Scott Shaffer
Olshan Frome Wolosky LLP
Park Avenue Tower
65 East 55th Street
New York, New York 10022
(212) 451-2300
sshaffer@olshanlaw.com

Anthony Todaro
Corr Cronin Michelson
Baumgardner & Preece LLP
1001 4th Ave., Suite 3900
Seattle, WA 98154-1051

Honorable Ronald B. Leighton

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

| | |
|---|---|
| CAROLYN ANDERSON,<br><br>Plaintiff,<br>v.<br><br>DOMINO'S PIZZA, INC., DOMINO'S PIZZA, LLC, FOUR OUR FAMILIES, INC. and CALL-EM-ALL, LLC,<br><br>Defendants. | **CIVIL ACTION NO.: 11-cv-00902-RBL**<br><br>**DEFENDANT CALL-EM-ALL, LLC'S MOTION FOR SUMMARY JUDGMENT**<br><br>**HEARING DATE:**<br><br>**ORAL ARGUMENT REQUESTED** |

COMES NOW Defendant Call-Em-All, LLC (hereinafter, "CEA") and moves for summary judgment dismissing Plaintiff's claims against it and also for summary judgment on its crossclaims against Defendant Four Our Families, Inc. (ECF document #22).

## I. INTRODUCTION

Stripped of the now-dismissed class action allegations, this is a lawsuit about a single telephone call made by a Domino's Pizza franchisee to Plaintiff Carolyn Anderson



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

offering her a discounted pizza. The involvement of CEA is extremely limited: all it did was provide a technology that allowed the pizza store to record a message and send that message via telephone to Plaintiff and others at a designated time. Under the facts of this case, CEA is a common carrier, no different from a telephone company or postal service, because it simply delivered its client's message.

Summary judgment dismissing the Amended Complaint's allegations against CEA is appropriate, first and foremost, under the common carrier doctrine. CEA is not in the pizza business: it is a technology provider that was simply a conduit for the pizza store's recorded message. The pizza store, Defendant Four Our Families, Inc., admits CEA did nothing more than provide the technology or "platform" enabling the discount pizza message to reach Anderson and other customers. As Four Our Families repeatedly states (and Plaintiff does not dispute), CEA played no role in determining who received the call(s) at issue or what message was transmitted during the call. Although CEA believes there was nothing illegal about the call, the law affords an exemption to common carriers and broadcasters even for illegal calls.

Because CEA had neither a high degree of involvement in the call nor actual notice of any illegal conduct, it is legally entitled to the common carrier's exemption. Specifically, **CEA did nothing more than provide a service that enabled mass delivery of phone messages advertising pizza. CEA did not obtain, provide or select the telephone numbers to which the calls were made; CEA did not script the recorded message; CEA had no ability to determine whether Plaintiff consented to the call in**



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

**question (in which case it would be a legal call); and CEA's services were not advertised during the calls in question**. There is no material factual dispute concerning CEA's role in this matter. Furthermore, Four Our Families has admitted its responsibility in writing and that CEA was merely a conduit for the call to Plaintiff. Accordingly, CEA is entitled to summary judgment on all claims against it.

Summary judgment should also be granted to CEA on its crossclaims against Four Our Families. CEA is indisputably entitled to contractual and legal indemnification from Four Our Families under the terms of the agreement that governed their business relationship, namely CEA's Terms Of Use. As shown below, CEA's right to indemnification was further cemented by Four Our Families' recent admission of responsibility, to the extent any liability exists at all.

## II. STATEMENT OF RELEVANT FACTS

**Four Our Families Calls Plaintiff To Offer Discounted Pizza**

Plaintiff Carolyn Anderson's Amended Complaint seeks statutory damages for purported violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), and Washington's RCW 80.36.400.

On August 31, 2009, Anderson, an admitted Domino's pizza customer, received a telephone call on her residential phone line advertising a discount on Domino's pizza. *See* Plaintiff's Motion To Certify Class (ECF document #31) at 2:1. The call was made by Four Our Families, Inc. (a Domino's franchisee) to Anderson using CEA's Internet-based technology. *Id.* at 2:2. Anderson's number was neither obtained nor provided by CEA:



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

Anderson concedes she voluntarily provided her number to Four Our Families during a prior Domino's pizza order. *Id.* at 3:3; *see also* Deposition of Plaintiff.[1] The call played a pre-recorded message advertising a pizza discount and presented no opportunity to speak to a human being. *See* Motion To Certify Class (ECF document #31) at 2:12 (transcript of call).

CEA is a small business publicly offering an automated telephone messaging service that allows its clients to communicate directly to thousands of people in a very short time. CEA's clients include, for example, Amazon.com, which uses CEA to communicate with thousands of Amazon's temporary employees around the holiday season, as well as non-profit organizations such as little leagues, schools and churches that use CEA to communicate changes in schedules, school closings, and other time-sensitive information. Because it has thousands of clients making calls all over the United States and Canada, CEA is not in a position to vet the legality of each call, just like the United States Post Office cannot guarantee whether every piece of mail it delivers is sent for a proper purpose.

As CEA's president Brad Herrmann testified in his deposition[2] (and there is no dispute in this case), as a pre-condition of using CEA's services, Four Our Families, like every CEA client, must accept CEA's Terms Of Use[3] and represent to CEA that all calls

---

[1] *See* Exhibit 1 to Declaration of Scott Shaffer, Esq., submitted herewith ("Shaffer Decl."), which consists of excerpts from the deposition of Plaintiff Carolyn Anderson (hereinafter referred to as "Pl. Dep."). In her deposition, Anderson admits purchasing "two or three" Domino's pizzas. Pl. Dep. at 23:4.

[2] *See* Exhibit 2 to Shaffer Decl. (excerpts from deposition of CEA president Brad Herrmann) (hereinafter referred to as "CEA Dep.") at 69:9-70:25.

[3] *See* Exhibit 3 to Shaffer Decl. (CEA's Terms Of Use; produced as CEA000043-48).



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

made through CEA's technology will comply with all applicable laws. Failure to accept the Terms Of Use means that clients are blocked from using the CEA service. CEA Dep. at 8:17-9:24; 27:5-27:9. Four Our Families did in fact accept the Terms Of Use and the calls could not and did not begin until it such acceptance. *Id.* Four Our Families' testimony is not to the contrary on this point[4] and its discovery responses in this action included CEA's Terms Of Use.[5]

After agreeing to CEA's Terms Of Use, Four Our Families provided and uploaded telephone numbers it provided from its own database to CEA's website. CEA Dep. at 71:1-71:8; FOF Dep. at 35:22-37:17; ECF Document #30 at 9:23-9:26. CEA's system then requires the client to record the message to be played, and to select the date and time the message will be broadcast to the phone numbers it provided. CEA Dep. at 74:25-75:15. CEA's role in making the phone call at issue is limited to providing the technology that broadcasts the client-recorded message to the client-selected numbers at the client-selected time. *See* Ex. 5 to the Shaffer Decl. at page entitled "features". Significantly, when the call was made to Plaintiff, the Caller ID feature displays Four Our Families' number as the

[4] *See* Exhibit 4 to Shaffer Decl. (excerpts from deposition of Four Our Families' owner Michael W. Brown) (hereinafter referred to as "FOF Dep.") at 35:12-35:18.

[5] Although Michael Brown, in his deposition, said only, "I believe there was" a set of CEA's terms to which he agreed, the response that Four Our Families provided to CEA's request for production leaves no doubt that Four Our Families actually agreed to CEA's Terms Of Use. Submitted herewith as Exhibit 5 to the Shaffer Decl. is Four Our Families' response to CEA's Request For Production No. 5 in which Four Our Families responds "Also attached are CEA's Privacy Statement, Terms Of Use, and Features Dated June 23, 2010 and accessed via CEA's website. Exhibit 5 at 9. Also produced as part of Exhibit 5 to the Shaffer Decl. are the Terms Of Use that were produced by Four Our Families as part of the same discovery response. The version is identical to the one produced by CEA (Exhibit 3 to the Shaffer Decl.).



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

caller, not CEA. *Id.* ("Your number shows up as the Caller ID); Pl. Dep. at 8:1-8:11 ("My phone… said Domino's Pizza and the phone number").

For purposes of this lawsuit, CEA is no different from a telephone company or postal service because it delivers its clients' messages to the persons selected by the client and receives only a flat fee not contingent on any sale being made.

**CEA's Terms Of Use**

As stated *supra*, CEA's Terms Of Use must be agreed to by every one of its clients, including Four Our Families, as a pre-condition of using CEA's automated messaging service. Specifically, CEA actually blocked Four Our Families from placing a single call until Four Our Families agreed to CEA's Terms of Use, which required that the calls would comply with all applicable state and federal laws. CEA Dep. at 9:7-10:4; 68:2-69:16.

Four Our Families accepted and agreed to CEA's Terms Of Use, which state:

> **You [Four Our Families] will not use, or attempt to use, the Call-Em-All Service in connection with any… messages… that are… unsolicited**

and also:

> "**User [Four Our Families] agrees that it is the sole responsibility of User to abide by any laws defined by the State or Federal Government in which Call-Em-All Services will be applicable. User understands and agrees that Call-Em-All will not be held responsible for damages to the User or any third party incurred due to User's failure to abide by State and/or Federal laws**.

Ex. 3 to Shaffer Decl. at CEA000045-46, ¶¶ 11, 13 (emphasis supplied).

Four Our Families also agreed to the following indemnification provision contained in CEA's Terms Of Use:



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

> You agree to indemnify, defend and hold harmless Call-Em-All, its officers, directors, owners, employees, agents, other Service Providers, vendors or customers from and against all losses, liabilities, expenses, damages and costs, including reasonable attorneys' fees resulting from any violation of the User Agreement by you or any harm you may cause to anyone. You agree and we reserve the right, at your expense, to assume the exclusive defense and control of any matter otherwise subject to indemnification by you.

Ex. 3 to Shaffer Decl. at CEA000048, ¶23.

Finally, the Terms Of Use called for the application of Texas law. *Id.*, ¶27. Once the Terms Of Use were accepted, Four Our Families proceeded to prepare its recorded message. To be clear, CEA played no active part: CEA's services were not advertised in any call at issue. ECF Document #31 at 2:12 (transcript of call). CEA did not script or otherwise prepare the pre-recorded message or create the message to buy pizzas. *See* Four Our Families Dep. at 37:24 (owner Michael Brown says script was "my decision").

Most importantly, CEA did not provide or select which telephone numbers received the calls at issue. *See* FOF Dep. at 36:19 ("I downloaded them from the store"); CEA Dep. at 86:1 ("Q: did you upload any of the numbers? A: No. Q: Did you supply them with any numbers that they could upload? A: No"); ECF document #31 at 3:3 (Plaintiff states, "FOFI (Four Our Families) collected the telephone numbers from customers who had placed orders for pizza"). The numbers to which the calls were made were selected entirely by Four Our Families from its proprietary customer database. FOF Dep. at 36:17-37:24.

CEA voluntarily ceased accepting business from Four Our Families when the applicable federal law changed on September 1, 2009 regarding the delivery of pre-recorded auto-dialed phone calls. ECF Document #31 at 25:15-25:23.



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

Given the foregoing facts, it is not surprising that Four Our Families has essentially acknowledged that it, not CEA, is responsible for any claim Plaintiff might have. On June 12, 2012, in an e-mail responding to Plaintiff's attorney concerning scheduling matters, Four Our Families' attorney stated as follows:

> FOFI [Four Our Families] has admitted to making calls, in particular to the Plaintiff. FOFI has admitted that CEA was merely a conduit for the calls, and therefore an agent of FOFI. Hasn't liability already been established against FOFI? Thus, the only matter to be determined at this point is damages.

*See* Exhibit 6 to Shaffer Decl. (e-mail from Four Our Families counsel).

**Procedural History Of This Litigation**

After receiving the call in August 2009 just prior to the change in federal law, Anderson filed suit in April 2010 in the Superior Court of King County and amended her complaint in May 2011. She was solicited for this class action lawsuit via a solicitation letter sent by the law firm of Williamson & Williams. *See* Plaintiff Dep. at 87:8; Exhibit 7 to Shaffer Decl. (copy of solicitation letter). This action was timely removed to the Western District of Washington by CEA on May 31, 2011. Plaintiff alleged a claim under the TCPA, but failed to move for class certification under that statute.

On May 15, 2012, Plaintiff's motion for class certification under RCW 80.36.400 was denied. ECF document #104. Defendants Domino's Pizza, Inc. and Domino's Pizza, LLC were granted summary judgment, while Four Our Families' summary judgment motion was denied. *Id.*



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

On May 18, 2012, CEA served and filed the Expert Report Of Ray Horak (ECF Document #105). This motion for summary judgment follows.

## III. ISSUES

1. Whether CEA should be liable for a telephone call to from Four Our Families to its customers on the basis that CEA provided technological services to Four Families, even though CEA had no involvement in the content or recipients of the call and therefore is exempt from liability under longstanding FCC's common carrier doctrine?

2. Whether CEA is entitled to full indemnification from Four Our Families, given that Four Our Families accepted CEA's Terms Of Use and admitted CEA was merely a conduit for Four Our Families to call Plaintiff?

## IV. EVIDENCE RELIED UPON

1. This motion and the legal authorities cited herein;

2. Deposition testimony and discovery materials from this action;

3. Expert Report of Ray Horak with Exhibits thereto (ECF Document # 105);

and 4. The Declaration of Scott Shaffer and the Exhibits thereto, which is submitted herewith.

## V. LEGAL ARGUMENT

### 1. SUMMARY JUDGMENT STANDARD

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c).

Once the moving party informs the district court of the basis for its motion and identifies evidence which it believes demonstrate the absence of a genuine issue of material fact, the burden shifts to the non-moving party to establish that a genuine issue as to any material fact exists. *Matsushita Elec. Indus.Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). In order to defeat summary judgment, the non-moving party must then present significant probative evidence tending to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

**2. CEA IS ENTITLED TO SUMMARY JUDGMENT BECAUSE IT HAD NO INVOLVEMENT IN THE CONTENT OR RECIPIENTS OF THE CALLS AND IS THEREFORE EXEMPT FROM LIABILITY UNDER THE LONGSTANDING FCC POLICY THAT ENTITIES ARE NOT RESPONSIBLE FOR COMMUNICATIONS FOR WHICH THEY SERVE ONLY AS A CONDUIT**

Under the undisputed facts of this case, CEA is nothing more than a common carrier or conduit for the telephone call from Four Our Families to Plaintiff Carolyn Anderson.

As described below, and in the Expert Report of Ray Horak[6], common carriers such as CEA are exempt from liability unless they possess a high degree of involvement or actual notice that their service is being used for illegal conduct. Because CEA had neither a high degree of involvement nor actual notice of any illegal conduct, it is entitled to a common carriers' exemption from liability.

[6] ECF Document # 105. Mr. Horak's qualifications appear on pp. 8-10 therein.



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

Additionally, the call in question is not *per se* illegal under either statute at issue, because both statutes prohibit only unsolicited pre-recorded, autodialed calls. 47 U.S.C. § 227(b)(1)(B) (autodialed calls legal if made with consent); RCW 80.36.400(1)(b) (defining commercial solicitation as "the unsolicited initiation of a telephone conversation for the purpose of encouraging a person to purchase property, goods, or services"). Therefore, Four Our Families, who had the direct relationship with Anderson, was the only party capable of determining the legality of the call to Plaintiff, and CEA, like any other common carrier, could not make such a determination.

This Court should recognize the functional equivalence between CEA and other common carriers, and because the proper factual circumstances exist, it should exempt CEA from liability in this dispute. As discussed below, the common carrier exemption is part of longstanding Federal Communications Commission ("FCC") precedent.

**A. CEA IS A COMMON CARRIER**

For the telephone call at issue, CEA was a common carrier used by Four Our Families to deliver a discount pizza message to its customers.

CEA, located in Texas, provides interstate communications for hire to the general public in the form of its automated calling service. It was engaged by Four Our Families, located in Washington, to provide such services, and is a common carrier under the definitions employed by both the FCC and the Supreme Court of Washington.



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

Common carriers are generally exempt from liability under both federal and state law, and fax broadcasters receive a specific exemption under the TCPA and its accompanying regulations. *See* 47 C.F.R. § 64.1200(a)(3)(vii).

In the context of telecommunications, a common carrier is a company providing message transport services to the general public for a fee. The FCC defines a "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter…." 47 U.S.C. § 153. Similarly, the Supreme Court of Washington has held that in the communications industry, a "common carrier" is "broadly defined" as "[a]ny person engaged in rendering communication service for hire to the public." *Tenore v. AT&T Wireless Services*, 136 Wash.2d 322, 333-34, 962 P.2d 104, 109 (1998) (citing 47 C.F.R. § 101.3).

The message was created by Four Our Families and transmitted to telephone numbers wholly selected by Four Our Families. Plaintiff testified that when she received the call, it was the number of Four Our Families, not CEA, that appeared on her Caller ID. Thus, with respect to the content or legality of the phone call, CEA is no different than common carriers such AT&T, the United States Postal Service, Federal Express overnight delivery, an Internet service provider or a fax broadcaster, all of whom, like CEA, allow information to pass through their respective networks from party to party. *See* Horak Expert Report (ECF Document #105) at 4-6.



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

## B. CEA QUALIFIES FOR THE COMMON CARRIER EXEMPTION BECAUSE IT LACKS A "HIGH DEGREE INVOLVEMENT" AND "ACTUAL NOTICE" IN THE CALL TO PLAINTIFF

The FCC has a longstanding policy, grounded in principles of common carrier regulation, of holding a service provider not liable for the content of communications that pass through their networks. This policy does not insulate wrongdoers from liability. Instead, it attaches liability to the party responsible for the content of the communication and protects innocent third-party intermediaries who provide only transmission services.

FCC regulations exempt common carriers from liability unless they have a "high degree of involvement" or "actual notice" of the illegal use of their services and they fail to take steps to prevent such illegal use. *In the Matter of Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials,* 2 FCC Rcd. 2819, 2820 (May 15, 1987) (hereinafter, "*Use of Common Carriers*").

The FCC has incorporated the common carrier exemption into the TCPA by including fax broadcasters[7] and stating:

> […] carriers who simply provide transmission facilities that are used to transmit others' unsolicited facsimile advertisements may not be held liable for violations of § 64.1200(a)(3). […] In the absence of "a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions," common carriers will not be held liable for the transmission of a prohibited facsimile message.

[7] The FCC defines a "facsimile broadcaster" as "a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee." See 47 CFR 64.1200(f)(7). CEA fits this definition but for the fact that technology has evolved and uses a machine different from a "facsimile machine."



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

*In the Matter of Rules And Regulations Implementing The Telephone Consumer Protection Act Of 1991*, 7 FCC Rcd 8752, 8780 at ¶54, 1992 WL 690928, at *19 (Oct. 16, 1992) (quoting *Use of Common Carriers*, 2 FCC Rcd at 2820).

The fax broadcaster exemption advanced the TCPA's underlying objectives by placing the onus of compliance on the party that determines the recipient and content of the communication at issue.

The FCC has repeatedly reinforced the TCPA's common carrier exemption, stating that liability for unsolicited fax advertisements is imposed upon the party on whose behalf the faxes are sent, while exempting "fax broadcasters" that act only as a conduit:

> We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with this rule. This interpretation is consistent with the TCPA's legislative history, and with our finding in the Report and Order that carriers will not be held liable for the transmission of a prohibited message.

*In re Rules and Regulations Implementing the Telephone Consumer Protection Act*, 10 F.C.C.R. 12391 at 12407 ¶ 35 (Aug. 7, 1995).

In 2003, the FCC reiterated:

> if a common carrier is merely providing the network over which a subscriber (a fax broadcaster or other individual, business, or entity) sends an unsolicited facsimile message, that **common carrier will not be liable** for the facsimile."

*Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, 68 F.R. 44144-01, at 44170, ¶139, 2003 WL 21713245 (July 25, 2003) (emphasis supplied); *see also In the Matter of Rules And Regulations*



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

*Implementing The Telephone Consumer Protection Act Of 1991*, 27 FCC Rcd 1830, 1861, 2012 WL 507959, at *23 (Feb. 15, 2012).

Because the advertiser, not the common carrier, is the party who actually determines the recipients of the message in question, it the advertiser who "is in the best position to ensure that recipients have consented to receive the faxes," and, therefore, that party "should be liable for violations of the prohibition." *Id.* 68 F.R. at 44169, ¶138. This case is no different: the advertiser, Four Our Families, solely determined who would receive its message, while CEA had no ability to determine whether Four Our Families had obtained the consumers' consent.

But for the new telephonic technology that improves upon fax machines, CEA operates exactly like a fax broadcaster in that it provides a service for a fee whereby a customer can send messages to a specified recipient list. Horak Expert Report (ECF Document #105) at 7-8. A recent determination by the FCC which vacated a common carrier's liability confirms there is no fundamental difference between CEA and a fax broadcaster:

> Upon review of the record, […] we conclude that CyberData presents a reasonable case that it complied with the requirements for facsimile broadcasters under the Commission's rules with respect to the advertisements at issue. Those advertisements offered services that CyberData does not appear to provide, and were apparently transmitted on behalf of other business entities, thus supporting CyberData's assertion that it was a "facsimile broadcaster," and not the "sender" of these advertisements. Further, the record offers no evidence inconsistent with CyberData's assertion that it does not have a high degree of involvement with those senders' transmissions. For example, the record contains no evidence that CyberData determined the content of the faxed messages, provided a source of fax numbers, made representations about the legality of faxing to those



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

> numbers, advised a client about how to comply with the fax advertising rules, or had actual notice of unlawful activity. Finally, CyberData asserts that it has taken steps to prevent further unsolicited facsimile transmissions by creating a Blocking Database to avoid sending unsolicited ads to consumers, and by terminating all business with the entities that the FCC has determined are apparently violating the junk fax rules. We therefore conclude that the forfeiture proposed in the NAL should not be imposed.

*In the Matter of Cyberdata, Inc.*, 25 F.C.C.R. 17045, 17047, 2010 WL 5014428, at *2 (Dec. 8, 2010) (vacating notice of apparent liability) (footnotes omitted). CEA behaved exactly like CyberData.

At least one federal court has held that the FCC's common carrier exemption is entitled to judicial deference. *See Kopff v. Battaglia*, 425 F.Supp.2d 76, 92, n.19 (D.D.C. 2006) ("Regardless of whether the term 'fax broadcaster,' 'service provider,' or 'common carrier' is used, the FCC 'has focused on the nature of an entity' s activity rather than any label that that entity may claim'") (citation omitted). While *Kopff v. Battaglia* was decided on a motion to dismiss and allowed the case to proceed to discovery (425 F.Supp.2d at 93), this is a summary judgment motion where the uncontradicted testimony is that CEA had no involvement in the calls and that Four Our Families chose Plaintiff's number to call, recorded the message and selected the delivery time. Just like a telephone company, CEA received only a per-minute fee for transmitting the calls and its services were not advertised or mentioned on any of the calls.

While the medium of choice for advertisers has changed from facsimiles to autodialed calls in recent years, CEA fits all of the criteria for the FCC's common carrier exemption and, as admitted by Four Our Families, merely served as conduit for the call to



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

Anderson. Like any other common carrier, CEA provided only the broadcast service and physical infrastructure (i.e., the service platform and the telecommunications network). Just like in *Matter of Cyberdata*, CEA's services were not advertised in the call.

In conclusion, CEA had neither a "high degree of involvement" in the calls nor "actual notice" of any unlawful activity. As proof that CEA lacked these elements, the Court should further consider that CEA requires all its clients, including Four Our Families, to accept its Terms of Use. Under the Terms of Use, Four Our Families accepted all responsibility for ensuring compliance with all state and federal laws. CEA was not in a position to verify if Four Our Families had obtained valid consent from its pizza customer or to otherwise verify Four Our Families' legal compliance. In fact, CEA took steps to prevent illegal communications by terminating its relationship with Four Our Families on September 1, 2009. CEA Dep. at 25:15-25:23. Finally, Four Our Families' recent e-mail confirms CEA's role as a mere conduit. Taking all the undisputed facts of this case and the absence of a high degree of involvement or actual notice of illegality into account, it is clear CEA is entitled to the same exemption from liability afforded to common carriers and fax broadcasters.

**3. CEA IS ENTITLED TO INDEMNIFICATION FROM FOUR OUR FAMILIES**

CEA's crossclaim (ECF Document # 22) contains claims against Four Our Families for indemnity and contribution. The first count of the crossclaim seeks indemnification on the basis of Four Our Families' contractual obligation contained in CEA's Terms Of Use.



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

In order to activate CEA's service, Four Our Families was required to, and did in fact agree to CEA's Terms Of Use, which contained the following indemnification provision:

> You agree to indemnify, defend and hold harmless Call-Em-All, its officers, directors, owners, employees, agents, other Service Providers, vendors or customers from and against all losses, liabilities, expenses, damages and costs, including reasonable attorneys' fees resulting from any violation of the User Agreement by you or any harm you may cause to anyone.

*See* Exhibit 3 to Shaffer Decl. at CEA000048, ¶23.

The Terms Of Use call for the application of Texas Law. *Id.* at ¶27.

Counsel for Four Our Families subsequently wrote in this case: "FOFI has admitted that CEA was merely a conduit for the calls, and therefore an agent of FOFI. Hasn't liability already been established against FOFI? Thus, the only matter to be determined at this point is damages." *See* Ex. 6 to Shaffer Decl. (e-mail from Four Our Families counsel).

Under Texas law, when determining the rights and liabilities of parties to an indemnification agreement, their intention will first be ascertained by rules of construction applicable to contracts generally. *Mitchell's, Inc. v. Friedman,* 157 Tex. 424, 303 S.W.2d 775, 778 (1957), *overruled on other grounds by Ethyl Corp. v. Daniel Constr. Co.,* 725 S.W.2d 705 (1987). Indemnity agreements: they are construed under the same "normal" rules of contract construction, with the primary goal of determining the parties' intent as expressed in the contract. *Gulf Ins. Co. v. Burns Motors, Inc.,* 22 S.W.3d 417, 424 (Tex. 2000); *Associated Indem. Corp. v. CAT Contracting, Inc.,* 964 S.W.2d 276, 284 (Tex. 1998). Construction and interpretation of an unambiguous contract is a question of law.



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

*Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). Finally, summary judgment on an indemnity claim is proper when the undisputed facts show the claims for which indemnity is sought arise out of or are connected with those contractual obligations for which indemnity attaches. *Boyd v. Amoco Prod. Co.,* 786 S.W.2d 528, 530 (Tex.App.--Eastland 1990, no writ). Finally, an indemnitee such as CEA is entitled to recover the costs incurred in the defense of a claim against it, "irrespective of whether the claim is ultimately proved." *Fisk Elec. Co. v. Constructors & Assoc., Inc.,* 888 S.W.2d 813, 815-16 (Tex. 1994).

The facts adduced in discovery clearly entitle CEA to indemnification from Four Our Families under the law of Texas or any other state. CEA's Terms Of Use were accepted by Four Our Families (*see* n.5, *supra*) and those terms hold Four Our Family responsible for "all losses, liabilities, expenses, damages and costs, including reasonable attorneys' fees" sustained by CEA. The claim in this case, that an illegal telephone call was received, indisputably arises out of the contractual arrangement between Four Our Families and CEA.

In sum, there is no dispute that: a) Four Our Families agreed to CEA's Terms Of Use; b) the Terms Of Use contained indemnification provisions; c) the terms of the indemnity provision are clear and enforceable; and d) Plaintiff's claim is clearly within the scope of the indemnification obligation. As a matter of law, CEA is entitled to indemnification from Four Our Families for all losses, liabilities, expenses, damages and costs, including reasonable attorneys' fees that CEA has and will sustain as a result of this



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

lawsuit. Summary judgment should be granted on CEA's crossclaim for contractual indemnification.

## V. CONCLUSION

There is no material factual dispute concerning CEA's involvement in this case. CEA was engaged by Four Our Families to provide interstate telephone communications, and therefore is a common carrier under the definitions employed by both the FCC and the Supreme Court of Washington.

CEA did not select Plaintiff's telephone number to be called, it did not record or schedule the message that was sent, it had no ability to determine whether Plaintiff had solicited or consented a call from Four Our Families, and CEA's services were not advertised in the call to Plaintiff. The testimony and evidence of CEA and Four Our Families is in full agreement on these points, and the testimony and evidence of Plaintiff is fully consistent on all of these points.

When these undisputed facts are applied to the law concerning common carriers, it is clear that CEA had neither a "high degree of involvement" or "actual notice of illegal use". Because it lacked either of these, CEA is entitled to summary judgment dismissing Plaintiff's claims against it under the common carrier exemption.

CEA also is entitled to summary judgment on its contractual indemnification crossclaim asserted against Four Our Families. Indemnification obligations are contained in CEA's Terms Of Use, Four Our Families agreed to the Terms Of Use, and Plaintiff's claims against CEA clearly are within the scope of the indemnification obligations.



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200

For the above stated reasons, Call-Em-All, LLC respectfully requests that all of Carolyn Anderson's claims against it be dismissed with prejudice, and judgment entered in Call-Em-All, LLC's favor on its cross claim for contractual indemnification.

Dated: June 26, 2012

Respectfully submitted,

**OLSHAN FROME WOLOSKY LLP**

Scott Shaffer (admitted pro hac)
Park Avenue Tower
65 East 55th Street
New York, New York 10022
Tel. 212.451.2300
Fax. 212.451.2222

**CORR CRONIN MICHELSON BAUMGARDNER & PREECE LLP**
Anthony Todaro
1001 4th Ave., Suite 3900
Seattle, WA 98154-1051
Tel. 206.625.8600
Fax. 206.625.0900

*Attorneys for Defendant Call-Em-All, LLC*

## CERTIFICATE OF SERVICE

I, Elissa J. Shane an employee of Olshan Frome Wolosky LLP counsel for defendant Call-Em-All, LLC in the within action, do hereby certify that a true and correct copy of the following documents:

**DEFENDANT CALL-EM-ALL, LLC'S MOTION FOR SUMMARY JUDGMENT**

**DECLARATION OF SCOTT SHAFFER IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (with attached Exhibits 1 - 7)**

**[PROPOSED] ORDER ON DEFENDANT CALL-EM-ALL, LLC'S MOTION FOR SUMMARY JUDGMENT**

was served by me on the 26th day of June 2012. Service was made by electronic mail via the Court's ECF system thereby causing it to be delivered to all counsel of record in the within action who are registered with the Court's electronic filing system ("ECF").

The foregoing statements are true to the best of my information and belief. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Elissa J. Shane



**OLSHAN FROME WOLOSKY LLP**
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Tel (212) 451-2300
Fax (212) 451-2200