

1 HONORABLE RONALD B. LEIGHTON
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5 UNITED STATES DISTRICT COURT
6 FOR THE WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 CAROLYN ANDERSON,

Plaintiff,

NO. C11-00902 RBL

9 vs.

10 DOMINO'S PIZZA, INC., DOMINO'S
11 PIZZA, LLC, FOUR OUR FAMILIES, INC.
and CALL-EM-ALL, LLC,

Defendants.

PLAINTIFF'S MOTION FOR
RECONSIDERATION OF THE
COURT'S ORDER DENYING MOTION
FOR CLASS CERTIFICATION (MAY
15, 2012)

NOTED ON MOTION CALENDAR:
May 24, 2012

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15 Plaintiff respectfully seeks reconsideration by the Court of a portion of its Order of May
16 15, 2012 (Dkt. #104). In particular, plaintiff believes that the Court was mistaken in its denial of
17 her Class Certification Motion on both of the two grounds set forth in the Order. Further, the
18 Court did not conduct the rigorous analysis of the various elements of class certification that
19 must be undertaken when a class certification motion is determined.

20 The Court appears to deny the Motion for Class Certification because plaintiff's motion
21 was untimely. While the Court notes that the defendants neither claimed nor in fact suffered any
22 prejudice as a result of the plaintiff's three-week delay in filing her Motion for Class
23 Certification, the Court also states "... They (sic) simultaneously failed to explain cause of the
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PLAINTIFF'S MOTION FOR RECONSIDERATION
OF THE COURT'S ORDER DENYING MOTION FOR
CLASS CERTIFICATION (MAY 15, 2012) - 1
(NO. C11-00902 RBL)

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1 delay."¹

2 It would appear that the Court has not recalled its own order of January 27, 2012 (Dkt.
3 #71) in which it granted plaintiff's Motion to Extend the Class Certification Filing Deadline.
4 (Dkt. #51). Plaintiff's Motion to Extend the Class Certification Deadline was fully and
5 vigorously briefed, and while opposed by the defendants, none in fact disputed that they were not
6 prejudiced. Plaintiff did in fact show good cause. In particular plaintiff cited delays caused by
7 removal of this case, defendant's recalcitrance in responding to discovery and its refusal to make
8 a critical witness available for deposition. It would appear that the Court has simply ignored
9 plaintiff's motion to extend the time to file for class certification motion, the authorities cited in
10 her motion and her reply, and the good cause that was established by the motion. Furthermore,
11 Local Rule 23(1)(3) provides that extending the time to file the motion can only be granted on
12 good cause. This Court granted the motion, presumably having found that there was indeed such
13 good cause.
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16 The Court also denies class certification because of its concern that class certification
17 "here inflicts a grossly disproportionate and crippling liability, far beyond the actual damages
18 suffered..." and concludes that because the class here is represented by a sole named plaintiff the
19 statutory damages reflecting the state legislature's intent to discourage auto dialing somehow
20 does not apply, especially if "... The burden of his award would fall on a small business." The
21 Court reaches this conclusion with respect, it is presumed, as defendants Four Our Families, Inc.
22 and Call-Em-All, LLC. This conclusion is not supported by any evidence that either of the
23 businesses are "small," whether they have insurance or not, or whether they have the ability to
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25 _____
26 ¹ The court refers to the plaintiff, Carolyn Anderson, in the plural, but there in fact is only one plaintiff.

1 respond to the damages in question.

2 More importantly, this Court has ignored virtually all authority to the contrary in reaching
3 its conclusion that class certification is inappropriate because it may inflict "grossly
4 disproportionate and crippling liability." As stated in plaintiff's reply (Dkt. #56) to the opposition
5 Call-Em-All, LLC (Dkt. #47) to Plaintiff's Motion for Class Certification:
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7 No court has ever denied class certification of a TCPA class because of the
8 arguments advanced by CEA. Yet another very recent example is *Centerline*
9 *Equipment Corp. v. Banner Personnel Service, Inc.*, 545 F.Supp.2d 768, 778 (N.D.
10 Ill. 2008), in which the defendant unsuccessfully challenged the constitutionality
11 of the TCPA:

12 Banner has not satisfied the court that the TCPA's statutory
13 damages remedy violates the Due Process clause. In any event, if
14 Banner were able to show that the statutory damages are in fact so
15 excessive as to be improper, the appropriate remedy would be a
16 reduction of the aggregate damage award, not a dismissal of
17 Centerline's claim. *See Tex. v. Am. Blastfax, Inc.*, 164 F.Supp.2d
18 892, 900-01 (W.D. Tex. 2001) (interpreting the TCPA to provide
19 "up to" \$500 per violation, and awarding seven cents per
20 violation); *see also Murray v. GMAC Mortg. Corp.*, 434 F.3d 948,
21 954 (7th Cir.2006) (stating that, if a trial judge were concerned that
22 a FCRA class action would result in unconstitutionally excessive
23 damages, the appropriate judicial response would be to reduce an
24 excessive award, not deny class certification). It is premature at
25 this stage to consider whether any hypothetical award might be
26 constitutionally excessive, however. *See Murray*, 434 F.3d at 954.

27 Plaintiff's Reply (Dkt. #56), p. 13

28 Finally, the Court has not engaged in the rigorous analysis that is required in connection
29 with consideration of a motion for class certification. Because there has been no such analysis,
30 appellate review of the Court's Order will not be possible because the reviewing court will not
31 have any understanding of the basis of this Court's ruling. That such an analysis is necessary is
32 well established:

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1 Rule 23 of the Federal Rules of Civil Procedure governs when a federal court may
2 certify a class. A class must satisfy the four prerequisites of Rule 23(a) and fall
into one of the three categories of class actions defined in Rule 23(b).

3 Fed.R.Civ.P. 23; *Parra v. Bashas', Inc.*, 536 F.3d 975, 978 (9th Cir.2008). The
4 party seeking class certification must demonstrate that certification is warranted,
and the court must conduct a "rigorous analysis" to determine that the
5 prerequisites of Rule 23 have been met. *Zinser v. Accufix Research Inst., Inc.*, 253
6 F.3d 1180, 1186 (9th Cir.2001). In reviewing a denial of class certification, the
standard of review is for abuse of discretion. *Parra*, 536 F.3d at 977.

7 *Kennedy v. Natural Balance Pet Foods, Inc.*, 361 F. App'x 785, 786 (9th Cir. 2010)

8 It is respectfully submitted that the Court's Order Denying Class Certification is mistaken
9 and contrary to all applicable authority and the denial should be reconsidered.

10
11 DATE: May 24, 2012

12 WILLIAMSON & WILLIAMS

13 /s/ Rob Williamson

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record who receive CM/ECF notification, and that the remaining parties shall be served in accordance with the Federal Rules of Civil Procedure.

Dated this 24th day of May, 2012.

By /s/Rob Williamson
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