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 DEFENDANT FOUR OUR FAMILIES, INC.'S JOINDER TO DEFENDANTS DOMINO'S PIZZA, INC. AND DOMINO'S PIZZA, LLC'S MOTION FOR SUMMARY JUDGMENT HEARING DATE: December 30, 2011

In this memorandum, Plaintiff Carolyn Anderson responds to the brief filed by Defendant Four Our Families, Inc. (FOFI) in support of the motion for summary judgment by Defendants Domino's Pizza, Inc. and Domino's Pizza, LLC's (collectively "Domino's"). First, FOFI effectively admits, by its detail-specific attempt to distinguish Plaintiff's cases and its concession about discovery "thus far",[1] that there are numerous genuine issues of material fact at this time, when discovery is far from complete.[2] Second, FOFI mischaracterizes the issue as whether Domino's "made" the illegal calls, when the statutory language and decisional law makes clear that with regard to the Telephone Consumer Protection Act ("TCPA"), the question is whether

[1] "The evidence produced thus far has not shown the level of control by Domino's over its franchisee's marketing efforts … nor will future evidence show such control." FOFI Response, at 5-6.
[2] The discovery cutoff is May 29, 2012. Plaintiffs have propounded interrogatories and requests for production to all Defendants that remain unanswered or inadequately responded to.

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

the calls were made "on behalf of" Domino's, 47 U.S.C. § 227(c)(5). The very fact that the calls are made in Domino's name, to sell Domino's products, raises triable factual issues on this matter. *See* Williamson Decl., ¶4 (Script of call). There is no question that, regardless of who actually placed the calls, automatic dialing and answering devices were "used" such that Domino's is liable under the state statute, RCW 80.36.400.[3]

FOFI is incorrect in arguing that the test for liability is pure agency law, imposed on the plain language "on behalf of". 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. As discussed in Plaintiff's Opposition to Domino's Motion for Summary Judgment, Domino's explicitly states in its Franchise Agreement that advertising by the franchisee is "for the benefit of Domino's System." Williamson Decl., Ex. 2.

The principal case FOFI relies on, *Charvat v. EchoStar Satellite, LLC,* 676 F.Supp.2d 668 (S.D. Ohio 2009), went up to the Sixth Circuit on appeal, and that court remanded the case to the parties asking them to petition the FCC for guidance on entity liability for calls made on its behalf. *Charvat v. EchoStar Satellite, LLC,* 630 F.3d 459 (6th Cir. 2010). Neither party ever sought referral in that case.[4] *Charvat* has no precedential or persuasive value here.

---

[3] 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 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).

[4] 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 Dkt. No. 11-50.

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

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 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, ¶¶ 34-35 (Aug. 7, 1995) (dealer on whose behalf an illegal call or fax was sent is ultimately liable); *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**")(Emphasis supplied); *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, 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 messages were sent"); *Glen Ellyn Pharmacy v. Promius Pharma, LLC*, 09 C 2116, 2009 WL 2973046 (N.D. Ill. Sept. 11, 2009); *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").

---

http://fjallfoss.fcc.gov/ecfs/document/view?id=7021238462.

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

See also Maryland v. Universal Elections, ——F.Supp.2d ——, 2011 WL 2050751, at *4–5 (D.Md. 2011) (court denied defendant's motion to dismiss, concluding the plaintiff stated a claim against a corporation under § 227(d) of the statute where it contracted out for robocall services to make automated calls containing political content to Maryland residents). FOFI argues that TCPA cases dealing with unsolicited facsimile advertisements should have no weight in the Court's decision here. But the vast majority of published decisions on the TCPA involve faxes. The statutory language and court decisions are substantially similar on the issues presented. FOFI provides no reason to reject these on-point authorities, and courts regularly follow them in applying the TCPA to robo-calling. *E.g., Spafford v. Echostar Communications Corp.*, 448 F. Supp. 2d 1220, 1225 (W.D. Wash. 2006) (citing, *e.g., Destination Ventures, Ltd. v. FCC,* 46 F.3d 54 (9th Cir.1995) (unsolicited facsimile advertisements).

Despite FOFI's attempts to distinguish the relevant cases, in *Worsham,* the court expressly rejected the same argument here, concluding an issue of fact existed as to whether the entity on whose behalf the calls were made was liable under the TCPA. 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." *ITT Rayonier, Inc. v. Puget Sound Freight Lines*, 44 Wn. App. 368, 377, 722 P.2d 1310 (1986) (quoting *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980)). 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 WL 4628744 at *4-5; *Worsham,* 777 A.2d at 877-78; *Hooters,* 537 S.E.2d at 472.

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

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 "intiating" a call is directly liable for compliance with the Act's 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 either 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, as Domino's concedes in its Franchise Agreement. 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. 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. Domino's official stance that it "would not touch" a third party telemarketer "with a 10-foot pole" (Herrmann Dep., p. 45; FOFI Joinder, at 4) almost proves the opposite: Domino's takes this position because it knows it is liable for illegal telemarketing calls made to sell its products.

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

Domino's requires its franchisees to use its name in advertising, including telemarketing. Domino's extracts fees from franchisees for advertising. Williamson Decl. Ex. 2 (Franchise Agreement, Section 13). It is also important in understanding FOFI's apparently selfless support of Domino's attempt to evade liability to know that Domino's requires franchisees to indemnify it against "all judgments, settlements, penalties, and expenses, including attorney's fees, court costs and other expenses of litigation ... incurred by or imposed on us" for all claims related to franchisee activities. Williamson Decl., Ex. 2 (Franchise Agreement, Section 22.3).

FOFI's hands are tied by its agreement with Domino's. The harsh terms of the indemnification provision contained in that agreement surely influence positions taken by FOFI in this litigation. On the one hand, FOFI must vigorously sell its products as Domino's products, complying with rules and requirements dictated by Domino's. If, in marketing products under the Domino's label, it violates telemarketing laws, even when Domino's introduced it to the telemarketing vendor involved (Call-Em-All), it must indemnify Domino's. Under these circumstances, FOFI has no choice but to "join" in Domino's Motion for Summary Judgment, and its arguments as to why summary judgment should be granted are no more meritorious than those advanced by Domino's.

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

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

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).

The FCC has stated 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. As noted above, the FCC has explained that its "rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations." *Rules and Regulations Implementing the Telephone Consumer Protection Act of* 1991, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397 ~ 13 (1995) ("1995 *Order").* Thus, as the FCC further explained, "[c]alls placed by an agent of a telemarketer are treated as if the telemarketer itself placed the call." *Id.* The Commission's interpretation of its rules in the 1995 *Order* - that, for an entity to be liable for calls it did not place, the calls must have been placed "on behalf of' the entity - is consistent with the language of 47 U.S.C. § 227(c)(5). That section 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 shown, 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*

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

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-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.[5] 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."[6]

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

[5] *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.

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

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

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.

By s/Rob Williamson
Rob Williamson, WSBA #11387
Kim Williams, WSBA #9077
17253 Agate Street NE
Bainbridge Island, WA 98110
Telephone: (206) 780-4447
Fax: (206) 780-5557
Email: kim@williamslaw.com;
roblin@williamslaw.com
Attorneys for Plaintiff