

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KEVIN MCCLINTIC on behalf of himself and  
all others similarly situated,

Plaintiff,

v.

LITHIA MOTORS, INC.,

Defendant.

**CLASS ACTION**

No. 2:11-cv-00859-RAJ

PLAINTIFF'S MEMORANDUM IN  
RESPONSE TO OBJECTION OF DAN  
MCLAREN

Noted for Hearing: October 11, 2012 @  
2:00 p.m.

**I. INTRODUCTION**

Dan McLaren is the sole objector to the settlement in this case. After Plaintiff McClintic filed this lawsuit in April 2011, Mr. McLaren, through his counsel, John Ochoa of the Chicago firm of Edelson McGuire LLC, sued Defendant Lithia Motors, Inc. ("Lithia") and DMEAutomotive, LLC ("DME"), a vendor used by Lithia for transmitting the text messages at issue, in the District of Oregon, asserting claims similar to those asserted in the case at bar. Mr. McLaren and his counsel also filed a Motion to Intervene in the instant case, asserting generally that both Mr. McClintic and his counsel were inadequate to represent the interests of the class or classes of persons receiving the subject text messages; this Court denied Mr. McLaren's Motion to Intervene (Dkt # 31).

The Court in Mr. McLaren's Oregon case dismissed his claims against Lithia with prejudice on September 5, 2012, *See McLaren v. DMEautomotive, LLC*, Cause No. 3:11-cv-00810 (D.Or). On September 14, 2012, the last day an objection could be mailed and still

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1 considered timely, McLaren's counsel mailed his objection to the settlement in this case to the  
2 claims administrator, The Garden City Group, Inc. ("GCG").<sup>1</sup> The objection suggests that the  
3 data upon which the parties based their settlement is incomplete such that there could be  
4 unidentified class members, and that the settlement should provide for some form of injunctive  
5 relief. The objection is not well taken because the data available to the parties and GCG was  
6 more than adequate to identify class members and provide them with notice by mail, as has  
7 occurred; further, Mr. McLaren does not identify any form of injunctive relief that would be  
8 necessary or beneficial.

## 10 II. ARGUMENT

### 11 A. Settlement Class Members have been Fully Identified and Notified of their 12 Rights Under the Settlement.

13 Mr. McLaren criticizes counsel for the parties, and Plaintiff's counsel in particular, for  
14 failing to propound confirmatory discovery so that class members could be identified.

15 McLaren argues that counsel should not have relied upon DME's data which, as set forth in  
16 detail in the Declaration of Jennifer Keough (Chief Operating Officer of GCG) Regarding  
17 Notice and Settlement Administration, was made available to the parties and GCG for review  
18 and analysis. It was determined that the database contained detailed information concerning  
19 the telephone numbers which received text messages from Lithia in April 2011 (59,178  
20 telephone numbers), and the names and addresses which Lithia associated with those telephone  
21 numbers. GCG conducted a reverse directory search on the telephone numbers and identified  
22 an additional 20,630 records which had a different name or address associated with the cellular  
23

24  
25  
26 <sup>1</sup> Mr. McLaren also submitted a Claim Form in this case (Williamson Decl. in Support of Motion for Final Approval, Exh. A) in which he certifies to the best of his knowledge that he received two text messages from Lithia, and that he received a second text message from Lithia after he attempted to opt out; in other words, he certifies that he received a total of two text messages from Defendant Lithia.

1 telephone number listed in the original data, and GCG sent notice to all 74,980 addresses, and  
2 followed up as needed (Keough Decl., ¶4-8).

3 Objector McLaren asserts that counsel should have subpoenaed records from third  
4 parties which he maintains facilitated the transmission of the text messages involved in this  
5 case, instead of or in addition to relying on the DME data. McLaren offers no evidence that the  
6 third party records to which he refers contain information differing in any respect from the  
7 information contained in the DME database, or calling in to question the accuracy of that  
8 database. McLaren also states that records he subpoenaed in the Oregon case identify the  
9 transmission success and failure rates of some of the subject text messages, offering to submit  
10 the “voluminous” data to the Court for review upon request (Objection, p. 5), but fails to  
11 explain why transmission success and failure rates are relevant to the Court’s decision to grant  
12 Final Approval of the settlement.  
13

14 Finally, McLaren states that records subpoenaed from OpenMarket “reveal other text  
15 messages sent by Lithia and DME to Class Members ‘confirming’ their request not to receive  
16 additional text messages...” (Objection, p. 5-6). McLaren represents (Objection, fn. 10, p. 6)  
17 that he received a total of four text messages from Lithia, one on April 11, 2011, one on April  
18 19, 2011 and two other text messages stating “Thank you Lithia respects the wishes of its  
19 customers.”, although he does not state the dates he received the latter two. McLaren’s  
20 representation to this effect is contradicted by the certification in his claim form to the effect  
21 that he received two text messages from Lithia, his having made no effort to note on the claim  
22 form that he had actually received four such messages. Nevertheless, any class member  
23 receiving a confirmatory text message was free to claim that text message on the claim form as  
24 one of the two text messages received, the second after attempting to opt out (which will result  
25  
26

1 in payment of \$869.00) because the Claim or Exclusion Form did not limit the number of text  
2 messages that could be claimed to text messages with any particular content. Considering the  
3 generous per text payments provided for in the settlement, a fact that McLaren does not  
4 dispute, the Court should reject McLaren's claim that the settlement is flawed because a  
5 fictional class member might not receive compensation for a confirmatory text message.  
6

7 **B. Injunctive Relief is Unnecessary.**

8 Mr. McLaren further objects to the settlement because it does not provide for injunctive  
9 relief prohibiting Lithia from continuing in its illegal telemarketing practices. McLaren does  
10 not provide the Court with the content of the injunction he believes the Court should issue, nor  
11 does he acknowledge that Lithia has not engaged in text message advertising since this case  
12 was filed. There is no need to enjoin conduct that is not occurring, and there appears to be no  
13 need to remind Lithia that it is bound to obey the law.  
14

15 **C. Joinder in Response of Lithia.**

16 Plaintiff further joins in the response that Lithia has submitted to the objection.

17 **III. CONCLUSION**

18 For the foregoing reasons, the Court should overrule Mr. McLaren's objection.

19 DATED: September 28, 2012

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21  
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