HONORABLE RONALD B. LEIGHTON
Date of Hearing: December 23, 2011

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

CAROLYN ANDERSON, Plaintiff, vs. DOMINO'S PIZZA, INC., DOMINO'S PIZZA, LLC, FOUR OUR FAMILIES, INC. and CALL-EM-ALL, LLC, Defendants.	No. C11-902RBL PLAINTIFF'S REPLY TO DEFENDANT DOMINO'S PIZZA, INC. AND DOMINO'S PIZZA, LLC'S RESPONSE TO PLAINTIFF'S 56(d) MOTION

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I. INTRODUCTION

Defendants Domino's Pizza, Incorporated and Domino's Pizza, LLC ("Domino's") fail to demonstrate that the motion of the Plaintiff for a brief continuance of its summary judgment motion should not be granted. Domino's simply ignores the incomplete discovery that it has given to date, and the critical additional discovery that is required in light of deposition testimony of its own agents.

Since Plaintiff filed her motion to continue the summary judgment motion, an FRCP 30(b)(6) deposition notice has been served on Domino's and a separate such notice on Defendant Four Our Families, Incorporated ("FOFI"), a Fourth and Fifth set of Requests for Production have been served on Domino's, as has a Second such Request on FOFI, and Domino's, which has previously taken the position it has no obligation to conduct a review of its electronically

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stored information ("ESI") as part of responding to discovery. Domino's has now been served with a notice providing ESI search terms. Copies of this recent discovery, including the ESI notice, are attached as exhibits A, B, C, D, E, and F to the Declaration of Rob Williamson ("Williamson Decl.") submitted with this Reply.

Discovery to date has revealed that every time a pizza is sold by any of its franchisees, Domino's makes more money. The franchisees are tightly controlled by Domino's, and all advertising and marketing is made in the name of Domino's. Domino's facilitated and encouraged making the "robo-calls" that are the subject of this litigation, in part, because such marketing generated additional revenue. It specifically invited Defendant Call-Em-All ("Call-Em-All") to attend a rally where its automated voice broadcasting services could be promoted to franchisees. It requires franchisees to use the software system entitled PULSE which collects data, including the telephone numbers of all customers of Domino's, and provides a mechanism by which those telephone numbers can be downloaded by a franchisee for various purposes, including the robo-calling in this case. (Williamson Decl. ¶14)

It appears, subject to additional discovery, that at the time Plaintiff received the autodialer solicitation calls at issue in this case, Domino's was fully aware that franchisees were robo-calling, and, other than to issue a warning to franchisees to be sure to follow state and federal laws, did nothing to prevent this form of marketing, again presumably because it increased its revenue as the franchisees' revenue increased. Domino's received possibly thousands of complaints on its website from customers around the country complaining about robo-calling, to which, apparently, its sole response was to send the complaints on to the franchisees. Domino's initiated a Telephone Opt In program to permit customers who log on to the Domino's website to "opt in" to receive various communications from Domino's (as opposed

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1 to the individual franchisees), including "robo-calls." This particular functionality of its website
2 was added specifically at the request of Domino's largest franchisee, RPM, Incorporated because
3 its relationship with RPM is important to revenue generation for Domino's. (Williamson Decl.
4 ¶15)

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6 **II. REPLY TO DOMINO'S CONTENTIONS**

7 Domino's claims Plaintiff has not diligently pursued discovery. In fact, efforts to schedule
8 depositions of critical Domino's personnel were delayed by various conflicts in the schedules of
9 the witnesses and the lawyers for the three defendants. Plaintiff first requested Domino's
10 depositions in mid-June 2011 and the depositions that were not taken until October 28, 2011.
11 With Call-Em-All, written discovery responses were not received until September and the
12 deposition with respect to Call-Em-All not until December 1, 2011. To criticize Plaintiff for
13 failing to diligently pursue discovery is, at best, unfair and, at worst, disingenuous when
14 Plaintiff's counsel attempted to get these depositions scheduled for four months before the
15 witnesses were made available (Williamson Decl., ¶11).

16

17 Domino's claims that Plaintiff represented that she would be able to respond to its
18 summary judgment motion after conducting depositions of two Domino's employees, serving a
19 third request for production on Domino's and obtaining written and deposition discovery from
20 Call-Em-All. As noted above, the depositions could not be scheduled until October 28 and
21 December 1, respectively.[1] In addition, the October and early December depositions gave rise to
22 the need for Plaintiff to promulgate additional written discovery as set forth above. Plaintiff's

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25 [1] Domino's appears to fault Plaintiff for "declining" to take the depositions of certain witnesses. (Domino's Response to CR 56 (d), 3). Domino's does not advise the court that the witnesses were excused after discussions among
26 counsel concluded that they had no additional knowledge besides that of the witnesses who had already been deposed, and that the parties agreed to forgo their depositions.

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counsel did not know what additional discovery would be required based on the deposition testimony until the depositions actually occurred, and then Plaintiff promptly promulgated that discovery (Williamson Decl., ¶10).

As Plaintiff has learned more about the various issues in this case, it is now clear that Domino's was not fully forthcoming in its answers to Plaintiff's written discovery. It has taken the position that it had no obligation to provide ESI as part of its responses to that discovery which was propounded while the case was pending in state court and before the removal by Call-Em-All on May 31, 2011. Plaintiff is unaware of any authority that permits a party in state court to refuse to review ESI and Domino's has never cited any such authority. Plaintiff has now met and conferred with Domino's counsel as a prerequisite to bringing a Motion to Compel, and has likewise served a notice regarding ESI (Exhibit F to the Williamson Decl.) after the "ESI" conference with Domino's counsel Domino's produced an inadequate response to the concerns regarding ESI. That response is attached as Exhibit G to the Williamson Decl.

Plaintiff has not been able to file her motion for class certification because of the incomplete discovery that has been provided by Domino's, and the difficulties scheduling necessary depositions. This has also been thwarted by Domino's failure to conduct a thorough investigation to respond to the written discovery, and its failure to produce critical written information relevant to the proceedings. When Plaintiff suggested in the Joint Status Report that discovery regarding class certification could be completed by October 31, 2011, that statement was cast in terms of "Plaintiff believes" the discovery could be completed at that time. Obviously Plaintiff was not anticipating that the depositions of critical Domino's personnel would be put off until October 28, 2011, and the Call-Em-All depositions until December 1, 2011 (Williamson

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Decl., ¶11).[2]

Domino's has in fact concealed from Plaintiff both the PULSE program as well as the Opt In program, which are both integrally related to the ability of its franchisees to make "robo-calls." Domino's suggestion that PULSE was revealed in the deposition of Scott Senne is erroneous. The so-called "revelation" about the PULSE system by Mr. Senne was in response to a question about whether or not a vendor coming to a rally would not be permitted because it would be in direct competition with Domino's. His answer, in part was "I know there was one that wanted to come that was in direct competition with our pulse computer system, the software". (Deposition of Scott Senne, p. 8 attached to Williamson Decl., Exh. H). Senne did not indicate what the software system was about, did not indicate that its use was required by Domino's franchisees, nor that the system allowed for the collection telephone numbers to be used for marketing (Williamson Decl., ¶10).

Domino's further claims that the Plaintiff should have known about PULSE because Mr. Michael Brown, the owner of FOFI testified that he had downloaded numbers from his stores and each store maintained a database of telephone numbers. He made no mention of PULSE and it was the assumption of Plaintiff that Mr. Brown was referring to a database he had generated on his own. In fact it was not until the deposition of Mr. Brad Herrmann, the owner of Call-Em-All, in early December 2011 that it was revealed that Mr. Brown had actually been sent specific information concerning how to use PULSE to download telephone numbers so he could do the robo-calling (Deposition of Brad Herrmann, p. 72 attached as Exhibit I to the Williamson Decl.).

Plaintiff's recent "flurry" of discovery is neither improper nor late. Domino's has been

[2] Notwithstanding that discovery is not completed and that Domino's has not met its discovery obligations, Plaintiff filed her motion for class certification motion on December 22, 2011 so that the issues will be before the Court (Williamson Decl., ¶ 16.).

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sued in another jurisdiction for the very conduct of which it is guilty in this case and the matter is pending in the Central District of Louisiana, *Spillman v. Domino's Pizza LLC and RPM Pizza*, Inc. (10-349-BAJ-SCR). In that case, Domino's has not brought a motion for summary judgment like it has here. One of the defendants in that case is the franchisee, RPM, Incorporated, referenced above, and RPM was able to prevail upon Domino's to create methods by which it and other franchisees could make "robo-calls." Clearly discovery related to Domino's' interactions with RPM on this exact issue is relevant both to class certification and liability (Williamson Decl., ¶14).

III. ADDITIONAL DISCOVERY

Plaintiff claims Domino's knowingly aided and abetted its franchisees to make robo-calls. It invited and encouraged Call-Em-All to sell robo-calling services to franchisees. It required franchisees to operate the PULSE program which was designed, in part, to permit downloading telephone numbers for marketing. It designed and implemented a Telephone Opt In program on its website so consumers could choose to receive robo-calls and the information then made available to franchisees. This was done, it appears, at the request of its largest franchisee, RPM, Incorporated. Domino's has been sued along with RPM, Inc. for exactly the same violations as alleged here yet Domino's has not brought a summary judgment on this issue in that case. Domino's received complaints on its website from customers about robo-calls so that it was clearly aware the robo-calling was occurring on a major scale. It profited from every pizza or other product sold as a result of the robo-marketing. Its field managers apparently communicated to franchisees about robo-calling. All of this conduct is the subject of the additional discovery that is required. Further, Domino's has wrongly refused even to search for ESI much less produce it.

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CONCLUSION

Plaintiff asks the Court to move the Motion for Summary Judgment to March 30, 2012 in order to permit her to fully prepare her response. Domino's has not yet responded to outstanding and new discovery that will lead to relevant evidence demonstrating the illegal robo-calls were made with Domino's knowledge and consent, if not at its direction, making it liable to Plaintiff and the potential Classes under Telephone Consumer Protection Act and Washington law.

DATED this 23th day of December 2011.

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