THE HONORABLE RONALD B. LEIGHTON

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CAROLYN ANDERSON,

Plaintiff,

v.

DOMINO'S PIZZA INC., DOMINO'S PIZZA, LLC, FOUR OUR FAMILIES, INC., and CALL-EM-ALL, INC.,

Defendants.

NO. C11-00902 RBL

PLAINTIFF'S MOTION FOR CERTIFICATION OF CLASS

NOTED ON MOTION CALENDAR: JANUARY 13, 2012

I. RELIEF REQUESTED

Plaintiff asks the Court to certify this action as a Class action under FRCP 23(b)(2) or, alternatively, FRCP 23(b0(3) on behalf of persons with claims under the Washington statute, RCW 80.36.400(2) which provides, " No person may use an automatic dialing and announcing device for purposes of commercial solicitation."[1] Defendants' violation of RCW 80.36.400 constitutes a violation of RCW 19.86, et seq., the Washington Consumer Protection Act ("CPA").

The Class is defined as:

> All persons residing in the State of Washington who received a pre-recorded telephone message at their telephone from or on behalf of Defendants sent by an automatic dialing and announcing device for the purposes of solicitation at any time during the period that begins four years prior to the filing of the original complaint in this action through trial.

[1] Plaintiff's Complaint also includes a claim for violation of the Telephone Consumer Protection Act, 47 U.S.C. 227(b)(1)(B) which is not a subject of this motion.

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II. FACTS

On or about August 31, 2009, Defendant Four Our Families, Inc. ("FOFI"), a franchisee of Defendants Domino's Pizza, Inc. and Domino's Pizza, LLC ("Domino's"), using the services of Defendant Call-Em-All, Inc. ("Call-Em-All"), caused a call to be placed to Plaintiff's residence telephone number (Declaration of Carolyn Anderson ["Anderson Dec."] ¶7). The call consisted of a pre-recorded message delivered by an automatic dialing and announcing device ("ADAD"). The pre-recorded message identified itself as being from "Domino's Pizza" and was for the purpose of commercial solicitation, encouraging Plaintiff to purchase pizza from Dominos. (Amended Complaint ¶s 2.1-2.3). The script of the call as provided in discovery was:

> Hi, this is Domino's Pizza with a special offer. To block these calls, press 3 during this call. If this is a voicemail, you can opt out by calling (866) 284-6198. (small pause) Hi, your Parkland Spanaway Domino's Pizza is offering any large pizza for $10. Any large pizza for $10. You can choose from our American Legends Line, a Specialty Pizza, or Build-Your-Own up to 10 toppings for only $10. Hurry this is for today only and it's for carry-out or delivery. Please call (253) 535-5000 to place your order. Tax and delivery charge may apply. (See Joint Declaration of Rob Williamson and Kim Williams ["W&W Decl."] ¶11)

In May, 2009, Mike Brown, the owner of FOFI, attended a worldwide rally sponsored by Domino's (Deposition of Michael Brown, 28-29, 43-44) ["Brown Dep."] excerpts of which are attached as Exhibit 5 to the Joint Declaration of Rob Williamson and Kim Williams ("W&W Decl"). Mr. Brown saw a vendor offering automatic calling services, Call-Em-All (*Id.* 31-32). Prior to the rally, Call-Em-All had been approved by Domino's to provide its services, automatic voice messaging, which were known to Domino's. (Deposition of Scott Senne, 10-12, excerpts of which are attached as Exhibit 6 to the W&W Decl., and Response of Domino's to Plaintiff's Request for Production No. 17, attached as Exhibit 8 to the W&W Decl). Mr.

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Brown did not recall that any issues regarding the legality of the calls were raised in his discussion with Call-Em-All representatives. (Brown Dep. 32).

FOFI collected telephone numbers from customers who had placed orders for pizza. (FOFI Answer to No. 2 to Plaintiff's First Interrogatories and Requests for Production attached as Exhibit 1 to W&W Decl; (Brown Dep. 36). All customers called had given their telephone numbers to FOFI as part of ordering a pizza (Id. 62). All numbers collected were put into a data base (Ibid 62-3) using an operating system called PULSE (FOFI Answer to Interrogatory No. 24, attached as Exhibit 2 to the W&W Decl.). All franchisees are required by Domino's to use PULSE (Domino's 10-K filed with the Securities and Exchange Commission, effective January 2, 2011, attached as Exhibit 3 to the W&W Decl.). FOFI used Call-Em-All to make the pre-recorded calls to customers (FOFI Answer to Interrogatory No. 4, attached as Exhibit 7 to the W&W Decl.) using telephone numbers provided by FOFI. The telephone numbers were downloaded to the Call-Em-All website by Mr. Brown and then Call-Em-All made the calls (Brown Dep. 34). Call-Em-All actually gave FOFI instructions on how to use PULSE to build the databases (Interrogatories, Answer to No. 4). The calls were made between June and August of 2009 (Id. 34) and stopped because Call-Em-All advised that federal law had changed and the written permission of any called person would be required to make automated calls to that person. (Id. 34-35)

The first calls made by Defendants in June 2009 to persons in Washington State were approximately 5,000 (*Id.* 36). By the end of August 2009, Defendants had made or caused to be made over 42,000 robo-calls to Washington residents (Call-Em-All Documents CSE12120-3 attached as Exhibit 4 to the W&W Decl.) at a cost to FOFI of only $4,250.50 (FOFI Interrogatories, Answer to No. 17, attached as Exhibit 91003 to W&W Decl.). No calls went

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into the voice mails of called persons but, instead, pre-recorded messages were played when a live person answered the call. (Brown Dep. 46-47).

III. STATEMENT OF ISSUES

Should the Court enter an Order certifying the Class as requested herein?

IV. EVIDENCE RELIED UPON

This motion relies upon the Joint Declaration of Rob Williamson and Kim Williams and its exhibits, the Declaration of Carolyn Anderson, the Complaint, and the records and files herein.

V. LEGAL AUTHORITY

1. Introduction

Defendants made or caused to be made substantially similar ADADs to residential telephone numbers for the purpose of solicitation, in the same manner to all Class members. In the light of the evidence, the Court should certify the Class.

A. The fundamental purposes of FRCP 23 are well-served by certification of the proposed class and subclass.

Class actions are favored as an effective means of adjudicating numerous small, similar claims. As the United States Supreme Court has observed, "[c]lass actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 99, 101 S.Ct. 2193, 58 L.Ed.2d 693 (1981). One such "function of the class suit is to provide a procedure for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significant size and importance if taken as a group." *Brown v. Brown,* 6 Wn. App. 249, 253, 492 P.2d 581 (1971); *see also Phillips Petroleum v. Shutts,* 472 U.S. 797, 809, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) ("Class actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually. [In such a case,] most of the plaintiffs

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would have no realistic day in court if a class action were not available."). This is particularly true in cases involving consumer protection issues. As stated in *Eshaghi v. Hanley Dawson Cadillac Co.*, 214 Ill. App.3d 995, 574 N.E.2d 760, 764-66 (Ill. App. 1991) (citation omitted):

> In a large and impersonal society, class actions are often the last barricade of consumer protection. . . . To consumerists, the consumer class action is an inviting procedural device to cope with frauds causing small damages to large groups. The slight loss to the individual, when aggregated in the coffers of the wrongdoer, results in gains which are both handsome and tempting. The alternatives to the class action -- private suits or governmental actions -- have been so often found wanting in controlling consumer frauds that not even the ardent critics of class actions seriously contend that they are truly effective. The consumer class action, when brought by those who have no other avenue of legal redress, provides restitution to the injured and deterrence to the wrongdoer.

The facts of this case present a canonical example of a claim suitable for class treatment: Plaintiff received an ADAD solicitation transmitted on behalf of Defendants under exactly the same circumstances as every other member of the class. All of the ADADs transmitted on behalf of Defendants were for the same purpose, namely to advise customers of opportunities to purchase pizza. All of the telephone numbers provided by FOFI to Call-Em-All were provided by customers who had placed orders and stored in the operating system Domino's required FOFI to maintain. Here, common questions do not just predominate over individual questions, there are no individual questions. The only relevant legal and factual issue, whether the Class members received the ADADs from Defendants in violation of the Washington anti-ADAD statute, is common to every member of the proposed Class.

Class certification prevents multiplicity of litigation, allows class members to share the costs of litigation when individual suits may be economically prohibitive, and frees defendants from the prospect of identical future suits and the risk of inconsistent results. *See e.g., Brown*, 6 Wn. App. at 256-57; *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318, 54 P.3d 665 (2002). Class actions also serve the important purpose of educating individuals about their

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rights. *Ergonomic Solutions, LLC v. United Artists*, 50 P.3d 844, 848 (Ariz. App. 2002). *Demetropoulos v. Bank One Milwaukee, Inc.*, 915 F. Supp. 1399, 1419 (N.D. Ill. 1996). Plaintiff seeks certification of a State class containing thousands of members. Defendants will presumably concede numerosity. The Court should certify the proposed Class to achieve the purposes of FRCP 23 and ensure that members of the Class obtain a legally enforceable remedy that otherwise would not likely be available given the small amount of individual damages.

B. Relevant legal standards.

The decision to certify a class is committed to the discretion of the trial court. *Gulf Oil Co.*, 452 U.S. at 100; *Doninger v. Pac. NW Bell, Inc.*, 564 F.2d 1304, 1309 (9th Cir. 1977). In determining whether a class action will be allowed, the substantive allegations of the complaint should be taken as true. *Blackie v. Barrack*, 524 F.2d 891, 901 n.16 (9th Cir. 1975); *Irwin v. Mascott*, 96 F. Supp.2d 968, 971-72 (N.D. Cal. 1999). In considering a motion for class certification, a court may not delve into the merits of the dispute and should not make a premature determination on the merits of the action. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). As the Supreme Court noted in *Eisen*, "We find nothing in either the language or history of FRCP 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.*; *see also Blackie*, 524 F.2d at 901; *In re Visa Check/ Mastermoney Antitrust Litig.*, 280 F.3d 124, 134-35 (2nd Cir. 2001) (citation omitted) ("a motion for class certification is not an occasion for examination of the merits of the case"); *Roe v. Operation Rescue*, 123 F.R.D. 500, 502 (E.D. Pa. 1988) ("Appraisal of a class action, however, does not depend on a showing of a probability of success on the merits, nor is the court authorized to make such an inquiry at this stage of the proceedings."). Rather, all that is required is that the Plaintiff make "some showing" that the requirements of FRCP 23 are met.

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through such things as "expert opinions, evidence (by document, affidavit, live testimony, or otherwise), or the uncontested allegations of the complaint," *DeMarco v. Robertson Stephens Inc.,* 228 F.R.D. 468, 470 (S.D.N.Y. 2005) (citation omitted), so that the Court can form a reasonable judgment on each FRCP 23 requirement. *Blackie,* 524 F.2d at 901.

In a close case, the Court should find that the prerequisites to class certification have been established. *Kahan v. Rosenstiel,* 424 F.2d 161, 169 (3rd Cir.) (quoting *Esplin v. Hirschi,* 402 F.2d 94, 101 (10th Cir. 1968). Such an application of FRCP 23 is supported by many courts which find that not only does such application of the rule "avoid multiplicity of litigation, but (1) it saves members of the class the cost and trouble of filing individual suits; and (2) it also frees the defendant from the harassment of identical future litigation." *Brown,* 6 Wn. App. at 256-57. Thus, courts have stated "if there is to be an error made, let it be in favor and not against the maintenance of the class action." *Id.* at 256 (quoting *Esplin,* 402 F.2d at 99); *accord, In re Folding Carton Antitrust Lit.,* 75 F.R.D. 727, 732 (N.D. Ill. 1977) ("[When a class is certified,] the potential judicial burdens of multiple lawsuits are obviated, and the sharing of the costs on an equitable basis between large, medium, and small claimants is made possible."). An order certifying a class "may be conditional, and may be altered or amended" at any time prior to judgment. FRCP 23(c)(1). As discussed below, certification of a class in this case is justified under the requirements of FRCP 23.

a. The Class Is So Numerous That Joinder Is Impracticable.

To obtain certification, a Plaintiff must show that the Class is "so numerous that joinder of all members is impracticable." FRCP 23(a) (1). "'Impracticability' does not mean 'impossibility,' but rather refers only to the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.,* 329 F.2d 909, 913-14 (9th Cir. 1964) (citation omitted). Precise enumeration of the members of a class is not necessary for the Court

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to certify the Class. *In re Computer Memories Sec. Lit.,* 111 F.R.D. 675, 679 (N.D. Cal. 1986); *Weinberger v. Thornton,* 114 F.R.D. 599, 602 (S.D. Cal. 1986). Here, the numerosity requirement is easily met because records show over 42,000 calls were made.

2. The Class Shares Common Questions of Law and Fact.

Plaintiff must satisfy the second prerequisite of FRCP 23(a) by showing that there are "questions of law or fact common to the class." The showing necessary to satisfy commonality is "minimal." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir. 1998); *see also Mortimore v. FDIC,* 197 F.R.D. 432, 436 (W.D. Wn. 2000) ("It is common for courts to write, 'the threshold for commonality is not high.'") (citation omitted).

Commonality is satisfied where the Defendants engaged in a "common course of conduct" or the Plaintiff's allegations arise from a "common nucleus of operative facts." *Brown,* 6 Wn. App. at 255 (citations omitted). The Ninth Circuit construes commonality liberally and permissively, and all questions of law and fact need not be common to class members. *Hanlon,* 150 F.3d at 1019; 7B Charles A. Wright, et al., FEDERAL PRACTICE AND PROCEDURE, § 1763 (2d ed. 1986) ("this provision does not require that all questions of law and fact raised by the dispute be common"). The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class. *Id.* "[C]ourts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, and that the issue may profitably be tried in one suit." *Blackie,* 524 F.2d at 902; *see also Irwin v. Mascott,* 96 F. Supp.2d 968, 973 (N.D. Cal. 1999) ("A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a) (2).") (citations omitted); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996) (to satisfy

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commonality, there need be only a "single issue common to all members of the class"); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 145 (N.D. Cal. 2004) ("[O]ne significant issue common to the class may be sufficient to warrant certification."); *Tylka v. Gerber Prods. Co.*, 178 F.R.D. 493, 496 (N.D. Ill. 1998) (if "at least one question of law or fact [is] common to the class," commonality is satisfied).

Here, Defendants engaged in a "common course of conduct" by causing the transmission of ADAD advertisements to thousands of persons that were substantially identical. All members of the Class share the single common issue: they received ADAD advertisements at the direction of Defendants. The common legal issue is the liability of each Defendant for the conduct. Dominos and Call-Em-All may contest that liability, but there is no question the class members share the common issue of establishing that liability and the same facts apply to every single class member.

3. <u>The Representative Plaintiff's Claims Are Typical Of The Class.</u>

FRCP 23(a) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." This requirement is satisfied if the representative Plaintiff's claim stem "from the same event, practice, or course of conduct that forms the basis of the class claims and is based upon the same legal or remedial theory." *Jordan v. County of Los Angeles,* 669 F.2d 1311, 1321 (9th Cir.), *vacated on other grounds,* 459 U.S. 810 (1982); *In re Am. Med. Sys.*, 75 F.3d at 1082.

"Typicality turns on the defendant's actions toward the plaintiff class, not particularized defenses against individual class members." *Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp.2d 1324, 1342 (W.D. Wash. 1998) (citation omitted). When it is alleged that the same unlawful conduct was directed at or affected both the named Plaintiff and the class sought to be represented, typicality is usually satisfied, irrespective of varying fact patterns which underlie individuals' claims. *Ali v.*

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Ashcroft, 213 F.R.D. 390, 409 (W.D. Wash. 2003), *remanded on other grounds,* 421 F.3d 795 (9th Cir. 2005) (citation omitted). The proposed representative's claims in a class action need only be "reasonably coextensive with those of absent class members," and need not be substantially identical. *Staton v. Boeing Co.,* 327 F.3d 938, 957 (9th Cir. 2003). "[U]nder [Rule 23's] permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Takeda v. Turbodyne Technologies, Inc.,* 67 F. Supp.2d 1129, 1136-37 (C.D. Cal. 1999) (*quoting Hanlon,* 150 F.3d at 1019); *see also Weinberger v. Thornton,* 114 F.R.D. at 603 ("[T]he test generally is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named Plaintiffs, and whether other class members have been injured by the same course of conduct.").

Where, as here, it is alleged that Defendants engaged in a common scheme relative to all Class members, there is a strong presumption that Plaintiff's claims are typical of the claims of absent Class members:

> The typicality requirement may be satisfied even if there are factual distinctions between the claims of the named Plaintiffs and those of other class members. Thus, similarity of legal theory may control even in the face of differences of fact.

De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983) (citations omitted). As long as the claims "resemble or exhibit the essential characteristics of those of the representatives," the typicality requirement of FRCP 23(a) (3) is satisfied. *Kas v. Financial General Bankshares, Inc.,* 105 F.R.D. 453, 461 (D.D.C. 1984); *see also Covelo Indian Community v. Watt,* 551 F. Supp. 366, 377 (D.D.C. 1982); *Lewis v. National Football League,* 146 F.R.D. 5, 9 (D. D.C. 1992).

While "truly unique defenses can defeat a request for class certification, they must be a 'major focus of the litigation.'" *Mortimore,* 197 F.R.D. at 437 (citation omitted). In this case, all of Plaintiff's claims arise from the same course of conduct, the transmission of pre-recorded telephone solicitations using an ADAD device. Each member of the Class has claims based on the same legal

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theories as Plaintiff's claims. Further, the damage awards to which Class members are entitled are statutory and the same for every Class member. Accordingly, Plaintiff's claims easily satisfy the typicality requirement of FRCP 23.

4. The FRCP 23(a) Adequacy Requirement Is Satisfied.

The final element of FRCP 23(a) requires that the proposed class representative "will fairly and adequately protect the interests of the class." Such inquiry requires a two-prong test. First, the representative party must be able to prosecute the action vigorously through qualified counsel, and second, the representative cannot have antagonistic or conflicting interests with the unnamed members of the class. *Staton,* 327 F.3d at 957; *Smith,* 2 F. Supp.2d at 1343.

In assessing whether a proposed class representative has conflicts with other members of the proposed class, the standard only requires similarity of interests, not identity of interests. It does not preclude some unique interests among members of the class; only adverse interests are precluded. *Dukes,* 222 F.R.D. at 168-69.

Both prongs of the adequacy test are met in this case. Plaintiff's interests are the same as the interests of all other members as established by her Declaration filed in support of the motion. Ms. Anderson is willing to serve as Class Representative, understands her responsibilities as Class Representative to prosecute this case on behalf of the entire Class, and is willing to undertake those responsibilities. See Anderson Decl., ¶8. Ms. Anderson knows what her claims are and has the understanding of what is required as Class Representative. "The threshold of knowledge required to qualify a class representative is low; a party must be familiar with the basic elements of [its] claim . . . and will be deemed inadequate only if [it] is 'startlingly unfamiliar' with the case. . . . It is not necessary that a representative be intimately familiar with every factual and legal issue in the case; rather, it is enough that the representative understand the gravamen of the claim." *Moeller v. Taco Bell Corp.,* 220 F.R.D. 604, 611-12

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(N.D. Cal. 2004); *see also In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litigation,* 78 F.R.D. 622, 627 (W.D. Wash. 1979) (citations omitted) ("It is not necessary that named class representatives be knowledgeable, intelligent, or that they have a firm understanding of the legal or factual basis on which the case rests in order to maintain a class action.").

Before the 2003 amendments to FRCP 23, the adequacy of counsel was also considered when determining the adequacy of the class representative. FRCP 23(g) now requires that the court separately appoint counsel who will fairly and adequately represent the interests of the class. While the adequacy of counsel is not of the same import for appointing a class representative as it once was, it is worth noting that Plaintiff's counsel are well-qualified to represent Plaintiff and the proposed Class. See W&W Decl. ¶ 11-15.

Because Plaintiff has no conflicts in representing her interests along with the interests of the proposed Class, and because Plaintiff and her counsel are prepared to prosecute vigorously this case, the fourth element of FRCP 23(a) for class certification is satisfied.

5. Class Certification Is Proper Under FRCP 23(b)(2).

Once Plaintiff has met the requirements of FRCP 23(a), the Court must determine whether the proposed Class satisfies one or more of the requirements of FRCP 23(b). Plaintiff seeks certification of this action under CR 23(b) (2) which provides for certification when:

> The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Here, Ms. Anderson seeks an injunction to prevent Defendants from transmitting or causing to be transmitted the pre-recorded solicitations that are illegal under both state *and federal* law under the same circumstance. Defendants have acted "on grounds generally applicable to the class" by causing the pre-recorded calls to be made in a common manner, making injunctive relief proper.

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Plaintiffs pursuing a class action under FRCP 23(b)(2) may seek monetary damages if they are incidental to the primary claim for injunctive or declaratory relief. *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2002). *Molski* involved an action where Plaintiff Molski brought an action against Atlantic Richfield Company on behalf of a class of mobility-impaired individuals, alleging denial of access to public accommodations and discrimination under the Americans with Disabilities Act and California disability laws. The District Court certified a mandatory class under FRCP 23(b)(2) and approved a proposed consent decree. The Court declined to adopt a per se rule that any class action seeking damages must necessarily be certified under FRCP 23(b)(3):

> We have implicitly refuted Appellants' argument for the adoption of a per se rule. In recent cases, we have indicated that certification of a mandatory class may be appropriate even when monetary damages are involved. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir.2001) ("In Rule 23(b)(2) cases, monetary damage requests are generally allowable only if they are merely incidental to the litigation.").

Molski v. Gleich 318 F.3d 937, 949 (C.A.9 (Cal.),2003)

> Although the rule is silent as to this issue, we have recognized that "[c]lass actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages." *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir.1986); *see* Fed.R.Civ.P. 23(b)(2) advisory committee's note (1966) ("The subdivision does not extend to cases in which the appropriate final relief relates exclusively or **predominantly** to money damages.") (emphasis added). In other words, in order to permit certification under this rule, the claim for monetary damages must be secondary to the primary claim for injunctive or declaratory relief. *Probe*, 780 F.2d at 780; *see Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1240 & n. 3 (9th Cir.1998).

Molski v. Gleich 318 F.3d at 947.

Certification in *Molski* was rejected because the damages at issue were individual and could be trebled:

> As an initial matter, we agree that the consent decree released damages that were not incidental damages. Incidental damages are damages "that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory

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> relief." *Id.* at 415 (emphasis in original) (citing Fed.R.Civ.P. 23(b)(2)). Here, the released damages included both actual and treble damages. *See* Cal. Civ.Code §§ 52, 54.3 (providing for statutory damages up to three times the amount of actual damages). The actual damages were not incidental because they do not flow directly from liability to the class as a whole. Similarly, the treble damages that were released were not incidental.

Molski v. Gleich 318 F.3d at 949.

Damages are incidental if they "flow directly from liability to the class as a whole." *Id.* *See also Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998). Damages are incidental if they are awarded automatically after liability is established and are based on objective standards, rather than "complex individualized determinations." *Id.* The key to determining whether a claim for damages is incidental to a claim for injunctive relief is whether the damages claim effects "the cohesiveness and homogeneity of interests among members of ... (b) (2)... classes." *Id.* at 412. *See also Arnold v. United Artists Theatre Circuit*, 158 F.R.D. 460, 462 (N.D. Cal. 1994) ("[T]he cohesiveness of the class and the homogeneity of the members' interests are the salient factors on which availability of the (b)(2) class action form hinges."). Whether damages are "incidental" depends on: (1) whether such damages are of a kind to which class members would be automatically entitled; (2) whether such damages can be computed by "objective standards" and not standards reliant upon "the intangible, subjective differences of each class member's circumstances"; and (3) whether determining such damages would require additional hearings. *Allison*, 151 F.3d at 415.

While some of its holding has subsequently been abrogated, the discussion of *Molski* in *Wang v. Chinese Daily News, Inc.* 231 F.R.D. 602, 610 -611 (C.D.Cal.,2005) is still apt:

> Class certification under Rule 23(b)(2) is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief corresponding declaratory relief with respect to the class as a whole." ... The Ninth Circuit has recognized that "class actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive or

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> declaratory relief, but may include cases that also seek monetary damages." *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir.1986). However, the monetary damages must be "incidental to the primary claim for injunctive relief." *Id.; see also* F.R.C.P. Advisory Committee Notes to the 1966 Amendments to Rule 23 (clarifying that a class may not be maintained under subpart (b)(2) where the appropriate final relief relates exclusively or predominantly to monetary damages). The use of the word "incidental" in this context was intended to mean "secondary" to injunctive relief. *Molski v. Gleich,* 318 F.3d 937, 950 n. 14 (9th Cir.2003). The Ninth Circuit has refused to adopt a "bright-line rule" distinguishing between incidental and non-incidental damages for the purpose of Rule 23(b)(2) certification. *Id.* at 950. Rather, the Ninth Circuit has focused on the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit. *Id.*

Wang v. Chinese Daily News, Inc. 231 F.R.D. at 611 -612.

Here, the monetary damages, being fixed in amount by statute, "flow directly" from the claims for injunctive and declaratory relief and are therefore incidental to those claims. *Arnold*, 158 F.R.D. at 462 (finding that fixed nature of statutory damages made monetary relief incidental and suitable for certification as a (b)(2) class). The statutory damages meet all three of the criteria set forth by the *Allison* court above: class members are automatically entitled to statutory damages upon a finding of a violation of Washington statute law,[2] the damages can be determined by an objective standard, and there will be no need for individual hearings to determine Class members' individual damages. No Class member could want to hire a separate attorney to prove greater or individual relief when damages are fixed by statute and the cost of an attorney is much greater than the individual damages at issue. The claims for monetary damages are secondary to the primary claim for injunctive and declaratory relief under the standards enunciated by the *Allison* court. This class satisfies the "cohesiveness and homogeneity of interest" that is required for certification under FRCP 23(b) (2). *Id.* at 412.

Dukes v. Wal-Mart....

[2] RCW 80.36.400(3) provides: "A violation of this section is a violation of Chapter 19.86 RCW. It shall be presumed that damages to the recipient of commercial solicitations made by using an automated dialing and announcing device are five hundred dollars.

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6. **Class Certification Is Proper Under FRCP 23(b)(3).**

In addition to seeking certification of some of the proposed Classes under FRCP 23(b)(2), Kwan also seeks certification under CR 23(b)(3). This subsection is satisfied if the Court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.

In the Ninth Circuit, "[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Hanlon,* 150 F.3d at 1022 (citation omitted). As was stated in *Hanlon,* "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than an individual basis." *Id.* (citation omitted). Under Rule 23(b)(3), common issues need only predominate, as FRCP 23 does not require the total absence of any individual issues. *In re Activision Sec. Litig.,* 621 F. Supp. 415, 429-30 (N.D. Cal. 1985). The rule requires only that common questions predominate, not that they be unanimous. *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L. Ed.2d 689 (1997) (citation omitted). It is enough if the claims of the class are not in conflict with each other:

> [C]ourts have held that [a class action] can be brought . . . even though there is not a complete identity of facts relating to all class members, as long as a "common nucleus of operative facts" is present. . . The common questions need not be dispositive of the entire action. . . Therefore, when one or more of the central issues in the action are common to the class and can be said to predominate, the [class] will be considered proper.

7A Charles A. Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 1778 at 528-29 (2nd ed. 1986), (cited with approval in *In re Telectronics Pacing Systems, Inc.,* 172 F.R.D. 271, 287 (S.D. Ohio 1997)).

Here, common questions of fact and law predominate because there are no individual issues in this case. Defendants made or caused to be made the same telephone calls, resulting

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in essentially the same violations, to all members of the proposed Classes. Simply put, this case presents a commonality of factual and legal issues that clearly justify handling this case on a class basis. Thus, the first requirement of Rule 23(b)(3) is satisfied.

1. A class action is superior to separate litigation of individual actions.

FRCP 23(b)(3) also requires that class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy. "The superiority inquiry under Rule 23(b)(3) requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon,* 150 F.3d at 1023. Superiority is demonstrated where "class-wide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter-Wallace, Inc.,* 97 F.3d 1227, 1234 (9th Cir. 1996). "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Amchem Prods.,* 521 U.S. at 617 (citation omitted).

Here, the individual class members' damages are not large to justify individual actions. If these individual claims were to be litigated without the benefit of a class action, "these claims would not only unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs." *Hanlon,* 150 F.3d at 1023. Litigation costs would dwarf potential recovery. *Id.*

In evaluating whether a class action is superior to separate lawsuits on the same subject matter, courts also must consider the four factors of FRCP 23(b)(3): (a) the interest of each member in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the difficulties likely to be encountered in the management of a class action. *Zinser v. Accufix Research Inst., Inc.,* 253 F.3d 1180, 1190–92 (9th Cir. 2001).

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a. Members of the proposed Class would have no interest in individually controlling the prosecution of separate actions.

The first factor is the interest of each member in "individually controlling the prosecution or defense of separate actions." FRCP 23(b)(3)(A). "This factor is most relevant where each class member has suffered sizeable damages or has an emotional stake in the litigation." *Haley,* 169 F.R.D. at 652. However, "[w]here damages suffered by each putative class member are not large, this factor weighs in favor of certifying a class action." *Zinser,* 253 F.3d at 1190. Thus, the fact that the proposed Class members' damages in this case do not exceed $500 weighs heavily in favor of certification here.

Furthermore, because the claims of all of the potential class members are virtually identical, "no one member of the [c]lass has an interest in controlling the prosecution of the action." *See Westways World Travel,* 218 F.R.D. at 240. In this case, as was the case in *Hanlon,* "[f]rom either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." *Hanlon,* 150 F.3d at 1023. Accordingly, the first factor of FRCP 23(b)(3) weighs in favor of certification of this case as a class action.

b. Extent and nature of other litigation concerning the controversy already commenced by or against members of the proposed Class.

Plaintiff's counsel is not aware of any other litigation concerning the matter before this Court. Even if there were such other litigation, there is no prohibition on the Court certifying a class if there are other class action lawsuits pending against the defendant. *See e.g. Gorbach v. Reno,* 181 F.R.D. 642, 644 (W.D. Wash. 1998) (trial court certified nationwide class where there was another competing class action case in another jurisdiction pending when the decision on the motion for class action was issued). Thus, the second factor of FRCP 23(b)(3) also weighs in favor of certification of this case as a class action.

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c. Desirability of concentrating the claims in this forum.

A class action in this forum, where there is an adequate plaintiff and experienced and able legal counsel willing to pursue the claims, is the superior means of resolving this dispute because the proposed Class numbers in the thousands. Consolidating the case into one action will conserve judicial resources and time. Further, the relatively small amount of damages available to each class member and the high cost of litigation would likely deter most individuals from filing suit. Finally, maintaining this case as a class action in this forum will guard against inconsistent results. The third factor of FRCP 23(b)(3) weighs in favor of certification of this case as a class action.

d. There will be no unusual difficulties encountered in the management of the case.

There should be no unusual difficulties encountered in the management of the case. Plaintiff's counsel are experienced class action attorneys and have the financial capabilities to manage the nationwide case. Moreover, "dismissals [of class actions] for management reasons, in view of the public interest involved in class actions, should be the exception rather than the rule." *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litigation,* 78 F.R.D. at 628 (citation omitted). As Judge Posner recently noted in a Seventh Circuit decision,

> The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative – no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied – to no litigation at all.

Carnegie v. Household Intern., Inc., 376 F.3d 656, 661 (7th Cir. 2004) (emphasis in original). The fourth factor of FRCP 23(b)(3) weighs in favor of certification of this case as a class action. Therefore, considering all the relevant factors, it is clear that certification of the proposed Class pursuant to FRCP 23(b)(3) is proper and warranted.

VI. CONCLUSION

At this stage of the proceedings "if there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require." *Brown v. Brown,* 6 Wn. App. 249, 256,

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492 P.2d 581 (1971).

DATE: December 22, 2011.

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