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Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

CAROLYN ANDERSON, Plaintiff, vs. DOMINO'S PIZZA, INC., DOMINO'S PIZZA, LLC, FOUR OUR FAMILIES, INC., and CALL-EM-ALL, LLC, Defendants.	CIVIL ACTION NO. C11-902-RBL DEFENDANTS DOMINO'S PIZZA, INC. AND DOMINO'S PIZZA, LLC RESPONSE TO PLAINTIFF'S MOTION FOR CERTIFICATION OF CLASS **Hearing Date: January 13, 2012**

I. RELIEF REQUESTED

Defendants Domino's Pizza, Inc. and Domino's Pizza, LLC (Domino's) request that Plaintiff Carolyn Anderson's Motion for Certification of Class be denied. Plaintiff's motion is time barred. The time for filing a class certification under the local court rules has passed. Plaintiff has never requested and shown good cause for extending the period for class certification. Additionally, the plaintiff has failed to establish under FRCP 23(b)(3) that the class action is superior to other available methods to adjudicate the controversy.

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II. RELEVANT FACTS

Plaintiff filed a claim against Domino's and Four Our Families, Inc. (FOF) in King County Superior Court on April 29, 2010. In May of 2011, plaintiff amended her complaint to add Call-Em-All, Inc. (CEA). CEA filed a notice of removal and the case was removed to Federal Court on May 31, 2011.

III. ARGUMENT

A. Plaintiff's Motion Is Time Barred.

The rules for the United States District Court for the Western District of Washington regarding class actions require that a plaintiff shall move for determination of class action status within 180 days after filing the complaint. Local Rule W.D. Wash. CR 23(i)(3) states as follows:

> (3) Within one hundred eighty days after the filing of a complaint in a class action, unless otherwise ordered by the court or provided by statute, the plaintiff shall move for a determination under Fed.R.Civ.P. 23(c)(1), as to whether the case is to be maintained as a class action. This period may be extended on motion for good cause. . . .

Plaintiff's case was removed to Federal Court on May 31, 2011. The 180 day period set forth in local rule CR 23(i)(3) ran on November 28, 2011. Plaintiff's motion was not filed until December 22, 2011. Plaintiff missed the deadline for filing a motion for class certification. The current motion before the Court is time barred. It must be denied.

The time deadline set forth in Local Rule W.D. Wash. CR 23(i)(3) is mandatory. The rule specifically states that the plaintiff shall move for determination within 180 days after filing the complaint. It is Hornbook law that the word "shall" is mandatory. Plaintiff, without explanation or request from the court for additional time, has missed this deadline. Plaintiff's

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motion for class certification should be denied on this basis.

B. Plaintiff Has Failed To Follow The Procedures Set Forth In Local Rule W.D. Wash. CR 23(i)(3) To Request Additional Time.

The mandatory 180 day period set forth in Local Rule W.D. Wash. CR 23(i)(3) may be extended by the court. The rule states that "This period (the one hundred eighty day time period) may be extended upon motion for good cause." If the plaintiff believed that she needed more than the 180 days set forth in the local rule to bring her class certification motion, it was incumbent upon her to file a motion with the court. Plaintiff must establish good cause on why the 180 day time period should be extended. Plaintiff has not filed such a motion. Plaintiff has not shown good cause why the mandatory 180 day period for filing class certification should be extended. Plaintiff's failure to file a motion and show good cause for an extension of time is another reason why the plaintiff's motion for class certification should be denied.

C. A Class Action Is Not A Superior Method Of Adjudication.

Under FRCP 23(b)(3) the court has to find that a class action is superior to other methods for fairly and efficiently adjudicating the controversy. Under the "superiority analysis", the court has to find that the class action is superior, not equal to other methods of adjudication. Construing another similar Washington court rule, the court in *Schnall v. AT&T Wireless Services, Inc.*, 171 Wash.2d 260, 259 P.3d 129 (2011) stated as follows:

> Even if individualized issues did not predominate, CR 23(b)(3) also requires 'that a class action [be] *superior* to other available methods for the fair and efficient adjudication of the controversy.' (Emphasis added). *See also* 4 Conte & Newberg, *supra,* Sec. 13:11,

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> at 406 ('It must be emphasized that, under the rule, a class action *must be superior, not just as good as,* other available methods.' (Emphasis added)). The superiority requirement 'focuses upon a comparison of available alternatives.'

171 Wash.2d 260 at 265.

In the case at bar, there is a far superior method of adjudicating the controversy for those plaintiffs who deem themselves damaged.

The plaintiff's claim for class action is based upon RCW 80.36.400. This statute contains a "presumed damages" clause. RCW 80.36.400(3) states as follows:

> A violation of this section is a violation of chapter 19.86 RCW. (The Consumer Protection Act). It shall be presumed that damages to the recipient of commercial solicitations made using an automatic dialing and announcing device are five hundred dollars.

The purpose for including a presumed damage amount of $500 and a statement that violation of this section is a violation of the Consumer Protection Act (which allows the recovery of attorney's fees and treble damages) is to encourage the use of small claim courts to recover damages. Plaintiff, in a small claim court action, simply has to establish that he or she received a call in violation of RCW 80.36.400. Damages are then presumed. Any costs and attorney's fees incurred would be recovered under the Consumer Protection Act. This is a far superior method than establishing a large unwieldy class. Those individuals who are in fact aggrieved have a clear and easy avenue for redress.

A similar provision establishing presumed damages exists in the TPCA. Cases construing this provision regarding class action certification are instructive to analysis of a class

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action certification under RCW 80.36.400.

47 USC 227(b)(3) creates a private right of action for violation of the TCPA. 47 USC 227(b)(3)(B) states that a plaintiff can recover actual monetary loss for a violation of the TCPA or $500 in damages for each violation. This provision is virtually analogous to Washington state statute.

Local Baking Products, Inc. v. Kosher Bagel Munch, Inc., 23 A.3d. 469 N.J. Appellate Div., 2011 held that TCPA claims were ill suited for class action lawsuits.

The trial judge denied a motion for class certification. The judge concluded that under the superiority analysis the use of small claims court was a far superior method of adjudicating claims than class action lawsuits. This in part was based upon the fact that TCPA statute presumed damages of $500. This eliminated the need for a plaintiff to "prove" damages. The trial judge concluded that:

> New Jersey's easily accessible small claims courts, the expressed statutory intent, the minimal harm involved, and the relatively high statutory damages supported the view that individual claims were 'a far superior method to vindication of any rights and protection of the public than any certification or class action.'

23 A.3d. 469 at 471.

The Appellate Court of New Jersey affirmed this analysis. In conducting its superiority analysis, the court considered the provisions of the TCPA and the legislative history. TCPA provided for a private right of action under 47 USC 227(b)(3). Damages would be the greater of actual monetary loss or $500 for each violation. In reviewing the legislative history, the court recognized that the drafters of this bill recognized that the damages from a single violation would

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be minimal. They therefore believed that a $500 minimum damage award would be sufficient to motivate private redress of a consumer's grievance through a relatively simple small claims court proceeding.

In making this analysis, the court relied upon the statements of Senator Fritz Hollings, a co-sponsor of the TCPA. Senator Hollings stated as follows:

> The . . . [act] contains a private right of action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the bill . . . [I]t is my hope that the States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. . . .
>
> Small claims court or similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the tele-marketer. However, it would defeat the purposes of the bill if the attorney's fees cost to consumers in bringing an action would be greater than the potential damages. (Remarks of Senator Hollings, 137 Congressional Cong. Rec. 30821-30822 (1991).

The court in *Local Baking Products, Inc. v. Kosher Bagel Munch, Inc., supra,* stated as follows:

> Here, by imposing a statutory award of $500, a sum considerably in excess of any real or sustained damages, Congress has presented an aggrieved party with an incentive to act in his or her own interest without the necessity of class action relief. As the motion judge observed, 'the nature of the harm . . . as far as I can tell, is about two cents worth of paper and perhaps a little ink and toner.' The judge also noted that in New Jersey, 'pro se individuals and consumers [are] allowed to file a small claims complaint, [and] they do not need a lawyer. They are quickly before a Judge. I believe at the present time the standard is 30 to 45 days. An answer doesn't even have to be filed.'

23 A.3d. 469 at 476.

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In short, the Appellate Court of New Jersey concluded that the class action cannot meet the superiority test and is inappropriate.

A similar ruling that a class action was not a superior method of obtaining relief was handed down in the case of *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400 (E.D.Pa. 1995). *Forman* involved the transmission of unsolicited advertisements via fax in violation of the TCPA. The court denied the class action status under the superiority analysis. The court held as follows:

> A class action would be inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements.

164 F.R.D. 400 at 405.

The "personal remedy" referred to by the court in *Forman* and the analysis of the court in *Local Baking Products, Inc., supra*, is the use of the small claims court.

Like the federal law, the Washington statute establishes statutory damages. RCW 80.36.400(2). The "proof problem" confronting a plaintiff in small claims court is minimal. Any individual aggrieved by the receipt of an unsolicited ADA call in violation of RCW 80.36.400(2) can easily, cheaply and efficiently receive redress in small claims court. RCW 80.36.400 establishes damages of $500 which are trebled under the Consumer Protection Act, RCW 19.86. Fifteen hundred dollars is well in excess of the "actual damages" sustained by a consumer who has received an unsolicited ADA call. In the case at bar, the plaintiff has failed to establish a class action is a superior method to relief under a small claims court which is readily available to all aggrieved consumers in the State of Washington.

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D. Plaintiff's Motion Fails To Satisfy The Requirements Of CFR 23(b)(2).

Plaintiff's claim for injunctive relief in this case is spurious. Under the undisputed facts in this case, all of the calls the plaintiff alleges were illegal ceased by September 1, 2009. On September 1, 2009, the federal law regarding automatic calling changed, requiring prior written consent before automated calls were made. FOF ceased advertising due to this change in the law. CEA also ceased dealing with Domino's franchisees in making automated calls. Plaintiff's own brief has conceded that all of the automated calls have ceased. Plaintiff's own brief states as follows: the calls were made between June and August 2009 (id. 34) and stopped because CEA 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).

Injunctive relief is not appropriate in this case. The conduct complained of permanently and voluntarily ceased well before the plaintiff filed her action. The predominant relief sought by the plaintiff is monetary. Under FRCP 23(b)(2) monetary requests for damages are allowed if they are merely incidental to the litigation. *Casteneda v. Burger King Corp.*, 264 FRD 557 (N.D. Cal.). In the case at bar, monetary damages sought are not "incidental" to the litigation. They are the primary and driving force behind it. If the class is certified, plaintiff's counsel will attempt to collect a $500 statutory award for each of 42,000 calls. The potential recovery of millions of dollars and not any claim for injunctive relief is motivating the lawsuit.

In *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Circuit) 2007, the Ninth Circuit stated that:

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> Rule 23(b)(2) is not appropriate for all classes and 'does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.' Fed.R.Civ.P. 23(b)(2). Adv. Comm. Notes to 1966 amend., 39 F.R.D. 69, 102, *see also Zinser,* 253 F.3d at 1195 ('Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive.'). In *Molski* we refused to adopt a bright-line rule distinguishing between incidental and nonincidental damages for the purposes of determining predominance because such a rule 'would nullify the discretion vested in the district courts through Rule 23.' *Molski*, 318 F.3d at 950. Instead, we examine the specific facts and circumstances of each case, focusing predominantly on the plaintiffs' intent in bringing the suit. *Kanter v. Warner-Lambert Co.,* 265 F.3d 853, 860 (9th Cir. 2001); *Linney v. Cellular Alaska P'ship,* 151 F.3d 1234, 1240 n.3 (9th Cir. 1998). At a minimum, however, we must satisfy ourselves that: '(1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.' *Robinson,* 267 F.3d at 164, *quoted with approval in Molski,* 318 F.3d at 940 n. 15.

509 P.3d 1168 at 1186.

The plaintiff has failed to satisfy the requirements of FRCP 23(b)(2). Plaintiff's motion for class certification should be denied.

E. Plaintiff's Alleged Class Does Not Conform To State Law.

The description of plaintiff's alleged class does not conform to state or federal law. Plaintiff's proposed order has asked for a class to be formed of all residents in the State of Washington who received pre-recorded ADA calls from or on behalf of defendants for a four year period.

There is no basis under the Washington statute for the inclusion of the "on behalf of" language. RCW 80.36.400(2) states "no person may use an automatic dialing and announcing

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device for purposes of commercial solicitation." There is no "on behalf of" language in the Washington statute. There is no statutory basis for the inclusion of the "on behalf of" language in the Washington law.

The plaintiff's federal claim against the defendants is based upon 47 USC 227(b)(1)(B). This statute also does not contain the "on behalf of" language. 47 USC 227(b)(1)(B) prohibits the initiation of any telephone call to any residential phone line using an artificial or pre-recorded voice to deliver a message without prior express consent of the called party. . . . Again, there is no "on behalf of" language in 47 USC 227(b)(1)(B).

The TCPA does contain the "on behalf of" language. However, this language is not under the section that is at issue in this lawsuit. The section of the TCPA where the "on behalf of" language occurs deals with the violation of the do not call list. 47 USC 227(c)(5). The case at bar does not involve the "do not call list". The plaintiff cannot extrapolate the "on behalf of" language in the Federal do not call list to State statute.

Plaintiff's proposed order also asks the class to include all calls made four years prior to the filing of the original complaint. This is based upon the federal statute of limitations. Under the Federal law, a four year "catchall" statute of limitations has been applied to the TCPA claims. However, the four year federal statute of limitations is inapplicable to a claim based upon Washington State law. The applicable state statute of limitations in Washington's "catchall" statute of limitations RCW 4.16.100 which establishes a two year time limitation.

IV. CONCLUSION

Plaintiff's motion for class certification is time barred and must be denied. It is

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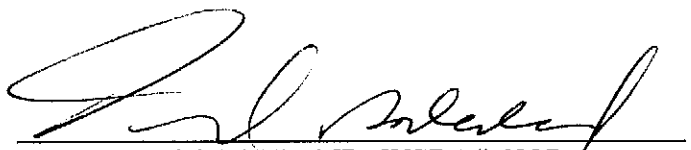
undisputed that plaintiff failed to comply with the 180 day time limit set forth in Local Rule WD Wash. CR 23(3). Plaintiff also failed to file a motion with the court under Local Rule WD Wash. CR 23(3) for an extension of the mandatory 180 day time period. Plaintiff has failed to show good cause why additional time should be allowed. All of these failures dictate that plaintiff's motion for class action is not timely and should be denied.

Plaintiff's motion for class action should also be denied on the merits. The plaintiff has failed to establish that the class action litigation is a superior method of adjudicating the case at bar. RCW 80.36.400(2) assumes damages in the amount of $500 (which can be trebled to $1,500 under the Consumer Protection Act). The presumed statutory damages and the availability of small claims courts are a much superior method of obtaining relief for any consumer who believes that they were aggrieved for damages by receiving an unsolicited ADA call. Plaintiff's motion for class certification should be denied.

Respectfully Submitted



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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am employed at Dunlap & Soderland, PS, attorneys of record for Defendants Domino's Pizza, Inc. and Domino's Pizza, LLC.

On January 9, 2012, I caused a true and correct copy of the foregoing document to be delivered to the following via email:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 9 day of January, 2012.

Gail M. Garner

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