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Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

CAROLYN ANDERSON,)
)
 Plaintiff,)
)
 vs.)
)
 DOMINO'S PIZZA, INC., DOMINO'S)
 PIZZA, LLC, FOUR OUR FAMILIES,)
 INC., and CALL-EM-ALL, LLC,)
)
 Defendants.)

CIVIL ACTION NO. C11-902-RBL

DOMINO'S PIZZA, INC. AND
DOMINO'S PIZZA, LLC RESPONSE
TO PLAINTIFF'S MOTION TO EXTEND
CLASS CERTIFICATION DEADLINE

HEARING DATE: January 20, 2012

I. RELIEF REQUESTED

COME NOW Domino's Pizza, LLC and Domino's Pizza, Inc. (collectively "Domino's") and requests that Carolyn Anderson's ("Anderson") Motion to Extend Class Certification Deadline be denied. The plaintiff failed to comply with the mandatory deadline for filing for class certification set forth in WD Local Rule 23(i)(3). She failed to file a motion for extension before the deadline ran. She has been dilatory in pursuing this case. She has not established the "good cause" required for the Court to grant her additional time. The burden is

DOMINO'S RESP. RE: EXTEND CLASS CERT. DEADLINE – 1

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1 on Anderson to establish good cause. Anderson has provided no evidence to establish good
2 cause for missing a mandatory filing deadline. The deadline is akin to a statute of limitations.
3 Having failed to establish good cause, Anderson's motion should be denied.

4 II. PERTINENT FACTS

- 5
6 1. Despite having all information required to file a motion for class certification
Anderson failed to do so and has provided no explanation for this failure.

7 Plaintiff alleges that she did not have sufficient information to timely file her motion for
8 class certification. This is not true. The following chart shows when the information cited in the
9 Joint Declaration of Rob Williamson and Kim Williams in Support of Plaintiff's Motion for
10 Class Certification was available. All of it was provided or known long before the November 28,
11 2011 deadline.
12

13 Document/Testimony	Date Provided/Available
14 FOFI Answers to First Interrogatories and Requests for Production	July 13, 2010
15 FOFI Answers to Second Interrogatories and Request for Production ¹	December 12, 2011
16 Domino's 10-K referencing PULSE	January 2, 2011
CAE12120-3	September 15, 2011
17 Deposition of Michael Brown	September 30, 2010
Deposition of Scott Senne	October 28, 2011
18 Domino's Response to Request for Production Number 17	May 5, 2011
19 Transcript of call at issue	September 15, 2011

20 With the exception of FOFI Answers to Second Interrogatories, Anderson had all items
21 upon which she relied in her motion for class certification at least one month prior to the
22 deadline. Plaintiff did not propound the second set of Interrogatories to FOFI until AFTER the
23

24
25 ¹ This discovery was requested December 9, 2011, eleven days **after** the deadline for the class
certification motion.

1 deadline for filing for class certification had passed. The deadline for filing was November 28,
2 2011. The interrogatories are dated December 9, 2011. Plaintiff cannot rely on these late
3 discovery requests to establish good cause for extending the deadline.

4
5 The deposition of CEA's President, Brad Herman, was not relied upon or referenced in
6 Anderson's motion for class certification. Thus, the fact that this deposition was taken on
7 December 2, 2011, after the deadline for a motion for class certification, is irrelevant. Anderson
8 could have taken the deposition if necessary for the class certification. She did not.

9 Further, Anderson knew of the identity of Mr. Herman since at least August 8, 2011
10 when CEA initial discovery disclosures identifying Brad Hermann as the President of CEA.
11 Anderson made a tactical decision not to depose Mr. Hermann until after the class certification
12 deadline. Anderson's choice should not create good cause for her missing this mandatory
13 deadline.
14

15 2. The "issues" raised related to discovery are red-herrings and should be disregarded.

16 a. **Anderson did not request ESI discovery until December 8, 2011, ten days**
17 **AFTER the deadline for class certification.**

18 Anderson alleges that Domino's has refused to provide ESI and this delayed her ability to
19 file the motion for class certification. The record shows otherwise. Anderson's only request for
20 ESI came on December 8, 2011... ten days after the class certification deadline. Anderson
21 should not be allowed to rely on ESI requests made after the deadline to establish good cause. If
22 anything, the fact that the requests were only made late demonstrates a lack of due diligence in
23 prosecuting this action.
24

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1 When responding to the state discovery, Domino's made a diligent search for documents
2 with custodians likely to possess responsive information. These searches satisfy the
3 requirements under the state discovery rules.

4 **b. Anderson didn't raise any issues with Domino's discovery answer until after**
5 **November 28, 2011 and has never filed a motion to compel.**

6 Anderson served three sets of discovery on Domino's while the case was in State Court.
7 Domino's answered all three sets of discovery. Many months passed. During those months
8 Anderson raised no issues related to Domino's answers. Only after Domino's filed its motion for
9 summary judgment, which Anderson acknowledges she knew was coming since April 22, 2011,
10 did Anderson raise any objections. Substantive objections did not come until seven and nineteen
11 months after Domino's provided answers. Substantive objections did not come until after the
12 deadline for class certification. Anderson still has not filed any motion to compel. Anderson has
13 not moved with due diligence to correct any alleged deficiencies with Domino's discovery
14 answers. Given Anderson's months long delay in addressing alleged deficiencies with
15 discovery, she should not be allowed to use these alleged problems to establish good cause.

16 **c. The December discovery cannot create "good cause" for extending the class**
17 **certification deadline.**

18 Anderson sent Domino's Fourth Requests for Production and ESI requests on December
19 8, 2011. Anderson sent Domino's Fifth Requests for Production on December 12, 2011.
20 Anderson sent Domino's Sixth Requests for Production on December 28, 2011. This discovery
21 comes ten, fourteen and thirty days respectively after the class certification deadline. Discovery
22 sent after the deadline cannot establish good cause for failure to timely file a motion for class
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1 certification. If anything, this flurry of discovery shows a late realization on Anderson's part that
2 the case has not been vigorously prosecuted.

3 3. Domino's Motion for Summary Judgment has no relevance to whether or not
4 Anderson has good cause for a late filing.

5 Domino's re-filed its motion for summary judgment on November 28, 2011. This is the
6 same day Anderson's motion for class certification was due. The fact that Anderson had to
7 respond to Domino's motion is irrelevant since any response was due **after** the deadline for class
8 certification. It is apparent that Anderson did not have any motion for class certification
9 prepared. Neither did Anderson file a timely request for additional time.

10 4. Anderson's counsel knew of the deadline for class certification and parties since
11 May 31, 2011.

12 This case was removed to Federal Court on May 31, 2011. All parties were known at
13 that time, including Call-Em-All. Anderson's counsel are well experienced and by their own
14 statements, have been involved in over 20 class actions, many in Federal Court for the Western
15 District of Washington. They are aware of the 180 day deadline for filing for class certification
16 under Local Rule 23(i)(3). Anderson has been aware of all parties and the deadline for filing for
17 class certification since May 31, 2011. It is a red herring to claim the removal to Federal Court
18 had anything to do with Anderson's failure to file this required pleading.

19 5. Anderson is not prejudiced by denying the motion for class certification.

20 Anderson indicates that she will "suffer serious harm" should the Court deny certification
21 based on failure to meet the mandatory deadline imposed by Local Rule 23(i)(3). This is not the
22 case. Anderson is currently the only plaintiff. Denying class certification will not deprive
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1 Anderson of any remedies. She will still be allowed to pursue her individual state remedies
2 under RCW 80.36.400. She will still be allowed to pursue her individual federal remedies under
3 U.S.C. 227 (b)(1)(B). The calls have stopped and there is no danger of Anderson receiving any
4 further calls, making injunctive relief a moot issue. Denying Anderson's motion to certify the
5 class will have zero impact on the Anderson. The only prejudice from denying the motion to
6 certify will be to Anderson's counsel, the same individual that missed the mandatory deadline.
7

8 III. EVIDENCE RELIED UPON

- 9 1. This Response.

10 IV. ISSUE

11 Whether "I forgot" constitutes good cause sufficient to extend a known and mandatory
12 180 day deadline for filing a motion for class certification?
13

14 V. ARGUMENT/AUTHORITY

- 15 1. Good cause to extend the deadline is not present here where the delay in filing for
16 class certification was entirely within Anderson's control.

17 It is well established that the critical factor as to whether good cause exists is the reason
18 for the delay:

19 The determination [as to whether good cause exists for an
20 extension] is at bottom an equitable one, taking account of all
21 relevant circumstances surrounding the party's omission. These
22 include...the danger of prejudice to [opposing party], the length of
23 the delay and its potential impact on judicial proceedings, **the
24 reason for the delay, including whether it was within the
25 reasonable control of the movant, and whether the movant acted
26 in good faith.**

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1 We have emphasized...that it is the **third factor- the reason for**
2 **the delay- that predominates, and that the other three are**
3 **significant only in close cases.** But we have emphasized this
4 factor where the non-moving party made an objection to the
5 validity of the explanation given for the delay.

6 *Patton v. Topps Meat Company, LLC*, 2009 WL 2027106, at 6 (emphasis added).

7 Anderson has admittedly filed her motion for class certification late. The deadline for
8 filing a motion for class certification is a mandatory one, stating that Anderson “shall” have her
9 motion filed. Like a statue of limitations, the deadline for filing is not flexible.

10 While some discretion exists allowing the Court to grant an extension for “good cause”
11 none of the reasons given for this late filing justify such a request. Anderson has had all the
12 information upon which she relied in filing her motion since October 28, 2011 at the latest. As
13 of October 28, 2011 she could have filed the motion. It was completely within Anderson’s
14 control to do so as of that date. Anderson has provided no reason for failing to file between
15 October 28, 2011 and November 28, 2011.

16 The additional factors cited by Anderson as justifying her failure have no relevance here.
17 Anderson did not raise substantive issues with Domino’s discovery answers until after the
18 deadline for filing for class certification. Anderson still has not moved to compel Domino’s.
19 The current discovery to Domino’s that is pending was all filed **after** the motion for class
20 certification was due and cannot explain her failure to act.

21 As experienced attorneys, who have brought multiple class actions in the Western
22 District, Anderson’s attorneys were certainly aware of the 180 day deadline. Indeed, the Joint
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1 Status Report puts a closing date on class certification discovery in order to allow Anderson to
2 file a timely motion for class certification.

3 Finally, Anderson will not be prejudiced by denying this motion. She retains all her
4 remedies under State and Federal law.

5 **VI. CONCLUSION**

6 For the above stated reasons, Domino's respectfully requests that Anderson's Motion to extend
7 the class certification deadline be denied.
8

9 DATED: January 17, 2012.

10 DUNLAP & SODERLAND, P.S.

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12 _____
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14 BRANT A. GODWIN, WSBA# 34424
15 Attorneys for Defendants Domino's Pizza, Inc.
16 and Domino's Pizza, LLC
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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am employed at Dunlap & Soderland, PS, attorneys of record for Defendants Domino's Pizza, Inc. and Domino's Pizza, LLC.

On January 17, 2012, I caused a true and correct copy of the foregoing document to be delivered to the following via email:

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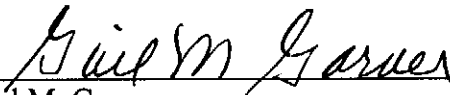
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8 I declare under penalty of perjury under the laws of the State of Washington that the
9 foregoing is true and correct.

10 DATED at Seattle, Washington this 17 day of January, 2012.

11 
12 Gail M. Garner

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24 CERTIFICATE OF SERVICE - 2

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