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.	No. C11-902RBL PLAINTIFF'S OPPOSITION TO DEFENDANT FOUR OUR FAMILIES, INC'S MOTION FOR SUMMARY JUDGMENT Noted on Motion Calendar: Friday, March 30, 2012

I. INTRODUCTION

Discovery taken in this case has demonstrated that all of the robo-calls which are the subject of this class action were made to Washington residents who had been customers at one time or another of Defendant Four Our Families, Inc. ("FOFI"). Accordingly, but without conceding that FOFI is correct, Plaintiff is not pursuing the claim under the Telephone Consumer Protection Act and will not, therefore, respond to that portion of FOFI's Summary Judgment Motion ("Motion" at 13-18).

Two King County Superior Court Judges, as well as Judge Marsha Pechman of this District have rejected the conclusion of Judge Settle in *Cubbage versus Talbots*, (C09-911 BHS, 2010 Westlaw 2710628 (W.D. Wash.2010)), the only case upon which FOFI can rely. FOFI's claim that the ruling in *Cubbage* was "extended in *Meilleur v. AT&T, Inc.*" (Motion at 9) is simply wrong and, in fact, *Meilleur* applies precisely like this case and Judge Pechman found

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

that the robo-calls of AT&T should not be dismissed. Only last Friday, March 23, 2012, Judge Robart of this District also dismissed a challenge virtually identical to that of FOFI in *Hartman v. United Bank Card, Inc., et al.* (C11-1753JLR), a copy of which is attached to the Declaration of Rob Williamson filed in support of this Opposition as Exhibit 13 ("Williamson Decl.") It is respectfully submitted that this Court should follow the analysis made by Judges Pechman and Robart, and also consider the decisions of Judges Susan Craighead and Laura Inveen.[1]

This action involves violations of the Washington law prohibiting all automatic dialing and announcing devices (ADADs) for commercial solicitation, RCW 80.36.400 ("WADAD") which provides:

> (1) As used in this section: (a) An automatic dialing and announcing device is a device which automatically dials telephone numbers and plays a recorded message once a connection is made. (b) Commercial solicitation means the unsolicited initiation of a telephone conversation for the purpose of encouraging a person to purchase property, goods or services.
> (2) No person may use an automatic dialing and announcing device for purposes of commercial solicitation. This section applies to all commercial solicitation intended to be received by telephone customers within the state.
> (3) A violation of this section is a violation of chapter 19.86 RCW. It shall be presumed that damages to the recipient of commercial solicitations made using an automatic dialing and announcing device are five hundred dollars.

Plaintiff alleges that FOFI and the remaining Defendants placed ADADs to her telephone numbers to solicit her purchase of FOFI's products, namely pizza and other food items. The ADADs left the following prerecorded message:

> Hi, this is Dominos' Pizza with a special offer. To block these calls, press 3 during this call. If this is a voicemail, you can opt out by calling (866) 284-6198. (small pause)

[1] The plaintiff in *Cubbage v. Talbots* appealed the ruling of Judge Settle to the 9th Circuit, and the case was fully briefed and scheduled for oral argument. Two days before argument, Talbots and the other Defendant settled the case, and last week Judge Settle granted preliminary approval of the settlement.

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

> 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 Build-Your-Own up to 10 toppings for only $10. Hurry this is for today only and it's for carry-out or delivery. Please call (253) 535-5000 to place your order. Tax and delivery charge may apply.

Plaintiff alleges that these ADADs violate the WADAD and consequently the Washington Consumer Protection Act. Plaintiff requests statutory damages of $500 per ADAD, as well as declaratory and injunctive relief. FOFI contends the claims should be dismissed solely on the ground that no live "conversation" took place sufficient to bring the calls within the definition of illegal ADADs under RCW 80.36.400(1)(b).

II. STATEMENT OF FACTS

FOFI's statements concerning the procedural background of this litigation are substantially correct. Plaintiff has filed a motion to be relieved from deadline to respond to the Motion for Summary Judgment that was filed by Defendants Domino's Pizza, Inc. and Domino's Pizza, LLC ("Domino's") because said Defendants' Motion for Protective Order has not yet been ruled upon, and, therefore, discovery responses required by Plaintiff to respond to the Summary Judgment Motion have not yet been produced. Plaintiff has also filed a Motion to Compel Domino's to produce proper FRCP 30(b)(6) witnesses. This Summary Judgment Motion is not set for oral argument on March 30, 2012, but has been noted for that date.

FOFI's statement of the factual background is also substantially correct, certainly for purposes of responding to its motion. FOFI's gratuitous discussion of the involvement of Domino's is both irrelevant and unnecessary and should be ignored.

III. ISSUES

The Washington Legislature enacted the WADAD to prohibit all ADADs for purposes of commercial solicitation, with no exceptions. FOFI placed ADADs for commercial solicitation,

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslow.com

violating the statute. Accordingly, should this Court deny the Summary Judgment Motion of FOFI?

IV. ARGUMENT/AUTHORITY

A. RCW 80.36.400 DOES NOT REQUIRE THE INITIATION OF A CONVERSATION WITH A LIVE TELEMARKETER.

1. Four Courts Have Rejected FOFI's interpretation of RCW 80.36.400.

The Court should deny the motion to dismiss based on FOFI's disfavored construction of the WADAD. RCW 80.36.400 broadly provides that "[n]o person may use an [ADAD] for purposes of commercial solicitation." RCW 80.36.400(2). The statute "applies to **all** commercial solicitation intended to be received by telephone customers within the state." *Id.* (emphasis added).

FOFI contends:

1. Its calls are legal under the WADAD, based on the definition of commercial solicitation, which is "the unsolicited initiation of a **telephone conversation** for the purposes of encouraging a person to purchase property, goods, or services." RCW 80.36.400(1)(b).
2. It did not make ADADs for the purpose of "initiating a **telephone conversation**" and thus the calls cannot come within the statute's definition of "commercial solicitation."
3. The statute is clear and unambiguous in defining commercial solicitation to require that the prerecorded messages connect the called party to a live operator so that a "conversation" occurs.

FOFI relies on *Cubbage v. Talbots, Inc.,* in which Judge Settle construed the definition of commercial solicitation to require a two-way spoken exchange between live persons, excluding

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

the intrusive, illegal robo-calls with prerecorded messages that are the very target of the statute. The Court reasoned that ADADs leaving a recorded message:

> [D]o not consummate a transaction or present the risks attendant to high-pressure sales tactics after the recording is completed. It is therefore logical that the legislature would be most concerned with those calls that combined the use of automated dialing messages with the risks posed by conversation with a live solicitor seeking to consummate a sales transaction over the telephone.

Concluding that the statute is unambiguous and ignoring the legislative intent and history, Judge Settle dismissed Plaintiff Cubbage's claims because the ADADs "merely delivered a recorded message and provided no means whatsoever to have a telephone conversation with a live operator, or anyone else." *Cubbage,* at *5-6.

Since *Cubbage,* four decisions have rejected the argument of FOFI: Judge Laura Inveen of the King County Superior Court rejected the same argument in the case of *Hartman, et al. v. United Bank Card, Inc.* (Williamson Decl., Ex. 1). Judge Susan Craighead of the King County Superior Court rejected the same argument in the case of *MacLean v. Stellar Concepts & Design, Inc.* (Williamson Decl., Ex. 2). The Order in *MacLean* contains the court's denial without explanation, but at the close of argument, the Court gave her analysis orally:

> ...I come down to looking at the statute as a whole. I just can't see the term "conversation" being interpreted as literally[2] or narrowly, whatever we want to use there, as defendant suggests.
>
> I think in looking at the statute as a whole, the term "conversation" is ambiguous, and therefore we can look at legislative history.
>
> When I do that, it is clear that many of the people who spoke at the hearings, Mr. Jacobsen, all of those people who are involved, were as troubled by the making of the call as they were about the contents and who the recipient of the call may actually be speaking to.
>
> So to my mind, that supports the plaintiff's case at this point.
>
> So I'm going to deny the motion for summary judgment.

[2] By "literally," the Court meant "the image of a conversation being a dialogue between two people. I started out by asking you some questions about one-sided conversations. We still call them conversations, but you are right; they may appropriately be called monologues. That doesn't mean we don't call them conversations." Williamson Decl., Ex. 4 (Transcript of Oral Argument in *MacLean*), at p. 34.

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

(Williamson Decl., Ex. 4 (Transcript of Oral Argument in MacLean), at pp. 35-36).

Judge Marsha Pechman of the Western District of Washington rejected the same argument by distinguishing *Cubbage* in *Meilleur v. AT&T, Inc.* (Williamson Decl., Ex. 3):

> One court within this District has examined this same portion of the Washington ADAD and concluded that there is no violation where a person receives an automated call that merely attempts to convey information but does not initiate a conversation. *Cubbage v. Talbots, Inc.,*...("[T]he automated call simply provided information (albeit a solicitation to purchase goods at Talbots), without the ability of the caller or recipient of the call to engage in conversation"). Defendants rely on this case to suggest that Plaintiff has not stated a claim because the automated call he received was not a conversation. The case cannot be stretched as far as Defendants suggest.
>
> Plaintiff has alleged a violation of the Washington ADAD by virtue of the automated call he received that has been adequately alleged to be a "commercial solicitation." *See* RCW 80.36.400(2). A commercial solicitation is one that initiates a conversation. RCW 80.36.400(1)(b). The call Plaintiff received told him that [he] had been billed at AT&T's maximum rate and that he should call a toll-free number to speak to AT&T about it. ... 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. Thus, *Cubbage* does not command the Court to dismiss Plaintiff's state law claims. Instead, it supports a finding that the call here was the initiation of a conversation because it invited Plaintiff to call AT&T and buy its services. ... As Defendants recognize, whether the call was for a commercial purpose or not is a question of fact.

The recorded call here likewise initiated a dialogue with Plaintiff. It asked her to call the telephone number included in the recorded call in order to place an order for the advertised special, any large pizza for $10. Contrary to the claims of FOFI, the Washington law does not require that there be an actual telephone conversation between the called party and the robo-caller.

In *Hartman, et al. v. United Bank Card,* it was alleged that defendant International Payment Systems, on behalf of defendant United Bank Card, used automatic dialing and announcing devices to place prerecorded telephones calls to the plaintiffs. The prerecorded message was:

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

> Good morning, this is Nicole from UBC and I'm calling to inform you that because of your credit card processing history and the volume of your business, you qualify for a special program with record low rates and brand new equipment for accepting credit card payments from your customers absolutely free. Call me back today at toll free 866-858-4540. Again I can be reached at 866-858-4540. Thank you and I look forward to speaking with you soon.

Emphasizing the prohibition against the "initiation" of a unsolicited telephone conversation for the purpose of encouraging a person to purchase property, goods or services Judge Robart dismissed the argument of International Payment Systems that there needed to be a live conversation between the called party and the caller. Judge Robart found that the WADAD had a plain meeting that did not require a live conversation, and analyzed the legislative history and intent behind the WADAD and concluded:

> Based on the foregoing statutory analysis, the court examines the ADAD messages left by IPS. IPS's message informed the recipient that he or she may qualify for a special credit card program and then invited the recipient to return the phone call. (Mot. at 3; Resp. at 2.) The message also (twice) left a phone number for the caller to return the phone call. (Id.) Armed with this information, the recipient presumably could return the ADAD message and enter into an exchange of information or ideas with the caller, resulting in a conversation. Thus, IPS's message was the initiating step in consummating a conversation with the recipient. Accordingly, the court determines that IPS's messages fall squarely within WADAD's prohibition and the court denies IPS's motion to dismiss.
>
> (Order at 10-11)

The message left by FOFI is essentially the same as in *Hartman*. FOFI initiated a conversation with Plaintiff in the same way, namely providing information so Plaintiff could return the ADAD message and enter into an exchange of information ideas with the called, in this case to learn more about the specials and, of course as was planned by FOFI, to place an order for its products.

B. LEGISLATIVE INTENT

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

Judge Settle's decision and FOFI's argument ignore the Legislature's intent behind the WADAD, defy logic, and make RCW 80.36.400 virtually meaningless.[3] In construing a state statute, this Court must "interpret the law as would the [Washington] Supreme Court." *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1209 (9th Cir. 2010) (quoting *Planned Parenthood of Idaho, Inc. v. Wasden,* 376 F.3d 908, 925 (9th Cir. 2004)). Federal courts are "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." *American Civil Liberties Union of Nevada v. Heller,* 378 F.3d 979, 986 (9th Cir. 2004) (quoting *Stenberg v. Carhart,* 530 U.S. 914, 944 (2000)).

In Washington, if the meaning of a statute is plain and unambiguous on its face, then the court gives effect to that plain meaning. If there is more than one reasonable interpretation of the statute, then it is ambiguous and the court may turn to statutory construction, legislative history, and relevant case law to resolve the ambiguity. A term in a statute should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole. The court should not construe the statute in a manner that is strained or leads to absurd results. The court's paramount concern is to ensure that the statute is interpreted in a manner consistent with its underlying policy. *Overlake Hosp. Ass'n v. Dep't of Health of State of Washington*, 170 Wn.2d 43, 52 (2010).

In adopting RCW 80.36.400, the Washington Legislature made its intent crystal clear:

> The legislature finds that the use of automatic dialing and announcing devices for purposes of commercial solicitation (1) **Deprives consumers of the opportunity**

---

[3]The Washington Attorney General's Office agrees. As stated by Assistant Attorney General Shannon Smith in a *Seattle Times* article on October 3, 2010 in regard to Judge Settle's decision: "It nullifies the statute. It's a very narrow interpretation of the statute, and it eviscerates the whole intent of the Legislature. This ruling gives a green light to use automated dialing with impunity." *See also* the amicus brief filed by the Attorney General's Office in support of Plaintiff's position filed in *Cubbage v. Talbots* in the Ninth Circuit, Case. No. 10-35640, Dkt. 310, ID No. 7544764. A link to the brief is at: https://ecf.ca9.uscourts.gov/cmecf/servlet/TransportRoom?servlet=ShowDoc&dls_id=009022437389&caseId=208656&dktType=dktPublic. When accessing the brief, a PACER account is required.

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

> **to immediately question a seller about the veracity of their claims**; (2) subjects consumers to unwarranted invasions of their privacy; and (3) encourages inefficient and potentially harmful use of the telephone network. The legislature further finds that it is in the public interest to **prohibit the use of automatic dialing and announcing devices for purposes of commercial solicitation.**

Laws of 1986, Chapter 281 (emphasis added).

The legislative history behind RCW 80.36.400 overwhelmingly supports the Legislature's foremost intent to prohibit all ADAD solicitation calls—whether an ADAD that leaves a prerecorded message or an ADAD that also allows a connection to a live telemarketer. All ADADs for commercial solicitation are illegal in this State. There is nothing in the legislative history reflecting any intent to require that, in order to come within the prohibition, the ADAD connect the recipient to a live telemarketer. There is nothing showing any intent to exempt calls that merely leave a prerecorded message. There was no controversy or discussion within the Legislature whatsoever regarding use of the word "conversation" to mean anything other than playing a prerecorded message to a call recipient or the recipient's answering machine. (Williamson Decl., Exh. 5).

The legislative history contains absolutely no discussion of ADADs combined with live solicitation calls, and there is no evidence that, in 1986 when RCW 80.36.400 was enacted, the technology was even available to initiate such calls. While 25 years later, the technology has advanced significantly,[4] the Court can take judicial notice that, even today, ADAD calls that play

[4] ADADs have become increasingly cheap while the technology allows even greater numbers to be blasted. New technologies such as such as Voice over Internet Protocol ("VoIP" or "internet telephony") allow telemarketers to generate automated, inexpensive calls with ordinary computers. According to a 2001 profile of one telemarketer, "Voice Mail Broadcasting Corporation" could deliver 200,000 answering machine messages per hour. Kathryn Balint, *Ringing Endorsements*, San Diego Union Trib., May 6, 2001. *See also* Jesse Slome, *Telemarketing Media Targets Answering Machines, Voicemail*, Los Angeles Business Journal, Nov. 1, 1999 (in 1999, Voice Mail Broadcasting Corporation could make 1.5 million calls a day; could leave messages with 1% of the U.S. population over a two-day period; and when VMBC's technology was linked with Voice over Internet Protocol, at very low rates it could initiate even more calls, all at the expense of individuals' privacy.

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

a prerecorded message permitting the called party to opt through to a live person do not automatically connect to the live telemarketer; the called party must first select that option.

In fact, telephone solicitation by live telemarketers is not illegal Washington, with limited exceptions. The statute immediately before the prohibition on ADADs, RCW 80.36.390, requires that live telephone solicitors identify the company calling and the purpose of the call within the first 30 seconds of the call, and that they honor Do Not Call requests from consumers. But there are many exceptions and it does not otherwise regulate live telemarketing calls. Why would the Legislature ban only ADADs that permit connection to a live telemarketer when it did not ban direct calls from a live telemarketer? It would not and did not.

RCW 80.36.390 also employs the word "conversation,"[5] contemplating an exchange between a live telemarketer and the called party. In adopting RCW 80.36.400 governing ADADs, the Legislature picked up the word "conversation" from RCW 80.36.390. Harmonizing the two statutes as this Court must, *Overlake Hosp.*, 170 Wn.2d at 52 ("a term in a [statute] should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole"), and ensuring that the statute "is interpreted in a manner that is consistent

---

[5] "As used in this section, 'telephone solicitation' means the unsolicited initiation of a **telephone call** by a commercial or nonprofit company or organization to a residential telephone customer and **conversation** for the purpose of encouraging a person to purchase property, goods, or services or soliciting donations of money, property, goods, or services." But IPS neglects to explain that statute is aimed at regulating calls by live telemarketers, not a machines; it does not govern ADAD calls, as is apparent from the statute's content:

> (2) A person making a telephone solicitation must identify him or herself and the company or organization on whose behalf the solicitation is being made and the purpose of the call within the first thirty seconds of the telephone call.
>
> (3) If, at any time during the telephone contact, the called party states or indicates that he or she does not wish to be called again by the company or organization or wants to have his or her name and individual telephone number removed from the telephone lists used by the company or organization making the telephone solicitation, then:
>
> (a) The company or organization shall not make any additional telephone solicitation of the called party at that telephone number within a period of at least one year; and
>
> (b) The company or organization shall not sell or give the called party's name and telephone number to another company or organization: PROVIDED, that the company or organization may return the list, including the called party's name and telephone number, to the company or organization from which it received the list.

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

with [its] underlying policy", *id.,* the word "conversation" signifies that for commercial-solicitation ADADs to violate the law, the called party must hear a message.[6]

Demonstrating that the Legislature certainly intended to target calls that do not connect to a live person, it found that "the use of ADADs for commercial solicitation "**deprives consumers of the opportunity to immediately question sellers,** subjects customers to unwarranted invasions of their privacy, and encourages inefficient and potentially harmful use of the telephone network. The Legislature finds it is in the public interest to prohibit the use of ADADs for commercial solicitation." Laws of 1986, Chapter 281 (emphasis added). The only way an ADAD could deprive a consumer of the opportunity to immediately question the seller is if there is no live telemarketer on the line when the consumer receives the call.

Tapes from legislative committee hearings reveal that the bill intended first and foremost to prohibit **machines** (as opposed to live telemarketers) from calling, which is the exact opposite of what the *Cubbage* Court held. During the Senate Energy and Utilities Committee Meeting

---

[6]Both the Federal Communications Commission and the Federal Trade Commission, which regulate ADADs nationally, strictly limit the number of ADADs for which the telemarketer fails to provide a human connection within a matter of seconds ("abandoned" calls). 47 C.F.R. § 64.1200(a)(6); 16 C.F.R. § 310.4(b)(1). "The abandoned call provision was intended to address the problem of dropped calls resulting from the use of predictive dialers. A predictive dialer is an automated dialing system that automatically dials consumers' telephone numbers in a manner that 'predicts' the time when a consumer will answer the phone and a telemarketer will be available to take the call. Such software programs are set up in order to minimize the amount of downtime for a telemarketer. In some instances, however, no telemarketer is free to take a call that has been placed by a predictive dialer and the consumer answers the phone only to hear 'dead air' or a dialtone." *In re Matter of the Telephone Consumer Protection Act,* CG Docket 02-278, Notice of Proposed Rulemaking (Jan. 22, 2010), para. 44 n. 113.

Similarly, addressing the fact that using a live person on the call escapes the prohibition of the federal Telephone Consumer Protection Act regarding ADADs, commentator Robert Biggerstaff noted that debt collectors making ADADs "have a simple solution ... use a live human and not a robot. When a live person is on the other end of the line, the consumer can tell them that they have a wrong number and to stop calling. It is the automated nature of the calls that is the gravamen of the problem, and what Senator Hollings identified as 'telephone terrorism.'" Comments of Robert Biggerstaff On The Petition Of Paul D. S. Edwards, Docket No. 02-278, p. 2 (March 31, 2009).

Also by comparison, California has a long-standing law requiring that, to be legal, prerecorded messages must be introduced with a live speaker before the recorded message can be played. California Civil Code 1770(a)(22)(A)(prohibiting a prerecorded message to be disseminated "without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message").

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

Hearing on HB134, on April 1, 1985, sponsoring Senator Ken Jacobsen explained ADADs as follows:

> They basically work by programming in a set of numbers or by setting them off on a random dialing pattern where they will call every number in an exchange until **they make a connection and then they will play the message. ...**
>
> **This bill makes a number of findings; that the use of these devices deprives consumers of the opportunity to question sellers immediately about the veracity of their claims ...**
>
> **It essentially is a flat ban on the use of these ADADs. They are defined—it's a flat ban for the purposes of commercial solicitation. ...**

(Williamson Decl., Ex. 8, Page 3).

> The discussion ended on the point of our—we discussed what a nuisance these calls are...[I]t's quite difficult to work on the areas dealing with a person, an individual calling up somebody else, that's in the area of commercial free speech, and that very could possibly be a constitutional issue. But **when you're looking at a machine calling a person and asking if they wish to purchase goods and services, there isn't a constitutional problem with free speech... Machines in this country do not have free speech at this time.**

Id., Pages 5-6.

> [I]t's a real nuisance to leave the family dinner table to go to the phone and **answer a machine trying to sell goods or services.**

Id., Page 7 (all emphasis added).[7]

During floor action for final passage of Engrossed House Bill 134 on March 1 and March 10, 1986, another of the bill's sponsors, Senator Williams, urged the Senate to support HB134, "a bill that prohibits the...combined use of automatic dialing and announcing devices for commercial purposes," and the Senate unanimously voted to pass the bill that has been on the books since 1986. (Williamson Decl., Exh. 6).

---

[7] In addition, as reflected in the Declaration of Deborah Senn, attached as Exhibit 7 to the Williamson Declaration, who was the legal counsel to the Joint Select Committee on Telecommunications, a sub-committee of the Senate and House Energy and Utilities Committee, in 1985-86 when EHB 134 was brought before the Legislature, "...the sponsors of the Legislation intended EHB 134 to prohibit all ADADs for commercial solicitation, with no exceptions. Certainly the Legislature never intended to exempt ADADs that leave only prerecorded messages. The definition of commercial solicitation was never meant to require the initiation of a spoken exchange between a live telemarketer and the called party."

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

Our courts place great weight on testimony by a bill's sponsor. *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 785 P.2d 815 (1990) (en banc). In *Howell,* the Court considered the floor statements of a Bill's sponsors to carry more weight than other, contrary history, swaying the court to find intent as expressed by those Sponsors. Quoting a discussion on the floor by the House and Senate sponsors of the bill, the Court held:

> We believe, considering_this colloquy and **the specific assertions as to the intentions of the House and Senate sponsors of the legislation, that regardless of other evidence to the contrary, it was the intent** of the Legislature to make the addition of AIDS to RCW 70.54.120 prospective rather than retroactive.

Howell, at 51 (emphasis added).

Here, not only did Senators Jacobsen and Williams emphasize the law's goal to prohibit all ADADs for commercial solicitation, including those that do not give the opportunity to connect to a live person, but others confirmed that purpose. Gerald Paulette of WashPIRG testified they "strongly support this bill because we agree with Representative Jacobsen that it is necessary to allow people to close the door...to their home from certain types of obnoxious phone calls...Is a ban absolutely necessary? And we think the answer is yes... And the bottom line was, we actually discovered that there's no doubt about it, **we need an absolute ban on commercial solicitation using these computer devices. Nothing else is going to solve the problem."** Arnold Livingston, President of Senior Citizens' Lobby, also testified in favor of the bill. (Williamson Decl., Exh. 8, pgs. 3, 5-6, 10-12, 20-22) (emphasis added).[8]

In reporting on the enacted statute, then-Insurance Commissioner Dick Marquardt said nothing about requiring a live conversation:

---

[8] *See also* Williamson Decl., Exh. 9, for February 19, 1986 Senate Energy and Utilities Commission discussion of the bill, "which would prohibit the use of commercial dialing devices for this---to use, for the sales of goods and services."

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

> RCW 80.36.400 prohibits the use of devices which automatically dial telephone numbers and play a recorded message when a connection is made, for unsolicited commercial solicitations. The statute creates a presumption that a recipient of such a solicitation sustains damages of $500, recoverable under the consumer protection act, Chapter 19.86 RCW.

Insurance Bulletin 87-4 (September 24, 1987).

Earlier, in 1985, the Washington Legislature found that "telephone solicitations by commercial and charitable organizations are increasing and that such solicitations cause increasing intrusions on the legitimate privacy rights of Washington citizens." The Legislature commissioned the Utilities and Transportation Commission to conduct a study of telephone solicitations in Washington (Williamson Decl., Exh. 10). The study, published in January 1986, examined 75 residential telephone subscribers in Washington, and reported that "over 75% responded to telephone solicitation for commercial purposes as not at all acceptable." (Williamson Decl., Exh. 11, pg. 4-2).

The focus throughout the history of this law was to curb the annoyance of ADADs for commercial solicitation, with no exceptions for those leaving only a prerecorded message.

C. FOFI'S READING OF RCW 80.36.400 WOULD EVISCERATE THE PROHIBITION AGAINST ALL ADADS FOR COMMERCIAL SOLICITATION.

Despite having this legislative history before it, the *Cubbage* Court stated, "It is therefore logical that the legislature would be most concerned with those calls that combined the use of automated dialing messages with the risks posed by conversation with a live solicitor seeking to consummate a sales transaction over the telephone." *Cubbage,* at *5. But, as shown above, the Legislature was concerned with no such thing. *See* Declaration of Ken Jacobsen attached as Exhibit 12 to the Williamson Declaration.

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

Under FOFI's and Judge Settle's interpretation, to avoid violating RCW 80.36.400, all retailers and telemarketers need do is blast ADAD solicitation messages to Washington residences and businesses using equipment that does **not** permit the answering party to make an interactive selection or to opt through to speak with a live person. This absurd result would effectively nullify RCW 80.36.400 and fail to protect Washington citizens and businesses from the plague of ADAD solicitation calls. This Court cannot allow such destruction of the law. *See Overlake Hosp.,* 170 Wn.2d at 52. *See also Post v. City of Tacoma,* 167 Wn.2d 300, 311 (2009)("[a] reading that produces absurd results should be avoided, if possible, because we presume the legislature does not intend them").

A regulation of the Washington Utilities and Transportation Commission also supports Plaintiff's interpretation of Washington law: "(3) This rule regulates the use of ADADs for purposes other than commercial solicitation. RCW 80.36.400 prohibits the use of an ADAD for purposes of commercial solicitation intended to be received by telephone consumers within the state." The Utilities and Transportation Commission did not promulgate regulations concerning the use of ADADs for purposes of commercial solicitation because the Legislature banned such ADADs completely when it enacted RCW 80.36.400., so there was no reason to do so.

The plain language and common sense analysis of RCW 80.36.400 also rebuts FOFI's position. While the statute does not define the word "conversation", it bans prerecorded messages. One cannot have a conversation with a message machine like one has with another person, so the word "conversation" in the statute cannot have the dictionary definition adopted in *Cubbage*. The type of ADAD device which retailers and telemarketers are prohibited from using to send messages to Washington consumers is the type that "automatically dials telephone numbers and plays a recorded message once a connection is made." RCW 80.36.400(1)(a). It is

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

the playing of the message to a live person or a person's answering machine that constitutes the two-way "conversation" for purposes of RCW 80.36.400(b).[9] Indeed, if an ADAD machine calls a Washington consumer but **fails** to leave a prerecorded message, it could be said that the ADAD did not violate RCW 80.36.400.[10]

The Attorney General of Washington agrees. As indicated above, the Washington Attorney General submitted an amicus brief rejecting the opinion of Judge Settle to the Ninth Circuit Court of Appeals in support of the appeal of that decision. The Attorney General's amicus brief is at the link provided in footnote 4 above.

D. STATUTORY CONSTRUCTION PRINCIPLES DO NOT REQUIRE THE COURT TO STOP AT ONE TERM'S DICTIONARY DEFINITION IN ISOLATION.

Overarching principles articulated by the United States Supreme Court hold that statutory construction is a "holistic endeavor." *E.g., United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. 365, 371 (1988). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme-because … only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.* at 371 (citations omitted).

> The definition of words in isolation … is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading

---

[9] In *Noel v. Hall*, 568 F.3d 743, 750 (9th Cir. 2009), a Wiretap Act case, the Ninth Circuit Court of Appeals employed similar reasoning in discussing its decision in *United States v. Smith,* 155 F.3d 1051 (9th Cir.1998): "voicemail messages are the same as phone conversations for the purposes of the Act because they are a part of the original 'aural transfer' between parties to the communication. If A divulges a secret to B on the phone, her conversation is protected; if B is not at home and A leaves the same secret on the voicemail for B to retrieve later, that message is also protected."

[10] This is the holding of a recent unpublished, nonbinding Ninth Circuit decision affirming dismissal of a WADAD claim. According to *Williams v. MCIMetro Access Transmission Services, LLC*, 363 Fed. Appx. 518, 2010 WL 331475 (9th Cir. January 28, 2010), an ADAD "'automatically dials telephone numbers *and plays a recorded message once a connection is made.*' RCW 80.36.400(1)(a)(emphasis added). Thus, the use of a device that merely automatically dials telephone numbers--but does not play a recorded message once a connection is made--does not violate RCW 80.36.400." *Id.* at *1.

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

> the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."

Dolan v. USPS, 546 U.S. 481, 486 (2006) (citations omitted). *See also, e.g., King v. St. Vincent's Hosp.,* 502 U.S. 215, 221 (1991) ("we … follow the cardinal rule that a statute is to be read as a whole … since the meaning of statutory language, plain or not, depends on context").

The "plain meaning rule" intoned by FOFI does not permit the court to stop at the dictionary definition of a single word. "[C]ommon sense suggests that inquiry benefits from reviewing additional information rather than from ignoring it". *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 611 n.4 (1991); *United States v. American Trucking Assns., Inc.,* 310 U.S. 534, 543-44 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination' " (footnote omitted)); *United States v. Fisher,* 2 Cranch 358, 386 (1805) (Marshall, C.J.) ("Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived"). Courts execute their duty most faithfully when they arrive at an interpretation only after "seek[ing] guidance from every reliable source." A. Barak, *Judicial Discretion* 62 (Y. Kaufmann transl. 1989).

Washington law is in accord. "Statutory construction begins by reading the text of the statute." *State v. Roggenkamp,* 153 Wn.2d 614, 621 (2005). "When we read a statute, we must read it as a whole and give effect to all language used." *In re Pers. Restraint of Skylstad,* 160 Wn.2d 944, 948 (2007). "We give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute." *C.J.C. v. Corp. of Catholic Bishop,* 138 Wn.2d 699, 708 (1999).

The WADAD (like the federal Telephone Consumer Protection Act, 47 U.S.C. § 227, ("TCPA"), is a remedial consumer protection statute. The Court cannot ignore the legislative

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

intent, "which calls for a broad construction of [the statute's] terms in favor of the consumer." *Ramirez v. Apex Fin. Mgmt., LLC,* 567 F.Supp.2d 1035, 1041-42 (N.D.Ill. 2008) (addressing FDCPA). Interpreting the WADAD as would the Washington Supreme Court, this Court is "without power" to narrow its meaning unless such a construction is "reasonable and readily apparent." *American Civil Liberties Union of Nevada v. Heller,* 378 F.3d 979, 986 (9th Cir. 2004) (U.S. Supreme Court quotation omitted). Yet the *Cubbage* Court's singular reliance on "conversation" ignores what other courts presented with similar questions do—they construe a statute holistically, in context, informing themselves with the purpose and context and any authority that informs the analysis.

A close example is this Court's decision in *Satterfield v. Simon & Schuster, Inc.,* 569 F.3d. 946 (9th Cir. 2009), interpreting the word "call" in the TCPA, 47 U.S.C. § 227, which prohibits any "call" using an ADAD. The court found "call" included more than the common usage of "oral communication by phone", noting that "text messaging is a form of communication used primarily between telephones" and is therefore consistent with the definition of "call." *Id.* at 954. *Satterfield* observed that Congress found cheap, pervasive telemarketing practices in the form of non-human "calls" needed to be controlled, and intended to restrict unsolicited, automated advertisements and solicitations by telephonic means. So did the Washington Legislature in enacting the WADAD. The Washington Legislature's intent to prohibit **all** ADADs for commercial solicitation does not evaporate simply because it did not use the words "human" or "live" to restrict "conversation."

In *Lozano v. Twentieth Century Fox Film Corp.,* 702 F.Supp.2d 999, 1003 (N.D. Ill. 2010), the court followed *Satterfield's* and other decisions' application of statutory construction principles to conclude the word "call" in the TCPA includes text messages:

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

> [I]t is clear that the term "call" cannot invoke only the common usage suggested by Defendants in which a "call" refers to oral communication between two parties via telephone. *See, e.g., Abbas v. Selling Source, LLC,* 2009 WL 4884471 (N.D.Ill. Dec. 14, 2009) ("[N]either the above-quoted dictionary definition nor the TCPA requires that a 'call' be 'oral.' Indeed, if such a requirement existed, the TCPA's prohibition on calls to 'a paging service,' would be of little effect.") (internal citation omitted).

The *Lozano* court concluded "call" is an ambiguous term. As in that case, FOFI's arguments refute its position that "conversation" is unambiguous, and instead make it appear highly ambiguous.[11]

Here, the plain meaning of "initiation of a telephone conversation" does not prohibit the WADAD from barring ADADs "initiated" by a machine only. Nothing in the statute or elsewhere requires that a live telemarketer be involved at all.

Lozano also concluded that telemarketers read the TCPA too narrowly when they contend Congress's key objective was to limit the ability of automatic dialers to tie up a recipient's phone line (just as the *Cubbage* Court read the WADAD too narrowly as targeting live, high-pressure salespeople). Rather, Congress and the Washington Legislature sought primarily to "protect the privacy interests of telephone subscribers." *Satterfield,* at 954 ("[t]he purpose and history of the TCPA indicate that Congress was trying to prohibit the use of [ADADs] to communicate with others by telephone in a manner that would be an invasion of privacy" and therefore "a voice message or text message are not distinguishable in being an invasion of privacy"). *Lozano,* at 1007. *See also Abbas,* 2009 WL 4884471, at *4 (neither the dictionary definition nor the TCPA requires that a 'call' be 'oral'"); *Mark v. J.C. Christensen & Associates, Inc.,* 2009 WL 2407700 (D.Minn. Aug. 4, 2009) ("communication" in the FDCPA covers ADADs leaving prerecorded

---

[11] *See also Critchfield Physical Therapy v. Taranto Group, Inc.*, 263 P.3d 767 (Kan. 2011) ("Through the plain language of the statute, Congress clearly intended to restrict business in *sending* unsolicited fax advertising. This interpretation is consistent with opinions interpreting the word "call" in the TCPA to include *attempts* to make telephone calls, even when the call was not completed.")

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

messages; rejecting argument that one section of the FDCPA uses "communication" while another uses "conduct"). Thus, the TCPA and the FDCPA's reach goes well beyond those using a live telemarketer; that is the only construction consistent with Congress's intent. *See Ramirez v. Apex Fin. Mgmt., LLC,* 567 F.Supp.2d 1035, 1041-42 (N.D. Ill. 2008) ("narrow interpretation" fails to recognize the FDCPA's legislative intent in favor of consumer).

As for the other Washington statutes FOFI cites, RCW 19.158.040 prohibits professional telemarketers making live solicitation calls from engaging in unfair or deceptive solicitation, calling residences before 8 am or after 9 pm, and harassing, intimidating or tormenting called parties, but it does not ban live telemarketing calls. RCW 19.158.20 (definition in that statute for "commercial solicitation") has absolutely nothing to do with machines; the chapter governs live commercial telephone solicitation. RCW 9.73.095, a criminal statute applying to conversations by criminal offenders within state corrections facilities, and RCW 9.61.230, another criminal statute addressing the crime of telephone harassment, have nothing to do with ADADs for commercial solicitation. There is no reason for the Court to consider, much less harmonize, them.

E. EVEN UNDER *CUBBAGE*, FOFI'S ADADS VIOLATE RCW 80.36.400.

Even Judge Settle would find that the FOFI ADAD solicitation message violated RCW 80.36.400 because it provided the called party with a way to speak with a live person. Judge Settle did not hold that **all** ADAD solicitations in Washington are permitted by RCW 80.36.400:

> It is evident from these definitions that the mere transmittal of a recorded message is not a conversation. The prerecorded call did not initiate a spoken exchange between two or more people…Here, the automated call simply provided information (albeit, a solicitation to purchase goods at Talbots), without the ability of the caller or recipient of the call to engage in conversation. The call merely delivered a recorded message and provided no means whatsoever to have a telephone conversation with a live operator, or anyone else. Because the call

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

> could only deliver a recorded message, and because, as a result, no "telephone conversation" could ensue, no violation of RCW 80.36.400 has been shown.

Cubbage, at *5-6. The FOFI prerecorded message was the opposite of one offering no means to have a telephone conversation with another person: the message urges, "Please call 253-535-5000 to place your order". Plaintiff had every reason to believe were she to call, she would speak with a live person who could provide them with more information about the "special offer", the very "sales pitch" (*Cubbage,* at *5) that Judge Settle was concerned about. The request to call back differs from the "straight advertisement" form of message involved in *Cubbage*. While Judge Inveen recognized in *Ed Hartman, et al. v United Bank Card, Inc.,* that both forms of messages are prohibited by RCW 80.36.400, even under Judge Settle's reasoning in *Cubbage,* the FOFI message violates the statute.

V. CONCLUSION

There is simply no support in RCW 80.36.400, its legislative purpose for enactment, or the legislative history for FOFI's interpretation. Washington's statue imposes an absolute ban on ADAD solicitation telephone calls which leave prerecorded messages within our state. Even under *Cubbage,* the messages initiated a telephone conversation by instructing Plaintiff to call Domino's. Since the calls received by Plaintiff were ADADs for commercial solicitation, FOFI's actions in initiating the calls violated RCW 80.36.400, and Plaintiff should be permitted to redress this violation. Plaintiff asks the Court to deny the Motion.

///

///

///

///

WILLIAMSON & WILLIAMS
17253 AGATE STREET NE
BAINBRIDGE ISLAND, WA 98110
(206) 780-4447
(206) 780-5557 (FAX)
www.williamslaw.com

DATED: March 26, 2012.

WILLIAMSON & WILLIAMS

By: /s/ Rob Williamson
Rob Williamson, WSBA #11387
Email: roblin@williamslaw.com
Kim Williams, WSBA #9077
Email: kim@williamslaw.com
17253 Agate Street NE
Bainbridge Island, Washington 98110
Telephone: 206.780.4447
Facsimile: 206.780.5557

Attorneys for Plaintiff