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Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

CAROLYN ANDERSON,)	
)	
Plaintiff,)	CIVIL ACTION NO. C11-902-RBL
)	
vs.)	DEFENDANTS DOMINO'S PIZZA,
)	INC. AND DOMINO'S PIZZA, LLC
DOMINO'S PIZZA, INC., DOMINO'S)	MOTION FOR SUMMARY JUDGMENT
PIZZA, LLC, FOUR OUR FAMILIES,)	
INC., and CALL-EM-ALL, LLC,)	HEARING DATE: December 30, 2011
)	
Defendants.)	WITH ORAL ARGUMENT
)	

I. INTRODUCTION

COMES NOW Defendants Domino's Pizza, Inc. and Domino's Pizza LLC (collectively, 'Domino's') and moves for summary judgment dismissal of plaintiff Carolyn Anderson's ('Anderson') claims. Anderson seeks an unspecified amount of statutory damages for the defendants' purported violations of the U.S.C. 227 (b)(1)(B) ('TCPA') and RCW 80.36.400. The TCPA and local statute makes it unlawful to make certain kinds of calls using automated telephone equipment or a prerecorded voice. In this case plaintiff alleges to have received two pre-recorded messages delivered by an automatic dialing and announcing device. The calls were not placed by Domino's, but by local Washington Domino's Pizza stores, which are

1 independently owned and operated by a Domino's Pizza franchisee, Four Our Families, Inc.
2 ("FOF"). Plaintiff attempts to hold Domino's liable for the messages plaintiff asserts were
3 transmitted at the direction of FOF. Liability can't be established on Domino's.

4 First, and most simply, there is no evidence that Domino's was involved in any of the
5 phone calls giving rise to plaintiff's claims. There is no evidence that Domino's knew about,
6 approved, endorsed, induced, directed, controlled, engaged in, paid for, or played any part in the
7 illegal advertising alleged by Anderson. All the evidence shows the alleged illegal advertising
8 was conducted solely by FOF, an independent franchisee, and that the franchisee's decisions and
9 actions were entirely its own. Furthermore, the evidence shows that the franchisee's decision to
10 engage in this type of marketing was made without input from or the approval of Domino's.
11

12 In addition, Domino's is not liable for the franchisee's actions because it does not
13 exercise control over the day to day operations of the franchisee's stores. Pursuant to the terms
14 of the applicable franchise agreements, the franchisee is an independent contractor who was
15 simply granted a license to use the Domino's trade names and service marks and to operate under
16 the Domino's franchise system. Domino's exerts no authority over the franchisee's day to day
17 business affairs and, more importantly, did not exercise control over the franchisee's local
18 marketing efforts, including, but not limited to, the franchisee's decision to engage Call-Em-All
19 to send marketing messages to its local customers. Accordingly, Domino's should be dismissed
20 since it was not involved in any of the activities alleged as improper by Anderson.
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22

23 I. FACTS

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1 Domino's operates a nationwide pizza delivery company based out of Ann Arbor,
2 Michigan. As part of its business, Domino's grants franchises to operate retail pizza stores in
3 various states including Washington.

4 Michael Brown formed Four Our Families, Inc. ("FOF") in 1994 to purchase and manage
5 four Domino's franchises. See, Exhibit 1 to Godwin Dec.: Portions of Michael Brown Dep. 5:
6 12-21. Mr. Brown is the President of FOF. See, Declaration of Michael Brown. FOF operates
7 entirely out of Pierce County, Washington. See, Exhibit 1 to Godwin Dec.: Portions of Michael
8 Brown Dep. 6: 20-22. By 2009, the time relevant to this action, FOF operated six franchises.
9 See, Exhibit 1 to Godwin Dec.: Portions of Michael Brown Dep. 77: 3-9.

11 **The Domino's Pizza Standard Franchise Agreement**

12 FOF is an entity formed by Mr. Brown. Mr. Brown personally and by and through FOF
13 entered into multiple Standard Franchise Agreements with Domino's. Under the Franchise
14 Agreements FOF acquired the right to operate Domino's Pizza franchise stores. At all times
15 relevant to this lawsuit, those stores were owned, operated and maintained by Mr. Brown and/or
16 his employees. The Standard Franchise Agreement disavows the existence of any agency
17 relationship and clearly states that FOF was an independent contractor:

19 The parties to this Agreement are **independent contractors** and no
20 training, assistance or supervision which we may give or offer to
21 you [Franchisee/Four Our Families, Inc.] shall be deemed to
negate such independence or create a legal duty on our
[Franchisor/Domino's] part.

22 You [Franchisee/Four Our Families, Inc.] acknowledge and agree
23 that **you do not have the authority to act for or on behalf of us**
[Franchisor/Domino's] or to contractually bind us to any
24 agreement. No party to this Agreement shall have any authority to
assume any liability for the acts of the other."

1 See, Exhibit 2 to Godwin Declaration: Standard Franchise
2 Agreement § 22.8 page 30 (emphasis added).

3 It is clear from multiple provisions in the Standard Franchise Agreement that FOF
4 retained control over its local advertising campaigns. The language from multiple sections of the
5 Standard Franchise Agreement is clear, franchisee FOF, is responsible for local advertising.

6 Domino's franchisees are responsible for local advertising even before they open their
7 store.

8 If you (or the Controlling Person if you are an Approved Entity)
9 are opening your (or his or her) first Domino's Pizza Store, you
10 must submit to us proof no later than ninety (90) days after
opening of the Store that you have spent at least Three Thousand
Dollars (\$3,000.00) on grand opening **advertising and promotion**.

11 See, Exhibit 2 to Godwin Declaration: Standard Franchise
12 Agreement § 5 page 3 (emphasis added).

13 The Standard Franchise Agreement makes it clear that even after a store is up and
14 running, while Domino's will provide the franchisee with operating assistance from time to time,
15 such assistance does not include "marketing services required for the operation of the Store."
16 See, Exhibit 2 to Godwin Declaration: Standard Franchise Agreement § 11.1(b) page 9. The
17 Standard Franchise Agreement leaves "marketing services" to the franchisee FOF.
18

19 Further, while the Standard Franchise Agreement allows Domino's to review television
20 and radio advertising, Domino's has no control over a franchisee's telephone advertising
21 activities, such as the ones FOF engaged in here.
22

23 All advertising and promotion by you must be completely factual
24 and shall conform to the highest standards of ethical advertising
25 and be consistent with the image of a Domino's Pizza Store. All
advertising and promotion to be conducted by you on radio or
television must be submitted to us for our prior written approval or

1 in accordance with procedures we may from time to time
2 prescribe.

3 See, Exhibit 2 to Godwin Declaration: Standard Franchise
4 Agreement § 13.3 page 11.

5 Finally, the Standard Franchise Agreement placed responsibility for “compliance with
6 laws” on independent contractor, franchisee FOF, which was required to “operate the Store in
7 full compliance with all applicable laws, ordinances and regulations....” See, Exhibit 2 to
8 Godwin Declaration: Standard Franchise Agreement § 15.2 page 14.

9 **Michael Brown Testimony**

10 FOF’s President, Michael Brown’s testimony was consistent with the language of the
11 Standard Franchise Agreement and further establishes that Domino’s had no knowledge of,
12 control over, or participation whatsoever in the advertising that gives rise to this action. Mr.
13 Brown testified that as part of its franchising activities, Domino’s coordinates national
14 advertising campaigns, particularly television, radio and emailing. See, Exhibit 1 to Godwin
15 Dec.: Portions of Michael Brown Dep. 20: 8-9 & 20-22. Domino’s national television, radio and
16 email advertising campaign is not at issue in this suit.

17
18 Mr. Brown testified that Domino’s plays little role in its franchisee’s local advertising
19 campaigns. In this case, Domino’s involvement in local advertising was limited to negotiating a
20 deal so that franchisees, such as FOF, could, at the franchisee’s sole option, direct mail coupons
21 to potential customers. See, Exhibit 1 to Godwin Dec.: Portions of Michael Brown Dep. 19:25 &
22 20: 8-17. Domino’s also provided advice to FOF regarding local advertising. Domino’s advice
23 related to local advertising is limited to suggestions. See, Exhibit 1 to Godwin Dec.: Portions of
24 Michael Brown Dep. 18: 25- 19: 6. For example, Domino’s suggested putting coupons on pizza
25

1 boxes, having menus in carry out orders, having drivers hand out menus to potential customers
2 and mailings to existing customers. Dep. 19: 25-20: 1-6. Franchisees are free to take the advice
3 from Domino's or completely disregard Domino's advice and formulate their own local
4 advertising campaigns. See, Declaration of Michael Brown. Domino's never advised FOF to
5 make the calls at issue in this case. See, Exhibit 1 to Godwin Dec.: Portions of Michael Brown
6 Dep. 19: 20-23 & Declaration of Michael Brown. There is however testimony that Domino's
7 advised franchisees to check local, state and federal laws prior to making any auto-dial calls.¹
8 See, Exhibit 1 to Godwin Dec.: Portions of Michael Brown Dep. 13: 18-21. There is no
9 evidence that Domino's directed or controlled any local advertising, or specifically, the
10 telephone calls pertinent to this case.
11

12 Franchisee Convention

13 In May 2009, Mr. Brown attended a franchisee convention on behalf of FOF in Las
14 Vegas. See, Exhibit 1 to Godwin Dec.: Portions of Michael Brown Dep. 29: 2-3. Franchisees
15 from approximately 60 countries and from all across the United States were in attendance at the
16 convention. The convention was organized by Domino's Pizza LLC. See, Exhibit 3 to Godwin
17 Dec.
18

19 In association with the convention, an Expo Hall was open for franchisees to visit, with
20 almost 100 different vendors present to advertise products of potential interest to franchisees.
21 Franchisees were not required to visit the Expo Hall while attending the convention. See,
22 Exhibit 3 to Godwin Dec. These vendors in attendance at the convention were similar to those
23 that attend continuing legal education seminars. Mr. Brown does not know if the vendors in the
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1 Expo Hall were selected by either of the Domino's defendants or the independent franchisee
2 group.² Mr. Brown does not know whether or not Domino's selected, recommended or endorsed
3 the vendors.. See, Declaration of Michael Brown & See, Exhibit 1 to Godwin Dec.: Portions of
4 Michael Brown Dep. 43: 3-13.

5
6 Mr. Brown noticed a vendor booth for a company named "Call-Em-All." Call-Em-All
7 makes automated telephone calls ("auto-dial calls") with recorded advertising messages. Mr.
8 Brown discussed the services provided by Call-Em-All with the representative of Call-Em-All.
9 See, Exhibit 1 to Godwin Dec.: Portions of Michael Brown Dep. 31: 1-7 & 22-25. Call-Em-All
10 did not indicate that their services were approved by Domino's. See, Exhibit 1 to Godwin Dec.:
11 Portions of Michael Brown Dep. 43: 3-13. Mr. Brown obtained a flyer from Call-Em-All. See,
12 Exhibit 1 to Godwin Dec.: Portions of Michael Brown Dep. 31: 22-25. The fact that Call-Em-All
13 was at the rally did not influence Mr. Brown's independent decision to use Call-Em-All's
14 services. See, Declaration of Michael Brown.

15
16 While Anderson alleges that Call-Em-All's automatic dialing services were illegal in
17 Washington, there were at least five states where such telephone advertising was completely
18 legal in 2009. Delaware, Maryland, Michigan, Ohio and Vermont apparently had no restrictions
19 on automated dial calls at the time the calls at issue in this case were made. See, Exhibit 4 to
20 Godwin Declaration: <http://www.winningcalls.com/statelaws.html> for a map providing
21 information on the status of auto dial calling legality as of July 2009.
22
23

24 ¹ This advice seems to have come in a newsletter sent to franchisees in all 50 states, including states in which auto-
25 dial advertising is completely unregulated.

26 ² Vendors were generally invited based on their attendance at past Expos, status as a current vendor of Domino's
Pizza LLC or based on a request from a franchisee. Invited vendors completed an application and paid a fee
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1 Further, automated dial calls for commercial purposes were restricted but not forbidden
2 in numerous states in 2009. For example, Georgia allows such calling but requires consent from
3 the recipient, limits the hours calls can be made and makes other restrictions. See, Exhibit 5 to
4 Godwin Declaration: Title 46, Chapter 5, Section 23 (46-5-23). In Illinois, auto-dialing is
5 allowed but hours are limited, methods are limited, caller identification cannot be blocked and
6 other restrictions are placed. See, Exhibit 6 to Godwin Declaration: 815 ILCS 305. In
7 Kentucky, auto-dialing is allowed but the caller must obtain a permit from the Attorney General
8 and be bonded. See, Exhibit 7 to Godwin Declaration: KRS 367.469. Nebraska allows auto dial
9 calls but requires registration, identification of the caller, limits the hours and makes other
10 restrictions. See, Exhibit 8 to Godwin Declaration: NRS 86-256. In New Mexico, auto dialing is
11 allowed subject to existing business relationship, within limited hours and subject to other
12 restrictions. See, Exhibit 9 to Godwin Declaration: NMC Section 57-12-22. What is clear from
13 this sampling of state laws related to auto-dialing as of 2009 is that auto-dialing in some form
14 was legal in numerous states.
15

16
17 After the convention, and prior to making the calls using Call-Em-All, FOF engaged an
18 attorney to inquire into the legality of such calls. Michael Brown's daughter, Nicole Brown,
19 determined that the calls were legal under the Washington Administrative Code. Only after
20 determining that the calls were legal, did FOF engage Call-Em-All. See, Exhibit 11 to Godwin
21 Dec.: Letter from N. Brown.
22

23 FOF independently signed up online for Call-Em-All's services. See, Declaration of
24 Michael Brown. The calls were not placed for or on behalf of either Domino's defendant. See,
25

1 Exhibit 12 to Godwin Dec.: Portions of Discovery to Call-Em-All. By signing up, Mike Brown
2 of FOF agreed that it “is the sole responsibility of the User [FOF] to abide by any laws defined
3 by the State or Federal government....” See, Exhibit 13 to Godwin Dec.: Terms of Use for Call-
4 Em-All services. Indeed, prior to making the calls, FOF consulted with an attorney to verify that
5 such calls were legal. See, Ex 11 to Godwin Dec.: Letter from attorney N. Brown.

7 Call-Em-All allowed FOF to download its existing or prior customers’ phone numbers
8 and have automatic calls placed to each with recorded promotions for his stores. See, Exhibit 1
9 to Godwin Dec.: Portions of Michael Brown Dep. 32: 14-15 & 36: 17-21. On his own, without
10 direction from or knowledge of Domino’s, Mr. Brown went to the Call-Em-All website,
11 downloaded the phone numbers, typed in the script and paid his fee. Call-Em-All then made the
12 calls between June and August of 2009. See, Exhibit 1 to Godwin Dec.: Portions of Michael
13 Brown Dep. 34: 14-24 & Declaration of Michael Brown. Domino’s did not participate in
14 making any of the calls. All of the calls were made to FOF’s existing customer base in Pierce
15 County. See, Exhibit 1 to Godwin Dec.: Portions of Michael Brown Dep. 72: 1-3. Mr. Brown
16 stopped using Call-Em-All when Federal laws changed to require express consent from each
17 person to be called.
18

19
20 **Domino’s Involvement**

21 The testimony establishes that Domino’s was not involved in any of the calls that form
22 the basis of Anderson’s Complaint.

23 Domino’s played no role in FOF’s decision to use Call-Em-All. See, Declaration of
24 Michael Brown. Domino’s did not place, authorize or ratify any auto-dial calls. See, Exhibit 10
25

1 to Godwin Dec.: Portions of Domino's Discovery Responses. Michael Brown never spoke with
2 anyone at Domino's about his arrangement with Call-Em-All to use automated dialing calls.
3 See, Exhibit 1 to Godwin Dec.: Portions of Michael Brown Dep. 70: 4-16 & Declaration of
4 Michael Brown. Mr. Brown decided to use automated dialing as a marketing technique on his
5 own. See, Declaration of Michael Brown. Domino's has never suggested Mr. Brown call
6 potential customers as part of his local advertising campaign. See, Exhibit 1 to Godwin Dec.:
7 Portions of Michael Brown Dep. 19: 21-23. Michael Brown never spoke with anyone at
8 Domino's about whether the automated calls were legal. See, Exhibit 1 to Godwin Dec.:
9 Portions of Michael Brown Dep. 16: 3-5 & Declaration of Michael Brown. Domino's was not
10 involved in contracting with Call-Em-All. Mr. Brown never informed anyone at Domino's that
11 he intended to use or was using the services of Call-Em-All. See, Exhibit 1 to Godwin Dec.:
12 Portions of Michael Brown Dep. 46: 1-4. Mr. Brown never asked anyone from Domino's if
13 using Call-Em-All was an acceptable form of advertising. Mr. Brown does not know whether or
14 not the vendors at the convention, including Call-Em-All, had worked with Domino's in the past.
15 When opting to work with Call-Em-All, Mr. Brown was not relying on any recommendation
16 from Domino's. Mr. Brown's decision to use Call-Em-All was independent of any involvement
17 or advice from Domino's. See, Declaration of Michael Brown.

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21 There is no evidence that Domino's knew of, approved of or participated in the calls.

22 The Calls

23 Anderson alleges she received two calls to her residential phone line on August 31, 2009.
24 See, Complaint. The calls consisted of a pre-recorded message delivered by an automatic dialing
25 device. Anderson alleges, without any evidence to support the claim, that the calls were part of
26 an illegal national telemarketing campaign by Domino's. She has no basis for this belief.

1 Q: What information did you have that Domino's Pizza, LLC was conducting a
2 national telemarketing campaign?

3 A: I did not know that they were doing anything nationally.

4 Q: And then the same question relative to Domino's Pizza, Incorporated.

5 A: I was not aware they were doing anything - - I was not aware of any programs
6 they were involved in.

7 Q: So this was not your information and this was not your belief, correct? Because
8 as you stated, you had - - you did not know any of these parties was conducting a
9 national campaign of any sort?

10 A: No. I thought it was a local promotions of some type coming through to me.
11 See, Exhibit 14 to Godwin Dec.: Portions of Carolyn Anderson Dep. 43: 1-14.

12 Ms. Anderson knew within seconds of receiving the calls that they were from the local Domino's
13 franchise and not Domino's corporate.

14 Q: And when you hung up the phone after the second robocall was made, did you tell
15 them [husband and son] what had transpired?

16 A: Yes.

17 Q: And what did you tell them?

18 A: I said, This is one of those robotic calls and they're trying to sell you a bunch of
19 stuff that is on sale down there at the Parkland Domino's.

20 See, Exhibit 14 to Godwin Dec.: Portions of Carolyn Anderson Dep. 67: 1-8.

21 To this day, Ms. Anderson has no evidence that any entity besides FOF was involved in
22 the calls that form the basis of her suit.

23 Q: And at this point, do you have any knowledge on your own that Domino's
24 corporate from Michigan was involved in placing these calls?

25 A: Do I have any information?

26 Q: Do you have any, yes.

A: No, I do not.

See, Exhibit 14 to Godwin Dec.: Portions of Carolyn Anderson Dep. 72: 3-8.

1 Anderson brought this lawsuit alleging violation of 47 U.S.C. 227 and violation of RCW
2 80.36.400. Anderson is seeking class action status. In her Complaint Anderson collectively
3 refers to all the defendants as “Domino’s” and does not specify which entity was the one
4 responsible for making the allegedly improper phone calls.
5

6 II. ISSUES

- 7 1. Whether Domino’s Should be Liable for the Telephone Calls Placed by an
8 Independent Franchisee Acting Without Domino’s Knowledge and Beyond
9 Domino’s Control Without Domino’s Approval, Knowledge or Participation?
- 10 2. Whether There is Any Evidence that Domino’s Induced or Assented to FOF’s
11 Auto-Dial Advertising?

12 III. EVIDENCE RELIED UPON

- 13 1. This Motion;
- 14 2. Declaration of Michael Brown;
- 15 3. Declaration of Brant Godwin with Exhibits.

16 IV. ARGUMENT

- 17 1. Summary Judgment Standard

18 Summary judgment is properly granted “if the pleadings, depositions, answers to
19 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
20 genuine issues as to any material fact and that the moving party is entitled to judgment as a
21 matter of law.” CR 56 (c).

- 22 2. Domino’s is Not Liable Under 47 U.S.C. 227(b)(1)(B) or RCW 80.36.400
23 Because it did not Make the Subject Phone Calls

24 Despite having sent and received answers to two sets of written discovery to Domino’s, one set
25 of written discovery to FOF and having taking FOF’s President, Michael Brown’s deposition,
26

1 plaintiff has produced no evidence to date, and will not be able to produce any credible evidence,
2 that Domino's had any involvement in the allegedly improper phone calls. To the contrary, the
3 evidence demonstrates that Domino's was not the entity that made any of the subject phone calls.
4 The evidence clearly shows that FOF retained a company named Call-Em-All to make the
5 subject phone calls. Domino's had no contractual relationship with Call-Em-All. There is no
6 evidence that Domino's ever made any of the offending phone calls or instructed either Call-Em-
7 All or FOF to do so. Simply put, Domino's was not involved in these calls. It is undisputed that
8 Domino's is merely the franchisor of the Domino's Pizza franchise system and that the calls in
9 question were made at the request and on behalf of a Domino's franchisee, FOF, that conducted
10 this local marketing campaign independently and without any participation by Domino's.
11 Domino's has not engaged in any activity that gives rise to liability under the statutes
12 cited by plaintiff in the Complaint. Accordingly, it is appropriate to enter summary judgment in
13 favor of Domino's with respect to plaintiff's claims.

16 3. Franchisor Domino's is Not Liable for Franchisee Four Our Family, Inc.'s
17 Independent Actions Since it Did Not Have a Right to Control the Physical
18 Details of Four Our Family, Inc.'s Advertising.

19 The mere existence of a franchisor-franchisee relationship is not enough, by itself, to
20 either make the franchisor vicariously liable for the conduct of the franchisee or create a duty on
21 the part of the franchisor toward the franchisee's customers. Therefore, as a general matter,
22 Domino's cannot be responsible for any violations of law that arose out of its franchisee's
23 activities. Washington law is well settled: "[a]bsent power to control day-to-day operations,
24 [a]franchisor is not liable to employee of franchisee." *D.L.S. v. Maybin*, 130 Wash.App. 94, 98,
25 121 P.3d 1210 (2005); citing, *Folsom v. Burger King*, 135 Wash.2d 658, 958 P.2d 301 (1998).

1 The Court's reasoning was explained in the *Folsom* case. *Folsom* involved two Burger King
2 employees murdered during a robbery. The estates sued the franchisor, Burger King, alleging
3 that Burger King retained control over the franchisee's operations and security procedures, and
4 was thus responsible in part for the robbery/murders. *Id.* at 671.

5
6 The Court recognized that the relationship between franchisor and franchisee is governed
7 by the franchise agreement. The franchise agreement in *Folsom* contained language stating that
8 the franchisee was an independent contractor. *Id.* 671. The language of the franchise agreement
9 was important in determining the relationship and liabilities of the parties. The *Folsom* Court
10 likened the relationship between franchisor and franchisee to that between an employer and
11 independent contractor. *Id.* at 672.

12
13 The Court in *Folsom* went on to note that even though Burger King's Franchise
14 Agreement detailed certain standards of performance, contained guidelines for performance and
15 allowed for termination of the franchise if these standards were not met; this was not enough
16 control sufficient to create liability on the part of the franchisor. Requiring a franchisee to
17 adhere to a "system" was not sufficient control to create liability. *Id.* at 672. Franchisor liability
18 only exists where the franchisor retains power to control the day-to-day operations of the
19 franchisee. In cases cited by the *Folsom* Court, where the franchisee "owns the business
20 equipment, operates the business, holds the operating licenses and permits, determines the
21 wages, provides for the basic training and insurance for the franchisee's employees, and hires,
22 fires, supervises and disciplines the employees," there is no franchisor liability. *Id.* at 672. The
23 *Folsom* Court went on to cite authority from multiple other jurisdictions making similar
24 holdings.
25

1 The *Folsom* court also recognized that other courts have followed a similar approach, citing two
2 cases that extend the analysis to third-party claims. *Folsom*, 135 Wash. 2d at 672-73 (citing *Little*
3 *v. Howard Johnson Co.*, 183 Mich. App. 675, 682, 455 N.W.2d 390, 394 (1990); *Hayman v.*
4 *Ramada Inn, Inc.*, 86 N.C. App. 274, 357 S.E. 2d 394 (1987)). In *Little*, the court affirmed the
5 dismissal of a guest's slip and fall claim against the franchisor, when the franchise agreement
6 created no direct liability for the franchisor because the franchisor didn't occupy or control the
7 premises, and created no vicarious liability for the franchisor because the franchisor had no right
8 to control the day to day operations. *Little*, 455 N.W.2d. at 392-94. The court determined that no
9 such control existed even though the franchise agreement terms insured uniformity and
10 standardization of products and services; regulated building, construction, furnishings,
11 equipment and advertising; and generally required the franchisee to maintain a clean and orderly
12 condition. *Id.*, at 394. Moreover, the right to conduct inspections also did not establish "control"
13 since the only result of deviation from franchisor standards was termination of the franchise
14 agreement. *Id.*

17 In *Hayman*, the court also affirmed dismissal of a guest's negligent security claim against
18 the franchisor because the franchisor did not maintain control of the day to day operations
19 sufficient to establish vicarious liability. *Hayman*, 357 S.E. 2d at 397. The court concluded that
20 franchisor could not be held liable for the alleged negligence of its licensee. *Id.* The present case
21 is quite similar to the *Maybin* and *Folsom* cases. The Standard Franchise Agreement between
22 Domino's and FOF governs the relationship and liabilities between these parties. The Standard
23 Franchise Agreement contains language stating that each party is an independent contractor with
24 no authority to bind each other. See, Exhibit 1 to Godwin Declaration. The Standard Franchise
25

1 Agreement here makes it clear that franchisee FOF directs and controls its own local advertising
2 including the calls at issue in this case. See, Declaration of Michael Brown. Like the *Maybin*
3 and *Folsom* cases, the general standards and obligations that FOF is obligated to comply with as
4 part of the Standard Franchise Agreement here does not give Domino's sufficient day to day
5 control over FOF's operations so as to render Domino's liable for FOF's acts or omissions.
6 Further, FOF's President has testified that Domino's did not control or direct FOF's local
7 advertising. It is well settled that a franchisor's mere retention of the right to enforce system
8 standards that ensure uniformity in the services and products offered or terminate the agreement
9 for failure to comply with those standards is insufficient to impose liability on the franchisor.
10

11 Like the *Maybin* and *Folsom* cases, the undisputed facts are:

- 12 - Domino's did not place, pay for, provide the equipment necessary to make the calls or
13 have any involvement whatsoever in the calls;
- 14 - Domino's generally left local marketing to FOF;
- 15 - Domino's did not, nor did it have the right to, interview, hire, train, pay, schedule for
16 work, discipline, terminate any individual who worked for FOF;
- 17 - FOF was solely responsible for training its employees, owned its own business
18 equipment and possessed its own business permits and tax identification number;
- 19 - Michael Brown, on his own with no input or direction from Domino's opted to
20 advertise via auto dial calling;
- 21 - Domino's is a party to no contract with Call-Em-All, has never made any payment to
22 Call-Em-All and played no role in FOF contracting with Call-Em-All;
- 23 - Domino's did not require franchisees, such as FOF to engage in telemarketing
24 activities and played no role whatsoever in the auto dial advertising conducted by
25 FOF;
- 26

- Plaintiff asserts nowhere that the calls at issue were made pursuant to a national advertising campaign conducted by Domino's. To the contrary, plaintiff alleges that the two calls came from a local Domino's Pizza store; and
- Domino's did not control or direct FOF's local advertising

Domino's cannot be liable, under Washington law, for the actions of its independent contractor over which Domino's did not retain the right or ability to control.

4. Beyond Plaintiff's Unsupported Assertions, There is No Evidence that FOF was Induced to or Used Call-Em-All Based in Reliance Upon Any Action of Domino's.

It is anticipated that Anderson will claim FOF was induced by Domino's to use Call-Em-All or relied upon the fact that Call-Em-All was at the convention in an attempt to create liability for Domino's and avoid summary judgment. This argument is without merit.

First, there is no evidence to support this assertion by Anderson. The undisputed facts actually establish the opposite. In a sworn Declaration, Mr. Brown has stated that:

- Domino's did not control or direct his local advertising methods;
- Domino's never recommended or directed him to use automatic dial calls;
- The decision to use Call-Em-All was entirely his own;
- He does not know whether the vendors at the convention, including Call-Em-All were endorsed by Domino's;
- He did not rely on the fact that the vendor was at the convention in making the decision to use Call-Em-All;
- He does not know whether the vendors at the convention, including Call-Em-All were selected and approved of by Domino's; and,
- He does not even know if Domino's was aware of his decision to use Call-Em-All.

In his sworn deposition testimony, Mr. Brown testified that:

- 1 - He does not know whether or not Domino's approved of the vendors at the
2 convention; See, Exhibit 1 to Godwin Dec.: Portions of Michael Brown Dep. 43:
3 3-13.
- 4 - Mr. Brown never spoke with anyone from Domino's about his decision to use
5 Call-Em-All. See, Exhibit 1 to Godwin Dec.: Portions of Michael Brown Dep.
6 70: 4-16.
- 7 - Domino's has never suggested he use automatic dial calls as part of his local
8 advertising campaign. See, Exhibit 1 to Godwin Dec.: Portions of Michael
9 Brown Dep. 19: 20-23.

10
11 Further, FOF, without assistance from or participation by Domino's, had an attorney
12 determine whether or not the calls were legal prior to engaging Call-Em-All. FOF recognized
13 that it had an obligation to verify the legality of this form of advertising and was not relying on
14 Domino's to approve such calling. See, Exhibit 11 to Godwin Dec.: Letter from N. Brown.

15 Domino's has testified in its sworn Interrogatory Answers that it did not place, authorize,
16 ratify or have any involvement whatsoever in the calls that form the basis of Plaintiff's
17 Complaint. See, Exhibit 10 to Godwin Dec.: Portions of Domino's Discovery Responses.

18
19 In summary, the only person capable of saying whether or not he relied upon the fact that
20 Call-Em-All was at a convention sponsored by Domino's in making his decision to use Call-Em-
21 All's services, has testified both live under oath and in a written sworn statement that he did not.
22 Furthermore, Domino's has testified that it did not endorse the calling. There is a complete lack
23 of proof regarding inducement or reliance to advertise by automatic dialing. Plaintiff's only
24 support for this allegation is her own assertions. "A plaintiff may not defeat summary judgment
25 by relating conclusions, allegations, or speculations." *Grimwood v. Univ. of Puget Sound*, 110

1 Wash.2d 355, 359-60, 753 P.2d 517 (1988). "Responses by an adverse party to a motion for
2 summary judgment must be made on personal knowledge, must set forth facts that would be
3 admissible in evidence, and must show affirmatively that the declarant of such facts is competent
4 to testify to the matters stated therein." *Id.* at 359.

5
6 Further, even if FOF relied upon Domino's in its decision to use Call-Em-All, it would
7 not be enough to create liability for Domino's. As stated above, franchisee FOF is an
8 independent contractor and there is no evidence that Domino's controlled, directed or retained
9 the right to potentially control FOF's advertising methods. Even if Domino's induced or
10 impliedly endorsed such advertising, it would not be enough to create liability for Domino's here
11 where it did not retain the right to control the advertising of FOF.

12
13 Any inducement and/or implied endorsement argument is a red herring and should be
14 disregarded.

15 V. CONCLUSION

16 The decision to make purportedly illegal auto dial calls was made entirely by Michael
17 Brown acting for FOF. Washington law is clear, franchisees are equivalent to independent
18 contractors; Domino's is not liable for the actions of FOF since Domino's did not retain any right
19 to control or direct Mr. Brown's telephone advertising activities. There is also no evidence that
20 FOF relied upon any action of Domino's in deciding to engage in the telephone advertising
21 activities complained of by Plaintiff and even if FOF did rely upon Domino's impliedly
22 endorsing the calls, that would not be enough to create liability given that Domino's did not
23 control or direct FOF's advertising methods. Given the total lack of proof as to any wrong doing
24 on the part of Domino's, it seems likely that the only reason it was named in this lawsuit is due
25

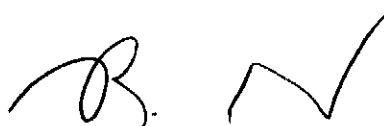
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to its national stature and deep pockets. These are not proper reasons to keep Domino's in the case. Domino's should be dismissed.

For the above stated reasons, Domino's respectfully requests that all of Anderson's claims against Domino's Pizza, Inc. and Domino's, Pizza, LLC be dismissed with prejudice.

DATED: November 18th, 2011.

DUNLAP & SODERLAND, PS



BRANT A. GODWIN, WSBA#34424
Attorneys for Domino's Pizza, Inc.
& Domino's Pizza, LLC.

1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies as follows:

3 I am employed at Dunlap & Soderland, PS, attorneys of record for Defendants Domino's
4 Pizza, Inc. and Domino's Pizza, LLC.

5 On November 28, 2011, I caused a true and correct copy of the foregoing
6 document to be delivered to the following via email:
7

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

DATED at Seattle, Washington this 28 day of November, 2011.



Gail M. Garner