Anderson v. Domino's Pizza, Inc. et al Doc. 47

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

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

Defendant Call-Em-All, LLC (hereinafter, "CEA"), by and through its undersigned attorneys, submits this memorandum in opposition to Plaintiff's Motion For Class Certification. The instant motion should be denied for the following reasons:

INTRODUCTION

As a threshold matter, the motion for class certification is untimely and should be stricken under the Local Rules of the Western District of Washington. Plaintiff missed the unequivocal deadline imposed by Local Rule 23(i)(3) and does not show good cause to

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1 explain her failure (indeed good cause does not exist).

2 Plaintiff's motion should also be denied for multiple substantive reasons: this
3 matter presents individual issues requiring separate inquiries to determine which call
4 recipients belong in or out of the putative class and, accordingly, Plaintiff does not satisfy
5 Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure; also, Washington law
6 already provides a $500 statutory penalty for the purpose of encouraging aggrieved
7 individuals to assert their rights and therefore the class action device is not the superior
8 way to deal with the claims in this case; Plaintiff's illegitimate request for injunctive relief
9 also fails to satisfy Rule 23(b)(2) because the conduct at issue voluntarily ended over two
10 years ago when the law changed; and finally, the approximately $20 million award sought
11 by Plaintiff is so disproportionate to the negligible damages (if any) suffered, that the
12 Court should not certify a class that would obliterate CEA, a legitimate businesses and
13 employer who simply serves as a passive broadcaster of the calls and whose services were
14 not advertised in the calls. Under these circumstances, a class action is neither proper nor
15 is it the superior method of adjudicating Plaintiff's claims.

16-18

STATEMENT OF RELEVANT FACTS

19 Plaintiff Carolyn Anderson received a telephone call advertising a pizza offer on
20 August 31, 2009. Plaintiff's Motion For Certification Of Class, ECF docket entry #31
21 (hereinafter, "Pl. Mem.") at 2:1. She was solicited for this class action lawsuit via a
22 solicitation letter sent by the law firm of Williamson & Williams. *See* Exhibit A to
23 Declaration of Scott Shaffer, Esq. (submitted herewith) (hereinafter, "Shaffer Decl.").
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Neither Plaintiff, nor her counsel, have identified any other class representative or potential plaintiff as being aggrieved.

CEA offers an automated messaging service that allows its clients to communicate directly to thousands of people in a very short time. As CEA's president, Brad Herrmann generally testified in his deposition (and there is no dispute in this case), each one of CEA's clients (not CEA itself), select and upload the telephone numbers the client wishes call, the client records a message to be broadcast, and then selects the time that the message is to be broadcast to the uploaded numbers. CEA provides only the technology that sends out the automated messages. *See generally,* CEA website (http://www.call-em-all.com). CEA, then, is essentially a conduit or broadcaster of the calls, much like a telephone company or postal service for purposes of this dispute. CEA has thousands of clients, including for example, Amazon.com, who uses CEA to communicate with thousands of temporary employees around the Christmas holiday season, and non-profit organizations such as little leagues, schools and churches, who use CEA to communicate changes in schedules, school closings, and other time-sensitive information. Because it has thousands of clients making calls all over the United States and Canada, CEA is not in a position to vet the legality of each call, just like the United States Post Office cannot guarantee whether every piece of mail it delivers is sent for a proper purpose. Therefore, CEA requires its clients, as a pre-condition of using CEA's services, to accept and represent in writing that the calls it makes through CEA's technology will comply with all local laws.

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The calls at issue in this case were made by CEA's former client, Defendant Four Our Families, Inc. (a Domino's Pizza franchisee). Plaintiff alleges 42,000 illegal calls were made in total. Pl. Mem. at 3:24. The particular call in question was placed to Plaintiff, who had previously ordered pizza from one of Four Our Families' Domino's locations. Like all calls made from CEA's platform, the call to Plaintiff played only a pre-recorded message advertising a pizza discount and it presented no opportunity to speak to a human being or otherwise initiate a live conversation. Pl. Mem. at 2:12. Plaintiff concedes in her motion that CEA voluntarily ceased making the calls at issue in August 2009. *Id.* at 3:17.

To be clear, CEA played no active part in the solicitations at issue: CEA's services were not advertised in any call at issue. Pl. Mem. at 2:12 (transcript of call). CEA did not script or otherwise prepare the pre-recorded message or create the content of the calls, which advertised Domino's pizzas. *See* Deposition of Four Our Families at 37:24 (script was "my decision").[1] CEA made no representations about the legality of Four Our Families' marketing strategy and required, as a pre-condition of doing business, that Four Our Families represent the legality of the calls in writing.[2] Specifically, CEA actually blocked Four Our Families from placing a single call until Four Our Families agreed to CEA's Terms of Use,

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[1] *See* Shaffer Decl., Exhibit B (excerpts from deposition of Four Our Families' owner Michael Brown).

[2] *See* Shaffer Decl., Exhibit C (CEA's Terms of Use, which Four Our Families accepted, states as follows at Paragraph 11: "You will not use, or attempt to use, the Call-Em-All Service in connection with any... messages... that are... <u>unsolicited</u>" and Paragraph 13: "User [Four Our Families] agrees that it is the sole responsibility of User to abide by any laws defined by the <u>State</u> or Federal Government in which Call-Em-All Services will be applicable. User understands and agrees that Call-Em-All will not be held responsible for damages to the User or any third party incurred due to User's failure to abide by <u>State</u> and/or Federal laws" (emphasis supplied).

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which required that the calls would comply with all state and federal laws. See Deposition of CEA at 8:17.[3] CEA voluntarily ceased accepting business from Four Our Families when federal law changed in August 2009. Pl. Mem. at 3:17.

Most importantly, CEA did not provide or select which telephone numbers received the calls at issue. *See* Ex. B to Shaffer Decl. at 36:17 ("I downloaded them from the store"); Deposition Ex. of CEA at 86:1 ("Q: did you upload any of the numbers? A: No. Q: Did you supply them with any numbers that they could upload? A: No"). The numbers to which the calls were made were selected entirely by Four Our Families from its proprietary customer database. *See* Ex. B to Shaffer Decl. at 36:17-37:24. Although individual circumstances vary, most of the putative class members voluntarily provided their telephone numbers during conversations with Four Our Families' employees when ordering pizza over the telephone. Others voluntarily provided their numbers when ordering pizza through Domino's website. *See* Deposition of Domino's employee Christopher Roeser.[4] Plaintiff concedes she voluntarily gave her number out prior to receiving the call in question while she was ordering pizza, although she does not remember the exact date of her order. *See* Deposition of Plaintiff.[5]

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[3] *See* Shaffer Decl., Exhibit D (excerpts from deposition of CEA's president Brad Herrmann, testifying that Four Our Families, like all CEA clients, could not activate CEA's calling platform unless it agreed to CEA's Terms Of Use).

[4] *See* Shaffer Decl., Exhibit E at 38:18-40:12 (excerpts from deposition of Domino's employee Christopher Roeser explaining that Domino's website allowed franchisees to collect phone numbers of customers who had affirmatively indicated their willingness to receive calls from Domino's).

[5] *See* Shaffer Decl., Exhibit F at 23:4 (excerpts from deposition of Plaintiff admitting she made "two or three" pizza purchases from Domino's).

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After receiving the call in August 2009, Plaintiff filed suit in April 2010 in the Superior Court of King County and amended her complaint in May 2011. This action was timely removed to the Western District of Washington by CEA on May 31, 2011. This motion for class certification was filed on December 22, 2011 in violation of Local Rule 23(i)(3), as it came more than twenty months after the case was first filed, and more than six months after removal. While Plaintiff sought an extension of time to oppose Domino's summary judgment motion, she never sought an extension of the mandatory deadline to seek class certification imposed by Local Rule 23(i)(3), nor has she offered any explanation for ignoring the rules.

Plaintiff initially alleged a claim under the federal Telephone Consumer Protection Act (47 U.S.C. 227) (hereinafter, "TCPA"), but has apparently abandoned that claim by failing to move for class certification under that statute. Pl. Mem. at n.1 She only seeks certification under RCW 80.36.400.

LEGAL STANDARDS

1. CLASS CERTIFICATION

Class actions are an exception to the general rule that litigation is to be conducted by and on behalf of individually named plaintiffs only. *Wal-Mart Stores, Inc. v. Dukes,* --U.S.--, 131 S. Ct. 2541, 2550 (2011). A party seeking class certification must affirmatively demonstrate compliance with Federal Rule of Civil Procedure 23. *Id.* at 2551. Given the serious consequences that result from class certification, a court may certify a class only after conducting a "rigorous analysis" to determine whether such requirements have been

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satisfied. *Id.* at 2551; *Gen'l Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364 (1982). "Careful attention" to the requirements of Rule 23 is "indispensable." *E. Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405-06, 97 S. Ct. 1891 (1977).

The party seeking class certification bears the burden of proving each element of Rule 23 by a preponderance of the evidence. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 117 S. Ct. 2231 (1997); *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). A court may not reverse this burden by presuming class certification is proper and requiring a defendant to show cause why the court should not certify a class. *In re Am. Med. Sys.*, 75 F.3d 1069, 1086 (6th Cir. 1996).

In order for a class to be certified, Plaintiff must first establish each requirement of Federal Rule of Civil Procedure 23(a) by demonstrating: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative party are typical of the claims or defenses of the class, and (4) the representative party will fairly and adequately protect the interests of the class. A failure to satisfy *any* of these elements requires denial of class certification. In addition to Rule 23(a), Plaintiff must also satisfy at least one of the requirements of Rule 23(b). Even if the Court disregards the instant motion's untimeliness, Plaintiff falls short under Rule 23(a) and (b), and therefore this motion must be denied.

2. WASHINGTON'S AUTOMATIC DIALING STATUTE

Plaintiff seeks class certification solely under RCW 80.36.400, which provides, "no person may use an automatic dialing and announcing device for the purpose of commercial

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solicitation." RCW 80.36.400(2). In turn, commercial solicitation is defined as "the unsolicited initiation of a telephone conversation for the purpose of encouraging a person to purchase property, goods, or services." RCW 80.36.400(1)(b) (emphasis supplied). There are no Washington cases interpreting the meaning of "unsolicited" under RCW 80.36.400, but due to the similarity between the state law and the TCPA, cases interpreting the TCPA are instructive. Importantly, the state and federal statutes both permit pre-recorded calls so long as the calls are not "unsolicited." RCW 80.36.400(1)(b); 47 U.S.C. § 227(a)(5).

ARGUMENT

I. PLAINTIFF'S MOTION IS TIME BARRED UNDER LOCAL RULE 23(i)(3)

As a threshold matter, the instant motion is both time-barred and procedurally improper. First, Plaintiff missed the mandatory filing deadline without seeking an extension. Second, she ignored the Local Rules which require the filing of a motion and a showing of good cause explaining her failure for making a timely filing. Third, after the deficiency was brought to her attention, Plaintiff's untimely motion for class certification did not even address her knowing failure to comply with the applicable rule.

Plaintiff seeks class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure and Rule 23 of the Local Civil Rules of the Western District of Washington (hereinafter, "Local Rule"), which govern the certification class actions. Local Rule 23(i)(3) states:

> 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

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to whether the case is to be maintained as a class action. This period **may** be extended on motion for good cause [emphasis supplied].

Under the plain language of the Local Rule, the Court is constrained to deny this motion. Regardless of whether the time runs from the filing of the Complaint, the Amended Complaint or the date of Removal, Plaintiff did not move for class certification within 180 days nor did she seek an extension of time. Under Local Rule 23, the only possible way to remedy this failure is by filing a motion showing good cause to excuse such failure. Indisputably, Plaintiff has not filed such a motion nor otherwise presented good cause explaining the blown deadline. Principles of statutory interpretation require the motion to be denied or stricken as the wording allows a court no discretion. "Where a provision contains both the words 'shall' and 'may,' it is presumed that the lawmaker intended to distinguish between them, 'shall' being construed as mandatory and 'may' as permissive. *In re the Parentage of K.R.P.*, 160 Wash.App. 215, 223, 247 P.3d 491 (2011).

Thus, Local Rule 23(i)(3) clearly creates a mandatory deadline for filing for class certification and Plaintiff's counsel is demonstrably aware of this rule. *See Clausen Law Firm, PLLC v. Nat'l Academy of Continuing Legal Education,* --- F.Supp.2d. ---, 2010 WL 4396433, at *9 (W.D.Wash, Nov. 2, 2010) (Williamson & Williams refer to Local Rule 23(i)(3)). The 180-day deadline passed on or about November 28, 2011, and the instant motion was not filed until December 22, 2011. However, Plaintiff: (a) made no request to extend the deadline; (b) filed no post-deadline motion for leave to excuse the missed deadline; and (c) provided no just cause for why the deadline was missed. In short, good

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cause has not been shown, and, quite the opposite, none exists because Plaintiff's attorneys were demonstrably aware of the rule from the *Clausen Law* case yet chose to ignore it. Under the terms of Local Rule 23(i)(3), the Court has no discretion and cannot grant the motion for class certification.

II. INDIVIDUAL FACTS AND CIRCUMSTANCES RENDER CLASS CERTIFICATION INAPPROPRIATE

"Numerous courts, citing the lack of commonality, typicality and predominance of common issues, have determined that TCPA claims cannot be brought as a class action." *Levitt v. Fax.com*, No. WMN-05-949, 2007 WL 3169078, at *4 (D. Md. May 25, 2007) (TCPA plaintiff failed to meet commonality element where proof of consent required determination on an individual basis).[6]

What matters to class certification is not simply the raising of common questions "even in droves, but rather the capacity of a classwide proceeding to generate common answers. Dissimilarites within the proposed class have the potential to impede the generation of common answers." *Wal-Mart Stores, Inc. v. Dukes,* -- U.S.--, 131 S. Ct. 2541, 2551 (2011). (internal quotation omitted).

Commonality is satisfied if the common question can be resolved for each class member in a single hearing. *Levitt v. Fax.com, supra*, 2007 WL 3169078 at *3. That

[6] It is appropriate to refer to TCPA class certification decisions for guidance as there are very few, if any, reported decisions analyzing whether automatic dialer cases brought exclusively under RCW 80.36.400 are appropriate for class certification. In both TCPA cases and the present case, whether the calls were unsolicited is a crucial inquiry in determining not only liability, but also, as explained below, the propriety of class certification.

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standard cannot be met in this case because membership in Plaintiff's proposed class turns on the dissimilar circumstances under which each of the 42,000 telephone numbers was obtained by Four Our Families.

Under RCW 80.36.400(1)(b), a commercial solicitation is defined as "the unsolicited initiation of a telephone conversation [...]." Thus, if a phone call is not unsolicited, there is no violation of the statute. At bar, each telephone number was provided to Four Our Families individually.

The evidence gleaned from discovery shows that the numbers were acquired in several ways by Four Our Families: directly from customers during individual telephone conversations with different employees at multiple Domino's locations; from orders placed through Domino's website; or through caller ID-type software employed at the Domino's locations. There may be other methods of acquisition as well. What was communicated or understood during a telephone call is clearly an individual question, not a common one. For customers who provided their numbers through Domino's website, the terms and conditions stated thereon may have changed since 2009, thereby necessitating additional individual inquiries into what disclaimers were present, but the current website obtains consent to be called, thus rendering purchasers ineligible for membership in the putative class. The website states, "Domino's delivers terrific offers, promotions and news through email and phone! By signing up for Domino's Pizza Offers, you will be the first to hear our news." *See* Exhibit G to the Shaffer Decl. (Domino's website at http://express.dominos.com/pages/opt-in.jsp). Plaintiff offers no method to exclude these individual categories from her putative class, and,

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indeed, there may be no way to determine how any individual number was obtained by Four Our Families (*i.e.,* orally, through the website, through software or through another method).

Another individual circumstance affecting class membership is that for Plaintiff and many other putative class members, the telephone number could have been validly provided by any other member of the household without the knowledge of the person who answered the call. Plaintiff testified she lives with her teenage son and her husband, plus her daughter and a teenage grandchild live half a mile away. *See* Ex. F to Shaffer Decl. at 75:2-75:22. The teenage son sometimes has friends come over to the house. *Id., 77:15.* Thus, any one of a group of people could have validly provided Plaintiff's number to Four Our Families under a variety of circumstances that would render the call permissible. This is exactly the sort of inquiry the Court would need to conduct to determine which among the 42,000 calls at issue qualify for entry into the putative class.

Moreover, once the numbers were collected, many individuals took advantage of the calls to obtain discounts on their pizza orders. Individual inquiries would have to be made to weed out from class membership those customers who saved money by responding to the calls and buying pizzas at discounted rates. Those persons would have no standing to receive a statutory award, and in any event, it would be unjust for this Court to give such customers a $500 windfall. Plaintiff makes no effort to account for, or otherwise exclude from the class, anyone who consented to receive calls or who saved money due to the calls. Again, there may be no way to determine who these people are, even after individual inquiries are conducted. All of the foregoing contingencies constitute individual

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1 circumstances that defeat a finding of commonality under Rule 23(a) and predominance
2 under Rule 23(b)(3).
3 TCPA cases make clear that a class may not be certified where, as here, an inquiry
4 must be made in order to decide whether or not a person belongs to the putative class.
5 *Levitt v. Fax.com, supra*, 2007 WL 3169078 at *3 ("It is this need to make a determination
6 for each class member [...] that makes class treatment of this action inappropriate and
7 unmanageable"); *Gene and Gene, LLC v. Biopay, LLC*, 541 F.3d 318, 328 (5th Cir. 2008)
8 (denying class certification under the TCPA because the telephone "numbers were
9 collected over time and from a variety of sources," and thus "individual inquiries of the
10 recipients are necessary" to determine consent); *Forman v. Data Transfer, Inc.*, 164 F.R.D.
11 400, 403 (E.D. Pa. 1995) (class certification improper because "determining a membership
12 in the class would essentially require a mini-hearing on the merits of each case"); *Kenro,
13 Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1169-70 (S.D. Ind. 1997) (noting that it would
14 be required "to conduct individual inquiries with regard to each potential class member in
15 order to determine whether each potential class member had invited or given permission for
16 transmission of the challenged fax"); *Vigus v. Southern Illinois Riverboat Casino Cruises,
17 Inc.*, 274 F.R.D. 229, 238 (S.D. Ill 2011) ("given the facts of this case, including the origin
18 of the Casino's call list from its existing customers who gave their general consent to be
19 called, determining which specific calls were made to individuals protected by the TCPA
20 cannot be made by generalized proof at a class level"); *Local Baking Products, Inc. v.
21 Kosher Bagel Munch, Inc.*, 421 N.J.Super. 268, 280–81, 23 A.3d 469, (2011) (barring
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1 TCPA class actions in New Jersey); *Blitz v. Xpress Image, Inc.*, Civ. No. 05-679, 2006 WL
2 2425573 (N.C. Super. Aug. 23, 2006) (denying class certification because "there is no
3 avoiding an individualized inquiry into the facts and circumstances of each recipient's
4 'invitation and permission' should this matter proceed as a class action"); *Carnett's Inc. v.*
5 *Hammond*, 610 S.E.2d 529, 531-32 (Ga. 2005) (commonality requirement not met where
6 issue was whether fax was "unsolicited").
7
8 Violations of the TCPA are not <u>per se</u> unsuitable for class resolution (*see Kavu, Inc.*
9 *v. Omnipak Corp.,* 246 *F.R.D.* 642, 650 (W.D. Wash. 2007)), but a plaintiff:
10
11 > must advance a viable theory employing generalized proof to establish liability with respect to the class involved, and it means too that district courts must only certify class actions filed under the TCPA when such a theory has been advanced.
12
13 *Gene and Gene, supra*, 541 F.3d at 328. In the *Kavu* decision, commonality was satisfied
14 only because all of the telephone numbers in question had been obtained from a single
15 third-party source. That is not the case at bar, where Four Our Families compiled the
16 numbers individually.
17
18 Finally, Plaintiff's unusual path to the courthouse renders her atypical of the class
19 she seeks to represent. She apparently is the only one complaining about the calls at issue,
20 and, to make matters worse, she was affirmatively solicited by her attorneys to file a class
21 action through a direct marketing ploy whereby her attorneys scoured the files of the
22 Attorney General to recruit class-action plaintiffs through solicitation letters. Shaffer Decl.
23 Ex. A & Ex. F at 86:25-88:5.
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Thus, Plaintiff falls short in at least two of the four Rule 23(a) inquiries she must satisfy. Because Plaintiff has not advanced viable theories of commonality or typicality for certification, this motion must be denied.

III. CERTIFICATION IS INAPPROPRIATE BECAUSE PLAINTIFF FAILS TO SATISFY ANY PORTION OF RULE 23(b)

A. The Class Should Not Be Certified Under Rule 23(b)(2) Because the Predominant Relief Sought is Monetary

Besides the requirements of Rule 23(a), Plaintiff must also satisfy one of the prerequisites of Rule 23(b). Plaintiff first claims certification is proper under Rule 23(b)(2). Plaintiff is wrong.

Rule 23(b)(2) permits class certification when "the party opposing the class has acted or refused to act [...and] final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." In this case, the allegedly illegal conduct ceased more than two years ago at CEA's instance (Pl. Mem. at 3:17) and this motion is in reality, an attempt by Plaintiff's counsel to collect a statutory $500 award for each of the 42,000 calls at issue.

Plaintiff's authorities claiming certification is proper under Rule 23(b)(2) all predate the recent Supreme Court case, *Wal-Mart Stores, Inc. v. Dukes,* -- U.S.--, 131 S. Ct. 2541 (2011), which holds very clearly that claims for monetary relief may not be certified unless

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1 such relief is incidental to the injunctive or declaratory relief.[7] *Id.* at 2557. In this case, $20
2 million in monetary relief cannot be considered incidental to a request to injunctively end
3 conduct that already voluntarily ceased over two years ago. The *Wal-Mart* case clearly
4 trumps Plaintiff's canned brief on this point.
5
6 In order to certify a class under Rule 23(b)(2), a court must find that the
7 predominant relief sought is injunctive and declaratory. *Davis v. Homecomings Fin.*, No.
8 C05-1466RSL, 2006 WL 2927702, at *6 (W.D. Wash. Oct. 10, 2006). A class may only
9 be certified if "plaintiffs would have brought suit to obtain the injunctive relief they seek
10 even if they could not obtain a money recovery." *Id.* Furthermore, in Rule 23(b)(2) cases,
11 monetary damage requests are generally allowable only if merely incidental to the
12 litigation. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001)); *see also*
13 *Casteneda v. Burger King Corp.*, 264 F.R.D. 557 (N.D.Cal. 2009) (finding that minimum
14 statutory damages predominated over injunctive relief where damages exceeded $5
15 million). Usually, in classes certified pursuant to Rule 23(b)(2), damages are merely
16 nominal. *See, e.g., Hunt v. Check Recovery Sys., Inc.*, 241 F.R.D. 505, 513 (N.D.Cal.
17 2007) (citing "de minimus amount of statutory damages that each class member would
18 potentially receive"). With Plaintiff seeking millions of dollars in this case, certification of
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21
22 [7] Plaintiff's motion fails to acknowledge the *Wal-Mart v. Dukes* decision except for a random typographical error in her brief cryptically stating, "Dukes v. WalMart....". Pl. Mem. at 15. There is no further mention of the case, but Plaintiff's stray reference demonstrates her awareness of this controlling precedent. Plaintiff offers no explanation for why *Wal-Mart* does not require denial of this motion.
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Rule 23(b)(2) class is clearly inappropriate. This is not a case where the damages sought are incidental to the injunctive relief or are nominal in nature.

Besides the monetary relief being plaintiffs' primary goal, certification is inappropriate under 23(b)(3) because the conduct in question has permanently and voluntarily ceased in August 2009. Plaintiff less than compellingly states she "seeks an injunctive to prevent Defendants from transmitting or causing to be transmitted the pre-recorded solicitations that are illegal under both state and federal law under the same circumstance." Pl. Mem. at 12. But Plaintiff admits elsewhere the calls all ceased in August of 2009 (Pl. Mem. at 3) with no allegation of reoccurrence and no intent to resume calling. As of September 1, 2009, the Federal Trade Commission ("FTC") expressly prohibited telemarketing sales calls from delivering pre-recorded messages unless the seller previously obtained the recipient's signed, written agreement to receive such calls. 16 C.F.R. § 310.4(b)(1)(v)(A). As Plaintiff acknowledges, CEA voluntarily stopped allowing, and Four Our Families stopped placing pre-recorded calls as soon as the FTC regulation took effect. Thus there is no need for an injunction and there is no future harm that an injunction would prevent. The predominant relief sought here is undoubtedly monetary and Plaintiff has therefore failed to satisfy the requirements of Rule 23(b)(2).

B. Certification Is Improper Under Rule 23(b)(3) Because Common Questions Do Not Predominate And A Class Action Is Not Superior to Other Means of Adjudication

Plaintiff also seeks certification under Rule 23(b)(3), which requires: (a) that

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1 common questions predominate over individual ones; and (b) that a class action is superior
2 to other methods of adjudication in terms of fairness and efficiency. Neither requirement
3 is satisfied here. For the same reasons described in the commonality section, *supra*,
4 individual questions predominate over common ones, and CEA hereby incorporates into
5
6 this section the authorities referenced on pages 13-14 above.
7 With respect to the superiority issue, Plaintiff has not met her burden of
8 demonstrating a class action is superior to other means of adjudicating this dispute. By
9 failing to move for certification under the TCPA, Plaintiff essentially concedes a class
10 action is not superior. The $500 statutory remedy provided by RCW 80.36.400, just like the
11
12 one provided by the TCPA, combined with the provision of attorney's fees or the option
13 going to small claims court, provides sufficient incentive for plaintiffs to litigate
14 individually. *See Local Baking Products, Inc. v. Kosher Bagel Munch, Inc.,* 421 N.J.Super.
15 268, 280, 23 A.3d 469, 476 (2011)[8] (internal quotation marks omitted).
16 In certain instances, the class-action device equalizes the claimants' ability to
17 zealously advocate their positions, but this is not one of those instances. By including the
18
19 $500 statutory award, a sum that considerably exceeds any real damages, plus attorneys'
20 fees under RCW 19.86, the State of Washington has presented every putative class member
21 with a superior incentive to act in his her own interest. Pro se individuals and consumers
22 can also file a small-claims action to collect the statutory windfall and have the matter
23
24

[8] In December, the New Jersey Supreme Court affirmed this principle by denying Local Baking Products' petition for certification. Shaffer Decl. at Exhibit H (copy of denial of petition for certification).

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1 adjudicated in a single court appearance without needing to hire a lawyer. Each person can
2 decide whether or not to bring suit, has no need to hire an attorney, and unlike a class
3 action scenario, no one will have the risk of an attorney they never met compromising their
4 claim for pennies on the dollar in order to obtain a large payment of attorneys' fees. The
5 built-in statutory windfall (actual damages are, at most, by a few cents on Plaintiff's phone
6 bill), suggests that the benefit of a class action has already been conferred on every putative
7 class members by the very nature of the procedures available and relief that can be
8 obtained. *Local Baking, supra,* 421 N.J. Super at 280-81. By ensuring that the cost of
9 litigating for an individual remains significantly lower than the potential recovery, the
10 statutory award replaces for the consumer all the benefits of a class action and eliminates
11 many of the problems inherent in a class action. *See Id.* The superiority requirement
12 clearly militates against class certification where the potential adverse consequences and
13 undesirable results outweigh any perceived benefits. *G.M. Signs, Inc. v. Brink's Mfg. Co.,*
14 No. 09 C 5528, 2010 WL 2558143 (N.D.Ill. May 14, 2010) (denying class certification in
15 TCPA case).
16
17 In sum, Plaintiff has not satisfied the requirements of Rule 23(b)(3) because
18 common questions do not predominate over individual ones, and a class action is not the
19 superiority means of adjudication.
20
21 **C. Concerns Of Fairness And Proportionality Preclude Class Certification**
22
23 A related but separate basis for denying class certification is the unfairness and
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devastation that a $20 million award would wreak on the defendants. A fairness inquiry, which is related to the superiority test, requires this Court to deny class certification. Plaintiff is unhappy because she received a call from Four Our Families, but the Court should not enable her to destroy legitimate small businesses that provide jobs in Washington (Four Our Families) and Texas (CEA) when she can easily go to small claims court and collect a statutory, but relatively reasonable, windfall if she wins her case. Additionally, there is no evidence in the record, or otherwise noted by Plaintiff, that anyone else complained about the alleged 42,000 calls, despite the mailed advertisements sent out by Plaintiffs' attorneys.

In determining whether to certify a class, the financial impact on a defendant should be considered where there is the possibility of a disproportionate "damage award that has little relation to the harm actually suffered by the class." *Legge v. Nextel Communications,* CV 02-8676, 2004 WL 5235587, at *15 (C.D. Cal. June 25, 2004) (internal citations omitted). Moreover, where a plaintiff suffers no actual damages, a class action may not be the proper method for adjudicating claims. *See In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 350 (N.D. Ill. 2002). In *Trans Union*, for example, the court denied class certification, finding that "even the minimum statutory recovery of $100 far exceeds any actual damages suffered by plaintiffs." *Id.* at 350. The court stated:

> Congress has created a statutory scheme that provides for a minimum recovery of $100 for each willful violation of the Act, yet it is that very $100 minimum, combined with the enormous size of the putative class, that leads in this case to the potential for catastrophic damages and, as a result, the denial of class status. The net result is that absent class notification, it is likely that the vast majority of potential class members will not even become aware that their privacy rights have been violated.

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> At first glance, this result appears to encourage wide-spread rather than narrow abuse, for if the putative class was smaller, certification might be proper… The harshness of this anomalous result is tempered, however, by the same statutory scheme that also provides for regulation and enforcement by the FTC, which has resulted in cease and desist order against Trans Union halting much of the practices attacked by plaintiffs. Thus, any "uninformed victims" who have suffered no actual economic damage, have been and continue to be protected by the FTC's enforcement of the statute and regulations. In light of this balanced statutory scheme enacted by Congress, the court concludes that regulation by the FTC, coupled with individual actions for damages (and attorney fees) is superior to a class action for statutory damages.

Id. See also Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972) (denying class certification where a statutory award of $100 for each class member would be a "horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant"). At bar, all "uninformed victims" are protected by the fact that the calls stopped over two years ago without any recurrence.

In *Kim v. Sussman,* No. 03 CH 07663, 2004 WL 3135348 (Ill. Cir. Ct., Oct. 19, 2004), the Illinois Circuit Court ruled that "[g]iven the statutory framework of plaintiff's [TCPA] claims, the Court strongly believe that a class action is not an appropriate method for the 'fair and efficient' adjudication of this controversy." The court continued:

> in enacting the TCPA, Congress expressly struck a balance that was designed to be fair both to the recipient and the sender of the facsimile. Congress believed that allowing an individual to file an action in small claims court to redress the nuisance of unsolicited faxes and to recover a minimum of $500 in damages was an adequate incentive to address what is at most, a minor intrusion into an individual's daily life. […] To engraft on this statutory scheme the possibility of private class actions, with potential recoveries in the millions of dollars, strikes the Court as unfair given the nature of the harm Congress attempted to redress in the TCPA.

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Id., 2004 WL 3135348 at *2.

The same principals apply here: class certification would lead to inequitable results. The putative class members suffered no monetary damages as a result of any conduct at bar. Allowing certification of this class would be unjust, since many of the class members authorized, or at the very least, did not object to receiving the solicitation, and have taken advantage of the discounted pizzas the calls alerted them to, thereby gaining a benefit from receiving those very calls. The harm to defendants is particularly disproportionate since the class members all provided Four Our Families with their phone numbers through on method or another. This is not a case of phone numbers acquired from an illegal or even a third-party source. Furthermore, the putative class members here are protected from any future "harm" because CEA barred its customers from making calls after August 2009 when the FTC prohibited pre-recorded calls without express written consent.

CONCLUSION

Based on the foregoing, the Court should deny Plaintiff's Motion for Class Certification.

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Dated: January 9, 2012

Respectfully submitted,

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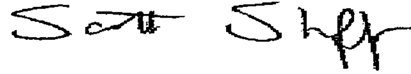

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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys of record for Defendant Call-Em-All, LLC herein.

I hereby certify that on this date, I electronically filed the attached foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following persons:

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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: January 9, 2012 at Seattle, Washington.

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