

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CAROLYN ANDERSON,

Plaintiff,

No. C11-902RBL

vs.

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

PLAINTIFF'S MOTION TO EXTEND
CLASS CERTIFICATION DEADLINE
UNDER W.D. WASH. LOCAL RULES
7(d)(2)(A) AND 23(i)(3)

Defendants.

NOTE ON MOTION CALENDAR:
January 20, 2012

I. RELIEF REQUESTED

Plaintiff Carolyn Anderson moves the Court under W.D. Wash. Local Rules 7(d)(2)(A) and 23(1)(3) for an extension of the time to move for class certification in this case until **December 22, 2011** (when she filed her motion for class certification, Dkt. No. 31). W.D. Wash. Local Rule 23(i)(3) provides that a motion for class certification is due within 180 days after the complaint is filed. Defendants contend Plaintiff's motion for class certification should be denied as beyond the deadline, which they concede was **November 28, 2011** (counted from the time this case was removed to federal court) or **December 2, 2011**. Local Rule 23(i)(3) provides that the 180-day period may be extended on motion for good cause. Good cause is established by the delays caused due to removal of this case; Defendants' recalcitrance in responding to discovery since this case began in state court; lack of prejudice to Defendants;

PLAINTIFF'S MOTION TO EXTEND CLASS CERTIFICATION
DEADLINE UNDER W.D. WASH. LOCAL RULES 7(d)(2)(A) AND 23(a)(3) -
(C11-902RBL)

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

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2 serious harm to Plaintiff should the Court deny certification based on the deadline; and
3 excusable neglect.

4 II. STATEMENT OF FACTS

5 This case was originally filed in Washington State Superior Court (King County Case No.
6 10-2-15941-0) on **April 29, 2010**. Defendants Domino's Pizza, Inc. and Domino's Pizza, LLC
7 ("Domino's") originally filed a motion for summary judgment while this matter was pending in
8 King County Superior Court on April 22, 2011. Plaintiff's counsel immediately conferred with
9 Domino's counsel regarding rescheduling the motion so that discovery could be completed,
10 especially depositions of Domino's personnel in Ann Arbor, Michigan. A few weeks later
11 Domino's and Defendant Four Our Families, Inc. ("FOFI") agreed to permit Plaintiff to amend
12 her complaint to add a new party, defendant Call-Em-All, Inc. ("CEA"). (Declaration of Rob
13 Williamson ["Williamson Decl."], ¶ 2).

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16 After the complaint was amended to add Call-Em-All, LLC, as a Defendant, the case was
17 removed on **May 31, 2011**, by Call-Em-All, and assigned to Judge Marsha Pechman. The
18 parties filed a Joint Status Report on **July 26, 2011**. On **July 29, 2011**, the case was transferred
19 to Judge Leighton, who entered a case schedule on August 9, 2011, setting trial for September
20 24, 2012. Dkt. No. 19. Call-Em-All moved to amend its answer on **August 22, 2011** to assert a
21 claim against Defendant Four Our Families, Inc. (FOFI), who did not file an answer until
22 **September 21, 2011**. (*Id.* ¶ 3).

23
24 Domino's renewed their motion for summary judgment on November 28, 2011.
25 Plaintiff's counsel asked Domino's counsel for more time due to the holidays and the fact that
26 Domino's responses to Plaintiff's discovery requests were incomplete and inadequate. Domino's
did not respond until **December 5, 2011**, with a refusal. (*Id.* ¶ 6).

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2 Because of Domino's refusal to continue the summary judgment motion to provide time
3 for more discovery and to accommodate Plaintiff's counsel over the Christmas holiday, Plaintiff
4 immediately filed a Motion for Continuance of the Summary Judgment Motion, which Domino's
5 opposed. Because the Court did not have time to rule on that Motion prior to the date when
6 Plaintiff's Opposition to the Summary Judgment Motion was to be filed, we did prepare and
7 submit our opposition on December 28, 2011. This Court granted the continuance rescheduling
8 the summary judgment motion for March 30, 2012 (Dkt. #43)
9

10 Plaintiff filed the present Motion for Class Certification on **December 22, 2011**.

11 Review of the litigation reveals that Plaintiff has pursued this matter diligently to obtain
12 the necessary discovery and evidence for class certification and trial. When suit was filed,
13 Plaintiff did not know what parties were responsible for placing the calls at issue, as is typical in
14 robo-call solicitation cases. Almost a year passed before it was possible to add Defendant Call-
15 Em-All, which then removed the case. (*Id.* ¶ 9).
16

17 Defendants have been less than forthright in discovery. For example, Domino's
18 responses to Plaintiff's discovery requests were incomplete and inadequate, as detailed in
19 Plaintiff's Motion for CR 56(d) Continuance of Domino's Motion for Summary Judgment,
20 which continuance this Court recently granted. Domino's provided no electronically stored
21 information (ESI), which Anderson originally requested when this case was in Washington State
22 Superior Court, before Domino's removed it to this Court. (*Id.* ¶ 10). It was not until **December**
23 **2, 2011**, that Defendant Call-Em-All provided its President, Brad Herrmann, for deposition in
24 Irving, Texas. (*Id.* ¶ 5).
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26 In a case involving multiple parties and counsel, some scheduling delays are typical, and
the delays in this case were not out of the ordinary. Denial of Plaintiff's motion for class

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2 certification would penalize Plaintiff alone for these delays and reward Defendants.

3 **III. ISSUE**

4 Given the history of removal from state court, Defendants' delay in discovery, the
5 absence of any prejudice to Defendants, and the injury to Plaintiff from denial of class
6 certification, does good cause exist to extend the deadline for filing a motion for class
7 certification in this case?
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9 **IV. LEGAL AUTHORITY**

10 Fed. R. Civ. P. 23(c)(1)(A) provides: "At an early practicable time after a person sues or
11 is sued as a class representative, the court must determine by order whether to certify the action
12 as a class action." Under the circumstances of amendment of the complaint, removal to this
13 Court, out-of-state Defendants, delays by Defendants in discovery, other inevitable delays
14 because of all counsel's calendars, the absence of prejudice to Defendants and the serious injury
15 to Plaintiff if certification is denied, Plaintiff submits her motion filed three weeks after
16 November 28, 2011, is reasonable and excusable neglect and good cause for an extension to
17 **December 22, 2011.**
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19 In the courts that have addressed this issue, "the prevailing view and the better approach
20 requires the court to weigh the equities to determine if untimely compliance has resulted in any
21 prejudice to the defendant, and if not, to proceed to determine if Rule 23 criteria for a class
22 action are satisfied." *Patton v. Topps Meat Co., LLC*, 07-CV-654S(M), 2009 WL 2027106, at *7
23 (W.D.N.Y. July 9, 2009) (quoting 8 *Newberg on Class Actions* § 24:78 (4th Ed.)). In *Probe v.*
24 *State Teachers' Retirement System*, 780 F.2d 776, 780 (9th Cir. 1986), the Ninth Circuit held that
25 a delay of 18 months in filing for class certification "was reasonable" given that the original
26 complaint alleged only Equal Pay Act violations, amended complaint adding Title VII claims

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2 was filed six months before plaintiffs' motion for class certification, defendant filed its answer to
3 the amended complaint and the plaintiffs conducted discovery to determine the number of class
4 members, and "defendant did not claim that it was prejudiced by the delay." The key factor is
5 prejudice, which Defendants do not claim here. *Siegel v. Lyons*, C-95-3588 DLJ, 1996 WL
6 634206, at *9 (N.D. Cal. Sept. 16, 1996) ("in the absence of prejudice to defendants, the Court is
7 unwilling to punish the plaintiff class for one incident of inadvertence on the part of counsel.
8 Accordingly, as defendants have offered no reason for this Court to believe that the delay in this
9 case was prejudicial, this Court will not deny class certification based solely on plaintiff's failure
10 to file a timely motion.")

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12 As the court stated in *Balarezo v. Nth Connect Telecom, Inc.*, 5:07-CV-05243 JF PSG,
13 2011 WL 1344250, at *2 (N.D. Cal. Apr. 8, 2011), even when a motion to certify a class is filed
14 late in the litigation (which did not occur here, a mere three weeks beyond the deadline):

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16 [A] court must determine whether (1) there is a reasonable explanation for the
17 delay, and (2) whether the defendant will be prejudiced by the delay.² See 1
18 William B. Rubenstein et al., *Newberg On Class Actions* § 3:43 (4th ed.2010); see
19 also *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th
20 Cir.1986) (holding that an eighteen-month delay in moving for class certification
21 was reasonable because plaintiffs used that time to conduct discovery to
22 determine the number of potential class members and the defendants did not claim
23 that they were prejudiced by the delay). District courts in the Ninth Circuit give
24 particular weight to the second factor, noting that motions for class certification
25 should be denied as untimely when the defendant would be prejudiced by the
26 delay. See, e.g., *Arnold v. Arizona Dept. of Public Safety*, 233 F.R.D. 537, 541
(D.Ariz.2005) ("Courts applying Rule 23, as amended, do not deny class
certification based on timeliness unless the delay has prejudiced a defendant.").

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28 In *Patton*, Plaintiff had not brought a class certification motion until over 17 months from
29 when the case had been filed, and also after the deadline for filing such motions set by the local
30 rule had passed. The District Court, in affirming the Magistrate's decision to permit the class

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2 certification motion to proceed, had no difficulty rejecting the same argument Defendants make
3 here – that the local rule mandates denial of an untimely motion:

4 A status conference was held on March 18, 2009. At the conference, the parties
5 proposed a revised schedule for a class certification motion. Magistrate Judge
6 McCarthy noted that the time to move for class certification had expired, and that
7 Plaintiffs would be required to seek relief from the Court upon a showing of
8 excusable neglect and good cause. (Docket No. 98.) Plaintiffs filed their motion
9 on March 27, 2009 (Docket No. 99), which motion was opposed by all
10 Defendants (Docket No. 102).

11 In his Report and Recommendation, Magistrate Judge McCarthy
12 addressed the provisions of this Court's Local Rule 23. He went on to discuss the
13 **factors considered in determining excusable neglect as applied by both the**
14 **United States Supreme Court and the Second Circuit-to wit, danger of**
15 **prejudice to the non-moving party; length of the delay and its potential**
16 **impact on judicial proceedings; reason for the delay, including whether it**
17 **was within the reasonable control of the movant; and whether the movant**
18 **acted in good faith.** *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507
19 U.S. 380, 392, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993); *Williams v. KFC*
20 *Nat'l Mgmt. Co.*, 391 F.3d 411, 415-16 (2d Cir.2004). Among other things, Judge
21 McCarthy noted that Plaintiffs had filed their motion within a reasonable time
22 after issue was joined, Defendants did not object to an extended deadline for class
23 certification until Judge McCarthy raised the issue, and they do not claim any
24 prejudice. He went on to conclude that, in light of the circumstances and
25 procedural history here, the equities weigh in favor of extending the time in which
26 Plaintiffs may move for class certification.

Applying those factors here:

1. Danger of Prejudice to the non-moving party. Defendants here do not claim any
prejudice, nor could they, as the parties responsible for the majority of delay.

2. Length of Delay and its Impact on Judicial Proceedings. Defendants delayed in
responding to discovery and then Domino's prematurely filed a motion for summary judgment
dismissal, which this Court continued to allow discovery to be completed. The three-week
"delay" by Plaintiff in filing her motion for class certification is excusable and Plaintiff is
unaware of any impact the "Delay" will have on judicial proceedings.

3. Reason for the Delay. The reasons have been set forth herein, and much of the delay

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2 was not in the control of Plaintiff but, instead, the schedules of Defendants and the delay
3 occasioned by Defendants in discovery.

4 4. Where Plaintiff (And his counsel) Acted in Good Faith. If the Court believes that
5 there has been a lack of good faith by counsel or Plaintiff, this would be an unfortunately and
6 unjustified conclusion and counsel would seek an opportunity to present their testimony at an
7 evidentiary hearing on that issue.
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9 Other courts have considered claims that a class certification motion is untimely and
10 rejected them on similar grounds. *See, e.g., Misra v. Decision One Mortg. Co., LLC*, 673 F.
11 Supp. 2d 987, 994 (C.D. Cal. 2008) (“under Fed.R.Civ.P. 23(c)(1)(A), there is no specific time
12 limitation; instead, the determination must be made ‘[a]t an early practicable time.’ Discovery
13 has been slow to commence in this action”; court allowed motion in its discretion as it would be
14 inequitable to deny for untimeliness); *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582, 585 n.1 (C.D.
15 Cal. 2011) (“Defendant has failed to argue that it would be prejudiced by the allowance of the
16 Motion”); *Clark v. Sprint Spectrum L.P.*, CV 10-9702 CAS SSX, 2011 WL 835487 (C.D. Cal.
17 Mar. 7, 2011) (extending deadline as equitable, whether under “good cause” or “excusable
18 neglect” standard); *Ferrell v. ConocoPhillips Pipe Line Co.*, 5:09-CV-00431-RRP-OP, 2010 WL
19 1946896 (C.D. Cal. May 12, 2010) (“the court would not be inclined to strictly enforce Rule 23-
20 3 in the circumstance of this case. Doing so would allow Defendant an unfair advantage as a
21 result of the fact that this case spent several weeks as an orphan following Judge Larson’s
22 resignation”). *Cf. Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1093 (9th Cir. 2011) (“the district
23 court abused its discretion in finding that Pitts could no longer file a timely motion to certify a
24 class.”)
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See also, e.g., Brown v. J.P. Allen Co., 79 F.R.D. 32 (N.D. Ga. 1978) (lateness in filing

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2 for class certification may be a factor in deciding whether prerequisites for certification have
3 been met, but it is not ground for denial when defendant has shown no resultant prejudice);
4 *Alexander v. Aero Lodge No. 735, Intern. Ass'n of Machinists and Aerospace Workers, AFL-*
5 *CIO*, 565 F.2d 1364, 1372 (6th Cir. 1977) ("Notwithstanding our strongly expressed views on
6 the desirability of an early determination of whether a class will be maintained, our circuit has
7 required a showing of actual prejudice to the protesting party."); *Gray v. Greyhound Lines, East*,
8 545 F.2d 169, 173, n. 11 (D.C.Cir. 1976) (district court directed to reconsider denial of class
9 certification for late filing of motion under local court rule: "[i]t is not clear that dismissal of the
10 class allegations for failure to comply with the local time limit is consistent with Rule 23(c)(1)
11 F.R.Civ.P. which may require the court to determine the merits of their claim to representative
12 status."); *Stolz v. United Broth. of Carpenters and Joiners of America, Local Union No. 971*, 620
13 F.Supp. 396 (D.Nev. 1985) (plaintiff's motion to certify was made one year after filing the
14 complaint, and such delay alone will not cause denial of certification absent a showing of harm
15 to the other party.); *Griffin v. National Public Radio*, 1977 WL 15507 (D.D.C. 1977) (failure to
16 file motion for certification within time prescribed by local rule was not a ground to dismiss class
17 allegations when the record showed the case had been diligently prosecuted and the defendant
18 suffered no prejudice; conditional certification was granted); *U.S. v. Terminal Transport Co.,*
19 *Inc.*, 1976 WL 525 (N.D.Ga. 1976), order modified, 1976 WL 586 (N.D. Ga. 1976), order
20 *clarified*, 1976 WL 726 (N.D.Ga. 1976) (court has independent obligation to determine class
21 action status though motion for class determination was not timely under local rule); *Alexander*
22 *v. Aero Lodge No. 735, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 565 F.2d
23 1364, 1372 (6th Cir. 1977) ("Notwithstanding our strongly expressed views on the desirability of
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2 an early determination of whether a class will be maintained, our circuit has required a showing
3 of actual prejudice to the protesting party."); *Dickerson v. U.S. Steel Corp.*, 1974 WL 186
4 (E.D.Pa. 1974) (plaintiffs' class discovery was allowed despite late filing of class motion; class
5 was subsequently certified in *Dickerson v. U.S. Steel Corp.*, 64 F.R.D. 351 (E.D.Pa. 1974)).

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7 In *Bernstein v. National Liberty Intern. Corp.*, 407 F.Supp. 709 (E.D. Pa. 1976), the court
8 said:

9 Even though plaintiff's motion to add class action allegations and motion for
10 declaration as a class action were not filed until almost eight months after the
11 filing of the original complaint, absent a showing of prejudice to defendant, a
12 mere delay in seeking certification is not a ground for denying the motions.
Similarly, the court is not required to deny the motion to amend simply because of
a failure to comply with a local rule.

13 *Id.* at 714. Certification in *Bernstein* was denied on other grounds. In *Lee v. North Penn*
14 *Transfer, Inc.*, 15 Fed. R. Serv. 2d 1405 (E.D. Pa. Feb. 5, 1972), the court said:

15 That plaintiff failed to strictly comply with certain rigid rules should not be fatal
16 where the equities are so strongly in favor of the granting of its motion.
17 Nevertheless, plaintiff should be required to amend its pleadings so as to bring the
original complaint into strict compliance with local Rule 45.

18 *Id.* at 1406.

19 Four Our Families mentions (without citation) *Strange v. Les Schwab Tire Centers of*
20 *Oregon, Inc.*, C06-045RSM, 2008 WL 2001158 (W.D. Wash. May 7, 2008), but in that case
21 plaintiffs failed to show good cause for filing their motion more than a year after their amended
22 complaint. This is not such a case.

24 V. CONCLUSION

25 Plaintiff asks the Court to permit Plaintiff to file her Motion for Class Certification
26 effective December 22, 2011.

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DATE: January 12, 2012.

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