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

PLAINTIFF'S REPLY TO RESPONSE OF DOMINO'S PIZZA, INC. AND DOMINO'S PIZZA, LLC 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]

In this Reply, Plaintiff will respond to Domino's arguments. In separate briefs, Plaintiff will respond to CEA's Opposition and FOFI's timeliness concerns.

[1] CAE and Domino's also devote a small portion of their oppositions to the timeliness issue.

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II. LEGAL AUTHORITY

Domino's concedes that Plaintiff has satisfied all the elements of FRCP 23(a), the class is numerous, Plaintiff is typical, there are common issues of fact and law, and Plaintiff and her counsel are adequate to represent the class. Domino's limits its opposition to the lack of superiority, purported defects in the class definition, and the application of FRCP 23(b)(2). As to the FRCP 23(b)(2) argument, Plaintiff addresses it in her Reply to CEA's Opposition.

A. Lack of Superiority

Virtually no cases support Domino's argument which, put simply, is that anyone with a claim for a violation of the statute at issue can and should pursue it in the small claims courts. Domino's relies solely on an ill-reasoned and aberrant decision from New Jersey, *Local Baking Products Inc. v. Kosher Bagel Munch, Inc.*, 23 A. 3d. 469 (N.J. Appellate Div. 2011), which held that TCPA claims are ill-suited for class action lawsuits; and also on *Forman v. Data Transfer, Inc.* 164 F.R.D. 400 (E.D. Pa. 1995).

Domino's claims a class action is not superior because consumers have an incentive to bring actions individually for illegal robo-calls. While a few cases support Domino's position that a class action is not a superior remedy, the overwhelming weight of authority is to the contrary. *CE Design v. Beaty Const., Inc.*, 07 C 3340, 2009 WL 192481, at *10 (N.D. Ill. Jan. 26, 2009) ("Allowing plaintiffs to spread out the financial burden is especially important given the purpose behind class actions is to 'aggregate the relatively paltry potential recoveries' into something worth an attorney's labor. The Court finds that the superiority requirement has been met."); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 WL 2224892, at *5 (N.D. Ill. May 27, 2008) ("class treatment appears to be a superior method of handling plaintiff's claims. In consumer actions involving small individual claims, such as this one, class treatment is often

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appropriate because each member's damages 'may be too insignificant to provide class numbers with incentive to pursue a claim individually'"; citing *Murray v. New Cingular Wireless Services, Inc.*, 232 F.R.D. 295, 303 (N.D. Ill. 2005) and *Hinman v. M & M. Rental Center Inc.*, 545 F. Supp. 2d 802, 807-08 (N. D. Ill. 2008) ("resolution of the issues on a class wide basis, rather than in thousands of individual lawsuits-which in fact may never be brought because of their relatively small individual value-would be an efficient use of both judicial and party resources.")); *Pintas & Associates, Ltd, v. Bebon Office Machines Co.*, 2007 TCPA Rep. 1683 (Ill. Cir. 2007); *Mey v. Herbalife International, Inc.,* 2006 TCPA Rep. 1445 (W. Va. Cir. 2006) ("the TCPA does not preclude the use of the class action mechanism in its enforcement"); *Mulhern v. MacLeod*, 2006 TCPA Rep.1428 (Mass. Super. 2006), *Overlord Enterprises Inc. v. Wheaton-Winfield Dental Associates*, 2006 TCPA Rep. 1718, 2006 WL 4591049 (Ill. Cir. 2006) ("Here, it appears that forcing class members to pursue their claims individually will make their claims impractical as they will be required to hire counsel in order to seek an award of $500. This result would seriously undermine the goal of the TCPA scheme"). *See also Blitz v. Agean, Inc.,* 197 N.C. App. 296, 311, 677 S.E.2d 1, 11 (2009) ("We hold that claims brought pursuant to the TCPA are not *per se* inappropriate for class actions.") One purpose of the class action in this case is to obtain an injunction that Defendants cease their illegal robo-calling, relief not available in the small claims court.

Critchfield Physical Therapy v. Taranto Group, Inc., 293 Kan. 285, 263 P.3d 767, 780 (2011) is important. First, while not mentioned by Domino's, in *Critchfield,* the Kansas Supreme Court rejects the holding of *Local Baking Products Inc.* on which Domino's places such weight, and holds without qualification that a class action is superior:

> We do not agree with the defendant's contention that over 100,000

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> individual small claims actions would be superior to a single class action. While the defendant in such an action might benefit if only a small number of plaintiffs found it worth their while to bring suit or were aware of their rights under the TCPA, this small turnout would serve only to frustrate the intent of the TCPA and to protect junk fax advertisers from liability. It would, accordingly, not provide a "superior" method for individual plaintiffs. If, on the other hand, many thousands of plaintiffs elected to pursue their rights in small claims courts, those courts would be overwhelmed, plaintiffs would have to invest time and money in prosecuting their claims, and the defendant would have to appear in thousands of actions around this state and other states. See *Landsman & Funk PC v. Skinder–Strauss Associates,* 640 F.3d 72, 95 (3d Cir. 2011) (little reason to believe individual actions automatically efficient, and thousands of TCPA actions may be more efficiently brought as single class action).
>
> The small claims alternative is contrary to the policy behind Federal Rule 23(b)(3), which the Kansas statute resembles. The United States Supreme Court has noted that "[w]hile the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high," the underlying policy of the class action mechanism is to overcome the problem that small recoveries provide little incentive for individuals to bring solo actions to protect their rights. *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

The Kansas Supreme Court cites *Landsman & Funk PC v. Skinder–Strauss Associates,* 640 F.3d 72, 94-95, *reh'g en banc granted*, 650 F.3d 311 (3d Cir. 2011). In that case, the court was evaluating three class actions--one involving plaintiff Afgo Mechanical Services, Inc.--and ruled:

> The *Afgo* Court's suggestion that the individual statutory damages of $500 to $1500 are enough to both punish offenders and spur victims substitutes its judgment for that of Congress and makes unmerited presumptions regarding deterrence and the motivation to litigate. Had Congress wanted to preclude aggregation of individual TCPA claims, it could have so provided in the TCPA itself or in CAFA, which specifically lists certain types of statutory claims that could not be brought as class actions. 28 U.S.C. § 1332(d). CAFA lists various other statutes, but not the TCPA. Moreover, although nuisance faxes are not the most egregious of wrongs policed by Congress, the District Court was speculating when it assumed that individual suits would deter large commercial entities as effectively as aggregated class actions and that individuals would be as motivated—or even more motivated—to sue in the absence of the class action vehicle. The District Court should not have dismissed out of hand the possibility that a class action could provide a superior method of "fairly and efficiently adjudicating the controversy," as required by Rule 23(b)(3). Although individual

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> actions under the TCPA may be easier to bring in small claims court than other types of cases, that does not necessarily undermine the greater efficiency of adjudicating disputes involving 10,000 faxes as a single class action. Indeed, as plaintiffs point out, we have little reason to believe that individual actions are automatically efficient; plaintiffs can still face protracted litigation when they sue individually.

Cases interpreting other statutes which provide for fixed damages have also concluded that a class action is a superior method for adjudicating consumers' rights. *See, e.g., Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 721 (9th Cir. 2010) (Fair and Accurate Credit Transactions Act and Fair Credit Reporting Act; "the district court abused its discretion in considering the proportionality of the potential liability to the actual harm alleged in its Rule 23(b)(3) superiority analysis."); *Zimmerman v. Portfolio Recovery Associates, LLC*, 276 F.R.D. 174, 180 (S.D.N.Y. 2011) (Fair Debt Collection Practices Act; "Class adjudication of this case is superior to individual adjudication because it will conserve judicial resources and is more efficient for class members. ... Employing the class device will not only achieve economies of scale for class members, but will also conserve the resources of the judicial system and preserve public confidence in the integrity of the system by avoiding the waste and delay of repetitive proceedings. This approach also avoids the potential for inconsistent adjudications of similar issues and claims.") In *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997), an action brought under the Fair Debt Collection Practices Act, the Court ruled:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.
>
> True, the FDCPA allows for individual recoveries of up to $1000. But this assumes that the plaintiff will be aware of her rights, willing to subject herself to all the burdens of suing and able to find an attorney willing to take her case. These are considerations that cannot be dismissed lightly in assessing whether a class action or a series of individual lawsuits would be more appropriate for pursuing the FDCPA's objectives.

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This contention that a class action is not superior was rejected in an action under the Fair Credit Reporting Act, *White v. E-Loan, Inc.* 2006 WL 2411420, at *9 (N.D. Cal. 2006):

> E-Loan's next argument is that the remedy that Congress has provided--individual statutory damages accompanied by a provision for attorney's fees--is a superior mechanism for resolving disputes under the FCRA. The Court disagrees. As courts have repeatedly recognized, the statutory damages available under the FCRA are "too slight to support individual suits." *Murray,* 434 F.3d at 953; *see also Braxton v. Farmer's Ins. Gp.,* 209 F.R.D. 654, 662 (N.D. Ala. 2002) ("[T]he cost of investigating and trying these cases individually likely exceeds the value of any statutory and/or punitive damage award that may be due to any particular class claimant."). Thus, without class actions, there is unlikely to be any meaningful enforcement of the FCRA by consumers whose rights have been violated. Moreover, given that thousands of consumers may have suffered identical injury, a class action is certainly the most efficient way to adjudicate disputes over those consumers' rights.

B. Class Definition

Domino's quarrels needlessly with Plaintiff's class definition, arguing that were someone to receive a call "on behalf of a defendant", that defendant is not really liable, because RCW 80.36.400(2) makes it unlawful to use automatic dialing and announcing devices for purposes of commercial solicitation. In this case, the issue is not the narrow question of who literally operated the device, but whether one was used by the Defendants to blast out illegal robo-calls in order to advance their profit making agenda.

Domino's also argues that the two-year Washington statute of limitations applies to this case, which is not true, and that the class definition is therefore also inaccurate because it seeks to go back four years from filing. Because, under the facts of this case, the robo-calls at issue were made within two years of filing the complaint, the objection to the class definition is irrelevant. Domino's forgets, however, that a violation of the Washington statute here is a per se violation of the Consumer Protection Act for which the statute of limitations is four years.

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III. CONCLUSION

Class certification should be granted pursuant to FRCP 23(b)(2) or, alternatively, FRCP 23(b)(3). 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, 492 P.2d 581 (1971).

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