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

FOUR OUR FAMILIES, INC.'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

NOTE ON MOTION CALENDAR: March 30, 2012

I. INTRODUCTION

Plaintiff attempts to direct the Court to look to statutory construction and legislative history instead of the plain meaning of the term "conversation" in RCW 80.36.400(1)(b). Plaintiff's counsel engaged in these same tactics in *Cubbage v. Talbots* by providing lobbyist statements, surveys, etc. Judge Settle determined RCW 80.36.400 was unambiguous and looked to the dictionary definition. Cubbage, No. C09-911 BHS, 2010 WL 2710628 (W.D. Wash. 2010). *Meilleur v. AT&T* distinguished *Cubbage*. *Meilleur v. AT&T, Inc.*, No. C11-

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1025 MJP, 2011 WL 5592647. In doing so, Judge Pechman did not look to legislative history and agreed that a conversation was required to violate the statute. She chose not to follow an expansive definition of a "conversation" as *Cubbage*. This was simply due to the set of facts presented in *Meiuller* and nothing more. AT&T engaged in a practice that was deceitful to its customers forcing them to call back, by eliminating any choice on the part of the consumer.

Judge Robart, in Hartman v. United Bank Card, found the undefined term "conversation" had a plain meaning; he also recognized that the legislature chose to use two distinct terms "telephone conversation" in RCW 80.36.400 versus "telephone call" in RCW 80.36.390. *Hartman v. UBC*, No. C11-1753JLR (W.D. Wash. 2012). This distinction is very important. This is important because a conversation encompasses an interaction between two or more parties, versus a call which involves no interaction. He, too, looked at the message left by the recipient to decide if a "conversation" occurred.

FOFI argues that it did not engage in an exchange of opinions, thoughts, and ideas with the Plaintiff. It did not coerce Plaintiff to call it back. It conveyed a special offer to Plaintiff, who was a customer of FOFI, to buy a specific pizza for a specific price. There was no need to call back to receive more information in order to find out further details. There is a difference between misleading sales tactics and a message that conveys factual information to a company's customer. In fact, plaintiff does not allege that the FOFI message was misleading.

II. STATEMENT OF THE FACTS

Plaintiff, in her response, concedes there is no genuine issue of material fact. [dkt. no. 83, Plaintiff's Response 3]. Anderson, at the time of the call was a customer of FOFI.

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FOFI made the call to Plaintiff through its agent CEA. Domino's did not make the call to Plaintiff. There is no dispute that the message that played for Plaintiff was entirely automated and during the call Plaintiff could not speak to a live person or have a conversation with another person. Even though the technology is available, CEA did not have the equipment to connect the recipient to a live person. The call disconnected after the message played. Due to CEA being an agent of FOFI and acting under its direction and control, it should be dismissed from this action.

III. ARGUMENT

A. The Plain Meaning

Plaintiff suggests the Court is to look to the statutory construction, legislative history and relevant case law rather than the plain meaning of the term "conversation". She believes RCW 80.36.400 is unclear and ambiguous and attempts to "seek refuge in a morass of vague, conflicting, unhelpful comments provided prior to the passage of the statute (principally comments of partisan lobbyists)".[1] FOFI vehemently disagrees.

"Plain language does not require construction." See *State v. Van Woerden*, 93 Wn. App. 110, 116, 967 P.2d 14, 17 (1998). Words, that are not defined by the statute specifically, are then to be given their ordinary meaning by way of a dictionary definition. *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)); *State v. Standifer*, 110 Wn.2d 90, 92 (1988). In the Western District of

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[1] Cited from SmartReply's Reply in Support of Talbot's Motion for Summary Judgment. *Cubbage v. Talbots*, C09-00911-BHS, pg. 6 of 13 [dkt. no. 69].

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Washington, three judges have looked only to the plain meaning of the statute, ignoring the legislative intent. Judge Settle, in *Cubbage v. Talbots*, paved the way by interpreting the WADAD statute by looking ONLY to the plain meaning of the term "conversation"; he examined many dictionary definitions and came to the conclusion that the word had clear and consistent meanings. *Cubbage* at *5. In *Meilluer v. AT&T*, Judge Pechman did not look to the legislative history, but only the interpretation provided in *Cubbage* that focused on the requirement of a conversation. *Meilluer* at 6-7. Finally, Judge Robart in *Hartman v. UBC*, like *Cubbage*, only looked to the dictionary definition of a "conversation". *Hartman* at 9.[2]

This Court should not accept plaintiff's argument which would require ignoring the plain language of the statute and established precedence. *Hartman* concluded that the requirement of a conversation does not make RCW 80.36.400 "virtually meaningless" as Plaintiff claims. The legislature purposely chose to use different terms in RCW 80.36.390 ("telephone call") and RCW 80.36.400 ("telephone conversation").

> "The plain statutory language of RCW 80.36.390 differentiates between the initiation of a telephone "call" and the initiation of a telephone conversation, and therefore, the court will afford the words "call and "conversation" different meanings. *Hartman* at 9 (citing *State v. Flores*, 186 P.3e 1038, 1044 (Wash. 2008); *City of Seattle v. Allison*, 59 P.3d 85, 88 (Wash. 2002). "As a result of this finding, Plaintiff's interpretation that WADAD prohibits all ADAD telephone calls is misplaced." *Hartman* at 9.

This is further illustrated by the statutes provided in FOFI's Motion (RCW 9.61.301, 9.73.095, 19.158.20) where the terms "call" and "conversation" were distinctly used like in RCW 80.36.390 and 80.36.400. Plaintiff is correct that the statutes described in FOFI's motion do not discuss automated messages/calls, but that is not the reason they were

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[2] Page 9 of Exhibit 13 to Plaintiff's Opposition [dkt. no. 84-4]- Order from *Hartman v. UBC*.

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provided. They were provided to illustrate that the legislature uses specific terms in a statute to achieve its purpose as Judge Robart recognized in Hartman.

Plaintiff discusses two state court cases decided in King County Superior Court where the judges have fallen for counsel's distractions. Those cases should have no weight with the Court. Plaintiff also discusses cases outside of this jurisdiction and discuss whether a text message is considered a "call" under the TCPA (a statute that is no longer at issue for Plaintiff) and discusses a FTC rule that was not implemented at the time the call was made to Plaintiff; therefore, they should have no bearing on this Court.[3] Legislative history was never consulted, examined or determined relevant in this Court's analysis. It should bear no weight on the Court today.

It has been established that a conversation is required to violate the statute as discussed above. The issue before the Court is whether the content of FOFI's specific message qualified as a conversation with Plaintiff. "A distinction may be made between prerecorded calls that initiate a conversation and those that simply convey information without interaction with the recipient." *Cubbage* at *5.

B. A conversation did not occur

FOFI has supplied many dictionary definitions of the word "conversation" and Plaintiff has submitted none. Instead, Plaintiff creates her own definition that "playing of a message to a live person...constitutes a two way conversation for purposes of RCW 80.36.400(b)." (Opp. at 15). RCW 80.36.400 requires the playing of a message and a conversation to occur after the message has played. A conversation is an "informal interchange of thoughts,

[3] Plaintiff's citation to Federal Trade Commisssion Rules is irrelevant to this case as the FTC's prerecorded message rules have changed since the call that is the subject of this lawsuit was placed. Plaintiff's Opposition, n. 6; see Federal Trade Commission Final Rule Amendments, 60 C.F.R. Part 310, RIN3084-A98, effective September 1, 2009.

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information, etc. by spoken words; oral communication between persons; an oral exchange of sentiments, opinions, or ideas." *Cubbage* at *5. 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. *Cubbage* recognized a distinction between the initiation of a conversation and the conveyance of information without interaction with the recipient. The playing of a tape does not "present the risks attendant to high-pressure sales tactics after the recording is completed." *Id.*

There is a reason Judge Pechman distinguished *Cubbage* from *Meilluer. Cubbage* merely advertised a sale where AT&T left no choice, but to return its' call. The message AT&T left the recipient was "someone in your household has made international calls on your phone that have been billed at AT&T's maximum rate and it urged Meilluer to call AT&T back at a toll-free number." *Meilluer* at *7. When Meilluer called AT&T, it then notified him that he was paying too much for his long distance service and that AT&T could offer a better rate. Id. He was not a customer of AT&T. *Meilluer* at *1. AT&T engaged in high pressure sales tactics; the exact tactics the legislature is trying to prohibit. *Meiuller* at *7. Talbots merely advertised a sale to Cubbage. *Id.*

Plaintiff then claims there has been a violation of the statute because the customer is encouraged to call for more information. AT&T and UBC forced the consumer, with whom they did not have an established business relationship, to listen to the prerecorded message (the delivery) and a "sales pitch" when the call was returned by the recipient (the "conversation"). The message UBC left Hartman stated, "you may qualify for special credit

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card program and asked the recipient to return the call." *Hartman* at 11. Both Talbots & FOFI, in this case, delivered a recorded message and did not engage Plaintiff in a conversation. It delivered facts. The consumer knew the offer without having to call back. There were no hidden details, no high pressure sales tactics. Anderson had the knowledge and choice to decide whether she wanted a $10 pizza or not once she hung up.

The *Cubbage* court went on to state the WADAD "prohibits the use of automatic dialing announcing devices to contact persons and play recordings in hopes of initiating a conversation with a live operator (e.g. , to make a sales pitch)." Id. The goal of FOFI's call was to provide information, rather than to have a live operator in any way pressure a customer to purchase their products over the telephone. The message was a "straight advertisement". The type of efforts FOFI engaged in was the same as sending a flyer with coupons in the mail addressed to a specific recipient. The message was an invitation to purchase by calling, visiting the store or website when the customer was ready to make a purchase. The message informed the recipient of a one day sale leaving it entirely up to the customer to decide later if she wanted to "shop" at her local Domino's franchise.

The message created by FOFI is identical to that of Talbots. The messages are provided below for comparison:

> Hi, it's Julie calling from Talbots with a reminder that you have only a few days left to take advantage of your exclusive 20% savings pass and free shipping offer. Now through this Saturday, May 2nd enjoy 20% off your merchandise purchase every time you shop Talbots and free shipping when you order online at Talbots.com or through our catalog at 1-800-Talbots. Plus class awards members eanr double points on their purchases through May 2nd too. For more information or to choose whether to receive future messages about exclusive offers and promotions, call 1-800-699-4051. Spring is in full bloom at Talbots. Shop early and often for the best selection of our latest fashions. Can't make it into the store? Simply use the offer code on your savings pass when you call 1-800-Talbots or shop at Talbots.com by May 2nd. Thank you for shopping at Talbots.

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Dkt. No. 63 of *Cubbage v. Talbots*, C09-911BHS

> 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 to FOFI's Motion.

Even though the industries and the subject matter of the messages are different, the content of the messages are identical. The Court in *Cubbage* found no conversation to have taken place and encourages this Court to follow suit. FOFI's call may have invited a subsequent conversation or store visit at the initiation of the recipient. FOFI's message was an unilateral conveyance of information. There was no exchange of opinions, thoughts, or ideas. FOFI left its store's general telephone number for three reasons; (1) it is required by the Telephone Consumer Protection Act, 47 USC §227, et seq.; (2) the Domino's phone number is the store identifier (not all Domino's stores were participating), and (3) pizza delivery is primarily driven by the customer purchasing his/her order by telephone versus visiting a retail store like Talbots. A pizza delivery company leaving its telephone number is equivalent to Talbots asking its customers to visit the store or go online to purchase its products. Talbots did leave a phone number to call in order to make a catalog purchase at 1-800-Talbots and provided a website at Talbots.com. *Cubbage* at *1 (citing dkt. no. 63). A conversation was still not found to have taken place. The message was not misleading like in *Meilluer*, nor did it lack information like *Hartman*.

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IV. CONCLUSION

The precedence of this Court is clear: RCW 80.36.400(1)(b) is clear and unambiguous and "conversation" is afforded a plain meaning. There is no need to look to the legislative history. A telephone conversation is required to violate the statute versus a telephone call as Plaintiff proposes. A "conversation" is the spoken exchange of thoughts, opinions, ideas, etc. FOFI did no such thing. It conveyed a special offer to the Plaintiff, a customer of FOFI, to buy a specific pizza for a specific price. The message was not misleading; it did not engage in high pressure sales tactics like in *Meilluer* and *Hartman*. Like *Cubbage*, FOFI conveyed all of the factual details of the sale to its customer. There was no need to call FOFI except to actually purchase the advertised special.

CEA and Domino's did not make the calls and therefore should be dismissed in this action. Plaintiff conceded there was no dispute of FOFI's statement of facts. (Opp. 3). "FOFI's statement of the factual background is also substantially correct, certainly for purposes of responding to its motion." (Opp. 3, ¶ 21). Due to the lack of a conversation, all of Plaintiff's state and federal claims against the Defendants should be dismissed. FOFI respectfully requests its Motion for Summary Judgment be granted.

Dated at Lakewood, Washington this 30th day of March, 2012.

/s Nelson C. Fraley, II
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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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