THE 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. 2: 11-cv-00902-RBL

DEFENDANT FOUR OUR FAMILIES, INC.'S MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

HEARING DATE: March 30, 2012

COMES NOW, the DEFENDANT, FOUR OUR FAMILIES, INC. ("FOFI"), who respectfully submits this Motion for Summary Judgment and attached memorandum of points and authorities. FOFI is seeking a judgment in its favor on all federal and state claims asserted by Plaintiff Carolyn Anderson ("Anderson").

I. STATEMENT OF FACTS:

A. Procedural Background:

This case arises out of a telephone call placed by CALL-EM-ALL, Inc. ("CEA") to Anderson, on behalf of Four Our Families, Inc ("FOFI"). Anderson was a customer of FOFI

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at the time the call was made. CALL-EM-ALL, a Texas corporation, offers its clients the use of its automated phone calling system. FOFI is a franchisee of Defendant Domino's Pizza, LLC and Domino's Pizza, Inc. ("Domino's"). Domino's sells pizza and other food related items through its retail stores in both national and international markets. FOFI denies being an agent of Domino's in any respect. Domino's did not make the call complained of by the Plaintiff. Nor did Domino's contract with CEA to make the call Plaintiff complains of.

In response to a call, Anderson initiated this lawsuit alleging violations of Federal law (Count A) under 47 U.S.C. §227(1)(b)(B) (the Telephone Consumer Protection Act, "TCPA"), as well as, RCW 80.36.400 (Count C) (prohibiting the use of automatic dialing and announcing devices that initiate telephone conversations), RCW 19.86 *et. seq.* (Count D) (the Washington Consumer Protection Act, "CPA"), and RCW 7.24.010 (the Washington Declaratory Judgment Act) under Washington law. Count D, the "CPA" claim, is dependent on FOFI's alleged violation of RCW 80.36.400. The complaint was amended on May 4, 2011, adding CEA as a party to this litigation. CEA removed this action from King County Superior Court of Washington to this Court on May 31, 2011.

Since the original filing of this action in state court and its subsequent removal to federal district court, discovery has been conducted according to the deadlines established in the Joint Status Report [dkt. no. 15] and state court rules.

On November 30, 2011, Domino's filed a Motion for Summary Judgment requesting its removal from this matter. In response, Plaintiff filed a Motion for Continuance of the Summary Judgment motion. Plaintiff's motion was granted and the Court will hear oral argument on Domino's Motion for Summary Judgment on March 30,

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2012. Plaintiff filed a Motion to Certify the Class on the state claims described above on December 22, 2011. The class deadline passed on November 28, 2011. In reaction to the missed deadline, Plaintiff filed a Motion to Extend the Class Deadline. The Court granted the extension on January 27, 2012.

B. Factual Background:

On August 31, 2009, a call was placed by CEA from Texas, with whom FOFI contracted, to the Plaintiff, Carolyn Anderson, a customer of FOFI. The telephone call was made to her residential telephone line in the State of Washington. Declaration of Nelson Fraley ("Fraley") 6 (Dep. of Carolyn Anderson ("Anderson"): 14:11-15). The telephone number has been owned by Anderson for the past twenty-one (21) years. Fraley 6 (Anderson: 14:24-15:4). Anderson has been an occasional customer of FOFI for many years. Anderson does not remember the exact date of her last purchase with FOFI. Fraley 6 (Anderson 15). She had recently purchased pizza six (6) months to one (1) year prior to the date the call was made. Declaration of Michael Brown ("Brown") 2, ¶8.

The telephone call was an automated message that played to the recipient or the recipient's voicemail. It was entirely automated and intended for Anderson. Anderson was the individual who received the call. Fraley 4 (Anderson 9:20-25). The call appeared on the recipient's caller id as Domino's Pizza at (253) 535-5000. Fraley 9 (Anderson 57: 11-13). As Anderson discovered, this number belonged to the Parkland/Spanaway Domino's owned and operated by FOFI. Fraley 9 (Anderson 57); Brown 2,¶ 6 . Plaintiff could not speak to a live operator or have a conversation with another person. Fraley 5 (Anderson 11:20, 23). There was no option for the recipient to connect to a live operator/person. Fraley 13 (Dep. of Brad Herrmann) ("Herrmann") 77:24-78:5). Once the message played,

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the call was disconnected. Fraley 13 (Hermann 78:4-5). To redeem the special, the customer had to call the local store to purchase the item. The recorded message was a total of thirty seconds. Fraley 12 *(Herrmann* 39:21-24). The message alerted the recipient of a one day only special offered by FOFI to its existing customers. The message, created by FOFI, that played for Anderson on August 31, 2009, stated:

> Hi, this is Domino's Pizza with a special offer. To block these calls, press 3 during this call. If that [sic] is voice mail, you can opt out by calling 866-284-6198.
>
> Hi, your Parkland Spanaway Domino's Pizza is offering any large pizza for $10. Any large pizza for $10. You can choose from our American Legends line, a Specialty pizza, or a Build Your Own up to 10 toppings for only $10. Hurry, this is for today only, and it's for carryout or delivery. Please call 253-535-5000 to place your order. Tax and delivery charge may apply.
>
> Fraley 14, Exh. 3.: Transcript of Message.

FOFI contracted with CEA to make the above described call. Brown 2, ¶ 6. FOFI created a list of telephone numbers from its computer operating system, PULSE. Brown 2,¶ 7. A customer's phone number is obtained when any customer places an order with Domino's Pizza for carryout or delivery over the telephone or in person. Id. A telephone number is the customer's reference number. Fraley 30 (Brown 64:13-21). Plaintiff's number was used any time she made a purchase from FOFI. Fraley 7 (Anderson 21:13-22). An order cannot be submitted without the customer's phone number. Fraley 36, Exh. 5 (Dep. of Wayne Peterson ("Peterson") 11:8-20). A franchisee cannot input phone numbers into PULSE any other way besides the entry of an order. Fraley 37 (Peterson at 14:18-20).

PULSE does not have the ability to make automated calls. Fraley 40 (Peterson 28:2-4). It does have the ability to create a marketing report based on date parameters entered by the franchisee (e.g. all phone numbers of customers who have ordered in the

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last 180 days). Fraley (Peterson 14). A date range had to be selected to form the list FOFI created. Michael Brown, President of FOFI, created its customer database.

He selected only customers who had ordered from FOFI six (6) months to one (1) year prior to the actual date of the call (August 31, 2009). Brown 2, ¶ 8. There were two reasons for this; (1) CEA made it quite clear to Mr. Brown that the customer had to order within the previous eighteen (18) months of the call; and (2) PULSE only kept information up to one year before it was purged from the system. Brown 2, ¶ 9; Fraley 39 (Peterson 18). PULSE deletes customer records that have not ordered during the purge setting established by the franchisee. Fraley 39 (Peterson 18). Mr. Brown could not have requested his customer telephone numbers from Domino's. Id. at 30. In 2009, Mr. Brown's purge settings were set at one year. Brown 3,¶ 10. Plaintiff had ordered prior to August 31, 2009. Fraley 8 (Anderson 26: 18-20).

C. Involvement of Domino's Pizza, LLC.

Domino's Pizza, LLC is in the business of selling pizzas both nationally and internationally. Michael Brown is a franchisee of Domino's, owning six stores only in the Pierce County, Washington area. FOFI conducts no business outside of Pierce County, Washington.

A majority of Domino's Pizza's stores are franchise owned. A Standard Franchisee Agreement regulates the relationship between the parties. Domino's does not control, direct, or influence the local advertising efforts of a franchisee. Brown 1,¶ 3; Fraley 43,44 (Haydon 11:5-12, 24:4-9). It does control the national advertising campaigns. Franchisees are not required to participate in the national campaigns, but are highly

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encouraged to. Brown 2, ¶ 4. Local franchisees form a local advertising co-op. Brown, 2, ¶ 5 . The co-op decides how its contribution to the marketing fund is spent. The marketing used by the co-op consists of radio, television, and primarily print materials. Fraley 21 (Dep. of Brown 25-28). Domino's does not control, influence, or direct the decisions made by the co-op. Brown 2, ¶ 5.

In May 2009, Mr. Brown attended Domino's bi-annual World Wide Rally ("Rally"). Fraley 22 (Dep. of Brown 29). One of the events at the Rally is the Vendor Show ("Show"). Fraley 22 (Dep. of Brown 30). Attendance at the Rally and the Show are not required. There are various vendor booths where the vendors can communicate available services, products, etc. to those in attendance. Fraley 22 (Dep. of Brown 30). Call-Em-All was a vendor at the show. Fraley 22 (Dep. of Brown 30).

Domino's was not involved with the described calls above. Brown 3, ¶ 12. Michael Brown did not speak to anyone with Domino's about the calls. Id; Exh. 6 of Fraley Dec. (Dep. of Natalie Haydon ("Haydon") 7:13-16). An independent franchisee controls any decisions made regarding local efforts and funds. Fraley 43,44 (Haydon 11:5-12, 24:4-9). Domino's did not encourage franchisees to promote these types of calls. Fraley 45 (Haydon 30, 31); Exh. 7 of Dec. of Fraley 46 (Dep. of Chris Roeser ("Roeser")10:2-14). The Plaintiff did not speak to anyone from the Domino's corporate stores or with Domino's headquarters. Fraley 10 (Anderson 58:2-6). The caller id displayed the local Domino's Pizza number. Fraley 9 (Anderson, 57:11-13).

II. STANDARD OF REVIEW

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material

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fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *Cubbage v. Talbots*, No. C09-911BHS, 2010 WL 09 -911BHS (W.D. Wash. July 7, 2010). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Cubbage (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). See also Fed. R. Civ. P. 56(e). "Material facts" are those that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A purely legal issue such as interpretation of a statute or regulation is appropriate for summary judgment. See *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987).

III. ARGUMENT

A. Introduction

The facts described above establish that FOFI has not violated federal or state law when CEA made a call to Plaintiff Anderson on its behalf. No facts will show otherwise. The call did not violate RCW 80.36.400 because there was no "unsolicited initiation of a telephone conversation" as required by the statute and case law. FOFI also had an established business relationship ("EBR") with Anderson at the time the call was made. Due to this relationship, FOFI had a right to call Anderson under the Federal Communications Commission ("FCC") regulations.

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B. FOFI did not violate state law because it did not have a telephone conversation with Anderson.

In response to the call, Anderson initiated this lawsuit alleging violations of RCW 80.36.400 (Count C) (Washington Automatic Dialing and Answering Devices Act ("WADAD")- prohibiting the use of automatic dialing and announcing devices that initiate telephone conversations), RCW 19.86 *et. seq.* (Count D) (the Washington Consumer Protection Act, "CPA"), and RCW 7.24.010 (the Washington Declaratory Judgment Act) under Washington law. Count D, the "CPA" claim, is dependent on FOFI's alleged violation of RCW 80.36.400. Under RCW 80.36.400(3), a violation of RCW 80.36.400 constitutes a violation of RCW 19.86, *et. seq.* Thus, the CPA claim will fall should summary judgment be granted on the automatic dialing device (Count C) claim.

1. Definition of a telephone conversation

RCW 80.36.400 begins by defining an automatic dialing and announcing device as "a device which automatically dials telephone numbers and plays a recorded message once a connection is made". RCW 80.36.400(1)(a). For purposes of this Motion, FOFI does not dispute that the call at issue was made with an automatic dialing and announcing device as defined by the statute. The statute continues by defining a commercial solicitation. "Commercial solicitation means the unsolicited **initiation of a telephone conversation** for the purpose of encouraging a person to purchase property, goods, or services". RCW 80.36.400(1)(b)(*emphasis added*). The statute requires the "*initiation of a telephone conversation*". The evidence is undisputed that the Call at issue in this case was not made for the purposes of initiating a "telephone conversation". As the testimony of CEA and FOFI makes clear, it was impossible for such to occur. When the call was made, it

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could only play a recorded message created by the client. Fraley 13 (Herrmann 77:24-78:5) It would play when the call connected to either the recipient or the recipient's voicemail. The technology used by CEA did not provide the means whatsoever to have a telephone conversation with a live operator or anyone else. Fraley 13 (Herrmann 77:24-78:5). Because no telephone conversation could occur, there can be no violation of the statute.

The subject of this motion is the exact issue decided by this Court in *Cubbage v. Talbots*[1] and extended in *Meillleur v. AT&T, Inc.*. The actions of Talbots are factually indistinguishable from that of FOFI. Talbots, a clothing retailer, made an automated call where Plaintiff's wife was the intended recipient. A message was left notifying Plaintiff and his wife of a sale taking place on a specific date. *Cubbage v. Talbots, Inc.*, No. C09-911BHS, 2010 WL 2710628 (W.D. Wash. July 7, 2010) (unpublished). The Court found no "conversation" to have occurred as required by RCW 80.36.400. The Court also concluded that an established business relationship Talbots had with Plaintiff's wife extended to her husband. The Court granted Talbot's summary judgment motion and dismissed all state and federal claims.

The Court in *Cubbage* engaged in the rules of statutory construction to determine the meaning of a "telephone conversation" as required. (*Emphasis added.*) "If the word is not defined by the statute, the Court is to determine its meaning by following the rules of statutory construction." *Home Street, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). Where the language of a statute is plain and unambiguous, the Court ascertains the statute's meaning from the statute itself. *Lewis v. State Dept. of Licensing*,

[1] A copy of the Court's Order in *Cubbage* is attached to the Appendix of Unpublished Authorities submitted herewith.

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157 Wn.2d 446, 465, 139 P.3d 1078 (2006). The word "conversation" is not defined by RCW 80.36.400, but *Cubbage and Meilleur* determined it does have a plain meaning under Washington law that controls and cannot be ignored. *Cubbage* at*5; *See State v. Van Woerden*, 93 Wn. App. 110, 116, 967 P.2d 14,17 (1998).

"Plain language does not require construction" and so the court is to "look to a dictionary for its ordinary meaning." Id.; *Cubbage* at *5 (citing *Armantrout v. Carlson*, 166 Wn.2d 931 (2009); *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9 (2002); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183 (2002); *Garrison v. Washington State Nursing Bd.*, 87 Wn.2d 195, 196 (1976). In *Home Street*, the Supreme Court of Washington had to determine what the word "interest" meant in a statute that did not define the term. *Home Street* at 452. The Court cited Webster's Dictionary's definition of "interest" *Id.* at 452-453. There was no need to look at legislative history or other sources because the statute was unambiguous. Id. at 454. The Washington Supreme Court and the Ninth Circuit have held that "absent a statutory definition of a term, courts may resort to dictionaries to ascertain the common meaning of statutory language." *State v. Christensen*, 153 Wn.2d 186, 195, 102 P.3d 789 (2004) (citing *State v. Pacheco*, 125 Wn.2d 150, 154, 882 P.2d 183 (1994); See also *Cubbage* at *5 (citing *Dep't. of Ecology v. Campbell & Gwinn, LLC.*, 146 Wn.2d 1, 9 (2002); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183(2000)).

RCW 80.36.400 is unambiguous and the Court is to only look to the dictionary definition for guidance. The dictionary defines the word "conversation" as an "informal interchange of thoughts, information, etc., by spoken words; oral communication between persons; talk; colloquy," or "an instance of this." Cubbage at *5 (citing Random House

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Dictionary (2010)). "Colloquy" is a "conversation; dialogue; a high level serious discussion." Merriam-Webster Online Dictionary (2011), http://www.merriam-webster.com/dictionary. According to Merriam-Webster, a "conversation" is an "oral exchange of sentiments, observations, opinions, or ideas; an instance of such exchange." Merriam-Webster Online Dictionary (2011), http://www.merriam-webster.com/dictionary. It is a "talk, especially an informal one, between two or more people, in which news and ideas are exchanged". Oxford Dictionary Online (2011),http://www.oxfordictionaries.com. Finally, American Heritage Dictionary defines it as "the exchange of thoughts and feelings by means of speech or sign language; an instance of this." American Heritage Dictionary of the English Language (5th Ed. 2011). The definitions are all similar and consistent.

For a violation of RCW 80.36.400, an ADAD must be used for the purpose of initiating a telephonic exchange of information, a discussion between two or more persons, not the mere delivery of a prerecorded message. "It is evident from these definitions that the mere transmittal of a recorded message is not a conversation." *Cubbage* at *5. The call made on behalf of FOFI could not lead to a telephone conversation. It could only deliver a prerecorded message and so it falls outside the clear language of the statute. When the call was made to Anderson, it could only play a recorded message created by FOFI. The technology used by CEA did not provide the means whatsoever to have a telephone conversation with a live operator or anyone else. The Court recognized a distinction between that initiation of a conversation and the conveyance of information.

FOFI urges the Court to recognize this same distinction as Judge Settle did in *Cubbage v. Talbots*. The call was completely automated. In *Cubbage*, Judge Benjamin Settle explains,

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> "a distinction may be made between prerecorded calls that initiate conversation and those that simply convey information without interaction with the recipient. The statute prohibits the use of automatic dialing announcing devices to contact persons and play recordings in the hopes of initiating a conversation with a live operator (e.g. to make a sales pitch). While calls that play tapes and then simply hang up (as here) would be disruptive to those who do not wish to receive them, they do not consummate a transaction or present the risks attendant to high-pressure sales tactics after the recording is completed." *Cubbage* at *5.

Cubbage established that the WADAD was not violated by Talbots because after the message hung up it disconnected with no connection to a live person. *Cubbage* at *6. The WADAD and the definition of an "initiation of a telephone conversation" have been discussed in *Meilleur v. AT&T, Inc.* In *Meilleur v. AT&T,Inc.,* the Court distinguishes *Cubbage*. Judge Pechman states, "One court within this District has examined this same portion of the Washington ADAD and concluded there is no violation where a person receives an automated call that merely attempts to convey information but does not initiate a conversation." *Meilleur*, No. C11-1025MJP, 2011 WL 5592647, *6 (W.D. Washington November 16, 2011) (distinguishing *Cubbage v. Talbots*, Inc., No. C09-911BHS, 2010 WL 2710628, at *5 (W.D. Wash. July 7, 2010)('The automated call simply provided information without the ability of the caller or recipient of the call to engage in conversation.') Judge Pechman could not stretch AT&T's argument within the definition established by *Cubbage*; she clarifies her position by explaining, "Unlike the recorded call in *Cubbage*, the call here initiated a dialogue with Plaintiff. It asked him to call AT&T back, while the call from Talbots in *Cubbage* merely advertised a sale." *Meilleur* at *7. A conversation was determined to have been initiated by AT&T. It made the Plaintiff believe something was wrong with his existing long distance service and he needed to call. AT&T engaged in a high-pressure sales tactic; the exact tactics the legislature is attempting to prohibit. *Id.*

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Akin to *Cubbage*, FOFI called advertising a $10 pizza sale. See Exhibit 3 to Fraley Dec. The equipment used by CEA did not have the ability to engage in conversation. When the prerecorded message was delivered to Anderson, it did not have the means to connect to a live operator. The forty second call terminated after the message played. Anderson would have had to pick up her phone and dial her local Domino's Pizza to purchase the offered special. Brown 3, ¶ 11. If she called, she would have had to inquire about the special. The store personnel did not offer this special when customers called unless the customer mentioned it. Brown 3, ¶ 11. The recording was simply a notice of a sale, leaving it entirely up to the customer to decide whether to actually purchase items from FOFI.

C. TCPA

The federal statute, at the time the Call was made to Plaintiff, allowed a business to deliver a prerecorded message to an individual that made a purchase "within eighteen months". 47 U.S.C. §227(b)(1)(B); 47 C.F.R.§ 64.1200(a)(2)(iv). *See also Palmer v. Sprint Nextel Corp.*, 2009 WL 4730851, 674 F.Supp.2d 1224 (W.D. Wash. Dec. 7, 2009)(noting that the FCC adopted by regulation an exemption "for prerecorded calls 'made to any person with whom the caller has an established business relationship").

The FCC regulations define an established business relationship ("EBR") as a prior or existing relationship formed on the basis of the subscriber's purchase or transaction with the entity within the eighteen months immediately preceding the date of the telephone call. See 47 C.F.R. §64.1200(f)(4). "The FCC has opined that the established business relationship exemption is broad and that 'you have an established business relationship with a person or entity if you have made an inquiry, application, purchase, or transaction

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regarding products or services offered by such person or entity.'" *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 648 (W.D. Wash. 2007). The FCC has also ruled that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. 7 F.C.C.R 8752, ¶ 31 (1992). The FCC believes,

> "the ability of sellers to contact existing customers is an important aspect of their business plan and often provides consumers with valuable information regarding products or services that they may have purchased from the company. ...To the extent that some consumers oppose this exemption, we find that once a consumer has asked to be placed on the seller's company-specific-do not call list, the seller may not call the consumer again regardless of whether the consumer continues to do business with the seller." *In re Rules and Regulation Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, Report and Order 18 F.C.C.R. 14014, 47 CFR Parts 64,68 § 20 (July 25, 2003).

Anderson purchased items from FOFI prior to August 31, 2009. Fraley 8 (Anderson 26: 18-20) Michael Brown, the president of FOFI, created its database of customers CEA was to call. Brown 2, ¶ 8. When Mr. Brown created the August 2009 database, he only selected customers that had ordered from the Parkland/Spanaway Domino's location within the preceding six to twelve months. Id.

1. FCC had authority to promulgate the Established Business Relationship Exemption

Under the TCPA, it is:

> Unlawful for any person...to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the [FCC]...under paragraph (2)(B). 47 U.S.C. § 227(b)(1)(B).

A plain reading of this provision indicates that automated messages are prohibited without the prior express consent of the recipient unless the call (1) is initiated for emergency purposes; or (2) the call is exempted by rule or order of the FCC. "Based on

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the rules of grammar and the common definition of "unless," *Perrin v. united States*, 444 U.S. 37, 42 (1979), these two categories describe exceptions to the general rule requiring prior express consent before placing an artificial or prerecorded call." *Hovila v. Tween Brands, Inc.*, No. *C09-0491RSL, 2010 WL 1433417, *2 (W.D. Wash. Apr. 7, 2010*[2]) (cited by *Meilleur v. AT&T*, No. C11-1025MJP, 2011 WL 5592647 (W.D. Washington November 16, 2011).

The FCC has the ability to determine classes of calls that will not adversely affect the privacy rights the TCPA is intended to protect and do not include the transmission of any unsolicited advertisement. 47 U.S.C. §227(b)(2)(B)(ii); See also *Hovila* at *2. Paragraph (2)(B) of the TCPA provides that the FCC:

> may, by rule or order, exempt from the requirements of paragraph (1)(B)...such classes or categories of calls made for commercial purposes as the [FCC] determines- (I) will not adversely affect the privacy rights that this section is intended to protect; and (II) do nto include the transmission of any unsolicited advertisement. 47 U.S.C. §227(b)(2)(B)(ii).

The TCPA defines an "unsolicited advertisement as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. §227(a)(5). The TCPA does not define the phrase "prior express invitation or permission." The FCC has the authority to determine and define the term. *Hovila* at *2 (See Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984) (where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulations."). The FCC exercised valid agency authority under a *Chevron*

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[2] A copy of the Court's Order in Hovila is attached to the Appendix of Unpublished Authorities submitted herewith. Hovila is cited by Judge Pechman in Meilleur v. AT&T, No. C-11-1025 (W.D. Wash. November 16, 2011).

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analysis when it adopted the established business relationship. *Hovila* at *2. The FCC adopted an exemption under paragraph (2)(B) allowing prerecorded voices to deliver a message if an established business relationship ("EBR") existed between the recipient and caller. 47 C.F.R. 64.1200(a)(2). An EBR is defined as a prior or existing relationship formed on the basis of the subscriber's purchase or transaction with the entity within the eighteen months immediately preceding the date of the telephone call. See 47 C.F.R. §64.1200(f)(4).

"Congress specifically noted that "an enterprise having an 'existing business relationship' with a subscriber should be permitted to solicit the subscriber even if the subscriber otherwise objected to unsolicited calls. Congress also suggests that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary" *Hovilla* at*3 (citing H.R. Rep. No. 102-317, at 13, 14). The FCC followed the appropriate standards and procedures when creating the EBR exemption. The agency conducted a full notice-and-comment rulemaking in defining the EBR exemption; it addressed both customer and industry concerns. *Hovila* at*3 (See Notice of Proposed Rulemaking, 7 F.C.C.R. 2736, 2738 (1992); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C.R. 8752, 8769-71(1992); See also Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 F.C.C.R. 17459, 17479-81 (2002); Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44144, 44167-68 (July 25, 2003). "The FCC also incorporated into the exemption provisions that protect consumer privacy, such as a requirement that the communication be voluntary, an express time

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limitation, and a provision for customer termination of the relationship." *Hovila* at*3 (citing 47 C.F.R. §64.1200(f)(4)).

2. Plaintiff had an established business relationship with FOFI as defined by the FCC.

The Call made to Plaintiff fails as a matter of law because it was permissible under the EBR exemption created by a FCC regulation; authority granted by the TCPA. Through the creation of an established business relationship, the customer has provided consent to place automated calls. *Cubbage* at *3. Plaintiff admits that she purchased pizza from her local Domino's Pizza on several occasions over the years.[3] Fraley 8 (Anderson 26: 18-20) Plaintiff admits to providing her phone number when she placed her orders. Fraley 7 (Anderson 21:13-22). A customer's phone number is voluntarily provided. Brown 2, ¶ 7. The number where the call was made was the same number she provided when placing her orders. Fraley 6 (Anderson 14). Anderson recognized her business relationship with FOFI/Domino's when she saw the number on caller id and chose to answer it. Fraley 9 (Anderson 57). She again acknowledged her business relationship with FOFI when the pre-recorded message named the business, the reason for calling, and even though she was provided the choice to "block the call" by pressing 3, she continued to listen to the special offer. See Exh. 3 of Fraley Dec. She listened to the message to know that it offered a "price and some combination" Fraley 5 (Anderson 8-9).

The customer call list, created by Michael Brown, could only be formed from the Parkland/Spanaway Domino's customer database on the PULSE operating system utilized by FOFI. Brown 2, ¶7; Fraley 39 (Peterson 18). The phone number was voluntarily provided by the customer and not retrieved by or purchased from a third party source.

[3] Anderson acknowledges she has ordered from her local Parkland/Spanaway Domino's Pizza in previous years. She cannot remember the exact date of her last purchase. Fraley 6 (Anderson 14-15).

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Fraley 7 (Anderson 21:13-22); Brown 2, ¶ 7. Michael Brown, in order to create FOFI's customer call list, had to select a date range on PULSE. Fraley (Peterson); Brown 2, ¶ 8. He only selected customers that had purchased items from the franchise location six months to a year preceding the August 31, 2009 telephone call. Id. FOFI had an established business relationship with Plaintiff in the previous eighteen months.

IV. CONCLUSION

Defendant, FOUR OUR FAMILIES, INC., respectfully requests the Court grant its summary judgment motion because neither the state WADAD or the federal TCPA statutes have been violated. The language of RCW 80.36.400 is unambiguous; it requires the "initiation of a telephone conversation" to take place. The prerecorded message that played for Plaintiff on August 31, 2009, did not have the ability to exchange thoughts and opinions with her. There was no ability to speak to a live representative of FOFI. A violation of RCW 19.86 is dependent on a violation of RCW 80.36.400 and should be so dismissed. FOFI was allowed to call Plaintiff under, 47 U.S.C. §227(1)(b)(B), because it had an established business relationship with her in the preceding year of the call. The statute only requires a transaction to occur within the past 18 months. Therefore, all claims against FOFI should be dismissed.

Dated at Lakewood, Washington this 7th day of March, 2012.

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