The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KEVIN McCLINTIC, on behalf of himself and all others similarly situated,

Plaintiff,

— and —

DAN McLAREN, individually and on behalf of a class and subclass of similarly situated individuals,

Plaintiff-Intervenor,

v.

LITHIA MOTORS, INC.

Defendant.

No. C11-859 RAJ

PROPOSED PLAINTIFF-INVERVENOR DAN McLAREN'S MOTION TO INTERVENE

NOTE ON MOTION CALENDAR:
Friday, August 12, 2011

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Proposed plaintiff-intervenor Dan McLaren ("McLaren"), pursuant to Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure, hereby moves for leave to intervene as a party-plaintiff in order to protect his own interests, as well as the interests of the class and subclass that he seeks to represent in order to redress violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq*. ("TCPA").

I. INTRODUCTION

McLaren moves to intervene in this action to protect his interests and those of a proposed class and subclass that received unauthorized text messages from Defendant Lithia Motors. By admission of his own counsel, Plaintiff Kevin McClintic ("McClintic") cannot adequately represent a subclass of individuals who received Lithia's first text-message advertisement, then affirmatively opted out of receiving Lithia text messages, and then subsequently received such additional texts. Yet McClintic is nevertheless attempting to do so in a hastily arranged settlement with Defendant Lithia Motors ("Defendant" or "Lithia Motors"). This raises serious questions not only of McClintic's representation of the proposed opt-out class, but also of the larger proposed class of individuals who received text messages from Lithia Motors.

McLaren's and McClinic's cases arise from the same set of facts—alleged unauthorized text messages sent by Lithia Motors in violation of the TCPA—but differ in one crucial aspect: McLaren opted out[1] of receiving further calls but continued to receive text-message advertisements from Lithia Motors. This "Opt-Out Class" that McLaren seeks to represent has a unique and factually stronger claim than McClintic, as Lithia Motors unquestionably did not have consent to send text messages to members of the "Opt-Out Class" and appears to have acted in knowing violation of the TCPA with respect to such "Opt-Out Class." Yet McClintic's counsel—

[1] An "opt out" is an affirmative act by the recipient of a text message that communicates to the sender that the recipient does not wish to receive further text messages from that sender. In the text-message marketing industry, a recipient is able to opt out by replying using the word "STOP" to the unwanted text message. This action by a recipient is an unequivocal statement that he or she does not want to receive text messages from that sender; any subsequent messages sent are unauthorized, and are also sent with the sender's knowledge that the recipient had previously opted out.

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who filed this TCPA text-messaging suit by cutting and pasting one of McLaren's counsel's previously filed complaints—is currently attempting to settle the opt-out claims despite conceding that McClintic does not have standing to bring a claim for the Opt-Out Class.

Accordingly, McLaren should be permitted to intervene in this action as of right. Alternatively, McLaren should be granted permissive intervention because he shares a similar cause of action as McClintic, both cases are in their early stages, and McLaren's counsel can demonstrate that it has been on the forefront of litigating TCPA claims that involve unauthorized text messages.

II. FACTS AND PROCEDURAL HISTORY

This case arises from a marketing campaign conducted on behalf of Lithia Motors by advertiser DMEautomotive, Inc. that involved the transmission of text message advertisements—messages that both McClintic and McLaren contend in separate lawsuits were unauthorized and in violation of the TCPA. On April 11, 2011, McLaren and McClintic both received an identical unauthorized text-message advertisement sent on behalf of Lithia Motors. (*McClintic* Compl., Dkt. 1[2]; Complaint-in-Intervention of Dan McLaren, a copy of which is attached as Ex. A, ¶¶ 19-20.) Both seek to represent a class of individuals (the "Class") who received one or more unauthorized text messages from Lithia Motors. But this is where the similarities between McLaren and McClintic end.

In response to this text message, McLaren affirmatively "opted out" of receiving further messages by replying "STOP" to the offending message. (Ex. A, ¶ 21.) But one week later, on April 19, 2011, Lithia Motors sent a second text message to McLaren informing him that Lithia was "serious" about its previous text message and encouraging him to buy Lithia's products.[3] (*Id.*, ¶¶ 22-23.) McClintic, on the other hand, never opted out of receiving messages and never received the second text message on April 19, 2011.

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[2] References to "Dkt." will refer to the docket in the case pending in this Court, unless otherwise noted.

[3] This message read: "WE ARE SERIOUS, 0% ON USED VEHICLES, SHOP LITHIA @ HTTP://BIT.LY/DS675E TO SEE FOR YOURSELF."

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This case, *McClintic v. Lithia Motors*, began in King County Superior Court on April 26, 2011, and was docketed as case No. 11-2-14632-4 SEA. (Dkt. 1., p. 6.) The law firm representing McClintic—Williamson & Williams—filed a complaint that copied almost word-for-word other text-message TCPA complaints filed by the attorneys who represent McLaren. (*See, e.g., Satterfield v. Simon & Schuster*, 06-cv-02893-CW, Dkt. No. 99, (N.D. Cal.)). On May 23, 2011, Defendant Lithia Motors removed the case to this Court. (Dkt. 1.) On July 14, 2011, Lithia Motors filed an answer to the complaint. (Dkt. 11.) On July 19, 2011, this Court issued an Order to Show Cause as to why the *McClintic* action should not be dismissed for the parties' violation of this Court's Scheduling Order. (Dkt. 12.)

Despite the total absence of activity on the public record, on July 21, 2011 the parties in this case filed a response to the Order to Show Cause informing the Court that they had engaged in one day of mediation with the Honorable Terrence Lukens (Ret.) on July 5, 2011, and that the parties were continuing settlement negotiations. (Dkt. 13.) It is this secret and hurried settlement involving unrepresentative persons that McLaren believes will impair the interests of the proposed Class and Opt-Out Class that he seeks to protect.

The case *McLaren v. Lithia Motors, Inc.* was filed on July 5, 2011 in the federal court in the District of Oregon and was docketed as 11-cv-810 MO. On the civil cover sheet, the *McLaren* case was designated as "related" to the *McClintic* action. (*See* McLaren Dkt. 1-1.) The law firm that represents McLaren, Edelson McGuire LLC, has prosecuted and favorably resolved numerous TCPA cases that involve alleged unauthorized text messages[4] and has successfully argued in the Ninth Circuit that the TCPA applies to text messages—a case of first impression in the federal appellate courts. *See Satterfield v. Simon & Schuster*, 569 F.3d 946 (9th Cir. 2009). As stated above, McLaren contends that he not only received an unauthorized text message from

[4] *See, e.g., Satterfield v. Simon & Schuster*, No. C 06 2893 CW (N.D. Cal.); Abbas v. Selling Source, Inc., No 09-cv-3413 (N.D. Ill.); *Weinstein v. Airit2me, Inc.*, No. 06 C 0484 (N.D. Ill.); Lozano v. 20th Century Fox, No. 09-cv-06344 (N.D. Ill.); *Espinal v. Burger King Corp.*, No. 09-cv-20982 (S.D. Fla.), *Kramer v. Autobytel, Inc. et al.*, No. 10-cv-2722 (N.D. Cal.).

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Lithia Motors on April 11, 2011, but also that he received an additional text message on April 19, 2011 after he had affirmatively opted out. (Ex. A, ¶¶ 19-23.)

On July 6, 2011, counsel for McLaren reached out to Williamson & Williams in an attempt to coordinate their efforts in their respective lawsuits. (*See* Declaration of Jay Edelson ("Edelson Decl."), attached as Ex. B, ¶¶ 1-3.) During this phone call, Jay Edelson, managing partner of Edelson McGuire LLC, informed the Williamson firm that McLaren seeks to represent not only a class of persons who received an unauthorized text message from Lithia Motors, but also an Opt-Out Class that received subsequent messages—messages that McClintic did not receive. (*Id.*, ¶ 6.) While conceding that McClintic did not have standing to bring suit for this second text message because he never attempted to opt out, the Williamson firm nevertheless stated to Edelson that they had just completed one day of mediation with Lithia Motors and were discussing a class settlement that would resolve all of Lithia Motors's text message spam, including any text messages from Lithia Motors touting the "seriousness" of their previous advertisements sent subsequent to consumer opt-outs. (*Id.*, ¶¶ 5, 7.)

Mr. Edelson informed the Williamson firm that the claim for text messages following an opt-out was different from McClintic's claim because, among other things, the willfulness of any message sent after an opt-out request would allow for a trebling of damages under the TCPA. (*Id.*, ¶ 6.) Despite this, the Williamson firm informed Mr. Edelson that it believed it had the ability to settle these claims and intended to do so. (*Id.*, ¶ 7.) Mr. Edelson suggested that McLaren's participation in the second round of mediations would ensure that the interests of the proposed Opt-Out Class were adequately protected. (*Id.*, ¶ 8.) Mr. Edelson also reached out to Lane Powell, P.C., counsel for Lithia Motors, in order to discuss McLaren's inclusion in the ongoing settlement discussions.

Although the Williamson firm initially seemed receptive to counsel for McLaren's offer to represent the interests of the proposed Opt-Out Class, it appears that was simply part of a larger plan to stall McLaren so they could race to the bottom and hastily reach a settlement. Indeed, over the past two weeks the Williamson firm has been essentially incommunicado, and recent

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court papers—filed only at the prompting of the Court—have stated that settlement talks were ongoing. To date, the Williamson firm has failed to accept McLaren's offer to participate and appears to be moving forward with a settlement of the claims of the Class and Opt-Out Class. (Dkt. 13.)

III. ANALYSIS

A. McLaren Should Be Permitted to Intervene as of Right

This Court should grant McLaren's motion to intervene because McClintic's attempts to settle claims of the proposed Opt-Out Class that he cannot represent raises questions about his adequacy as a class representative generally. A party can intervene in an action where a person "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). Guided by practical and equitable considerations, courts traditionally construe Rule 24 liberally and in favor of applicants for intervention. *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) ("Rule 24 traditionally receives liberal construction in favor of applicants for intervention").

In the Ninth Circuit, intervention by right is required where the following four elements are met: (1) the application must be timely; (2) the applicant must have a "significantly protectable" interest relating to the transaction that is the subject of the litigation; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the parties before the court. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997). In determining whether these requirements are satisfied the court is to "accept as true the non-conclusory allegations of the motion and cross-complaint." *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir. 1983). A motion to intervene as of right should not be refused "unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts which could be proved under the complaint. *Crosby v.*

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St. Paul Fire & Marine Ins. Co., 138 F.R.D. 570, 572 (W.D. Wash. 1991), *aff'd*, 15 F.3d 1084 (9th Cir. 1994). In this case, each element of Rule 24(a) is satisfied.

1. McLaren's Motion to Intervene is Timely

The first element of Rule 24(a)—timeliness—is easily met here. This Motion comes less than two months after the *McClintic* case was removed to this Court, and the *McClintic* parties have not conducted any discovery or filed any substantive documents except for an answer to the complaint.[5] McLaren diligently moved to intervene once he realized that his interests were impaired, and moved to intervene only after first reaching out to the *McClintic* parties and attempting to informally resolve the issue. (*See* Edelson Decl., ¶¶ 2-4.) Given the early stage of litigation, there can be no prejudice to either party by granting intervention. *See Crosby*, 148 F.R.D. at 572 (finding intervention timely and no prejudice to other parties when intervenor filed motion shortly after the commencement of the action and before any significant decisions on the merits). Accordingly, McLaren's motion is timely.

2. McLaren Has a Protectable Interest

To satisfy the second element for intervention as of right, "[i]t is generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Wilderness Soc. v. United States Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011). McLaren possesses a significant protectable interest: He received unauthorized text messages from Lithia Motors and would be entitled to recover statutory damages under the TCPA on his own behalf and on behalf of the proposed Class and Opt-Out Class he seeks to represent. McLaren's complaint-in-intervention, attached to this motion as Exhibit A, demonstrates this interest.

[5] That McClintic and Lithia Motors have engaged in one round of mediation to settle a claim for which McClintic lacks standing underscores the necessity of McLaren's immediate intervention.

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3. McLaren's Interest, as a Practical Matter, Is Being Impaired By McClintic

Satisfying the third element for intervention as of right, McLaren and the proposed Class and Out-Out Class he seeks to represent would be impaired by a judicial decision approving a settlement in this case because McLaren could no longer seek class certification and damages for the Class and Opt-Out Class that are encompassed in a settlement. "A judicial decision which as a practical matter would foreclose the would-be intervenor's interest is sufficient impairment." *Silver v. Babbitt,* 166 F.R.D. 418, 429 (D. Ariz. 1994), *aff'd,* 68 F.3d 481 (9th Cir. 1995); *see also Wright Miller,* 7C FED. PRAC. & PROC. CIV. § 1908.2 (3d ed. 2011) ("[i]t generally is agreed that in determining whether disposition of the action will impede or impair the movant's ability to protect its interest the question must be put in practical terms rather than in legal terms").

Here, McClintic's counsel has already communicated to counsel for McLaren that they intend to settle all claims involving unauthorized Lithia text messages, including messages sent after consumers opted out. (Edelson Decl. ¶ 6.) Because McClintic is unable to represent an Out-Out Class, that class cannot effectively bargain to receive the statutory damages that they are entitled to, which will likely be higher than that of the larger class due to a clear lack of consent as well as evidence of willfulness. As a practical matter, all absent Opt-Out Class members would lose the right to effectively bargain for increased damages unless each one of them opted-out of whatever settlement is eventually reached in the *McClintic* action. Also, McLaren would be unable to represent either class in subsequent litigation if those claims are resolved in a prior settlement.

4. McClintic Cannot Adequately Represent Either Proposed Class

The fourth element examines "whether existing parties' interests are such that they will make all of the arguments the applicants would make." *United States v. Oregon,* 839 F.2d 635, 638 (9th Cir. 1988). The burden of showing inadequate representation is minimal, and is satisfied if the proposed intervenor can demonstrate that representation of his or her interests "may be" inadequate. *Arakaki,* 324 F.3d at 1086; *see also Sec. & Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1390 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 993 ("an applicant to intervene need

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only show that the representation of his interest may be inadequate; the burden of proof rests on those resisting intervention"). In the context of class action lawsuits, inadequate representation is present, and intervention proper, when existing class representatives cannot represent the claims of all the purported class members. *Hartman v. Duffy*, 158 F.R.D. 525, 534 (D.D.C. 1994), *aff'd in part, remanded in part sub nom. Hartman v. Duffey*, 88 F.3d 1232 (D.C. Cir. 1996).

a. McClintic Cannot Adequately Represent the Opt-Out Class

McClintic cannot adequately represent the proposed Opt-Out Class for several reasons: (1) his claims are factually distinct from those of the Opt-Out Class; (2) his claims are weaker than those of the Opt-Out Class in that certain potential defenses are not available against the Opt-Out Class; (3) his statutory damages will be different than those to which the Opt-Out Class members may be entitled; and (4) Lithia Motors's alleged conduct towards the Opt-Out Class vis-à-vis the class McClintic could potentially represent is sufficiently different to defeat typicality.

As McClintic's complaint demonstrates (Dkt. 1) and as his own counsel has conceded (Edelson Decl. ¶ 6), McClintic did not attempt to opt out of receiving further messages and did not receive a subsequent text message from Lithia Motors. As explained above, receiving this second text message after opting out completely removes the defense of consent from Lithia Motors's arsenal and provides the recipient with a strong case for receiving treble damages under 47 U.S.C. § 227(b)(3)(C) of the TCPA.

The Williamson law firm understands the concept of the need for having an appropriate plaintiff representing an opt-out class with different factual claims, as demonstrated in one if its own recent "robo-dialer" settlements against Sprint Solutions, Inc.[6] In that settlement there are three classes that depend in part on whether the class member informed the defendant Sprint Solutions that he or she did not wish to receive further calls. In *Palmer v. Sprint Solutions*, the plaintiff attempted to "opt out" of receiving further calls but still received messages, giving her the ability to represent such a subclass. *(See Palmer v. Sprint Solutions,* No. 09-cv-1211 (JLR),

[6] The settlement website for the case *Palmer v. Sprint Solutions, Inc.*, No. 09-cv-1211 (JLR), can be found at www.palmersolicitationcallsettlement.com.

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Proposed Second Amended Complaint, Dkt. 31-2) (demonstrating that the plaintiff in *Palmer* requested that she stop receiving calls)). Strangely, the class members in *Palmer* who received subsequent contacts after informing Sprint that they did not want to be contacted again are entitled to receive no more compensation than the main class, suggesting that representation by the Williamson firm of the opt-out classes in that case is inadequate as well.

Because of the factual differences between McClintic's and McLaren's claims, and also because of the Defendant's differing conduct towards them, McClintic would be unable to represent and adequately bargain on behalf of a proposed Opt-Out Class of consumers who received the April 19, 2011 subsequent text message from Lithia Motors, while McLaren could do so. *See Smith v. University of Washington Law School*, 2 F. Supp. 2d. 1324, 1342 (W.D. Wash. 1998) ("typicality turns on the Defendant's actions towards the plaintiff class") (internal quotations omitted). Lithia Motors, by enabling a system whereby opt-out requests were dishonored and met with additional text messages, acted in a different way towards McLaren and the other subclass members he seeks to represent. McClintic's claims are not typical of those of the Opt-Out Class. Not only is it *possible* that McClintic cannot adequately represent the interests of the Opt-Out Class—it is *likely*.

b. McClintic May Not Be Able to Adequately Represent the Larger Class

In addition to protecting the interests of the Opt-Out Class, McLaren should also be allowed to intervene as of right to protect the interests of the larger proposed Class. All of the issues discussed above regarding the proposed Opt-Out Class, and the hurried and secret nature of the impending settlement, raise deeper issues about the conduct of both sides in this case, and suggest that another class plaintiff, along with counsel, is necessary to protect the proposed Class and Opt-Out Class.

McLaren has moved to intervene swiftly to protect his interests before any substantive event occurs in the *McClintic* action and has satisfied the burden of showing that McClintic may not adequately represent the interests he seeks to represent. Without McLaren's intervention, his ability to represent this subclass would be impaired by a hasty settlement that released opt-out

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claims without class members being able to effectively bargain to receive the damages to which they are entitled. Given the conduct of the parties, it would be beneficial for the members of both proposed classes to have McLaren, along with his counsel Edelson McGuire LLC, involved in any settlement that is reached. McLaren's motion to intervene should be granted as of right under Rule 24(a).

B. In the Alternative, the Court Should Grant Permissive Intervention

A court may grant permissive intervention where: (1) the movant shows an independent ground for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense and the main action have a question of law or fact in common. Fed. R. Civ. P. 24(b); *Greene v. United States*, 996 F.2d 973, 978 (9th Cir. 1993). A district court possesses broad discretion to grant or deny permissive intervention. *Smith v. Pangilinan*, 651 F.2d 1320, 1325 (9th Cir. 1981). Whether permissive intervention should be granted is a question of law regarding whether the applicants' claim or defense and the main action have a "common question of fact or law" and the determination of such is liberally construed. *Silver v. Babbitt*, 166 F.R.D. 418, 433 (D. Ariz. 1994), *aff'd*, 68 F.3d 481 (9th Cir. 1995).

Even after finding these elements satisfied, a court may also consider other factors including the nature and extent of the intervenor's interest, whether the intervenor's interests are adequately represented by other parties, and whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009).

As discussed above, McLaren's motion to intervene is timely and, as demonstrated in his Complaint-in-Intervention, he has independent federal jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d). (*See* Ex. A., ¶ 9.) The analysis conducted in Part III.A, above, is equally relevant to the analysis here, and demonstrates that both McLaren and McClintic share common questions of law and fact insofar as they both received the April 11, 2011 text message (i.e., the first text message) from Lithia Motors that they allege violates the TCPA. Additionally, adequacy of representation is also a consideration under Rule 24(b). As shown above, McClintic

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cannot adequately represent the potential claims against Lithia Motors related to its text message marketing campaign.

This case is particularly suited for permissive intervention under Rule 24(b) because of the early stages of litigation that both cases are in, as well as the experience that McLaren's attorneys possess in prosecuting TCPA actions involving unauthorized text messages. Permitting McLaren to intervene in this action would preserve judicial resources and serve the interests of all class members.

IV. CONCLUSION

Plaintiff-Intervenor Dan McLaren respectfully requests that this Court grant his motion to intervene pursuant to Rule 24(a) and/or (b) of the Federal Rules of Civil Procedure, and grant whatever other relief it deems reasonable and just.

Dated: July 26, 2011

Respectfully submitted,

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Attorneys for Plaintiff-Intervenor Dan McLaren, individually and on behalf of a class and subclass of similarly situated individuals.

Certificate of Service

I certify that I filed this motion, accompanying exhibits, and proposed order with the Clerk of the Court using the CM/ECF system, which will email notification of filing to all counsel of record. I also certify that I have provided notice of this motion as required by Fed. R. Civ. P. 24(c) on counsel of record for Plaintiff Kevin McClintic and Defendant Lithia Motors, Inc. using the CM/ECF system.

s/ Cliff Cantor, WSBA # 17893

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