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Honorable Ronald B. Leighton

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

9 CAROLYN ANDERSON,
 10
 Plaintiff,
 11
 vs.
 12 DOMINO'S PIZZA, INC., DOMINO'S PIZZA,
 13 LLC, FOUR OUR FAMILIES, INC., and
 CALL-EM-ALL, LLC.,
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 Defendants.
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CASE NO. :C 11-902-RBL

DEFENDANT FOUR OUR FAMILIES,
 INC.'S NOTICE OF JOINDER &
 RESPONSE IN SUPPORT OF DOMINO'S
 PIZZA INC. AND DOMINO'S PIZZA
 LLC'S MOTION FOR SUMMARY
 JUDGMENT

HEARING DATE: December 30, 2011
WITH ORAL ARGUMENT

I. INTRODUCTION

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 19 COMES NOW, the DEFENDANT, FOUR OUR FAMILIES, INC. ("FOFI") who
 20 respectfully joins Domino's Pizza, Inc. and Domino's Pizza, LLC. (collectively "Domino's")
 21 in its Motion for Summary Judgment [dkt.no.69] and adopts all arguments and evidence
 22 presented by Domino's. FOFI submits this Response in Support of Domino's Motion for
 23 Summary Judgment and attached memorandum of points and authorities seeking a judgment
 24 in Domino's Pizza's favor on all federal and state claims asserted by Plaintiff Carolyn
 25 Anderson ("Anderson"). FOFI provides the argument below to supplement Domino's Motion
 26

FOFI Response to Domino's Motion
 For Summary Judgment - 1 of 11
 [response to sj]

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1 to address the issues in Plaintiff's Motion for Continuance/Denial of Summary Judgment [dkt.
2 No. 25].

3 No evidence has been shown nor will further discovery show liability by Domino's for
4 the pre-recorded messages alleged to have been made to Anderson. The alleged activity was
5 performed, directed, purchased, and controlled by FOFI with no influence, direction, or
6 assistance by Domino's Pizza. This was an effort by FOFI to engage in new local marketing
7 efforts in which Domino's does not control.
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9 II. STATEMENT OF FACTS

10 Domino's Pizza, LLC is in the business of selling pizzas and other food related items
11 through its retail stores both nationally and internationally. Domino's franchises its business
12 to franchisees. Michael Brown has been a franchisee of Domino's since 1994 and now owns
13 six stores in the Pierce County, Washington area. Exh. 15 to Godwin Dec: ¶ 3, pg. 1. A
14 majority of Domino's Pizza's stores are franchise owned. A Standard Franchise Agreement
15 regulates the relationship between the parties. Exh.2 to Godwin Dec.: Standard Franchise
16 Agreement ("SFA"). Domino's does not control, direct, or influence the local advertising
17 efforts of a franchisee. Exh. 2 to Godwin Dec.: SFA §11.1(b), pg. 9, §13.3, pg. 11. It does
18 control the national advertising campaigns and may require franchisees to participate in the
19 national campaigns it creates. *Id.* at § 13. Local franchisees form a local advertising co-op.
20 The co-op decides how its own contributions are spent. Exh. 1 to Fraley Dec.: Portions of
21 Brown's Dep. 22:22-25. The co-op membership consists only of franchisees. Exh. 1 to Fraley
22 Dec.: Portions of Brown's Dep.: 23:1-7.
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24

25 In May 2009, Domino's had its bi-annual World Wide Rally ("Rally"). This event is
26 designed to bring Domino's franchisees, corporate employees, and team members together to

1 motivate, discuss, and celebrate the brand. Exh. 4 to Fraley Dec.: Portions of Devereaux Dep.
2 9:16-25. 10:1-4. One of the events at the Rally is the Domino's Equipment & Supply ("E&S")
3 Vendor Show ("Show"). There are various vendor booths where the vendors can
4 communicate available services, products, etc. to those in attendance. Michael Brown
5 attended the Rally and Show in 2009. Call-Em-All was a vendor at the Show. Exh. 1 of Fraley
6 Dec.: Brown Dep. 30:11-31:17.
7

8 A vendor is sent an invite to attend the show by E&S in one of three ways: 1) a
9 franchisee requests that the vendor is invited; 2) the Domino's Franchise Association requests
10 that the vendor is invited; or (3) the vendor attended the show the previous year. The 2009
11 show was the first and last time CEA attended. Exh. 3 of Fraley Dec: Herrmann 24:11-13.
12 CEA was invited at the request of a franchisee. Exh. 4 of Fraley Dec.: Devereaux 18:21-24;
13 Exh. 7 of Fraley Dec.: Portions of Senne Dep. 5:24-7:7.
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15 Following the Rally, Mr. Brown, as the owner of FOFI, employed the services of Call-
16 Em-All. Call-Em-All ("CEA") is a company engaged in the business of electronic and phone
17 marketing and advertising. Mr. Brown retained his customers' telephone numbers that
18 purchased from him in the previous six months to one year creating a database. Exh. 6 of
19 Fraley Dec.: FOFI's Answers to Plaintiff's Interrogatories, The database was then uploaded to
20 the CEA website where its equipment was used to call the customers and played a recorded
21 message.
22

23 On August 31, 2009, a call was made to Plaintiff by Call-Em-All on behalf of FOFI
24 where a pre-recorded message conveyed a pizza special the local Parkland/Spanaway
25 Domino's was offering. Domino's was not involved with the described calls above. Domino's
26 did not engage in a national call campaign. In fact, according to Brad Herrmann, president of

1 CEA, Domino's "would not touch us with a 10 foot pole." This underscores the absence of
2 any relationship between Domino's and CEA. The call was made due to a decision of a local
3 franchisee without input, encouragement, or approval by Domino's Pizza. Exh. 1 to Fraley
4 Dec.: Portions of Brown's Dep. 70:4-16. Michael Brown did not speak to anyone with
5 Domino's about the calls. *Id.* The Plaintiff did not speak to anyone from the Domino's
6 corporate stores regarding the calls and she thought it was a local promotion. Exh. 2 of Fraley
7 Dec.: Portions of Anderson Dep., 58: 2-6. The caller id displayed the local Domino's Pizza
8 number. *Id.* at 57: 11-13.

10 III. ARGUMENT

11 A. The Alleged Phone Calls were Not Made by Domino's Pizza as Required for 12 Liability Under 47 USC §227(b)(1)(B) And RCW 80.36.400.

13 The evidence that has been produced thus far in this litigation by all parties involved
14 has demonstrated clearly that Domino's was not involved with the alleged calls ordered by
15 FOFI and made by CEA. Under the federal and state laws, it is unlawful for any person to
16 initiate any telephone call to a residential line using a pre-recorded message for commercial
17 solicitation. TCPA 47 U.S.C. § 227(b)(1)(B), RCW 80.36.400. In order to create liability, the
18 plaintiff must show that Domino's, LLC. made the alleged calls.

19 As addressed by Domino's in its Motion [dkt. 24], Mike Brown did not request
20 information from, consult with, or interact with Domino's about Call-Em-All or the services it
21 offered. Exh. 1 of Fraley Dec.: Portions of Brown's Dep. 46:1-4. Domino's never contracted
22 with CEA to use its services and never had a business relationship with CEA. Exh. 3 of Fraley
23 Dec.: Portions of Herrmann Dep. 53:21, 54:17-19; Exh. 5 of Fraley Dec.: Portions of Roeser
24 66:19-20. CEA in fact tried to be involved with Domino's after the 2009 and it ignored its
25 request. Exh. 3 of Fraley Dec.: Portions of Herrmann 24:11-13, 59:1-5, 13-25, 60:1-17. In
26

1 fact, "they [Domino's] didn't want to touch us with a 10-foot pole." Exh. 3 of Fraley Dec.:
2 Portions of Hermann's Dep. 45:9. Anderson only spoke to Michael Brown and Nicole Brown,
3 at the local level, about the alleged violations of state and federal law. Exh. 2 of Fraley Dec.:
4 Anderson Dep.: 58:11-14. She never had communications with any Domino's corporate
5 personnel about the alleged violations of state and federal law. Exh. 2 of Fraley Dec.:
6 Anderson Dep 58:7-10. The number that displayed on Anderson's caller-id was from the local
7 Parkland/Spanaway location. Exh. 2 of Fraley Dec.: Anderson Dep.:8:7-9, 57:8-13.

9 B. The Calls were Made by CEA "On Behalf Of" FOFI and Not For The Benefit of
10 Domino's.

11 Plaintiff, in her Motion for Continuance/Denial of Summary Judgment [dkt. 25],
12 asserts that the ultimate issue is not one of agency as Domino's suggests, but an issue of
13 whether FOFI was acting "on behalf of" Domino's when it placed the call to Anderson.
14 *Plaintiff's Motion for Continuance*, pg. 8, ¶ 15. Essentially, the issues are one in the same
15 (agency law applies for state claims and "on behalf of" liability for the federal claims).
16 Plaintiff's Motion is a mere attempt to throw mud on the wall with the hope something sticks.
17 The Plaintiff also cites to part of the TCPA that is not relevant to this litigation, 47 C.F.R. §
18 64.1200(d)(3), which creates liability for entities on whose behalf calls are made where
19 entities do not honor the do-not-call registry request. *See* fn. 7 to Plaintiff's Motion [dkt 25],
20 pg. 8. There is no claim that Anderson has been placed on such a registry. See Amended
21 Complaint. Furthermore, the Plaintiff directs the Court to FCC rules and case law regarding
22 facsimile advertisements on behalf of liability. Faxes are not at issue in this litigation and
23 should not weigh on the reasoning of the Court. The evidence produced thus far has not
24 shown the level of control by Domino's over its franchisee's marketing efforts as required by
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1 the TCPA and the “on behalf of”, nor will future evidence show such control. *See Domino’s*
2 *Response to Plaintiff’s 56(d) Motion* [dkt. 28].

3 In *Charvat v. EchoStar Satellite, LLC.*, 676 F.Supp.2d 668 (S.D. Ohio 2009), the
4 court dealt with this exact issue. Pre-recorded messages were sent to Plaintiff offering DISH
5 Network programming and were placed by several different companies. The companies had
6 entered into Retailer Agreements where they were authorized, as independent contractors, to
7 advertise, promote, and solicit orders for DISH products. *Charvat v. EchoStar Satellite, LLC.*
8 676 F. Supp.2d 668,671 (2009). This is the same luxury Domino’s has afforded FOFI. The
9 issue to be decided was whether EchoStar may be held liable for the alleged violations of its
10 retailers. *Charvat* at 673.

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12 Even though a company may claim no agency relationship exists and the person is an
13 independent contractor through an agreement, there may still be liability. *Charvat* at 674
14 (citing *Worsham v. Nationwide Ins. Co.*, 138 Md.App.487, 772 A.2d. 868, 878 (2001);
15 *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga.App. 363, 537 S.E. 2d 468, 472 (2000)). The
16 court is to determine if the company retains the “right to control the manner or means” of the
17 content of the solicitations, direction of the marketing, and the means method and manner of
18 executing the work, including the design of the advertisement and recipients of said
19 advertisement. *Charvat* at 675 (citing *Hooters* at 472.). The court found that EchoStar
20 maintains no control over the method of advertising or the means by which the retailers carry
21 out their marketing activities. *Id.* EchoStar did retain ownership of subscriber’s contact
22 information, the prices to be charged, the type of programming offered, and it reserved the
23 right to accept or reject any programming orders submitted by Retailers, but this did not
24 illustrate control over the manner or means by which the Retailers marketed the product.
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1 *Charvat* at 676. EchoStar's control over the Retailers marketing efforts was limited to the
2 demand that Retailers comply with all federal, state and local laws. *Id.* There was no
3 indication of micro-managing by EchoStar of the retailers marketing efforts. EchoStar did not
4 place the calls or direct others to place the calls. *Charvat* at 679.

5 Plaintiff cites to various cases where liability was found based on the same "on behalf
6 of" theory she claims exists, including *Worsham v. Nationwide*, and *Hooters v. Augusta*. See
7 *Plaintiff's Motion* at 9-11 (citing *Worsham*, 138 Md. App. 487, 772 A.2d 868 (2001);
8 *Hooters*, 537 S.E.2d 468 (Ga. App. 2000). There was evidence that Nationwide exhibited
9 control based on similar scripts used by its agents. *Worsham* at 879. *Hooters* designed and
10 produced the ad and determined who would receive the advertisement. *Hooters* at 472.
11 *Charvat* discusses each of these cases and how the facts are distinguishable and instead looks
12 to two other cases for instruction, *Charvat v. Farmers Insurance* (Agent was an independent
13 contractor with sole authority to determine who to solicit business from and how to do it) and
14 *Lary v. VSB Financial* (No employee of VSB was in direct control of unsolicited
15 advertisement or played a part in sending it). *Charvat*, 178 Ohio App.3d 118, 897 N.E.2d 167
16 (2008); *Lary*, 910 So.2d 1280 (Ala. Civ. App. 2005). The courts in *Charvat* and *Lary* ruled
17 that the independent contractors were not acting on behalf of anyone other than their own
18 business. *Charvat v. EchoStar* at 676-677. Anderson also directs the Court to a decision by
19 the FCC regarding illegal calls or faxes. The Plaintiff in *Charvat* also pointed the court in the
20 same direction. In response the court stated,

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24 Plaintiff's reliance on an opinion issued by the Federal Communications Commission
25 is misplaced. In discussing whether telephone solicitations made by or on behalf of
26 **tax-exempt non-profit organizations** were subject to the TCPA, the FCC stated, "our
rules generally establish that the party on whose behalf of a solicitation is made bears
ultimate responsibility for any violations. Calls placed by **an agent** of the telemarketer
are treated as if the telemarketer itself placed the call.

1 *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection*
2 *Act of 1991, 10 F.C.C.R. 12391, 12397 (1995)(footnote omitted).*

3 Domino's Pizza is not a tax-exempt non-profit organization, nor is Mr. Brown an agent of
4 Domino's Pizza as evidenced by testimony and the SFA.

5 This case could not be more on point with the issues before the Court today. Domino's
6 Pizza, as franchisor, has clearly defined its relationship with its franchisees as one of
7 independent contractors in the Standard Franchise Agreement ("SFA") and has disavowed an
8 agency relationship. See Exhibit 2 to Godwin Dec.: SFA §22.8, pg. 30. "You do not have the
9 authority to **act for or on behalf of us** [Domino's]." Id. The SFA specifically addresses
10 advertising and efforts by the franchisee. Like *EchoStar*, Domino's may exercise control over
11 pricing, national advertising efforts, and the type of products offered, but it does not control
12 the means or manner of local advertising efforts of its franchisees. Exh. 2 to Godwin Dec.:
13 SFA § 13.1, pg. 10, §12.1 pg. 9. Domino's will provide advice and guidance on methods of
14 food preparation and administrative and financial tasks, but it does not provide guidance on
15 advertising. SFA § 11, pg. 9.

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18 The SFA does not direct or require any advertising methods for the franchisee to
19 engage in; the franchisee may be required to participate in promotions and advertising
20 Domino's determines to be appropriate for the benefit of the system. SFA § 13.1, pg. 10. This
21 is in reference to TV and radio advertising of specials Domino's creates. Exh. 1 of Fraley
22 Dec.: Brown Dep. 20:18-23. There is no written policy regarding marketing, except the SFA.
23 Exh. 4 of Fraley Dec.: Portions of Devereaux Dep. 38:5-19. The Field Marketing Team has a
24 liaison type role between franchisees and national level marketing.

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26 It is up to the franchisee how it spends their own dollars on local marketing in
the way they see fit, if there is any role that Domino's Corporate plays is to
facilitate discussions across franchisees and franchisees to share best practices. It

1 is kind of hands-off when it comes to local, actual executing local marketing and
2 local marketing decisions.

3 Exh. 3 of Fraley Dec.: Portions of Christopher Roesser 64:19-25, 65:1-16.

4 Domino's did not limit Mr. Brown's local marketing efforts. Exh. 1 of Fraley Dec.:
5 Portions of Brown Dep. 18:25, 19:16. Domino's does make suggestions on types of local
6 advertising efforts such as box topping (placing flyers on pizza boxes), passing out menus at
7 lunch time, direct mailing, and Advo (coupon insert in mail). Exh. 1 of Fraley Dec.: Portions
8 of Brown Dep. 19:25, 20:1-23; Exh. 5 of Fraley Dec.: Portions of Roeser Dep.: 17:13-18;
9 Exh. 4 of Fraley Dec.: Portions of Devereaux Dep. 21:17-25-22:11. Domino's has never
10 encouraged telemarketing, but it has not actively discouraged it. Exh. 4 of Fraley Dec.:
11 Portions of Devereaux Dep. 22:12-18, 39:19-24. Mr. Brown was never required by Domino's
12 to engage in any local advertising. Exh. 1 of Fraley Dec.: Portions of Brown Dep. 21:15-17.
13 Domino's never required Mr. Brown to send faxes or make pre-recorded calls. Exh. 1 of
14 Fraley Dec.: Portions of Brown Dep. 19:20-23. Franchisees do not report to Domino's the
15 type of efforts it engages in or the result of those activities. Exh. 4 of Fraley Dec.: Portions of
16 Devereaux Dep 35:2-8.
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19 Mr. Brown did not make Domino's aware that he was placing pre-recorded messages
20 to his customers. See Exh. 15 of Godwin's Decl. [dkt 24-1]: Dec of Michael Brown; Exh. 4 of
21 Fraley Dec: Portions of Devereaux Dep. 33:8-16. Mr. Brown had no contact with Domino's
22 about the calls. Exh. 1 of Fraley Dec.: Portions of Brown Dep. 46:1-4. He did not seek its
23 permission, approval, or recommendations. He used the equipment of a third party vendor,
24 CEA, to make the calls. Mr. Brown created his own database of customers to call. He did not
25 receive the numbers from Domino's, but only from customers who had called and placed an
26 order with FOFI. Exhibit 6 of Fraley Dec.: FOFI's Answers to Plaintiffs Second Set of

1 Interrogatories 1. Domino's as a corporation did not want to participate in a program where
2 customers would be called with a pre-recorded message. The focus for Domino's marketing
3 efforts is to promote traffic to its website, to encourage online ordering. Placing calls to
4 customers did not promote this focus. Exh. 5 of Fraley Dec.: Portions of Roeser Dep. 23:3-
5 25, 24:9. Domino's corporate, as its own entity, was against the practice. *Id.* at 33:3-9. Like
6 *EchoStar*, it did not operate or maintain control over any automated dialing equipment that
7 initiated the calls, each call was initiated by FOFI, Domino's did not provide telephone
8 numbers, and it did not instruct its franchisees to make calls to its customers.
9

10 IV. CONCLUSION

11 Four Our Families, Inc., respectfully requests Domino's Pizza's Motion for Summary
12 Judgment be granted by the Court. Mr. Brown was not an agent authorized to act on its behalf
13 nor did it assert control over Mr. Brown's advertising efforts to create "on behalf of" liability.
14 Mr. Brown found a new way to market a special to his customers at the local level without
15 any assistance, influence, or direction from Domino's Pizza. There is no genuine dispute of
16 material fact as required to deny this motion.
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20 Dated at Lakewood, Washington this 19th day of December, 2011.
21

22 FAUBION REEDER FRALEY & COOK, P.S.

23
24 By /s/ Nelson Fraley, II
25 NELSON C. FRALEY II, WSBA No. 26742
26 Attorneys for Four Our Families, Inc.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on December 19th, 2011, I electronically served the foregoing to
3 the parties listed below:

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