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,

and

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

Plaintiff-Intervenor,

v.

LITHIA MOTORS, INC.

Defendant.

No. C11-859 RAJ

PROPOSED PLAINTIFF-INTERVENOR DAN McLAREN'S COMBINED REPLY IN SUPPORT OF HIS MOTION TO INTERVENE

NOTE ON MOTION CALENDAR:
Friday, August 12, 2011

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Defendant Lithia Motors and Plaintiff Kevin McClintic (the "Parties") each oppose Dan McLaren's motion to intervene as a party-plaintiff. (Dkts. 21 & 25.) The Parties' arguments lack merit and the Court should grant McLaren's motion.

The Parties argue that the proposed settlement they reached *after* McLaren sought to intervene precludes intervention because (1) McLaren waited too long before seeking to intervene, (2) the relief provided in the proposed settlement is so generous that his interests will not be impaired, and (3) Plaintiff McClintic can adequately protect the interests of the proposed settlement class even though he is not representative of the entire class.

With a scattershot of incorrect and irrelevant personal attacks and misleading quotations from inapposite case law, the Parties hope the Court will overlook the evidence suggesting the recently proposed settlement is the product of collusion, the relief being offered to the class is largely illusory, and McClintic altered the initial terms of the settlement to sell out the interests of certain class members whom he is unable to adequately represent.

The Parties claim that the settlement—reached less than four months into the litigation between counsel and a mediator with past associations—provides $175 per text message and $500 for texts received after opting out. These settlement amounts are pure fiction as there is only $1,740,000 available to pay the 57,800 class members—including 6,190 persons who, like McLaren, have stronger cases and are entitled to $675 each (6,190 x $675 = $4.18 million) and another 48,000 members entitled to $350 each. Plaintiff received only one text message and, by his own admission, is not representative of the full class.

There is also evidence of collusion that calls into question the ethical propriety of the settlement. Judge Lukens felt personally compelled after the second mediation to independently contact McLaren's counsel about the negotiations. (Edelson Decl. ¶¶ 14-15.) Judge Lukens told McLaren's counsel that a settlement had been reached in the *McClintic* action and, during the first round of mediation—before the Parties became aware of the *McLaren* case—their settlement discussions did not involve additional compensation for an opt-out class. (*Id.* ¶ 17; *compare with* contradictory statements in Williamson Decl. ¶ 6.) Judge Lukens further stated that *McLaren* was a significant focus of the second mediation and it was only then that the

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Parties began to discuss providing more relief for the "opt-out class" of individuals. (Edelson Decl. ¶¶ 17-18.)

For these reasons, and those that follow, McLaren should be allowed to intervene so that the Parties will not further compromise the interests of the classes he seeks to represent.

I. McLaren Meets the Requirements for Intervention by Right

In order to intervene as of right under Rule 24(a), McLaren must establish that (1) his application was timely; (2) he has a "significantly protectable interest" in the litigation; (3) he is so situated where the disposition of this case will impair or impede his ability to protect his interest; and (4) his interest is not being adequately represented by the parties before the court. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997). The Parties do not contest that McLaren has a protectable interest in this litigation. (*See* Dkts. 21 & 25.) Rather, Lithia argues that McLaren delayed too long in seeking to intervene, and both Plaintiff and Lithia argue that the settlement terms are such that the disposition of this case will not affect McLaren's interest and McClintic has adequately protected the interests of McLaren, as well as others who opted out yet received additional text messages. None of the arguments presented in opposition present grounds for denial of intervention.

A. McLaren's Petition Is Timely and any Delay Was Caused by Plaintiff's Counsel

Lithia first argues that McLaren's motion is untimely, asserting that "this case is in its final stage" because the Parties moved for preliminary approval on the same day that they filed oppositions to McLaren's motion to intervene; that the parties would be prejudiced by allowing intervention; and the terms of the settlement protect McLaren's interests. (Dkt. 21 at 7:7-14.) Lithia's half-hearted claims of untimeliness are non-starters.

First, a quick review of the docket in this matter reveals that Plaintiff filed this case less than four months ago, there has been little activity, and there have been no decisions on the merits, making McLaren's petition both timely and non-prejudicial. *Crosby v. St. Paul Fire & Marine Ins. Co.*, 138 F.R.D. 570, 572 (W.D. Wash. 1991), *aff'd*, 15 F.3d 1084 (9th Cir. 1994) (intervention was timely and not prejudicial when sought shortly after the commencement of the action and before any significant decisions on the merits.)

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Second, given the case's infancy, Lithia's argument that this case is in its "final stage" presumes that this Court will rubber-stamp the proposed order approving the settlement filed immediately prior to Lithia's opposition to intervention. Otherwise, there has been no formal discovery, no motion practice, and as of July 12, 2011, Plaintiff's counsel did not even know the number of text messages covered by his own settlement. (Edelson Decl. ¶ 5.)

Third, McLaren would have moved for intervention sooner had it not been for the collusive stalling of counsel for Plaintiff and Defendant. Shortly after learning that McClintic and Lithia were engaged in settlement discussions involving the claims of those consumers who opted out of receiving future texts, McLaren's counsel sought to work together with the Williamson firm to represent the interests of the opt-out subclass. (Edelson Decl. ¶¶ 2-13.) But the Williamson firm stalled for weeks, stating that they would discuss McLaren's participation with and obtain information from Lithia's counsel; McLaren's Oregon complaint had been passed on to their mediator; and they were interested in working together toward resolution. (*Id.*) Instead of following through on the representations made in their emails, the Parties' counsel was working toward a finalizing their settlement with an aim of settling McLaren's claims on less than favorable terms. As such, McLaren's petition is timely.

B. The Parties' Settlement Will Impair the Interests of McLaren and the Class

Having conceded McLaren has a protectable interest in the litigation, the Parties argue that his interest will not be impaired by their proposed settlement, which they assert will provide McLaren and the class $175 per text message and $500 for a text message received after opting out. McLaren does not dispute that a settlement providing class members with $175 per text message and those who opted out $500 would be an excellent recovery. However, these sums are *not* what is actually being offered to McLaren and the class in the Parties' proposed settlement. The reason is that the cap on Lithia's payments to the class—the $1.74 million "class member payment sum"—is so paltry that the chance of anyone receiving $175, let alone $675, is nil.

Lithia's attempt to support the payments available in its proposed settlement as "consistent" with the amounts available in the TCPA text-messaging settlements in *Satterfield v.*

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Simon & Schuster, *Lozano v. Twentieth Century Fox*, and *Weinstein v. The Timberland Co.*, where Edelson McGuire LLC was class counsel, is disingenuous at best. Each of those settlements included common funds of sufficient size to actually pay the claims of class members at amounts consistent with those advertised: The *Satterfield* settlement established a $10 million fund and afforded the 59,000 recipients of the unauthorized text messages who submitted claims $175 each; the *Lozano* settlement established a $16 million fund and afforded the 98,000 recipients of the unauthorized text messages who submitted claims $200 each; and the *The Timberland Co.* settlement established a $7 million fund and afforded the 40,000 recipients of the unauthorized text messages who submitted claims $150 each. As such, if "relief" in the proposed settlement is approved, McLaren's interest will be impaired.[1]

C. McLaren's Interests Are Not and Cannot Be Adequately Represented by McClintic

The Parties pontificate about how intervention is unwarranted, how the drastic differences in recovery among class members presents no obstacles, and McClintic argues that he adequately "represented McLaren's interest by creating a separate subclass for those who opted out." (Dkt. 25 at 7:16-17.)

These arguments fundamentally misapply basic class action law and expose the fatal conflict McClintic created in his haste to settle this litigation for the class he seeks to represent. Under the Parties' settlement, the "opt out class," which consists of 6,190 individuals and alone exposes Lithia to roughly $4.1 million in claims liability, is competing with 57,800 individuals in total entitled to $22 million, all from a common fund of $1.7 million. And of these class members' claims, those of the "opt out class" are the strongest.

McClintic acknowledges that Rule 23(c)(5) permits a class to be divided into subclasses (Dkt. 25 at 6:4-7), but ignores the mandate that, upon division, "each [is] treated as a class under

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[1] McLaren also has an interest in obtaining injunctive relief as provided in the TCPA. 47 U.S.C. § 227(b)(3)(A). Lithia has agreed to an injunction as part of the proposed settlement, but the injunction does not ensure that those who opted out will receive no further messages and may not actually prohibit the future transmission of unauthorized text ads in violation of the TCPA as its prohibition of the use of an "ADAD" is distinct from an automatic telephone dialing system as defined in the TCPA. *See* 47 U.S.C. § 227(a)(1).

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the rule." Fed. R. Civ. P. 23(c)(5). McClintic also overlooks that "[a] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-626 (1997) (quotation marks omitted). Contrary to McClintic's assertion that he has "created a separate subclass for those who opted out" (Dkt. 25 at 7:16-17), the settlement agreement contains only one "Settlement Class" that combines (i) consumers like McClintic who received one text message; (ii) those who received two texts, and (iii) those like McLaren who received one text, opted out, and still received another text. (Dkt. 20 at 14 part B.)

As presently defined, McClintic is not representative of all members of his own class which "includ[es] all persons … who received a second Text Message from Defendant or on Defendant's behalf after attempting to opt out after receiving a first Text Message." (*Id.* at 14-15.) Even if the settlement did contain a subclass of those consumers who opted out, McClintic is not a member of that subclass and did not suffer the additional statutory injury. In fact, Plaintiff admits that he received his lone text message "in error," and this arguably makes his claim atypical of the vast majority of class members. (Williamson Decl. ¶ 10.)

That McClintic does not represent either the full class he defined in his proposed settlement or the non-existent subclass that his counsel believes exists highlights the irreconcilable conflict he has created by attempting to settle the more valuable claims of McLaren.[2] The 6,190 consumers like McLaren who are entitled to $675, and the 48,000 others who are entitled to $350 each, will be fighting with McClintic and the 9,800 individuals like him who are entitled to $175 to receive ***any*** payment from the relatively small fund created.

McClintic attempts to distract the Court's attention from this conflict by cutting-and-pasting strings of block quotations from cases that are either wholly distinguishable or irrelevant. Other times, McClintic selectively cites to only segments of cases that appear to support his

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[2] Lithia argues McLaren cannot adequately represent any class here because he is a former employee who it claims advocated for the incorporation of SMS marketing for the company. This argument is a red herring. McLaren was not employed by Lithia when the text message campaign at issue occurred and had no role whatsoever in its creation. (McLaren Decl. ¶¶ 8-9.) Lithia's characterization of McLaren's duties in his marketing position and his advocacy of the use of text marketing are grossly distorted. (McLaren Decl. ¶¶ 2-7.)

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position while consciously omitting clarifying language that destroys it.

For instance, McClintic relies on *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir. 1981) for his argument that classes can be represented by someone who does not necessarily fall into both classes and represent their interests exactly. (*See* Dkt. 25 at 10-11.) After four paragraphs of block quotation, McClintic omits the court's conclusion that is unfavorable to his position: "In deciding whether the settlements resulted from proper advocacy, we must inquire, first, whether the general interests of the subclasses respecting the settlements were the same and amenable to being achieved by unified representation; and, second, whether any specific features of the settlement sacrificed the interests of one class in favor of the interests of the other." *In re Corrugated Container*, 643 F.2d at 208.

McClintic's interests diverge from those of the subclass and he has crafted a settlement that favors his interests over those of individuals he does not adequately represent. As such, McLaren should be permitted to intervene as of right and be granted leave to file an opposition to the Motion for Preliminary Approval of the settlement.

II. Alternatively, the Court Should Allow Permissive Intervention

The Parties oppose permissive intervention by merely repeating their flawed arguments. Those arguments again fail. However, should the Court not grant intervention as of right, it should grant permissive intervention so that McLaren may protects his interests and those not being looked after by McClintic, including by opposing the Motion for Preliminary Approval.

III. McLaren's Complaint in Intervention is Proper

Rule 24(c) requires the filing of a complaint in intervention, but Lithia claims it was procedurally improper to do so and McLaren must take McClintic's flawed complaint "as he finds it." This is not the law in the Ninth Circuit. *Spangler v. United States*, 415 F.2d 1242, 1245 (9th Cir. 1969) (the federal rules prohibit a standard that limits an intervenor to the claims of the original parties). Nor is it the law in the majority of jurisdictions. *See, e.g., Alvarado v. J.C. Penney Co., Inc.*, 997 F.2d 803, 805 (10th Cir. 1993) ("where the intervenor claims an interest adverse to both the plaintiff and defendant he or she is entitled to have the issues raised thereby tried and determined").

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IV. Conclusion

Proposed Plaintiff-Intervenor Dan McLaren respectfully requests that this Court grant his motion to intervene in this action under Rules 24(a) and 24(b).

Dated: August 12, 2011

Respectfully submitted,

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Certificate of Service

I certify that I filed this reply, together with the declarations of Jay Edelson and Dan McLaren, with the Clerk of the Court using the CM/ECF system, which will email notification of filing to all counsel of record.

s/ Cliff Cantor, WSBA # 17893