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 MCCLINTIC'S RESPONSE TO PROPOSED PLAINTIFF-INTERVENOR MCLAREN'S MOTION TO INTERVENE NOTED ON MOTION CALENDAR: August 12, 2011

OVERVIEW

Proposed Plaintiff-Intervenor McLaren ("McLaren") moves to intervene in this action under Fed. R. Civ. P. 24(a) as a matter of right, and alternatively by permission under Fed. R. Civ. P. 24(b). McLaren contends that Plaintiff McClintic ("McClintic") cannot adequately represent the interests of a subclass to which McLaren belongs because McClintic received only one text message, while McLaren explicitly "opted out" of receiving any further messages from Defendant Lithia Motors ("Lithia") but nevertheless received a second one. The Motion should be denied because McClintic can and has adequately represented all persons with potential claims and has reached a settlement that has been submitted to the Court for preliminary approval that meets all of McLaren's interests. Intervention is neither factually nor legally required.

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RELEVANT FACTS

This case was filed in King County Superior Court on April 26, 2011 and removed to the Court by Lithia on May 23, 2011. McLaren filed his own lawsuit on July 5, 2011 in the District of Oregon. Declaration of Rob Williamson in Opposition to Motion to Intervene (Williamson Decl.) ¶ 2.

Both lawsuits arise from Lithia's sending of unsolicited text messages to individuals in violation of the Telephone Consumer Protection Act (TCPA), 47 U.S.C.§ 227. On April 11, 2011, Lithia sent, and both McClintic and McLaren received, an unsolicited text-message advertisement advertising Lithia's sale of used vehicles. According to Lithia, 57,800 messages were sent. Williamson Decl. ¶ 9. McClintic received no further text messages from Lithia.

After McLaren received the first text message on April 11, 2011, he attempted to opt-out of receiving any further messages by replying "STOP," but the procedure did not work and on April 19, 2011, he received a second message from Lithia. Other class members also received the second message even thought they also tried to opt-out. Others received the second messages but did not attempt to opt-out. Lithia sent only two messages. According to Lithia, 48,000 second messages were sent, including 6190 to persons who had attempted to opt out. Williamson Decl. ¶ 9.

Shortly after McClintic's suit was filed in King County, on May 4, 2011, Lithia's counsel, Grant Degginger of Lane Powell, advised McClintic's counsel that his firm had been retained by Lithia and that his client was interested in resolving the case sooner rather than later. Further discussion resulted in an agreement to seek mediation, using Judge Terry Lukens (Retired from the King County Superior Court) of JAMS. Judge Lukens haw been involved in several mediations involving claims under the TCPA for robo-calls by Intuit, Comcast, Tween Brands, Payless ShoeSource and Talbots, all involving McClintic's counsel, and the latter three involving Lithia's. All resulted in settlements, and Intuit and Comcast have been given

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preliminary approval by Judge Lasnik of this Court, and Tween Brands is pending preliminary approval by Judge Lasnik upon the receipt of a declaration from Tween regarding why notice is better served by mail rather than e-mails. Williamson Decl. ¶13. The parties to this case agreed Judge Lukens had the experience and skills to assist them in reaching a settlement.

Mediation was conducted on July 5, 2011. It lasted well into the evening and involved the parties and their counsel as well as counsel for DMEautomotive, LLC, a vendor used by Lithia for transmitting the text messages at issue. While a settlement was not reached on that day, the framework and dollar amount range of a possible resolution was reached. This included a claims-made process, one which would be easily understood and available to class members, the creation of a settlement fund that would be exhausted on claims, costs of administration, costs, and fees, with any unclaimed funds to be donated to the Legal Foundation of Washington. There was to be no reversion to Lithia. Further, some extra payment was to be made to class members who had opted out but nonetheless received a second text. Williamson Decl. ¶6.

On July 27, 2011, after continued negotiations with the assistance of Judge Lukens, Lithia and McClintic reached a settlement in this case which has been presented to this Court for preliminary approval. The settlement provides as follows:

1. A Settlement Fund of $2,500,000;
2. A claims made procedure that provides for direct mailed notice of a simple letter and an enclosed, postage prepaid postcard that can be sued for making a claims; in the present case reached a settlement.
3. $1,700,000 of the fund is to be used for claims;
4. Every class member who makes a claim will receive $170.00 for each text received. For a class member who received a second text and had earlier attempted to opt-out, the payment for the second text will be $500.00;
5. Lithia will pay, from the Settlement Fund, $150.000 for costs of administration, which include mailing notice, processing claims and questions, creating a website for class members to access the long form of notice, and distribution of claim checks. If costs of administration exceed $150,000, Lithia will pay those extra costs independently, not from the Settlement Fund.
6. McClintic will be paid a class representative fee of $10,000.00;
7. McClintic's counsel will be paid fees and costs of $600,000.

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Williamson Decl. ¶11.

On July 26, 2011, McLaren filed his Motion to Intervene. The Motion is based primarily on concerns that McClintic cannot adequately represent and protect the interests of the class of person who, like McLaren, received a second text after trying to opt-out, and complaints that McClintic and Lithia, through their counsel, have colluded and moved forward in a speedy, secret manner intending, apparently, to deprive all class members of a fair and just resolution of the case. McLaren also suggests that McClintic's counsel may not be adequate, that McLaren's counsel was deliberately kept out of the mediation and settlement process, and the settlement was reached in haste and with collusion without adequately preserving the rights of class members. None of these charges are true.

AUTHORITY/ARGUMENT

A. McLaren Does Not Meet The Requirements For Intervention By Right. In order to have the right to intervene in this case under Fed. R. Civ. P. 24(a)(2),[1] McLaren has the burden of demonstrating all four of these elements, which he cannot do:

> (1) the application must be timely; (2) the applicant must have a "significantly protectable" interest relating to the transaction that is the subject of the litigation; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the parties before the court.

League of United Latin American Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997) ("*LULAC*");[2] *U.S. v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) ("The party seeking

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[1] "**(a) Intervention of Right.** On timely motion, the court must permit anyone to intervene who: ... **(2)** 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."

[2] *LULAC,* cited by McLaren, actually supports denial of McLaren's motion. In that case, the court recognized that when an intended intervenor and a party in the action seek the same ultimate objective, a presumption arises that the intervenor's interests are adequately presented. 131 F.3d 1297. The plaintiff brought a lawsuit challenging California's Proposition 187, which had been enacted into law. *Id.* at 1300. A public interest group moved to intervene as of right, claiming it participated in drafting and sponsoring the proposition. *Id.* at 1301. The Ninth Circuit held the defendant (State of California) and the public interest group sought the same ultimate

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to intervene bears the burden of showing that *all* the requirements for intervention have been met"). Failure to satisfy any one of the requirements is fatal to the application. *Perry v. Proposition 8 Official Proponents,* 587 F.3d 947, 950-51 (9th Cir. 2009).

Intervention is not necessary when the interests of the proposed intervener and the existing party (as well as its representation) are so closely matched that to allow intervention would be superfluous:

> The "most important factor" to determine whether a proposed intervenor is adequately represented by a present party to the action is "how the [intervenor's] interest compares with the interests of existing parties." *Arakaki [v. Cayetano,* 324 F.3d 1078, 1086 (9th Cir.2003)] (citations omitted). Where the party and the proposed intervenor share the same "ultimate objective," a presumption of adequacy of representation applies, and the intervenor can rebut that presumption only with a "compelling showing" to the contrary. *Id.* (citing *LULAC,* 131 F.3d at 1305).

Perry, at 950-51. *See also Prete v. Bradbury,* 438 F.3d 949, 956 (9th Cir. 2006).

Here, the ultimate objective of McClintic was to pursue, by litigation or settlement, the best recovery for the class, a goal presumably shared by McLaren. In alleging his interests may not be met, McLaren challenges both the adequacy of McClintic as a class representative for McLaren, and the adequacy of McClintic's counsel in representing McLaren's interests. The argument as to McClintic's inadequacy is that, because McLaren tried to out, Lithia's act of nevertheless sending a second text message would allow for greater damages under the TCPA--more money than McClintic would be entitled to. McLaren alleges that McClintic is "unable to represent an Opt-Out Class" and cannot effectively bargain to receive the higher statutory damages to which he is entitled. McLaren asserts that McClintic's claims are factually distinct from those of his own "opt-out" class, perhaps weaker because Lithia may have a possible defense against McClintic that he consented to receive text messages.

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objective-*i.e.,* to defend the constitutionality of Proposition 187—so a presumption of adequacy of representation arose and the intervenor-applicant's interests were adequately represented by the state defendant. . *Id.* at 1305.

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The parties in this case, represented by competent, experienced counsel negotiating at arms-length, have created a settlement that generously provides for McLaren's claim. To the extent McLaren is part of a class different from McClintic, subclasses are permitted.

Fed. R. Civ. P. 23(c)(2)(5) provides: "*Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule." The Advisory Committee's Note to the Rule states, "Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class." Advisory Committee Note (1966). *See also* 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 3.31, at 453-55 (4th ed. 2002) (if a member's interest can be protected by creation of subclasses, the conflict should not preclude class action; a conflict as to distributing money can be resolved by subclasses along the lines of conflicting interests; citing *American Timber & Trading Co. v. First Nat. Bank of Oregon,* 690 F.2d 781, 786-87 (9th Cir. 1982)).

Moreover, "[t]he potential difference in recovery does not in itself create a conflict between" the named and unnamed class members. *Palmer v. Stassinos,* 233 F.R.D. 546, 550 (N.D.Cal. 2006) (Palmer entitled to up to $1,000 in statutory damages, while the unnamed class members would recover no more than $0.21 in statutory damages each). The court in *Palmer* recognized "that the amounts that would be involved in individual cases by plaintiffs seeking to prosecute their own [Fair Debt Collection Practices Act] claims would make prosecution of such individual cases economically impractical." *See also Hunt v. Check Recovery Systems, Inc.,* 241 F.R.D. 505, 511 (N.D. Cal. 2007) ("the only conflict between Plaintiffs and any potential class member could be a difference in the amount of recovery. However, a potential difference in recovery does not, in itself, create a conflict of interest. ... Additionally, any financial incentive to Plaintiffs or class counsel will likely lead them to 'prosecute the action vigorously.'")

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As for adequate representation (factor 4 in *LULAC,* 131 F.3d at 1302), Fed. R. Civ. P. 23(a)(4) (regarding the prerequisites for a class action), requires that "the representative parties will fairly and adequately protect the interests of the class." To determine whether the representation meets this standard, the court asks: "(1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.,* 327 F.3d 938, 957 (9th Cir. 2003). *See also* Fed. R. Civ. P. 23(g)(1)(B) ("An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.").

A petitioner for intervention must produce something more than speculation to the purported inadequacy in order to justify intervention as of right. *Prete v. Bradbury*, 438 F.3d 949, 957-58 (9th Cir. 2006) (intervenor-defendants failed to present evidence sufficient to support a finding that their interests were not adequately represented by the defendant).

McLaren accuses McClintic's counsel of deliberately stalling and shutting McLaren out of secret settlement talks. First, this argument is moot because McClintic's lawyers have in fact represented McLaren's interests by creating a separate subclass for those who opted out. If McLaren is complaining that his lawyers will lose compensation because McClintic's lawyers have adequately represented him, that also is not a sufficient reason to grant intervention by right. In *Palmer,* the court addressed the argument whether a class representative's lawsuit may primarily benefit his lawyers:

> That Palmer's lawsuit may be primarily for the benefit of Arons, Wilcox, and Bragg is not something the Ninth Circuit has expressly stated is appropriate to consider when certifying a class. Indeed, if the lawsuit is primarily for the benefit of the attorneys, they are likely to "prosecute the action vigorously." While the court would not condone champerty, Palmer's legal team has no conflicts with class members the court is aware of and, given its extensive involvement in other FDCPA class actions, seems likely to prosecute these cases vigorously; the attorneys satisfy the requirements of *Staton.*

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Palmer v. Stassinos, 233 F.R.D. 546, 551 (N.D.Cal. 2006) (footnotes omitted). [3]

> A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Manual for Complex Litigation, Third,* § 30.42 (1995). We are mindful of the "strong judicial policy in favor of settlements, particularly in the class action context." *In re PaineWebber Ltd. P'ships Litig.,* 147 F.3d 132, 138 (2d Cir.1998). "The compromise of complex litigation is encouraged by the courts and favored by public policy." 4 Newberg § 11:41, at 87.

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116-17 (2d Cir. 2005); *see Churchill Village v. General Electric,* 361 F.3d 566, 575 (9th Cir.2004); *Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1375 (9th Cir.1993).

The presumption of adequacy of representation applies, and McLaren can rebut that only with a compelling showing to the contrary. The court must examine McLaren's rebuttal in terms of the three factors:

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Perry, 587 F.3d at 952 (citing, *e.g., Arakaki,* 324 F.3d at 1086).

McLaren has failed to make a "compelling showing" that McClintic has not and will not adequately represent his interests. Even taking all of McLaren's well-pleaded and nonconclusory allegations as true, the record establishes that McClintic is capable of making and has in fact made the arguments in support of McLaren's interests. McClintic has not and will not neglect any matters necessary to McLaren's interests in adequate representation and recovery. McClintic's counsel have fully advocated for the McLaren claims.

> "[M]ere [] differences in [litigation] strategy ... are not enough to justify intervention as a matter of right." *United States v. City of Los Angeles,* 288 F.3d 391, 402-03 (9th Cir.2002); *Nw. Forest Res. Council v. Glickman,* 82 F.3d 825, 838 (9th Cir.1996) (holding that "minor differences in opinion" between the parties and proposed intervenor

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> "fail[ ] to demonstrate inadequacy of representation"); *see also Daggett v. Comm'n on Governmental Ethics and Election Practices,* 172 F.3d 104, 112 (1st Cir.1999) (noting that "[o]f course, the use of different arguments as a matter of litigation judgment is not inadequate representation *per se* ").

Perry, 587 F.3d at 954-55.

> [A] party's seeking to intervene merely to attack or thwart a remedy rather than participate in the future administration of the remedy is disfavored. *United States v. Oregon,* 913 F.2d 576, 588 (9th Cir.1990) (upholding denial of intervention where applicant sought to intervene not to participate in remedial phase of litigation but to attack a fish management plan approved by the court). Here, Silverwood seeks to intervene primarily to contest a possible award of damages to the United States. Given the discretion of the district court to "control proceedings before it," the district court did not abuse its discretion in finding that Silverwood's motion to intervene came too late in the proceedings. *Id.*

U.S. v. Alisal Water Corp., 370 F.3d 915, 922 (9th Cir. 2004).

> "The fact that the proposed intervening party would have reached different conclusions on individual aspects of a settlement does not alone establish inadequacy of representation. *Bradley,* 828 F.2d at 1192 ("A mere disagreement over litigation strategy or individual aspects of a remediation plan does not, in and of itself, establish inadequacy of representation."); *U.S. v. Perry County Bd. of Educ.,* 567 F.2d 277, 280 (5th Cir.1978) (fact that party seeking to intervene would have voted differently than the school board, which was party to the case, is insufficient to support motion to intervene).

In re Domestic Air Transp. Antitrust Litigation, 148 F.R.D. 297, 336-37 (N.D.Ga. 1993).

In *In re Domestic Air Transp.,* the court concluded the objectors did not demonstrate their interests were unique or different from the interests of the class as a whole; failed to show that the class representatives and their experienced class counsel did not adequately represent their interests; and presented no evidence of collusion between the class representatives and defendants. They "merely expressed dissatisfaction with specific aspects of the proposed settlement and have presented no evidence to demonstrate that they would be better representatives of the class or that they would somehow enhance the representation of the class." *Id.* at 336-37.

> The goals of Rule 23 would be defeated if the Court permitted every individual or entity that objected to discrete aspects of the settlement to intervene. *See American Pipeline and*

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> *Construction Co. v. Utah,* 414 U.S. 538, 550-51, 94 S.Ct. 756, 764-65, 38 L.Ed.2d 713 (1974) (The filing of individual motions to join or to intervene was "precisely the multiplicity of activity which Rule 23 was designed to avoid"). Accordingly, the Court will deny Public Citizen's request for intervention as of right.

Id. at 337.[4]

In *In re Corrugated Container Antitrust Litigation,* 643 F.2d 195, 207-09 (5th Cir. 1981) the court held that even when subclasses have divergent interests and settlement negotiations are "irregular", there can still be a judicially-acceptable class-action settlement if the record clearly indicates that the representation of the class during negotiations was adequate and that the settlement itself is fair:

> We can assume, for purposes of considering the conflicts argument, that the two subclasses had significantly diverging interests and that an attorney could not adequately represent all these interests throughout the litigation. This does not mean that the settlements are necessarily void, however, because even "irregular settlement negotiations may ... form the basis for a judicially acceptable class action settlement ... if the record clearly indicates that representation of the class during the negotiations was adequate and that the settlement itself is fair." *In Re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106, 1131-32 (7th Cir.), *cert. denied,* 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 (1979) (emphasis supplied). ... We consider, in this section, the question of adequacy of representation.
>
> Recognizing that the allegedly differing interests of the two subclasses might have conflicted at some point in the litigation, we think the question before the district court was whether these interests conflicted at the point of settlement negotiation, and thus deprived either class of the vigorous and unqualified advocacy in settlement negotiations to which both were entitled. ...

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[4] For the same reasons, in that case the court also denied permissive intervention:

> The Court has discretion to deny a motion for permissive intervention if "intervention will unduly delay or prejudice the adjudication of rights of the original parties." Judicial economy and convenience are two of the factors that make the class action mechanism viable and justify its use. *U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 402-03, 100 S.Ct. 1202, 1211-12, 63 L.Ed.2d 479 (1980). Permitting the intervention would be unfair and would prejudice the rights of all class members for the Court to permit the intervention of all objecting class members. Here the interests of Public Citizen are the same as that of the named parties, to obtain a settlement that is fair, reasonable, and adequate for the class. There are no divergent interests, only differing opinions on how the proferred settlements fit within that framework. Public Citizen's presence through intervention would not accomplish any more than their participation as objectors and would create the possibility of further delay and final disposition of this action. The Court finds no reason justifying permissive intervention.

Id. at 337.

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> ..."[S]o long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes." *In Re Corrugated Container Antitrust Litigation, 1980-1 Trade Reg. Rep.* (CCH) P 63,163 at 77,788 n.10 (S.D.Tex.1979). We think it clear that the primary settlement goal of each class was to cause defendants to agree to pay substantial compensation in exchange for the most limited possible release from their obligations and potential liabilities as parties to the litigation.
>
> We have carefully reviewed the objectors' appellate briefs, and their submissions to the district court in opposition to the settlements, and have not been pointed to anything suggesting that other significant subclasses' settlement interests existed

In re Corrugated Container Antitrust Litigation, 643 F.2d at 207-08. *See also Twelve John Does v. District of Columbia,* 117 F.3d 571, 575 (D.C. Cir. 1997) (evidence supported district court's determination that class counsel provided adequate representation in class prison litigation, as a basis for denying the dissident inmates' request to intervene as a subclass, despite counsel's failure to pursue the dissidents' agenda or to confer more with them).

McLaren has shown no evidence of collusion, bad faith, fraud, or inability to represent all interests. Nor will the settlement impair McLaren's interests. As McLaren points out, absent members of his subclass would have the right to opt out of the settlement. [*Devlin v. Scardelletti,* 536 U.S. 1, 14 (2002]." *Churchill Village, L.L.C. v. General Electric,* 361 F.3d 566, 572 (9th Cir. 2004).]

Allowing McLaren to intervene in this case after the parties have reached an excellent settlement that meets his interests would delay these proceedings with no benefit to any class member. The Court should deny the motion for intervention by right.

B. McLaren's Same Arguments Do Not Merit Permissive Intervention. McLaren bases his alternative request for permissive intervention under Fed. R. Civ. P. 24(b)[5] on the same reasons as his motion for intervention by right—his claim for greater damages and alleged inadequacy of class and class counsel's representation. For the same reasons discussed above, these arguments fare no better under this subsection of Rule 24:

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[5] "**(b) Permissive Intervention. (1)** ***In General.*** On timely motion, the court may permit anyone to intervene who: ... **(B)** has a claim or defense that shares with the main action a common question of law or fact."

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> A district court may grant permissive intervention under Federal Rule of Civil Procedure 24(b)(1)(B) where the applicant "shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." ... Where a putative intervenor has met these requirements, the court may also consider other factors in the exercise of its discretion, including "the nature and extent of the intervenors' interest" and "whether the intervenors' interests are adequately represented by other parties." ... Rule 24(b)(3) also *requires* that the court "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).
>
> The district court's denial of intervention based on the identity of interests of the Campaign and the Proponents and the Proponents' ability to represent those interests adequately is supported by our case law on intervention in other contexts. ...
>
> ... The Campaign's intervention was unnecessary given that the parties were "capable of developing a complete factual record encompassing [its] interests." (noting that "the participation of [the Campaign] ... in all probability would consume additional time and resources of both the Court and the parties that have a direct stake in the outcome of these proceedings").
>
> ... It was well within the district court's discretion to find that the delay occasioned by intervention outweighed the value added by the Campaign's participation in the suit.

Perry, 587 F.3d at 955-56 (citations omitted).

CONCLUSION

Plaintiff asks the Court to deny McLaren's motion to intervene and allow this case to proceed to prompt approval of the settlement.

DATE: August 8, 2011

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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.

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