

Exhibit B

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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,

Plaintiffs-Intervenors

v.

LITHIA MOTORS, INC.

Defendant.

No. 11-cv-00859 RAJ

**DECLARATION OF JAY EDELSON IN
SUPPORT OF PLAINTIFF-
INTERVENOR DAN MCLAREN'S
MOTION TO INTERVENE**

NOTE ON MOTION CALENDAR:
AUGUST 12, 2011

DECLARATION OF JAY EDELSON

1
2 I, JAY EDELSON, hereby aver, pursuant to 28 U.S.C. § 1746, that I have personal
3 knowledge of all matters set forth herein unless otherwise indicated, and would testify thereto if
4 called as a witness in this matter.

5 1. I am an adult over the age of 18, and a resident of the State of Illinois. I am one of
6 a managing partner at Edelson McGuire, LLC, the law firm representing Plaintiff-Intervenor Dan
7 McLaren in this matter. I am fully competent to make this Declaration, and make such
8 Declaration in support of Plaintiff-Intervenor Dan McLaren's Motion to Intervene.
9

10 2. On July 6, 2011, I called Roblin Williamson, an attorney at Williamson &
11 Williams, at the phone number appearing on the firm's website.

12 3. A person answered the phone and identified himself as Rob Williamson.

13 4. I informed Mr. Williamson of the pending action *McLaren v. Lithia Motors, Inc.*,
14 No. 11-CV-810 MO, in the District of Oregon, and told him that I wanted to discuss possibly
15 coordinating our efforts.
16

17 5. Mr. Williamson told me that his law firm, on behalf of Plaintiff Kevin McClintic,
18 had just completed one day of mediation with Defendant Lithia Motors, Inc.

19 6. I informed Mr. Williamson that Plaintiff McLaren received a text message on
20 behalf of Lithia Motors on April 18, 2011, after McLaren affirmatively opted-out of receiving
21 further messages. I told Mr. Williamson that a claim under the TCPA for this message is
22 presumptively stronger than a claim brought as a result of the initial text message. I also told Mr.
23 Williamson that we didn't believe that McClintic could represent such a subclass or settle such a
24 claim.
25

26 7. Mr. Williamson told me that although McClintic did not have standing with
27 respect to this April 18, 2011 text message, he nevertheless believed that the law would allow

1 McClintic to represent such a subclass in a settlement.

2 8. I suggested to Mr. Williamson that our firm be invited to the next round of
3 mediations between McClintic and Lithia Motors in order to represent this Opt-out subclass.

4 9. Mr. Williamson informed me that he would forward a copy of the Complaint in
5 *McLaren* to Lithia Motors, and to the mediator being used by the parties in their settlement
6 discussions.

7 10. An attorney at my law firm, John Ochoa, sent an email to Mr. Williamson at his
8 email address with a copy of the Complaint in *McLaren* attached to the email. A true and
9 accurate copy of this email is attached as Exhibit 1.
10

11
12 I declare under penalty of perjury that the foregoing is true and correct. Executed on July
13 26, 2011.

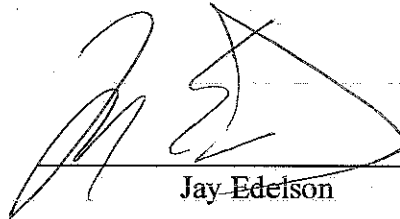
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15
16 
Jay Edelson

Exhibit 1

Zimbra**jochoa@edelson.com**

Lithia Motors

From : John Ochoa <jochoa@edelson.com>

Wed, Jul 06, 2011 05:30 PM

Subject : Lithia Motors

📎 1 attachment

To : roblin@williamslaw.com**Cc :** Jay Edelson <jedelson@edelson.com>**Reply To :** John Ochoa <jochoa@edelson.com>

Mr. Williamson,

On behalf of myself and Jay Edelson, it was nice speaking with you earlier today. Per your request, attached to this email is a copy of the class action complaint that our firm filed earlier this month.

You will notice that Mr. McLaren represents not only a class of persons who received the initial message on April 11, but also a secondary class of individuals who opted out, then received subsequent text messages. We understand that your view on this is that while your plaintiff did not have standing to sue for these subsequent text messages, there still may be law that supports your plaintiff's right to represent both classes. Our concern is that your plaintiff may not be able to adequately represent the interests of these "opt-out" plaintiffs in a class settlement.

We appreciate you reaching out to defense counsel and informing them of our desire to be involved in any settlement discussion on behalf of the opt-out class. (We are sensitive of the fact that you filed your case several weeks before ours and do not want to unnecessarily upset the applecart.) We look forward to hearing your thoughts after you speak to defense counsel.

Sincerely,

John

John Ochoa | Edelson McGuire LLC
350 North LaSalle, Suite 1300
Chicago, IL 60654

312.572.7209 (direct) | 312.589.6370 (firm) | 312.589.6378 (fax)
jochoa@edelson.com | www.edelson.com



Complaint.pdf

323 KB

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A

James Forbes
JAMES FORBES, PC
2608 NW Ordway Avenue
Bend, OR 97701
Phone: (541) 382-3917

FILED 05 JUL '11 11:08 SDC-GRP

Michael J. McMorrow (*Pro Hac Vice* pending)
John C. Ochoa (*Pro Hac Vice* pending)
EDELSON MCGUIRE LLC
350 N. LaSalle Street, Suite 1300
Chicago, Illinois 60654

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

<p>DAN MCLAREN, individually and on behalf of a class and subclass of similarly situated individuals,</p> <p style="text-align: center;">PLAINTIFF,</p> <p>v.</p> <p>LITHIA MOTORS, INC., an Oregon corporation,</p> <p style="text-align: center;">DEFENDANT.</p>	<p>Case No. CV 11-810 MO</p> <p>CLASS ACTION ALLEGATION COMPLAINT</p> <p>VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT 47 U.S.C. § 227 et seq.</p> <p>DEMAND FOR JURY TRIAL</p>
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CLASS ACTION COMPLAINT

Plaintiff Dan McLaren ("Plaintiff") brings this Class Action Complaint against Lithia Motors, Inc. ("Defendant" or "Lithia Motors") to stop Defendant's practice of making unsolicited text message calls to cellular telephones, and to obtain redress for all persons injured by its conduct. Plaintiff, for his Class Action Complaint, 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.

CLASS ACTION COMPLAINT

#41316

NATURE OF THE CASE

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

2. In an effort to promote the sale of its automotive products, Lithia Motors, an automobile dealership, engaged in an especially pernicious form of marketing: the transmission of unauthorized advertisements in the form of “text message” calls to the cellular telephones of consumers throughout the nation.

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

4. In order to redress these injuries, Plaintiff, on behalf of himself and a nationwide class and subclass of similarly situated individuals, brings this suit under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA”), which prohibits unsolicited voice and text calls to cell phones.

5. On behalf of the class and subclass, Plaintiff seeks an injunction requiring Defendant to cease all wireless spam activities towards him and the proposed class and subclass,

as well as an award of actual and statutory damages to the class and subclass members, together with costs and reasonable attorneys' fees.

PARTIES

6. Plaintiff is a citizen of the State of Oregon.

7. Defendant is an automobile dealership that sells new and used cars throughout the nation, including in Oregon and this District. It is a company organized and existing under the laws of the State of Oregon and maintains its principal place of business in the State of Oregon.

JURISDICTION AND VENUE

8. The Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332 (d) because: (a) at least one member of the putative class is a citizen of a state different from Defendant, (b) the amount in controversy exceeds \$5,000,000, exclusive of interest and costs, and (c) none of the exceptions under that subsection apply to this action.

9. Venue is proper in the District of Oregon under 28 U.S.C. § 1391 because Defendant resides in this District.

10. This Court has personal jurisdiction over the Defendant because the acts alleged herein were committed in Oregon and/or because the Defendant maintains offices in this District.

CONDUCT COMPLAINED OF

11. In recent years, marketers who often have felt stymied by federal laws limiting solicitation by telephone, facsimile machine, and e-mail have increasingly looked to alternative technologies through which to send bulk solicitations cheaply.

12. One of the newest types of such bulk marketing is to advertise through Short Message Services, commonly know as text messages. The term "Short Message Service," "SMS," or "text message" describes a messaging system that allows cellular telephone

subscribers to use their cellular telephones to send and/or receive short text messages, usually limited to 160 characters.

13. An "SMS message" is a text message call directed to a wireless device through the use of the telephone number assigned to the device. When an SMS message call is successfully made, the recipient's cell phone rings, alerting him or her that a call is being received.

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

15. Beginning in at least April of 2011 and continuing for weeks if not months thereafter, Defendant and/or its agents caused mass transmissions of wireless spam to the cell phones of what they hoped were potential customers of Defendant's automobiles.

16. For instance, on or about April 11, 2011, Plaintiff's cell phone rang, indicating that a text call was being received.

17. The "from" field of the transmission was identified as "35703," which is an abbreviated telephone number known as a SMS short code and operated by Defendant's agents.

The body of the text message read:

0% FINANCING ON USED VEHICLES DURING THE BIGGEST
SALE EVER. OVER 3000 USED VEHICLES AT LITHIA
MOTORS [HTTP://BIT.LY/HOJPLX](http://bit.ly/HOJPLX)
REPLY STOP TO OPT-OUT

18. Upon receiving this message, Plaintiff attempted to "opt-out" of receiving further messages by replying "STOP" to the text message above.

19. Despite Plaintiff's request to not receive further messages from Lithia Motors, on April 19, 2011, his cell phone rang again, indicating that a text call was being received.

20. The "from" field of the transmission was identified as "35703," which is an SMS short code operated by Defendant's agents. The body of the text message read:

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

21. Defendant's and/or its agents' use of a short code enabled Defendant's mass transmission of wireless spam to a list of cellular telephone numbers, including those belonging to Plaintiff and the proposed Class and Subclass.

22. At no time did Plaintiff consent to the receipt of the above-referenced text messages or any other such wireless spam text messages from Defendant.

CLASS ALLEGATIONS

23. Plaintiff brings this action on behalf of himself and a class (the "Class") defined as follows: All persons in the United States and its territories who received one or more unauthorized text message advertisements on behalf of Defendant.

24. Plaintiff also brings this action on behalf of himself and a subclass (the "Subclass") defined as follows: All persons in the United States and its territories who received one or more unauthorized text message advertisements on behalf of Defendant after affirmatively "opting-out" of the receipt of any further text message advertisements from Defendants.

25. In order to make its *en masse* transmission of text message advertisements economical, Defendant uses lists of thousands of cellular telephone numbers. As such, the Class and Subclass consists of thousands of individuals, making joinder impractical.

26. Common questions of law and fact exist as to all members of the Class, and such questions predominate over questions affecting Plaintiff or individual members. Common questions for the Class include:

- (a) Does the wireless spam Defendant distributed violate the TCPA?
- (b) Are the Class members entitled to treble damages based on the willfulness of Defendant's conduct?

27. Common questions of law and fact exist as to all members of the Subclass, and such questions predominate over questions affecting Plaintiff or individual members. Common questions for the Subclass include:

- (a) Did Subclass members opt-out of receiving further messages from the Defendant?
- (b) Did Subclass members continue receiving unauthorized text messages from Defendant after opting-out?
- (c) Are the Class members entitled to treble damages based on the willfulness of Defendant's conduct?

28. Plaintiff will fairly and adequately protect the interests of the Class and Subclass, his claims are typical of the claims of the members of the Class and Subclass, and he has retained counsel competent and experienced in similar class action litigation.

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

COUNT I

(Violation of the TCPA, 47 U.S.C. § 227: On behalf of the Class and Subclass)

30. Plaintiff incorporates by reference the foregoing allegations as if fully set forth herein.

31. Defendant and its agents made unsolicited commercial text calls to the wireless telephone numbers of Plaintiff and the other members of the Class and Subclass using equipment that had the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

32. These text calls were made *en masse* through the use of a short code without the prior express consent of Plaintiff and the Class and Subclass.

33. Defendant has, therefore, violated the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii). As a result of Defendant's illegal conduct, the members of the Class and Subclass suffered actual damages and, under section 227(b)(3)(B), are each entitled to, *inter alia*, a minimum of \$500.00 in damages for each such violation of the TCPA.

34. Defendant's misconduct was willful and knowing, and the Court should, pursuant to section 227(b)(3)(C), treble the amount of statutory damages recoverable by Plaintiff and members of the Class and Subclass.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Dan McLaren, on behalf of himself and the Class and Subclass, prays for the following relief:

1. An order certifying the Class and Subclass as defined above;
2. An injunction requiring Defendant to cease all wireless spam activities;
3. An award of actual and statutory damages;

4. An award of reasonable attorneys' fees and costs; and
5. Such further and other relief the Court deems reasonable and just.

JURY DEMAND

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

July 1, 2011

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

By: _____

One of Plaintiff's attorneys

James Forbes
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