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Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT WESTERN
DISTRICT OF WASHINGTON AT TACOMA

CAROLYN ANDERSON,

Plaintiff,

vs.

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

Defendants.

CASE NO. :C 11-902-RBL

DEFENDANT FOUR OUR FAMILIES, INC.'S RESPONSE TO PLAINTIFF'S MOTION FOR CERTIFICATION OF CLASS

NOTED ON MOTION CALENDAR:
January 13, 2012

I. INTRODUCTION

COMES NOW, the DEFENDANT, FOUR OUR FAMILIES, INC. ("FOFI") who respectfully requests the Court deny Plaintiff's Motion to Extend Class Certification Deadline. Plaintiff has passed the deadline to certify the class in this litigation according to the very specific time frame the local court rule provides. Local Rule CR 23(i)(3). Plaintiff has not illustrated good cause for missing the deadline and should be denied an extension. The following dates are of significance to this Motion:

- Plaintiff's Complaint was filed in King County Superior Court on April 29, 2010.
- Plaintiff's First Set of Interrogatories and Request for Production were sent to FOFI on April 29, 2010.

- Michael Brown's Deposition was taken on September 30, 2010.
- On April 13, 2011, the first deposition of Domino's 30(b)(6) representative, Joseph Devereaux, was taken.
- CEA removed this action to federal court on May 31, 2011, after Plaintiff filed an Amended Complaint in state court adding CEA as a defendant.
- The Plaintiff and Defendants had a conference on July 13, 2011, to comply with Federal Rule of Civil Procedure 26(f).
- The Plaintiff drafted and filed the Joint Status Report agreed to by all parties on July 26, 2011.
- The Joint Status Report identified the deadline for class certification as December 1, 2011, and the discovery cutoff for class certification as October 30, 2011.
- On September 9 and 15, 2011, CEA provided documents regarding the alleged calls and the number of calls in response to Plaintiff's First Set of Interrogatories and Requests for Production propounded to CEA.
- The Depositions of Christopher Roeser and Scott Senne, Domino's employees named in Mr. Devereaux testimony regarding the rally and marketing efforts of Domino's Pizza, were held on October 28, 2011.
- The Deposition of Brad Herrmann, the president of CEA, was taken on December 2, 2011. (Plaintiff does not use his testimony in her Motion to Certify).

The language of the local rule is mandatory and strict compliance is required. Plaintiff failed to file a motion for extension prior to the deadline of November 28, 2011. The claimed supporting case presented to the Court by Plaintiff only interprets the federal rule- "at an early practicable time". Fed. Civ. Proc. R. 23(c)(1)(A). The language of this rule is permissive and the court is to look at other factors to determine if class certification has been filed at such time ("early practicable time").

The Plaintiff is the only reason for any delay. Defendants have been more than accommodating to Plaintiff throughout this matter and have extended every professional courtesy. Now, Plaintiff attempts to portray these professional courtesies as negative actions

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by Defendants such as delays, noncompliance, etc. The removal from state court to federal court did not affect the certification of the class as Plaintiff claims. Plaintiff chose to include a party who was not party to the originally filed state court cause. Defendant, Call-Em-All appropriately chose to remove this action to federal court based upon diversity jurisdiction. The removal gave Plaintiff a one year head start on discovery (the state action was filed by Plaintiff on April 29, 2010; complaint included class allegations); the timing of the 180 day deadline did not begin until May 31, 2011 when CEA removed this action.

With great diligence, Defendants have complied with all discovery requests. Plaintiff only asserts issues with discovery answers submitted by Defendant Domino's. Domino's should not even be party to this action as it made no "calls" giving rise to Plaintiff's claims. The discovery from Domino's is not needed to certify the class (Plaintiff was able to file a Motion to Certify on December 22, 2011 without such discovery) and therefore, Plaintiff should not be able to use such an argument for a basis for good cause. There would be no harm to Plaintiff if the motion to extend the deadline is not granted. She would still be able to pursue both her federal and state claims.

Plaintiff has not illustrated circumstances reflecting excusable neglect. Plaintiff has always been well aware of the class deadline as exhibited by the Joint Status Report and has conducted discovery in recognition of the deadline established by local rule. Plaintiff's counsel claims to have been distracted by Domino's Motion for Summary Judgment and could not adequately focus attention on a motion for class certification or motion to extend the class deadline. This makes no sense and is disingenuous at best. Domino's Motion was filed on December 5, 2011, after the 180 day deadline had expired (November 28, 2011). In fact, Domino's originally filed it's Motion for Summary Judgment in King County Superior Court

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prior to removal to Federal District Court. Plaintiff have over a 6-month head start on the subject Motion for Summary Judgment and knew well in advance the class certification issues.

The discovery Plaintiff relies on in her Motion to Certify was completed by October 28, 2011, as required by the Joint Status Report (a deadline Plaintiff established). If Plaintiff felt more discovery needed to be conducted or that Domino's had not complied with its obligation to produce discovery (Dominos and FOFI do not agree with Plaintiff's position; ESI was not requested of Domino's until December 8, 2011 after the deadline), the motion to extend the deadline should have been requested no later than November 28, 2011. It was not until Domino's pointed out Plaintiff's "I forgot" moment in its response to Plaintiff's Motion for Continuance filed December 16, 2011.

Plaintiff has not provided evidence to establish good cause for missing the mandatory deadline proscribed by local court rule. Based on the mandatory language of the rule and its establishment of a deadline akin to a statute of limitations, FOFI respectfully requests Plaintiff's Motion be denied. FOFI submits this Response to Deny Plaintiff's Motion and attached memorandum of points and authorities.

II. ARGUMENT

A. FOFI joins in Domino's Response to Plaintiff's Motion to Extend Class Certification Deadline.

In order to not duplicate the same argument for the Court, FOFI joins Defendant Domino's Response, including but not limited to its relief requested, pertinent facts, issues and argument. In summary (provided by Domino's Response [dkt. no. 53],

- Plaintiff had all the information required to file a motion for class certification, but she failed to do so and has provided no explanation for this failure.

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- Plaintiff did not request ESI discovery until December 8, 2011, ten days AFTER the deadline for class certification. She cannot claim delays in discovery are the reason for the late motion when the discovery was not requested prior to the deadline.

- Anderson never raised issues with Domino's discovery answer until after November 28, 2011 and has never filed a motion to compel.

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

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

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

FOFI would like to add one fact Domino's does not stress. Plaintiff's class certification could have been filed with her Amended Complaint when Call-Em-All ("CEA") was added to the litigation on April 29, 2011. Plaintiff discovered CEA was the entity hired by FOFI to make the alleged robo-calls during Michael Brown's, president of FOFI, deposition on September 30, 2011. At Mr. Brown's deposition, Plaintiff was informed that at least 5,000 numbers were in the first data base and more data bases were made. Brown's Dep. 30 attached with Plaintiff's Motion to Certify [dkt. no. 32]. **The claims, causes of action, and relief requested have not changed since the original complaint was filed in state court in April 2010.** FOFI provides to the Court the additional arguments and points of authority.

B. <u>The meaning of the local court rule is plain and unambiguous and the language "within 180 days" and "the plaintiff shall move" is mandatory directing the Court to enforce the deadline.</u>

Plaintiff's Motion to Extend Class Certification Deadline is untimely. Plaintiff relies only on case law interpreting the <u>permissive language</u> of the Federal Civil Procedure Rule. The Rule allows a plaintiff to certify, "At an early practicable time after a person sues or is

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sued as a class representative, the court must determine by order whether to certify the action as a class action." Fed. Civ. Proc. R. 23(c)(1)(A)-*Time to Issue*. The case law in Plaintiff's Motion should not provide any guidance for the Court because strict compliance is required under the local rule. District Courts are allowed to establish their own rules as long as their rules are consistent with the Federal Rules and Acts of Congress. Fed. Civ. Proc. R. 83(a)-*Local Rules*. The Local Federal Civil Procedure Rule is very specific and provides an exact date a plaintiff's motion for class certification must be filed. The analysis is not the same as under FRCP 23(c)(1)(A). The Local Rule states:

> **Within one hundred eighty days** after the filing of a complaint in a class action, unless otherwise ordered by the court or provided by statute, the plaintiff **shall** [emphasis added] move for a determination under Fed. R. Civ. P. 23(c)(1), as to whether the case is to be maintained as a class action. **This period may be extended on motion for good cause** [emphasis added]. The court may certify the class, may disallow and strike the class allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appear appropriate and necessary in the circumstances. Whenever possible, where the determination is postponed, a date will be fixed by the court for renewal of the motion. Local Rule W.D. Wash. CR 23(i)(3). *Emphasis added*.

The local rule provides assistance to all parties involved in class action litigation by clearly delineating a deadline for class certification. The standard described by Fed. R. Civ. P. 23(c)(1)(A) creates flexibility for Plaintiffs, but most of all it creates ambiguity; often bogging down the courts with excessive motions to determine if the certification was brought "as soon as practicable". This is ironic since class actions are to assist with judicial economy and efficiency. The US District Court of Western Washington has created a rule that eliminates this ambiguity, but yet still provides Plaintiff the same flexibility as the Federal Rule; it allows a motion for good cause to be filed prior to the expiration of the deadline. The language of the local rule is mandatory and not permissive like the federal rule. If the

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language of the rule was to be read as permissive, then the local rule would not have established a very specific and clear 180 day deadline.

A court rule is to be interpreted in the same manner as a statute; "Where the statute is clear on its face, its meaning is to be derived from the language of the statute alone." *Brackman v. City of Lake Forest Park*, 163 Wn.App. 889, 262 P.3d 116 (Wash.App. Div. 1 2011) *(citing Kilian v. Atkinson, 147 Wash.2d 16, 20,* 50 P.3d 638 *(2002); Nevers v. Fireside, Inc.*, 133 Wash.2d 804, 809, 947 P.2d 721 *(1997*)). If the language of the court rule is plain and unambiguous, the meaning of the court rule is to be derived from the wording of the rule itself. *Marquez v. Cascade Residential Design, Inc.*, 142 Wn.App. 187, 174 P.3d 151 (Wash.App. Div. 2 2007) (*See Rozner v. City of Bellevue* , 116 Wash.2d 342, 347, 804 P.2d 24 (1991); *Malted Mousse*, 150 Wash.2d 518 , 79 P.3d 1154 (A statute or rule that is clear on its face is not subject to judicial interpretation. *See In re Marriage Kovacs*, 121 Wn.2d 795, 804, 854 P.2d 629 (1993)). Time calculation rules are to be applied in a clear, predictable manner. "It is a well-accepted premise that ' litigants and potential litigants are entitled to know that a matter as basic as time computation will be carried out in an easy, clear, and consistent manner, thereby eliminating traps for the unwary who seek to assert or defend their rights.'" *Stikes Woods Neighborhood Ass'n v. City of Lacey*, 124 Wn.2d 459, 463, 880 P.2d 25 (1994)[173 P.3d 232] (alteration in original) (quoting *McMillon v. Budget Plan of Va*., 510 F.Supp. 17, 19 (E.D. Va. 1980)). As a general rule, the use of the word "shall" in a statute or court rule is mandatory and operates to create a duty. *State ex rel. Nugent v. Lewis*, 93 Wash.2d 80, 82, 605 P.2d 1265 (1980); *See also Pybas v. Paolino*, 73 Wash.App. 393, 400 n. 3, 869 P.2d 427 (1994) ("whether strict compliance is required, except in exceptional

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circumstances, depends on the nature of the words of command or direction in light of policy considerations") (citing *State v. Ashbaugh*, 90 Wash.2d 432, 583 P.2d 1206 (1978)).

The local rule is a time computation statute, "within 180 days" from the filing of a complaint a motion for class certification is to be filed by plaintiff. The rule is to be "carried out in an easy, clear, and consistent manner." *Stikes* at 463. A time is provided for Plaintiff in and unambiguous manner. The local rule is clear and mandatory due to the directive language. Plaintiff "shall" certify a class. This creates a duty for Plaintiff. The timeline, "within 180 days" is clear in its meaning; the Plaintiff shall file certification before the 180 day deadline passes. Due to the clarity and lack of ambiguity, it is not open to any other judicial interpretation. The rule allows Plaintiff to request an extension if good cause exists, but this alternative must be filed within the 180 day deadline, as explained by the language of the rule above. The mandatory language created a duty for Plaintiff to comply with the deadline; Plaintiffs error is a failure to exercise that duty, but the time deadline must be enforced. Plaintiff's error only hurts her attorneys that made the error and does not prejudice or harm the Plaintiff in any way. The local rule is analogous to a statute of limitations. If Plaintiff was 26 days late with filing a complaint, mercy would not be provided for her failure. Her claim would be time barred. The rule provides the same constraints and the class allegations should be time barred. There was no significant barrier that prevented Plaintiff from filing this motion. Plaintiff was able to file this motion on January 12, 2012 without any additional discovery as she had in her possession in October 2011.

C. <u>Case law does not look to prejudice to the Plaintiff or Defendant, but solely whether good cause exists; Plaintiff has not illustrated such.</u>

The local rule is very exact to timing and so the factors do not need to be weighed. The Plaintiff only focuses the Court to the Federal Rule and attempts to ignore the standard in

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the local rule. There is little to no case law interpreting the local rule. In St*range v. Les Schwab Tire Centers,* this Court interpreted Local Rule CR 23(f)(3). *Strange v. Les Schwab Tire Centers of Or.*, No. C06-045RSM, 2008 WL 2001158 (W.D. Wash. 2008)(Court determined the 180 day deadline barred Plaintiff's claim). The plaintiffs filed the motion to certify as timely and did not acknowledge the expiration of the deadline (like Plaintiff did in this matter). "**This Court's local rules provide a date for class certification that is realistic in terms of trial preparation."** Due to the untimely motion (passed the 180 day deadline), the motion to certify was denied. The Court did not consider the prejudice to either party.

Courts that have similar timelines for class certification do not require prejudice to Plaintiff or the Defendant. The courts look to whether a motion for good cause was filed prior to the expiration of the deadline and if so whether significant barriers provided reason for such delays. Courts in Louisiana, New York, Pennsylvania, and Michigan, have dealt with class certification deadlines established by civil procedure rules that range from 60-120 days from the filing of the complaint. Each has dismissed class allegations based on this time specific filing deadline. *Landry v. Liberty Bank & Trust Co*. US DC. E.D. LA 05-688711-481(2011); *Sellers v. El Paso Industrial Energy, 8 So. 3d 723 (La. Crt. App. 2009)* (strict application of the local 90 day rule, language is clear and plain) (citing *Crader v. Pinnacle Entertainment Inc*., 06-136, 931 So.2d 535(La.App. 3 Cir. 2006) where Plaintiff was slightly over 3 month deadline)*; Nguyen v. Liberty Mutual Insur. Co*., US DC E.D. 07-4469 (2008) (all three cases interpreting La. C.C.P. art. 592(A)(1) that provides a class certification deadline of 90 days after service on all adverse parties of initial pleading); *Hill v. City of Warren*, 748 NW. 2d. 520, Mich. (2007) (MCR 3.501(B)(1)(a) provides 91 day deadline); *Tigg v. Pirelli Tire Corp*., 232 S.W.3d 28 (Tenn. SC 2007) (Superior Court Rule allows for

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"as soon as practicable", but the Circuit Court Rule 26.14 provides 60 days); *Shariff v. Goord*, US DC W.D. NY (2006) (Local Rule CR 23(d) provides 120 days); *Walton v. Eaton*, 563 F. 2d 66 Ct. App. 3rd Circuit (1977) 45(c) of the Rules of the US DC for the ED of PA provides a 90 day deadline, unless this period is extended on motion. "Local Rule 45(c) is a valid exercise of the district court's power under Fed.R.Civ.Proc. 83." Citing *Umbriac v. American Snacks, Inc.*, 388 F.Supp. 265, 274 (E.D.Pa.1975)); *Fox v. Prudent Resources*, 69 FRD 74, 77 & n. 1 (E.D.Pa.1975). *See also Gilinsky v. Columbia Univ.*, 62 FRD 178, 179 (S.D.N.Y.1974) (concerns a similar local rule, the S.D.N.Y.'s Civil Rule 11A(c)); *Walker v. Columbia Univ.*, 62 FRD 63, 64 (S.D.N.Y.1974); *Sheridan v. Liquor Salemen's Union*, 60 FRD 48, 50-51 (S.D.N.Y.1973)).

1. <u>Plaintiffs reasons for delay does not establish good cause.</u>

Anderson now attempts to provide justifications for her failure to certify a class as good cause for an extension. This matter was removed from state court to federal court by Call-Em-All on May 31, 2011. In order to meet the deadline set forth by Local CR 23(i)(3), plaintiff was required to bring her motion to certify a class by November 28, 2011. It did not file its Motion until December 22, 2011. This Motion was **<u>ONLY</u>** filed in reaction to Domino's Response to Plaintiff's Motion for 56(d) Continuance [dkt. no. 28]. Domino's brought to Plaintiff's attention that it did not certify the class by the appropriate deadline. The Plaintiff more than likely would not have brought her Motion to Certify at that time if Domino's did not draw attention to such an obvious oversight. Plaintiff missed the deadline by 26 days. The 180 day deadline is exactly like a statute of limitations for a cause of action barring any class claims. The rule clearly states- "Plaintiff <u>shall</u> move", within 180 days of filing of a complaint for class certification, not when Plaintiff feels like getting around to it.

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The Joint Status Report, drafted and filed by Plaintiff on July 26, 2011, and agreed to by all the parties, established a deadline for Plaintiff's Motion for Class Certification by December 1, 2011. [dkt. no. 15, 2]. The Report outlines a discovery deadline relating to class certification of October 31, 2011, "so that her [Plaintiff] Motion for Class Certification may be timely filed. Following the Court's ruling on class certification, the parties would request leave to submit to the Court a discovery plan related to merits." [dkt. no. 15, ¶ 6]. Plaintiff was well aware of the 180 day deadline according to the Joint Status Report she drafted.

The Rule does allow the Court flexibility in allowing a continuance prior to the passing of the deadline. If Plaintiff needed more time to conduct discovery, a motion for good cause should have been filed requesting postponement of the determination prior to expiration of the deadline. Local Rule CR 23(i)(3). Plaintiffs did not request and Defendants did not agree to any further extensions from the December 1, 2011, date in the joint status report. Plaintiff has not moved the Court for an extension, much less demonstrated "good cause" for this delay. Plaintiff simply ignores this significant oversight.

The Plaintiff was required to bring a motion for good cause for an extension of time prior to the expiration of the 180 day deadline. Local Rule CR 23(i)(3). Good cause does not exist. "Good cause" is a "Legally sufficient reason. Good cause is often the burden placed on the litigant (by court rule or order) to show why a request should be granted or an action excused." Black's Law Dictionary 89 (2nd ed. 2001). The dominant factor for a court to consider is the reason for delay. *Patton v. Topps Meat Company, LLC*. 2009 WL 2027106 at 6. The original complaint was filed in King County Superior Court on April 29, 2010, (over a year prior to removal to federal court). The lawsuit included both FOFI and Domino's Pizza. The Complaint alleged the same causes of action relating to a state and national class as the

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Amended Complaint (adding CEA as a defendant) filed on May 10, 2011. The Complaint contained Counts A, C, D and E and explained the elements of the National and Washington classes. The definition of the Washington Class in the original Complaint is identical to the one Plaintiff proposes today:

> Washington State Class: All Washington persons who received a pre-recorded telephone message on their telephone from Defendants sent by automatic dialing machine for purposes of commercial solicitation at any time for the period that begins 4 years from the date of this complaint to trial. *See,* Complaint filed with Notice of Removal.

The causes of action did not change when the Amended Complaint was filed. *See,* documents filed with Notice of Removal. [dkt. No. 1].

Discovery began in this matter on April 29, 2010, when Plaintiff sent her First Set of Interrogatories and Requests for Production to FOFI. Discovery with FOFI continued on September 30, 2010, with the deposition of Mike Brown, President and Owner of FOFI. Since Plaintiff's First Set of Interrogatories, FOFI has defended its action of making telephone calls to customers with whom it maintains a business relationship. In fact, Mr. Brown estimates more than 5,000 calls were made in the first download and that more calls were made. Exh. 7 to Joint Decl. 30 [dkt. No. 32]. CEA provided documentation on September 9 and 15, 2011, in response to Plaintiff's First Set of Interrogatories and Requests for Production to Call-Em-All. Exh. 4 to Jt. Decl. [dkt. No. 32]. The documents stated the amount of calls made and to whom the calls were made. No further discovery needed to be performed in order to form the class as of September 2011. In fact, the only relevant discovery performed since that date and this Motion is the Deposition of Brad Herrmann, the president of CEA in on December 2, 2011. Plaintiff does not use Mr. Herrmann's deposition testimony in this Motion as a basis for class certification. *See,* Motion [dkt. no. 31] Plaintiff only uses information she has had in her

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possession between the summer of 2010 to September 15, 2011. According to Plaintiff's Motion, she had the discovery in her possession as of September 2011, which forms the basis of Plaintiff's proposed class. **THERE IS NO LEGITIMATE REASON FOR THE DELAY.** Plaintiff failed to meet the deadline outlined in the joint status report (December 1, 2011) and the deadline established by court rule (November 28, 2011). Good cause does not exist and Plaintiff's Motion should be denied.

III. CONCLUSION

Plaintiff has failed to bring this Motion within the 180 day deadline as required by Local Rule CR 23(i). Like a statute of limitations, this deadline shall bar Plaintiff's state class allegations. The language of the rule is plain and clear. Good cause does not exist because there was no reason for Plaintiff's failure. The Defendant Four Our Families Inc., respectfully requests the court find no reason why the Plaintiff was prevented from filing a motion for class certification within the 180-day period and deny Plaintiff's Motion.

Dated at Lakewood, Washington this 18th day of January, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2012, I electronically served the foregoing to the parties listed below:

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