

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,

v.

LITHIA MOTORS, INC.,

Defendant.

No. 2:11-cv-00859-RAJ

PLAINTIFF'S UNOPPOSED MOTION FOR  
PRELIMINARY APPROVAL OF  
PROPOSED CLASS ACTION  
SETTLEMENT

NOTE ON MOTION CALENDAR:  
August 8, 2011

Plaintiff Kevin McClintic ("Plaintiff") requests that the Court grant preliminary approval to the Settlement Agreement the Parties have reached. A copy of the Settlement Agreement is attached as Exhibit A to the Joint Declaration of Kim Williams and Rob Williamson ("Joint Declaration") filed with this Motion. A proposed Order Granting Preliminary Approval of Class Action Settlement and Class Certification, Approving Class Notice, and Scheduling a Final Settlement Approval Hearing ("Preliminary Approval Order"), in the form approved by the Parties as Exhibit B to the Settlement Agreement, is filed concurrently herewith.<sup>1</sup>

<sup>1</sup> Any capitalized terms used but not defined herein shall have the meanings ascribed to them in the Settlement Agreement attached as Exhibit A to the Joint Declaration.

1  
2 Plaintiff respectfully submits that the Court should preliminarily approve the Settlement  
3 Agreement, certify a settlement class, appoint Plaintiff as Class Representative and Williamson  
4 and Williams as Class Counsel for settlement purposes, approve the form, content and method  
5 of delivering Notice of the Settlement Agreement to Class Members and schedule a Final  
6 Settlement Hearing. Plaintiff relies upon the Settlement Agreement, the pleadings filed with  
7 the Court to date, the Joint Declaration, and the authority cited herein.  
8

## 9 I. INTRODUCTION

### 10 A. The Allegations of Plaintiff

11 Plaintiff alleged, *inter alia*, that Lithia had caused the transmission of unauthorized  
12 advertisements, in the form of "text messages", to the cellular telephones of consumers residing  
13 in a number of states, in violation of the Telephone Consumer Protection Act ("TCPA"), 47  
14 U.S.C. § 227, and various state laws, including RCW 80.36.400, RCW 19.190.060 and RCW  
15 19.86 during the four-year period preceding the filing of the complaint, *i.e.*, from April 21,  
16 2007. Defendant Lithia Motors, Inc. ("Defendant" or "Lithia") denied any wrongdoing and the  
17 Settlement Agreement represents no admission of liability on its part.  
18

19 The class consists of:

20 All persons within the United States who received a Text Message on their  
21 cellular telephones from Defendant or on Defendant's behalf, at any time during  
22 the Class Period, including all persons within the United States who received a  
23 second Text Message from Defendant or on Defendant's behalf after attempting  
24 to opt out after receiving a first Text Message.

### 25 B. Procedural History and Efforts of Plaintiff's Counsel

26 Plaintiff filed this lawsuit in King County Superior Court on April 21, 2011. Lithia  
removed the case to this Court on May 23, 2011. Shortly thereafter, Lithia requested early  
mediation to attempt to resolve the case.

1  
2 C. Mediation

3 Plaintiff and Lithia agreed to mediate this case before the Honorable Terrence Lukens  
4 of JAMS, in Seattle. That mediation took place on July 5, 2011 and went into the evening. In  
5 addition to counsel for the Parties, counsel for DMEautomotive LLC, a third party vendor  
6 retained by Lithia, also attended. Following the mediation, subsequent negotiations between  
7 the Parties resulted in the Settlement Agreement.  
8

9 **II. THE TERMS OF THE SETTLEMENT**

10 The Settlement Agreement provides that Defendant shall establish a Settlement Fund of  
11 \$2,500,000.00. The class consists of approximately 57,800 persons who were sent a text  
12 message in April 2011 and a subset of that 57,800 (approximately 48,000) who were sent a  
13 second text message approximately one week later. Thus, some Class Members received two  
14 texts. Further, some Class Members attempted to opt out from receiving further text messages  
15 after receiving the first one, but nonetheless received a second text message. There are 6190  
16 such Class Members. No one received more than two text messages.  
17

18 All Class Members will be provided with Notice as provided in Section III.C.6. of the  
19 Settlement Agreement, which will include a Claim Form to be submitted to the Settlement  
20 Administrator. For each text message received, a Class Member will be paid \$175.00, except  
21 that a Class Member who received a second text after attempting to opt out of receiving any  
22 further messages will receive \$500.00 for the second text message, or a total of \$675.00.  
23 Subject to Court approval, a sum of \$1,740,000 will be available to pay Approved Claims to  
24 Class Members (the "Class Members Payment Sum"). In the event that the amount of  
25 Approved Claim payments exceeds the available Class Members Payment Sum, the amount of  
26 the settlement payments to Class Members will be reduced pro rata. In the event that there are

1  
2 Class Member Payment Sum funds remaining after all Approved Claims are paid, the balance  
3 of the funds will be donated to the Legal Foundation of Washington.

4 The Settlement Agreement also provides for Defendant to select, engage and pay the  
5 fees and expenses of the Settlement Administrator, who will provide or supervise Notice and  
6 who will receive and review Claim Forms submitted by Class Members. The Settlement  
7 Administrator shall review each Claim Form submitted, determine whether the submitting  
8 claimant is an eligible Class Member, determine whether the payment sought in the Claim  
9 Form should be an Approved Claim, and determine the correct amount due each eligible Class  
10 Member who submitted an Approved Claim. The settlement also provides for Defendant to pay  
11 costs of settlement administration, which the Parties estimate will be approximately  
12 \$150,000.00.  
13

14 The Settlement Agreement provides for injunctive relief barring Lithia from  
15 transmitting or causing to be transmitted text messages containing commercial solicitations  
16 without obtaining express consent. The Settlement Agreement also provides that Lithia will  
17 be separately responsible to pay all attorneys' fees, litigation expenses and costs in an amount  
18 up to \$600,000.00 and payment of an incentive fee to Plaintiff of \$10,000.00.  
19

### 20 III. NOTICE

21 The Settlement Agreement provides that Notice will be provided to Class Members by  
22 direct mail with an enclosed claim form (Exhibits C and A of the Settlement Agreement) that  
23 will advise them of the details of the settlement and of their right to make a claim, opt-out or  
24 object. The Notice will also direct Class Members to a website created and maintained by the  
25 Settlement Administrator, which will include a copy of the Settlement Agreement and the long  
26

1  
2 form Notice of Settlement (Exhibit D) and post deadlines for objecting to or opting out of the  
3 settlement.

4 The Settlement Administrator will also post on the website a toll free telephone number  
5 for Class Members to obtain information about the Settlement. The telephone support will  
6 remain active for a period of sixty (60) consecutive calendar days; starting on the date notices  
7 are mailed to Class Members. Mailing the notices is to be completed with 30 days of the date  
8 of entry of the Order Granting Preliminary Approval of the Settlement.  
9

10 Objections to the settlement and/or the request for attorney fees are to be mailed to the  
11 Settlement Administrator, postmarked no later than 60 days after the notices are mailed and  
12 published. Likewise, claims and requests for exclusion, the latter substantially in the form of  
13 Exhibit E to the Settlement Agreement, are to be mailed by that same date.

14 The Notice will also advise Class Members of the deadline for Class Counsel to post  
15 their Motion for approval of attorney fees to the website so that Class Members may review it  
16 to determine if they wish to object to the requested award. Class Counsel will be required to  
17 file their Motion for approval of attorney fees no later than 60 days after the date of entry of the  
18 Order Granting Preliminary Approval of the Settlement. This will provide Class Members 30  
19 days to review and submit objections to the request for fees.  
20

#### 21 **IV. REQUEST FOR A SETTLEMENT HEARING**

22 The Court is requested to schedule a hearing ("Settlement Hearing") to consider giving  
23 final approval to the settlement, enter judgment accordingly, substantially in the form of  
24 Exhibit F to the Settlement Agreement and to approve an award of attorney fees and costs of a  
25 total not to exceed \$600,000.00 and class representative fees of \$10,000.00 for the Plaintiff.  
26

1  
2 That hearing should take place approximately 125 days after the Court enters the Order  
3 Granting Preliminary Approval of the Settlement.

4 Summary of Deadlines

5 Date of Entry of the Order Granting Preliminary Approval of the Settlement

6 Within 30 Days Mail Notices

7 Within 60 Days Deadline to File, Post Attorney Fee Application

8 Within 90 Days Deadline to makes claims, or object or opt-out

9 With 125 Days Final Settlement Hearing

10  
11 This schedule gives Class Members over 60 days to decide whether to make a claim, opt-out or  
12 object to the settlement, and to contact Class Counsel or the Settlement Administrator with any  
13 questions, and 30 days to decide whether to object to the requested attorney fees.

14 **V. AUTHORITY**

15 **A. Settlement and Class Action Approval Process**

16 Federal courts strongly favor and encourage settlements as a matter of “express public  
17 policy,” particularly in class actions, where the inherent costs, delays, and risks of continued  
18 litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See*  
19 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting the “strong  
20 judicial policy that favors settlements, particularly where complex class action litigation is  
21 concerned”); *see also* 4 Newberg on Class Actions § 11.41 (4th ed. 2002) (citing cases).  
22 Handling claims like those at issue here through individual litigation would unduly tax the  
23 court system, require expenditure of public and private resources and, given the relatively small  
24 value of individual claims, be impracticable. Thus, the proposed Settlement Agreement is the  
25 best way for Class Members to receive the relief to which they are entitled in a prompt and  
26 efficient manner.

1  
2           The *Manual for Complex Litigation* describes a three-step procedure for approval of  
3 class action settlements:

- 4           (1) Preliminary approval of the proposed settlement at an informal hearing;  
5           (2) Dissemination of mailed and/or published notice of the settlement to all  
6 affected class members; and  
7           (3) A “formal fairness hearing” or final settlement approval hearing, at which  
8 class members may be heard regarding the settlement, and at which evidence  
9 and argument concerning the fairness, adequacy, and reasonableness of the  
10 settlement may be presented.

11           *Manual for Compl. Lit.* at § 21.63. *See also* Fed. R. Civ. Pro. 23(e). This procedure safeguards  
12 class members’ due process rights and enables the court to fulfill its role as the guardian of  
13 class interests. 4 *Newberg* § 11.25. With this motion, Plaintiff requests that the Court take the  
14 first step in this process by (1) granting preliminary approval of the proposed Settlement,  
15 (2) preliminarily certifying for settlement purposes the proposed classes, and (3) approving as  
16 sound under Rule 23 the proposed notice plan.

17           The decision to approve or reject a proposed settlement is committed to the Court’s  
18 sound discretion. *See City of Seattle*, 955 F.2d at 1276 (in context of a class action settlement,  
19 an appellate court cannot “substitute [its] notions of fairness for those of the [trial] judge and  
20 the parties to the agreement,” and will reverse only upon strong showing of abuse of discretion)  
21 (*quoting Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 626 (9th Cir. 1982)).

22           The Court’s grant of preliminary approval will allow all class members to receive notice  
23 of the proposed class certification and proposed Settlement’s terms and the date and time of the  
24 “formal fairness hearing,” or final Settlement approval hearing, at which class members may be  
25 heard regarding the Settlement, and at which further evidence and argument concerning the  
26 fairness, adequacy, and reasonableness of the Settlement may be presented. *See Manual for  
Compl. Lit.* at §§ 13.14, 21.632.

1  
2 Neither formal notice nor a hearing is required at the preliminary approval stage; the  
3 Court may grant such relief upon an informal application by the settling Parties, and may  
4 conduct any necessary hearing in court or in chambers. *Id.* at § 13.14.

5 **B. The Court Should Grant Preliminary Approval of the Proposed Class Action**  
6 **Settlement**

7 The purpose of preliminary evaluation of proposed class action settlements is to  
8 determine whether the settlement is within the “range of reasonableness,” and thus whether  
9 notice to the proposed class and of the terms and conditions of the Settlement and the  
10 scheduling of a final approval hearing are worthwhile. 4 *Newberg* § 11.25 (quoting *Manual for*  
11 *Complex Litigation*, § 30.41). “If the proposed settlement appears to be the product of serious,  
12 informed, non-collusive negotiation, has no obvious deficiencies, does not improperly grant  
13 preferential treatment to class representatives or segments of the class, and falls within the  
14 range of possible approval, then the court should direct that the notice be given to the class  
15 members of a formal fairness hearing.” *In re Portal Software, Inc.*, 2007 WL 1991529, at \*5  
16 (N.D. Cal. June 30, 2007) citing *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157  
17 F. Supp.2d 561, 570, n. 12 (E.D. Pa. 2001) (citing, in part, *Manual for Complex Litigation*).

18 **1. The Settlement Agreement resulted from arms' length negotiations and was**  
19 **not the product of collusion.**

20 The Court’s first role is to ensure that “the agreement is not the product of fraud or  
21 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as  
22 a whole, is fair, reasonable and adequate to all concerned.” *Hanlon v. Chrysler Corp.*, 150 F.3d  
23 1011, 1027 (9th Cir. 1998) (internal quotes and citations omitted). “A presumption of  
24 correctness is said to attach to a class settlement reached in arms-length negotiations between  
25 experienced capable counsel after meaningful discovery.” *Hughes v. Microsoft Corp.*, 2001  
26 WL 34089697, at \*7 (W.D.Wash. Mar. 26, 2001); *see also* 2 *Newberg* § 11.41.



1  
2 The requirement that the settlement be fair is designed to protect against collusion  
3 among the Parties.<sup>2</sup> There is usually an initial presumption of fairness when a proposed  
4 settlement, which was negotiated at arms' length by counsel for the class, is presented for court  
5 approval.<sup>3</sup> Here, the settlement was the result of such arms' length negotiations by experienced  
6 attorneys with the assistance of Judge Terrence Lukens (Ret.), who served as mediator. Joint  
7 Dec., ¶2. The negotiations were initiated early in the litigation as a result of the Defendant's  
8 desire to reach early resolution and avoid the expense and delay of litigation. Plaintiff's  
9 counsel have been involved in litigation with various defendants regarding junk faxes and pre-  
10 recorded telephone calls, including cases mediated with Judge Lukens and with Defendant's  
11 counsel. *Id.* at ¶3 The parties are familiar with the legal issues, defenses, risks and ranges of  
12 settlement results in other cases. Plaintiff's counsel has been involved in approximately 35  
13 settlements involving claims under the Telephone Consumer Protection Act and its Washington  
14 state equivalents. No settlement has ever been disapproved. There has been no collusion and  
15 the Settlement Agreement reflects the separate judgment of each Party's counsel that it is  
16 reasonable under the circumstances.  
17  
18

19 **2. The value of this Settlement Agreement outweighs the mere possibility of**  
20 **future relief after protracted litigation and therefore justifies preliminary**  
21 **approval.**

22 The Settlement Agreement provides payments of \$175.00 for text messages received by  
23 a Class Member and \$500.00 for a Class Member who received a second text message after  
24 attempting to opt out of receiving any further text messages from Lithia.

25 In evaluating the proposed settlement, Plaintiff and his counsel have considered the  
26 expense and length of time necessary to prosecute the claims in the case through trial and

<sup>2</sup> *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F.Supp. 1379, 1383 (D. Md. 1983).

<sup>3</sup> 2 *Newberg on Class Actions*, § 11.41 at 11-88 (3<sup>rd</sup> ed. 1992).

1  
2 possible appeal, the claims asserted by the class, and the defenses asserted by and available to  
3 Lithia. The risk, expense, and uncertainty in actions such as this one, the fact that this Court's  
4 final resolution of the claims and defenses asserted in the litigation whenever and however  
5 determined may be appealed with substantial delays and attendant risk from years of protracted  
6 litigation, and the benefits provided pursuant to the Settlement Agreement were all considered.  
7 Based on these and other considerations, Plaintiff and his counsel have concluded that it is in  
8 the best interest of the members of the class to compromise and settle the claims. Class  
9 Counsel believe that the proposed settlement provides for a fair, efficient and expeditious  
10 resolution of all claims asserted by the class against Defendant and provides significant benefits  
11 to the members of that class. Given the current posture of the case and the cost of the litigation,  
12 the value of an immediate recovery outweighs the mere possibility of relief to the class in the  
13 future.<sup>4</sup>  
14

15 Defendant obtained all of the cell phone numbers of persons who received text  
16 messages in April 2011, some of whom actually may have given permission to receive such  
17 messages but who nevertheless will be included in the settlement. Were the case to proceed,  
18 Defendant intended to vigorously defend on the issue of consent based upon its relationship  
19 with customers. This was not a texting-marketing program sent out to a list of leads provided  
20 by a third party. There is no evidence that Defendant intended to cause injury.  
21

22 While the maximum award payable under the applicable federal and state statutes is  
23 \$500, with trebling for willful violations, courts have the discretion to award less. There is  
24 some authority that while potentially "ruinous damages" is not a barrier to class certification,  
25 courts can consider damages at trial. This settlement reflects a balance between the risks of  
26

---

<sup>4</sup> *Cottlieb v. Willes*, 11 F.3d 1004, 1014 (10<sup>th</sup> Cir. 1993).  
PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY  
APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT - 10  
(NO. C11-0859 RAJ)

1  
2 trial and the expense and delay of proceeding with the litigation against the value of a certain  
3 result at this time, which provides substantial financial relief to all class members. The amount  
4 awarded bears a reasonable relationship to the injury caused by the alleged intrusion of an  
5 automatically dialed phone solicitation.

6  
7 **3. The Settlement Agreement is fair and falls within the range of preliminary  
approval because it provides substantial relief to Class Members**

8 The settlement benefits made available to Class Members will provide a cash payment  
9 that represents either their maximum available statutory damages or a substantial percentage  
10 thereof and will account for multiple violations. Accordingly, the proposed benefits are not  
11 only fair but will be much greater than those approved in other cases. *See, e.g., Officers for*  
12 *Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982) (“[i]t is well-settled law that a  
13 cash settlement amounting to only a fraction of the potential recovery will not per se render the  
14 settlement inadequate or unfair”); *Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974)  
15 (even if “a proposed settlement may only amount to a fraction of the potential recovery,” that  
16 does not mean “the proposed settlement is grossly inadequate and should be disapproved.”);  
17 *Kakani v. Oracle Corp.*, 2007 WL 2221073, at \*3 (N.D. Cal. Aug. 2, 2007) (granting  
18 preliminary approval to settlement for 12.3% of maximum claims).

19  
20  
21 In this District, courts have given final approval in two automatic dialing machine cases  
22 involving Plaintiff’s counsel. In *Gardner v. Capital Options* (C07-1918), Judge Coughenour  
23 approved a claims paid settlement which involved sending a check to every class member of  
24 \$170.00. Judge Robart in *Hovila v. Direct Capital Corporation* (C09-00669) approved a  
25 claims made settlement providing \$135.00 to each class member. In a junk fax case, *Kavu v.*  
26 *Omnipak*, Judge Lasnik approved a settlement for payment of \$500.00 for every claim made.

1  
2 Judge Lasnik has also given preliminary approval of settlements in two other robo-calls cases  
3 where each class member will be paid \$100.00 for each claimed call.

4 Settlements for texting cases have also been in the range of this settlement. *Lozano v.*  
5 *Twentieth Century Fox Film Corp.* (09-06344)(N.D. Ill.)(200.00 claims made); *Weinstein v.*  
6 *Airit2me, Inc.* (06-0484)(N.D. Ill.)(150.00 claims made); *Espinal v. Burger King Corporation,*  
7 *Inc.* (09-20982 (S.D. Fla.)(250.00 claims made for class members who received a text after  
8 opting out); *Satterfield v. Simoni & Schuster* (C06-2893)(N.D. Cal)(175.00 claims made); and  
9 *Kramer v. Autobytel, Inc.* (C-10-02722)(N.D. Cal.)(100 claims made).  
10

11 **4. The Settlement Agreement treats all Class Members fairly**

12 Under the Settlement Agreement, all Class Members will be eligible for the amount of  
13 statutory damages available under the statute giving rise to their claims. In the unexpected  
14 event that the proposed settlement amount is insufficient to pay the maximum amount, each  
15 class members' amount of recovery will be reduced on a pro-rata basis according to the total  
16 number of claims made. The only differential treatment will be that plaintiff seeks an incentive  
17 award for Mr. McClintic, the named class representative. Plaintiff believes, and Defendant  
18 does not oppose, that an incentive award for him is permissible and promotes a public policy of  
19 encouraging individuals to undertake the responsibility of representative lawsuits. *See Grays*  
20 *Harbor Adventist Christian School v. Carrier Corp.*, 2008 WL 1901988, at \*7 (W.D. Wash.  
21 Apr. 24, 2008); *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 463 (9th Cir.  
22 2000); *see also Manual for Complex Litigation* (Fourth) § 21.62 n. 971 (2004) (incentive  
23 awards may be “merited for time spent meeting with class members, monitoring cases, or  
24 responding to discovery”).  
25  
26

1  
2 **C. The Court Should Provisionally Certify the Proposed Settlement Class**

3 The Parties request that the Court provisionally certify a nationwide class for settlement  
4 purposes only. This provisional certification permits notice of the proposed settlement to issue  
5 to the Class Members to inform them of the existence and terms of the proposed Settlement  
6 Agreement, their right to object and be heard on its fairness, their right to opt out, and of the  
7 date, time, and location of the formal fairness hearing. *See Manual for Complex Litigation*  
8 (Fourth) §§ 21.632, 21.633 (2004).

9 **1. The requirements of FRCP 23(a) are met**

10 Plaintiff asserts that the requirements of Rule 23(a) are met.

11 **a. The classes are so numerous that joinder of all Class Members is impracticable**

12 There are approximately 57,800 Class Members. Joinder of these persons would be  
13 impracticable.

14 **b. There are numerous common issues of law and fact**

15 This case involves nationwide claims under the TCPA; common issues of law and fact  
16 include: (1) whether and how many text messages were sent to Class Members, (2) whether a  
17 text message was sent after a Class Member asked to opt out of receiving any further text  
18 messages, and (3) whether any Class Member had consented to receiving the text messages.  
19 All of these numerous questions of law and fact are common to members of the classes and  
20 FRCP 23(a)(2)'s commonality requirement is fully satisfied.

21 **c. The Class Representative's claims are typical**

22 Representative claims are "typical" if they are "reasonably coextensive with those of the  
23 absent class members." *Dukes v. Walmart, Inc.* 509 F. 3d 1168, 1184 (9th Cir. 2007). The  
24 Class Representative's claims need not be substantially identical to those of absent class  
25 members, but rather, "[t]he test of typicality is whether other members have the same or similar  
26 injury, whether the action is based on conduct which is not unique to the named plaintiffs, and  
whether other class members have been injured by the same conduct." *Hanlon* 976 F. 2d. at

1  
2 508 (internal quotation marks omitted). In this case, the Plaintiff has precisely the same claims  
3 as every other Class Member, having received a text message from Defendant. While he did  
4 not opt out from receiving further texts and did not receive a second text, those differences are  
5 immaterial to the typicality of his claims and his ability to represent all class members. The  
6 Class Representative's claims are coextensive with those of all class members.

7 **d. The named Plaintiff and his counsel adequately represent the**  
8 **proposed class**

9 The adequacy of representation requirement is satisfied. Plaintiff is represented by  
10 qualified and competent counsel and the interests of the Plaintiff do not conflict with the  
11 interests of the proposed Class Members. *See Dukes*, 509 F. 3d at 1185. Plaintiff's claims are  
12 coextensive with those of the class, and he and each Class Member have identical interests in  
13 establishing liability and have been injured in the same way. Plaintiff asserts the same legal  
14 claims and theories as all other Class Members and seeks identical relief. There is no conflict  
15 between Plaintiff's claims and those of the proposed class and he has agreed to assume the  
16 responsibility of representing the class. He has taken seriously his obligations to the class and  
17 nothing more is required.

18 Class Counsel has extensive experience and expertise in prosecuting complex class  
19 actions, especially those involving violations of the TCPA and its Washington state  
20 equivalents, including the Washington ADAD statute and the Washington Telephone  
21 Solicitation Act. Class Counsel has been appointed to represent classes in numerous cases, *see*  
22 Declaration of Rob Williamson at ¶15, and have vigorously prosecuted this case.

23 **2. The proposed settlement classes also meets the predominance and**  
24 **superiority requirements of FRCP 23(b)(3)**

25 This action is well-suited for certification under FRCP 23(b)(3) because questions  
26 common to the Class Members predominate over questions affecting only individuals. The  
class action device promotes the fair and efficient resolution of the claims of the class and it  
will do so in this case. When addressing the propriety class certification at this stage, the Court

1  
2 should take into account that because of settlement, trial is not necessary and manageability of  
3 class certification purposes is not relevant at this time.

4 There is no dispute that common questions predominate this action, as the common  
5 questions are simply the number of text messages received and whether a request to opt-out  
6 was made. Class treatment in this case is clearly superior to alternative methods of  
7 adjudication because it will facilitate the favorable resolution of all class claims and is superior  
8 to multiple individual suits or piecemeal litigation. Settlement here will greatly conserve  
9 judicial resources and promote consistency and efficiency of adjudication.

10 **D. The Proposed Class Notice Is Adequate and Should Be Approved.**

11 Pursuant to Fed. R. Civ. P. 23(c)(2)(B), "...the Court must direct to class members the  
12 best notice practicable under the circumstances, including individual notice to all members who  
13 can be identified through reasonable effort." Fed. R. Civ. P. 23(e)(1) provides that the court  
14 must direct notice in a "reasonable manner." The purpose of the Notice is to fulfill the  
15 requirements of due process by alerting and informing members of the class about class  
16 certification, their right to opt out of or object to the class, the Settlement Agreement, and of the  
17 Fairness Hearing. Plaintiff has proposed a form of Notice that he believes meets this standard.  
18  
19

20 Fed. R. Civ. P. 23(c)(2)(B) provides that, regarding certification of a provisional class,  
21 "the Court must direct to class members the best notice practicable under the circumstances,  
22 including individual notice to all members who can be identified through reasonable effort."  
23 *See In re-Phenylpropanolamine Products Liability Litigation*, 227 F.R.D. 553, 565 (W.D.  
24 Wash. 2004) (under Rule 23(c)(2)(B), "the applicable standard [for notice] is not the best  
25 conceivable notice, but the best notice practicable under the circumstances"). In addition,  
26 Fed. R. Civ. P. 23(e)(1) provides that, regarding the terms of the proposed class action  
settlement, the court must direct notice in a "reasonable manner." *See Rodriguez v. West*

1  
2 *Publishing Co.*, 563 F.3d 948, 962 (9th Cir. 2009). Where a class is provisionally certified and  
3 a proposed settlement is provisionally approved, as would be the case in this matter, the Parties  
4 can and should combine notice of the class certification and of the class action settlement so  
5 long as the notice satisfies the more stringer standard of Rule 23(c)(2)(B). *Manual for Complex*  
6 *Litigation (Third)*, § 3.212 at 228; *see also Grunewald v. Kasperbauer*, 235 F.R.D. 599, 609  
7 (E.D. Pa. 2006); *Thomas v. NCO Financial Sys., Inc.*, 2002 WL 1773035, at \*7 (E.D. Pa.  
8 July 31, 2002) (citing, in part, *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994)).

9 Plaintiff has proposed a Notice plan that meets this standard by providing individual  
10 notice to all Class Members. Defendant has the names and postal addresses of all Class  
11 Members effective at the time the text messages in question were sent. As the text messages  
12 were sent only four months ago, it is likely that most or all of the addresses will be current and  
13 valid. Plaintiff believes direct mailing of the Notice and Claim Form, together with the  
14 telephone and website information described herein, is an effective and cost efficient method to  
15 provide Class Members with the requisite information about this case. Counsel for Plaintiff  
16 believes the contemplated Notice provides a comprehensive, plain language explanation of the  
17 Settlement Agreement and its terms to Class Members.  
18

## 19 VI. CONCLUSION

20  
21 For the foregoing reasons, Plaintiff requests that the Court enter the Order Granting  
22 Preliminary Approval of the Settlement and schedule the date for the final settlement hearing.  
23 There is overriding public interest in settling and quieting litigation, particularly in class action  
24 suits.<sup>5</sup>  
25  
26

<sup>5</sup> *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943 (9<sup>th</sup> Cir. 1976).  
PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY  
APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT - 16  
(NO. C11-0859 RAJ)



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

DATED: August 8, 2011.

WILLIAMSON & WILLIAMS

By /s/ Rob Williamson  
Rob Williamson, WSBA #11387

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

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record who receive CM/ECF notification, and that the remaining parties shall be served in accordance with the Federal Rules of Civil Procedure.

Dated this 8th day of August 2011.

By s/Rob Williamson  
Kim Williams, WSBA #9077  
Rob Williamson, WSBA #11387  
17253 Agate Street NE  
Bainbridge Island, WA 98110  
Telephone: (206) 780-4447 Fax: (206) 780-5557  
Email: [kim@williamsllaw.com](mailto:kim@williamsllaw.com)  
[roblin@williamsllaw.com](mailto:roblin@williamsllaw.com)