The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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|---|---|
| KEVIN MCCLINTIC on behalf of himself and all others similarly situated,<br><br>Plaintiff,<br>v.<br><br>LITHIA MOTORS, INC.,<br><br>Defendant. | No. 2:11-cv-00859-RAJ<br><br>PLAINTIFF MCCLINTIC'S SURREPLY TO PROPOSED PLAINTIFF-INTERVENOR MCLAREN'S COMBINED REPLY IN SUPPORT OF HIS MOTION TO INTERVENE |

Proposed Plaintiff-Intervenor McLaren's Reply contains arguments and evidence that are improper and should be stricken.

**Purported Statements of JAMS Mediator Judge Terry Lukens.** McLaren's counsel claims in his declaration (Dkt. #27-2) that Judge Terry Lukens made certain statements to him during a telephone conversation (paragraphs 14-18). Further, in the Reply itself (Dkt. #27) McLaren states, with no evidentiary support whatsoever, "Mediator Lukens felt personally compelled to contact McLaren's counsel".

Judge Lukens contacted McLaren's counsel at the request of counsel for the parties in this case, not on his own initiative (Williamson Decl., ¶ 2). Counsel for the parties asked Judge Lukens to do so in order to respond to McLaren's counsel's attempts to inject themselves in to a mediation process that was substantially complete, and to advise such counsel that the case was



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1 settled. To assert that Judge Lukens contacted McLaren's counsel of his own accord because he
2 felt "compelled" to do so is simply wrong. Plaintiff's counsel has conversed with Judge Lukens
3 both before and after his contacts with McLaren's counsel and can assure the Court that
4 McLaren's representations concerning Judge Lukens' position are false[1] (Williamson Decl. ¶ 3).
5 Furthermore, references to what may have been said by Judge Lukens to counsel are
6 inadmissible hearsay, McLaren's counsel does not attempt to argue otherwise and, accordingly,
7 those references should be stricken.
8
9 **The Settlement Amount.** McLaren faults the adequacy of Plaintiff McClintic and his
10 counsel on grounds that the amount of the settlement which has been submitted to the Court for
11 preliminary approval, while providing for an excellent per call payment to class members,
12 including those in the "opt-out" subclass, is too low. In support of McLaren's claim, his counsel
13 refers to settlements under which the payments to class members making claims were generally
14 lower than those provided for class members in this case and in two of which no cy pres fund
15 was established.
16
17 Settlement of class actions, including those cited by McLaren's counsel and the proposed
18 settlement in the instant case, often involves a "claims made" process. Class members receive
19 notice and a claim form which must be timely and properly submitted in order for claimant
20 benefits to be paid. During claims made settlement negotiations, defendants seek to establish a
21 total cap on the amount that will be paid for claims, costs of administration, class representative
22 fees and costs and fees of counsel so that they achieve certainty as to the maximum potential
23 pay-out. Claims rates are generally below 10%, and often below 5%. In the settlement submitted
24
25
26

[1] As a result of McLaren's counsel's representations regarding his actions and motives, Judge Lukens referred the issue to counsel for JAMS which is currently reviewing it (Williamson Decl. ¶ 4).



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to the Court, the parties attempted to make a realistic estimate of the potential claims rate and to provide either for a pro ration of payments or a payment of any unspent funds to the Legal Foundation of Washington.[2] Plaintiff's counsel's proposed fees are also based on this realistic estimate (Williamson Decl. ¶ 5).

McLaren's counsel makes no reference to claims rates or to the ultimate payout by defendants in their cases and, without this information, it is impossible to compare their settlements to the proposed settlement; it is apples and oranges. Indeed, because McLaren counsel reports only gross potential payout amounts without reporting actual payout amounts, the Court can safely assume the actual payout amounts were relatively low, as is unfortunately generally true.

**Conclusion.** The Court should deny McLaren's Motion to Intervene.

DATE: August 17, 2011

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[2] For example, in this case, 6190 persons may receive a total of $675 each. Were 10% to make claims, they would be paid $417,825. There are 41,890 persons who may have received two text messages but had not attempted to opt out. Were 10% of them to make claims, they would be paid $1,466,150. Finally there are 9200 persons who received only one text. Were 10% of them to apply, they would be paid $161,000. The total payments with a 10% claims rate would be $2,044,975. In order to pay everyone on an equal and pro rata basis, payments would be prorated such that class member would receive 85% of the projected payments, a payment above the range, of comparable settlements. Were 5% to apply, then $1,022,487.50 would be paid, leaving over $700,000 to be paid to the Legal Foundation of Washington.

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 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 17th day of August 2011.


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