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3 **UNITED STATES DISTRICT COURT**  
4 **NORTHERN DISTRICT OF CALIFORNIA**  
5 **OAKLAND DIVISION**

6 CHRISTOPHER KRAMER,  
7 individually and on behalf of all others  
8 similarly situated,

9 Plaintiff,

10 v.

11 AUTOBYTEL, INC., a Delaware  
12 corporation, and B2MOBILE, LLC, a  
13 California limited liability company, and  
14 LEADCLICK MEDIA, INC., a  
California corporation,

Defendants.

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)  
) No. 10-cv-02722-CW  
)  
)  
)

) Honorable Claudia A. Wilken

) **FINAL JUDGMENT AND ORDER OF**  
) **DISMISSAL WITH PREJUDICE.**

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16 This matter came before the Court for the Final Approval Hearing set by the Court, as  
17 well as Plaintiff’s Motion for Final Approval of Class Action Settlement (dkt. 137), and  
18 Plaintiff’s Motion for Award of Attorneys’ Fees, Expenses, and Incentive Award (dkt. 127). The  
19 Court, having reviewed the papers filed in support of and in opposition to the motion, heard  
20 argument of counsel, and good cause appearing therein, Plaintiff’s Motions are hereby  
21 GRANTED and it is hereby ORDERED, ADJUDGED, and DECREED THAT:

22 1. Terms and phrases in this Order shall have the same meaning as ascribed to them  
23 in the Settlement Agreement.

24 2. This Court has jurisdiction over the subject matter of this action and over all  
25 Parties to the Action, including all B2Mobile Class Members and LeadClick Auto Class  
26 Members (hereinafter collectively referred to as “Settlement Class Members”).

27 3. On July 29, 2011, this Court granted Preliminary Approval of the Settlement  
28 Agreement and certified two settlement classes consisting of:

1       **“B2Mobile Class”** consisting of all Persons in the United States and its territories  
2       who, from January 1, 2008 until the date of preliminary approval, received a text  
3       message from Short Code 77893 or a text message containing a B2Mobile Website  
4       that was transmitted by or on behalf of B2Mobile and was sent without such  
5       Person’s prior express consent.

6       **“LeadClick Auto Class”** consisting of all persons in the United States and its  
7       territories who, from January 1, 2008 until the date of preliminary approval, received  
8       an automobile-related text message from Short Code 77893 or an automobile-related  
9       text message containing a B2Mobile Website that was transmitted by or on behalf of  
10       B2Mobile and was sent without such Person’s prior express consent.

11       4.       Excluded from the B2Mobile Class are the following: the Defendants, LeadClick  
12       Auto Class Members (as defined herein and to the extent they only received auto-related text  
13       messages), the Settlement Administrator, the Mediator, and any respective parent, subsidiary,  
14       affiliate or control person of the Defendants or their officers, directors, agents, servants, or  
15       employees as of the date of filing of the Action, any judge presiding over the Action and the  
16       immediate family members of any such Person(s). Excluded from the LeadClick Auto Class are  
17       the following: the Defendants, the Settlement Administrator, the Mediator, and any respective  
18       parent, subsidiary, affiliate or control person of the Defendants, as well as their officers,  
19       directors, agents, servants, or employees, any judge presiding over the Action and the immediate  
20       family members of any such Person(s). The B2Mobile Class and the LeadClick Auto Class are  
21       hereinafter referred to as the “Settlement Classes.”

22       5.       Further excluded from the Settlement Classes are those persons who have  
23       submitted valid and timely requests for exclusion pursuant to the Preliminary Approval Order.  
24       Annexed hereto as Appendix 1 is a schedule of all such persons excluded from the Settlement  
25       Classes.

26       6.       This Court now gives final approval to the settlement and finds that the  
27       Settlement Agreement is fair, reasonable, adequate, and in the best interests of the Settlement  
28       Classes. Specifically, the complex legal and factual posture of this case, and the fact that the  
29       Settlement Agreement is the result of arms’ length negotiations presided over by a neutral  
30       mediator support this finding. The Class Representative and Class Counsel adequately  
31       represented the Settlement Classes for purposes of entering into and implementing the Settlement  
32       Agreement. Accordingly, the Settlement Agreement is hereby finally approved in all respects,

1 and the Parties are hereby directed to perform its terms. The Settlement Agreement and every  
2 term and provision thereof shall be deemed incorporated herein as if explicitly set forth, and shall  
3 have the full force of an Order of this Court.

4 7. The Court approved Notice Plan to the Settlement Classes, as set forth in the  
5 Preliminary Approval Order on July 29, 2011, was the best notice practicable under the  
6 circumstances, including comprehensive nationwide newspaper and magazine publication,  
7 website publication, and extensive online advertising. The Notice Plan has been successfully  
8 implemented and satisfies the requirements of Federal Rule of Civil Procedure 23 and Due  
9 Process.

10 8. The Court finds that the Defendants properly and timely notified the appropriate  
11 state and federal officials of the Settlement Agreement, pursuant to the Class Action Fairness Act  
12 of 2005 (“CAFA”), 28 U.S.C. § 1715. The Court has reviewed the substance of Defendants’  
13 notices and accompanying materials, and finds that they complied with all applicable  
14 requirements of CAFA.

15 9. Subject to the terms and conditions of the Settlement Agreement, this Court  
16 hereby dismisses the action on the merits and with prejudice.

17 10. Upon the Effective Date of this settlement, the Plaintiff and each and every  
18 B2Mobile Class Member and LeadClick Auto Class Member who did not opt out of the  
19 Settlement (whether or not such members submit claims) and to the extent the LeadClick Auto  
20 Class Member or B2Mobile Class Member is not an individual, all of its present, former, and  
21 future direct and indirect parent companies, affiliates, subsidiaries, divisions, agents, franchisees,  
22 successors, predecessors-in-interest, and all of the aforementioned’s present, former, and future  
23 officers, directors, employees, shareholders, attorneys, agents, independent contractors; and, to  
24 the extent the LeadClick Auto Class Member or B2Mobile Class Member is an individual, any  
25 present, former, and future spouses, as well as the present, former, and future heirs, executors,  
26 administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest,  
27 and assigns of each of them, shall be deemed to have released Defendants B2Mobile, LLC, and  
28 LeadClick Media, Inc., and any and all of their respective present or past heirs, executors,

1 estates, administrators, predecessors, successors, assigns, parents, subsidiaries, affiliates,  
2 associates, employers, employees, agents, consultants, independent contractors, insurers,  
3 directors, managing directors, officers, partners, principals, members, attorneys, accountants,  
4 financial and other advisors, investment bankers, underwriters, shareholders, lenders, auditors,  
5 investment advisors, legal representatives, successors in interest, assigns and companies, firms,  
6 trusts, corporations, officers, directors, other individuals or entities in which any of the  
7 Defendants have a controlling interest or which is affiliated with any of them, or any other  
8 representatives of any of these Persons and entities, but specifically excluding all entities from  
9 whom B2Mobile obtained cellular phone numbers, other than LeadClick and B2Mobile; entities  
10 on whose behalf any text message was transmitted by or on behalf of B2Mobile, other than  
11 LeadClick and B2Mobile; and entities who received consumer internet traffic or leads that were  
12 linked or driven from a B2Mobile Website or text message that paid or otherwise compensated  
13 B2Mobile or its agents to drive such traffic, other than LeadClick and B2Mobile, from any and  
14 all actual, potential, filed, known or unknown, fixed or contingent, claimed or unclaimed,  
15 suspected or unsuspected, claims, demands, liabilities, rights, causes of action, contracts or  
16 agreements, extracontractual claims, damages, punitive, exemplary or multiplied damages,  
17 expenses, costs, attorneys' fees and or obligations (including "Unknown Claims" as defined in  
18 the Agreement), whether in law or in equity, accrued or unaccrued, direct, individual or  
19 representative, of every nature and description whatsoever, whether based on the TCPA or other  
20 federal, state, local, statutory or common law or any other law, rule or regulation, including the  
21 law of any jurisdiction outside the United States arising out of the facts, transactions, events,  
22 matters, occurrences, acts, disclosures, statements, misrepresentations, omissions or failures to  
23 act regarding the alleged sending of any text message from Short Code 77893 or any text  
24 message containing a B2Mobile Website, including any automobile-related text message from  
25 Short Code 77893 or automobile-related text message containing a B2Mobile Website that was  
26 transmitted by or on behalf of B2Mobile or LeadClick and allegedly received by the Plaintiffs,  
27 including all claims that were brought or could have been brought in the Action relating to such  
28 text messages.

1           11.     Upon the Effective Date, any action or claim for indemnification, including but  
2 not limited to actions or claims for breach of contract, contribution, or subrogation, that could be  
3 or could have been brought by LeadClick or B2Mobile against the other related to the Action or  
4 any of the facts, matters or agreements on which the claims in the Action were based are hereby  
5 released and dismissed with prejudice on the merits.

6           12.     Upon the Effective Date the above release of claims and the Settlement  
7 Agreement will be binding on, and have *res judicata* and preclusive effect in all pending and  
8 future lawsuits or other proceedings maintained by or on behalf of Plaintiff and all other  
9 Settlement Class Members, Releasing Parties, and their heirs, executors and administrators,  
10 successors and assigns. All Settlement Class Members who have not been properly excluded  
11 from the Settlement Classes are hereby permanently barred and enjoined from filing,  
12 commencing, prosecuting, intervening in, or participating (as class members or otherwise) in,  
13 any lawsuit or other action in any jurisdiction based on or arising out of the Released Claims.

14           13.     Pursuant to the terms of the Settlement Agreement, LeadClick has consented to  
15 the entry of an injunction and is hereby enjoined, for a period of four (4) years following the  
16 Effective Date, as follows:

17                 a.       to the extent its standard “Media Publisher Agreement” or any other  
18 agreement it enters into utilizes text message advertising of any kind, LeadClick shall modify or  
19 otherwise require such agreement to state that LeadClick and any entity with which it contracts  
20 are prohibited from advertising any LeadClick website or LeadClick “offer” by using or  
21 cooperating with others to use an ATDS to send SMS messages to cellular phones unless each  
22 text-message recipient has given explicit prior written consent to receive such text messages;

23                 b.       to the extent its standard “Media Publisher Agreement” or any other  
24 agreement it enters into utilizes text message advertising of any kind, LeadClick shall modify or  
25 otherwise require such agreement to require LeadClick, its “publishers,” or other advertisers  
26 obtaining consumer cell phone numbers to keep documented proof of all prior express consent  
27 received for a period of four (4) years after said consent is obtained;

1 c. to the extent its standard “Media Publisher Agreement” or any other  
2 agreement it enters into utilizes text message advertising of any kind, LeadClick shall modify or  
3 otherwise require such agreement to state that the requisite “prior express consent” can be  
4 obtained “by oral or written means, including electronic methods” and require that if a cellular  
5 phone number is obtained on a website, that any authorization must include an affirmative action  
6 on the part of the consumer, such as checking a box or clicking on an “I Accept” “Submit,”  
7 “Proceed,” or similar button, with disclosures informing that the affirmative action will result in  
8 receiving text messages presented on the same page as the required affirmative action indicating  
9 consent, with the text of such disclosures placed within a reasonable distance (for example 200  
10 pixels on a 100 PPI screen) from the telephone number submit field and in text of sufficient size  
11 and contrast to be clearly legible.

12 14. Pursuant to the terms of the Settlement Agreement, B2Mobile has consented to  
13 the entry of an injunction and is hereby enjoined, for a period of four (4) years following the  
14 Effective Date, as follows:

15 a. B2Mobile shall not make, or cooperate with others to make, SMS text  
16 calls to cellular phones unless each text-message recipient has given explicit prior express  
17 consent to receive such text messages (in a manner explained below);

18 b. B2Mobile shall modify its standard “B2Mobile List Management  
19 Agreement,” or any other such contract it enters into for the purpose of obtaining consumer cell  
20 phone numbers to transmit text messages, to require B2Mobile and each entity with whom it  
21 contracts to obtain consumer cell phone numbers to keep documented proof of all prior express  
22 consent received from the owners of said cell phone numbers for a period of four (4) years after  
23 said consent is obtained;

24 c. B2Mobile shall modify its standard “B2Mobile List Management  
25 Agreement,” or any other such contract it enters into for the purpose of obtaining consumer cell  
26 phone numbers to transmit text messages, to state that the requisite “prior express consent” can  
27 be obtained “by oral or written means, including electronic methods” and require that if a cellular  
28 phone number is obtained on a website, that any authorization must include an affirmative action

1 on the part of the consumer, such as checking a box or clicking on an “I Accept,” “Submit,”  
2 “Proceed,” or similar button with disclosures informing that the affirmative action will result in  
3 receiving text messages, which are presented on the same page as the required affirmative action  
4 indicating consent, with the text of such disclosers placed within a reasonable distance (for  
5 example 200 pixels on a 100 PPI screen) from the telephone number field or submit button, and  
6 in text of sufficient size and contrast to be clearly legible.

7         15. The Court approves the agreed-upon Fee Award to Class Counsel in the amount  
8 of \$3,050,000, which the Court finds to be fair and reasonable. The Court finds this amount to  
9 be reasonable in that it represents 25% of the \$12.2 million common fund established for the  
10 benefit of the Classes. In this Circuit, a 25% fee is the accepted “benchmark” in common fund  
11 cases, and reasonable in light of the relevant factors. *Vizcaino v. Microsoft Corp.*, 290 F.3d  
12 1043, 1048-50 (9th Cir. 2002). The Court additionally finds this amount fair and reasonable  
13 based upon a lodestar cross check. Class Counsel provided the Court with documentation and  
14 sworn declarations supporting a lodestar of \$1,129,629. Specifically, Class Counsel expended  
15 2741.7 hours in investigating, litigating, and resolving this case (including a reasonable  
16 estimation of upcoming hours). Additionally, Class Counsel set forth the experience of each  
17 attorney working on the case and his or her corresponding billable rate. The Court finds the rates  
18 charged to be appropriate and reasonable in light of the experience of each attorney and that the  
19 hourly rates are in line with comparable market rates. The Court finds the hours expended to be  
20 reasonable when compared with the time and effort put forth by Class Counsel in investigating,  
21 litigating, and resolving this case, as well as in light of the results achieved for the Settlement  
22 Classes in terms of both monetary and injunctive relief. Accordingly, the overall lodestar of  
23 \$1,129,629, when enhanced by a reasonable multiplier of 2.69, provides a reasonable lodestar  
24 cross-check in awarding Class Counsel’s Fee Award of \$3,050,000. Class Counsel’s total Fee  
25 Award is inclusive of \$14,192 in costs, which is likewise reasonable based on the documentation  
26 and sworn declarations submitted.

27         16. Defendants shall pay the Fee Award pursuant to and in the manner provided by  
28 the terms of the Settlement Agreement.

1           17.     The Court approves the payment by Defendants of \$10,000 to the Class  
2 Representative Christopher Kramer as an incentive award for taking on the risks of litigation and  
3 helping achieve the results to be made available to the Settlement Classes, including sitting for a  
4 full day deposition. Such payment shall be made pursuant to and in the manner provided by the  
5 terms of the Settlement Agreement.

6           18.     The Parties shall bear their own costs and attorneys' fees, except as otherwise  
7 provided in the Settlement Agreement and this Order.

8           19.     This Court hereby directs the entry of this Final Judgment based upon the Court's  
9 finding that there is no just reason for delay of enforcement or appeal of this Final Judgment  
10 notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement  
11 of the Settlement Agreement.

12           20.     This Final Judgment and order of dismissal with prejudice, the Settlement  
13 Agreement, the settlement that it reflects, and any and all acts, statements, documents, or  
14 proceedings relating to the Settlement Agreement are not, and shall not be construed as, or used  
15 as an admission by or against Defendants of any fault, wrongdoing, or liability on any  
16 Defendant's part, or of the validity of any Claim or of the existence or amount of damages.

17           21.     The Parties, without further approval from the Court, are hereby permitted to  
18 agree to and adopt such amendments, modifications and expansions of the Settlement Agreement  
19 and its implementing documents (including all exhibits to the Settlement Agreement) so long as  
20 they are consistent in all material respects with the Final Judgment and do not limit the rights of  
21 Settlement Class Members.

22           22.     Without affecting the finality of this Final Judgment in any way, this Court hereby  
23 retains continuing jurisdiction over, *inter alia*, (a) implementation, enforcement, and  
24 administration of the Settlement Agreement, including any releases in connection therewith; (b)  
25 resolution of any disputes concerning class membership or entitlement to benefits under the  
26 terms of the Settlement Agreement; and (c) all Parties hereto, for the purpose of enforcing and  
27 administering the Settlement Agreement and the Action until each and every act agreed to be  
28 performed by the Parties has been performed pursuant to the Settlement Agreement.



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**IT IS SO ORDERED**

DATED this 27th day of January, 2012

  
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HONORABLE CLAUDIA A. WILKEN  
UNITED STATES DISTRICT COURT