and unacceptable situation involving improper activity by content providers associated with Motricity.

Yesterday, Verizon Wireless filed a complaint in the United States District Court for the District of Arizona seeking injunctive relief and damages against these content providers and the individuals associated with them for perpetrating a massive fraud scheme involving dozens of premium messaging campaigns and short codes. The lead defendants are Jason Hope, Wayne Destefano, Quinn McCullough, Christa Stephens, Steve Uhrman, Janet O'Meara, Cylon LLC, Eye Level Holdings LLC and Jawa LLC (along with many related entities that we have been able to identify so far). The complaint demonstrates that the defendants employed sophisticated techniques, including the use of cloaking software and a large web of shell companies, to frustrate the efforts of Verizon Wireless and its auditor, Aegis Mobile, to discover its fraudulent scheme. A copy of the complaint is attached.

Pursuant to the Advanced Messaging Agreement for Marketing Messaging Hubs between Motricity and Verizon Wireless (the "Agreement"), we demand that Motricity undertake the following steps associated with this situation.

First, all message campaigns associated in any way with any of the defendants must be terminated immediately. A list of the short codes that we have been able to identify so far as associated with the defendants and active with Motricity is set out below.

By the end of day tomorrow (i.e., March 9, 2011), Motricity must prevent all customers of Verizon Wireless from opting in to the messaging campaigns run on these short codes, and all marketing efforts aimed at getting customers to opt in to the campaigns must stop. Additionally, by the end of the day tomorrow, all customers of Verizon Wireless currently opted in to any of the campaigns must be opted out from the campaigns, and those customers must be provided with a free text message notifying them of the opt out. Motricity then must terminate all of the short codes on its platform to ensure that all messaging and premium charges are stopped, and it must notify Verizon Wireless in writing once this termination is completed. Further, within 10 days of receipt of this letter, Motricity must provide a refund to all customers opted in to the campaigns for any premium charges assessed those customers in the 30 day period immediately preceding the opt out. Motricity must provide Verizon Wireless with written notice once the refunds are completed.

Second, Verizon Wireless expects Motricity to cooperate fully with it in the ongoing investigation of this situation and to voluntarily, and proactively, provide any information that it thinks might be relevant. This includes providing any relevant information you have about the defendants and the campaigns they have run (e.g., a list of all campaigns and short codes connected to the defendants, correspondence with the defendants that relate to the matters addressed in the complaint or concerns Motricity may have had regarding the campaigns being run by defendants, etc.).

Third, Motricity must not allow any of the defendants listed in the complaint, or anyone else subsequently identified by Verizon Wireless as associated with the activity described in the complaint, to ever again submit a request to Verizon Wireless to run a messaging campaign (unless specifically authorized by Verizon Wireless in writing).

Fourth, Motricity must accept responsibility for the costs that Verizon Wireless will incur in connection with these improper messaging campaigns that the defendants have been running through Motricity. Effective today, Verizon Wireless has established a web site where customers who believe they were charged improperly as a result of the scam outlined in the complaint can go to obtain refunds. In the coming days and weeks, Verizon Wireless will send notices to affected customers to make them aware of the web site and refund process. Many of the refunds issued by Verizon Wireless involving campaigns run through Motricity will flow back to Motricity following existing processes. To the extent any refunds are issued by Verizon Wireless outside of these processes, we expect that Motricity will cover the costs of those refunds as well. Moreover, we expect Motricity to reimburse us for its proportionate share of other costs that we incur in connection with this investigation, including, but not limited to, our outside counsel costs.

Fifth, this is to notify you that, effectively immediately, Verizon Wireless will withhold payment to Motricity on any charges associated with the short codes listed below. To the extent Motricity has submitted any invoices that have not yet been paid, please be advised that Verizon Wireless will not pay those invoices until Motricity resubmits them after removing any such charges. Going forward, please remove such charges from invoices before sending them to Verizon Wireless.

Finally, we insist that Motricity provide us a complete explanation of how this fraud was allowed to occur and what steps Motricity plans to undertake to ensure that such a thing can never happen again.

Under the Agreement, Motricity is responsible for the messaging campaigns it manages, and it is responsible for ensuring that the campaigns comply with Verizon Wireless, as well as industry, standards. As you can see from the complaint, many of the campaigns run by the defendants, including those run through Motricity, violated these standards and were intentionally designed to deceive consumers. While Verizon Wireless is pursuing those that actually perpetrated the fraud in the complaint, it is important to note that Motricity ultimately is responsible under the Agreement. Motricity's failure to detect this activity, or to figure out that the entities it was paying and with which it was doing business were engaged in a massive fraud scheme, is inexcusable and a breach of the Agreement. Verizon Wireless reserves all rights and remedies it has under the Agreement, and at law, in connection with this situation.

We will be setting up a meeting in the near future to discuss this situation with you. Thank you in advance for your full and immediate cooperation in response to this situation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dave Burmester', with a stylized flourish at the end.

Dave Burmester
Verizon Wireless

cc: Nichole Lemieux

Attachment

Short Codes

21344
27449
32941
33849
35182
38254
44811
46327
47553
50920
50920
51062
51368
57370
59252
60339
61266
62478
64219
65108
65500
70877
72078
74034
74332
76426
81946
85797
96666
96835
97688
99796