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Honorable Ronald B. Leighton

8 UNITED STATES DISTRICT COURT WESTERN
9 DISTRICT OF WASHINGTON AT TACOMA

10 CAROLYN ANDERSON,

11 Plaintiff,

12 vs.

13 DOMINO'S PIZZA, INC., DOMINO'S PIZZA, LLC,
14 FOUR OUR FAMILIES, INC., and CALL-EM-ALL,
15 LLC.,

16 Defendants.

CASE NO. :C 11-902-RBL

DEFENDANT FOUR OUR FAMILIES, INC.'S
RESPONSE TO PLAINTIFF'S MOTION FOR
CERTIFICATION OF CLASS

NOTED ON MOTION CALENDAR: January 13,
2012

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18 I. INTRODUCTION

19 COMES NOW, the DEFENDANT, FOUR OUR FAMILIES, INC. ("FOFI") who respectfully
20 requests the Court deny Plaintiff's Motion for Class Certification. Plaintiff has passed the
21 deadline to certify the class in this litigation according to the very specific time frame the
22 local court rule provides. Local Rule CR 23(i)(3). Plaintiff does not have good cause for
23 missing the deadline in order to receive an extension. The following dates are of significance
24 to this Motion:

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- Plaintiff's Complaint was filed in King County Superior Court on April 29, 2011.

- 1 • Plaintiff's First Set of Interrogatories and Request for Production were sent to
- 2 FOFI on April 29, 2010.
- 3 • Michael Brown's Deposition was taken on September 30, 2010.
- 4 • On April 13, 2011, the first deposition of Domino's 30(b)(6) representative,
- 5 Joseph Devereaux was taken.
- 6 • CEA removed this action to federal court on May 31, 2011 after Plaintiff filed an
- 7 Amended Complaint in state court adding CEA as a defendant.
- 8 • The Plaintiff and Defendants had a conference on July 13, 2011 to comply with
- 9 Federal Rule of Civil Procedure 26(f).
- 10 • The Plaintiff drafted and filed the Joint Status Report agreed to by all parties on
- 11 July 26, 2011.
- 12 • The Joint Status Report stated the deadline for class certification was December
- 13 1, 2011 and the discovery cutoff for the class certification was October 30, 2011.
- 14 • On September 9 and 15, 2011, CEA provided documents regarding the alleged
- 15 calls and the number of calls in response to Plaintiff's First Set of Interrogatories
- 16 and Requests for Production propounded to CEA.
- 17 • The Depositions of Christopher Roeser and Scott Senne, Domino's employees
- 18 named in Mr. Devereaux testimony regarding the rally and marketing efforts of
- 19 Domino's Pizza, were held on October 28, 2011.
- 20 • The Deposition of Brad Herrmann, the president of CEA, was taken on December
- 21 2, 2011. (Plaintiff does not use his testimony in her Motion to Certify).

22 Plaintiff brings this Motion only to certify the state claims under the Washington statutes,

23 RCW 80.36.400 ("ADAD") and RCW 19.86, et. seq. ("WCPA"), but does not include the causes

24 of action under the Telephone Consumer Protection Act ("TCPA"), 47 USC 227(b)(1)(B) as

25 alleged in the complaint. ¹ FOFI submits this Response to Deny Plaintiff's Motion and

26 attached memorandum of points and authorities.

¹ "Plaintiff's Complaint also includes a claim for violation of the Telephone Consumer Protection Act, 47 U.S.C. 227(b)(1)(B) which is not a subject of this motion." fn. 1 of Plaintiff's Motion for Class Certification.

1 II. ARGUMENT

2 **A. Plaintiff’s Class Claims Are Untimely**

3 Plaintiff’s Motion for Class Certification is untimely. The Court is to apply the state
4 substantive laws and federal procedural laws. *Erie R.R.Co. v. Tompkins*, 304 US 64, 58 S. Ct.
5 817, 82 L. Ed. 1188 (1938). The Federal and State Superior Court Rules allow a plaintiff to
6 certify, “**At an early practicable time** after a person sues or issued as a class representative,
7 the court must determine by order whether to certify the action as a class action.” Fed. Civ.
8 Proc. R. 23(c)(1)(A)-*Time to Issue; Sup. Crt. CR 23(c). Emphasis added.* District Courts are
9 allowed to establish their own rules as long as their rules are consistent with the Federal
10 Rules and Acts of Congress. Fed. Civ. Proc. R. 83(a)-*Local Rules.* The Local Federal Civil
11 Procedure Rule is very specific and provides an exact date the plaintiff’s motion for class
12 certification must be filed. The Local Rule states:
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15 **Within one hundred eighty days** after the filing of a complaint in a class action,
16 unless otherwise ordered by the court or provided by statute, the plaintiff **shall**
17 [emphasis added] move for a determination under Fed. R. Civ. P. 23(c)(1), as to
18 whether the case is to be maintained as a class action. **This period may be extended**
19 **on motion for good cause** [emphasis added]. The court may certify the class, may
20 disallow and strike the class allegations, or may order postponement of the
21 determination pending discovery or such other preliminary procedures as appear
22 appropriate and necessary in the circumstances. Whenever possible, where the
23 determination is postponed, a date will be fixed by the court for renewal of the
24 motion. Local Rule W.D. Wash. CR 23(i)(3). *Emphasis added.*

25 There is no state law that extends or limits the certification deadline; therefore, the federal
26 procedural rule controls. *Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965).

In *Strange v. Les Schwab Tire Centers*, this Court interpreted Local Rule CR 23(f)(3)
and dealt with the same issues before the Court today. *Strange v. Les Schwab Tire Centers of*

1 Or., No. C06-045RSM (W.D. Wash. 2008). The complaint was filed on January 11, 2006, and
2 an amended complaint on August 1, 2006. The parties filed their joint status report on
3 September 12, 2006, identifying that a motion for class certification would be filed on March
4 30, 2007. The plaintiffs filed the motion to certify as timely (in early 2008) and did not
5 acknowledge the expiration of the deadline. "This Court's local rules provide a date for class
6 certification that is realistic in terms of trial preparation." Plaintiff did not provide a
7 justification for the late motion nor indicate "extraordinary circumstances". Due to the
8 untimely motion (passed the 180 day deadline), the motion to certify was denied.
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11 Courts in Louisiana, New York, Pennsylvania, and Michigan, have dealt with class
12 certification deadlines established by civil procedure rules that range from 60-120 days from
13 the filing of the complaint. Each has dismissed class allegations based on this time specific
14 filing deadline. *Landry v. Liberty Bank & Trust Co.* US DC. E.D. LA 05-688711-481(2011);
15 *Sellers v. El Paso Industrial Energy*, 8 So. 3d 723 (La. Crt. App. 2009) (strict application of the
16 local 90 day rule, language is clear and plain) (citing *Crader v. Pinnacle Entertainment Inc.*,
17 06-136, 931 So.2d 535(La.App. 3 Cir. 2006) where Plaintiff was slightly over 3 month
18 deadline); *Nguyen v. Liberty Mutual Insur. Co.*, US DC E.D. 07-4469 (2008) (all three cases
19 interpreting La. C.C.P. art. 592(A)(1) that provides a class certification deadline of 90 days
20 after service on all adverse parties of initial pleading); *Hill v. City of Warren*, 748 NW. 2d.
21 520, Mich. (2007) (MCR 3.501(B)(1)(a) provides 91 day deadline); *Tigg v. Pirelli Tire Corp.*,
22 232 S.W.3d 28 (Tenn. SC 2007) (Superior Court Rule allows for "as soon as practicable", but
23 the Circuit Court Rule 26.14 provides 60 days); *Shariff v. Goord*, US DC W.D. NY (2006) (Local
24 Rule CR 23(d) provides 120 days); *Walton v. Eaton*, 563 F. 2d 66 Ct. App. 3rd Circuit (1977)
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1 45(c) of the Rules of the US DC for the ED of PA provides a 90 day deadline, unless this
2 period is extended on motion. "Local Rule 45(c) is a valid exercise of the district court's
3 power under Fed.R.Civ.Proc. 83." Citing *Umbriac v. American Snacks, Inc.*, 388 F.Supp. 265,
4 274 (E.D.Pa.1975)); *Fox v. Prudent Resources*, 69 FRD 74, 77 & n. 1 (E.D.Pa.1975). *See also*
5 *Gilinsky v. Columbia Univ.*, 62 FRD 178, 179 (S.D.N.Y.1974) (concerns a similar local rule, the
6 S.D.N.Y.'s Civil Rule 11A(c)); *Walker v. Columbia Univ.*, 62 FRD 63, 64 (S.D.N.Y.1974); *Sheridan*
7 *v. Liquor Salemen's Union*, 60 FRD 48, 50-51 (S.D.N.Y.1973)).
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9 Anderson has not provided a justification or illustrated extraordinary circumstances.
10 Instead, the issue is ignored completely. This matter was removed from state court to
11 federal court by Call-Em-All on May 31, 2011. In order to meet the deadline set forth by
12 Local CR 23(i)(3), plaintiff was required to bring her motion to certify a class by November
13 28, 2011. It did not file its Motion until December 22, 2011. This Motion was filed in reaction
14 to Domino's Response to Plaintiff's Motion for 56(d) Continuance [dkt. no. 28]. Domino's
15 brought to Plaintiff's attention that it did not certify the class by the appropriate deadline.
16 The Plaintiff more than likely would not have brought her Motion to Certify at that time if
17 Domino's did not draw attention to such an obvious oversight. Plaintiff missed the deadline
18 by 26 days. The 180 day deadline is exactly like a statute of limitations for a cause of action
19 barring any class claims. The rule clearly states- "Plaintiff shall move", within 180 days of
20 filing of a complaint for class certification, not when Plaintiff feels like getting around to it.
21 The Joint Status Report, drafted and filed by Plaintiff on July 26, 2011 and agreed to by all
22 the parties, established a deadline for Plaintiff's Motion for Class Certification by December
23 1, 2011. [dkt. no. 15, 2]. The Report outlines a discovery deadline relating to class
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1 certification of October 31, 2011, “so that her [Plaintiff] Motion for Class Certification may
2 be timely filed. Following the Court’s ruling on class certification, the parties would request
3 leave to submit to the Court a discovery plan related to merits.” [dkt. no. 15, ¶ 6]. Plaintiff
4 was well aware of the 180 day deadline according to the Joint Status Report she drafted.
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6 The Rule does allow the Court flexibility in allowing a continuance prior to the passing
7 of the deadline. If Plaintiff needed more time to conduct discovery, a motion for good cause
8 should have been filed requesting postponement of the determination prior to expiration of
9 the deadline. Local Rule CR 23(i)(3). Plaintiffs did not request and Defendants did not agree
10 to any further extensions from the December 1, 2011, date in the joint status report. Plaintiff
11 has not moved the Court for an extension, much less demonstrated “good cause” for this
12 delay. Plaintiff simply ignores this significant oversight.
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14 **B. Plaintiff lacks good cause and should not be granted an extension of time.**

15 The Plaintiff was required to bring a motion for good cause for an extension of time
16 prior to the expiration of the 180 day deadline. Local Rule CR 23(i)(3). Good cause does not
17 exist. “Good cause” is a “Legally sufficient reason. Good cause is often the burden placed on
18 the litigant (by court rule or order) to show why a request should be granted or an action
19 excused.” Black’s Law Dictionary 89 (2nd ed. 2001). The original complaint was filed in King
20 County Superior Court on April 29, 2010, (over a year prior to removal to federal court). The
21 lawsuit included both FOFI and Domino’s Pizza. The Complaint alleged the same causes of
22 action relating to a state and national class as the Amended Complaint (adding CEA as a
23 defendant) filed on May 10, 2011. The Complaint contained Counts A, C, D and E and
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1 explained the elements of the National and Washington classes. The definition of the
2 Washington Class in the original Complaint is identical to the one Plaintiff proposes today:

3 Washington State Class: All Washington persons who received a pre-recorded
4 telephone message on their telephone from Defendants sent by automatic dialing
5 machine for purposes of commercial solicitation at any time for the period that
6 begins 4 years from the date of this complaint to trial. *See*, Complaint filed with
Notice of Removal.

7 The causes of action did not change when the Amended Complaint was filed. *See*,
8 documents filed with Notice of Removal. [dkt. No. 1].

9 Discovery began in this matter on April 29, 2010, when Plaintiff sent her First Set of
10 Interrogatories and Requests for Production to FOFI. Discovery with FOFI continued on
11 September 30, 2010, with the deposition of Mike Brown, President and Owner of FOFI. Since
12 Plaintiff's First Set of Interrogatories, FOFI has defended its action of making telephone calls
13 to customers with whom it maintains a business relationship. In fact, Mr. Brown estimates
14 more than 5,000 calls were made in the first download and that more calls were made. Exh.
15 7 to Joint Decl. 30 [dkt. No. 32]. CEA provided documentation on September 9 and 15, 2011,
16 in response to Plaintiff's First Set of Interrogatories and Requests for Production to Call-Em-
17 All. Exh. 4 to Jt. Decl. [dkt. No. 32]. The documents stated the amount of calls made and to
18 whom the calls were made. No further discovery needed to be performed in order to form
19 the class as of September 2011. In fact, the only relevant discovery performed since that
20 date and this Motion is the Deposition of Brad Herrmann, the president of CEA in on
21 December 2, 2011. Plaintiff does not use Mr. Herrmann's deposition testimony in this
22 Motion as a basis for class certification. *See*, Motion [dkt. no. 31] Plaintiff only uses
23 information she has had in her possession between the summer of 2010 to September 15,
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1 2011. According to Plaintiff's Motion, she had the discovery in her possession as of
2 September 2011, which forms the basis of Plaintiff's proposed class. Plaintiff failed to meet
3 the deadline outlined in the joint status report (December 1, 2011) and the deadline
4 established by court rule (November 28, 2011). Good cause does not exist and Plaintiff's
5 Motion should be denied.
6

7 III. CONCLUSION

8 Plaintiff has failed to bring this Motion within the 180 day deadline as required by
9 Local Rule CR 23(i). Like a statute of limitations, this deadline shall bar Plaintiff's state class
10 allegations. The language of the rule is plain and clear. Good cause does not exist for such
11 failure. The Defendant Four Our Families Inc., respectfully request Plaintiff's Motion for
12 Class Certification be denied.
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15 Dated at Lakewood, Washington this 9th day of January, 2012.
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17 FAUBION REEDER FRALEY & COOK, P.S.

18 By /s/ Nelson Fraley, II
19 NICOLE BROWN, WSBA No. 40704
20 NELSON C. FRALEY II, WSBA No. 26742
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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2012, I electronically served the foregoing to the parties listed below:

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