

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CAROLYN ANDERSON,

vs.

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

Defendants.

Plaintiff,

CLASS ACTION

No. C11-902RBL

PLAINTIFF'S MOTION FOR AN ORDER
COMPELLING DEFENDANTS DOMINO'S
PIZZA, INC. AND DOMINO'S PIZZA, LLC TO
PRODUCE PROPER FRCP 30(B)(6)
WITNESSES AND SANCTIONS

NOTED FOR HEARING: April 6, 2012

I. RELIEF REQUESTED

Plaintiff hereby requests that the Court issue an Order Compelling Defendants Domino's
Pizza, Inc. and Domino's Pizza, LLC ("Domino's"), to present proper FRCP 30(b)(6) witnesses
and for sanctions.

II. STATEMENT OF FACTS

A. Introduction

This is a claim for damages due to illegal "robo-calls"—calls made using automatic
dialing and answering devices, or ADADs--by defendant Call-Em-All, LLC, on behalf of
Domino's and its franchisee, defendant Four Our Families, Inc. ("FOFI"), to blast unsolicited
Domino's advertisements to class members, in violation of the federal Telephone Consumer

PLAINTIFF'S MOTION FOR AN ORDER COMPELLING DEFENDANTS
DOMINO'S PIZZA, INC. AND DOMINO'S PIZZA, LLC TO PRODUCE
PROPER FRCP 30(B)(6) WITNESSES AND SANCTIONS - 1
(No. C11-902-RBL)

**WILLIAMSON
& WILLIAMS** | 17253 AGATE STREET NE
BALDWIN ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamsonlaw.com

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2 Protection Act, 47 U.S.C. § 227, and the Washington State counterpart, RCW 80.36.400.

3 Domino's had filed a Motion for Summary Judgment noted for December 30, 2011 (Dkt. #23).

4 Plaintiff successfully moved to continue the motion so that critical additional discovery could be
5 obtained and discovery that should already have been answered completed. One important goal
6 for Plaintiff was to schedule depositions pursuant to FRCP 30(b)(6). Those depositions were
7 conducted in Ann Arbor, Michigan, headquarters of Domino's, on February 10, 2012. As the
8 30(b)(6) notice itemized 6 different topics (Hereafter "Item"), Domino's presented three
9 witnesses. The notice is attached as Exhibit 1 to the Declaration of Rob Williamson filed with
10 this Motion ("Williamson Decl."). Domino's advised that Christopher Roeser, Natalie Haydon
11 and Wayne Peterson would appear and testify regarding the topics set out in the deposition
12 notice.
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14 The dispositive issue in this litigation with respect to Domino's is its liability for the
15 actions of its franchisees, including FOFL. Domino's takes the position it has no such
16 responsibility and has sought to distance itself from the activities of the franchisees who in fact
17 engaged in robo-call marketing. Clearly it was important to Plaintiff that the witnesses that were
18 tendered by Domino's for the FRCP 30(b)(6) depositions be knowledgeable and prepared to
19 address the topics. That notice was served on Domino's on December 8, 2011 so it had over 9
20 weeks to identify proper witnesses. Except for witness Peterson who testified regarding Items 3
21 and 5 (The Pulse software and how franchisees can save telephone numbers) the other two
22 witnesses were unprepared and did not have information and knowledge regarding the topics.
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25 B. Witness Roeser

26 With respect to witness Roeser, no effort was made to become knowledgeable about

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2 Items 4 and 6 which Domino's stated would be his responsibility. Item 2 related to "All
3 communications or policies from or (sic) DOMINO'S PIZZA, INC. or DOMINO'S PIZZA, LLC
4 regarding marketing with voice broadcasting or prerecorded telephone calls using automated
5 dialing and announcing devices". It was Plaintiff's intention to obtain this information from all
6 possible sources at Domino's, not simply what Mr. Roeser might have remembered. However,
7 Mr. Roeser did not review or search for any documents, did not consult or confer with other
8 employees, and, if fact, did nothing to prepare to testify regarding the topics. Instead, he limited
9 his "preparation" to thinking about what he recalled. Mr. Roeser was aware that he had been
10 designated by Domino's to respond to the two topics (Deposition of Chris Roeser, 4:22-25,
11 ["Roeser Dep."], excerpts of which are attached to the Williamson Decl.). His efforts to prepare
12 were limited to "searched my recollection" (*Id.* 5:6). He did not conduct a search or use search
13 terms to look at materials that may have been sent out to franchisees regarding the topic. Instead
14 he relied on his own experience and recollection (*Id.* 6:17). He admitted that he understood that
15 he was to look for and testify about all communications regarding voice broadcasting, and that he
16 did nothing other than look "within your head" (*Id.* 6:23). He made no search of any of the
17 communication that field marketing teams had with franchisees about voice broadcasting. With
18 respect to whether or not there were any advice, directives or guidance that Domino's had issued
19 about robo-calling other than one "fast fax", about which he had testified in his first deposition,
20 Mr. Roeser stated he was unaware of any, but admitted that his search "was between your ears
21 primarily". (*Id.*10:15-17).
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25 Item 6 related to "The telephone opt in program or functionality", the names of all
26 franchisees who used it, and all communications with RPM, the largest Domino's franchisee, or

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2 any other franchisee about the functionality, as well as all communications with RPM or any
3 other franchisee regarding the decision to delete the functionality. This line of inquiry was
4 important to Plaintiff because it demonstrated an ongoing commitment by Domino's to facilitate
5 and promote robo-calling after the Federal Trade Commission had issued regulations restricting
6 such calls to customers who had expressly agreed in writing to receive them. As to
7 communications between Domino's and RPM or any other franchisee about the telephone opt in
8 program Mr. Roeser did not look for any communications between Domino's and RPM (*Id.*
9 10:20-22), notwithstanding that he was aware of communications generally on the (*Id.* 10:23-25,
10 11:1-2). When asked about whether or not he looked for communications about the functionality
11 of the website (of Domino's) to collect telephone numbers of customers, he agreed he made no
12 effort to use search terms to find documents or the names of persons who may have been
13 involved in such communications (*Id.* 18:3-11, 18:21)

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15 C. Witness Haydon

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17 With regards to witness Haydon, the record is the same. Item 1 of the FRCP 30(b)(6)
18 deposition notice was intended to elicit information about "All communications with FOUR
19 OUR FAMILIES, INC. regarding marketing in 2008 and 2009, including but not limited to the
20 calls made by using the CALL-EM-ALL platform". To prepare for her deposition, other than
21 consult with counsel, Ms. Haydon reviewed previous e-mails and documentation regarding the
22 particular area that she oversees (*Id.* 13:3-6). She looked at e-mails only on her internal mailbox
23 and searched only the terms "call" and "Mike Brown". (*Id.* 13:12-18). She did not search the e-
24 mails of any other Domino's employees (*Id.* 14:22-24), although admitting that she understood
25 that she was to testify about all communications by Domino's with FOFI regarding marketing in
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2 2008 and 2009 (*Id.* 14:25, 15:1-4). The only communications that she reviewed or her own e-
3 mails and communications from her to Mike Brown and did not have access to any other e-mails,
4 and made no effort to look beyond what might have been on her own computer (*Id.* 15:5-22).
5 She said that she was not told to look for anything other than what would be on her own
6 computer. (*Id.* 15:23-25). As a result of this limited effort, not all communications that would
7 have been conducted between FOFI in 2008 and 2009 regarding marketing were identified.
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9 Item 2 of the FRCP 30(b)(6) notice dealt with "All policies regarding marketing and the
10 role OF DOMINO'S PIZZA, INC. or DOMINO'S PIZZA, LLC regarding marketing by Four Our
11 Families in 2002 and 2009." Ms. Haydon, based in Denver, is a field marketing leader only for
12 Portland, Oregon, and the states of Washington, Idaho and Montana. (Deposition of Natalie
13 Haydon, page 5: 12-25, 6:1-13, excerpts of which are attached to the Williamson Decl.) With
14 regard to the crucial issue concerning the role of Domino's regarding marketing in 2008 and
15 2009 in connection with FOFI, Ms. Haydon was in asked, "Did you look at the policies or
16 guidelines that were in effect in 2008 and 2009?", and answered "No" (*Id.* 23:9-20). With
17 respect to policies regarding marketing, Haydon was "aware of some" but could not recite them.
18 (*Id.* 23:21-24). She did not know what policies were in effect in 2008 and 2009 compared to
19 current policies. (*Id.* 23:25, 24:1-3).
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21 Haydon was unaware of any other documents other than the Managers Reference Guide
22 that pertained to marketing, but also did not look anywhere else (25:2-8) and was not instructed
23 to look for policies regarding marketing with respect to Domino's and FOFI. (25:9-12); nor did
24 she make a search other than on her own computer to see if there were any policies regarding
25 marketing (*Id.* 25:13-16). Haydon did testify that at some point after August of 2008 Domino's
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2 had taken a position with respect to prerecorded calls, namely to advise franchisees not to use
3 them (30:19-23). She could not recall the date of the communication, but said that it took place
4 in a conference call (30:24-25, 31:3), but could not recall the date of the call (32:16-17 and 23-
5 24). She admitted she made no effort to determine when the call was made, who was on the call,
6 she did not know if it had any minutes, nor did she look for them. (33:3-14).

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8 Haydon was asked whether or not any of the franchisees within her region were ever
9 made aware of the advice about prerecorded calls it was given in the conference call, and stated
10 that it was set out in some system wide communication from Domino's. She did not look at the
11 document (43:15-16), did not know whether this document had been sent out a week or a year
12 later from the conference call (44:14-16) and could not recall what it said, (44:21-22). Ms.
13 Haydon did reviewed the document before the deposition, had no memory of what it said and
14 was not aware of anything else ever sent to franchisees about using prerecorded phone calls. (*Id.*
15 44:17-25, 45:1-3). She did not conduct a search of fast faxes sent to franchisees from 2008 to the
16 present to see if there was anything in them about prerecorded phone calls. (*Id.* 45:25 to 46:1-3).

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18 Prior to bringing this motion, counsel for Plaintiff and Domino's have met and conferred
19 in good faith to resolve the issue without the Court's intervention. They have agreed to disagree
20 and Plaintiff indicated this motion would be filed.¹

21 **III. STATEMENT OF THE ISSUES**

22 The issue raised by this Motion is whether Domino's should be ordered to prepare and
23 present witnesses who can in fact respond to the topics in the FRCP 30(b)(6) notice, and whether
24 Domino's should be ordered to pay Plaintiff's attorney fees and other expenses as set forth below
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26 ¹ Plaintiff's counsel sent this statement to Domino's counsel to confirm it, but he has not responded.

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2 incurred as a result of the need to bring the Motion.

3 **IV. EVIDENCE RELIED UPON**

4 The evidence relied upon includes the Declaration of Rob Williamson with Exhibits.

5 **V. AUTHORITY**

6 Pursuant to FRCP 37(a), a party may move the Court for an order compelling discovery.

7 “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the
8 subject matter involved in the pending action” FRCP 26(b)(1). Information is
9 discoverable, even if it is not admissible at trial, “if the information sought appears reasonably
10 calculated to lead to the discovery of admissible evidence.” FRCP 26(b)(1). In this case,
11 Domino's has resisted liability on the grounds that it has no responsibility for the actions of its
12 franchisees, in general, and specifically with respect to FOFI. There can be no question that the
13 topics of the FRCP 30(b)(6) notice served on Domino's seeks the discovery, through a
14 deposition, of highly relevant and substantive evidence which Plaintiff requires in order to
15 oppose the Motion for Summary Judgment Domino's has filed. When Plaintiff sought an
16 extension of the time to oppose the Summary Judgment Motion, a request opposed by Domino's,
17 she noted the importance of taking depositions pursuant to FRCP 30(b)(6).
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20 Pursuant to FRCP 30(b)(6):

21 In its notice or subpoena, a party may name as the deponent a public or
22 private corporation . . . agency and must describe with reasonable
23 particularity the matters for examination. The named organization must
24 designate one or more officers, directors, or managing agents, or designate
25 other persons who consent to testify on its behalf; and it may set out the
26 matters on which the person designated will testify. . . . *The persons
designated must testify about known or reasonably available to the
organization.*

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2 (Emphasis added.)

3 Domino's designation here failed completely to provide witnesses who could testify
4 about matters known or reasonably available to Dominos. Mahaffey v. Investor's Nat. Sec. Co.,
5 102 Nev. 462, 463, 725 P.2d 1218, 1219 (1986). "The purpose of the rule is to streamline the
6 discovery process" and "to avoid they 'bandying' by corporations where individual officers
7 disclaim knowledge of facts clearly known to the corporation." Great Am. Ins. Co. of N.Y. v.
8 Vegas Constr. Co., Inc., 251 F.R.D. 534, 538 (D. Nev. 2008) (quoting U.S. v. Taylor, 166 F.R.D.
9 356 (M.D.N.C. 1996). "[T]he responding party is required to produce one or more witnesses
10 *knowledgeable about the subject matter of the noticed topics.*" Id. (emphasis added). The
11 entity has "a duty . . . to provide a witness who is knowledgeable in order to provide binding
12 answers on behalf of the corporation." Id. (internal quotations omitted). The witness must be
13 thoroughly **prepared** to testify on the noticed matters within the knowledge of the entity, not just
14 the matters within the witness' personal knowledge. Id. at 538-39. (Emphasis added)

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17 Plaintiffs designated six limited Items for the FRCP 30(b)(6) deposition. Domino's
18 designated three separate witnesses to appear. Only one, Mr. Peterson, was adequate. As set forth
19 above, neither of the other witnesses made any effort whatsoever to be "knowledgeable about the
20 subject matter of the noticed topics", and neither was able to testify "as to matters known or
21 reasonably available to the organization". The FRCP 30(b)(6) deposition procedure is intended to
22 permit the discovery of information known to a corporate defendant which cannot be ascertained
23 by the moving party in any other manner. It is not appropriate for the corporate defendant to
24 produce two witnesses who basically limited their preparation to what they could remember,
25 sought no information or evidence from the organization itself, and admitted that they lacked

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2 knowledge regarding most of the aspects of the topics to which they were assigned

3 As a result of Domino's conduct, Plaintiff has incurred costs and expenses and devoted
4 time and effort in a lost cause. In particular, Plaintiff's counsel incurred the expense of travel to
5 Ann Arbor Michigan, including airfare, lodging and meals, as well as costs for a court reporter,
6 and of course the time spent in traveling to Ann Arbor, taking the depositions, and returning
7 home. The result of the effort was to achieve virtually no relevant information as a result of the
8 failure of Domino's to ensure that appropriate witnesses were offered at the depositions.
9

10 Plaintiff requests the following orders:

11 1. Domino's must designate a witness or witnesses with respect to Items 1,2,4 and 6 of
12 the 30(b)(6) notice, to appear at a deposition to be held in Seattle at a location specified by
13 Plaintiff;

14 2. Domino's shall pay all of the costs associated with bringing its witnesses to Seattle, as
15 well as costs for the court reporter to report and transcribed the depositions;

16 3. The current deadline of March 26, 2012 for Plaintiff to respond to the Summary
17 Judgment Motion of Domino's should be extended as requested in Plaintiff's Pending Motion for
18 Relief from Deadline (Dkt #75);

19 4. Domino's shall to reimburse Plaintiff for all expenses incurred by her counsel in
20 connection with the depositions that were taken in Ann Arbor on February 10, 2012, an
21 itemization of which will be submitted to the Court;

22 5. Domino's should be ordered to pay as terms the reasonable hourly rate for Plaintiff's
23 counsel for hours which were spent with travel to and from Ann Arbor for the failed depositions,
24 as well as for the time to prepare this motion, an accounting of which will submitted to the Court.
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& WILLIAMS** | 17253 AGATE STREET NE
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(206) 780-5557 (FAX)
www.williamsonlaw.com

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2 DATED: March 20, 2012

3 WILLIAMSON & WILLIAMS

4 /s/Rob Williamson

5 Rob Williamson, WSBA #11387

6 Kim Williams, WSBA #9077

7 17253 Agate Street NE

8 Bainbridge Island, WA 98110

9 Telephone: (206) 780-4447 Fax: (206) 780-5557

10 Email: roblin@williamslaw.com

11 kim@williamslaw.com

12 *Attorneys for Plaintiff and the Proposed Classes*

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