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. 11-cv-00859 RAJ **LITHIA MOTORS, INC.'S OPPOSITION TO PLAINTIFF-INTERVENOR DAN McLAREN'S MOTION TO INTERVENE** **NOTED ON MOTION CALENDAR: AUGUST 12, 2011**

I. INTRODUCTION

Defendant Lithia Motors, Inc. ("Lithia") hereby opposes Proposed Plaintiff-Intervenor Dan McLaren's Motion to Intervene (the "Motion"). Because McLaren cannot satisfy each of the elements necessary to warrant intervention as of right, and because permissive intervention is improper, the Court should deny the Motion.

McLaren filed this Motion on July 26, 2011 – weeks after the parties participated in mediation and after his counsel learned that a settlement had been reached. Indeed, McClintic has filed a motion for preliminary settlement approval with the Court.

The parties conferred and agreed to an early mediation and settlement effort in order to avoid the extensive costs – and risks – of class action litigation. The settlement reached by the parties was the result of an arms-length negotiation with the assistance of a skilled and experienced mediator. The settlement is fair to the class members – including McLaren.

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Now, at the eleventh hour, McLaren seeks to intervene and disrupt that settlement by arguing that his interests were not adequately represented. However, as McClintic's request for preliminary approval of the settlement demonstrates, intervention is not necessary, as McLaren's interests were adequately represented.

II. STATEMENT OF FACTS

A. McClintic's Action Against Lithia.

Kevin McClintic filed this action against Lithia on April 21, 2011. *See* Ex. A to the Declaration of Erin M. Wilson ("Wilson Decl."). McClintic's complaint alleges that on April 11, 2011, Lithia "sent or caused to be sent a text message to Plaintiff's cellular telephone." *Id.* at ¶ 14. The text message was as follows:

> From: 35703
> 0% financing on used vehicles during the Biggest Sale Ever. Over 3000 used vehicles at Lithia motors http://bit/ly.hojpLX REPLY STOP TO Opt-Out
> 10:00 am 4/11/11

Id. at ¶ 15. McClintic alleges that Lithia's text message was sent for the purpose of commercial solicitation and that he did not consent to the receipt of the text. *Id.* McClintic further alleges that Lithia sent similar text messages to numerous cellular telephone subscribers in a number of states. *Id.* at ¶ 16. McClintic seeks to represent a national class of people who received a text message on their cellular telephones from Defendant or on Defendant's behalf. *Id.* at ¶ 32 (the "National Class").

McClintic's Complaint alleges violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227(B)(1)(A) (the "TCPA"), RCW 80.36.400, RCW 19.190.060, and the Washington Consumer Protection Act, RCW 19.86 *et seq*. *See generally*, Ex. A to the Wilson Decl. McClintic seeks to recover, on behalf of himself and the National Class, the full amount of damages available by law, as well as injunctive relief to prevent Lithia from sending text messages in violation of federal law, statutory damages of not less than $500.00

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per text message sent to class members, treble damages, and attorneys' fees and costs. *See id.* at ¶¶ A-E.

The parties to this action agreed to early mediation of their dispute in order to avoid the substantial costs and uncertainty of litigation. Wilson Decl. at ¶ 3. DMEautomotive, LLC ("DME"), a vendor of Lithia who assisted in the text message program, was invited to, and did, participate in the mediation. *Id.* On July 5, 2011, the parties participated in a lengthy mediation in Seattle, Washington, with the Honorable Terrence Lukens (Ret.) serving as mediator. *Id.* Judge Lukens has mediated numerous TCPA cases involving counsel for both parties. *Id.* The parties subsequently finalized their settlement negotiations, and McClintic moved the Court for preliminary settlement approval on August 8, 2011. *Id.*; Dkt. No. 19. Although DME was not a party to this action, DME actively participated in the mediation and provided data necessary for the parties to formulate a fair settlement. Wilson Decl. at ¶ 3.

McClintic's motion for preliminary settlement approval demonstrates that this action was settled in an arms-length negotiation that inures to the benefit of the class members. In relevant part, Lithia agreed to establish a settlement fund in the amount of $2,500,000. Dkt. No. 19 at p. 3. Out of that fund, $1,740,000 shall be available for payments to class members. *Id.* Each class member who submits an approved claim will receive $175 per text message sent on behalf of Lithia, with the exception that each class member who received a second text message after attempting to opt out of receiving further text messages from Lithia will receive $500 for that second text message. *Id.* In the unexpected event that the number of claims exceeds $1,740,000, the amount of the settlement payments to class members will be reduced pro rata. *Id.* In the event that there are funds remaining after all valid claims of class members are paid, the balance of the funds will be donated to the Legal Foundation of Washington. *Id.* at p. 3-4.

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B. McLaren's Motion Is Untimely and He Should Not Be Permitted to Intervene.

McLaren is a former Lithia employee. Declaration of Chris Cooley ("Cooley Decl.") at ¶ 2. He began working for Lithia as an advertising department specialist in April of 2008. *Id.* He was subsequently promoted to an advertising department manager, and his position then changed to Regional Marketing Manager in July of 2009. *Id.* As a part of his duties, McLaren worked with a number of Lithia dealerships to advertise and market to Lithia's customers. *Id.*

McLaren urged the dealerships to market to their customers via text messages. *Id.* at ¶ 3; *see also* Declaration of Richard Summers ("Summers Decl.") at ¶ 2. McLaren's duties included providing advertising services for Richard Summers, the General Manager of Lithia Dodge Chrysler Jeep, from October 2008 until February 2011. Summers Decl. at ¶ 2. During that time, McLaren urged Mr. Summers – on three or four occasions – to advertise to the dealership's customers via text messages. *Id.*

McLaren also proposed advertising to customers via a new text message technology. Declaration of Chris Cooley at ¶ 3. McLaren encouraged Lithia to use a technology that would obtain individuals' cell phone numbers as they stepped onto Lithia's dealership lots. *Id.* McLaren wanted Lithia to then send these customers advertisements via text messages. *Id.* However, Lithia chose not to proceed with this method of advertising. *Id.* Thus, during his employment, McLaren was advocating that Lithia communicate to its customers via text message campaigns. *Id.*[1]

Despite encouraging Lithia to market to its customers in this way, McLaren initiated an action in the District of Oregon, Cause No. 11-cv-00810 MO—nearly two and a half months *after* the *McClintic* case began. Ex. B to the Wilson Decl. Lithia first learned that

[1] McLaren's position at Lithia was eliminated on March 5, 2011. *Id.* at ¶ 4.

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McLaren's action had been filed at the end of a long day of mediation of this case with Judge Lukens. Wilson Decl. at ¶ 4.

After McLaren learned that the *McClintic* parties were completing a settlement, he amended his complaint in the Oregon action on July 21, 2011, primarily in order to add DME as a party. Ex. C to the Wilson Decl. McLaren's allegations and claims in the Oregon case are similar to those made in *McClintic*. As in *McClintic*, McLaren alleges that he received a text message from Lithia on April 11, 2011. *Id.* at ¶¶ 19, 20. McLaren alleges that he received a second text message from Lithia on April 19, 2011, after he attempted to opt out from receiving text messages. McClintic does not make such an allegation, however, the settlement agreement in the *McClintic* case with Lithia will compensate class members including McLaren for *each* alleged violation of the TCPA. Dkt. No. 19 at p. 3. As a class member in the *McClintic* case, McLaren would receive $675 from Lithia, for having received two text messages, $175 for the first text message and $500 for the second text message he received after he sent an opt out request.

Also, after filing suit against Lithia in Oregon and learning that the parties in this case were completing a settlement, McLaren filed this Motion on July 26, 2011. Dkt. No. 14 at p. 3 (stating that the parties' response to the show cause order reflected that they were continuing settlement negotiations). McLaren alleges that McClintic and his counsel are unable to adequately represent his interests. *See generally*, Motion. In support of this argument, McLaren cites to his counsel's work in *Satterfield v. Simon & Schuster*, 569 F.3d 946 (9th Cir. 2009). *Id.* at p. 3. McLaren does not, however, reveal that *Satterfield* settled with an award of $175 per text message—the same settlement reached here (and less than what McLaren would receive in this case if he in fact opted out after receiving the first message). Exs. D, E to the Wilson Decl.

The thrust of McLaren's Motion appears to be that he should be permitted to intervene because he allegedly is—and McClintic allegedly is not—a proper representative of a

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subclass of individuals who allegedly attempted to opt out of receiving text messages. In support of McLaren's Motion, he filed a Complaint-in-Intervention, in which he purports to represent three subclasses. Complaint-in-Intervention at p. 6. These classes are as follows:

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

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

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

III. ARGUMENT

A. McLaren Should Not be Permitted to Intervene as of Right.

Federal Rule of Civil Procedure 24(a) states that a party can intervene in an action only 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." (emphasis added). A party seeking to intervene as of right must establish each of the following requirements:

> (1) the applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties.

Arakaki v. Cayetano, 324 F.3d 1078, 1083 (9th Cir. 2003). "Each of these four requirements must be satisfied to support a right to intervene." *Id.*; *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997). Because McLaren cannot satisfy each of these requirements, his Motion must be denied.

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1. McLaren's Motion Is Not Timely.

In "determining whether a motion to intervene is timely, courts weigh the following factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to the other parties; and (3) the reason for and length of the delay." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 WL 474936, *3 (N.D. Cal. Jan. 17, 2007). These factors weigh in favor of denying McLaren's Motion. First, this case is in its final stage. The parties engaged in preliminary discovery, participated in mediation and reached a settlement, and McClintic has filed a motion for preliminary settlement approval. McLaren's assertion that this case is in an "early stage" is false. Second, the parties would be prejudiced by McLaren's intervention. Given that intervention is wholly unnecessary because McLaren's interests are adequately protected by the settlement's terms (as discussed below), intervention would at best delay settlement and at worst could destroy it. Therefore, McLaren's Motion must be denied.

2. Disposition of this Action Will Not Impair McLaren's Interest in the Litigation.

Intervention is only appropriate where disposition of the action will impair an intervenor's interest in the litigation. Fed. R. Civ. P. 24(a). Here, McLaren's interests will not be impaired if this case is settled.[2] McLaren will have the opportunity to participate in the settlement as a member of the class McClintic represents.[3] Because McLaren received one text message from Lithia and then another after he attempted to opt out, he is eligible receive a payment of $675 from Lithia.[4] This is a substantial payment and more than adequately compensates McLaren for any actual damages sustained as a result of receiving

[2] If McLaren believes that some aspect of the settlement is unfair, he can file an objection and be heard, pursuant to Federal Rule of Civil Procedure 23(e)(5).

[3] Although McLaren will not proceed as the class representative if the Court denies McLaren's Motion, he has no legal right to do so. McLaren was not the "first to file" this action against Lithia.

[4] If the total claims submitted by class members exceeds the $1,740,000 fund available to pay class member claims, his recovery may be reduced pro rata.

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two text messages. The proposed settlement amount is consistent with other TCPA text settlements around the country, including *Satterfield*, as discussed above. For example, *Lozano v. Twentieth Century Fox Film Corp.*, Cause No. 1:09-06344 (N.D. Ill. Nov. 16, 2010), yet another TCPA text message class action, settled for a cash payment of $200 per text message for each class member. Exs. F, G to the Wilson Decl. Furthermore, *Weinstein v. Airit2me, Inc.*, Cause No. 1:06-cv-00484 (N.D. Ill. 2006), another TCPA text message class action, settled for $150.00 per text message for each class member. Exs. H, I to the Wilson Decl. McLaren's counsel represented the plaintiffs in *Lozano* and *Weinstein*, and the settlement in this case is consistent with the settlements obtained in those other cases.

Accordingly, McClintic adequately represented the class by obtaining a settlement that is in line with other similar class action settlements.

3. McLaren's Interests Are Adequately Represented by Existing Parties and the Purported Lithia Subclass is Unnecessary.

McLaren is required to demonstrate that his interests are not adequately represented by McClintic in order to intervene in this action. *Arakaki*, 324 F.3d at 1086. The record, however, demonstrates that McClintic adequately represented the class – including the purported Lithia Subclass – and reached an early, favorable settlement. As a result of McClintic's efforts, the class members will each receive $175 per text message or $500 for a text message received after attempting to opt out. McLaren cannot plausibly argue that this settlement is insufficient, given that it is even more favorable to class members than the *Satterfield* settlement, upon which he relies.

Furthermore, McLaren seeks to represent a subclass of individuals that is already adequately represented. No subclass is necessary. The so-called "Lithia Subclass" as described by McLaren is comprised of those individuals who attempted to opt out of receiving text messages from Lithia, but subsequently received a second text. However, this subclass is wholly unnecessary because these people are being adequately represented and compensated

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in the *McClintic* settlement. *In re Agent Orange Prod. Liability Litig.*, 996 F.2d 1425 (2d. Cir. 1993) (overruled on other grounds). Indeed, in *Agent Orange*, the Second Circuit upheld the District Court's refusal to designate a subclass because the settlement "was structured to cover" the purported subclass members. *Id.* at 1436. The Second Circuit emphasized that:

> to appoint another attorney to represent that sub-group would just, in my opinion, increase the amount of legal fees, which is what all of us want to keep to a bare minimum. There are lots of arguments and classes and sub-classes, but if we appoint attorneys and guardian ad litem for everybody who might have ... somewhat of a conflict of interest, there is hardly going to be any money left for the veteran.

Id. Here, appointing a subclass similarly would be unnecessary, given that the settlement is "structured to cover" the Lithia Subclass. Furthermore, adding another class counsel would likely increase the amount of legal fees and likely decrease the amount of money available to compensate the class members.

McLaren also seeks to represent a "Lithia Class" consisting of "plaintiff-intervenor and all others nationwide who received one or more unauthorized text message advertisements from DME by or on behalf of Lithia." *See* Complaint-in-Intervention at p. 7. However, McLaren fails to acknowledge that he himself could not adequately represent this class. Where a defendant has unique defenses to a class representative's claims, that class member cannot serve as an adequate class representative. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992) (finding class representative not typical where his unique background and factual situation required him to prepare to meet defenses that are not typical of the defenses that would be raised against other class members); *Gartin v. S&M NuTec LLC*, 245 F.R.D. 429, 434 (C.D. Cal. 2007); *Koos v. First Nat'l Bank of Peoria*, 496 F.2d 1162 (7th Cir. 1974) (holding that unique defense applicable to representatives prevented a finding of typicality).

Here, McLaren's status as a former Lithia employee who advocated for incorporating text messaging into the company's marketing programs renders him atypical rather than

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typical. Lithia likely has equitable defenses and possibly other defenses to McLaren's claims that are unique with respect to the first text message sent to McLaren. McLaren actively encouraged Lithia to advertise to its customers via text message. McLaren seeks to represent a class of individuals who complain of that very conduct. McLaren should not now be permitted to benefit from encouraging Lithia to advertise via text messages and participating in the development of the text message campaigns. Therefore, he cannot be an adequate representative of the Lithia Class.

Because McLaren failed to establish each element necessary for intervention as of right, his Motion must be denied.

B. Permissive Intervention Should Not Be Granted.

Permissive intervention is appropriate only where (1) the movant shows an independent ground for jurisdiction; (2) the motion is timely; and (3) the movant's claim or defense and the main action have questions of law or fact in common. Fed. R. Civ. P. 24(b). The Court may also consider the nature of the intervenor's interest and whether his interests are adequately represented by other parties. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009). The Court is required to "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.*; Fed. R. Civ. P. 24(b)(3).

Permissive intervention is improper in this case for three reasons. First, as discussed above, this motion is not timely, given that the parties have reached a settlement and this litigation is in its final stage. Second, not only have McLaren's interests been adequately represented, but he himself is not a proper class representative of the Lithia Class. Finally, this Court must consider whether intervention would unduly delay or prejudice the parties in this case. Given that intervention is wholly unnecessary (as discussed throughout), intervention would delay or destroy the settlement that the parties have worked hard to achieve. Therefore, McLaren's Motion must be denied.

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C. McLaren Must Take the Case as He Finds It and Cannot Amend the Complaint while Attempting to Intervene.

McLaren is not simply attempting to intervene in the case as currently framed—he is simultaneously trying to amend the complaint, create unnecessary new subclasses and join another party. This is procedurally inappropriate. Intervention is not intended to allow for the creation of new suits by intervenors. *Sierra Club v. United States Army Corp of Eng'rs*, 709 F.2d 175, 176-77 (2d Cir. 1983). It is well-settled law that a party seeking to intervene in a case must take the case as he finds it. *Wash. Elec. Co-op., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 992 F.2d 92 (2d Cir. 1990); *N. Cheyenne Tribe v. Hotel*, 854 F.2d 1152 (9th Cir. 1988) (stating that a party seeking to intervene must take the case as he finds it). Accordingly, if the Court grants McLaren's Motion, the Court should require McLaren to take the case as he finds it; that is, as a case involving one national class against a single defendant.

McLaren should not be permitted to add DME as a party to this case or to add a new class or otherwise expand the scope of the action. McLaren's Complaint-in-Intervention introduces a "DME Class" consisting of "plaintiff-intervenor and all others who received from DME one or more unauthorized text message advertisements on behalf of a third-party after affirmatively opting out." Complaint-in-Intervention at p. 6. This class is not limited to the text messages sent on behalf of Lithia that are complained of in the current *McClintic* action. This proposed new class is improper for two reasons. First, in his complaint McLaren failed to allege any facts supporting his allegation that DME has ever sent any unauthorized text messages, much less any to him, on behalf of anyone other than Lithia. Also, he does not allege that he opted out of receiving any message from DME on behalf of any third party.

Second, the law is well-settled that McLaren must take this case as he finds it, and he is not permitted to expand this case by attempting to amend the action in an intervention motion.

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IV. CONCLUSION

For the foregoing reasons, Lithia respectfully requests that the Court deny McLaren's Motion to Intervene.

DATED: August 8, 2011

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CERTIFICATE OF SERVICE

Pursuant to RCW 9.A.72.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the 8th day of August, 2011, the document attached hereto was presented to the Clerk of the Court for filing and uploading to the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to all CM/ECF participants and any non-CM/ECF participants will be served in accordance with the Federal Rules of Civil Procedure.

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DATED this 8th day of August, 2011 at Seattle, Washington.

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