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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 DEFENDANTS DOMINO'S PIZZA, REPLY BRIEF RE: MOTION FOR PROTECTIVE ORDER **HEARING DATE: January 20, 2012**

I. RELIEF REQUESTED

Domino's respectfully requests that the Court grant its Motion for Protective Order as to certain of Anderson's most recent discovery. Anderson's requests are late, burdensome, irrelevant and overly broad. Further, some of Anderson's late Requests are covered by a protective order in another case. The discovery should not be allowed.

II. FACTUAL CLARIFICATIONS

1. Certain "facts" as stated by Anderson are simply wrong.

Domino's has provided answers or responses to the non-objectionable discovery. Anderson claims that Domino's has "not responded to a single one!" of her most recent Requests. See, Plaintiff's Opposition at 1. Anderson's statement is false and misleading. Domino's provided Responses to Requests for Production Numbers 30, 31, 33, 35, 37, 39, 42, 43 and 46. Domino's has provided responses to the non-objectionable discovery from Anderson.

Domino's has never made a blanket refusal to provide electronically stored information (ESI). Anderson **never** requested ESI until December 8, 2011. Anderson's claim here is reminiscent of an old political adage, "a lie repeated often enough becomes the truth." In response to earlier discovery requests, Domino's made a diligent search of custodians likely to have responsive documents and produced the results. Counsel for Domino's has attempted to work with Anderson's counsel to formulate reasonable ESI requests and never indicated Domino's would not produce ESI. Anderson never raised any issues regarding Domino's prior responses, despite having months or years to do so, until Domino's renewed its motion for summary judgment and **still** has not filed any motion to compel in order to correct this alleged deficiency.

Domino's has not refused to disclose the PULSE system. It was discussed in the Scott Senne deposition on October 28, 2011, prior to the class certification discovery cut off. It was also referenced in Michael Brown's deposition on September 30, 2010. Anderson simply opted not to follow up on Brown's potential reference to PULSE. It is incorrect to allege that PULSE was concealed as Anderson does.

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Beyond Anderson's unsupported assertion, there is zero evidence that Domino's requires franchisees to use PULSE "in order to collect customers' telephone numbers for robo-calling." All testimony is to the contrary. This claim is simply fantasy.

2. Additional facts.

The time for discovery related to class certification has passed. In July 2011counsel for all parties conferred to draft a Joint Status Report. Anderson drafted the Joint Status Report, all parties signed the Joint Status Report which was filed on July 26, 2011. The Joint Status Report stated in part that the deadline for class certification discovery was October 31, 2011. As we have seen, Anderson missed this deadline and only filed the motion for class certification on December 22, 2011, after Domino's reminded her of the deadline's passage. Anderson's motion for class certification only relates to Washington RCW 80.36.400. **Anderson's federal claims under 47 U.S.C. Section 227 are and can only be individual.** On Anderson's homerun, best day, the maximum amount of damages she can ever obtain under the federal statute for her individual claims is $1,000.00.

III. ARGUMENT/AUTHORITY

1. The irrelevant, overbroad and burdensome discovery requested by Anderson constitutes a textbook example of oppressive discovery that prejudices Domino's.

Domino's will not rehash all issues raised in its original motion for a protective order. Instead it will stand on its earlier briefing and focus on some highlights cited in Anderson's own opposition briefing and demonstrating why Anderson's discovery request are objectionable.

a. PULSE/RPM and Opt-In

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Anderson Requests all documents to or from RPM related to PULSE, the opt-in program, litigation against RPM and this litigation. See, Request for Production No. 27. Anderson indicates that this might be relevant with respect to "all franchisees in encouraging and promoting robo-call marketing...." However, this case does not and cannot involve franchisees outside of Washington. The federal claims of Carolyn Anderson are individual. This request might related to a franchisee operating across the country, cannot possibly be relevant to Anderson's Washington claims as it does not involve a Washington franchisee. Such discovery can have no possible bearing on the claims in this action.

Further, Anderson requests **all** documents related to the PULSE system. See, Request for Production No. 28. (Anderson also requests documents regarding PULSE in No. 27). Such a request implicates hundreds of thousands of documents. The vast, vast majority of these are completely irrelevant to Anderson's individual federal claims or her potential class state claims. Such a request would cost thousands of dollars and require thousands of man hours for Domino's employees. The cost of providing these irrelevant documents would be many times any possible award to Anderson individually under the federal TCPA and the time for class certification discovery has passed. This Request potentially invokes proprietary and confidential business information about Domino's point of sale system. All of these concerns are truly prejudicial and oppressive to Domino's.

This Request might be reasonable if limited to information dealing with PULSE and telemarketing but Anderson did not word it that way and does not appear inclined to do so. Instead, despite the clear wording of the Request for all documents, Anderson now wants Domino's to not provide "the hundreds of thousands of other documents that it **knows** are not sought by plaintiff and would, indeed, be irrelevant. " See, Plaintiff's Opposition at 9.

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Domino's is not a mind reader and should not be in put in the position of narrowing down Anderson's unreasonable and overbroad request. Anderson has the obligation to tailor requests to target relevant documents.

As another example, Anderson requests "all documents related to Rick Rezler...." See, Request for Production No. 34. Like prior requests this is completely overbroad and calls for confidential information regarding Domino's employees. Arguably, the Request, since it asks for **all** documents, even requests information such as Social Security Numbers and dates of birth. Again, the burden is on Anderson to tailor Request so that relevant information is requested. It is not Domino's obligation to interpret Anderson's overbroad requests and somehow understand that this Request is only "to determine Mr. Rezler's role at Domino's, especially whether he has input on marketing and other strategies." See, Plaintiff's Opposition at 9. Domino's is willing to work with Anderson to narrow and target this overbroad Request but it is objectionable as currently drafted.

2. Sanctions are inappropriate here where Domino's has responded fully and completely to the majority of Anderson's discovery, attempted in good faith to work with Anderson to resolve discovery issues and timely filed for a protective order to the remaining issues.

Domino's timely answered Anderson's first three sets of discovery. Anderson raised no objection to Domino's answers and responses, despite the passage of between seven and nineteen months. Anderson has never filed a motion to compel.

Domino's timely filed objections to Anderson's December discovery requests (4th, 5th, and 6th Request for Production and ESI) and in good faith attempted to resolve the issues with Anderson's counsel. Domino's provided answers to that discovery that was relevant and non-objectionable. Good faith disagreements as to what is reasonable do not constitute sanctionable "resistance to discovery."

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Additionally, it must be remembered that Anderson's first Request for ESI was made on December 8, 2011. Domino's counsel attempted to work with Anderson's counsel to narrow the overly broad and irrelevant requests. There is no evidence to support Anderson's claim of willful and prolonged and continued resistance to discovery. Absent such evidence, sanctions are inappropriate.

Finally, Domino's is willing to provide proper discovery responses and has expressed willingness to work both with Anderson's counsel and the Court to do so. This position is not unreasonable and provides no grounds for sanctions.

3. The best course might be to appoint a special master to assist in resolving these discovery disputes.

The parties obviously have numerous disputes as to the proper scope of discovery. Domino's is willing and agreeable to the Court's appointing a special master to resolve these issues. Domino's suggests that, if the Court is not willing to grant an order completely relieving it from Anderson's objectionable discovery as drafted, the Court appoint a special master to assist the parties in resolving these disputes and formulate a discovery plan.

IV. CONCLUSION

For the above stated reasons, Domino's respectfully requests that the Court grant its motion for protective order. In the alternative, if the motion is not granted, Domino's respectfully requests the Court appoint a special master to resolve the discovery disputes between the parties.

January 20, 2012.

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