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Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

CAROLYN ANDERSON,

Plaintiff,

v.

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

Defendants.

CIVIL ACTION NO.: 11-cv-00902-RBL

DEFENDANT CALL-EM-ALL, LLC'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON ITS CROSSCLAIMS AGAINST FOUR OUR FAMILIES, INC.

HEARING DATE:

ORAL ARGUMENT REQUESTED

COMES NOW Defendant Call-Em-All, LLC (hereinafter, "CEA") and submits this reply memorandum in further support of its motion for summary judgment on its crossclaims against Defendant Four Our Families, Inc.

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CEA previously moved for summary judgment against Plaintiff Carolyn Anderson, but Plaintiff accepted CEA's offer of judgment, thereby mooting the portion of CEA's summary judgment motion directed at Plaintiff. The remaining portion of CEA's motion seeks summary judgment on CEA's crossclaims for indemnification against Four Our Families.

This is not a tough call for the Court: CEA is clearly entitled to summary judgment on its crossclaims. Four Our Families has submitted only speculation and hypotheses, but no evidence, in opposition to the unambiguous indemnification obligations contained in CEA's Terms Of Use. No affidavit was submitted by Four Our Families' principal, Michael Brown, or any other officer or employee of the company in opposition to CEA's summary judgment motion. The only evidence on which the Court can decide this motion is contained in Four Our Families' moving papers. As CEA's officer, Brad Herrmann testified, Four Our Families was required to accept, and did in fact accept, CEA's Terms Of Use prior to using CEA's services. During discovery in this action, both CEA and Four Our Families produced the same Terms Of Use and there is no dispute concerning the indemnification obligations contained therein.

Finally, Four Our Families' counsel admitted liability and that CEA was "merely a conduit" for Four Our Families' telephone call to Plaintiff. ECF Document 107-2 at 67. This admission completely negates Four Our Families' argument that CEA was negligent and therefore is not entitled to indemnification.

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There is nothing privileged about Four Our Families' admission, because the admission was not an attorney-client communication, was not attorney work product, and was contained in an e-mail to Plaintiff's attorney. Thus the motion to strike should be denied. However, absent this admission, there are still ample grounds to grant CEA's summary judgment motion.

LEGAL STANDARD

Federal Rule of Civil Procedure 56(e) requires that an adverse party's response to a motion for summary judgment must set forth **specific, substantial** facts showing that there is a genuine issue for trial. Here, Four Our Families has nothing more than its own faulty memories, and their factual averments are far from specific. It does not identify a sole document that contradicts their indemnification obligations.

Affidavits or declarations alone, without any other piece of probative evidence, are insufficient to survive summary adjudication. In this case, there is not even an affidavit from a party, merely its counsel. That is insufficient, because a party opposing summary judgment must produce sufficient evidence to raise a triable issue of fact. *Baylor v. Trident Sch. Corp.*, 268 F. App'x 684, 685 (9th Cir. 2008) (rejecting doctor's unsubstantiated testimony that he admittedly could not prove); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 559 (9th Cir. 1995) ("In opposing summary judgment, Appellants have the burden of putting forth evidence sufficient to establish a triable issue of material fact").

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A party cannot avoid summary judgment merely by resting upon its pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Moreover, conclusory or speculative testimony is does not meet this standard. *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 345 (9th Cir. 1995) (testimony produced by defendant did not raise a genuine issue of fact sufficient to defeat summary judgment); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 929 n.9 (9th Cir. 1980) (plaintiff's affidavit containing unsupported testimony disputing defendant's allegations held insufficient to withstand defendant's summary judgment motion).

Batiz v. American Commercial Security Services, 776 F. Supp. 2d 1087 (C.D. Cal. 2011) was originally a class action. However, after the court decertified the class on fairness and procedural grounds, it allowed named plaintiffs to proceed in their individual capacities. The defendants moved for partial summary judgment against two of the plaintiffs, and the court granted their motion. The court noted that the only evidence that each of the plaintiffs offered to counter the defendants' evidence was the deposition testimony and declarations of those same plaintiffs, which the plaintiffs contended was sufficient to create a genuine issue of material fact. The court, however, found that the testimony was "self-serving and uncorroborated," and refused to consider it. *Id.* at 1098, 1100. Summary judgment was therefore granted.

Similarly, in *FTC v. Neovi, Inc.*, 604 F.3d 1150, (9th Cir. 2010), the district court granted summary judgment after refusing to consider the declaration of one of the defendant's executives. It found the declaration to be "the epitome of uncorroborated and

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self-serving testimony," and therefore held that no genuine triable issues of fact necessitated a trial. The defendant appealed, arguing the district court had improperly weighed the evidence, but the Ninth Circuit affirmed the grant of summary judgment: "the district court was correct that it need not find a genuine issue of fact if, in its determination, the particular declaration was 'uncorroborated and self-serving.'" *Id.* at 1159 ("The district court was on sound footing concluding that Qchex put forward nothing more than a few bald, uncorroborated, and conclusory assertions rather than evidence").

LEGAL ARGUMENT

CEA IS ENTITLED TO SUMMARY JUDGMENT ON ITS CROSSCLAIMS

CEA is indisputably entitled to contractual and legal indemnification from Four Our Families under CEA's Terms Of Use, which Four Our Families was required to accept, and did in fact accept, before using CEA's service. Although Four Our Families nominally opposes summary judgment on the indemnification claims, it does not demonstrate any issue of material fact capable of staving off summary judgment.

Four Our Families offers no evidence disputing that CEA did not allow Four Our Families to use its service (including placing the prerecorded call to Plaintiff which became the basis of this action), until Four Our Families accepted CEA's Terms Of Use.

There is also no material dispute that the Terms of Use placed the responsibility of complying with all state and federal laws with Four Our Families, and further required Four Our Families to indemnify CEA for costs, including attorney's fees, if it failed to comply with the law. **Four Our Families even included CEA's Terms Of Use in its own**

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discovery responses in this litigation. Those Terms Of Use were confirmed by Four Our Families when it provided them back to CEA in the discovery process (*see* ECF Document 107-2 at Exhibit 5 (Four Our Families' discovery responses)) 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 in nature. **[**ECF Doc. # 107-2 at p. 58, ¶11].

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. [ECF Doc. # 107-2 at p. 59, ¶15].

and also:

> 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. [ECF Doc. # 107-2 at p. 61, ¶25].

Unable to deny these outcome determinative facts, Four Our Families speculates without any evidence that CEA may have altered its Terms Of Use sometime between 2009 (when Four Our Families accepted them) and 2011 (when Four Our Families produced them in its discovery responses). This argument, contained on page 7 of Four Our Families' opposition memorandum, appears to blame its counsel: "The Terms of Use

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provided in FOFI's response was accessed via CEA's website over a year later by FOFI's counsel. Anyone could access these documents on CEA's website."

However, Four Our Families' opposition contains no declaration from its president Michael Brown, or any other officer or employee of the company, disputing the indemnification obligation. The only argument is that the Terms of Use "might" have been different in 2009. As the authorities cited above indicate, mere speculation that something could have been different is not sufficient to withstand a summary judgment motion.

THERE IS NO BASIS TO STRIKE FOUR OUR FAMILIES' E-MAIL

On June 12, 2012, in an e-mail sent to all counsel in this case, Four Our Families' counsel admitted its liability and further admitted that CEA was "merely a conduit" for Four Our Families' telephone call to Plaintiff. ECF Document 107-2 at 67. This admission completely negates Four Our Families' argument that CEA was negligent and therefore is not entitled to indemnification.

Four Our Families moves to strike this admission from evidence, but there is no basis to do so. There is nothing privileged about this admission: it was not an attorney-client communication; it was not attorney work product; and was contained in an e-mail to Plaintiff's attorney. The e-mail is admissible into evidence under Rule 801(d)(2)(D) of the Federal Rules of Evidence because it was made by Four Our Families' agent (attorney) concerning a matter within the scope of their relationship.

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A statement is admissible under Rule 801(d)(2)(D) if: (1) there is an agency relationship between Four Our Families and its counsel; (2) counsel's statements were made during the course of that relationship; and (3) that the statements concerned matters within the scope of counsel's agency. *See, e.g., Hilao v. Estate of Marcos,* 103 F.3d 767, 775 (9th Cir. 1996). All three requirements are so obviously satisfied by the e-mail that no further explanation is needed.

Thus the motion to strike should be denied. However, absent this admission, there are still ample grounds to grant CEA's summary judgment motion.

CONCLUSION

There is no material factual dispute concerning CEA's crossclaims against Four Our Families, and CEA is entitled to summary judgment on its contractual indemnification crossclaims.

There is no dispute concerning the acceptance and scope of Four Our Families' obligation to indemnify CEA, only Four Our Families' baseless, self-serving speculation to the contrary. CEA's Terms Of Use, accepted by Four Our Families' as a condition of using CEA's services, speak for themselves. The e-mail by Four Our Families' counsel is an admissible admission by Four Our Families that CEA was not negligent, which destroys CEA's remaining argument.

For the reasons stated above, and in CEA's opening memorandum, Call-Em-All, LLC respectfully requests that judgment be entered in its favor on the crossclaims.

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Dated: September 7, 2012

Respectfully submitted,

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Attorneys for Crossclaimant 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 REPLY IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON ITS CROSSCLAIMS AGAINST FOUR OUR FAMILIES, INC.

was served by me on the 7th day of September 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

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