

THE HONORABLE RICHARD A. JONES

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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. 11-cv-00859-RAJ

**MEMORANDUM IN RESPONSE TO
OBJECTION FILED BY DAN
MCLAREN**

I. INTRODUCTION

On September 18, 2012, Garden City Group, the settlement administrator in this case, transmitted an objection postmarked September 14, 2012, from John Ochoa, counsel for Dan McLaren (“McLaren”). This objection is attached hereto as Exhibit A. McLaren is a class member and submitted a claim to participate in the class settlement. Previously, McLaren moved to intervene and filed a complaint in intervention in this case. Dkt No. 14. His motion was denied. Dkt No. 31.¹ McLaren was the only class member who objected to the settlement.

¹ After this case was commenced, McLaren also filed a separate class action in Oregon seeking to certify three separate classes—a Lithia class of all persons who received one or more unauthorized text message advertisements from DME by or on behalf of Lithia; a DME Class of McLaren and all others who received from DME one or more unauthorized text message advertisements on behalf of a third party after affirmatively opting out; and a Lithia Subclass of McLaren and all others who received from DME one or more unauthorized text message advertisements by or on behalf of Lithia after affirmatively opting out. *See McLaren v. DMEautomotive, LLC*, Cause No. 3:11-cv-00810 (D. Or.). On September 5, 2012, McLaren’s complaint alleging claims against Lithia was dismissed with prejudice and the portion of his complaint alleging a DME class was dismissed without prejudice with leave to file an amended

MEMORANDUM IN RESPONSE TO OBJECTION FILED
BY DAN MCLAREN - 1
No. 11-cv-00859-RAJ

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX: 206.223.7107

1 McLaren raises two objections to the final settlement of this case. First, McLaren
2 alleges that there was insufficient discovery undertaken in this case—as he did in his motion to
3 intervene, which this Court properly denied. Dkt. No. 31. Apparently, he now contends that
4 this purported inadequate discovery prevented the parties from structuring a claims paid
5 settlement. Second, McLaren objects because the settlement does not include an injunction.

6 McLaren’s first objection misses the mark for a second time. It is based upon the
7 unsubstantiated conclusions of his counsel. Class members who received the text messages
8 from DME on behalf of Lithia were sent notice of the settlement without the need for formal
9 discovery. The claims made settlement process was approved by the Court after the Court’s
10 careful consideration of a number of factors, including how best to reach the persons who
11 owned the cellular telephone numbers at the time the messages were sent.

12 McLaren’s second objection also is unavailing. This Court expressly considered and
13 rejected the need for inclusion of injunctive relief in the settlement. Dkt. No. 33. The Court
14 correctly recognized that injunctive relief is not well suited to this case. McLaren fails to
15 precisely say what should be enjoined, but his proposed complaint in intervention appeared to
16 advocate for an outright ban on the Defendants’ text messaging. McLaren failed to recognize
17 that text message advertising is permissible, so long as it is conducted within the confines of
18 the TCPA. The Court correctly noted that an injunction requiring the defendant to follow
19 exiting law is superfluous.

20 II. ARGUMENT

21 A. McLaren’s Contention that Additional Discovery was Necessary to Correctly 22 Identify Recipients of the Text Messages is Erroneous.

23 There are many factors to be considered in a court’s assessment of the fairness of a
24 settlement. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).²

25 complaint by September 19, 2012. *See id.* at Dkt. No. 52. On the evening of September 19,
26 2012, McLaren filed an amended complaint against DME. *Id.* at Dkt. No. 54.

27 ² The factors include (1) the strength of the plaintiff’s case; (2) the risk, expense, complexity,
and likely duration of further litigation; (3) the risk of maintaining class action status
throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed
and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a

1 McLaren focuses on only one of them and mistakenly contends that only through adversarial
2 discovery would it be possible to identify all persons who received text messages. He relies on
3 information he obtained in discovery directed to non-parties in his now-dismissed case in
4 Oregon District Court. One such third-party subpoena was to OpenMarket, a company which
5 has no business relationship with either Lithia or DME. OpenMarket was a subcontractor to
6 3Cinteractive (“3Ci”), a company that contracted with DME to distribute the Lithia text
7 messages to wireless providers. As the preliminary settlement approval process moved along,
8 the Parties spent time reviewing available data to best reach recipients of the text messages.³
9 DME, on behalf of Lithia, contacted 3Ci and requested its assistance in better determining the
10 phone numbers that successfully received the text messages. 3Ci provided information to DME
11 which permitted ascertainment of successful delivery of the text messages to the recipient
12 phone numbers. DME ultimately received the information, manually converted it into a format
13 compatible with its database, and on behalf of the parties provided it, along with the
14 corresponding names and addresses in Lithia’s database, to the Settlement Administrator. *See*
15 Declaration of Thomas Leonard.

16 McLaren next suggests that if the recipients of the text messages could be identified,
17 then all of them simply should have been sent settlement checks without having to submit
18 claims. This argument fails, however, because the data he purportedly discovered does not
19 answer an important question—the name of the person who owned each cellular telephone
20 number at the time the text messages were received. As the Parties explained in the response to
21 the Court’s October 19, 2011, order, ownership of a cellular telephone number can change over
22 time. Dkt. No. 32. The class representative, Mr. McClintic, was an excellent example of this
23 circumstance. The prior owner of his cellular number had provided Lithia with her number and
24 she was the intended recipient of the text message. Instead, Mr. McClintic received the

25
26 governmental participant; and (8) the reaction of the class members of the proposed settlement.
Id.

27 ³ Knowing that a text transmission was successful does not ensure that the name associated
with that number in Lithia’s database was in fact the person who received the text message.

1 message. Had the parties done as Mr. McLaren now suggests and undertaken a claims paid
2 settlement by simply sending checks to the names associated with the phone numbers for which
3 there was a record of a successful transmission, then in many cases, persons who had not
4 received the text messages would have been paid.

5 The Settlement Administrator undertook a “reverse append” process in an attempt to
6 associate a class member’s name with a telephone number for the most current address
7 compared to the address that appeared in Lithia’s database. See Declaration of Jennifer
8 Keough submitted with the Motion for Final Approval of Class Settlement. In the event that a
9 more current address was located, the Settlement Administrator mailed a claim for to both
10 addresses. This process resulted in sending an additional 20,000 notices. *Id.* It meant sending
11 some class members (including McLaren) notices at multiple locations. Thus, the Parties
12 employed exhaustive efforts to reach the actual recipients of the text messages.⁴ The claim
13 form required the claimant to identify the cellular phone number that received the text message,
14 whether one or more messages were received, and whether a message was received after
15 attempting to opt out. Accordingly, the recipients were asked to verify how many messages
16 that they received. Thus, the process that was implemented was more effective in reaching the
17 actual recipients of the text messages than a process of sending checks without a claim
18 submission step that McLaren now advocates.

19 In summary, McLaren’s claim that protracted discovery was necessary to ascertain the
20 recipients of the text messages is incorrect.⁵ Over 74,000 claim notices were sent out in the
21 effort to reach the over 59,000 recipients of the text messages. The claim submission process

22
23 ⁴ The Parties find McLaren’s argument that only those who “received” text messages were
24 included in the settlement class rather hypocritical in light of the fact that in his proposed
25 complaint in intervention, he, too, proposed settlement classes based upon who had “received”
26 text messages. Dkt. 14, Ex. A.

27 ⁵ McLaren also complains that what he calls “confirmatory texts”—texts acknowledging the
customer’s decision to opt out of receiving future texts also should be separately compensated.
Leaving aside the fact that McLaren did not make this claim in his proposed complaint in
intervention, Dkt. 14 at Ex. A, these messages were not solicitations nor violations of the
statute. Importantly, those who received them had notice of the settlement and will be well
compensated if they submitted a claim.

1 was necessary to prevent distribution of settlement proceeds to those who did not actually
2 receive messages. The amounts that will be paid to the claimants are generous in light of the
3 very limited harm at issue.

4 **B. An Injunction is Unnecessary.**

5 McLaren's objection failed to provide any coherent argument as to why an injunction is
6 necessary in this case. Lithia has ceased text messaging campaigns and McLaren fails to
7 identify any ongoing activities for which an injunction is necessary. In its Order dated
8 January 12, 2012, Dkt. 33, the Court rejected the Parties' proposed injunction as a mandatory
9 component of their settlement. McLaren's objection fails to identify any specific conduct that
10 requires prohibition which would enure to the benefit of class members. Lithia is no longer
11 advertising via text message. The regulations governing what constitutes prior written consent
12 were clarified by the Federal Communications Commission earlier this year. The regulations
13 further obviate the need for injunctive relief in this case. *See In the Matter of Rules and*
14 *Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No.
15 02-278 (February 12, 2012).

16 DATED: September 28, 2012

17
18 LANE POWELL PC

19 By s/Grant S. Degginger
20 Grant S. Degginger, WSBA No. 15261
21 s/Erin M. Wilson
Erin M. Wilson, WSBA No. 42456
Attorneys for Lithia Motors, Inc.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify under penalty of perjury under the laws of the State of Washington, that
3 on September 28, 2012, the document attached hereto was presented to the Clerk of the Court
4 for filing and uploading to the CM/ECF system. In accordance with their ECF registration
5 agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such
6 filing to all CM/ECF participants and any non-CM/ECF participants will be served in
7 accordance with the Federal rules of Civil Procedure.

8 Rob Williamson
9 Kim Williams
10 Williamson & Williams
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15 E-mail: roblin@williamslaw.com
16 E-mail: kim@williamslaw.com

- by CM/ECF
- by Electronic Mail
- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Overnight Delivery

17 Executed on the 28th day of September, 2012, at Seattle, Washington.

18 
19 Janet Wiley

EXHIBIT A



The Honorable Richard A. Jones

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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. 11-cv-00859 RAJ

**CLASS MEMBER DAN MCLAREN'S
OBJECTION TO PROPOSED
SETTLEMENT**

Judge: Hon. Richard A. Jones

Final Approval Hearing Date: Oct. 11, 2012
Time: 2:00 P.M.
Courtroom: 13106

1 Dan McLaren ("McLaren"), pursuant to Rule 23(e)(5) of the Federal Rules of Civil
2 Procedure, as well as the procedures set forth in the "Long Form Legal Notice" disseminated in
3 connection with the settlement of this case, hereby objects to the proposed settlement reached.¹ In
4 support of his objection, McLaren states as follows:

5 **I. INTRODUCTION**

6 On November 2, 2011, Plaintiff Kevin McClintic ("McClintic") and Defendant Lithia
7 Motors ("Lithia") (collectively, the "Parties"), in response to this Court's inquiries about the
8 information contained in DME Automotive's ("DME") records about transmission failure and
9 success rates of the text messages at issue here, informed this Court that DME's records could not
10 identify every person who received a text message promoting Lithia Motors. But that was not the
11 whole answer. The Parties had relationships with third-parties that facilitated the transmission of
12 the text messages in this case. Having conducted no formal discovery, neither Lithia nor Class
13 Counsel identified these third parties, or indicated that their records were consulted to determine
14 transmission rates for the text message campaign.

15 McLaren, through the companion action in Oregon (*McLaren v. Lithia Motors, Inc.*, No.
16 11-cv-0810 (D. Or.), obtained records from two third-parties involved in the transmission of the
17 subject text message marketing campaign: Neustar, Inc., the sole licensor of shortcodes in the
18 United States, including the shortcode at issue in this case (35703)²; and OpenMarket, Inc.
19 ("OpenMarket"), the aggregator that transmitted the subject text messages to consumers through
20 shortcode 35703.³ These records identify the transmission success and failure rates of over
21 60,000 of the subject text messages. Similar information is in the control of DME's former agent,
22 3Cinteractive, LLC ("3Ci").

23

24

25 ¹ Dan McLaren resides at 755 Stevens St., #223 Medford, OR, 97504 and can be contacted
26 through counsel. McLaren also timely submitted a claim form in this case. Neither McLaren nor
his Counsel intend to appear at the Final Approval Hearing.

27 ² A copy of the subpoena issued on Neustar, Inc. is attached as Exhibit A. Partial results of that
subpoena, which identify DME, OpenMarket, and 3Ci are attached as Exhibit B.

³ A copy of the subpoena issued on OpenMarket, Inc. is attached as Exhibit C.

1 Not only did the Parties fail to conduct any formal discovery, the Parties did not attempt to
2 do even simple confirmatory discovery that would have answered the Court's questions and
3 identified the settlement Class that will soon be releasing all of their claims against DME, Lithia,
4 and host of other entities which to date have not been identified, including OpenMarket and 3Ci,
5 among several others. In order to protect the interests of these Class Members, McLaren hereby
6 objects.

7 **II. BACKGROUND**

8 In this Court's October 19, 2011 Order, it expressed concern that McClintic and Lithia
9 were requiring Class Members to submit claim forms when the parties already admitted that they
10 were in possession of the addresses of each Class Member who received the first text message
11 promoting Lithia's automotive products. (Oct. 19, 2011 Order, Dkt. 31, at 11-12.) The Court
12 directed the Parties to explain why, based on the addresses in Lithia and DME's records, Class
13 Members should not simply be mailed checks. (*Id.* at 13.)

14 On November 2, 2011, the Parties submitted a Joint Statement Responding to the Court's
15 October 19, 2011 Order. (Dkt. 32.) In it, the Parties said that

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17 DME's records only reveal whether the text messages (and how many messages)
18 were sent and successfully received by the individuals' cell phone carriers. DME
19 does not know whether those text messages were then successfully transmitted to
20 the cell phones such that the intended individuals actually received them.

21 (Dkt. 32 at 5.) The Parties' Joint Statement only refers to "DME's records." As such, it fails to
22 account for records of other entities, including the third-parties that actually transmitted the text
23 messages at issue in this case. In order to fully answer the Court's query—and to insure the
24 settlement they reached adequately provided for the Class—a more thorough analysis of all
25 relevant evidence should have been conducted. This analysis would have necessarily
26 encompassed the records of third parties OpenMarket and 3Ci.

27 OpenMarket is a telecommunications company that maintains connectivity to the cellular
telephone carrier's networks. OpenMarket uses technology that allows a "content provider" to
transmit text messages *en masse* to end-users who have different cellular telephone carriers (i.e.

1 AT&T Mobility or Verizon Wireless.) A content provider is simply a person or entity that
2 provides the verbiage of a text message, such as DME in this case. OpenMarket takes the content
3 of the message, along with a list of recipient telephone numbers, and transmits the messages using
4 a shortcode. In this case, Lithia and DME provided the content and directed 3Ci to instruct
5 OpenMarket to transmit the text messages using shortcode 35703.

6 Another link in the chain from Lithia to the Class Members is 3Ci. Because of the lack of
7 discovery, the extent of 3Ci's role in this case is less clear. McLaren does know that 3Ci licensed
8 the shortcode that was used in this case (35703).⁴ McLaren also knows that 3Ci maintains certain
9 records related to the recipients of text messages sent on behalf of DME and was informed by
10 counsel for 3Ci that 3Ci possesses information related to this case. McLaren requested such
11 records in the form of a subpoena in the companion case *McLaren v. Lithia Motors, et al.*, but
12 DME moved the Court for a protective order preventing McLaren from receiving this
13 information.⁵ Because of this, neither this Court nor McLaren knows for certain the extent of
14 information retained by 3Ci. However, it is clear that 3Ci terminated its relationship with DME
15 following the text message campaign at issue in this case, as counsel for 3Ci informed counsel for
16 McLaren following McLaren's subpoena request. This information is crucial to understanding
17 whether the settlement in this case is "fair, reasonable and adequate"—and it doesn't appear from
18 the Parties' November 2 Joint Submission that these records were ever consulted.

19 The Parties' settlement agreement in this case also does not provide for any form of
20 injunctive relief. The Parties' original settlement agreement contained injunctive relief that stated
21 Lithia agreed not to violate the "TCPA, 47 U.S.C. § 227 and/or RCW 19.190.060 through the
22 unlawful use of an automatic dialing and announcing device ("ADAD") to deliver text messages
23 for commercial solicitation to Class Members who have not provided express consent." (January
24 12, 2012 Order, Dkt. 33, at 4.) The Court concluded that "the injunction to which Lithia has
25 agreed is valueless," as all people and entities are required to follow the law. (*Id.* at 7.) The

26 _____
27 ⁴ McLaren knows this because of the limited discovery he was able to conduct in *McLaren v.*
Lithia Motors, et al., No. 11-cv-0810 MO (D. Or.).

⁵ A copy of the subpoena to 3Ci is attached as Exhibit D.

1 Court also said that the Parties “may wish to remove this injunction as a mandatory component of
2 their agreement.” (*Id.*) (emphasis added). The Parties did remove the injunction from their
3 settlement, but McClintic did not even attempt to enter into an injunction that actually had teeth,
4 and instead abandoned injunctive relief altogether.

5 **III. ARGUMENT**

6 **A. The Parties’ Lack of Meaningful Discovery Calls into Question the Fairness of**
7 **the Settlement Reached**

8 The discovery conducted in this case has been woefully inadequate, and as a result there is
9 a real risk that Class Members are the ones that suffer the consequences. The little discovery
10 conducted by McLaren suggests that the recipients of text messages in this case can be identified,
11 and as a result all Class Members can be afforded relief. Courts give heightened scrutiny to class
12 action settlements reached without prior litigation or discovery for good reason—the issues and
13 evidence in such cases are not fully examined and as a result Class Members are not adequately
14 represented. This case is a prime example.

15 Under Fed. R. Civ. P. 23(e), parties to a class action may only settle the claims of the
16 Class Members if the Court grants approval. In cases where the parties have reached settlement
17 before class certification, approval “requires a higher standard of fairness and a more probing
18 inquiry than may normally be required under Rule 23(c).” *Dennis v. Kellogg Co.*, --- F.3d ---,
19 2012 WL 3800230, at *4 (9th Cir. Sept. 4, 2012) (internal citations and quotations omitted).
20 “District courts must be skeptical of some settlement agreements put before them because they
21 are presented with a ‘bargain proffered for ... approval without benefit of an adversarial
22 investigation.’” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998) (citing *Amchem*
23 *Products, Inc. v. Windsor*, 521 U.S. 591, 621 (1997)). One of the factors considered by courts
24 deciding whether to approve a class action settlement is the degree of discovery conducted in the
25 case. *Molski v. Gleich*, 318 F.3d 937, 652 (9th Cir. 2003) (*reversed on other grounds by Dukes v.*
26 *Wal-Mart Stores*, 603 F.3d 571 (9th Cir. 2010)). As one Court noted,

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An early settlement will find the court and class counsel less informed than if
substantial discovery had occurred. As a result, the court will find it more difficult

1 to access the strengths and weaknesses of the parties' claims and defenses,
2 determine the appropriate membership of the class, and consider how class
3 members will benefit from settlement
4 *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 397 (C.D. Cal. 2007) (internal citations and
5 quotations omitted). When adversarial discovery occurs in a case, the court can be more assured
6 that any settlement the parties reach is fair. See *Officers for Justice v. Civil Service Com'n of City
7 and County of San Francisco*, 688 F.2d 615, 626 (9th Cir. 1982).

8 In this case, the Parties decided to define the Class as "all persons in the United States who
9 received a text message from Defendant or on Defendant's behalf . . ." (June 11, 2012 Order,
10 Dkt. 37, at 6.) Putting aside the inclusion of only recipients of text messages as class members⁸,
11 the Parties in this case admit that they did not conduct any formal discovery, including third-party
12 discovery, to try and determine which Class Members received offending text messages. (Dkt.
13 40, ¶ 6.)

14 Based on discovery responses provided to McLaren by OpenMarket, McLaren knows that
15 OpenMarket retains transmission logs of the text messages transmitted in this case. These records
16 obtained to date show a significant portion of the telephone numbers provided to OpenMarket by
17 DME and/or 3Ci, as well as whether text message transmissions to those numbers were
18 "delivered" "failed" "rejected," or had other various technical difficulties.⁹ The records also
19 reveal other text messages sent by Lithia and DME to Class Members "confirming" their request
20 to not receive additional text messages (requests that were not honored by Lithia or DME).
21 Claims over these "confirmatory" text messages are released as part of this settlement, but no
22 Class Member would be able to receive any compensation for receipt of such message. Neither

23 ⁸ The Class could just as easily be defined as "All individuals who were sent a text message by
24 Lithia or on Lithia's behalf." This class definition that would allow all class members to receive
25 relief, as DME can identify all individuals who were sent a text message (or two). The TCPA
26 does not require that the defendant complete the call before the statutory violation is complete.
27 *Critchfield Physical Therapy v. Taranto Group, Inc.*, --- P.3d ---, 2011 WL 4505794, at *10 (Kan.
Sept. 30, 2011); see also *Hinman v. M & M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152, 1159 (N.D.
Ill. 2009) (finding that the analogous fax spam section of TCPA, on its face, prohibits the sending
of unsolicited advertisements without reference to receipt).

⁹ The records are voluminous and contain consumers' cellular telephone numbers, as well as the
content of the text messages sent to and from shortcode 35703. McLaren will submit this data to
the Court under seal upon request.

1 the Parties' settlement agreement, submissions to the Court nor notice provided to Class Members
2 identify these messages.¹⁰

3 While early settlement is sometimes preferable in order to reduce litigation costs and
4 preserve court resources, it should not be done at the expense of the putative class members. If
5 the Parties actually engaged in confirmatory discovery that involved OpenMarket and 3Ci, then
6 this fact should have been disclosed, and the results of this discovery should have been put before
7 the Court. If this discovery was not conducted, then there is a possibility that the rights of Class
8 Members are being short-changed through the use of claim forms rather than a "direct
9 distribution" type settlement model.¹¹

10 **B. The Proposed Settlement Does Not Provide for Injunctive Relief.**

11 The TCPA specifically provides for injunctive relief. *See* 47 U.S.C. § 227(b)(3)(A).
12 Instead of strengthening the injunctive relief contained in the Parties' initial settlement agreement,
13 the Parties abandoned injunctive relief completely, and with it any meaningful sanction against
14 Lithia Motors for its role in this text message campaign. With the exclusion of injunctive relief,
15 Lithia Motors is now receiving a full release from all Class Members in exchange for paying no
16 compensation to the Class, or agreeing to change their marketing practices.

17 If final approval is granted, neither the Lithia, DME, nor any of their third-party agents
18 will be bound by any injunctive relief, but Class Members are still giving up their ability to enjoin
19 the "Released Parties" from continuing these telemarketing practices. (*See* Settlement Agreement
20

21 ¹⁰ For instance, McLaren received not only the two text messages transmitted on April 11, 2011
22 and April 19, 2011, he also received two text messages stating "Thank you Lithia respects the
23 wishes of its customers," for a total of four unsolicited text messages. As shown in this case,
Lithia, in fact, did not respect the wishes of its customers, as McLaren continued to receive spam
text messages even after attempting to opt-out.

24 ¹¹ In other class action settlements where class members can be positively identified, the money
25 in a settlement fund is simply paid to class members, rather than burdening class members with a
26 claim form. *See, e.g., In re Checking Account Overdraft Litigation*, 830 F. Supp. 3d 1330, 1351
27 (S.D. Fla. 2011) (approving a settlement where the settlement fund is directly distributed to each
class member, and noting that "the absence of a claims-made process further supports the
conclusion that the Settlement is reasonable.") As this Court noted in its October 19 Order, there
is no good reason for class members to submit claims forms if the class members can be readily
identified.

1 and Release between McClintic and Lithia, Dkt. 34-1, at 7, § C.7.”) More troubling than the
2 abandonment of injunctive relief is Lithia’s belief that it actually did have the Class Member’s
3 consent to receive commercial solicitations by virtue of the Class Members providing Lithia with
4 their cellular telephone numbers in connection with business transactions and that they did not do
5 anything improper. (See Joint Statement Responding to the Court’s October 19, 2011 Order, Dkt.
6 32, at 3, Ex.’s A-C.) The idea that this practice satisfies “prior express consent” is dubious at
7 best. See *In re Jiffy Lube Int’l Text Spam Litig.*, 847 F. Supp. 2d 1253, 1258 n. 7 (S.D. Cal.
8 2012)¹² Without injunctive relief or some other contractual agreement that changes Lithia’s and
9 the other Released Parties’ methods of gaining “prior express consent,” they are free to continue
10 collecting consumer’s telephone numbers during transactions and sending text messages *en*
11 *masse*.

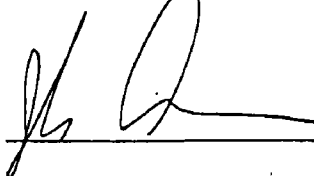
12 **IV. CONCLUSION**

13 The Parties rushed to settle this case before conducting necessary discovery that would
14 address the concerns of the Court. They also abandoned injunctive relief or contractual
15 prospective relief that would protect Class Members and other Lithia customers from receiving
16 future spam text messages. Objector Dan McLaren respectfully requests that this Court (1) deny
17 final approval of this class action settlement and (2) grant Objector McLaren leave (or direct the
18 Parties) to conduct additional discovery to determine whether the settlement and distribution plan
19 is “fair, reasonable, and adequate.”
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23 _____
24 ¹² “The court notes that even if it were to take judicial notice of the invoices, it is not persuaded
25 that a customer’s provision of a telephone number on the invoice in question would constitute
26 prior express consent. [Defendant’s] citations to FCC documents are not particularly convincing,
and it is doubtful that Plaintiffs’ alleged consent was “clearly and unmistakably stated.” *Id.*
(citing *Satterfield v. Simon & Schuster*, 569 F.3d 946, 955 (9th Cir. 2009)).
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1 Dated: September 14, 2012

Respectfully submitted,

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8 Chicago, Illinois 60654
9 Tcl: (312) 589-6370
10 Fax: (312) 589-6378

Attorneys for Objector Dan McLaren

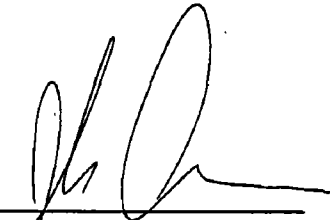
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Certificate of Service

I certify that I served the foregoing on the Claims Administrator as set forth in the Long Form Legal Notice via U.S. Mail and postmarked on September 14, 2012, and addressed to the following:

McClintic v. Lithia Motors
Class Action Litigation c/o GCG
P.O. Box 9786
Dublin, OH 43017-5686



John C. Ochoa

James Forbes
JAMES FORBES, PC
2608 NW Ordway Avenue
Bend, OR 97701
Phone: (541) 382-3917

John C. Ochoa (*Admitted Pro Hac Vice*)
EDELSON MCGUIRE LLC
350 N. LaSalle Street, Suite 1300
Chicago, Illinois 60654

Attorneys for Plaintiff Dan McLaren

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

<p>DAN MCLAREN, individually and on behalf of a class and subclass of similarly situated individuals, <i>Plaintiff,</i></p> <p>v.</p> <p>LITHIA MOTORS, INC., an Oregon corporation, and DMEAUTOMOTIVE LLC, a Delaware limited liability company, <i>Defendants.</i></p>	<p>Case No. CV-11-810 MO</p> <p>NOTICE OF SUBPOENA TO NEUSTAR, INC.</p>
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NOTICE OF SUBPOENA

Case No. CV-11-810 MO

PLEASE TAKE NOTICE, pursuant to Federal Rule of Civil Procedure 45, that Plaintiff Dan McLaren, in the above-captioned matter intends to serve a *Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises*, in the forms attached hereto, on **Neustar, Inc.** on June 19, 2012, or as soon thereafter as service may be effectuated.

Dated: June 19, 2012

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

BY: /s/ John C. Ochoa
One of his attorneys

James Forbes
jim@jimforbesattorney.com
JIM FORBES, P.C.
2608 NW Ordway Avenue
Bend, OR 97701

John C. Ochoa (Admitted *Pro Hac Vice*)
jochoa@edelson.com
EDELSON MCGUIRE LLC
350 N. LaSalle Street, Suite 1300
Chicago, Illinois 60654

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that I caused to be served the foregoing via United States First Class Mail, postage prepaid, and addressed to the following counsel of record on June 19, 2012.

CARTER M. MANN
mannc@lanepowell.com
ERIN M. WILSON
wilsonem@lanepowell.com
GRANT S. DEGGINGER
deggingerg@lanepowell.com
601 SW Second Avenue
Suite 2100
Portland, OR 97204-3158
Telephone: (503) 778-2100

Attorneys for Defendants.

/s/ John C. Ochoa

UNITED STATES DISTRICT COURT

for the

Eastern District of Virginia

Dan McLaren

Plaintiff

v.

Lithia Motors, Inc. and DMEAutomotive LLC

Defendant

Civil Action No. 3:11-cv-00810-MO

(If the action is pending in another district, state where: District of Oregon)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Neustar, Inc. c/o CT Corporation System, 4701 Cox Road, Suite 301 Glenn Allen, Virginia 23060

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See attached Schedule

Place: See attached Schedule Date and Time: 07/06/2012 5:00 pm

Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place: Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 06/19/2012

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ John C. Ochoa Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) Plaintiff Dan McLaren, who issues or requests this subpoena, are:

EDELSON MCGUIRE LLC, BY John C. Ochoa 350 N. LaSalle Street, Suite 1300 Chicago, Illinois 60654 ph. 312-589-6370 jchoa@edelson.com

Civil Action No. 3:11-cv-00810-MO

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____

I served the subpoena by delivering a copy to the named person as follows: _____
_____ on *(date)* _____ of _____

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ 40.00

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an untraced expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

Issued by

**THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

DAN MCLAREN , individually and on behalf of a class and subclass of similarly situated individuals, <i>Plaintiff,</i> v. LITHIA MOTORS, INC. , an Oregon corporation, and DMEAUTOMOTIVE LLC , a Delaware limited liability company, <i>Defendants.</i>	Case No. CV-11-810 MO
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SCHEDULE TO SUBPOENA TO NEUSTAR, INC.

Pursuant to the provisions of Rule 45 of the Federal Rules of Civil Procedure, Plaintiff Dan McLaren requests that you cause to be delivered all of the following documents that are in your possession, custody or control, including documents within the possession, custody or control of your officers, agents, attorneys, or employees, to the following persons by 5:00 p.m. on Friday, July 6, 2012:

John C. Ochoa jochoa@edelson.com EDELSON MCGUIRE LLC 350 N. LaSalle Street, Suite 1300 Chicago, Illinois 60654 (312) 589-6370 (phone) (312) 589-6378 (facsimile)	Clerk of the U.S. District Court Eastern District of Virginia Richmond Division 701 East Broad Street Richmond, Virginia 23219
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DEFINITIONS

"AND" as well as "OR" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these requests any information which might otherwise be construed to be outside its scope.

"ANY" and "ALL" shall be construed to include "each" and "each and every."

"CELLULAR TELEPHONE" shall mean cellular telephone, cell phone, mobile phone, wireless device, or wireless telephone.

"DOCUMENT" or "DOCUMENTS" shall mean any writings, letters, telegrams, memoranda, Correspondence, email messages, memoranda or notes of conferences or telephone conversations, reports, studies, lists, compilations of data, papers, books, records, contracts, deeds, leases, agreements, pictures, photographs, transcripts, tapes, microfilm, computer data files, printouts, accounting statements, mechanical and electrical recordings, checks, pleadings, and other tangible things upon which any handwriting, typing, printing, drawing, representation, photostatic, or other magnetic or electrical impulses or other form of communication is recorded, stored or produced, including audio and video recordings and electronically-stored information (including but not limited to e-mails, web pages, Websites, computer discs, computer programs and computer files, including, where applicable, compiled and uncompiled source code), whether or not in printout form. These terms shall also mean copies of Documents even though the originals are not in your possession, custody or control; every copy of a Document which contains handwritten or other notations or which otherwise does not duplicate the original of any other copy; all attachments to any Document; and any other Document, item and/or information discoverable under federal law and procedure, including, without limitation, the items referenced

in Federal Rule of Civil Procedure 34(a)(1).

“ELECTRONICALLY STORED INFORMATION” or “ESI” as used herein, means and refers to computer generated information or data, of any kind, stored on computers, file servers, disks, tape or other devices or media, or otherwise evidenced by recording on some storage media, whether real virtual, or cloud based.

“REGARDING” or “RELATE TO” means discussing, mentioning, addressing, referring to, analyzing, comprising, underlying, memorializing, describing, or showing the subject indicated.

“SHORTCODE” means an abbreviated telephone number used to transmit Text Messages to Cellular Phones.

“TEXT MESSAGE” or “TEXT MESSAGE CALL” shall mean a text message, text message call, text call, text message advertisement, SMS message, Short Message Service, SMS message call, SMS communication, SMS spam, spam text message, or commercial text call.

“YOU,” “YOUR,” or “NEUSTAR” means or refers to Neustar, Inc. and its divisions, subsidiaries, related companies, predecessors, and successors, all present and former officers, directors, agents, attorneys, employees, and all persons acting or purporting to act on behalf of any of them.

The singular includes the plural number and vice versa. The past tense includes the present tense where the clear meaning is not distorted by change of tense. The particularity or generality of any single discovery request shall not limit any other discovery request.

Where a request addresses acts or omissions of any entity, it shall be construed and interpreted to apply to the acts or omissions of that entity and the acts or omissions of that entity's employees, assigns, contractors, and any other agent of that entity.

All other terms shall be construed as necessary to bring within the scope of these requests any information that might otherwise be construed to be outside its scope.

INSTRUCTIONS

Please call the attorney issuing this Subpoena (John Ochoa) at 312-589-6370, or email him at jochoa@edelson.com at your earliest convenience. The intent is to avoid or minimize unnecessary expenses or burdens on the respondent. Minimizing expenses and/or burdens will require early and cooperative communication.

If You object to producing a Document and/or electronically stored information because of a privilege, You must provide the following information:

- (1) the nature of the privilege claimed, including work product;
- (2) if the privilege is being asserted in connection with a claim or defense governed by law, the privilege rule being invoked;
- (3) the date of the Document and/or electronically stored information;
- (4) the Document's type (e.g., letter or memorandum) and, if electronically stored information, the software application used to create it (e.g., MS Word or MS Excel Spreadsheet), and the custodian, location, and such other information sufficient to identify the material, including, where appropriate, the author, the addressee, and the relationship between the author and addressee; and
- (5) the general subject matter of the Document and/or electronically stored information.

If the request is objected to on the basis that the time period covered by the request is irrelevant, burdensome, or otherwise inappropriate, state what time period You consider proper for that request, and answer the request for that time period, preserving Your objection to the remainder of the time period.

If You choose to provide in electronic media or machine-readable form (such as computer disk, cartridge, tape, punch cards, or other non-printed media) any Documents or other materials in Your answer, You must provide all information and things necessary for Plaintiff to fully access, read, and decode into plain English text all data and files so provided. Nothing in this Subpoena should be construed to request premium text messages.

All electronic Documents, file systems, digital media and electronically stored information are to be produced in their respective native formats with all associated metadata intact and, if such electronic Documents or electronically stored information are no longer available in their native formats for any reason, please identify the reasons such native format Documents are no longer so available and the dates each such Document became unavailable.

All Documents are to be produced in the form, order, and manner in which they are maintained in Your files. Documents are to be produced in the folders, cartons, or containers in which they have been maintained, stored, clipped, stapled, or otherwise arranged in the same form and manner in which they were found and in such a manner that the office and location from which they were produced is readily identifiable. Whenever a Document (as defined) or group of Documents is taken out of a file folder, file drawer, file box, or notebook, before the same is produced, attach thereto a copy of the label on the file folder, file box, or notebook from which the Document or group of Documents was removed.

If any Document requested has been lost or destroyed since its creation, identify the nature of the Document (e.g. letter, email, etc.), the date of the Document, the Persons who sent and received the original and any copy of the Document, a summary of the content of the Document, and describe when, where, how, and by whom said Document was lost or destroyed, and state the name of the Person(s) who last had custody thereof.

DOCUMENTS REQUESTED

DOCUMENT REQUEST NO. 1

All Documents in Your possession and/or control that constitutes, manifests, contains, incorporates, reflects, pertains, indicates, discusses, mentions, and/or concerns the application for Shortcode 35703 from January 1, 2008, to the present.

DOCUMENT REQUEST NO. 2

All Documents in Your possession and/or control Relating To All Shortcodes licensed by or for DMEAutomotive LLC.

Dated: June 19, 2012

Respectfully Submitted,

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

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

James Forbes
jim@jimforbesattorney.com
JIM FORBES, P.C.
2608 NW Ordway Avenue
Bend, OR 97701

John C. Ochoa (Admitted *Pro Hac Vice*)
jochoa@edelson.com
EDELSON MCGUIRE LLC
350 N. LaSalle Street, Suite 1300
Chicago, Illinois 60654

ATTORNEYS FOR PLAINTIFF

- CSC Management**
- > [Search Codes/Application IDs](#)
- > [Reserve a Short Code](#)
- > [Contribute Reserved Short Code](#)
- > [Release Contributed Short Codes](#)
- > [View Rejected Applications](#)
- > [View Cancelled Applications](#)
- > [View Approved Applications](#)
- > [Content Provider Restrictions](#)
- Manage User Accounts**
- > [Disable/Enable User](#)
- > [Create Account](#)
- > [Create Additional Contacts](#)
- Account Management**
- > [Edit Account](#)
- > [Change Password](#)
- > [Review Applications](#)
- > [Review Campaigns](#)

Admin - Order Management

Review Order

Order Id: 1036038

Order Type: RENEW

Order Status: Approved

Short Code(s):

35703

Order last modified date: 2009-06-01 13:14:18.0

Term: 3 months

[View Invoice](#)

[View Sales Receipt](#)

[Change Content Provider on Order](#)

Best Practices

The 'dos & don'ts' to help ensure you achieve your business objectives.

[Learn More](#)

Find a Partner

Need connectivity? Help with creating your CSC program? Let us help.

[Get Info](#)

1. Applicant Details:

Contact Name:	Michael FitzGibbon	Address Line 1:	7800 Congress Ave.
Company Name:	3CINTERACTIVE	Address Line 2:	Suite 108
Phone #:	5614435505	City:	Boca Raton
Phone # Ext:	101	State/Province:	FL
Alt Phone #:	5612450387	Zip/Postal Code:	33487
Alt Phone # Ext:		Country:	US
Email Address:	billing@3cinteractive.com		

2. Billing Contact Details:

Contact Name:	Sari Terceira	Address Line 1:	7800 Congress Avenue
Phone #:	5614435505	Address Line 2:	Suite 108
Phone # Ext:	106	City:	Boca Raton
Alt Phone #:	5616296014	State/Province:	FL

Alt Phone # Ext: Zip/Postal Code: 33487
Email Address: billing@3cinteractive.com Country: US

The Applicant is requesting the CSC(s) on behalf of the following Content Provider:

3. Content Provider Details:

A content provider is the entity that owns or has the right to content and licenses such content to the application provider/connection aggregator for delivery to the end user.

Contact Name: Kurtis Smith Company Name: DME
Automotive, LLC
Email Address: kurt.smith@redrocketsolutions.com Phone #: 904.493.7631
Phone # Ext:

4. Application Provider Details:

An application provider delivers the technology platform for programs that utilize CSCs.

Contact Name: Michael FitzGibbon Company Name: 3CINTERACTIVE
Email Address: mfitzgibbon@3cinteractive.com Phone #: 5614435505
Phone # Ext: 101

5. Connection Aggregator Details:

A connection aggregator may provide connectivity between carrier networks and application providers/content providers.

Contact Name: Laura Hirzel Company Name: OpenMarket
Email Address: laura.hirzel@openmarket.com Phone #: 248-286-2831
Phone # Ext:

6. Payment Method:

Credit Card

7. Auto-Renew:

Opted-Out

8. Purchase Order Number:

Purchase Order Number:

9. Term:

3 months

10. Selected CSCs

Random:

Quantity: 1 - Content Rating: 18 & Over

The standard lease for each Random CSC is \$500 per month.

The Registry must receive payment before a CSC is leased to the Applicant.

11. Application type:

Contest
Info alerts
Coupons/advertising

12. Anticipated program duration:

Proposed Start date: 10/01/2008 ongoing

13. Time of Day / Day of Week:

Will the program be offered during a specific day of week/time of day?: No

14. Time of Day / Day of Week Restrictions:

Does the program have any time of day/day of week restrictions planned? (i.e run only at specific hours or on specific days): No

15. Is this a national campaign?

Yes

16. How will application(s) be promoted/marketed? (vehicles/frequency/impressions)

Web: Date live: 10/01/2008 National

17. Will traffic associated with the program be:

Constant

18. Provide estimated traffic volumes: 10,000 msgs/mo

What are the specific assumptions associated with the estimated traffic volumes:
Potential audience size: 3,000,000 Take Rate (%): 5% Number of MO messages:
25,000/week Number of MT messages: 150,000/week

19. Describe the Application associated with the CSC. Please describe the step-by-step interaction with the user:

This code will be used for standard rate text alerts, polling & coupons for subscribers receiving text alerts when their car is complete & ready for pickup from their auto dealer. Subscription Alert MO: ALERT MT: ?DME Alerts: Thanks for signing up! U will begin to receive 3 alerts/week from us. Txt STOP to quit. HELP 4 Help. Std msg chgs apply.? Sample Alert: ?DME Alerts: We have completed the service on ur car and is now available for pick up. Txt STOP 2 quit, HELP 4 Help. Std msg chgs apply.? Standard Rate Polling MT: DME Alerts: Plz rate the svc u rcvd on ur recent visit 2 ur DME Dealer Rply w/tr: A) Excellent B) Fair C) Poor MO: A, B or C MT: ?DME Alerts: Thanks 4 ur input. Plz recommend DME service 2 a friend. Txt STOP 2 quit, HELP 4 HELP. Std msg chgs apply.? Promo Offer Alert: Sample Alert ?DME Alerts: Show this

text to ur local auto dealer and receive \$10.00 off ur next oil change. Txt STOP 2 quit, HELP 4 Help. Std msg chgs apply?

20. Message Rates:

Non Premium

21. How do consumers get help?

DME Alerts, Polling & Promos: 4 help visit <http://www.dmeautomotive.com/txt>. Text STOP 2 quit. Std msg chgs apply.?

22. Provide website URL for consumer information: (optional)

www.dmeautomotive.com

23. Provide toll free customer care number for consumer information: (optional)

No toll-free number, only standard rate program.

24. Provide short description of the program that wireless carriers can inform their end users: (optional)

This short code will be used to send promotional alerts to DME Automotive clients

25. CSC Directory:

No

9. Registry Comments:

Approved by system following successful online Credit Card payment

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- CSC Management**
- > Search Codes/Application IDs
- > Reserve a Short Code
- > Contribute Reserved Short Code
- > Release Contributed Short Codes
- > View Rejected Applications
- > View Cancelled Applications
- > View Approved Applications
- > Content Provider Restrictions
- Manage User Accounts**
- > Disable/Enable User
- > Create Account
- > Create Additional Contacts
- Account Management**
- > Edit Account
- > Change Password
- > Review Applications
- > Review Campaigns

Admin - Order Management

[Review Order](#)

Order Id: 1061704

Order Type: RENEW

Order Status: Approved

Short Code(s):

35703

Order last modified date: 2011-02-01 14:37:26.0

Term: 3 months

[View Invoice](#)

[View Sales Receipt](#)

[Change Content Provider on Order](#)

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[Get Info](#)

1. Applicant Details:

Contact Name:	Michael FitzGibbon	Address Line 1:	7800 Congress Ave.
Company Name:	3CINTERACTIVE	Address Line 2:	Suite 108
Phone #:	5614435505	City:	Boca Raton
Phone # Ext:	101	State/Province:	FL
Alt Phone #:	5612450387	Zip/Postal Code:	33487
Alt Phone # Ext:		Country:	US
Email Address:	shortcode@3cinteractive.com		

2. Billing Contact Details:

Contact Name:	Sari Terceira	Address Line 1:	7800 Congress Avenue
Phone #:	5614435505	Address Line 2:	Suite 108
Phone # Ext:	106	City:	Boca Raton
Alt Phone #:	5616296014	State/Province:	FL

Alt Phone # Ext: Zip/Postal Code: 33487
Email Address: billing@3cinteractive.com Country: US

3. Content Provider Details:

A content provider is the entity that owns or has the right to content and licenses such content to the application provider/connection aggregator for delivery to the end user.

Company Name:	DME Automotive, LLC	Address Line 1:	2441 Bellevue Avenue
Contact Name:	Kurtis Smith	Address Line 2:	
Title/Role:		City:	Daytona Beach
Phone #:	904.493.7631	State/Province:	FL
Phone # Ext:		Zip/Postal Code:	32114
Alt Phone #:		Country:	US
Alt Phone # Ext:		Email Address:	kurt.smith@redrocketsolutions.com

4. Payment Method:

Credit Card

5. Auto-Renew:

Opted-Out

6. Purchase Order Number:

Purchase Order Number:

7. Term:

3 months

8. Selected CSCs

Random:

Quantity: 1

The standard lease for each Random CSC is \$500 per month.

The Registry must receive payment before a CSC is leased to the Applicant.

9. Registry Comments:

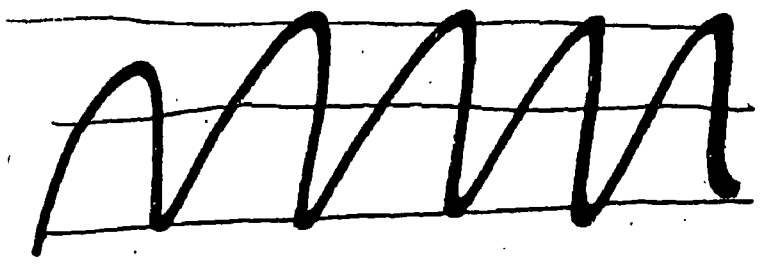
Approved by system following successful online Credit Card payment

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Neustar, Inc.

CTIA The Wireless Association **neustar.**



James Forbes
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Phone: (541) 382-3917

John C. Ochoa (Admitted *Pro Hac Vice*)
EDELSON MCGUIRE LLC
350 N. LaSalle Street, Suite 1300
Chicago, Illinois 60654

Attorneys for Plaintiff Dan McLaren

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

<p>DAN MCLAREN, individually and on behalf of a class and subclass of similarly situated individuals,</p> <p style="text-align: center;"><i>Plaintiff,</i></p> <p>v.</p> <p>LITHIA MOTORS, INC., an Oregon corporation, and DMEAUTOMOTIVE LLC, a Delaware limited liability company,</p> <p style="text-align: center;"><i>Defendants.</i></p>	<p>Case No. CV-11-810 MO</p> <p>NOTICE OF SUBPOENA TO OPENMARKET, INC.</p>
---	---

NOTICE OF SUBPOENA

Case No. CV-11-810 MO

PLEASE TAKE NOTICE, pursuant to Federal Rule of Civil Procedure 45, that Plaintiff Dan McLaren, in the above-captioned matter intends to serve a *Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises*, in the forms attached hereto, on **OpenMarket, Inc.** on June 19, 2012, or as soon thereafter as service may be effectuated.

Dated: June 19, 2012

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

BY: /s/ John C. Ochoa
One of his attorneys

James Forbes
jim@jimforbesattorney.com
JIM FORBES, P.C.
2608 NW Ordway Avenue
Bend, OR 97701

John C. Ochoa (Admitted *Pro Hac Vice*)
jochoa@edelson.com
EDELSON MCGUIRE LLC
350 N. LaSalle Street, Suite 1300
Chicago, Illinois 60654

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused to be served the foregoing via United States First Class Mail, postage prepaid, and addressed to the following counsel of record on June 19, 2012.

CARTER M. MANN
mannc@lanepowell.com
ERIN M. WILSON
wilsonem@lanepowell.com
GRANT S. DEGGINGER
deggingerg@lanepowell.com
601 SW Second Avenue
Suite 2100
Portland, OR 97204-3158
Telephone: (503) 778-2100

Attorneys for Defendants.

/s/ John C. Ochoa

UNITED STATES DISTRICT COURT

for the

Western District of Washington

Dan McLaren)
Plaintiff)
v.) Civil Action No. 3:11-cv-00810-MO
Lithia Motors, Inc. and DMEA Automotive LLC,)
Defendant) (If the action is pending in another district, state where:
District of Oregon)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: OpenMarket, Inc. c/o CT Corporation System, 1801 West Bay DR NW, STE 206, Olympia, WA 98502

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See attached Schedule

Place: See attached Schedule Date and Time: 07/06/2012 5:00 pm

Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place: Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 06/19/2012

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) Plaintiff Dan McLaren who issues or requests this subpoena, are:

EDELSON MCGUIRE LLC, by John C. Ochoa
350 N. LaSalle Street, Suite 1300
Chicago, Illinois 60654 ph. 312-589-6370 jochoa@edelson.com

Civil Action No. 3:11-cv-00810-MO

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____

I served the subpoena by delivering a copy to the named person as follows: _____
_____ on *(date)* _____; or

I returned the subpoena unexecuted because: _____

• Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

Issued by

**THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

DAN MCLAREN , individually and on behalf of a class and subclass of similarly situated individuals, <i>Plaintiff,</i> v. LITHIA MOTORS, INC. , an Oregon corporation, and DMEAUTOMOTIVE LLC , a Delaware limited liability company, <i>Defendants.</i>	Case No. CV-11-810 MO
---	-----------------------

SCHEDULE TO SUBPOENA TO OPENMARKET, INC.

Pursuant to the provisions of Rule 45 of the Federal Rules of Civil Procedure, Plaintiff Dan McLaren requests that you cause to be delivered all of the following documents that are in your possession, custody or control, including documents within the possession, custody or control of your officers, agents, attorneys, or employees, to the following persons by 5:00 p.m. on Friday, July 6, 2012:

John C. Ochoa jochoa@edelson.com EDELSON MCGUIRE LLC 350 N. LaSalle Street, Suite 1300 Chicago, Illinois 60654 (312) 589-6370 (phone) (312) 589-6378 (facsimile)	United States District Court United States Courthouse 700 Stewart Street, Lobby Level Seattle WA 98101-1271
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DEFINITIONS

"AND" as well as "OR" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these requests any information which might otherwise be construed to be outside its scope.

"ANY" and "ALL" shall be construed to include "each" and "each and every."

"CELLULAR TELEPHONE" shall mean cellular telephone, cell phone, mobile phone, wireless device, or wireless telephone.

"COMPLAINT" shall mean Plaintiff's Class Action Complaint filed in the United States District Court for the District of Oregon on July 5, 2011.

"DOCUMENT" or "DOCUMENTS" shall mean any writings, letters, telegrams, memoranda, Correspondence, email messages, memoranda or notes of conferences or telephone conversations, reports, studies, lists, compilations of data, papers, books, records, contracts, deeds, leases, agreements, pictures, photographs, transcripts, tapes, microfilm, computer data files, printouts, accounting statements, mechanical and electrical recordings, checks, pleadings, and other tangible things upon which any handwriting, typing, printing, drawing, representation, photostatic, or other magnetic or electrical impulses or other form of communication is recorded, stored or produced, including audio and video recordings and electronically-stored information (including but not limited to e-mails, web pages, Websites, computer discs, computer programs and computer files, including, where applicable, compiled and uncompiled source code), whether or not in printout form. These terms shall also mean copies of Documents even though the originals are not in your possession, custody or control; every copy of a Document which contains handwritten or other notations or which otherwise does not duplicate the original of any

other copy; all attachments to any Document; and any other Document, item and/or information discoverable under federal law and procedure, including, without limitation, the items referenced in Federal Rule of Civil Procedure 34(a)(1).

“ELECTRONICALLY STORED INFORMATION” or “ESI” as used herein, means and refers to computer generated information or data, of any kind, stored on computers, file servers, disks, tape or other devices or media, or otherwise evidenced by recording on some storage media, whether real virtual, or cloud based.

“IDENTIFY,” when used with respect to a natural person, means to state the person’s full name, present or last known business affiliation and position, past and present home address and past position and business affiliation, if any, with any of the parties herein.

“IDENTIFY,” when used with respect to a company or other business entity, means to state the company’s legal name, the names under which it does business, its form (e.g., partnership, corporation, etc.), the address of its principal place of business, and to identify its principal proprietors, officers or directors.

“PERSON” means or refers to any natural person, corporation, partnership, association, organization, joint ventures, or other entity of any type or nature.

“REGARDING” or “RELATE TO” means discussing, mentioning, addressing, referring to, analyzing, comprising, underlying, memorializing, describing, or showing the subject indicated.

“RELEVANT TIME PERIOD,” means the four (4) years prior to the date the Complaint was filed until the present. Unless otherwise indicated, all DOCUMENT and ESI production requests shall mean for the RELEVANT TIME PERIOD.

“YOU,” “YOUR,” or “OpenMarket” means or refers to OpenMarket, Inc. and all your

present and former officers, directors, agents, attorneys, employees, and all persons acting or purporting to act on behalf of any of them.

The singular includes the plural number and vice versa. The past tense includes the present tense where the clear meaning is not distorted by change of tense. The particularity or generality of any single discovery request shall not limit any other discovery request.

Where a request addresses acts or omissions of any entity, it shall be construed and interpreted to apply to the acts or omissions of that entity and the acts or omissions of that entity's employees, assigns, contractors, and any other agent of that entity.

All other terms shall be construed as necessary to bring within the scope of these requests any information that might otherwise be construed to be outside its scope.

INSTRUCTIONS

Please call the attorney issuing this Subpoena (John Ochoa) at 312-589-6370, or email him at jochoa@edelson.com at your earliest convenience. The intent is to avoid or minimize unnecessary expenses or burdens on the respondent. Minimizing expenses and/or burdens will require early and cooperative communication.

If You object to producing a Document and/or electronically stored information because of a privilege, You must provide the following information:

- (1) the nature of the privilege claimed, including work product;
- (2) if the privilege is being asserted in connection with a claim or defense governed by law, the privilege rule being invoked;
- (3) the date of the Document and/or electronically stored information;
- (4) the Document's type (e.g., letter or memorandum) and, if electronically stored information, the software application used to create it (e.g., MS Word or MS Excel

Spreadsheet), and the custodian, location, and such other information sufficient to identify the material, including, where appropriate, the author, the addressee, and the relationship between the author and addressee; and

(5) the general subject matter of the Document and/or electronically stored information.

If the request is objected to on the basis that the time period covered by the request is irrelevant, burdensome, or otherwise inappropriate, state what time period You consider proper for that request, and answer the request for that time period, preserving Your objection to the remainder of the time period.

If You choose to provide in electronic media or machine-readable form (such as computer disk, cartridge, tape, punch cards, or other non-printed media) any Documents or other materials in Your answer, You must provide all information and things necessary for Plaintiff to fully access, read, and decode into plain English text all data and files so provided. Nothing in this Subpoena should be construed to request premium text messages.

All electronic Documents, file systems, digital media and electronically stored information are to be produced in their respective native formats with all associated metadata intact and, if such electronic Documents or electronically stored information are no longer available in their native formats for any reason, please identify the reasons such native format Documents are no longer so available and the dates each such Document became unavailable.

All Documents are to be produced in the form, order, and manner in which they are maintained in Your files. Documents are to be produced in the folders, cartons, or containers in which they have been maintained, stored, clipped, stapled, or otherwise arranged in the same form and manner in which they were found and in such a manner that the office and location from which they were produced is readily identifiable. Whenever a Document (as defined) or

group of Documents is taken out of a file folder, file drawer, file box, or notebook, before the same is produced, attach thereto a copy of the label on the file folder, file box, or notebook from which the Document or group of Documents was removed.

If any Document requested has been lost or destroyed since its creation, identify the nature of the Document (e.g. letter, email, etc.), the date of the Document, the Persons who sent and received the original and any copy of the Document, a summary of the content of the Document, and describe when, where, how, and by whom said Document was lost or destroyed, and state the name of the Person(s) who last had custody thereof.

DOCUMENTS REQUESTED

DOCUMENT REQUEST NO. 1

All Documents and ESI Related to all Text Messages sent by You between January 1, 2008 and the present, from the Shortcode 35703 containing the following term in whole or part of other terms:

“LITHIA”

All Documents produced in response to this request shall identify the following:

- a. the date of transmission of the Text Message(s);
- b. the Shortcode(s) from which the Text Message(s) were sent;
- c. the Cellular Telephone number(s) to which the Text Message(s) were sent;
- d. the body of each Text Message sent;
- e. the delivery status of the Text Message(s) as to whether it was successful or if it failed; and
- f. any inbound text message You received to such Shortcode, including but not limited to any opt-out request.

DOCUMENT REQUEST NO. 2

All Documents and ESI Related To All Text Messages sent by You between January 1, 2008 and the present, from the Shortcode 35703. All Documents produced in response to this request shall identify the following:

- a. the date of transmission of the Text Message(s);
- b. the Shortcode(s) from which the Text Message(s) were sent;
- c. the Cellular Telephone number(s) to which the Text Message(s) were sent;
- d. the body of each Text Message sent;
- e. the delivery status of the Text Message(s) as to whether it was successful or if it failed; and
- f. any inbound text message You received to such Shortcode, including but not limited to any opt-out request.

Dated: June 19, 2012

Respectfully Submitted,

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

BY: /s/ John C. Ochoa
One of Plaintiff's Attorneys

James Forbes
jim@jimforbesattorney.com
JIM FORBES, P.C.
2608 NW Ordway Avenue
Bend, OR 97701

John C. Ochoa (Admitted *Pro Hac Vice*)
jochoa@edelson.com
EDELSON MCGUIRE LLC
350 N. LaSalle Street, Suite 1300
Chicago, Illinois 60654

ATTORNEYS FOR PLAINTIFF

James Forbes
JAMES FORBES, PC
2608 NW Ordway Avenue
Bend, OR 97701
Phone: (541) 382-3917

John C. Ochoa (*Admitted Pro Hac Vice*)
EDELSON MCGUIRE LLC
350 N. LaSalle Street, Suite 1300
Chicago, Illinois 60654

Attorneys for Plaintiff Dan McLaren

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

<p>DAN MCLAREN, individually and on behalf of a class and subclass of similarly situated individuals, <i>Plaintiff,</i></p> <p>v.</p> <p>LITHIA MOTORS, INC., an Oregon corporation, and DMEAUTOMOTIVE LLC, a Delaware limited liability company, <i>Defendants.</i></p>	<p>Case No. CV-11-810 MO</p> <p>NOTICE OF SUBPOENA TO 3C Interactive, LLC</p>
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NOTICE OF SUBPOENA

Case No. CV-11-810 MO

PLEASE TAKE NOTICE, pursuant to Federal Rule of Civil Procedure 45, that Plaintiff Dan McLaren, in the above-captioned matter intends to serve a *Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises*, in the forms attached hereto, on 3C Interactive, LLC on August 15, 2012, or as soon thereafter as service may be effectuated.

Dated: August 15, 2012

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

BY: /s/ John C. Ochoa
One of his attorneys

James Forbes
jim@jimforbesattorney.com
JIM FORBES, P.C.
2608 NW Ordway Avenue
Bend, OR 97701

John C. Ochoa (Admitted *Pro Hac Vice*)
jochoa@edelson.com
EDELSON MCGUIRE LLC
350 N. LaSalle Street, Suite 1300
Chicago, Illinois 60654

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused to be served the foregoing via email and addressed to the following counsel of record on August 15, 2012.

CARTER M. MANN
mannc@lanepowell.com
ERIN M. WILSON
wilsonem@lanepowell.com
GRANT S. DEGGINGER
dcggingerg@lanepowell.com
601 SW Second Avenue
Suite 2100
Portland, OR 97204-3158
Telephone: (503) 778-2100

Attorneys for Defendants.

/s/ John C. Ochoa

UNITED STATES DISTRICT COURT

for the

Southern District of Florida

Dan McLaren)	
<i>Plaintiff</i>)	
v.)	Civil Action No. 3:11-cv-00810-MO
Lithia Motors, Inc. and DMEAutomotive LLC,)	
<i>Defendant</i>)	(If the action is pending in another district, state where: District of Oregon)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: 3C Interactive, LLC c/o Jay B. Shapiro, Stearns Weaver Miller Weissler Alhadeff & Silterson, P.A., 150 West Flagler Street, Suite 2200, Miami, FL 33130

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See attached Schedule

Place: See attached Schedule	Date and Time: 08/15/2012 5:00 pm
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Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:
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The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 08/29/2012

CLERK OF COURT

OR

_____ <i>Signature of Clerk or Deputy Clerk</i>	/s/ John C. Ochoa <i>Attorney's signature</i>
--	--

The name, address, e-mail, and telephone number of the attorney representing (name of party) Plaintiff Dan McLaren, who issues or requests this subpoena, are:

EDELSON MCGUIRE LLC, by John C. Ochoa
350 N. LaSalle Street, Suite 1300
Chicago, Illinois 60654 ph. 312-589-6370 jochoa@edelson.com

Civil Action No. 3:11-cv-00810-MO

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I served the subpoena by delivering a copy to the named person as follows: _____
_____ on *(date)* _____; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

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(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) *Contempt.* The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

Issued by

**THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

DAN MCLAREN , individually and on behalf of a class and subclass of similarly situated individuals, <i>Plaintiff,</i> v. LITHIA MOTORS, INC. , an Oregon corporation, and DMEAUTOMOTIVE LLC , a Delaware limited liability company, <i>Defendants.</i>	Case No. CV-11-810 MO
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SCHEDULE TO SUBPOENA TO 3C INTERACTIVE LLC

Pursuant to the provisions of Rule 45 of the Federal Rules of Civil Procedure, Plaintiff Dan McLaren requests that you cause to be delivered all of the following documents that are in your possession, custody or control, including documents within the possession, custody or control of your officers, agents, attorneys, or employees, to one of the following persons by 5:00 p.m. on Thursday, August 29, 2012:

John C. Ochoa jochoa@edelson.com EDELSON MCGUIRE LLC 350 N. LaSalle Street, Suite 1300 Chicago, Illinois 60654 (312) 589-6370 (phone) (312) 589-6378 (facsimile)	Office of the Clerk United States District Court Wilkie D. Ferguson, Jr. United States Courthouse 400 North Miami Avenue Miami, FL 33128 (305) 523-5100
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DEFINITIONS

“AND” as well as “OR” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these requests any information which might otherwise be construed to be outside its scope.

“ANY” and “ALL” shall be construed to include “each” and “each and every.”

“CELLULAR TELEPHONE” shall mean cellular telephone, cell phone, mobile phone, wireless device, or wireless telephone.

“COMPLAINT” shall mean Plaintiff’s Class Action Complaint filed in the United States District Court for the District of Oregon on July 5, 2011.

“DOCUMENT” or “DOCUMENTS” shall mean any writings, letters, telegrams, memoranda, Correspondence, email messages, memoranda or notes of conferences or telephone conversations, reports, studies, lists, compilations of data, papers, books, records, contracts, deeds, leases, agreements, pictures, photographs, transcripts, tapes, microfilm, computer data files, printouts, accounting statements, mechanical and electrical recordings, checks, pleadings, and other tangible things upon which any handwriting, typing, printing, drawing, representation, photostatic, or other magnetic or electrical impulses or other form of communication is recorded, stored or produced, including audio and video recordings and electronically-stored information (including but not limited to e-mails, web pages, Websites, computer discs, computer programs and computer files, including, where applicable, compiled and uncompiled source code), whether or not in printout form. These terms shall also mean copies of Documents even though the originals are not in your possession, custody or control; every copy of a Document which contains handwritten or other notations or which otherwise does not duplicate the original of any

other copy; all attachments to any Document; and any other Document, item and/or information discoverable under federal law and procedure, including, without limitation, the items referenced in Federal Rule of Civil Procedure 34(a)(1).

“ELECTRONICALLY STORED INFORMATION” or “ESI” as used herein, means and refers to computer generated information or data, of any kind, stored on computers, file servers, disks, tape or other devices or media, or otherwise evidenced by recording on some storage media, whether real virtual, or cloud based.

“IDENTIFY,” when used with respect to a natural person, means to state the person’s full name, present or last known business affiliation and position, past and present home address and past position and business affiliation, if any, with any of the parties herein.

“IDENTIFY,” when used with respect to a company or other business entity, means to state the company’s legal name, the names under which it does business, its form (e.g., partnership, corporation, etc.), the address of its principal place of business, and to identify its principal proprietors, officers or directors.

“PERSON” means or refers to any natural person, corporation, partnership, association, organization, joint ventures, or other entity of any type or nature.

“REGARDING” or “RELATE TO” means discussing, mentioning, addressing, referring to, analyzing, comprising, underlying, memorializing, describing, or showing the subject indicated.

“RELEVANT TIME PERIOD,” means the four (4) years prior to the date the Complaint was filed until the present. Unless otherwise indicated, all DOCUMENT and ESI production requests shall mean for the RELEVANT TIME PERIOD.

“SHORTCODE” means an abbreviated telephone number used to transmit Text

Messages to Cellular Phones.

"TEXT MESSAGE" or "TEXT MESSAGE CALL" shall mean a text message, text message call, text call, text message advertisement, SMS message, Short Message Service, SMS message call, or SMS communication.

"YOU," "YOUR," or "3C" means or refers to 3C, Interactive, LLC and all your present and former officers, directors, agents, attorneys, employees, and all persons acting or purporting to act on behalf of any of them.

The singular includes the plural number and vice versa. The past tense includes the present tense where the clear meaning is not distorted by change of tense. The particularity or generality of any single discovery request shall not limit any other discovery request.

Where a request addresses acts or omissions of any entity, it shall be construed and interpreted to apply to the acts or omissions of that entity and the acts or omissions of that entity's employees, assigns, contractors, and any other agent of that entity.

All other terms shall be construed as necessary to bring within the scope of these requests any information that might otherwise be construed to be outside its scope.

INSTRUCTIONS

Please call the attorney issuing this Subpoena (John Ochoa) at 312-589-6370, or email him at jochoa@edelson.com at your earliest convenience. The intent is to avoid or minimize unnecessary expenses or burdens on the respondent. Minimizing expenses and/or burdens will require early and cooperative communication.

If You object to producing a Document and/or electronically stored information because of a privilege, You must provide the following information:

(1) the nature of the privilege claimed, including work product;

- (2) if the privilege is being asserted in connection with a claim or defense governed by law, the privilege rule being invoked;
- (3) the date of the Document and/or electronically stored information;
- (4) the Document's type (e.g., letter or memorandum) and, if electronically stored information, the software application used to create it (e.g., MS Word or MS Excel Spreadsheet), and the custodian, location, and such other information sufficient to identify the material, including, where appropriate, the author, the addressee, and the relationship between the author and addressee; and
- (5) the general subject matter of the Document and/or electronically stored information.

If the request is objected to on the basis that the time period covered by the request is irrelevant, burdensome, or otherwise inappropriate, state what time period You consider proper for that request, and answer the request for that time period, preserving Your objection to the remainder of the time period.

If You choose to provide in electronic media or machine-readable form (such as computer disk, cartridge, tape, punch cards, or other non-printed media) any Documents or other materials in Your answer, You must provide all information and things necessary for Plaintiff to fully access, read, and decode into plain English text all data and files so provided. Nothing in this Subpoena should be construed to request premium text messages.

All electronic Documents, file systems, digital media and electronically stored information are to be produced in their respective native formats with all associated metadata intact and, if such electronic Documents or electronically stored information are no longer available in their native formats for any reason, please identify the reasons such native format Documents are no longer so available and the dates each such Document became unavailable.

All Documents are to be produced in the form, order, and manner in which they are maintained in Your files. Documents are to be produced in the folders, cartons, or containers in which they have been maintained, stored, clipped, stapled, or otherwise arranged in the same form and manner in which they were found and in such a manner that the office and location from which they were produced is readily identifiable. Whenever a Document (as defined) or group of Documents is taken out of a file folder, file drawer, file box, or notebook, before the same is produced, attach thereto a copy of the label on the file folder, file box, or notebook from which the Document or group of Documents was removed.

If any Document requested has been lost or destroyed since its creation, identify the nature of the Document (e.g. letter, email, etc.), the date of the Document, the Persons who sent and received the original and any copy of the Document, a summary of the content of the Document, and describe when, where, how, and by whom said Document was lost or destroyed, and state the name of the Person(s) who last had custody thereof.

DOCUMENTS REQUESTED

DOCUMENT REQUEST NO. 1

All Documents and ESI Related to all Text Messages sent on behalf of DMEautomotive LLC between January 1, 2008 and the present, from the Shortcode 35703 containing the following term in whole or part of other terms:

“LITHIA”

All Documents produced in response to this request shall identify the following:

- a. the date of transmission of the Text Message(s);
- b. the Shortcode(s) from which the Text Message(s) were sent;
- c. the Cellular Telephone number(s) to which the Text Message(s) were sent;

- d. the body of each Text Message sent;
- e. the delivery status of the Text Message(s) as to whether it was successful or if it failed; and
- f. any inbound text message You received to such Shortcode, including but not limited to any opt-out request.

DOCUMENT REQUEST NO. 2

All Documents and ESI Related To All Text Messages sent on behalf of DMEautomotive LLC between January 1, 2008 and the present, from the Shortcode 35703. All Documents produced in response to this request shall identify the following:

- a. the date of transmission of the Text Message(s);
- b. the Shortcode(s) from which the Text Message(s) were sent;
- c. the Cellular Telephone number(s) to which the Text Message(s) were sent;
- d. the body of each Text Message sent;
- e. the delivery status of the Text Message(s) as to whether it was successful or if it failed; and
- f. any inbound text message You received to such Shortcode, including but not limited to any opt-out request.

DOCUMENT REQUEST NO. 3

All Documents and ESI Related To Any and All Shortcodes used by DMEautomotive LLC during the Relevant Time Period.

DOCUMENT REQUEST NO. 4

All Documents and ESI Related to Any and All Text Messages sent on behalf of DMEautomotive LLC during the Relevant Time Period.

Dated: August 15, 2012

Respectfully Submitted,

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

BY: /s/ John C. Ochoa
One of Plaintiff's Attorneys

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McClimic v. Lithia Motors, Inc.
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