

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10	KEVIN MCCLINTIC, on behalf of himself and all others similarly situated,)	No. 11-cv-00859-RAJ
11)	
)	PLAINTIFF KEVIN McCLINTIC AND DEFENDANT LITHIA MOTORS, INC.'S JOINT SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT
12	v.)	
13	LITHIA MOTORS, INC.,)	
14	Defendant.)	

Plaintiff Kevin McClintic (“Plaintiff” or “McClintic”) and Defendant Lithia Motors, Inc. (“Defendant” or “Lithia”), submit this supplemental memorandum in support of Plaintiff’s previously filed Motion for Preliminary Approval of the Class Action Settlement (the “Motion”). Dkt. No. 19.

Plaintiff originally filed the Motion on August 8, 2011. Dkt. No. 19. The Court subsequently entered an order on October 19, 2011, asking the parties to respond to certain questions posed by the Court regarding the proposed settlement. Dkt. No. 31. The parties responded accordingly on November 2, 2011. Dkt. No. 32. On January 12, 2012, the Court entered an order denying the Motion (the “Order”). Dkt. No. 33. The Court stated that the proposed class settlement satisfies the requirements of Rule 23(a) and Rule 23(b)(3) and that the “settlement advances substantially toward a resolution that is fair, reasonable and adequate.” *Id.* at p. 5. The Court found however, that there were “several obstacles”

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2 preventing the Court from granting preliminary approval, but that the parties could remove
3 these obstacles if they so choose. *Id.* at p. 4. The Order permits the parties to “renew the
4 motion in compliance with this order no later than February 17, 2012.” *Id.* at p. 1.
5 Accordingly, the parties now present the Court with this Supplemental Memorandum in
6 Support of the Motion.¹ A revised Settlement Agreement, executed by all parties, as well as
7 the accompanying exhibits, is submitted herewith.

8 **1. The *Cy Pres* Distribution.**

9 The Settlement previously provided for the distribution of a portion of the settlement
10 proceeds to the Legal Foundation of Washington (“LFW”). Specifically, the agreement
11 provided that if relatively few class members participate in the settlement such that their
12 payments do not exhaust the \$1.74 million Payment Fund,² Lithia was to distribute the
13 remainder to LFW. The Court, however, suggested that the parties “could just as easily provide
14 for a pro rata increase to each class member’s payment if too few of them participate.” *Id.* at p.
15 8. The Court went on to state that “*cy pres* payments ought to be limited to a distribution of
16 money that the parties cannot distribute to class members with reasonable efforts. That would
17 include, for example, settlement checks that are returned or that class members do not cash
18 within a reasonable time.” *Id.*

19 The parties agree and have revised the Settlement Agreement accordingly. If the claim
20 forms submitted fail to exhaust the Payment Fund, the Settlement Agreement now provides that
21 payments to Class Members will increase pro rata. *See* revised Settlement Agreement
22 §III.C.1.d.(6). With respect to any checks that have not been negotiated within sixty (60) days
23 of the Effective Date, such funds shall be donated to the Legal Foundation of Washington. *Id.*

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25 ¹ The Court’s Order stated that if the parties elect to submit a revised motion for preliminary approval, “[t]hey
26 need only explain to the court how they have chosen to address the concerns identified in this order.” Dkt. No. 33
at p. 10. Rather than resubmit arguments already made in the Motion, the parties submit this concise Supplemental
Memorandum to explain how the revisions to the Settlement Agreement and the Exhibits have attempted to
address the Court’s concerns.

² Defined terms used in this Supplemental Memorandum but not defined herein shall have the definitions
contained in the Settlement Agreement.

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2 at §III.C.1.d.(7). Otherwise, all of the Payment Fund will be paid to Class Members.

3 **2. Attorneys' Fees, Incentive Fee, and Administration Fees.**

4 The Court expressed concern that, under the prior Settlement Agreement, if it were to
5 award less than \$600,000 in attorneys' fees or less than \$10,000 as an incentive fee to
6 McClintic, or if administration fees were less than \$150,000, the difference would remain in
7 Lithia's hands. Dkt. No. 33 at pp. 8-9. *Id.* The Settlement Agreement has been revised to reflect
8 that in the event the Court enters an attorneys' fee award of less than \$600,000 or an incentive
9 fee of less than \$10,000, the Payment Fund will be increased accordingly, which will in turn
10 increase pro rata the payments to the Class Members. Revised Settlement Agreement at
11 §III.C.1.d.(5). Likewise, should class administration fees be less than \$150,000, the Payment
12 Fund will be increased and payments to Class Members will similarly increase pro rata. *Id.*

13 **3. DME's Participation in the Settlement.**

14 The parties' November 2, 2011 submission to the Court notes that although DME is not
15 a party to this case, it facilitated the sending of the text messages at issue on Lithia's behalf.
16 That submission further states that Plaintiff's counsel indicated in the mediation that led to the
17 settlement that Plaintiff would join DME as a defendant if a settlement were not reached. In
18 light of the foregoing, and without any admission of liability, DME agreed to "participate
19 financially" in the settlement and thereby "avoid potentially costly and uncertain litigation with
20 Plaintiff." Dkt. No. 32 at pp. 4-5. The Court found this disclosure to be insufficient and stated
21 that the "parties must disclose [DME's] contribution to the settlement." Dkt. No. 33 at p. 9.

22 In response to the Court's instruction, the parties hereby state that DME, to facilitate the
23 Settlement and without any admissions, agreed to pay the entire Settlement Fund on behalf of
24 Lithia, subject to a full reservation of its rights against Lithia. The parties have also added this
25 disclosure to Recital F of the revised Settlement Agreement.

26 **4. The Website.**

The settlement previously provided that the website to assist in informing Class

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2 Members about the settlement would remain active for only sixty days. The Court noted that
3 this “artificial [time] limit” did not serve the interests of the Class Members. *Id.* Accordingly,
4 the parties have revised the Settlement Agreement to reflect that the website will be active as
5 soon as notices are sent to the Class Members and will remain active until sixty days after the
6 Effective Date. Revised Settlement Agreement §III.C.5.c. Accordingly, the website will be
7 active for the entire time in which the Class Members can submit claims, opt out, object,
8 receive settlement payments, and/or cash settlement checks.

9 **5. The Release.**

10 In the Court’s October order, the Court raises concerns with the language of the release.
11 The parties’ November 2 submission to the Court states that the parties were willing to revise
12 the language of the release. The revised Settlement Agreement now reflects straight-forward,
13 simple release language, as follows:

14 Upon the Effective Date of the Settlement, the released parties shall be released
15 and forever discharged, to the fullest extent permissible by law, by each and all
16 of the Settlement Class Members for any claim, cause of action, or damage that
17 they asserted, may have asserted, or could have asserted against the Released
18 Parties arising out of, or in any way related to the lawsuit or the receipt of or
19 transmission of any Text Messages to any Settlement Class Member by or on
20 behalf of any Released Party during the Class Period.

21 The “Released Parties” are Lithia Motors, Inc., DMEautomotive LLC (a vendor
22 of Lithia and an intended beneficiary of the Settlement Agreement), and their
23 respective parents, subsidiaries, affiliates, members, partners, related entities,
24 predecessor or successor companies and any entity which shares common
25 ownership or control, in whole or in part, with any of the foregoing, along with
26 the present or former directors, officers, owners, managers, employees,
representatives, assigns, vendors, and agents of any of them, whether in their
individual or official capacities (specifically including, but not limited to, their
attorneys, investigators, and representatives).

23 *Id.* §III.C.7. The parties have also added a short “plain language” explanation of the release in
24 both the Summary Notice and Long Form Notice contained in new Exhibits C and D
25 respectively. Finally, the parties have clarified and simplified other portions of the Settlement
26 Agreement and accompanying exhibits.

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2 **6. Pre-Paid Claim Form.**

3 The Court stated that by mailing Class Members a pre-paid claim form, the parties
4 make it easy for Class Members to submit claims. Dkt. No. 33 at p. 9. The Court suggested
5 that the parties could similarly make it easy for Class Members to opt out of the settlement by
6 adding “the option to opt out to the same postage-prepaid card containing the claim form.” *Id.*
7 at pp. 9-10. The parties agree with the Court and have taken the Court’s suggestion. Exhibit A
8 to the revised Settlement Agreement reflects these changes. The Class Members will receive a
9 prepaid “Claim or Exclusion Form.” On the prepaid return form, the Class Members can elect
10 to either make a claim and participate in the Settlement or opt-out of the Settlement. The
11 parties have also heeded the Court’s prior recommendation and removed from the Claim or
12 Exclusion Form the acknowledgement of release.

13 **7. Objectors.**

14 The Court also expressed concerns with the Settlement Agreement’s provision that
15 stated that an “objection will not be valid if it only objects to the Lawsuit’s appropriateness or
16 merits.” *Id.* at p. 10. Accordingly, the parties have removed this provision from the Settlement
17 Agreement. The Court also expressed concern with the initial requirement that objectors must
18 submit their objections to class counsel, Lithia’s counsel, and the Court. *Id.* In response to this
19 concern, the parties have amended the Settlement Agreement to require that objections need
20 only be submitted to the Settlement Administrator, who will distribute copies to the parties.
21 The parties will distribute copies of any objections to the Court. *See* revised Settlement
22 Agreement §III.C.9; Ex. B at p. 4; Ex. D at pp. 3-4.

23 **8. The Injunction.**

24 On page 7 of the Court’s Order, the Court concluded that the injunction to which Lithia
25 agreed did not in fact prohibit any specified practice and that the Court was unlikely to enter
26 such an injunction. Dkt. No. 33. at p. 7. The parties have removed the injunction from the
proposed settlement.

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2 The parties believe they have fully addressed all of the Court's concerns herein and in
3 the accompanying revised Settlement Agreement and exhibits thereto. For the reasons stated
4 above and in Plaintiff's Unopposed Motion for Preliminary Approval of Proposed Class Action
5 Settlement, the parties respectfully request that the Motion be granted and that the Settlement
6 be preliminarily approved in accordance with the proposed order attached as Exhibit B to the
7 revised Settlement Agreement.

8 DATED: February 16, 2012
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10 WILLIAMSON & WILLIAMS
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12 By /s/Rob Williamson
13 Roblin Williamson, WSBA No. 11387

14 ATTORNEYS FOR PLAINTIFF KEVIN
15 McCLINTIC AND PUTATIVE CLASS

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