

HONORABLE RONALD B. LEIGHTON

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA**

<p>CAROLYN ANDERSON,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>DOMINO'S PIZZA, INC., DOMINO'S PIZZA, LLC, FOUR OUR FAMILIES, INC. and CALL-EM-ALL, LLC,</p> <p style="text-align: center;">Defendants.</p>

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.

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ANSWER TO AMENDED COMPLAINT – Page 1**
Case No. 11-902-RBL

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1 1.2 CEA admits the allegations contained in the first sentence of Paragraph 1.2
2 of the Amended Complaint. With respect to the second sentence of Paragraph 1.2 of the
3 Amended Complaint, CEA respectfully refers the Court to the referenced website for an
4 accurate recitation of the contents thereof.

5
6 1.3 CEA lacks knowledge and information to admit or deny the allegations
7 contained in Paragraph 1.3 of the Amended Complaint and thus denies same, putting
8 Plaintiff to her burden of proof for each and every allegation contained therein.

9 1.4 CEA lacks knowledge and information to admit or deny the allegations
10 contained in Paragraph 1.4 of the Amended Complaint and thus denies same, putting
11 Plaintiff to her burden of proof for each and every allegation contained therein.

12 1.5 The allegations contained in Paragraph 1.5 of the Amended Complaint call
13 for a legal conclusion to which no response is required. To the extent a response is
14 required, CEA denies the allegations contained in Paragraph 1.5 of the Amended
15 Complaint.

16 17 **II. FACTS**

18 2.1 CEA denies the allegations contained in Paragraph 2.1 of the Amended
19 Complaint.

20 2.2 CEA lacks knowledge and information to admit or deny the allegations
21 contained in Paragraph 2.2 of the Amended Complaint and thus denies same, putting
22 Plaintiff to her burden of proof for each and every allegation contained therein.
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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

7 3.7 CEA denies the allegations contained in the first sentence of Paragraph 3.7
8 of the Amended Complaint. The allegations contained in the second sentence of Paragraph
9 3.7 of the Amended Complaint call for a legal conclusion to which no response is required.
10 To the extent a response is required to the second sentence of Paragraph 3.7 of the
11 Amended Complaint, CEA denies same.
12

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

14 3.8 CEA denies it used an automated dialing and announcement device to send a
15 pre-recorded message to the telephones of persons in Washington.
16

17 3.9 The allegations contained in Paragraph 3.9 of the Amended Complaint call
18 for a legal conclusion to which no response is required. To the extent a response is
19 required, CEA denies the allegations contained in Paragraph 3.9 of the Amended
20 Complaint.
21

22 **IV. CLASS ACTION ALLEGATIONS**

23 4.1 CEA realleges its responses to the foregoing paragraphs as if fully stated
24 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

10 4. RCW 80.36.400 is preempted by the Telephone Consumer Protection Act,
11 47 U.S.C. § 227.

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

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

16 7. Plaintiff lacks standing to bring her claims.

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

18 9. Plaintiff's claims against CEA are barred because at all times, CEA acted in
19 good faith, consistent with any applicable standard of care and /or lacked any duty to
20 Plaintiff.
21

22 10. Plaintiff's allegations lack sufficient particularity and/or detail, and
23 accordingly CEA seeks a more definite statement of her claims.
24

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 **PRAYER FOR RELIEF**

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

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

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

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

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

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

22 Accordingly, CEA hereby asserts the following cross claims against FOF:
23
24

1 **ALLEGATIONS COMMON TO ALL CROSS CLAIMS**

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

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

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

10 4. The Amended Complaint was the first pleading that named CEA as a
11 defendant.

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

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

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

1 **SECOND COUNT**

2 15. 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 16. CEA is entitled to statutory indemnity and contribution from FOF pursuant
5 to RCWA 4.22.040 and/or Tex. Civ. Prac. & Rem. Code Ann. § 33.015.
6

7 **THIRD COUNT**

8 17. 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 18. Should CEA incur any liability as a result of the claims in this action, the
11 law implies, by virtue of the nature of the relationship between CEA and FOF, a
12 requirement that FOF discharge any such liability to CEA.
13

14 **FOURTH COUNT**

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

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

19 21. In the event that CEA is determined to be required to discharge any
20 obligation that FOF could or might owe to the Plaintiff or the putative class, then Calais
21 entitled to common law indemnity.
22

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

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**OLSHAN GRUNDMAN FROME
ROSENZWEIG & WOLOSKY LLP**

/s/ Scott Shaffer

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ATTORNEYS FOR
DEFENDANT CALL-EM-ALL, LLC

1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies as follows:

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

5 I hereby certify that on this date, I electronically filed the attached foregoing with
6 the Clerk of the Court using the CM/ECF system, which will send notification of such
7 filing to the following persons:
8

9 Kim Williams
10 Rob Williamson
11 Williamson & Williams
12 17253 Agate St. NE
13 Bainbridge Island, WA 98110
14 *Attorneys for Plaintiffs*

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13 Nelson C. Fraley II
14 Faubion, Reeder, Fraley & Cook, P.S.
15 5920 – 100th St. SW #25
16 Lakewood, WA 98499
17 *Attorneys for Defendant Four Our Families, Inc.*

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

20 DATED: September 21, 2011 at Seattle, Washington.

21 /s/ Heidi M. Powell

22 Heidi M. Powell