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Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CAROLYN ANDERSON,

Plaintiff,

vs.

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

Defendants.

CASE NO. :C 11-902-RBL

DEFENDANT FOUR OUR FAMILIES, INC.'S RESPONSE TO CALL-EM-ALL, LLC'S MOTION FOR SUMMARY JUDGMENT AND ITS MOTION TO STRIKE EXHIBIT 6 OF CEA'S MOTION UNDER CR 26(b)(3)(B)

HEARING DATE: September 7, 2012

WITH ORAL ARGUMENT

I. INTRODUCTION

COMES NOW, the DEFENDANT, FOUR OUR FAMILIES, INC. (hereinafter "FOFI") who respectfully requests the Court deny Call-Em-All, LLC.'s (hereinafter "CEA") Motion for Summary Judgment [dkt.no.107] of its cross-claims against FOFI because there is a dispute of material fact. FOFI submits this Response and attached memorandum of points and authorities seeking a denial of CEA's summary judgment motion.

FOFI also respectfully moves and requests the Court strike from the record the e-mail provided to the Court in Exhibit 6 of Shaffer's Declaration submitted with CEA's Motion for Summary Judgment because it is not admissible under Fed. Civ. Proc. Rule 26(b)(3)(B).

II. STATEMENT OF FACTS

During the summer of 2009, CEA's services were purchased and retained by FOFI to make automated calls to FOFI's existing customers. FOFI is a Domino's Pizza franchisee selling pizza and other menu items to its customers in Pierce County, Washington. A single call was made to Plaintiff's residential line on August 31, 2009, offering a large pizza at a discounted price. At the time of the call, the Plaintiff had an existing business relationship with FOFI in the previous eighteen (18) months of the call.

CEA, a Texas corporation, had the equipment and technology required to make such calls. CEA provides its services to clients in different states. Fraley Dec. Exh. 1 (Herrmann Dep. 7:7-9). Under Washington law, the equipment technology is termed Automated Dialing and Announcing Devices. RCW 80.36.400. In May 2009, Michael Brown, president of FOFI, learned of CEA and its services during a Domino's World Wide Rally Equipment and Vendor Show in Las Vegas, Nevada. Vendors are invited to showcase their equipment and/or services to franchisees and Domino's employees. FOFI discussed CEA's services with the President of CEA, Brad Herrmann, the only CEA representative at the event. Fraley Dec. Exh. 1 (Herrmann Dep. 23:15-16). It was explained how easy the process was, how other Domino's franchisees had success, and that as long as the federal laws were complied with- everything would be fine. Brown was convinced, by the information provided, that this was the answer to FOFI's struggling sales in a troubled economy.

When Brown returned to Washington State, he contacted Call-Em-All. To retain CEA's services, he accessed CEA's website whereby he created a username and password, provided contact information, and purchased credits to make phone calls to FOFI's existing customers. Shaffer Dec. Exh. 2, 18 (Herrmann Dep. 68). During the set-up process, Brown is

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uncertain whether there was or was not the CEA's Terms of Use referred to in Exhibit 5 of Shaffer Declaration, a contract, or something he had to do in order to sign up. Shaffer Dec. Exh. 4 (Brown Dep.35:12-18). FOFI then uploaded its customer's phone numbers and recorded a message like the one that played for Plaintiff on August 31, 2009. ECF # 73 Exh. 3 (Transcript of Message). CEA supplied to FOFI information regarding requirements the message must contain according to the Federal Trade Commission ("FTC"). Shaffer Exh. 2, 22 (Herrmann Dep. 74:12-17). To be in compliance with the Telephone Consumer Protection Act ("TCPA"), it requires users to identify itself, allow the option to opt out, disconnect within a specific period of time, etc. 47 USC §227, et seq., The recording was reviewed by CEA the first time its services were used by FOFI. At no time after did CEA review the messages recorded by FOFI. Fraley Dec. Exh. 1 (Herrmann Dep. 76:12-19). "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". CEA's Motion ECF Doc #107, 4. Yet, CEA had a mechanism in place to ensure that at least one of FOFI's messages met the minimum federal requirements. Fraley Dec. Exh. 1 (Herrmann 31:6-10, 76:13-19).

In FOFI's answer to CEA's Requests for Production No. 5, it provided a response to CEA's request with, "Also attached are CEA's Privacy Statement, Terms of Use, and Features dated June 23, 2010 and accessed via CEA's website". CEA Exh. 5 at 9. These items were retrieved by FOFI's counsel on that date. Fraley Dec. ¶1. CEA has several items on its website to try and make sure its "clients are using the technology responsibly". Shaffer Dec. Exh. 2, 13 (Herrmann Dep. 8:9-12). The alleged Terms of Use at issue in this Motion states:

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> You will not use, or attempt to use, the Call-Em-All Service in connection with any...messages...that are...unsolicited Exh. 3 of Shaffer Dec. at CEA000045-46 ¶11.
>
> User FOFI 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. Id. at ¶¶ 13.
>
> 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. Exh. 3 to Shaffer Decl at CEA 000048 ¶23.

FOFI chose to terminate any future use of CEA's services on September 1, 2009, after it was required to have written express permission from each customer. Fraley Dec. Exh. 2 (Brown Dep. 34:21-24-35:1-7). FOFI did not feel the hassle was worth the return. *Id.* CEA noted in its deposition, due to this new requirement, business with Domino's franchisees essentially ceased. Fraley Dec. Exh. 1 (Herrmann Dep. 66:16-20).

Procedural history of this litigation:

Anderson filed suit on or about April 2010 in King County Superior Court against Domino's Pizza and FOFI and amended her Complaint in May 2011 adding CEA as a Defendant to this action. On May 31, 2011, CEA timely moved this action to the Western District of Washington when it was added as a Defendant to this litigation. The Plaintiff alleged violations of the TCPA and RCW 80.36.400 on behalf of a class. Plaintiff failed to form a class under the TCPA and within the time constraints of Local Rule 23(i)(3). Therefore, on May 15, 2012, her motion was denied. ECF Doc. #104. Defendant Domino's Pizza, Inc. and Domino's Pizza, LLC were granted summary judgment and FOFI's request

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was denied. *Id.* On June 26, 2012, CEA filed its summary judgment motion with a hearing date of September 7, 2012. ECF Doc. #107. Trial is set to begin on this matter on September 24, 2012.

FOFI submitted an Offer of Judgment to Plaintiff. The Offer was accepted and filed with the Court on August 27, 2012. ECF Doc. #110. CEA recently filed a Stipulated Judgment as to Defendant Call-Em-All, LLC. on August 28, 2012, whereby it promised to pay Plaintiff $5,000. ECF Doc. # 111.

In attempting to resolve this matter, e-mail correspondence was sent between the legal counsel of all parties involved. Shaffer Dec. Exh. 6. The e-mail by FOFI's counsel was made in settlement discussions and was simply a summation of the status of those discussions.

III. ARGUMENT

I. **Motion to Strike**:

CEA has submitted to the Court as one of its exhibits an e-mail correspondence drafted by FOFI's counsel dated June 12, 2012, and sent to all legal counsel involved in this matter. CEA now attempts to use the e-mail as FOFI's admission of liability or the lack of liability on CEA's part. The e-mail was not intended as such and should not be considered by the Court. The e-mail provides a summation, FOFI's counsel's legal opinion of the status of the case, where things were in the litigation. Typically, a party may not discover documents by another party's attorney made in anticipation of litigation. Fed. Civ. Proc. R. 26(b)(3)(A). Furthermore, Federal Civil Procedure Rule 26(b)(3)(B) prevents the disclosure and use of the mental impressions, opinions, legal conclusions and/or legal theories of a party's attorney concerning litigation. A judgment shall be rendered on a summary judgment motion, if the "pleadings, discovery and disclosure materials on file, and any affidavits show that there is no

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genuine issue as to material fact". Fed. Civ.. Proc. R. 56(c)(2). The e-mail does not qualify as such. An attorney's communication is not evidence that is admissible and therefore should not be considered by the trier of fact.

FOFI requests the e-mail be stricken from the record and not considered by the Court.

II. **Motion for Summary Judgment**:

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 no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is not appropriate because there is a genuine issue as to a material fact and CEA is not entitled to judgment as a matter of law.

A. A genuine issue of material fact exists because CEA has never established that FOFI agreed to, accepted, or acknowledged the Terms of Use in 2009.

CEA claims there is no dispute of fact, but it has not clearly established that FOFI signed and accepted the Terms of Use at issue in this motion. On September 30, 2010, the deposition testimony of Michael Brown ("Brown") was taken by Plaintiff's counsel.

> Q: So when you would go online- - when you went on - - excuse me, went initially to do this, was there some portion of their [CEA] web page where you had to, in effect, sign a contract, where you had to click 'I agree' or somehow there was something that went that - - that you had to do?"
> A: "Yeah, I believe there was." - Shaffer Dec. Exh. 4 (Brown Dep.35:12-18).

Brown never identifies in his answer whether it was a contract, "something that he had to do", and more specifically, whether it was CEA's Terms of Use he had, if at all, agreed to. CEA's Terms of Use provided to the Court in Exhibit 3 of Shaffer Dec. was provided by CEA in

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Response to Plaintiff's Requests for Production propounded to Defendant Call-Em-All. No representative of FOFI has ever confirmed this was the Terms of Use reviewed or accepted at the time it signed up for CEA's services in 2009 or whether a Terms of Use was ever agreed to at all.

When FOFI responded to Request for Production No. 5 of FOFI's Answers and Responses to Defendant CEA's First Set of Interrogatories, Requests for Admission, and Requests Production, provided herein as Exhibit 5 of Shaffer Declaration, it provided various documents.

> REQUEST FOR PRODUCTION NO. 5: All documents relating to, referring to CEA in any way, including but not limited to all correspondence, e-mails, internet-based communications and transactions.
> RESPONSE: See Request for Production No. 10 for Exhibits 5-7 of Michael Brown's deposition. Also attached are CEA's Privacy Statement, Terms of Use, and Features dated June 23, 2010 and accessed via CEA's website.

Again, FOFI never confirms or admits accepting or signing the Terms of Use referenced in CEA's Motion. The Terms of Use provided in FOFI's response was accessed via CEA's website over a year later by FOFI's counsel. Fraley Dec. ¶1. Anyone could access these documents on CEA's website. Shaffer Dec. Exh. 2, 13(Herrmann Dep. 8). FOFI has maintained this position prior to CEA's involvement. The following Requests for Admission illustrates it is unclear whether CEA's Terms of Use referenced were agreed to by FOFI in 2009.

> REQUEST FOR ADMISSION NO. 1: Admit that You agreed to Call-Em-All's Terms of Use as part of the registration process for Call-Em-All's Internet website.
> ANSWER: This answering Defendant admits that "Terms of Use" may have been part of the registration process, but has no way of verifying that "Terms of Use" to which this request refers is the one that was provided on the date and time of registration."
>
> REQUEST FOR ADMISSION NO. 2: Admit that Exhibit A contains the identical terms, with respect to Paragraphs 13 and 22, as the Terms of Use You agreed to prior to doing business with CEA in 2009.

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ANSWER: Denied.

REQUEST FOR ADMISSION No. 3: Admit that You have a duty to indemnify, defend, and hold CEA harmless for all allegations in this Action.
RESPONSE: Denied

Shaffer Dec. Exh. 5 (pg. 10-11).

The Terms of Use has never been confirmed by CEA to be the Terms of Use FOFI accepted or rejected in the summer of 2009. CEA has provided as Exhibit 3 Terms of Use Bate stamped as CEA000043-48. During Herrmann's deposition, the Terms of Use were not admitted as an exhibit. Fraley Dec. Exh. 1 (Herrmann Dep.16-17). From that point forward, the document was referred to generally throughout the deposition. CEA doesn't provide any affirmative proof that FOFI agreed to any terms, liability, etc. A dispute of fact exists as to whether FOFI is liable to CEA. FOFI respectfully requests the Court deny CEA's motion for summary judgment.

B. It is irrelevant whether CEA is a common carrier and therefore exempt from liability due to the recent development of the parties settling and because the exemption does not apply under Washington law.

CEA is requesting summary judgment be granted dismissing the Amended Complaint's allegations against it under the common carrier doctrine. This is a question of whether CEA should be found liable to Plaintiff for the call made to her. When this litigation was filed, Plaintiff alleged Defendants violated the TCPA, RCW 80.36.400, and RCW 19.36, et seq. As the matter proceeded, Plaintiff did not move to form a national class based on the TCPA violations, but only a Washington Class. Plaintiff admitted she would no longer be pursuing any TCPA violations. Only the state claims remained. Under the TCPA, the Federal Communications Commission ("FCC") has recognized the common carrier exemption limiting the liability of service providers if certain elements are met. FOFI would like to point

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out to the Court that the rules and case law cited by CEA involve facsimile broadcasting which is not at issue in this matter. The transmissions of unsolicited facsimiles are treated differently under the TCPA. *See* CEA's Motion §2(B), 13.

The only causes of action remaining are the state law claims. CEA cites to *Tenore v. AT&T Wireless Services*, a Supreme Court of Washington case which used the FCC definition of a common carrier. *Tenore*, 136 Wn.2d 322, 333-34, 962 P.2d 104, 109 (1998). The Court had to determine whether the rounding up of cellphone minutes was an unfair business practice. To do so, the Court had to determine whether it was required to file a tariff under the "filed rate doctrine". *Id.* at 333-334. The Court examined whether it was a common carrier in order to determine whether AT&T was liable to Plaintiff under a completely different set of circumstances. RCW 80.36.400 does not recognize a common carrier exception as the TCPA does, nor does the Telephone Solicitation statute, RCW 80.36.390.

Both FOFI and CEA have resolved matters with Plaintiff, so each party's liability to her is no longer at issue. Due to the common carrier exception's lack of applicability to the alleged state law claims and because liability no longer needs to be determined, FOFI considers the issue no longer relevant to this Motion and therefore moot.

C. The indemnity clause contained within CEA's Terms of Use does not extend to the negligent actions of CEA, but only harm caused by FOFI to others, and thus fails the express negligence test.

CEA's involvement in this litigation has always been focused on whether CEA caused harm to Plaintiff, not whether FOFI did or did not cause harm to Plaintiff. Under the indemnity clause in the alleged Terms of Use, FOFI is only required to cover the harm it causes to others, not CEA's harm to others.

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> You agree to indemnify, defend, and hold harmless Call-Em-All...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**. Exh. 3 to Shaffer Decl at CEA 000048 ¶23.

The alleged Terms of Use requires the application of Texas law. Shaffer Dec. Exh. 3, ¶23. Under Texas law, an indemnity clause must meet certain requirements to be considered valid. CEA relies on both the case of *Boyd v. Amoco Prod. Co.* and *Fisk Electric Company v. Constructors & Associates* to describe its entitlement to recover costs incurred in the defense of a claim against it. *See* CEA Motion #107, 19. In certain circumstances, its interpretation may be correct, but it is not today. *Fisk and Boyd* discusses how an indemnity clause must meet the express negligence test for an indemnitor to be required to pay the indemnitee's attorney's fees and other expenses incurred. *Fisk* at 813 (See *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987); *Boyd v. Amoco Prod. Co.*, 786 S.W.2d 528, 530 (Tex.App.—Eastland 1990, no writ). "Parties seeking to indemnify themselves for their own negligence must express that intent in specific terms. Indemnity provisions that do not state the intent of the parties within the four corners of the instrument are unenforceable as a matter of law." *Fisk* at 814 (citing *Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc.*, 739 S.W.2d 239 (Tex. 1987). An agreement must expressly state the intention to indemnify the harm caused by the indemnitee. *Fisk* at 815. When there is no duty to indemnify, there is no duty to pay attorney's fees and costs. The express negligence test is required to prevent indemnitees from settling cases before harm is admitted or established. *Fisk* at 816.

FOFI did not agree to bear this burden- to be liable for costs resulting from CEA's harm it caused to Plaintiff. The language of the alleged indemnity clause is very specific, **"resulting from any violation of the User Agreement by you or any harm you may cause**

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to anyone". Exh. 3 to Shaffer Decl at CEA 000048 ¶23. It only describes FOFI's harm. Also, CEA has settled with Plaintiff without a determination or admission of harm. Due to its failure to expressly state in the indemnity clause that FOFI would bear the burden to defend and indemnify CEA from the harm itself caused, summary judgment should be denied based on its failure to meet the express negligence test.

CEA operates its business in a negligent manner and pushes the responsibility of protection on its customers. CEA has knowledge that the TCPA contains very specific requirements in order to be in compliance with the federal law.[1] It also has knowledge that state laws vary greatly across the country on whether the practice of using ADAD is allowed and if it is allowed, the extensive requirements that must be met. Its knowledge ends there. CEA seems familiar with the TCPA-established business relationship, promotional vs. informational calls, link to FTC website, connection to a live operator. It did not have knowledge of specific state laws, except for the state of Illinois for reasons unknown.[2] It knows there are complex rules in certain states including the inability to make ADAD calls, but yet it does not concern itself with becoming knowledgeable of the specifics.

> Q: Do you know, in 2009, in the summer before the FTC changed its ruling about getting written permission, whether making automated calls into Washington was legal under Washington state law?
> A: I wouldn't have any specific way of knowing, no.
> Q: You, I assume, are pretty familiar with the federal rules?
> A: Yes.
> Q: But you didn't have...You and Call-Em-All did not purport to have an understanding of all the various state laws and have a list of those laws or other information about them for your various clients; is that correct?
> A: Correct. Herrmann Dep. 10:10-25.

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[1] "When we review each client, we are not purporting to be attorneys, but what we are looking for are things that are obviously something that we know, like, for example, might violate a federal law or if they are doing–making promotional calls, we make sure they have the proper sales introduction and opt out information at the beginning of the call, some basics that we are looking for". Fraley Dec. Exh. 1 (Herrmann Dep. 16).

[2] "Well, Indiana was one state where we know they were really strict on calling". *Id.* at Herrmann Dep. 57-58.

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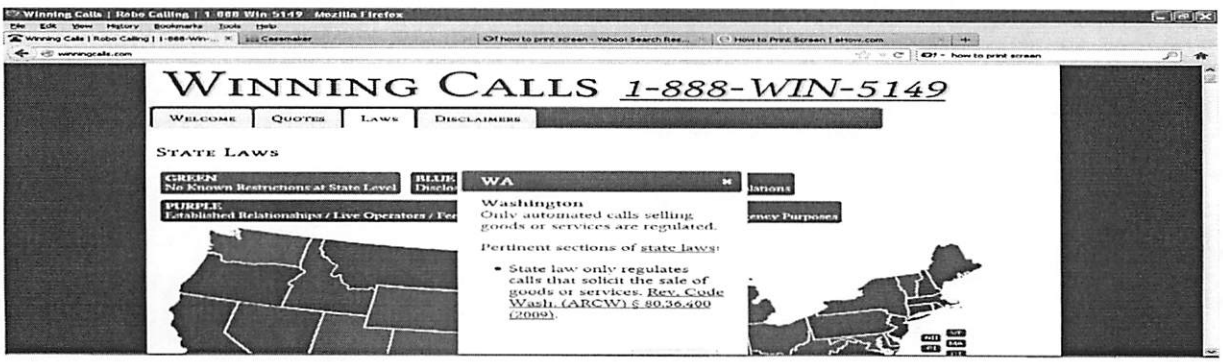
CEA was a vendor at the 2009 Domino's World Wide Rally Equipment and Vendor Show. CEA sought Domino's franchisees as customers on a national level. It sought after FOFI as a customer and other Domino's franchisees when it provided and made available information describing its services. FOFI did not seek out CEA. Due to the event, CEA received business from about 50 franchisees from different parts of the country. Fraley Dec. Exh. 1 (Herrmann 22:19-25-23:1-10, 62:8-23). It also has other clients outside of Texas. *Id.* (Herrmann Dep. 7). If a company is not aware or does not take the time to ensure the integrity of its business, then the business should not provide those services; lack of knowledge is not a defense that CEA should be able to hide behind.

CEA had the ability to determine whether automated calls/pre-recorded messages were allowed in Washington State by simply doing a little research. A Winning Call, a company that engages in similar services as CEA, provides on its website brief information of the legality of pre-recorded calls according to each state with links to the actual statute that applies. www.winningcalls.com/statelaws.com. It provides a map and a brief summation of the state's position on pre-recorded messages when the state is clicked on. Fraley Dec. Exh. 3.



For Washington it describes, "Only automated calls selling goods or services are regulated. Pertinent sections of state laws: State law only regulates calls that solicit the sale of goods or

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services. Rev. Code Wash. (ARCW) § 80.36.400 (2009)". *Id.* This company did not leave it solely to its customers to determine the legality of its services. RCW 80.36.400 has been in effect since 1986. The law has not changed since CEA's inception.

Even though the client recorded the message, CEA had the ability to review, at least, the first recorded message of its clients. Even thought the client controlled the amount of calls made each day, CEA had the ability to determine if a client was making too many calls in one day. Fraley Dec. Exh. 1 (Herrmann Dep. 12:5-25-13:8). This does not mean it actually reviewed or put an end to too many calls, but it had the ability to review if it wanted. Why would it? CEA supposedly has terms in place that safeguarded it from its client's actions. CEA would not allow calls to be made by clients in which it did not have a preexisting relationship with- even if it meant turning "down mountains of business". Fraley Dec. Exh. 1 (Herrmann Dep. 16). It knows Indiana has heavy restrictions on pre-recorded messages, almost banning them entirely, but CEA does not prevent customers from using its services.

> Q: Was there anything in place in your business to not allow people from the state of Indiana to work with you?
> A: No, because most clients are doing things like—that are strictly informational calls, for example, churches, schools and that kind of stuff, which those laws wouldn't apply to those folks.
>
> Herrmann Dep. 58.

Indiana customers would not be prevented from using CEA's services to make ADAD calls for promotional services because CEA has not blocked them from doing so. There is no indication by the deposition testimony that if the promotional sales call box was checked by an Indiana customer it would be prevented or blocked from making calls. So even with knowledge of the illegality of the calls, CEA still allows its customers to make possibly illegal calls. It is only their customers' burden to bear.

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Another indication CEA has only been defending the harm it caused, not the harm caused by FOFI, is the agreement between Plaintiff and CEA as indicated in the Stipulated Judgment. ECF Doc. # 111. CEA offered to pay Plaintiff $5,000 by way of an offer of judgment and Plaintiff accepted. Under RCW 80.36.400(3), Plaintiff was only allowed to receive $500 for each call made to her. Plaintiff alleged two calls were made to her. An automated call for commercial solicitation is a violation of the Washington Consumer Protection Act ("CPA"). *Id.* The CPA provides the Court discretion to treble the award of damages. RCW 19.86.090. The most Plaintiff could have received from the Court is $3,000.00 if she was successful in proving all of her claims. It is unclear why CEA would have agreed to pay to Plaintiff more than the amount allowed under the law. FOFI can only assume CEA saw that it caused Plaintiff harm in excess of the allowed statutory amount.

FOFI recognizes that it would be difficult and expensive for CEA to know every specific requirement in each state, but to not even know where its services are banned all together is different. It is negligent. "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". CEA is nothing like the United States Post Office. Packages are sealed when received by the post office. Everything is submitted to CEA prior to its transmission and open for its review. A product manufacturer is required to know the laws that apply to its product. It cannot put that responsibility to its buyers who then turn around and sell its product. Domino's Pizza cannot have the attitude, yea, we know it is a legal requirement for our pizza delivery drivers to have a driver's license and automobile insurance, but instead of checking to make sure, we will trust that the delivery driver is in compliance. Anyone would recognize

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that is a negligent way to run a business. That is exactly what CEA is doing to its customers- we know there are strict and varying regulations across the country about our business but we are going to put the responsibility only on our customers. It essentially put its head in the sand. CEA has received the benefit of increased business through sales and customer awareness due to its relationship with Domino's franchisees and more importantly from its relationship with FOFI. It now wants FOFI to suffer all the consequences of that relationship. This is an unfair, unjust, and a problematic means of running a business.

D. If the Court finds the existence of a valid indemnity clause between the parties, it was not violated because CEA admits the calls were not illegal, therefore a violation of the Terms of Use does not exist.

The Terms of Use require a violation of state/federal law. The Court has never determined that there was a violation of either and the parties have come to a settlement before any such liability could be established. Shaffer Dec. Exh. 3 ¶¶13, 23. In fact, "CEA believes there was nothing illegal about the call." CEA Motion ECF Doc. # 107, 2. By its own admission, FOFI could not have violated the User Agreement contained within the alleged Terms of Use.

IV. CONCLUSION

Four Our Families, Inc., respectfully requests CEA's Motion for Summary Judgment be denied by the Court and the email correspondence submitted be stricken from the record.

Dated at Lakewood, Washington this 4th day of September, 2012.

FAUBION, REEDER, FRALEY, & COOK, P.S.

By /s/ Nelson Fraley, II
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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2012, I electronically served the foregoing to the parties listed below:

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