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Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

CAROLYN ANDERSON, Plaintiff, vs. DOMINO'S PIZZA, INC., DOMINO'S PIZZA, LLC, FOUR OUR FAMILIES, INC., and CALL-EM-ALL, LLC, Defendants.	CIVIL ACTION NO. C11-902-RBL DEFENDANTS DOMINO'S PIZZA, INC. AND DOMINO'S PIZZA, LLC RESPONSE TO PLAINTIFF'S 56(d) MOTION **HEARING DATE: December 23, 2011**

I. RELIEF REQUESTED

Plaintiff Carolyn Anderson's ("Anderson") Motion for Rule 56(d) Continuance of Domino's Pizza, Inc. and Domino's Pizza, LLC's (collectively, "Domino's") Motion for Summary Judgment should be denied. Anderson has had ample time to conduct discovery to respond to the motion. A virtually identical motion was filed in State Court on April 22, 2011. That motion was continued to allow the plaintiff time to conduct discovery. Despite knowing of the legal issues for eight months, plaintiff has not diligently pursued discovery.

II. RELEVANT FACTS

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Anderson has omitted or misstated the following facts in her motion for a 56(d) Continuance.

A. Anderson has known of the issues in Domino's motion for over eight months. Anderson has had ample opportunity to request and complete all required discovery.

Anderson filed this action in King County on April 29, 2010. See, Complaint. After allowing almost **one year** for Anderson to conduct any necessary discovery, Domino's filed a motion for summary judgment. The motion raised all of the same issues and was substantially similar to the one now pending. The motion was originally set for May 20, 2011. Anderson's counsel was served on April 22, 2011. See, Ex. 1 to Godwin Dec.: Proof of Service.

At Anderson's request, Domino's continued the motion to July 22, 2011, to allow Anderson:

1. To conduct the depositions of Domino's employees Scott Senne and Amy Phillips;
2. To serve Third Requests for Production on Domino's; and
3. To obtain written and depositions discovery from Call-Em-All.

Anderson asserted that this additional discovery was necessary to respond to Domino's motion. **Anderson represented that she would be able to respond to Domino's motion after conducting the three discovery items noted above**. See, Ex. 2 to Godwin Dec.: email chain from April 25-27.

B. All of the discovery requested by Anderson as necessary to respond to Domino's motion has been completed.

Anderson served Third Discovery on Domino's on April 25, 2011. Domino's answered Anderson's Third Discovery on May 5, 2011. See, Ex. 3 to Godwin Dec.: Certificate of Service

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re: Third Discovery. Anderson raised no substantive objections to Domino's answers. Written discovery answers from Call-Em-All were provided on September 15, 2011. See, Ex. 4 to Godwin Dec.: Certificate of Service re: Call-Em-All Discovery. **All written discovery requested by Anderson as necessary to respond to Domino's motion has been completed.**

The deposition of Scott Senne was taken on October 28, 2011. Anderson took the deposition of Chris Roeser that same day. Anderson declined to take the deposition of Amy Phillips, even though she was available to be deposed on October 28, 2011.[1] At the time of these depositions, Anderson had possessed Domino's written discovery answers for at least five months. Anderson had also deposed Michael Brown the owner of Four Our Families, Inc. and Joseph Devereaux, Domino's Pizza LLC's Director of Franchise Services. Many of the issues sought in Anderson's latest discovery had been disclosed and were open for exploration at this point. Anderson declined to follow up.

Brad Herman, President of Call-Em-All was deposed on December 2, 2011. Other than Call-Em-All appearing at a vendor show in association with Domino's Pizza's May 2009 World Wide Rally, Call-Em-All had no relationship with Domino's. Domino's never retained the services of Call-Em-All. See, Ex. 15 to Godwin Dec.: Portions of Brad Herman deposition. Again, Anderson declined to take the deposition of another Call-Em-All witness who was available and ready to be deposed. **All depositions that Anderson represented were necessary to respond to Domino's motion have been taken or declined by Anderson.**

[1] Amy Phillips functions as a liaison between Domino's Headquarters and various Field Marketing Teams. Chris Roeser is the Manager of Precision Marketing and was identified in Domino's CR 26 Disclosures. These two individuals would likely be designated as Domino's 30(b)(6) representatives, if necessary, related to Anderson's latest 30(b)(6) deposition notice. Anderson's latest discovery requests are in large part due to Anderson's own

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C. Anderson never raised any substantive issue with Domino's discovery answers until the motion for summary judgment was noted for the third time.

Written Discovery Objections

Anderson has sent Domino's three sets of written discovery which Domino's has answered. Anderson never raised any substantive issue with Domino's answers or alleged that the answers were incomplete. **The first substantive objections Anderson raised relating to Domino's discovery answers were not raised until between seven and nineteen months after Domino's provided its answers.** Anderson has never filed a motion to compel discovery against Domino's.

ESI

Contrary to what Anderson asserts in her 56(d) motion, Domino's has not refused to provide ESI. **ESI was simply not requested until December 8, 2011**. See, Ex. 7 to Godwin Dec.: email dated December 8, 2011. Domino's conferred with Anderson on November 14, 2011 to formulate reasonable ESI search parameters. See, Declaration of Brant Godwin. Domino's provided the original information requested by Anderson on November 30, 2011; two days ahead of the agreed deadline. See, Ex. 8 to Godwin Dec.: email dated November 30, 2011. There is no evidence that Domino's has refused to provide ESI.

The ESI requests are late. Three of the witnesses that Anderson is now requesting ESI from, were first disclosed over fourteen months ago during the deposition of franchisee Michael Brown. A majority of the witnesses that Anderson is seeking ESI from were mentioned in depositions over six weeks ago. Anderson has had the names required to make ESI requests for

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decision to not ask certain questions at the Roeser deposition and to not depose Ms. Phillips. The same is true for the deposition of Michael Brown whom Anderson recently noted for a second time.

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months. There has been no explanation as to why this ESI was not requested until December 8, 2011. Anderson should not be allowed to oppose the Domino's motion simply by filing a late request for ESI.

D. Discovery related to class certification is closed, making the majority of discovery requested by Anderson irrelevant.

Contrary to Anderson's assertion, this is not a class action. It has never been certified. The deadline for Anderson to file a motion for class certification under CR 23(b)(3) was November 28, 2011, or 180 days from May 31, 2011. Anderson did not file this motion. It appears there is no intent to pursue class action claims. **Further, discovery related to class certification closed on October 31, 2011**. Anderson's attorney agreed to the October 31, 2011 discovery deadline so that "her Motion for Class Certification may be timely filed." See, Ex. 9 to Godwin Dec.: Joint Status Report. It appears there is no intent to pursue class action claims.

Since this litigation is solely about calls made to Carolyn Anderson, much of the discovery requested by Anderson is irrelevant and actually barred under the deadline in the Joint Status Report. The latest discovery and complaints regarding prior answers are simply an attempt to improperly extend the discovery deadline related to the class certification.

E. Nothing was "concealed" from Anderson.

Anderson has claimed the PULSE system and Opt In Program were concealed and this concealment explains and justifies the fact that discovery was only recently made on these issues. The evidence shows otherwise. PULSE was mentioned in Scott Senne's deposition on October 28, 2011. See, Ex. 10 to Godwin Dec.: Portions of Scott Senne deposition. Further, at his deposition on September 30, 2010, Michael Brown testified that he "downloaded" the numbers from his store and that each of his six stores maintained a database of customer

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numbers. See, Ex. 16 to Godwin Dec.: portions of Michael Brown deposition. Anderson had information that should have led to follow up questions regarding the PULSE system as of this date. Anderson opted not to follow up on this information. The Opt In Program was discussed at length during the Chris Roeser deposition on October 28, 2011. See, Ex. 11 to Godwin Dec.: Portions of Chris Roeser deposition. Again, Anderson has simply not followed up on this information.

F. Anderson's recent flurry of discovery to Domino's is improper and late.

Anderson has submitted two additional sets of discovery to Domino's. Anderson's Fourth Requests for Production were sent on December 8, 2011. They are not due until January 9, 2012. Anderson's Fifth Request for Production was served on December 12, 2011. They are not due until January 11, 2012. **Neither of the most recent discovery requests are due until after Domino's motion is set for hearing.** Both are too late to merit a continuance of the hearing.

Additionally, much of the latest discovery is actually directed at class certification issues. For example, Request for Production Number 27 requests: "all e-mails or letters to RPM." RPM is a Domino's franchisee located in Louisiana. No discovery conducted to date has led to evidence that Domino's Pizza LLC and/or Domino's Pizza, Inc. had any involvement in the calls in question and no discovery to date has even remotely suggested another franchisee, let alone one located in Louisiana, played any role in the calls made to Anderson. This discovery is not possibly related to Ms. Anderson's claims and can only be related to class certification. Anderson has missed the deadlines for class certification discovery and a class certification motion. Anderson should not be allowed to now use class certification discovery as grounds for a 56(d) continuance.

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G. There is no evidence that Domino's played any role in the calls at issue in this case.

Written discovery has been sent to all parties. Thousands of pages of documents have been produced. No document indicates Domino's was involved in these calls. Representatives of all parties have been deposed. Both Call-Em-All and Four Our Families, Inc. have testified that Domino's had no involvement with the calls. See, Exs. 15 & 16: Portions of Brad Herman and Michael Brown depositions. Michael Brown of Four Our Families, Inc. has even testified that Domino's had no knowledge of the calls. See, Brown Declaration.

III. ISSUES

1. Whether Anderson has shown due diligence in pursuing discovery to justify a CR 56(d) continuance when she has known about the legal issues in Domino's motion for over eight months and completed all discovery that she represented was necessary to respond to Domino's motion?
2. Whether Anderson's requested discovery on issues related to class certification justifies a CR 56(d) continuance when such discovery is time barred by the deadline in the Joint Status Report and the time for filing for class action is past?
3. Whether Anderson should be able to delay Domino's motion by conducting late discovery on irrelevant issues she has not pled in her Complaint?
4. Whether Anderson's requested discovery on "right to control" issues is warranted where all evidence shows Domino's did not retain any right to control the calls at issue?

IV. ARGUMENT/AUTHORITY

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1. Anderson has provided no reason to explain the months or years long delay in seeking the discovery now sought.

The Trial Court can deny a motion to continue a summary judgment if: "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence...or (3) the desired evidence will not raise a genuine issue of material fact." *Turner v. Kohler, M.D.*, 54 Wash.App. 688, 693, 775 P.2d 474 (1989).

a. Written Discovery

Anderson raised substantive objections to Domino's written discovery answers for the first time on December 8, 2011. See, Ex. 12 to Godwin Dec.: email dated December 8, 2011. Domino's provided written discovery answers to Anderson between five and nineteen months ago. Anderson raised no other issues with the Domino's answers until Domino's filed its motion for summary judgment for a third time. The delay in raising any objections until now is particularly odd given that the discovery deadline related to the class certification has passed and the deadline for filing class certification has passed. Anderson has provided no reason why she delayed in obtaining the evidence she needs to respond to a summary judgment motion that she has known about for over seven months.

b. ESI Issues

Anderson alleges Domino's never provided ESI discovery. Again, the record shows that Anderson did not request ESI until December 8, 2011. Again, there is no explanation for Anderson's delay in seeking this information. Again, Anderson never made this request despite the passage of the above deadlines related to class certification discovery and class certification. Again these unexplained late requests cannot form a basis for continuing Domino's motion.

c. Pulse Program and Opt In

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Anderson alleges that the Pulse program was concealed. This is simply not true. Pulse was referenced during Scott Senne's deposition on October 31, 2011. Anderson never pursued discovery related to this. Again, there is no explanation for Anderson's failure to follow up on this until now.

Anderson alleges that Domino's concealed an opt in program from her. However, the opt in program was discussed at length in the Chris Roeser deposition on October 28, 2011. For whatever unexplained reason, Anderson opted to not pursue discovery related to the opt in issue until December 8, 2011. Further, the Opt in Program is not relevant and will not raise any question of fact for Anderson's motion. Four Our Families, Inc. has testified that they were not aware of and thus did not use the Opt in Program. See, Ex. 13 to Godwin Dec.: Portions of Four Our Families, Inc. discovery. The Opt in Program might arguably be relevant to class action issues. But the time for class action discovery and certification has passed.

d. RPM/Franchisee Discovery

Anderson alleges that Domino's failed to provide discovery related to other franchisees, including RPM, and robo-calling. Domino's disputes this. First, much of the information sought is subject to a federal protective order. See, Ex. 14 to Godwin Dec.: Protective Order. Further, this discovery is irrelevant to this case where the claims only deal with Carolyn Anderson and there is no issue related to class action. Finally, RPM was mentioned multiple times during the Domino's 30(b)(6) deposition of Joseph Devereaux on April 13, 2011. See, Ex. 17 to Godwin Dec.: Portions of Joseph Devereaux deposition transcript. If Anderson wanted to pursue such discovery, or had any problems with Domino's answers on these issues, the time to raise such concerns was prior to the deadline for class certification discovery and class certification motion.

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Again, Anderson has no explanation for only raising these issues now and not objecting to Domino's answers months ago. Anderson has never filed a motion to compel against Domino's.

All of the discovery sought by Anderson as justification to continue Domino's motion should have been requested long ago. It was not. Anderson has completed all the discovery that she represented she needed to respond to the same motion when the case was in State Court.

2. Much of discovery sought by Anderson is irrelevant since it relates to class certification and is time barred by Anderson's own agreed Order.

Anderson agreed and represented to the Court and counsel that all discovery related to class certification would be complete by October 31, 2011. Anderson agreed to this in part to meet the 180 day federal deadline for filing a motion for class certification under FRCP 23. This filing was due on or about November 28, 2011. No motion for class certification has been filed. Anderson's recent discovery is a veiled attempt to avoid the fact that class action related discovery is closed.

3. The statutes pled by Anderson do not create "on behalf of" liability, making large portions of Anderson's requested discovery to delay Domino's motion irrelevant.

Anderson's action is based solely upon alleged violations of 47 U.S.C. 227(b)(1)(B) and RCW 80.36.400. See, paragraphs 3.1-3.4 of Anderson's Amended Complaint. **Subsection 227(b) pled by Anderson does not permit "on behalf of" liability.** Subsection 227(b) of the TCPA assigns liability only to the person or entity that "initiates" a prohibited solicitation. See 47 U.S.C. § 227(b)(1)(B) (unlawful to "initiate" a call to a residential phone using an automatic dialing system or pre-recorded voice). Likewise, RCW 80.36.400 creates potential liability for "use [of] an automatic dialing and announcing device for purposes of commercial solicitation." The sections pled by Anderson makes no reference to "on behalf of" liability. 47 U.S.C. §

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227(c)(5), which establishes "on behalf of" liability for solicitations to residences on the national "do not call list" has not been pled by Anderson and is not at issue in this case.

It is undisputed that Four Our Families, Inc., not Domino's, initiated the calls at issue. See, Brown Declaration. Anderson is not asserting a claim under Subsection 227(c) for alleged violations of the "do not call list." Anderson is not making claims under any law that create potential "on behalf of" liability. Neither the Federal nor State law under which Anderson is making claims creates "on behalf of" liability. The "on behalf of" discovery sought by Anderson as a basis for continuing Domino's motion is irrelevant. Such discovery cannot be the basis for continuing Domino's motion.

4. There is no evidence that Domino's retained the right to control Four Our Families, Inc. sufficient to justify continuing Domino's motion to allow Anderson discovery to explore this issue.

The eighteen year old *Parker* case cited by Anderson for the proposition that Domino's potentially has liability here, since it allegedly retained the right to control Four Our Families, Inc. is inapplicable. First, *Parker* is out of State authority and non-controlling. Additionally, even if the case were controlling, the document referenced as a "veritable bible" in the Parker case is no longer in existence or use and was not in 2009. The facts have changed sufficiently that it is likely a Florida court would no longer rule the same way it did eighteen years ago.

Most importantly, there is well settled Washington law directly on point: "[a]bsent power to control day-to-day operations, [a]franchisor is not liable to an employee of a franchisee." *D.L.S. v. Maybin*, 130 Wash.App. 94, 98, 121 P.3d 1210 (2005); citing, *Folsom v. Burger King*, 135 Wash.2d 658, 958 P.2d 301 (1998). Here, Michael Brown of Four Our Families, Inc. has testified that:

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- Domino's did not control or direct Four Our Families, Inc.'s local advertising campaigns, including the calls at issue here;
- Four Our Families, Inc. was free to accept or reject Domino's advice regarding local advertising, including the calls at issue here;
- Four Our Families, Inc. made the decision to utilize robo-calls independent of Domino's; and
- Four Our Families, Inc. does not even know whether or not Domino's was aware of these calls.

It is undisputed that Domino's had no ability to control or direct and did not control or direct Four Our Families, Inc.'s local advertising or decision to utilize robo-calls. Further discovery is not required on this issue.

V. CONCLUSION

Anderson has provided no explanation for the long delay in seeking the discovery now sought. Much of the discovery now sought is barred under the class action deadlines agreed to by Anderson. Much of the discovery now sought is irrelevant since it relates to a cause of action not pled or at issue in this action. Domino's respectfully requests that Anderson's motion for a CR 56(d) continuance be denied.

Dated December 16, 2011.

By: s/David Soderland
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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

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

On December 16, 2011, I caused a true and correct copy of the foregoing document to be delivered to the following via email:

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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 16th day of December, 2011.

Gail M Garner

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