

HONORABLE RONALD B. LEIGHTON  
Hearing Date: September 9, 2011  
Without Oral Argument

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**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.: C11-902-RBL

**DEFENDANT CALL-EM-ALL, LLC'S  
MOTION FOR LEAVE TO AMEND  
ANSWER TO INCLUDE CROSSCLAIMS**

COMES NOW defendant Call-Em-All, LLC (hereinafter "CEA"), by and through its undersigned attorneys, and applies for leave to amend its answer pursuant to Federal Rule of Civil Procedure 15(a)(2) for the purpose of adding crossclaims against defendant Four Our Families, Inc. CEA states as follows:

1. Attached hereto as Exhibit A is the proposed Amended Answer.
2. The only proposed amendment to the answer is the addition of crossclaims against defendant Four Our Families, Inc., and all of the crossclaims concern the same facts and circumstances alleged in plaintiff's Amended Complaint. A redline comparison between the Amended Answer and the original Answer is attached hereto as Exhibit B for the Court's convenience.

**DEFENDANT CALL-EM-ALL, LLC'S MOTION  
FOR LEAVE TO AMEND ANSWER TO INCLUDE  
CROSS-CLAIMS – Page 1**  
Case No. 11-902-RBL

**CORR CRONIN MICHELSON  
BAUMGARDNER & PREECE LLP**  
1001 Fourth Avenue, Suite 3900  
Seattle, Washington 98154-1051  
Tel (206) 625-8600  
Fax (206) 625-0900

1 3. CEA has not previously applied to amend its answer herein.

2 4. This application adds no new parties and will not delay trial on this matter.

3 5. There will be no prejudice to any of the parties should this application be  
4 granted and no additional discovery will be required.

5 6. Defendant Four Our Families, Inc. has been advised of CEA's intention to  
6 file the crossclaims and did not object to same.

7 **LEGAL ARGUMENT**

8 Pursuant to Rule 13(g) and 15(a) of the Federal Rules of Civil Procedure, CEA  
9 seeks leave of this Court to add crossclaims against defendant Four Our Families, Inc.  
10 Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that "[t]he court should  
11 freely give leave [to amend] when justice so requires." The U.S. Supreme Court has  
12 declared that "In the absence of any apparent or declared reason-such as undue delay, bad  
13 faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by  
14 amendments previously allowed, undue prejudice to the opposing party by virtue of  
15 allowance of the amendment, futility of amendment, etc.-the leave sought should, as the  
16 rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.  
17 222 (1962).

18 None of the factors identified by the Supreme Court in *Foman* as reasons to deny a  
19 motion for leave to amend exist in this case. The date to add additional *parties* to this case  
20 has not even been reached, and no additional discovery will be required by the crossclaims.  
21 There will be no prejudice to any of the parties should this application be granted,  
22 including to Four Our Families, Inc., whose counsel has been previously advised of CEA's  
23 intent to file the crossclaims and did not object to same.

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# **EXHIBIT A**

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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.: C11-902-RBL

**CALL-EM-ALL, LLC'S AMENDED  
ANSWER TO AMENDED COMPLAINT**

Defendant CALL-EM-ALL, LLC (hereinafter, "CEA"), by and through the undersigned attorneys of record, hereby answer Plaintiff CAROLYN ANDERSON's Amended Class Action Complaint For Damages, Injunctive And Declaratory Relief (hereinafter, "Amended Complaint") as follows:

**I. PARTIES, JURISDICTION, VENUE**

1.1 CEA lacks knowledge and information to admit or deny the allegations contained in Paragraph 1.1 of the Amended Complaint and thus denies same, putting Plaintiff to her burden of proof for each and every allegation contained therein.







1                                   **Count D. Violation of RCW 19.86 (Washington State Class)**

2           3.6     The allegations contained in Paragraph 3.6 of the Amended Complaint call  
3 for a legal conclusion to which no response is required. To the extent a response is  
4 required, CEA denies the allegations contained in Paragraph 3.6 of the Amended  
5 Complaint.

6           3.7     CEA denies the allegations contained in the first sentence of Paragraph 3.7  
7 of the Amended Complaint. The allegations contained in the second sentence of Paragraph  
8 3.7 of the Amended Complaint call for a legal conclusion to which no response is required.  
9 To the extent a response is required to the second sentence of Paragraph 3.7 of the  
10 Amended Complaint, CEA denies same.

11   **Count E. Declaratory Relief Under**  
12                                   **The Washington Declaratory Judgment Act RCW 7.24.010 (Washington State Class)**

13           3.8     CEA denies it used an automated dialing and announcement device to send a  
14 pre-recorded message to the telephones of persons in Washington.

15           3.9     The allegations contained in Paragraph 3.9 of the Amended Complaint call  
16 for a legal conclusion to which no response is required. To the extent a response is  
17 required, CEA denies the allegations contained in Paragraph 3.9 of the Amended  
18 Complaint.

19   **IV. CLASS ACTION ALLEGATIONS**

20           4.1     CEA realleges its responses to the foregoing paragraphs as if fully stated  
21 herein.

1           4.2     CEA admits this action purports to be brought pursuant to CR 23(b)(2) and  
2 admits Plaintiff seeks to represent National and Washington State classes. To the extent that  
3 Paragraph 4.2 makes any factual allegations, CEA denies such allegations, denies that this  
4 action may be maintained as a class action and denies that any allegations in Paragraph 4.2  
5 are relevant to CEA.  
6

7           4.3     CEA admits that the proposed classes likely have more than 100 members,  
8 but denies that this action may be maintained as a class action. CEA lacks knowledge and  
9 information to admit or deny the remaining allegations contained in Paragraph 4.3 of the  
10 Amended Complaint and thus denies same, putting Plaintiff to her burden of proof for each  
11 and every remaining allegation.  
12

13           4.4     CEA denies the allegations contained in Paragraph 4.4 of the Amended  
14 Complaint.  
15

16           4.5     CEA denies it violated the two cited statutes and lacks knowledge and  
17 information to admit or deny the remaining allegations contained in Paragraph 4.5 of the  
18 Amended Complaint, and thus denies same, putting Plaintiff to her burden of proof for each  
19 and every remaining allegation.  
20

21           4.6     CEA lacks knowledge and information to admit or deny the allegations  
22 contained in Paragraph 4.6 of the Amended Complaint and thus denies same, putting  
23 Plaintiff to her burden of proof for each and every allegation contained therein.  
24

          4.7     CEA denies the allegations contained in Paragraph 4.7 of the Amended  
Complaint.

1           4.8    CEA denies the allegations contained in Paragraph 4.8 of the Amended  
2 Complaint.

3   **AFFIRMATIVE DEFENSES**

4           1.    Plaintiff has failed to state a cause of action for which relief can be granted.

5           2.    Upon information and belief, the calls made to Plaintiff were not illegal.

6           3.    If Plaintiff's allegations are found to be true, CEA has established and  
7 implemented, with due care, reasonable practices and procedures to prevent and limit  
8 telephone solicitations in violation of the regulations prescribed under 46 U.S.C. § 227.

9           4.    RCW 80.36.400 is preempted by the Telephone Consumer Protection Act,  
10 47 U.S.C. § 227.

11           5.    To the extent Plaintiff suffered any damages at all, such damages resulted  
12 from the conduct of parties other than CEA.

13           6.    CEA is not the legal cause or proximate cause of any damages that might  
14 have been suffered by Plaintiff.

15           7.    Plaintiff lacks standing to bring her claims.

16           8.    Plaintiff's claims are barred because she failed to mitigate her damages.

17           9.    Plaintiff's claims against CEA are barred because at all times, CEA acted in  
18 good faith, consistent with any applicable standard of care and /or lacked any duty to  
19 Plaintiff.

20           10.   Plaintiff's allegations lack sufficient particularity and/or detail, and  
21 accordingly CEA seeks a more definite statement of her claims.  
22

1 11. CEA reserves the rights to amend this answer to assert additional affirmative  
2 defenses as warranted by discovery

3 12. CEA is not legally responsible for the calls at issue.  
4

5 **PRAYER FOR RELIEF**

6 1. CEA denies each and every prayer for relief requested in the Amended  
7 Complaint.

8 2. CEA is entitled to dismissal of each and every cause of action brought in the  
9 Amended Complaint.

10 3. CEA is entitled to judgment in its favor and to recover its attorney fees and  
11 costs of suit as permitted by applicable law.

12 4. CEA is entitled to any other or further relief which the Court deems fair and  
13 equitable.  
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15 **DEFENDANT CALL-EM-ALL, LLC'S CROSS CLAIMS**

16 While denying any liability in this action, defendant CEA, by and through the  
17 undersigned attorneys of record, hereby alleges that in the event the plaintiff and/or the  
18 proposed class obtain a judgment against it, CEA is entitled to indemnification and/or  
19 contribution from defendant FOUR OUR FAMILIES, INC. (hereinafter, "FOF")  
20 Accordingly, without admitting any liability whatsoever, CEA hereby demands, pursuant  
21 to the parties' agreement and any right provided by statute or common law, complete  
22 indemnification and contribution.  
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24 Accordingly, CEA hereby asserts the following cross claims against FOF:





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**SECOND COUNT**

15. CEA repeats, realleges and incorporates by reference herein each and every allegation contained in the foregoing Paragraphs all as if set forth fully herein.

16. CEA is entitled to statutory indemnity and contribution from FOF pursuant to RCWA 4.22.040 and/or Tex. Civ. Prac. & Rem. Code Ann. § 33.015.

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**THIRD COUNT**

17. CEA repeats, realleges and incorporates by reference herein each and every allegation contained in the foregoing Paragraphs all as if set forth fully herein.

18. Should CEA incur any liability as a result of the claims in this action, the law implies, by virtue of the nature of the relationship between CEA and FOF, a requirement that FOF discharge any such liability to CEA.

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**FOURTH COUNT**

19. CEA repeats, realleges and incorporates by reference herein each and every allegation contained in the foregoing Paragraphs all as if set forth fully herein.

20. FOF is liable to CEA under a common law duty of indemnity in the event it causes any damages to CEA.

21. In the event that CEA is determined to be required to discharge any obligation that FOF could or might owe to the Plaintiff or the putative class, then Calais entitled to common law indemnity.

23 **WHEREFORE,** CEA respectfully request that this Court enter judgment in its favor against FOF and in the alternative:





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**OLSHAN GRUNDMAN FROME  
ROSENZWEIG & WOLOSKY LLP**

/s/ Scott Shaffer

Andrew B. Lustigman (admitted *Pro Hac Vice*)

Scott Shaffer (admitted *Pro Hac Vice*)

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65 East 55th Street

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Tel. 212.451.2300

Fax. 212.451.2222

ATTORNEYS FOR  
DEFENDANT CALL-EM-ALL, LLC

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys of record for Defendant Call-Em-All, LLC herein.

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

Kim Williams  
Rob Williamson  
Williamson & Williams  
17253 Agate St. NE  
Bainbridge Island, WA 98110  
***Attorneys for Plaintiffs***

David M. Soderland  
Dunlap & Soderland, P.S.  
901 Fifth Avenue, Suite 3003  
Seattle, WA 98164  
***Attorneys for Domino's Pizza, LLC***

Nelson C. Fraley II  
Faubion, Reeder, Fraley & Cook, P.S.  
5920 – 100<sup>th</sup> St. SW #25  
Lakewood, WA 98499  
***Attorneys for Defendant Four Our Families, Inc.***

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED: August 22, 2011 at Seattle, Washington.

/s/ Heidi M. Powell  
Heidi M. Powell

# **EXHIBIT B**

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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.: 11-902-MJP

CALL-EM-ALL, LLC'S AMENDED  
ANSWER TO AMENDED COMPLAINT

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Defendant CALL-EM-ALL, LLC (hereinafter, "CEA"), by and through the undersigned attorneys of record, hereby answer Plaintiff CAROLYN ANDERSON's Amended Class Action Complaint For Damages, Injunctive And Declaratory Relief (hereinafter, "Amended Complaint") as follows:

**I. PARTIES, JURISDICTION, VENUE**

1.1 CEA lacks knowledge and information to admit or deny the allegations contained in Paragraph 1.1 of the Amended Complaint and thus denies same, putting Plaintiff to her burden of proof for each and every allegation contained therein.

1.2 CEA admits the allegations contained in the first sentence of Paragraph 1.2 of the Amended Complaint. With respect to the second sentence of Paragraph 1.2 of the Amended Complaint, CEA respectfully refers the Court to the referenced website for an accurate recitation of the contents thereof.

CROSS CLAIM - Page 1

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Tel (206) 625-8600  
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Deleted: ANSWER AND  
AFFIRMATIVE DEFENSES

1 1.3 CEA lacks knowledge and information to admit or deny the allegations  
2 contained in Paragraph 1.3 of the Amended Complaint and thus denies same, putting  
3 Plaintiff to her burden of proof for each and every allegation contained therein.

4 1.4 CEA lacks knowledge and information to admit or deny the allegations  
5 contained in Paragraph 1.4 of the Amended Complaint and thus denies same, putting  
6 Plaintiff to her burden of proof for each and every allegation contained therein.

7 1.5 The allegations contained in Paragraph 1.5 of the Amended Complaint call  
8 for a legal conclusion to which no response is required. To the extent a response is  
9 required, CEA denies the allegations contained in Paragraph 1.5 of the Amended  
10 Complaint.  
11

12 **II. FACTS**

13 2.1 CEA denies the allegations contained in Paragraph 2.1 of the Amended  
14 Complaint.  
15

16 2.2 CEA lacks knowledge and information to admit or deny the allegations  
17 contained in Paragraph 2.2 of the Amended Complaint and thus denies same, putting  
18 Plaintiff to her burden of proof for each and every allegation contained therein.

19 2.3 CEA lacks knowledge and information to admit or deny the allegations  
20 contained in Paragraph 2.3 of the Amended Complaint and thus denies same, putting  
21 Plaintiff to her burden of proof for each and every allegation contained therein.

22 2.4 CEA denies the allegations contained in Paragraph 2.4 of the Amended  
23 Complaint.  
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**CROSS CLAIM** - Page 2

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**Deleted: ANSWER AND  
AFFIRMATIVE DEFENSES**

1           2.5    With respect to the other Defendants, CEA lacks knowledge and information  
2 to admit or deny the allegations contained in Paragraph 2.5 of the Amended Complaint and  
3 thus denies same, putting Plaintiff to her burden of proof for each and every allegation  
4 contained therein. With respect to itself, CEA denies the allegations to the extent it alleges it  
5 conducts its business in any manner other than in compliance with the law.  
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7                               **III.    CAUSES OF ACTION**

8           3.1    With respect to the second sentence of Paragraph 3.1 of the Amended  
9 Complaint, CEA realleges its responses to the foregoing paragraphs as if fully stated herein.  
10 The second sentence of Paragraph 3.1 of the Amended Complaint requires no answer.

11                               **Count A. Violation of 47 U.S.C. 227(b)(1)(B) (National Class)**

12          3.2    CEA denies the allegations contained in Paragraph 3.2 of the Amended Complaint.

13          3.3    CEA denies the allegations contained in Paragraph 3.3 of the Amended Complaint.

14                               **Count C. Violation of RCW 80.36.400 (Washington State Class)**

15          3.4    CEA denies the allegations contained in Paragraph 3.4 of the Amended Complaint.

16          3.5    CEA denies the allegations contained in Paragraph 3.5 of the Amended Complaint.

17                               **Count D. Violation of RCW 19.86 (Washington State Class)**

18          3.6    The allegations contained in Paragraph 3.6 of the Amended Complaint call  
19 for a legal conclusion to which no response is required. To the extent a response is  
20 required, CEA denies the allegations contained in Paragraph 3.6 of the Amended  
21 Complaint.  
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**Deleted: ANSWER AND AFFIRMATIVE DEFENSES**

**CROSS CLAIM – Page 3**

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1           3.7    CEA denies the allegations contained in the first sentence of Paragraph 3.7  
2 of the Amended Complaint. The allegations contained in the second sentence of Paragraph  
3 3.7 of the Amended Complaint call for a legal conclusion to which no response is required.  
4 To the extent a response is required to the second sentence of Paragraph 3.7 of the  
5 Amended Complaint, CEA denies same.

6  
7                           **Count E. Declaratory Relief Under**  
8                           **The Washington Declaratory Judgment Act RCW 7.24.010 (Washington State Class)**

9           3.8    CEA denies it used an automated dialing and announcement device to send a  
10 pre-recorded message to the telephones of persons in Washington.

11           3.9    The allegations contained in Paragraph 3.9 of the Amended Complaint call  
12 for a legal conclusion to which no response is required. To the extent a response is  
13 required, CEA denies the allegations contained in Paragraph 3.9 of the Amended  
14 Complaint.

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15                           **IV. CLASS ACTION ALLEGATIONS**

16           4.1    CEA realleges its responses to the foregoing paragraphs as if fully stated  
17 herein.

18           4.2    CEA admits this action purports to be brought pursuant to CR 23(b)(2) and  
19 admits Plaintiff seeks to represent National and Washington State classes. To the extent that  
20 Paragraph 4.2 makes any factual allegations, CEA denies such allegations, denies that this  
21 action may be maintained as a class action and denies that any allegations in Paragraph 4.2  
22 are relevant to CEA.  
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Deleted: ANSWER AND AFFIRMATIVE DEFENSES

CROSS CLAIM – Page 4

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1           3.     If Plaintiff's allegations are found to be true, CEA has established and  
2 implemented, with due care, reasonable practices and procedures to prevent and limit  
3 telephone solicitations in violation of the regulations prescribed under 46 U.S.C. § 227.

4           4.     RCW 80.36.400 is preempted by the Telephone Consumer Protection Act,  
5 47 U.S.C. § 227.

6           5.     To the extent Plaintiff suffered any damages at all, such damages resulted  
7 from the conduct of parties other than CEA.

8           6.     CEA is not the legal cause or proximate cause of any damages that might  
9 have been suffered by Plaintiff.

10          7.     Plaintiff lacks standing to bring her claims.

11          8.     Plaintiff's claims are barred because she failed to mitigate her damages.

12          9.     Plaintiff's claims against CEA are barred because at all times, CEA acted in  
13 good faith, consistent with any applicable standard of care and /or lacked any duty to  
14 Plaintiff.

15          10.    Plaintiff's allegations lack sufficient particularity and/or detail, and  
16 accordingly CEA seeks a more definite statement of her claims.

17          11.    CEA reserves the rights to amend this answer to assert additional affirmative  
18 defenses as warranted by discovery

19          12.    CEA is not legally responsible for the calls at issue.  
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**CROSS CLAIM – Page 6**

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**Deleted: ANSWER AND  
AFFIRMATIVE DEFENSES**

1 **PRAYER FOR RELIEF**

2 1. CEA denies each and every prayer for relief requested in the Amended  
3 Complaint.

4 2. CEA is entitled to dismissal of each and every cause of action brought in the  
5 Amended Complaint.

6 3. CEA is entitled to judgment in its favor and to recover its attorney fees and  
7 costs of suit as permitted by applicable law.

8 4. CEA is entitled to any other or further relief which the Court deems fair and  
9 equitable.

10 **DEFENDANT CALL-EM-ALL, LLC'S CROSS CLAIMS**

11 While denying any liability in this action, defendant CEA, by and through the  
12 undersigned attorneys of record, hereby alleges that in the event the plaintiff and/or the  
13 proposed class obtain a judgment against it, CEA is entitled to indemnification and/or  
14 contribution from defendant FOUR OUR FAMILIES, INC. (hereinafter, "FOF")  
15 Accordingly, without admitting any liability whatsoever, CEA hereby demands, pursuant  
16 to the parties' agreement and any right provided by statute or common law, complete  
17 indemnification and contribution.

18 Accordingly, CEA hereby asserts the following cross claims against FOF:

19 **ALLEGATIONS COMMON TO ALL CROSS CLAIMS**

20 1. CEA is a Texas corporation with its principal place of business located in  
21 Frisco, Texas.

22 **CROSS CLAIM** - Page 7

23 **CORR CRONIN MICHELSON**  
24 **BAUMGARDNER & PREECE LLP**  
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**Deleted: ANSWER AND AFFIRMATIVE DEFENSES**

1           2.     FOF is a Washington corporation with its principal place of business  
2 located in Tacoma, Washington.

3           3.     Plaintiff has filed an Amended Class Action Complaint For Damages,  
4 Injunctive And Declaratory Relief (“the Amended Complaint”) in this case alleging that  
5 the defendants have made illegal telephone calls in violation of 47 U.S.C. § 227(b)(1)(B)  
6 and RCW 80.36.400.

7           4.     The Amended Complaint was the first pleading that named CEA as a  
8 defendant.

9           5.     CEA and FOF have a contractual agreement that is included CEA’s Terms  
10 of Use.

11           6.     CEA’s Terms of Use, which were accepted by FOF, contained the  
12 following indemnification, defense, and hold harmless provision:

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

21           7.     CEA has notified FOF in writing that the Amended Complaint triggered  
22 FOF’s indemnification, defense and hold harmless obligations under the above-referenced  
23 portion of the parties’ agreement.

24           8.     FOF has failed to honor its obligations to indemnify, defend and hold CEA  
harmless.

CROSS CLAIM – Page 8

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Deleted: ANSWER AND  
AFFIRMATIVE DEFENSES

1 9. FOF is liable to CEA for contribution for any damages to which Plaintiff  
2 and the putative class may ultimately be entitled to against CEA.

3 **FIRST COUNT**

4 10. CEA repeats, realleges and incorporates by reference herein each and every  
5 allegation contained in the foregoing Paragraphs all as if set forth fully herein.

6 11. FOF entered into an agreement with CEA which provides for contractual  
7 indemnity in the event any wrongdoing causes damages to CEA.

8 12. Pursuant to this agreement, FOF agreed to indemnify CEA for all losses,  
9 liabilities, expenses, damages and costs, including reasonable attorneys' fees, incurred.

10 13. This obligation was affirmatively agreed upon without objection by FOF,  
11 and CEA acted upon such agreement in reliance.

12 14. The quoted agreement gives rise to a contractual obligation on behalf of  
13 FOF to fully indemnify and hold harmless CEA against the causes of action asserted by  
14 against CEA by Carolyn Anderson and the putative class in this action.

15 **SECOND COUNT**

16 15. CEA repeats, realleges and incorporates by reference herein each and every  
17 allegation contained in the foregoing Paragraphs all as if set forth fully herein.

18 16. CEA is entitled to statutory indemnity and contribution from FOF pursuant  
19 to RCWA 4.22.040 and/or Tex. Civ. Prac. & Rem. Code Ann. § 33.015.

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CROSS CLAIM - Page 9

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AFFIRMATIVE DEFENSES**

1 **THIRD COUNT**

2 17. CEA repeats, realleges and incorporates by reference herein each and every  
3 allegation contained in the foregoing Paragraphs all as if set forth fully herein.

4 18. Should CEA incur any liability as a result of the claims in this action, the  
5 law implies, by virtue of the nature of the relationship between CEA and FOF, a  
6 requirement that FOF discharge any such liability to CEA.

7 **FOURTH COUNT**

8 19. CEA repeats, realleges and incorporates by reference herein each and every  
9 allegation contained in the foregoing Paragraphs all as if set forth fully herein.

10 20. FOF is liable to CEA under a common law duty of indemnity in the event it  
11 causes any damages to CEA.

12 21. In the event that CEA is determined to be required to discharge any  
13 obligation that FOF could or might owe to the Plaintiff or the putative class, then Calais  
14 entitled to common law indemnity.

15 **WHEREFORE, CEA respectfully request that this Court enter judgment in its**  
16 **favor against FOF and in the alternative:**

17 A. Directing that FOF fully indemnify and hold CEA harmless from and  
18 against any judgments or damages awarded in favor of Plaintiff and the putative class  
19 against CEA in this action under any equitable or legal theory.

20 **CROSS CLAIM— Page 10**

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1 B. Directing that FOF make contribution to CEA from and against any  
2 judgments or damages to which Plaintiff and the putative class may be entitled to from  
3 CEA in this action.

4 C. Further awarding CEA its attorneys' fees and costs expended in defense of  
5 this action and in prosecution of its cross claims, as well as any other and further relief as  
6 the Court deems just and proper in this matter.

7  
8 **DEMAND FOR TRIAL BY JURY**

9 CEA hereby demands trial by jury on the issues raised herein.

10 Dated: August 17, 2011

11 Respectfully submitted,

12 **CORR CRONIN MICHELSON**  
13 **BAUMGARDNER & PREECE LLP**

14  
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CROSS CLAIM - Page 11

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