

# EXHIBIT A

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KING COUNTY  
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CASE NUMBER: 11-2-14632-4 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

KEVIN MCCLINTIC, on behalf of himself and  
all others similarly situated,  
  
Plaintiff,  
  
vs.  
  
LITHIA MOTORS, INC.,  
  
Defendant.

Case No.  
  
COMPLAINT FOR DAMAGES,  
INJUNCTIVE AND DECLARATORY  
RELIEF

Plaintiff Kevin McClintic, individually and as class representative for a Washington State  
and National Classes of similarly situated entities and individuals, alleges as follows:

INTRODUCTION

1. In an effort to promote the sale of its products, Defendant, the owner and operator of  
automobile dealerships in the West and Midwest, engaged in an especially pernicious form of  
marketing: the transmission of unauthorized advertisements, in the form of "text messages" calls,  
to the cellular telephone of consumers across the nation.

2. By effectuating these text message calls, Defendant has caused consumers actual harm,  
not only because consumers were subjected to the aggravation and the invasion of privacy that  
necessarily accompanies unsolicited text messages, but also because consumers frequently have  
to pay their cell phone service providers for the receipt of such texts.

3. Plaintiff, on behalf of himself and a National Class and a Washington Class of  
similarly situated persons, brings this suit under the Telephone Consumer Protection Act



1 (TCPA), 47 USC§227 *et seq* which prohibits unsolicited text calls to cell phones, as well as the  
2 applicable Washington statutes set forth herein.  
3

4 4. Plaintiff also seeks injunctive relief and the award of statutory damages, together with  
5 costs and reasonable attorney fees.

#### 6 I. PARTIES, JURISDICTION, VENUE

7 5. Defendant Lithia Motors, Inc. is a corporation with its principal place of business  
8 in Oregon. Defendant conducts significant business in the State of Washington with citizens and  
9 residents of this State.  
10

11 6. Plaintiff is a resident of King County, Washington and receives text messages on  
12 his cellular telephone, primarily in King County.

13 7. The text message that is the subject of this Complaint was received on Plaintiff's  
14 cellular telephone in King County, Washington.

15 8. Venue and Jurisdiction are proper under RCW 4.12.020, RCW 2.08.010, and  
16 Washington Constitution Article. 4, §6.  
17

#### 18 II. FACTS

19 9. In recent years, businesses forbidden or limited by state or federal laws with respect  
20 to solicitations over residential telephones, facsimile machines, or e-mails, have looked to  
21 alternative technologies through which to send bulk solicitations inexpensively.

22 10. One of the newest types of such bulk marketing is to advertise through Short Message  
23 Services. The term "Short Message Service" or "SMS" describes a messaging system that allows  
24 cellular telephone subscribers to use their cellular telephones to send and receive short text  
25 messages, usually limited to 160 or so characters.  
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11. 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 typically rings or otherwise makes a signal alerting her or him that a call is received. As cellular telephones are inherently mobile and are frequently carried by their owners, calls to cellular telephones, including SMS messages, may be received by the called party virtually anywhere in the world.

12. Unlike more conventional solicitations, text messages actually cost the recipients money, because cell phone users must frequently pay their wireless service providers either for each text message call they receive or for a text plan that includes a specified number of messages, regardless of whether or not the message is authorized.

13. In addition to the cost to consumers, sending text messages can cause consumers to lose storage capacity on their cellular telephones and related devices, to the point that storage capacity is exhausted and a consumer is unable to receive necessary or expected communications, consumers are deprived of the opportunity immediately to question the seller of goods and services about the veracity of the seller's claims set out in the text, the privacy of consumers is invaded, telephone networks upon which consumers rely are used inefficiently and harmed to the detriment of consumers, and consumers are annoyed and harassed.

14. On April 11, 2011, Defendant sent or caused to be sent a text message to Plaintiff's cellular telephone.

15. 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"

1 Defendant's text message to Plaintiff was for the purpose of commercial solicitation, and  
2 Plaintiff did not consent, expressly or impliedly, to the receipt of the text.  
3

4 16. Upon information and belief, Defendant sent similar text messages to numerous  
5 cellular telephone subscribers in Washington State, including subscribers in King County, and  
6 subscribers in other states.

7 17. Upon information and belief, Defendant will continue to send or cause to send  
8 text messages to the cellular telephones of persons in Washington State and other states.  
9

### 10 III. CAUSES OF ACTION

11 18. Plaintiff realleges the foregoing paragraphs as if fully stated herein. The  
12 following causes of action are, to the extent necessary, stated in the alternative.

#### 13 Count A. Violation of RCW 80.36.400

14 19. RCW 80.36.400 provides, in pertinent part, as follows:

15 (2) No person may use an automatic dialing and announcing  
16 device for purposes of commercial solicitation. This  
17 section applies to all commercial solicitation intended to  
be received by telephone customers within the state.

18 20. Defendant has violated RCW 80.36.400.

19 21. As a result of said conduct, Plaintiff and members of this Washington Class are  
20 entitled to recover \$500.00 in damages from the Defendant for each violation of the statute, and  
21 treble those damages because of the willful conduct of Defendant.  
22

#### 23 Count B. Violation of RCW 19.190.060

24 22. RCW 19.190.060 provides as follows:

25 No person conducting business in the state may initiate or  
26 assist in the transmission of an electronic commercial text  
message to a telephone number assigned to a Washington  
resident for cellular telephone or pager service that is

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1  
2 equipped with short message capability or any similar  
3 capability allowing the transmission of text messages.

4 23. Defendant violated RCW 19.190.060 by transmitting or cause to be transmitted  
5 electronic commercial text messages to Plaintiff's cellular telephone and to the cellular telephone  
6 or pagers of the Washington subclass members.

7 24. As a result of said conduct, Plaintiff and members of the Washington State Class  
8 have sustained damages. Under RCW 19.190.060, Plaintiff and the class members are entitled to  
9 recover damages for each violation of the statute, as well as treble damages, attorney's fees and  
10 other remedies as permitted by law.

11 **Count C. Violation of RCW 19.86 (Washington Consumer Protection Act (CPA))**

12 25. RCW 19.19.060 provides as follows:

13 The legislature finds that the practices covered by this  
14 section are matters vitally affecting the public interest for  
15 the purpose of applying the consumer protection act,  
16 chapter 19.86 RCW. A violation of this section is not  
17 reasonable in relation to the development and preservation  
18 of business and is an unfair or deceptive act in trade or  
19 commerce and an unfair method of competition for the  
20 purpose of applying the consumer protection act, chapter  
21 19.86 RCW.

22 RCW 80.36.400 provides as follows:

23 A violation of this section is a violation of chapter 19.86 RCW.

24 26. As a result of said conduct, Plaintiff and members of the Washington State Class  
25 have sustained damages. Under the CPA, Plaintiff and all members of said Class are entitled to  
26 injunctive relief enjoining Defendant's unlawful conduct, as well as incidental, statutory and  
actual damages, and treble that amount, and costs of suit and attorney's fees.

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**Count D. Violations of the Telephone Consumer Protection Act  
(National Class)**

27. Defendant made or caused to be made text calls to Plaintiff and this National Class using an automatic telephone dialing system, within the meaning of 47 USC § 227 (a). By using such equipment system, Defendant was able to make thousands of text calls to consumers automatically without human intervention.

28. These calls were made without the prior express consent of Plaintiff and the other members of the Class.

29. As a result of said conduct, Defendant has, therefore, violated the Telephone Consumer Protection Act, 47 USC§227 (B) (1) (A) (iii), which makes it "unlawful for any person within the United States... To make any call (other than a call for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice... to any telephone number assigned to a... cellular telephone service..."

30. As a result of Defendant's illegal conduct, Plaintiff and members of the National Class are entitled to recover \$500.00 in damages from the Defendant for each violation of the Telephone Consumer Protection Act, and treble those damages because of the willful conduct of Defendant.

**IV. CLASS ACTION ALLEGATIONS**

31. Plaintiff realleges the foregoing paragraphs as if fully stated herein.

32. This class action is brought and may be maintained pursuant to CR 23(b)(2) and (b)(3). Plaintiff seeks to represent two Classes comprised of:

All Washington persons who received a text message on their cellular telephones from Defendant or on Defendant's behalf for commercial

1 solicitation purposes, at any time for the period that begins 4 years from  
2 the date of this complaint to trial (Washington State Class), and

3 All persons within the United States who received a text message on their  
4 cellular telephones from Defendant or on Defendant's behalf, at any time  
5 for the period that begins 4 years from the date of this complaint to trial  
(National Class).

6 33. **Numerosity.** The Classes are so numerous that joinder of all members is  
7 impracticable. Upon information and belief the Classes exceed 100 in number.

8 34. **Common Questions of Law and Fact.** The questions of law and fact are the  
9 same for all class members, including whether the Defendant's conduct violated RCW  
10 80.36.400, RCW 19.19.060 and the CPA, and the TCPA, as to Plaintiff and all other Class  
11 members.

12 35. **The Plaintiff's Claims are Typical of the Classes.** Plaintiff's claims are typical  
13 of the Classes in that they arise from Defendant's repeated violation of RCW 80.36.400, RCW  
14 19.19.060 and the CPA, and the TCPA, as to Plaintiff and all other Class members.

15 36. **The Plaintiff Will Fairly and Adequately Protect the Class.** Plaintiff will  
16 adequately represent and protect the interests of the Classes because he has retained competent  
17 and experienced counsel and his interests in the litigation are not antagonistic to the other  
18 members of the Classes.

19 37. **A Class Action is Maintainable Under CR 23(b)(3).** The questions of law and  
20 fact common to all members of the Class predominate over questions affecting only individual  
21 members of the Classes, because all members of the Classes were subjected to Defendant's  
22 unlawful texting. The prosecution of separate actions by individual members of the Classes  
23 against Defendant would create the risk of inconsistent or varying adjudications and  
24 incompatible standards of treatment. On information and belief, there are no other pending class  
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1 actions concerning these issues. A class action is superior to any other available means for the  
2 adjudication of this controversy. This action will cause an orderly and expeditious  
3 administration of the Class's claims; economies of time, effort and expense will be fostered; and  
4 uniformity of decisions will be ensured at the lowest cost and with the least expenditure of  
5 judicial resources.

7 38. A Class Action is Maintainable Under CR 23(b)(2). Defendant has acted on  
8 grounds generally applicable to Plaintiff and the Classes as alleged herein, thereby making  
9 appropriate injunctive and declaratory relief, as well as incidental damages, with respect to the  
10 Classes as a whole.

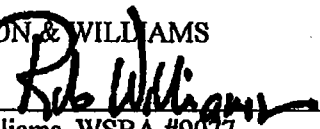
#### 12 V. PRAYER FOR RELIEF

13 WHEREFORE, the Plaintiff, on behalf of himself and the Classes of similarly situated  
14 individuals and entities, respectfully requests that the Court enter judgment in his favor and in  
15 favor of the Classes for:

- 16 A. Certification of the Classes pursuant to CR 23(b)(2) and CR 23(b)(3);
- 17 B. Granting injunctive relief as permitted by law to ensure that Defendant will not  
18 continue to send text messages to subscribers of cellular telephone services in the  
19 United States and Washington State for commercial solicitation purposes;
- 20 C. Judgment against Defendant for incidental statutory damages of not less than  
21 \$500.00 per legal violation involved in each message sent to Plaintiff and each  
22 member of the Classes, trebled, and other damages as are permitted by law;
- 23 D. Judgment against Defendant for attorney's fees and costs as permitted by law;
- 24 E. Any other or further relief which the Court deems fair and equitable.
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DATED: April 21, 2011.

WILLIAMSON & WILLIAMS  
By   
Kim Williams, WSBA #9077  
Rob Williamson, WSBA #11387  
*Attorneys for Plaintiff and the Proposed Classes*



# **EXHIBIT B**

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A

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FILED 05 JUL '11 11:08 USDC-ORP

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Chicago, Illinois 60654

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION**

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

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# **EXHIBIT C**

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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION**

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

Plaintiff Dan McLaren (“Plaintiff”) brings this First Amended Class Action Complaint 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. Plaintiff, for his First Amended Class Action Complaint, alleges as follows upon personal knowledge as to himself and

**FIRST AMENDED CLASS ACTION COMPLAINT**

his own acts and experiences, and as to all other matters, upon information and belief, including investigation conducted by his attorneys.

### 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, an automobile dealership, engaged DME, a mobile marketing firm, to conduct 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”), Defendants have 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 classes of similarly situated individuals defined below, 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. Plaintiff seeks an injunction requiring Defendants to cease all wireless spam activities towards him and the proposed classes, as well as an award of actual and statutory damages to the class members, together with costs and reasonable attorneys' fees.

#### **PARTIES**

6. Plaintiff is domiciled in Oregon.

7. Defendant Lithia 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 Oregon and maintains its principal place of business in Oregon.

8. Defendant DME is a marketing firm that conducts advertising campaigns on behalf automotive dealerships throughout the nation, including in Oregon and this District. It is a company organized and existing under the laws of Delaware and maintains its principal place of business in Florida.

#### **JURISDICTION AND VENUE**

9. 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 Defendants, (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.

10. Venue is proper in the District of Oregon under 28 U.S.C. § 1391 because Defendant Lithia resides in this District and because a substantial part of the events giving rise to the claim occurred in this District.

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

### **CONDUCT COMPLAINED OF**

12. 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.

13. One of the newest types of such bulk marketing is to advertise through Short Message Services, commonly known 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.

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

15. 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.

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

17. In order to perform text message marketing for its automotive clients, DME contracts with one or more third-parties known as text message aggregators to deliver text



messages on behalf of its clients, including those text messages promoting Defendant Lithia, directly to consumers' cellular telephones.

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

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

20. The "from" field of the transmission was identified as "35703," which is an abbreviated telephone number known as a SMS short code and was operated by DME on behalf of its clients, including Defendant Lithia. 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  
REPLY STOP TO OPT-OUT

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

22. Despite following the instructions to "opt-out" set forth in the message above, indicating a clear desire to not receive additional text messages from Defendants, on April 19, 2011, Plaintiff's cell phone rang again, indicating that a text call was being received.

23. The "from" field of the transmission was again identified as "35703" and the body of the text message read:

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

24. Defendants' and their agents' use of a short code enabled the *en masse* transmission of wireless spam to lists of cellular telephone numbers, including those belonging to Plaintiff and the proposed Classes set forth below.

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

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

#### **CLASS ALLEGATIONS**

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

- A) The "Lithia Class" consisting of Plaintiff 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 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 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.

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

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

- (a) Does the wireless spam Defendants distributed violate the TCPA?
- (b) Are the members of the Lithia Class entitled to treble damages based on the willfulness of Defendants' conduct?
- (c) Were the text messages transmitted with an "automatic telephone dialing system" as defined in 47 U.S.C. § 227?
- (d) Does the wireless spam Defendants distributed violate the right to privacy of the members of the Lithia Class?

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

- (a) Did DME Class members opt-out of receiving further messages from the Defendants?
- (b) Did DME Class members continue receiving unauthorized text messages from Defendants after opting-out?
- (c) Were the text messages transmitted with an "automatic telephone dialing system" as defined in 47 U.S.C. § 227?

- (d) Are the members of the DME Class entitled to treble damages based on the willfulness of Defendant DME's conduct?
- (e) Does the wireless spam DME distributed violate the right to privacy of the members of the DME Class?

31. Common questions of law and fact exist as to all members of the Lithia Subclass, and such questions predominate over questions affecting Plaintiff or individual members.

Common questions for the Lithia Subclass include:

- (a) Did Lithia Subclass members opt-out of receiving further messages from the Defendants?
- (b) Did Lithia Subclass members continue receiving unauthorized text messages from Defendants after opting-out?
- (c) Were the text messages transmitted with an "automatic telephone dialing system" as defined in 47 U.S.C. § 227?
- (d) Are the Lithia Subclass members entitled to treble damages based on the willfulness of Defendants' conduct?

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

33. 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 Classes is impracticable, and (b) many members of the Classes 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 Classes)**

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

35. Defendants and their agents made unsolicited commercial text calls to the wireless telephone numbers of Plaintiff and the other members of the Classes 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.

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

37. Defendants have, therefore, violated the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii). As a result of Defendants' illegal conduct, the members of the Classes 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.

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

**PRAYER FOR RELIEF**

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

1. An order certifying the Classes as defined above;
2. An injunction requiring Defendants 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 21, 2011

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

By: /s/ John C. Ochoa  
One of Plaintiff's attorneys

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Chicago, Illinois 60654

# **EXHIBIT D**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LACI SATTERFIELD, CARMELLA  
MILLER and CHARLENE KOUF,  
individually and on behalf of a class of  
similarly situated individuals,

Plaintiffs,

v.

SIMON & SCHUSTER, INC., a New York  
corporation, and IPSH!NET, INC., a Delaware  
corporation,

Defendants.

) Case No. C06 2893 CW

) FINAL JUDGMENT AND ORDER  
) OF DISMISSAL WITH PREJUDICE

**FILED**

AUG 06 2010

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND

**FINAL JUDGMENT AND ORDER OF DISMISSAL  
WITH PREJUDICE**

WHEREAS, this action having been filed in this Court as a class action ("the Action");

WHEREAS, the parties have entered into a Settlement Agreement dated as of  
January 15, 2010 ("the Settlement Agreement");

WHEREAS, Defendants deny that they have committed any wrongful acts or  
breached any duties as alleged in the Action, and the settlement of the Action does not  
constitute any such admission; and

WHEREAS, this matter having come before the Court for hearing, pursuant to  
the Order of this Court, dated March 3, 2010 ("the Preliminary Approval Order"), on the  
application of the parties for approval of the settlement set forth in the Settlement  
Agreement, and due and adequate notice having been given to the Settlement Class defined  
below as required by the Preliminary Approval Order, and the Court having considered all  
papers filed and proceedings herein and otherwise being fully informed in the premises, and  
good cause appearing, it is therefore

Final Judgment and Order of  
Dismissal with Prejudice

Case No. CV 06 02893 CW



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**ORDERED, ADJUDGED AND DECREED THAT:**

1. Terms and phrases in this Order shall have the same meaning as ascribed to them in the Settlement Agreement.

2. This Court has jurisdiction over the subject matter of this Action and over all parties to this Action, including all Settlement Class Members.

3. This Court previously gave its preliminary approval to the Settlement Agreement. The Court hereby gives its final approval to the settlement set forth in the Settlement Agreement, finds that said Settlement Agreement is, in all respects, fair, reasonable and adequate to, and in the best interests of, the Settlement Class, and hereby directs that it shall be effectuated in accordance with its terms. The Settlement Agreement and every term and provision thereof shall be deemed incorporated herein as if explicitly set forth, and shall have the full force of an Order of this Court.

4. The notice of the settlement pursuant to the Preliminary Approval Order and the Settlement Agreement was the best notice practicable under the circumstances, including individual notice to all members of the Settlement Class whose addresses could be obtained from reverse directory searching, email notice sent to the email addresses obtained from the former head of Nextones.com, newspaper publication and the maintenance of a settlement website by the Settlement Administrator. Said notice provided valid, due and sufficient notice of those proceedings and of the matters set forth therein, including the proposed settlement set forth in the Settlement Agreement, to all persons entitled to such notice, and said notice fully satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure and of Due Process.

5. The Court finds that the Defendants properly and timely notified the appropriate state and federal officials of the Settlement Agreement, pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715. The Court has reviewed the Defendants' notices and finds that they complied with any applicable requirements of CAFA.

1           6.     The Settlement Class certified for settlement purposes was defined as  
2 all persons who in January of 2006 were sent the Text Message, as set forth in the Settlement  
3 Agreement. Excluded from the Settlement Class is the one person who has submitted a  
4 valid and timely request for exclusion pursuant to the Preliminary Approval Order and the  
5 notice provided to Settlement Class Members in accordance with the provisions of the  
6 Preliminary Approval Order, Clifton Miller of Hartley, Texas.

7           7.     Subject to the terms and conditions of the Settlement Agreement, this  
8 Court hereby dismisses the Action on the merits and with prejudice.

9           8.     Upon the Effective Date of this settlement, the Class Representatives  
10 and each and every Settlement Class Member who has not timely filed a request to be  
11 excluded from the Settlement Class or who has rescinded a previous opt-out request pursuant  
12 to the Settlement Agreement, their respective present or past heirs, executors, estates,  
13 administrators, representatives, agents, predecessors, successors, assigns, parent companies,  
14 subsidiaries, associates, affiliates, officers, directors, managing directors, principals, partners,  
15 members, employers, employees, agents, consultants, independent contractors, insurers,  
16 attorneys, accountants, financial and other advisors, investment bankers, underwriters,  
17 lenders, controlled and controlling persons and any other representatives of the foregoing  
18 (the "Releasing Parties") shall be deemed to have released and forever discharged  
19 Defendants Simon & Schuster, Inc. and ipsh!net, Inc., and any and all of their present or past  
20 heirs, executors, estates, administrators, predecessors, successors, assigns, parents,  
21 subsidiaries, associates, affiliates, employers, employees, agents, consultants, independent  
22 contractors, insurers, directors, managing directors, officers, partners, principals, members,  
23 attorneys, accountants, financial and other advisors, investment bankers, underwriters,  
24 shareholders, lenders, auditors, investment advisors, legal representatives, successors in  
25 interest, assigns and Persons, firms, trusts, corporations, officers, directors, other individuals  
26 or entities in which Simon & Schuster, Inc. or ipsh!net, Inc. has a controlling interest or  
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1 which is related to or affiliated with any of them, or any other representatives of any of these  
2 Persons and entities, of and from any and all manner of claims (including "Unknown  
3 Claims" as defined in the Settlement Agreement), demands, rights, liabilities or causes of  
4 action, in law or in equity, accrued or unaccrued, fixed or contingent, direct, individual or  
5 representative, of every nature and description whatsoever, whether based on federal, state,  
6 local, statutory or common law or any other law, rule or regulation, including the law of any  
7 jurisdiction outside the United States, against the Released Parties (as defined in the  
8 Settlement Agreement), or any of them, arising out of or connected to the transmission of the  
9 Text Message.

10           9. The Court approves the payments from the Settlement Fund of  
11 attorneys' fees in the amount of \$2,500,000 and expenses in the amount of \$71,361.17.  
12 Such payments shall be sent by wire transfer in accordance with the provisions of Paragraph  
13 8.1 of the Settlement Agreement.

14           10. The Court approves the payment by Defendants of \$5,000 to  
15 representative plaintiff Carmella Miller, \$5,000 to representative plaintiff Charlene Kouf and  
16 \$20,000 to representative plaintiff Laci Satterfield as incentive awards for taking on the risks  
17 of litigation and helping to achieve the results to be made available to the Settlement Class,  
18 in accordance with the provisions of paragraph 8.4 of the Settlement Agreement. Such  
19 payment shall be sent by check to Class Counsel in accordance with the provisions of  
20 paragraph 8.4 of the Settlement Agreement.

21           11. Pursuant to paragraph 2.2 of the Settlement Agreement, the parties  
22 propose DonorsChoose.org, the Blessed Sacrament Youth Center (BSYC) and the  
23 International Center for Cooperation and Conflict Resolution (ICCCR) as organizations to  
24 receive cy pres awards from the Settlement Fund. The Court approves of DonorsChoose.org  
25 and ICCCR as recipients, but disapproves of BSYC and directs the parties to donate the  
26 funds earmarked for BSYC to DonorsChoose.org.

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12. The Parties shall bear their own costs and attorneys' fees, except as otherwise provided in the Settlement Agreement and this Order.

13. This Court hereby directs the entry of this Final Judgment and Order of Dismissal With Prejudice based upon the Court's finding that there is no just reason for delay of enforcement or appeal of this Final Judgment and Order of Dismissal With Prejudice notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Settlement Agreement.

14. This Final Judgment and Order of Dismissal With Prejudice, the Settlement Agreement, the settlement that it reflects, and any and all acts, statements, documents, or proceedings relating to the Settlement Agreement are not, and shall not be construed as, or used as an admission by or against Defendants of any fault, wrongdoing, or liability on any Defendant's part, or of the validity of any Claim or of the existence or amount of damages.

15. Without affecting the finality of this Judgment in any way, this Court hereby retains continuing jurisdiction over, inter alia, (a) implementation, enforcement, and administration of the Settlement Agreement, including any releases in connection therewith; (b) resolution of any disputes concerning class membership or entitlement to benefits under the terms of the Settlement Agreement; and (c) all parties hereto, for the purpose of enforcing and administering the Settlement Agreement and the Action until each and every act agreed to be performed by the parties has been performed pursuant to the Settlement Agreement.

Dated: August 6, 2010

Enter:

  
United States District Judge