THE HONORABLE RONALD B. LEIGHTON

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

CAROLYN ANDERSON,

Plaintiff,

v.

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

Defendants.

NO. C11-00902 RBL

REPLY OF PLAINTIFF TO CALL-EM-ALL'S OPPOSITION TO PLAINTIFF'S MOTION FOR CERTIFICATION OF CLASS

NOTED ON MOTION CALENDAR: JANUARY 13, 2012

I. INTRODUCTION

Plaintiff's Motion for Class Certification is directed to all three named Defendants, Domino's Pizza, Inc. and Domino's Pizza, LLC ("Domino's"), Four Our Families, Inc. ("FOFI") and Call-Em-All, Inc. ("CEA"). Domino's and CEA oppose the motion primarily on the merits, arguing that a class action is not a superior mechanism for resolution of the class claims asserted by Plaintiff. FOFI limits its arguments to the purported untimeliness of the motion, apparently conceding that class certification is otherwise appropriate.[1]

[1] CEA and Domino's also devote a small portion of their oppositions to the timeliness issue. Plaintiff responds to the timeliness claims of all three Defendants in her Reply to FOFI's Opposition.

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

Domino's contends a class action is not a superior method to other means of adjudication, primarily arguing that persons who are the recipients of robo-calls such as those blasted out by Defendants in this case can obtain redress in small claims court. CEA also makes this argument (CEA Opposition, 18-19). Plaintiff's response to this argument is set forth in her reply to Domino's Response. In this Reply[2], Plaintiff will respond to the additional arguments of CEA which are:

1. Individual facts and circumstances render class certification inappropriate;
2. Plaintiff is atypical;
3. Certification is not proper under FRCP 23(b)(2);
4. Certification is not proper under FRCP 23(b)(3) because
    1. Common questions do not predominate;
    2. Small Claims is superior;
    3. Unfairness and Proportionality.

II. LEGAL ARGUMENT

1. Individual facts and circumstances do not render class certification inappropriate.

CAE suggests that the telephone numbers used to place the calls at issue were acquired in several ways by FOFI, yet cites to no evidence in the record to support the claim. In fact, the record suggests that the calls were uploaded by FOFI using the PULSE system, and that CEA then showed FOFI how to access the data in order to download telephone numbers for the robo-call campaigns (need cite). This Court cannot rely on CEA's speculations about how telephone numbers were collected as the basis of an argument that the collection methods somehow create individual issues.

[2] This brief exceeds the page limit of 12 by two pages. The brief as to Domino's, however, is only 6 pages and to FOFI only two pages, so the total submitted to the Court is 20 pages with respect to reply to three separate opposing briefs.

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

The uncontroverted record is that Defendants have no evidence that any person who received the robo-calls in this case consented. Neither FOFI nor Domino's has argued to the contrary, and they do not support CEA's baseless claims. CEA's attempt to avoid class certification arising from its violation of Washington's absolute bar on commercial solicitation automatic dialing and announcing device ("ADAD") calls, RCW 80.36.400(2), is based on the argument that Plaintiff and all other class members must demonstrate whether the calls to them were "unsolicited" and whether they did or did not consent to the calls, thus raising individual issues which defeat certification. Judge Lasnik of this District rejected such arguments in his April 7, 2010 opinion in *Hovila v. Tween Brands, Inc.*, C09-0491RSL, 2010 WL 1433417 (W.D. Wash. Apr. 7, 2010), concluding that the WADAD flatly prohibits the use of ADADs in commercial solicitation. The WADAD provides no defenses for calls made with prior express permission or consent or to persons with whom the caller has an existing business relationship ("EBR"). Judge Lasnik stated:

> There is no dispute that Plaintiff received telephone solicitations through an ADAD....
>
> ... The federal and state statutes are not sufficiently similar for the Court to incorporate TCPA definitions into the WADAD, however. The common, ordinary meaning of the word "unsolicited" is "not asked for" or "not requested." While express consent by the recipient may constitute a request, there is no reason to assume that the Washington legislature intended to expand the universe of permissible calls to incorporate an EBR exemption. The plain language of the WADAD flatly prohibits the use of ADADs in commercial solicitation. *See* RCW 80.36.400(2); WAC 480-120-253(3). In contrast, the TCPA expressly permits certain automated calls (47 U.S.C. § 227(b)(1)(A)) and gives explicit authority to the FCC to define additional exemptions (47 U.S.C. § 227(b)(1)(B)). The sole purpose of the WADAD is consumer protection. *See* RCW 80.36.400(3). In contrast, Congress authorized the FCC to take into consideration legitimate business interests as well as citizen privacy when issuing regulations under the TCPA. *See* Congressional Statement of Findings, § 2 of Pub.L. 102-243. **Given the restrictive nature of the WADAD, the Court is not convinced**

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17253 AGATE STREET NE
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(206) 780-4447
(206) 780-5557 (FAX)
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that "unsolicited" has the same meaning as "prior express invitation or permission." The common, ordinary meaning will therefore apply.

Hovila, 2010 WL 1433417, at *12 (emphasis added).[3] Judge Lasnik's Order essentially disposes of CEA's arguments against certification. CEA does not address the definition of the class to be certified. It is all persons in Washington who received an ADAD solicitation at their homes from Defendants. It is not all persons who did not consent or did not solicit the calls.

Hovila also distinguishes claims under Washington's ADAD statute from those under the TCPA, further undermining CEA's arguments. As Judge Lasnik explained, "unsolicited" in RCW 80.36.400 does not mean the same thing as "prior express consent" in the TCPA. Under the plain language of the WADAD and the Court's construction of it, consent is not a defense and lack of consent is not an element.

Moreover, a person cannot agree to a Defendant's violation of RCW 80.36.400. The Legislature enacted RCW 80.36.400 in the interests of consumer protection, the right of privacy, and the state's interest in keeping phone lines clear. *Spafford v. Echostar Communications Corp.*, 448 F.Supp.2d 1220, 1224-26 (W.D. Wash. 2006). *See also Palmer v. Sprint Nextel Corp.*, 674 F.Supp.2d 1224, 1228-29 (2009). In *Spafford,* the court held that the state's interest in protecting privacy alone is sufficient to justify any restriction on commercial speech. Thus, any agreement by a consumer to waive the statute's prohibition is against public policy upheld in *Spafford.* An agreement to waive a statute's terms is invalid and unenforceable because it is

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[3] The court "must not add words where the legislature has chosen not to include them". *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). If the statutory language is clear, there is no resort to other principles of statutory construction, even if the court believes the legislature intended something else but did not adequately express it. *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 343, 227 P.3d 1284 (2010).

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

against public policy. *Scott v. Cingular Wireless,* 160 Wn.2d 843, 851-52, 161 P.3d 1000 (2007)("[a]n agreement that has a tendency to be against the public good, or to be injurious to the public violates public policy.... An agreement that violates public policy may be void and unenforceable"). A law established for a public policy reason cannot be circumvented by a private agreement. *Stuart v. Radioshack Corp.,* 2009 WL 281941 (N.D. Cal. 2009)(defendant could not allege, as a defense to violation of California statute requiring employer to reimburse expenses, that plaintiff waived his right to reimbursement by not requesting it below a certain amount; granting Rule 23(b)(3) certification);[4] *Soares v. Max Services, Inc.,* 42 Conn. App. 147, 175-76, 679 A.2d 37, 52 (1996)("[w]here there is a statutory duty to be performed by those charged with administering that statute, such a law established for a public reason cannot be waived or circumvented by a private act or agreements").[5] Defendants cannot circumvent RCW 80.36.400's prohibition against ADADs by obtaining their customers' agreement to receive ADAD solicitation calls at their homes.

Hovila also concluded, "[t]here is no dispute that plaintiff received telephone solicitations through an ADAD". Since it is undisputed the class received commercial solicitations through an ADAD, Defendant cannot defend on the grounds that the call recipient "solicited", "asked for" or "requested" the ADADs. The facts and issues of this case, robo-calling persons at their homes to solicit business, are common to all class claims. CEA's opposing arguments are attempts to graft a consent defense on to the Washington statutory ban

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[4] *See also, e.g., Farahani v. San Diego Community College Dist.,*175 Cal.App.4th 1486, 96 Cal.Rptr.3d 900 (2009); *Mary R. v. B. & R. Corp.*, 149 Cal.App.3d 308, 316-17, 196 Cal. Rptr. 871 (1983).

[5] In the event that the Court were to conclude a defense existed, the class can still be defined as all persons who received the ADADS except those whom Defendant can establish specifically invited ADADs for the purpose of commercial solicitation.

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

on ADAD solicitation calls.

2. Plaintiff is typical.

CEA argues Plaintiff is atypical because of her "unusual path to the courthouse" (Opp., 14), claiming without any evidence that Plaintiff is the only person complaining about the calls at issue. To the contrary, the Domino's robo-calls, sent by Call-Em-All, were so objectionable that they resulted in a second class action case, *Spillman v. RPM Pizza, LLC and Domino's Pizza, LLC*, Case No. 3:10-cv-00349-BAJ-SCR, which is currently pending in the United States District Court for the Middle District of Louisiana and is scheduled to be mediated soon (Williams Decl., ¶2-4). Call-Em-All's President, Brad Herrmann, was deposed in the *Spillman* case only a few short weeks before being deposed in the instant case (Williams Decl., ¶4). In addition, googling "Domino's robocalls" results in discovery of numerous on-line complaints regarding exactly the type of "misuse of customer phone numbers" that Ms. Anderson complains of in the case at bar (Williams Decl., ¶5; Exh. B).

CEA also asserts, "to make matters worse" (*id.*), Plaintiff was affirmatively solicited by class counsel who "scoured" the files of the Washington State Attorney General's Office. CEA does not and cannot argue that Plaintiff's retention of her counsel involved an ethical breach on counsel's part, so its allegations can only be intended to cast aspersions on Plaintiff and her counsel. Furthermore, CEA completely misrepresents the relationship between Plaintiff counsel's firm and the Attorney General's Office, and the origin of this case.[6]

3. Certification not proper under FRCP 23(b)(2).

[6] See Williams Decl., ¶6-8, for a description of efforts taken by Plaintiff's counsel's firm to enforce RCW 80.36.400 and the complementary efforts taken by the Washington Attorney General's Office.

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

CEA misconstrues and misunderstands FRCP 23(b)(2) and Plaintiff's position. There is no question that Plaintiff seeks injunctive and declaratory relief. She wants to stop the conduct of Defendants and others who invade the privacy of ordinary people in their homes with their robotic pitches to sell products and services, made at all hours of the day, interrupting their daily lives. Her declaration states:

> I understand that I seek to be the class representative in this case. I believe very strongly in seeking redress for myself and others who are the victims of conduct like that of the Defendant. I am not bringing this action to obtain money but to obtain an order from the Court forbidding Defendant from making robo-calls. I hope such an order would affect other businesses that do this sort of thing.

(Anderson Declaration, Dkt. #31, ¶2.)

Plaintiff was deposed. Defendants know her motives and goals. There is no evidence to dispute that she would have brought this suit even if she could not obtain monetary relief. The damages in this case are incidental, readily calculated and flow inextricably from the conduct at issue without the need of individual hearings.

CEA contends that the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Duke,* --U.S. --, 131 S.Ct. (2011) changes the analysis a trial court must employ when considering whether a plaintiff's motion for class certification should be granted under FRCP 23(b)(2). The decision should have no impact on whether this Court certifies the class proposed by Plaintiff. First, even if it can be argued that the decision puts in place new requirements for the commonality analysis, there is nothing in the decision indicating that the Supreme Court intended the supposed heightened commonality analysis to apply to any cases other than employment discrimination ones like the matter at issue in *Dukes.* Nothing in the opinion

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
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(206) 780-4447
(206) 780-5557 (FAX)
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indicates that the Supreme Court intended it to apply to consumer protection disputes such as the ones at issue in this case.[7] But even if *Dukes* has changed the standard applicable to the commonality analysis under FRCP 23(a), it should have no effect on how this Court resolves the motion for certification.

Justice Scalia, in the *Dukes* majority opinion, wrote:

> [FRCP 23(a) c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury[.] This does not mean that they have all suffered a violation of the same provision of the law. ... Their claims must depend upon a common contention -- for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.
>
> > What matters to class certification ... is not the raising of common 'questions' --even in droves -- but rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Dukes, 131 S.Ct. at 2552 (internal quotation and citation omitted, emphasis in original).

With respect to the proposed class of persons who were robo-called, it is not the "common question" that will entitle these proposed class members to compensation, but the common answer to the question, "Did Defendants make robo-calls to persons in Washington in violation of state law." The common answer is "Yes" -- and thus, for all class members for

[7] Nor is there any applicable authority that addresses the scope and meaning of the Supreme Court's decision. *Dukes* was decided on June 20, 2011; since then, one Ninth Circuit case and one trial court case in the Western District of Washington have cited or referred to it. In neither case, however, was FRCP 23(a) commonality an issue, so there was no discussion about commonality requirements in them. *Steams v. Ticketmaster Corp.,* 655 F.3d 1013 (9th Cir. 2011) (typicality was only FRCP 23(a) criterion at issue); *Lee v. ITT Corp.,* 275 F.R.D. 318 (W.D. Wash., June 24, 2011) (addressed only whether request for money relief was "incidental" to requested injunctive relief).

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17253 AGATE STREET NE
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(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

whom this is true, this answer drives the resolution of the litigation: each and every one of those persons is entitled to $500.00 for each call made to them by Defendants.

4. Certification is proper under FRCP 23(b)(3) because Common questions do predominate, Small Claims is not superior and Unfairness and Proportionality are inapplicable objections.

CEA's argument regarding commonality simply repeats its earlier position that there are individual questions that defeat class certification, and Plaintiff has addressed those arguments. Plaintiff will address the arguments regarding use of small claims court in her Reply to Domino's Opposition. Here, Plaintiff will demonstrate that the argument regarding unfairness and proportionality is completely without merit.

CEA's argument has been rejected by virtually all courts, including Judge Robert Lasnik in the Western District of Washington in *Kavu v. Omnipak*, 246 F.R.D. 642 (W.D.Wash. 2007). As did the defendant in *Omnipak*, CEA relies on *Ratner v. Chemical Bank New York Trust Co.* 54 F.R.D. 412, 413 (S.D.N.Y.1972) for the proposition that class certification should be denied because of the potential for significant damages to be assessed against it. The Judge in *Ratner* recognized the limits of his decision: "The court, for this *nisi prius* venture into largely unexplored terrain, will rule less heroically, only upon the specific case at hand." Likewise, the Judge was impressed with the fact that "[t]he substantive liability asserted … by Plaintiff under § 130(a) includes minimum damages of $100…without proof of any actual damages whatever." *Id.*

Ratner was rejected by *Haynes v. Logan Furniture Mart, Inc.* 503 F.2d 1161, 1165

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(206) 780-4447
(206) 780-5557 (FAX)
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(C.A.Ill. 1974) ("we deem it highly significant that here, unlike *Ratner* and *Wilcox*, actual damages were alleged", and "We note, too, that a class action in this case, involving approximately 2500 purchasers, would be inherently more manageable than the class of 180,000 members proposed in Wilcox or the class of 130,000 members suggested in *Ratner*".)[8] This rejection was noted in *Kenro, Inc. v. Fax Daily*, Inc. 962 F.Supp. 1162, 1166 (S.D. Ind. 1997):

> Huntington has submitted no evidence to support its contention that the transmission of unsolicited fax advertisements imposes a cost of as little as two cents on the recipient. Even if, as Huntington contends, the fax paper on which these unsolicited fax advertisements is printed costs no more than two cents per sheet, Congress was concerned with more than the cost of fax paper when it established the $500 statutory damages remedy. Congress designed a remedy that would take into account the difficult to quantify business interruption costs imposed upon recipients of unsolicited fax advertisements, effectively deter the unscrupulous practice of shifting these costs to unwitting recipients of "junk faxes", and "provide adequate incentive for an individual to bring suit on his own behalf." *Forman,* 164 F.R.D. at 404. It is permissible for Congress to design a remedy that will "serve to liquidate uncertain actual damages and to encourage victims to bring suit to redress violations." *Mourning v. Family Publications Service, Inc.,* 411 U.S. 356, 376, 93 S.Ct. 1652, 1664, 36 L.Ed.2d 318 (1973) (upholding Truth in Lending Act provision for § 100--$1000 statutorily-prescribed damages).[9]

White v. E-Loan, Inc. 2006 WL 2411420, at *8 (N.D. Cal. 2006) is a case which also has evaluated and rejected Hansen's argument in the context of a Fair Reporting Act case. The Judge noted the *Ratner* case and those that followed it, and also the analysis of the Ninth Circuit

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[8] In response to these decisions, Congress amended the statute to provide a limit on the maximum recovery available under the TILA. This amendment was intended to encourage the federal courts to begin certifying class actions in Truth in Lending lawsuits." *Johnson v. Tele-Cash, Inc.* 82 F.Supp.2d 264, *269 (D.Del. 1999).

[9] "The *Ratner* Court's conclusion that the availability of individual TILA actions for $100 made the use of the class action improper because of the potential for 'horrendous, possibly annihilating punishment' has been rejected in the Seventh Circuit. *See Haynes v. Logan Furniture Mart, Inc.,* 503 F.2d 1161, 1164 (7th Cir.1974); *Eovaldi v. First National Bank of Chicago,* 57 F.R.D. 545, 547 (N.D.Ill.1972) (potential for 'horrendous' punishment not a valid consideration in evaluating petition for class certification under Fed.R.Civ.P. 23)." *Kenro,* at 1166 n.2.

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17253 AGATE STREET NE
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(206) 780-4447
(206) 780-5557 (FAX)
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in *Kline v. Coldwell, Banker & Co.,* 508 F.2d 226 (9th Cir.1974):

> Despite the above cases, the Court believes that White's proposed class action satisfies the superiority test. While the damages E-Loan faces are substantial, they can be reduced if E-Loan is found liable. *See Murray,* 434 F.3d at 954 ("An award that would be unconstitutionally excessive may be reduced ... but constitutional limits are best applied after a class has been certified."); *Parker v. Time Warner Entertainment Co., L.P.,* 331 F.3d 13, 22 (2d Cir. 2003) ("[I]t may be that in a sufficiently serious case the due process clause might be invoked, not to prevent certification, but to nullify that effect and reduce the aggregate damage award.... At this point in this case, however, these concerns remain hypothetical.").

The Judge was also aware of the congressional intent in this area, and that no limitations on damages had been enacted:

> Most important, however, is the fact that Congress has not acted to limit class action damages under the FCRA. Certainly Congress could have done so; following a spate of TILA class action lawsuits it amended that statute to cap the amount that could be recovered in class actions. *See* 15 U.S.C. § 1640(a)(2)(B) (limiting total amount of recovery to "the lesser of $500,000 or 1 per centum of the net worth of the creditor"). Congress has similarly capped class action awards under other statutes. *See* 15 U.S.C. § 1692k(a)(2)(B) (same limit under Fair Debt Collection Practices Act). But Congress amended the FCRA as recently as 2003, yet has not enacted a similar cap. *See* Fair and Accurate Credit Transaction Act ("FACTA"), Pub.L. No. 108- 159, 117 Stat.1952 (Dec. 4, 2003). Thus, to the extent any problem exists, it results from Congress's policy decisions and is therefore Congress's issue to address.

See also Reynoso v. South County Concepts, 2007 WL 4592119 (C.D. Cal. 2007)("the Court holds that concerns about the constitutionality of damages awards are better addressed at the damages phase of the litigation and not as part of class certification... *See also Pirian v. In-N-Out Burgers*, 2007 WL 1040864 at *5 (C.D. Cal. 2007) (noting that 'concerns regarding excessive damages are best addressed if the class is certified and the damages are assessed.')".

ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc. 203 Ariz. 94, 100-102, 50 P.3d 844, 850 - 852 (Ariz. App. Div. 1, 2002) is directly on point and its reasoning is persuasive. It is submitted with the brief and quoted in full below:

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
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> The trial court, in denying ESI's motion to certify the class, was primarily concerned with the mandatory penalty it would be required to impose against the defendants…
>
> ESI contends, for several reasons, that the potential damage to defendants was an improper factor on which to find lack of superiority and that the court therefore abused its discretion. We agree.
>
> …[T]he fairness of the statutory penalty for the specific form of violation alleged here has been decided by Congress in enacting the law and that the court's determination that it would be unfair is an improper consideration in deciding whether a class action is the superior method of adjudication.
>
> Having provided for a private right of action and having decided the appropriate penalty, Congress did not preclude the use of class actions to obtain redress for violations. See 47 U.S.C. § 227. Rule 23 allows for class actions to "enhance the efficacy" of any private right of action provided by law. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). Class action relief is unavailable only if Congress expressly excludes it, *Califano v. Yamasaki*, 442 U.S. 682, 699-700, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979), and Congress has done so in some statutes. See, e.g., 15 U.S.C. § 6614 (2000) (limiting Y2K class actions); 29 U.S.C. § 732(d) (Supp. 1999)(barring designated agency class actions); 15 U.S.C. § 2310(e)(2000)(restricting consumer warranty class actions). Congress provided no express exclusion of class action relief in 47 U.S.C. § 227.
>
> Given that Congress determined the per-violation penalty and allowed for the pursuit of class actions under the statute, it is not for the court to determine that the penalty when applied in a class action context is unfair. The fairness of statutory punishment, within due process concerns, is properly determined by the legislature. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-45, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).
>
> That "ruinous or annihilating" damages should not be considered in the superiority analysis is particularly compelling in circumstances such as this, where the size of the class, and therefore, the potential class liability, is entirely within the control of the defendants. To deny the superiority of a class action because the size of the class made the damages annihilating, would serve to encourage violation of the statute on a grand rather than a small scale

CEA relies on *Local Baking Products, Inc. v. Kosher Bagel Munch, Inc.*, 421 N.J. Super. 268, 23 A.3d 469 (2011) to support is claims regarding superiority of the small claims court procedures for seeking redress of the claims in this case, but does not

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17253 AGATE STREET NE
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(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

advise the Court of *Critchfield Physical Therapy v. Taranto Group, Inc.,* 293 Kan. 285, 263 P.3d 767, 781 (2011), which rejects *Local Baking*, holding:

> If, as the plaintiffs allege, Taranto engaged in a widespread violation of the law, then class certification would fulfill a purpose of class action litigation. "[A]ggregate proof of the defendant's monetary liability promotes the deterrence objectives of the substantive laws underlying the class actions...." 3 *Newberg on Class Actions* § 10:5, 487 (4th ed. 2002).
>
> We conclude that the threat of catastrophic judgments should not protect parties that violate the law on a large scale and is not a relevant factor in determining whether a plaintiff class should be certified.

No court has ever denied class certification of a TCPA class because of the arguments advanced by CEA. Yet another very recent example is *Centerline Equipment Corp. v. Banner Personnel Service, Inc,* 545 F.Supp.2d 768, 778 (N.D. Ill. 2008), in which the defendant unsuccessfully challenged the constitutionality of the TCPA:

> Banner has not satisfied the court that the TCPA's statutory damages remedy violates the Due Process clause. In any event, if Banner were able to show that the statutory damages are in fact so excessive as to be improper, the appropriate remedy would be a reduction of the aggregate damage award, not a dismissal of Centerline's claim. *See Tex. v. Am. Blastfax, Inc.,* 164 F.Supp.2d 892, 900-01 (W.D. Tex. 2001) (interpreting the TCPA to provide "up to" $500 per violation, and awarding seven cents per violation); *see also Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir.2006) (stating that, if a trial judge were concerned that a FCRA class action would result in unconstitutionally excessive damages, the appropriate judicial response would be to reduce an excessive award, not deny class certification). It is premature at this stage to consider whether any hypothetical award might be constitutionally excessive, however. *See Murray*, 434 F.3d at 954.

III. CONCLUSION

At this stage of the proceedings "if there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require." *Brown v. Brown,* 6 Wn. App. 249, 256,

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

492 P.2d 581 (1971).

DATED: January 13, 2012.

WILLIAMSON & WILLIAMS

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

Attorneys for Plaintiff and the Proposed Class