HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

CAROLYN ANDERSON, Plaintiff, v. DOMINO'S PIZZA, INC., DOMINO'S PIZZA, LLC, FOUR OUR FAMILIES, INC. and CALL-EM-ALL, LLC, Defendants.	CIVIL ACTION NO.: C11-902-RBL **DEFENDANT CALL-EM-ALL, LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO EXTEND CLASS CERTIFICATION DEADLINE** **Hearing Date: January 20, 2012**

I. INTRODUCTION

Comes now Defendant Call-Em-All, LLC (hereinafter "CEA"), who respectfully requests that the Court deny Plaintiff's Motion To Extend Class Certification Deadline (Docket No. 51, hereinafter "Pl. Mem."). Plaintiff Carolyn Anderson has belatedly moved to extend the deadline for filing a class certification motion AFTER filing her untimely motion. The deadline to file the motion for an extension of time, along with the deadline

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to file the motion for class certification itself passed without any request for an extension. The motion for class certification was then filed after the deadline without explanation and without any explanation. For the reasons described below, this motion should be denied.

II. STATEMENT OF RELEVANT FACTS

As Plaintiff admits, Rule 23(i)(3) of the Local Rules for the Western District of Washington requires that a class certification motion be filed within 180 days after the complaint has been filed. Giving Plaintiff every benefit of the doubt, that deadline came and went on November 28, 2011 at the latest, which is 180 days from CEA's removal of this case to the Western District of Washington (if the starting point of the 180 days is the filing of plaintiff's complaint or amended complaint, the motion is even more untimely). There is no dispute Plaintiff missed the deadline, and there is no dispute the language of Local Rule 23(i)(3) is mandatory.

Additionally, the parties, including Plaintiff, drafted and filed a Joint Status Report, which independently provided that any motion for class certification should be filed by December 1, 2011. Docket # 15 at ¶1; Pl. Mem. at 2:18. Thus, Plaintiff was doubly aware of the filing requirement, from the Local Rule and from the Joint Status Report.

Plaintiff belatedly filed her motion for class certification on December 22, 2011, after the deadline, without seeking leave to excuse her belatedness and without offering good cause for her failure. That motion has been opposed by all three defendants. Docket ## 44, 47, 49. Now that Plaintiff has attempted to provide good cause to excuse the

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violation of the Local Rule, it is abundantly clear that good cause does not exist and the Motion To Extend Class Certification Deadline (as well as the Motion For Class Certification itself) must be denied.

III. LEGAL ARGUMENT

A. PLAINTIFF WAS DEMONSTRABLY AWARE OF THE FILING DEADLINE

Because of her participation in drafting the Joint Status Report (Docket #15), neither Plaintiff nor her counsel can claim ignorance of the deadline. Plaintiff also cannot claim ignorance of Local Rule 23(i)(3) because her counsel cited the rule a little more than one year ago in a court submission. *See Clausen Law Firm, PLLC v. Nat'l Academy of Continuing Legal Education,* --- F.Supp.2d. ---, 2011 WL 4396433, at *9 (W.D. Wash, Nov. 2, 2010) (Williamson & Williams refer to Local Rule 23(i)(3)).

B. PLAINTIFF LACKS GOOD CAUSE AS REQUIRED BY LOCAL RULE 23(i)(3)

Nowhere in Plaintiff's ten-page submission is anything even remotely approximating good cause for the late filing. The best Plaintiff can come up with is that good cause is established by the delays due to the removal of this case. Pl. Mem. at 1:25. Such an excuse is woefully insufficient. The removal of this case to federal court is not a reason why Plaintiff missed the 180-day deadline because the 180-day period did not begin to run until the case was removed.

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As for "Defendants' recalcitrance in discovery" (Pl. Mem. at 1:25), that too is a non-starter as far as good cause is concerned. Plaintiff was well aware of all the information necessary to file her motion for class certification well in advance of the deadline. Four Our Families' Michael Brown's deposition was taken prior to this case being removed, and that deposition provided the entire basis of Plaintiff's motion for class certification. That deposition occurred on September 30, 2010 (not 2011). Indeed, Plaintiff does not even identify any discovery that was obtained after the deadline which allegedly prevented her from filing the motion. All Plaintiff needed to know to seek class certification was that the telephone calls in question came from Four Our Families' customer list and the logistics of how the calls were placed- that, according to Plaintiff, the common question that justifies class certification. All of this information was known by Plaintiff on September 30, 2010, the day she deposed Four Our Families' Michael Brown. (CEA maintains, in its opposition to the class certification motion, that there are individual issues that preclude certification on the merits. Such arguments will not be repeated here).

Next, Plaintiff cites "lack of prejudice to Defendants" as the reason why her untimely motion should be considered. This too is improper, because it attempts to invert Plaintiff's affirmative burden to show good cause into a duty on the defendants. Plaintiff then cites a variety of cases from jurisdictions outside the Western District of Washington for the proposition that an untimely certification motion should be overlooked unless a defendant can show prejudice. Pl. Mem. at 4:19. While those cases may hold weight in

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other districts, they hold no sway in the Western District of Washington, where Local Rule 23(i)(3) provides a different standard. Local Rule 23(i)(3) very clearly provides that, in the case of an untimely motion for class certification, it is a plaintiff's burden to show good cause exists to allow a late motion, NOT a defendant's burden to show it would be prejudiced such a motion. There is one opinion directly on point, namely *Strange v. Lee Schwab Tire Centers of Oregon, Inc.,* No. C06-045RSM, 2008 WL 200158 (W.D. Wash May 7, 2008), which Plaintiff cites on the final page of her memorandum. Pl. Mem. at 9:19. That decision makes no reference to any duty on a defendant's part to demonstrate prejudice, and instead, it properly denied the motion for class certification on the basis that the plaintiff had not shown good cause. *Id.* at *1 ("plaintiff has neither moved for an extension nor shown good cause"); *see also Immigrant Assistance Project v. Immigration and Naturalization Svc.,* 306 F.3d 842, 849 n.4 (9th Cir. 2002) ("as an independent ground for denial of plaintiffs' Motion for Provisional Class Certification, the District Court determined that the Motion was untimely in violation of [what is now Local Rule 23(i)(3)]"). The instant facts are indistinguishable from the facts in *Strange*, and accordingly the result should be the same: denial of the motion to extend the time to seek class certification.

Finally, Plaintiff asks the Court to allow her untimely motion for class certification because Plaintiff would suffer "serious harm" if the motion were denied. This is patently untrue. Plaintiff herself would suffer absolutely no adverse consequences: she would

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continue to maintain her individual claims. The only party that would suffer "serious harm" is Plaintiff's counsel, who would lose out on the potential recovery of attorneys' fees that would come along with class certification. However, such "serious harm" is not a cognizable injury (see *Strange,* 2008 WL 2001158 at *2) and, in any event, the putative class members are still free to assert their rights to collect the statutory $500 penalty.

IV. CONCLUSION

It is clear Plaintiff do not and cannot meet the good cause standard required by Local Rule 23(i)(3) in order to excuse her untimely motion for class certification. The language of the rule is mandatory, plain and clear. While Plaintiff remains free to pursue her claims on an individual basis, Defendant CEA respectfully requests that Plaintiff's Motion To Extend Class Certification Deadline be denied in its entirety with prejudice.

Dated: January 18, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys of record for Defendant Call-Em-All, LLC herein.

I hereby certify that on this date, I electronically filed the attached foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following persons:

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

DATED: January 18, 2012 at Seattle, Washington.

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