

# Exhibit A

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

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., an Oregon  
corporation, and DMEAUTOMOTIVE LLC,  
a Delaware limited liability company,  
  
Defendants.

No. C11-859 RAJ

**PLAINTIFF-INTERVENOR  
DAN McLAREN’S  
COMPLAINT IN INTERVENTION  
— CLASS ACTION**

DEMAND FOR JURY TRIAL

Plaintiff-intervenor Dan McLaren brings this complaint in intervention against Lithia Motors, Inc. (“Lithia”) and DMEautomotive LLC (“DME”) (collectively, “Defendants”) to stop Defendants’ practice of making unsolicited text-message calls to cellular telephones and to obtain redress for all persons injured by their conduct. McLaren, for his complaint in intervention, alleges as follows upon personal knowledge as to himself and his own acts and experiences and, as to all other matters, upon information and belief, including investigation conducted by his attorneys.

1 **NATURE OF THE CASE**

2 1. Wireless spam is a growing problem in the United States. According to a recent  
3 study conducted by the Pew Research Center, “Spam isn’t just for email anymore; it comes in  
4 the form of unwanted text messages of all kinds—from coupons to phishing schemes—sent  
5 directly to user’s cell phones.” In fact, “57% of adults with cell phones have received unwanted  
6 or spam text messages on their phone.” Amanda Lenhart, *Cell Phones and American Adults:  
7 They Make Just as Many Calls, but Text Less than Teens*, Pew Research Center (2010) at  
8 <http://pewinternet.org/Reports/2010/Cell-Phones-and-American-Adults.aspx>.

9 2. In an effort to promote the sale of its automotive products, Lithia, an automobile  
10 dealership, engaged DME, a mobile marketing firm, to conduct an especially pernicious form of  
11 marketing: the transmission of unauthorized advertisements in the form of “text message” calls  
12 to the cellular telephones of consumers throughout the nation.

13 3. By effectuating these unauthorized text message calls (hereinafter, “wireless  
14 spam”), Defendants have caused consumers actual harm, not only because consumers were  
15 subjected to the aggravation that necessarily accompanies wireless spam, but also because  
16 consumers frequently have to pay their cell phone service providers for the receipt of such  
17 wireless spam.

18 4. In order to redress these injuries, plaintiff-intervenor, on behalf of himself and  
19 classes of similarly situated individuals defined below, brings this suit under the Telephone  
20 Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA”), which prohibits unsolicited voice  
21 and text calls to cell phones.

22 5. Plaintiff-intervenor seeks an injunction requiring Defendants to cease all wireless  
23 spam activities towards him and the proposed classes, as well as an award of actual and statutory  
24 damages to the class members, together with costs and reasonable attorneys’ fees.

25 **PARTIES**

26 6. Plaintiff-intervenor is a resident of Oregon.  
27



1           14.     A “SMS message” is a text message call directed to a wireless device through the  
2 use of the telephone number assigned to the device. When a SMS message call is successfully  
3 made, the recipient’s cell phone rings, alerting him or her that a call is being received.

4           15.     Unlike more conventional advertisements, SMS message calls, and particularly  
5 wireless spam, can actually cost their recipients money, because cell phone users must frequently  
6 pay their respective wireless service providers either for each text message call they receive, or  
7 incur a usage allocation deduction to their text plan, regardless of whether or not the message is  
8 authorized.

9           16.     DME is a self-described “multi-channel marketer” for clients in the automotive  
10 industry including Carmax, AutoNation and Defendant Lithia. DME performs numerous  
11 marketing activities such as inbound and outbound call generation and reception, email  
12 transmission, and, pertinent to this Complaint, text message marketing.

13           17.     In order to perform text message marketing for its automotive clients, DME  
14 contracts with one or more third-parties known as text message aggregators to deliver text  
15 messages on behalf of its clients, including those text messages promoting Defendant Lithia,  
16 directly to consumers’ cellular telephones.

17           18.     Beginning in at least April of 2011 and continuing for weeks if not months  
18 thereafter, Defendants and/or their agents caused mass transmissions of wireless spam to the cell  
19 phones of what they hoped were potential customers of Lithia automobile products and services.

20           19.     For instance, on or about April 11, 2011, plaintiff-intervenor’s cell phone rang,  
21 indicating that a text call was being received.

22           20.     The “from” field of the transmission was identified as “35703,” which is an  
23 abbreviated telephone number known as a SMS short code and was operated by DME on behalf  
24 of its clients, including Defendant Lithia. The body of the text message read:

1 0% FINANCING ON USED VEHICLES DURING THE BIGGEST  
2 SALE EVER. OVER 3000 USED VEHICLES AT LITHIA  
3 MOTORS HTTP://BIT.LY/HOJPLX  
4 REPLY STOP TO OPT-OUT

5 21. Upon receiving this text message, plaintiff-intervenor attempted to “opt-out” of  
6 receiving further text messages by replying “STOP” to the text message above.

7 22. Despite following the instructions to “opt-out” set forth in the message above,  
8 indicating a clear desire to not receive additional text messages from Defendants, on April 19,  
9 2011, plaintiff-intervenor’s cell phone rang again, indicating that a text call was being received.

10 23. The “from” field of the transmission was again identified as “35703” and the  
11 body of the text message read:

12 WE ARE SERIOUS, 0% ON USED VEHICLES,  
13 SHOP LITHIA @ HTTP://BIT.LY/DS675E  
14 TO SEE FOR YOURSELF

15 24. Defendants’ and their agents’ use of a short code enabled the *en masse*  
16 transmission of wireless spam to lists of cellular telephone numbers, including those belonging to  
17 plaintiff-intervenor and the proposed Classes set forth below.

18 25. Although plaintiff-intervenor attempted to opt out of receiving additional  
19 messages, Defendants knowingly constructed a system whereby the cellular telephone numbers  
20 of consumers who affirmatively “opt-out” of receiving further messages are not removed from  
21 the lists of text message recipients, but instead are subjected to further wireless spam.

22 26. At no time did plaintiff-intervenor consent to the receipt of the above-referenced  
23 text messages or any other such wireless spam text messages from Defendants.

24 **CLASS ALLEGATIONS**

25 27. Plaintiff-intervenor brings this action, pursuant to Federal Rules of Civil  
26 Procedure 23(b)(2) and 23(b)(3), on behalf of himself and two classes and a subclass  
27 (collectively the “Classes”) defined below:

1           A)     The “Lithia Class” consisting of plaintiff-intervenor and all others  
2 nationwide who received one or more unauthorized text message advertisements  
3 from DME by or on behalf of Lithia;

4           B)     The “DME Class” consisting of plaintiff-intervenor and all others  
5 nationwide who received from DME one or more unauthorized text message  
6 advertisements on behalf of a third-party after affirmatively opting out; and

7           C)     The “Lithia Subclass” consisting of plaintiff-intervenor and all  
8 others nationwide who received from DME one or more unauthorized text  
9 message advertisements by or on behalf of Lithia after affirmatively opting out.

10         28.     In order to make the *en masse* transmission of text message advertisements  
11 economical, Defendants use lists of thousands of cellular telephone numbers. As such, the  
12 Classes consist of thousands of individuals, making joinder impractical.

13         29.     Common questions of law and fact exist as to all members of the Lithia Class, and  
14 such questions predominate over questions affecting plaintiff-intervenor or individual members.  
15 Common questions for the Lithia Class include:

16           (a)     Does the wireless spam Defendants distributed violate the TCPA?

17           (b)     Are the members of the Lithia Class entitled to treble damages  
18 based on the willfulness of Defendants’ conduct?

19           (c)     Were the text messages transmitted with an “automatic telephone  
20 dialing system” as defined in 47 U.S.C. § 227?

21           (d)     Does the wireless spam Defendants distributed violate the right to  
22 privacy of the members of the Lithia Class?

23         30.     Common questions of law and fact exist as to all members of the DME Class, and  
24 such questions predominate over questions affecting plaintiff-intervenor or individual members.  
25 Common questions for the DME Class include:

26           (a)     Did DME Class members opt-out of receiving further messages  
27 from the Defendants?

1 (b) Did DME Class members continue receiving unauthorized text  
2 messages from Defendants after opting-out?

3 (c) Were the text messages transmitted with an “automatic telephone  
4 dialing system” as defined in 47 U.S.C. § 227?

5 (d) Are the members of the DME Class entitled to treble damages  
6 based on the willfulness of Defendant DME’s conduct?

7 (e) Does the wireless spam DME distributed violate the right to  
8 privacy of the members of the DME Class?

9 31. Common questions of law and fact exist as to all members of the Lithia Subclass,  
10 and such questions predominate over questions affecting plaintiff-intervenor or individual  
11 members. Common questions for the Lithia Subclass include:

12 (a) Did Lithia Subclass members opt-out of receiving further messages  
13 from the Defendants?

14 (b) Did Lithia Subclass members continue receiving unauthorized text  
15 messages from Defendants after opting-out?

16 (c) Were the text messages transmitted with an “automatic telephone  
17 dialing system” as defined in 47 U.S.C. § 227?

18 (d) Are the Lithia Subclass members entitled to treble damages based  
19 on the willfulness of Defendants’ conduct?

20 32. Plaintiff-intervenor will fairly and adequately protect the interests of the Classes,  
21 his claims are typical of the claims of the members of each of the Classes, and he has retained  
22 counsel competent and experienced in similar class action litigation.

23 33. A class action is superior to other available methods for fairly and efficiently  
24 adjudicating this controversy because, among other things, (a) joinder of all members of the  
25 Classes is impracticable, and (b) many members of the Classes cannot vindicate their rights by  
26 individual lawsuits because their damages are small relative to the burden and expense of  
27 litigating individual actions.



1 **COUNT I**

2 **Violation of the TCPA, 47 U.S.C. § 227, on behalf of the Classes**

3 34. Plaintiff-intervenor incorporates by reference the foregoing allegations as if fully  
4 set forth herein.

5 35. Defendants and their agents made unsolicited commercial text calls to the  
6 wireless telephone numbers of plaintiff-intervenor and the other members of the Classes using  
7 equipment that had the capacity to store or produce telephone numbers to be called using a  
8 random or sequential number generator and to dial such numbers.

9 36. These text calls were made *en masse* through the use of a short code without the  
10 prior express consent of plaintiff-intervenor and the Classes.

11 37. Defendants have, therefore, violated the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii).

12 38. As a result of Defendants' illegal conduct, the members of the Classes suffered  
13 actual damages and, under section 227(b)(3)(B), are each entitled to, *inter alia*, a minimum of  
14 \$500.00 in damages for each such violation of the TCPA.

15 39. Defendants' misconduct was willful and knowing, particularly as it relates to the  
16 text messages sent to the DME Class and Lithia Class. As such, the Court should, pursuant to  
17 section 227(b)(3)(C), treble the amount of statutory damages recoverable by plaintiff-intervenor  
18 and members of the Classes.

19 **PRAYER FOR RELIEF**

20 Plaintiff-intervenor Dan McLaren, on behalf of himself and the Classes, prays for the  
21 following relief:

- 22 A. An order certifying the Classes as defined above;
- 23 B. An injunction requiring Defendants to cease all wireless spam activities;
- 24 C. An award of actual and statutory damages;
- 25 D. An award of reasonable attorneys' fees and costs; and
- 26 E. Such further and other relief the Court deems reasonable and just.
- 27

1 **JURY DEMAND**

2 Plaintiff-intervenor requests trial by jury of all claims that can be so tried.

3 Dated July 26, 2011.

4 Respectfully submitted,

5 LAW OFFICES OF CLIFFORD A. CANTOR, P.C.

6 By: s/ Cliff Cantor, WSBA # 17893

7 627 208th Ave. SE

8 Sammamish, WA 98074-7033

9 Tel: (425) 868-7813

10 Fax: (425) 868-7870

11 Michael J. McMorrow

12 John C. Ochoa

13 EDELSON McGUIRE, LLC

14 350 North LaSalle, Ste. 1300

15 Chicago, Illinois 60654

16 Tel: (312) 589-6370

17 Fax: (312) 589-6378

18 Attorneys for Plaintiff-Intervenor Dan McLaren

19 Certificate of Service

20 I certify that I filed this complaint in intervention (as an attachment to plaintiff-  
21 intervenor's motion to intervene) with the Clerk of the Court using the CM/ECF system, which  
22 will email notification of filing to all counsel of record.

23 s/ Cliff Cantor, WSBA # 17893