HONORABLE RONALD B. LEIGHTON

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 RESPONSE TO DEFENDANTS DOMINO'S PIZZA, INC. AND DOMINO'S PIZZA, LLC'S MOTION FOR SUMMARY JUDGMENT HEARING DATE: December 30, 2011

I. INTRODUCTION

Plaintiff Carolyn Anderson asks the Court to deny Defendants Domino's Pizza, Inc. and Domino's Pizza, LLC's (collectively "Domino's") Motion for Summary Judgment under Fed. R. Civ. P. 56 because genuine issues of material fact exist for trial on Plaintiff's claims against Domino's. Through Domino's franchisee Four Our Families, Inc. ("FOFI"), and Defendant Call-Em-All, LLC ("Call-Em-All"), Domino's blasted illegal "robo-calls"—calls using automatic dialing and answering devices, or ADADs—to Plaintiff and other putative class members, advertising and soliciting the purchase of Domino's products, in violation of the RCW 80.36.400, which provides:

> As used in this section: (a) An automatic dialing and announcing device is a device which automatically dials telephone numbers and plays a recorded message once a connection is made. (b) Commercial solicitation means the unsolicited initiation of a telephone conversation for the purpose of encouraging a

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person to purchase property, goods, or services. (2) No person may use an automatic dialing and announcing device for purposes of commercial solicitation. This section applies to all commercial solicitation intended to be received by telephone customers within the state.

The critical issue presented in Domino's Motion is whether the illegal robo-calls were made "on behalf of" Domino's, or Domino's "used" ADADs to make the calls, so that it is liable for damages under state and federal law.[1] Domino's contention that the central issue is the application of agency law is mistaken, and its claim it cannot be liable because FOFI is an independent contractor which made its own arrangements with Call-Em-All is likewise not what determines its liability in this case. As demonstrated below, agency is not dispositive of Domino's liability, though there is evidence that Call-Em-All was acting as an agent for both Domino's and FOFI in placing the calls at issue.

It is highly relevant to obtain evidence that shows to what extent Domino's has been and is involved in marketing, including robo-calling. On this critical issue Domino's has not yet provided discovery. Domino's filed its motion for summary judgment on November 28, 2011, noting it for hearing on December 30, 2011. On the day Domino's filed its summary judgment motion, Plaintiff Anderson asked Domino's for more time due to the holidays and the fact that Domino's responses to Anderson's discovery requests were incomplete and inadequate, as Anderson will address in a separate motion to compel: For example, Domino's has provided no electronically stored information (ESI), which Anderson originally requested when this case was in Washington State Superior Court, before Call Em All removed it to this Court. Domino's did

[1] The Telephone Consumer Protection Act ("TCPA") provides, in part, in 47 U.S.C. § 227: "(b) Restrictions on use of automated telephone equipment (1) Prohibitions. It shall be unlawful for any person within the United States...(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party..."

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not respond until December 5, 2011, with a refusal. Anderson has moved for a continuance of at least 90 days, until March 30, 2012, under Fed. R. Civ. P. 56(d). Williamson Decl. ¶2.

Plaintiff has propounded new discovery requests which will elicit information demonstrating Domino's undeniable involvement in and benefit from the robo-calling program. No matter what marketing program is implemented, for every pizza sold as a result of the marketing, Domino's makes more money. Domino's robo-calling program includes its facilitation of robo-calling through PULSE, a point-of-sale software program Domino's requires all franchisees to utilize which enables them to collect telephone numbers of customers which could then be used for robo-calling. A Telephone Opt In program implemented to comply with the regulations of the Federal Trade Commission, which became effective September 30, 2009, requiring robo-callers to obtain written permission of persons called, even those with a so-called established business relation with the blaster. Domino's disclosed neither the PULSE nor the Opt In program in the limited discovery it has produced so far. Also depositions conducted in November 2011 of Domino's employees and in December 2011 of the President of Call-Em-All have revealed new facts and reasons for additional discovery. Williamson Decl. ¶3.

Even without the pending discovery and unknown facts, Plaintiff submits the record contains enough evidence to raise triable factual issues and summary judgment should be denied.

II. STATEMENT OF FACTS

A. Facts Regarding Domino's Use of ADADs.

Domino's controls its franchisees, including their marketing, knew or should have known of the illegal ADAD calling, in fact facilitated and approved ADAD calling by Domino's largest

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franchisee RPM,[2] and made RPM's robo-caller, Call-Em-All, available to franchisees at its 2009 rally so that they could utilize the services of Call-Em-All. Dominio's did so knowing this vendor sold ADAD calling services, and knowing the calls could produce more revenue for Domino's.

1. Domino's Script.

An example of the script used in this case alone establishes that the calls are made on behalf and for the benefit of Domino's:

> Hi, **this is Dominos' 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.

Declaration of Rob Williamson ("Williamson Decl."), ¶ 4 (emphasis added).

Domino's authorizes, indeed requires, franchisees to use its name in marketing. No pizza is sold without the Domino's label and with the imprimatur of the Domino's reputation. The robo-calls were made for the sole purpose of increasing sales for the benefit of Domino's and its franchisees.

2. Domino's Approved Robo-Caller's Solicitation Of Franchisee Robo-Calling Business.

Call-Em-All is an automated calling and texting service which allows its customers to record or type a message, provide a list of phone numbers, and have Call-Em-All blast the

[2] RPM is the largest franchisee in the Domino's system and is "very influential." Herrmann Dep., at 62. "[W]hen you work with them, you can just start dropping their name and everybody in the country kind of—all the other franchisees in the country know about RPM Pizza. ... it is a big name to drop". *Id.* RPM has been sued in a case in Louisiana federal court, *Spillman v. Dominos Pizza, LLC*, CIV.A. 10-349-BAJ-SC, 2011 WL 721498 (M.D. La. Feb. 22, 2011) *reconsideration denied,* CIV.A. 10-349-BAJ-SC, 2011 WL 2437628 (M.D. La. June 17, 2011) for similar violations as in this case. It appears RPM persuaded Dominos to create a telephone opt-in feature on the Domino's website which could then be tapped for robo-calls. Williamson Decl. ¶7.

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messages out to the phone numbers. (Deposition of Brad Herrmann ["Hermann Dep."], at 6, copies of the excerpts of which are attached to the Williamson Decl. as Eh. 1). Call-Em-All President Brad Herrmann testified in his recent deposition (Dec. 2, 2011, Irving, Texas) that Call-Em-All (represented by Mr. Herrmann) attended Domino's Worldwide Rally in May 2009, having heard about it from Domino's franchisee RPM Pizza, which was a client of Call-Em-All before the rally. (*Id.* at 19, 23). Mr. Herrmann contacted Domino's corporate headquarters to ask about attending the rally. Someone from Domino's corporate headquarters sent him a standard form to complete in order to attend. (*Id.* at 23-24). Domino's admits it organized this rally, and that franchisees from approximately 60 countries and all across the United States attended. (Motion, at 6; Declaration of Brant A. Godwin Ex. 3). Domino's also invited and permitted a total of almost 100 vendors to advertise their products to franchisees. *Id.*

As a result of the rally, Call-Em-All acquired several new Domino's franchisees as clients, including FOFI. (Herrmann Dep. at 26). Between the rally in May 2009 and September 1, 2009, when the FTC began requiring explicit written permission to robo-call a person, Call-Em-All went from having a few Domino's franchisees as clients to about 50. (*Id.* at 22-23). This increase was a direct result of Domino's having hosted Call-Em-All at its Worldwide Rally. Ultimately, of course, Domino's benefited from the robo-calling by higher sales of its products, including profits from its agreements with franchisees.

3. Domino's required franchisees to collect phone numbers.

Domino's had the PULSE program, a form of software that franchisees were required to use to input all orders received which would include all telephone numbers. The purpose of this requirement could only have been to permit franchisees to telemarket. According to Mr. Herrmann of Call-Em-All, franchisee orders and telephone numbers are stored on PULSE, so

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franchisees could use PULSE to pull phone numbers for robo-calling. (Herrmann Dep., at 47). Call-Em-All created a document with instructions on how a Domino's franchisee could get these phone numbers for robo-calling, in order to help franchisees get the data out of PULSE. (*Id.* at 47-48, 63-64 & Dep. Ex. 8.). Mr. Herrmann testified that Domino's corporate website had phone opt-ins after a customer ordered a pizza online, at least for its largest franchisee, RPM. (*Id.* at 51). Domino's 10K (attached as Exhibit 3 to the Williamson Decl. is page 8 of Domino's 10-K filed with the Securities and Exchange Commission, effective January 2, 2011) describes PULSE and mentions that Domino's requires franchisees to use it. Call-Em-All sent directions to Mike Brown, owner of FOFI, as to how to use PULSE to access telephone numbers of customers. (Herrmann Dep. at 72.)

In its Motion, Domino's glosses over the critical facts relating to the ability of FOFI and any other franchisee to obtain telephone numbers to use for marketing. FOFI could not have loaded numbers onto the Call-Em-All website without the direct assistance of Domino's that provided the mechanism for telephone number storage and retrieval through the PULSE software, the use of which was required by Domino's. Domino's concludes that it is not liable because it did not "participate" in making the calls. (Motion at 9). In reaching this conclusion, Dominio's ignores the critical fact that, regardless of whether Call-Em-All alone physically placed the calls, both FOFI and Domino's initiated and benefitted from the robo-call marketing.

4. Domino's Franchise Agreement Demonstrates Its Control of Franchisee Advertising.

Domino's own Franchise Agreement explicitly states that advertising and promotions are for its own benefit: "**You agree to participate in all national and local and regional advertising and promotions as we determine to be appropriate <u>for the benefit of Domino's</u>**

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System." Williamson Decl., Ex. 2 (emphasis added). The Franchise Agreement indicates, regarding marketing controls, that Domino's **requires** the franchisee to submit proof within 90 days of opening that it has spent at least $3,000 on advertising and promotions. Williamson Decl., Ex. 2 (Section 5, p. 3). Other advertising provisions are set forth in Section 13, for example:

> **13. ADVERTISING AND PROMOTION**
>
> **13.1 By Domino's**
>
> **We will from time to time formulate, develop, produce and conduct advertising and promotional programs in the form and media as we determine to be most effective. You agree to participate in all national and local and regional advertising and promotions as we determine to be appropriate for the benefit of Domino's System.... You will be obligated to pay three percent (3%) of the weekly royalty sales of the Store to the Advertising Fund.** Your contribution to the Advertising Fund must be postmarked on Monday and paid by Wednesday of each week on royalty sales for the week ending on the preceding Sunday or by Thursday if paid by electronic funds transfer ... **You agree that we shall have the right from time to time to increase your contribution** to the Advertising Fund by an amount not to exceed in the aggregate one percent (1%) of the royalty sales of the Store. ... **We reserve the right to engage the services of an advertising source or sources to formulate, develop, produce and conduct the advertising and promotion programs,** the cost of such services to be payable from the Advertising Fund.
>
> You acknowledge and understand that the Advertising Fund is intended to **maximize general public recognition and patronage of the Marks in the manner determined to be most effective by us** and that we undertake no obligation in developing, implementing or administering these programs to ensure that expenditures which are proportionate or equivalent to your contributions are made for the market area of the Store or that any Domino's Pizza Store will benefit directly or pro rata from the placement of advertising.
>
> **13.2 Local and Regional Advertising Cooperatives.**
>
> We reserve the right to require that you participate in local and regional advertising cooperatives in connection with the advertising and promotional programs administered by us or y other franchisees ....

Williamson Decl., Ex. 2 (emphasis added). The Franchise Agreement makes it clear that Domino's has an extremely broad right to control advertising and marketing decisions, including robo-calling campaigns, **for the benefit of the Domino's System** "Marks" or brands, and that all

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franchisees pay for these decisions made from the top by corporate management. Further details may be in policies and procedures or manuals; or they could be contained in e-mails or memoranda or electronic records. Domino's likely has other, more specific instructions not yet disclosed to Plaintiff about marketing its products in order for a franchisee to maintain and promote its brand. Domino's possibly tracks the advertising by robo-calls done by its franchisees, and the results. But to date, Domino's has refused to produce any material disclosing the nature of its involvement and any person knowledgeable about these matters.

B. Procedural History.

Anderson originally filed the case in the Washington State Superior Court, King County Case number 10-2-15941-0. Call-Em-All removed the action on May 31, 2011. Trial is set for 9 months from now, September 24, 2012; the discovery cutoff is May 29, 2012.

Plaintiff propounded discovery to Domino's in the state court litigation on 3 occasions. Domino's provided inadequate responses, withholding critical material. On December 5, 2011, after Domino's refused to continue its summary judgment motion, Anderson's counsel wrote defense counsel regarding necessary additional discovery:

- Complete responses to the three rounds of discovery (to be the subject of a motion to compel).
- Deposition of a knowledgeable person about PULSE. Anderson has set a Fed. R. Civ. P. 30(b)(6) deposition for January 23, 2012.[3]

[3] In the Fed. R. Civ. P. 30(b)(6) deposition, Plaintiff will ask questions and request production of documents concerning communications with franchisee FOFI regarding marketing in 2008 and 2009, including calls made using the Call-Em-All platform; policies regarding marketing and the role of Domino's regarding marketing by FOFI in 2008 and 2009; the PULSE software program; communications or policies from Domino's regarding marketing with voice broadcasting or pre-recorded telephone calls using automated dialing and announcing devices (ADADs); how franchisees can save telephone numbers in databases or otherwise, including the identification of the software or computer program used. All of this information is highly relevant to determining Domino's degree of direction,

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- All ESI discovery which Dominos refused to produce when the case was pending in state court.[4]
- Answers to further discovery propounded about the telephone opt-in program, the PULSE program and contacts between Domino's and RPM about robo-calling. Plaintiff has propounded Fourth Requests for Production of Documents.
- Depositions of RPM personnel.

Williamson Decl. ¶6.

Anderson has propounded further discovery requests of Domino's, to include: E mails or letters to RPM from Domino's or to RPM regarding PULSE, the Telephone Opt In Program, the litigation against RPM, and documents related to the PULSE and Telephone Opt-In Program; documents addressing automated telephone marketing/voice broadcasting, including documents expressing any reservations or negative positions Domino's had regarding such calls, documents discussing such marketing, encouraging it, explaining it, discouraging it; documents regarding the use of any franchisee of the services of Call Em All, or their use of voice broadcasting; all discovery and responses thereto, including all depositions, from the litigation against RPM; documents related to any vendor who has come to any Rally who offered franchisees voice broadcasting services; and documents related to telemarketing by Domino's franchisees, including but not limited to documents encouraging or discouraging telemarketing;

III. ISSUE

Has Plaintiff shown genuine issues of material fact exist to preclude summary judgment dismissal of Domino's?

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involvement and control with the illegal calls.

[4] Plaintiff also seeks ESI from several specific custodians with specific search terms. Williamson Decl., Ex. 4

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IV. ARGUMENT/AUTHORITY

A. Standard for Summary Judgment. Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits, when viewed in the light most favorable to the nonmoving party, "show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Galen v. County of Los Angeles,* 477 F.3d 652, 658 (9th Cir. 2007). The moving party—Domino's--bears the initial burden of showing there is no genuine issue of material fact and that it is entitled to prevail as a matter of law. *Celotex,* 477 U.S. at 323. Only if Domino's has met that burden must Plaintiff then identify facts showing a genuine issue for trial. *Cline v. Indus. Maint. Eng'g. & Contracting Co.,* 200 F.3d 1223, 1229 (9th Cir. 2000). Plaintiff "must make a showing sufficient to establish a genuine dispute of material fact regarding the existence of the essential elements of his case that he must prove at trial." *Galen,* 477 F.3d at 658. Genuine factual issues are those for which the evidence is such that "a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

B. The Robo-calls Received By Plaintiff Were Made For Domino's. Domino's contends it did not place any illegal calls to Plaintiff and has no involvement in the calls made by Call-Em-All for FOFI. RCW 80.36.400 prohibits the "use" of an ADAD for purposes of commercial solicitation. "Use" is not limited to the actual blaster, in this case Call-Em-All, but the parties on whose behalf and for whose benefit the calls are made, in this case Domino's and FOFI. Third-party telemarketers are routinely the entities physically making these calls for the Seller. Cases in this District have never questioned that the name-brand Seller is ultimately liable

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(Plaintiff's Request for ESI to Domino's).

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under the Washington state law, regardless of whether a third party actually placed the call. *See, e.g., Hovila v. Tween Brands, Inc.*, No. C09–0491RSL, 2010 WL 1433417, at *8 (W.D.Wash. Apr.7, 2010); *Palmer v. Sprint Nextel Corp.*, 674 F.Supp.2d 1224, 1229–31 (W.D.Wash.2009).

While few judicial opinions have analyzed RCW 80.36.400, it is very similar to the TCPA and shares similar consumer protection goals, so that review of TCPA jurisprudence is relevant and instructive. The TCPA and its accompanying regulations permit Plaintiff to recover damages from Domino's because the calls were made on behalf of Domino's, in order to sell internationally-uniform products "for the benefit of the Domino's System" (as Domino's admits). Sections 227(b)(3) and (b)(1)(B) of the TCPA allow a person to bring "an action" against an entity that "initiate[s]" a phone call using a pre-recorded device. Section 227(c)(5) allows "[a] person who has received more than one ... call ... by or on behalf of the same entity" to sue for a "violation of the regulations prescribed under this subsection."[5]

Regardless of the label used in any agreement between Domino's and FOFI and regardless of Domino's instruction that the franchisee identify applicable law, the calls were made "on behalf of" Domino's – how else would FOFI sell Domino's products, which is the entire point of the calls? The additional discovery requested by Plaintiff will demonstrate the degree of involvement of Domino's (like McDonald's, or Denny's, or similar large fast food corporations) with this type of advertising of its products.[6]

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[5] Both TCPA sections 227(b)(3) and (b)(1)(B) apply equally to calls placed by callers for Domino's, including when they are placed by independent contractors rather than by agents or employees. The corresponding TCPA regulations confirm this. 47 C.F.R. § 64.1200(d)(3) explicitly creates liability for entities on whose behalf calls are made. Other regulations concern entities who make or initiate calls. *See, e.g., id.* § 64.1200(d)(1), (d)(6). 47 U.S.C. § 217 codifies vicarious liability for "common carrier[s] or user[s]." Though user is not defined in this section, Congress made clear elsewhere that the term applies to users of telecommunications, 47 U.S.C. § 225, and mobile service, *id.* § 222, as well as premises, *id.* § 226; *id.* § 572 (cable users); *id.* § 605 (users of encrypted satellite cable). "Common carrier" means "any person engaged as a common carrier," 47 U.S.C. § 153(11). *See, e.g., In the Matter of Amendment of Section 64.702 Second Computer Inquiry,* 77 F.C.C. 2d 384 (1980).

[6] Importantly, Domino's has the obligation to produce the requested discovery whether or not it owns or controls or

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Domino's Motion rests on the false premise that this is an issue of pure agency law, that it did not make the illegal calls, and that no facts exist to show it had any right to control the illegal advertising calls made in this case. RCW 80.36.400 does not include any question of agency in order to determine who is liable. Like the TCPA, it should be interpreted to place liability on a seller who benefits from robo-calls made to sell its products, especially when it has knowledge that such calls are being made, as Domino's did with the Call-Em-All calls.[7]

The law is clear without any further ruling from the FCC. The FCC and the majority of courts to address the issue have held that "on behalf of" is not by any means limited to whether the entity making the call was an agent of the entity on whose behalf the call was made. In 1995, the FCC ruled that a dealer on whose behalf an illegal call or fax was sent is ultimately liable, and several courts followed this ruling:

> [R]ules [under the TCPA] generally establish that the party on whose behalf 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.

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, ¶ 13, 10 F.C.C.R. 12391, 12397, 1995 WL 464817 (1995) (footnote omitted).

> 34. Unsolicited Facsimile Advertisements. Some petitioners request clarification of whether responsibility for compliance with the ban on unsolicited facsimile advertising and with the facsimile identification requirement lies with the entity or entities on whose behalf such messages are sent or with service providers ("fax broadcasters"). Generally these commenters are fax broadcasters who disseminate facsimile messages for their clients. They favor excluding any fax broadcaster, whether or not a common carrier, from responsibility for compliance with the rules, and assigning ultimate responsibility to the author or originator of the facsimile message. The commenters contend that the Report and Order

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has the right to control franchisee advertising. Fed. R. Civ. P. 34 requires a party to produce "the following items in the responding party's **possession, custody, or control** ..."

[7] Pending before the FCC are 3 petitions on TCPA liability for companies when third party retailers make unlawful telemarketing calls. The FCC sought comments last spring and has not ruled. FCC Consumer & Governmental Affairs Bureau, Public Notice (DA 11-594) released on April 4, 2011, CG Docket No. 11-50. http://fjallfoss.fcc.gov/ecfs/document/view?id=7021238462.

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> indicates only that "carriers" would not be held liable, and did not indicate whether service providers who are not carriers would also be exempt from such requirements.
>
> 35. Decision. **We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with this rule.** This interpretation is consistent with the TCPA's legislative history, and with our finding in the Report and Order that carriers will not be held liable for the transmission of a prohibited message. We emphasize, however, that facsimile broadcast services must ensure that their own identifying information appears on fax broadcasts. We also point out that in cases where a facsimile is transmitted on behalf of multiple entities, the fax broadcaster must assure that each such entity is identified separately in accordance with the statutory requirement.

Id., ¶¶ 34-35 (Aug. 7, 1995) (emphasis added). *See also, e.g, Bridgeview Health Care Ctr. Ltd. v. Clark,* 09 C 5601, 2011 WL 4628744 (N.D. Ill. Sept. 30, 2011) ("Courts have relied upon the FCC's interpretation to conclude that defendants cannot escape liability simply by hiring an independent contractor to transmit unsolicited facsimiles on their behalf"; certifying class of persons who "were sent telephone facsimile messages of material advertising the commercial availability of any property, goods, or services by or on behalf of Defendant"); *Spillman v. Dominos Pizza, LLC*, CIV.A. 10-349-BAJ-SC, 2011 WL 721498 (M.D. La. Feb. 22, 2011) *reconsideration denied,* 2011 WL 2437628 (June 17, 2011) (complaint alleging that Domino's franchisee RPM Pizza, by virtue of its franchise or agency relationship, is obligated to engage in advertising and marketing campaigns to sell Domino's pizzas which included script of calls directing call recipient to "press '1' to be connected to Domino's", stated a claim "that the calls were either placed by Domino's or by a mandatary [sic] of Domino's", sufficient to survive motion to dismiss); *Kazemi v. Payless Shoesource Inc.*, C 09-5142 MHP, 2010 WL 963225 (N.D. Cal. Mar. 16, 2010) ("It is too early in this litigation to dismiss Collective Brands, as it is not clear whether Payless or Collective Brands, or both, were entities on whose behalf the alleged text

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messages were sent"; citing *Worsham v. Nationwide Ins. Co.,* 138 Md.App. 487, 496, 772 A.2d 868 (2001) and 47 C.F.R. § 62.1200(e)(2)(iii)); *Glen Ellyn Pharmacy v. Promius Pharma, LLC,* 09 C 2116, 2009 WL 2973046 (N.D. Ill. Sept. 11, 2009) (citing 1995 Order for conclusion that "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements"); *Worsham v. Nationwide Ins. Co.*, 138 Md. App. 487, 504-05, 772 A.2d 868, 878-79 (2001); *Hooters of Augusta, Inc. v. Nicholson,* 537 S.E.2d 468, 472 (Ga. App. 2000) ("...even if the jury finds that Clark was an independent contractor, Hooters may still be liable for unsolicited facsimile advertisements. Under the TCPA, "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the [TCPA's] rule banning unsolicited facsimile advertisements." Release No. 95-310 of the Federal Communications Commission, CC Docket No. 92-90, 10 FCC Rcd 12391 (1995), Pars. 34-35. "... [W]e conclude that an advertiser may not avoid liability under the TCPA solely on the basis that the transmission was executed by an independent contractor.").

In *Worsham,* the court expressly rejected the same argument Domino's makes here, concluding that, whether or not the calling entity was an independent contractor, an issue of fact existed as to whether the entity on whose behalf the calls were made was liable under the TCPA:

> We conclude that the existence of an independent contractor relationship between Nationwide and Gerety would not, in itself, insulate Nationwide from liability under the TCPA. The TCPA reaches not only the entity making the telephone solicitation, but also any entity "on whose behalf" such calls are made. Even if Gerety was an independent contractor, that status alone would not eliminate the possibility that Gerety was calling on behalf of Nationwide. Nationwide can be liable for calls that an independent contractor makes at Nationwide's direction and request.
>
> **Whether the First Call and the Second Call were made "on behalf of" Nationwide is a matter of fact that is disputed on the record now before us. Although the nature of the contractual relationship between Nationwide and**

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> **Gerety is relevant to this factual question, it is by no means dispositive. As Worsham correctly notes, "[w]hat is more indicative is whether Nationwide controls the content of the solicitations its agents use...."** It is unclear what responsibility Nationwide had, if any, for the two calls to Worsham. Worsham's unrebutted affidavit stating that, within one month, both callers used substantially identical scripts stating that they were calling "for Nationwide," without mentioning any individual Nationwide insurance agency, was sufficient to raise a dispute as to whether the solicitation was made on behalf of Nationwide. In the absence of additional information about Nationwide's contractual and de facto relationship to either Gerety or these calls, Worsham's affidavit raises an inference that Nationwide may have directed or authorized Gerety and other agents in the area to conduct telephone solicitations via a common script created or approved by Nationwide. In the event such scripts failed to meet the requirements set forth in the FCC regulations, a fact finder could conclude that both calls were made in violation of the TCPA "on behalf of" Nationwide.

(Emphasis added.)

FOFI and Domino's know well that "[w]hether an agency exists is usually a question for the jury. The court may decide the question only if the facts are undisputed and lead to a single conclusion. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980)." *ITT Rayonier, Inc. v. Puget Sound Freight Lines*, 44 Wn. App. 368, 377, 722 P.2d 1310 (1986). It is well settled that independent contractors can be agents despite their non-employee status, *see Fisher v. Townsends, Inc.*, 695 A.2d 53, 61 (Del. 1997) (collecting cases), and a seller cannot absolve itself of TCPA liability by simply labeling its sales entities "independent contractors," *see, e.g., Bridgeview Healthcare Ctr.*, 2011 U.S. Dist. LEXIS at * 12; *Worsham*, 777 A.2d at 877-78; *Hooters*, 537 S.E.2d at 472.

The TCPA is unambiguous that the primary seller of a brand like Domino's is liable for illegal calls. A telemarketer is defined as "the person or entity that **initiates** a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(10). Under the TCPA definition, the entity "initiating" a call is directly liable for compliance with the Act's

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provisions and liable for violations. The sole relevant definition of the term "initiate" as defined by the Oxford online dictionary is to "cause (a process or action) to begin". http://oxforddictionaries.com/view/entry/m_en_us1258139#m_en_us1258139 (last visited Dec. 27, 2011).

Sellers must be held strictly liable when a violative call is made to a person for the purpose of encouraging the purchase of the Seller's goods, and the party physically dialing the call identifies itself as the Seller—as in every Domino's telemarketing call. Sellers—obviously including large franchisors such as Domino's--derive benefits from third-party callers' actions. Even if the violative call does not result in a sale, Domino's (like McDonald's, Denny's, etc.) gets the benefit of having its products presented to a group of potential customers. Domino's recognizes this benefit in its Franchise Agreement ("for the benefit of Domino's System"). In this case, Domino's corporate **invited** the telemarketer, Call-Em-All, to attend its rally and sell its telemarketing services to franchisees to promote Domino's. Since every violative call confers a benefit on Domino's, it must be held responsible for each call.

The TCPA is, and has been held to be, a strict liability statute. Except in those cases for which a "Seller" has a "safe harbor", 47 C.F.R. § 64.1200 (c)(2), or is an entity specifically excluded by the Act, there are no protections granted to a Seller for violative acts. *CE Design Ltd. v. Prism Business Media, Inc.*, Civ. No. 07-5838, 2009 WL 2496568, at *3 (N.D. Ill. 2009) ("The TCPA is a *strict liability* statute"). *See also Penzer v. Transportation Ins. Co.* 545 F.3d 1303, 1311 (11th Cir. 2008) (citing *Park Univ. Enters., Inc. v. Am. Cas. Co. of Reading, PA.*, 314 F.Supp.2d 1094, 1103 (D.Kan.2004) ("The TCPA is essentially a strict liability statute" where liability can be found for erroneous unsolicited faxes).

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The FCC has clarified that a person or entity can be liable for calls made on its behalf even if the entity does not directly place those calls. In those circumstances, the person or entity is properly held to have "initiated" the call within the meaning of the statute and the Commission's regulations. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of* 1991, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397 ~ 13 (1995) (noted above; FCC "rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations"; "[c]alls placed by an agent of a telemarketer are treated as if the telemarketer itself placed the call."). 47 U.S.C. § 227(c)(5) establishes the private right of action for persons who have received more than one unlawful telemarketing call "by or on behalf of" the same entity. Thus, as the FCC has stated, an entity can be liable under the TCPA for a call made on its behalf even if the entity did not directly place the call. Under those circumstances, the entity is properly deemed to have initiated the call through the person or entity that actually placed the call.

Subsequent Commission precedent confirms this. In a 2005 declaratory ruling that addressed telemarketing calls made by agents on behalf of an insurance company, the FCC "t[ook] th[e] opportunity to reiterate that a company on whose behalf a telephone solicitation is made bears the responsibility for any violation of our telemarketing rules and calls placed by a third party on behalf of that company are treated as if the company itself placed the call." *Rules and Regulations Implementing the Telephone Consumer Protection Act of* 1991; *Request of State Farm Mutual Automobile Insurance Company for Clarification and Declaratory Ruling,* Declaratory Ruling, 20 FCC Rcd 13664, 13667 ~ 7 (2005) (citing 1995 Order ~ 13). And, reflecting a similar understanding of the TCPA, the Commission has approved consent decrees that terminated investigations into possible TCPA violations by entities on whose behalf third-

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party telemarketers made allegedly unlawful calls. *See, e.g., In the Matter of T-Mobile, USA, Inc.,* Order, 20 FCC Rcd 18272 (2005); *In the Matter of NOS Communications, Inc.,* Order, 22 FCC Rcd 19396 (2007).

Similarly, the FTC has consistently maintained that sellers are responsible for their marketers' telephone calls to solicit purchases of the seller's goods or services. Although the FTC's Telemarketing Sales Rule uses the verb "cause" rather than "initiate," the FTC's approach to protecting consumers' privacy is the same: a seller cannot escape liability for the telemarketing violations of its marketer. In its cases against DirecTV and ADT Security Services, for example, the FTC alleged that both sellers were responsible for the violations of their authorized dealers.[8] As then-Chairman Majoras noted in connection with the DirecTV settlement, "This multimillion dollar penalty drives home a simple point: Sellers are on the hook for calls placed on their behalf. The Do Not Call Rule applies to all players in the marketing chain, including retailers and their telemarketers."[9]

In fact, Domino's does retain significant control over its franchisees. In *Parker v. Domino's Pizza, Inc.,* 629 So. 2d 1026 (Fla. Dist. Ct. App. 1993), where a Domino's driver allegedly caused injuries from a car accident, the court noted that Domino's required its franchisee to adhere to a "veritable bible for overseeing a Domino's operation," and concluded Dominos exercised sufficient control over its franchisee to create a factual issues whether the franchisor would be vicariously liable for the franchisee's negligence:

> **The manual which Domino's provides to its franchisees is a veritable bible for overseeing a Domino's operation. It contains prescriptions for every**

[8] *See United States v. DirecTV,* Case No. 8:05-cv-01211 (C.D. Cal. complaint filed Dec. 14, 2005) (FTC matter no. 042-3039), press release available at http://www.ftc.gov/opa/2005/12/directv.shtm; *and United States v. ADT Security Services, Inc.,* Case No. 9:07-cv-81051 (S.D. Fla. complaint filed Nov. 6, 2007) (FTC matter no. 042-3091), press release available at http://www.ftc.gov/opa/2007/11/dncpress.shtm.

[9] *See* http://www.ftc.gov/opa/2005/12/directv.shtm.

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> **conceivable facet of the business: from the elements of preparing the perfect pizza to maintaining accurate books; from advertising and promotional ideas to routing and delivery guidelines; from order-taking instructions to oven-tending rules; from organization to sanitation. The manual even offers a wide array of techniques for "boxing and cutting" the pizza, as well as tips on running the franchise to achieve an optimum profit. The manual literally leaves nothing to chance. The complexity behind every element of the operation gives new meaning to the familiar slogan that delivery is to be, "Fast, Hot and Free."**
>
> The foregoing leads us to the self-evident conclusion that it was error to determine as a matter of law that Domino's does not retain the right to control the means to be used by its franchisee to accomplish the required tasks. At the very least a genuine and material question of fact is raised by the documentation.

Id. at 1028-29 (emphasis added).[10] *See also Viado v. Domino's Pizza, LLC*, 230 Or. App. 531, 544, 217 P.3d 199, 207 (2009), *review denied,* 347 Or. 608, 226 P.3d 43 (2010) (agency relationship between Domino's and franchisee in individual's personal injury action against franchisee's driver; "franchise agreement and Domino's' operating manual together set forth detailed rules and operating procedures relating to: ... (h) advertising on the Internet or other electronic media"); *Decker v. Domino's Pizza, Inc.,* 268 Ill.App.3d 521, 205 Ill. Dec. 959, 644 N.E.2d 515 (1994) (franchisee's worker injured during robbery; Domino's had sufficient procedures, etc. to assume duty to protect franchisee's workers). *See also Miller v. McDonald's Corp.,* 150 Or. App. 274, 945 P.2d 1107 (1997) (personal injury case; court rejected McDonald's efforts to escape liability because they ignored "the effect of [McDonald's] own efforts to lead the public to believe that McDonald's restaurants are part of a uniform national system of restaurants with common products and common standards of quality. "....The centrally imposed uniformity is the fundamental basis for the [other] courts' conclusion that there was an issue of fact whether the franchisors held the franchisees out as the franchisors' agents.").

[10] Plaintiff Anderson has promulgated a new Request for Production to Defendants Domino's and FOFI requesting the manuals Domino's provided to its franchisees, including FOFI, during the Class Period (Williamson Decl., ¶.9).

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VI. CONCLUSION

Plaintiff asks the Court to DENY Domino's Motion for Summary Judgment. Based on the current evidence alone, Plaintiff has raised genuine issues of material fact demonstrating the illegal robo-calls were made on Domino's behalf and for its use, or even at its direction, making it liable under RCW 80.36.400 and the TCPA. Alternatively, if the Court is inclined to grant Domino's Motion for Summary Judgment based on the current record, Plaintiff seeks additional time, as requested in her pending Motion to Continue, to conduct additional discovery before being required to respond to Domino's Motion for Summary Judgment.

DATED this 27th day of December, 2011.

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