

1 Nelson C. Fraley II
Nicole C. Brown
2 Faubion, Reeder, Fraley,
& Cook, P.S.
3 5920 100th Street SW, Ste 25
4 Lakewood, WA 98499
253-581-0660
5 nfraley@fjr-law.com
nbrown@fjr-law.com
6

Honorable Ronald B. Leighton

7 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 CAROLYN ANDERSON,

10 Plaintiff,

11 vs.

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

15 Defendants.

CASE NO. :C 11-902-RBL

CROSS-CLAIM DEFENDANT FOUR
OUR FAMILIES, INC'S PRETRIAL
ORDER

16 **I. JURISDICTION**

17 Jurisdiction is vested in this Court by virtue of:

18 1. Diversity jurisdiction under 28 U.S.C § 1332. Call-Em-All ("CEA") is a company
19 organized and existing under the laws of Texas with its principal place of business in Texas.

20 Four Our Families, Inc. ("FOFI") is a company organized and existing under the laws of
21 Washington with its principal place of business in Washington.

22 2. The original amount in controversy exceeded the amount of \$75,000.00.

23 3. This lawsuit was removed from King County Superior Court to this Court pursuant to
24 28 U.S.C §1441.
25
26

FOFI's PRETRIAL ORDER - 1 of 6
[PRETRIAL ORDER]

FAUBION, REEDER, FRALEY & COOK, P.S.
5920 100th St. SW, Suite 25
Lakewood, WA 98499
(253) 581-0660

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II. CLAIMS AND DEFENSES

The Cross-Claimant/Plaintiff will pursue at trial the following claims:

1. A breach of contract whereby FOFI agreed to indemnify and hold harmless CEA against any violation of its User Agreement and/or any harm FOFI causes to any third party.

The Defendant will pursue the following affirmative defenses and/or claims:

1. CEA's actions in this litigation has been defending the harm it caused to Plaintiff and because the indemnity does not pass the express negligence test, FOFI is not required to pay any judgments, costs, attorney's fees, etc. relating to such harm

2. CEA acted in a negligent manner when it allowed FOFI to place pre-recorded messages to Plaintiff, where ADAD calls for commercial solicitation are illegal.

III. ADMITTED FACTS

The following facts are admitted by the parties:

1. On August 31, 2009, Plaintiff, Carolyn Anderson, a customer of FOFI, a Domino's Pizza franchisee, received a pre-recorded message on her residential telephone line offering a discounted pizza.

2. CEA provided its services to FOFI by placing the calls using technology, often termed, automatic dialing and announcing devices ("ADAD"). CEA's technology allows its clients to communicate directly to a customer base in a very short time through these automated messages. It has customers all over the United States and Canada.

3. FOFI learned of CEA's services at a Domino's Pizza World Wide Rally Equipment and Vendor Show in May of 2009. Shortly thereafter, FOFI utilized the services of CEA.

1 4. The business relationship ended between FOFI and CEA after the applicable federal
2 law changed in September 2009 to require express written permission before a pre-recorded
3 call could be placed to FOFI's customers.
4

5 The cross-claimant/plaintiff contends as follows:

6 1.

7 2.

8 The defendant contends as follows:

9 1. FOFI did not violate the Terms of Use because it did not violate state or federal law,
10 nor did it cause harm to Plaintiff.
11

12 2. If it can be shown that FOFI agreed to the Terms of Use, indemnity and any other
13 provisions, FOFI contends it did not violate any terms or provisions.
14

15 **IV. ISSUES OF LAW**

16 The following are the issues of law to be determined by the court:

17 1. Whether defendant violated the indemnity clause in the alleged Terms of Use?
18

19 **V. EXPERT WITNESSES**

20 (a) Each party shall not be permitted to call expert witnesses because the only witness
21 identified by cross-claimant concerned liability to Plaintiff, Carolyn Anderson. This issue is
22 now moot due to the filing of Stipulated Judgments between CEA and Anderson dated August
23 28, 2012, and between FOFI and Anderson dated September 4, 2012.

24 (b) The name and addresses of the expert witness to be used by each party at the trial and
25 the issue upon which each will testify is:

26 None, see above.

1 **VI. OTHER WITNESSES**

2 The names and addresses of witnesses, other than experts, to be used by each party at
3 the time of trial and the general nature of the testimony of each are:

4 (a) On behalf of Cross-Claimant/Plaintiff:

5 Brad Herrmann, President of Call-Em-All, LLC. and FRCP 30(b)(6) designee, 2611
6 Internet Boulevard, Suite 120, Frisco, Texas, 75034
7

8 (b) On behalf of defendant:

9 Michael Brown, President of Four Our Families, Inc., 920 E 72nd St, Tacoma, WA;
10 will testify concerning the relationship between FOFI and CEA, the lack of information
11 provided to him, the Equipment and Vendor Show, and the call made to Plaintiff.
12

13 **VII. EXHIBITS**

14 (a) Admissibility stipulated:

15 Plaintiff's Exhibits

16 1.

17 2.

18 3.

19 Defendant's Exhibits

20 (b) Authenticity stipulated, admissibility disputed:

21 Plaintiff's Exhibits

22 Defendant's Exhibits

23 (c) Authenticity and admissibility disputed:

24 Plaintiff's Exhibits

25 Defendant's Exhibits
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VIII. ACTION BY THE COURT

- (a) This case is scheduled for trial without a jury on September 24, 2012, at 9:00am.
- (b) Trial briefs shall be submitted to the court on or before September 20, 2012.
- (c) Summary Judgment Motion filed by CEA is pending before this Court. The Court's ruling in that motion could determine the necessity of trial.

This order has been approved by the parties as evidenced by the signatures of their counsel. This order shall control the subsequent course of the action unless modified by a subsequent order. This order shall not be amended except by order of the court pursuant to agreement of the parties or to prevent manifest injustice.

Dated this _____ day of _____, 2012.

HONORABLE ROBERT LEIGHTON

FORM APPROVED:

By /s/ Nelson Fraley, II
NELSON C. FRALEY II, WSBA No. 26742
Attorneys for Defendant Four Our Families, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Kelly P. Corr
Christina N. Dimock
Corr Cronin Michelson, et al.
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154
Attorneys for Call-Em-All, LLC

Andrew B. Lustigman
Scott Shaffer
Olshan Grundman Frome
Rosenzweig & Wolosky, LLP
Park Avenue Tower
65 East 55th Street
New York, NY 10022
Pro Hac Vice Attorneys for Call-Em-All, LLC

/s/ Lona Hertz
Faubion Reeder Fraley & Cook, PS
5920 100th Street SW, Suite 25
Lakewood, WA 98499
Telephone: (253) 581-0660
Fax: (253) 581-0894
Email: lhertz@fjr-law.com