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Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

CAROLYN ANDERSON, )  
)  
Plaintiff, )  
)  
vs. )  
)  
DOMINO'S PIZZA, INC., DOMINO'S )  
PIZZA, LLC, FOUR OUR FAMILIES, )  
INC., and CALL-EM-ALL, LLC, )  
)  
Defendants. )

CIVIL ACTION NO. C11-902-RBL  
  
DOMINO'S PIZZA, INC. AND  
DOMINO'S PIZZA, LLC REPLY TO  
PLAINTIFF'S RESPONSE TO FOUR  
OUR FAMILIES, INC.'S MOTION FOR  
SUMMARY JUDGMENT  
  
**HEARING DATE: March 30, 2012**

I. Plaintiff has conceded in her opposition brief that she is not pursuing claims under the Federal Telephone Consumer Protection Act. All of plaintiff's claims arise out of the Washington State statute, RCW 80.36.400. The language in RCW 80.36.400 is clear and unambiguous. There is no need to rely on legislative history.

RCW 80.36.400 defines two terms used in the statute. The term "automatic dialing and announcing device" is defined in RCW 80.36.400(1)(a). The term "commercial solicitation" is

DOMINO'S REPLY TO PL'S RESPONSE  
TO FOUR OUR FAMILIES SUMMARY JUDGMENT - 1

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1 defined in the statute in RCW 80.36.400(1)(b). Commercial solicitation as used in RCW  
2 80.35.400 means “the unsolicited initiation of a telephone conversation for the purpose of  
3 engaging a person to purchase property, goods or services”. When the definition of commercial  
4 solicitation is inserted into RCW 80.36.400(2), the statute reads as follows: “No person may use  
5 an automatic dialing and announcing device for the purposes of ‘the unsolicited initiation of a  
6 telephone conversation for the purpose of engaging a person to purchase property, goods or  
7 services.’” The Washington legislature could have chosen to simply use the term “telephone  
8 call” instead of using and defining the term “commercial solicitation”. It chose not to use the  
9 broader term.  
10

11  
12 While the statute in question does not define the term “conversation”, the word  
13 “conversation” has a plain meaning that under Washington law controls its scope. See *State v.*  
14 *Van Woerden*, 93 Wn.App.110, 116, 967 P.2d 14, 17 (1998). As the Court of Appeals in *Van*  
15 *Woerden* explains, Courts look first at the plain language of the statute to ascertain its meaning.  
16 “Plain language”, the Court explained, “does not require construction”. “When a statutory term  
17 is undefined, we may look to a dictionary for its ordinary meaning. The dictionary definitions of  
18 the word “conversation” are clear and consistent. A conversation is an “informal interchange of  
19 thoughts, information, etc. by spoken words; oral communication between persons; talk;  
20 colloquy,” or “an instance of this”. Random House Dictionary (2010). A conversation is “the  
21 spoken exchange of thoughts, opinions and feelings; talk”. The American Heritage Dictionary of  
22 the English Language (4<sup>th</sup> Ed. 2009). Finally, the Merriam-Webster Online Dictionary (2010)  
23

24  
25 DOMINO'S REPLY TO PL'S RESPONSE  
26 TO FOUR OUR FAMILIES SUMMARY JUDGMENT - 2

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1 defines the term conversation as “an oral exchange of sentiments, observations, opinions, or  
2 ideas” or “instance of such exchange”.

3  
4 The Washington State Supreme Court defined the term “conversation” in the case of  
5 *State vs. Smith*, 85 Wash.2d 840, 540 P.2d 424 (1975). In that case the statute that was construed  
6 was RCW 9.73.030 which prohibited the recording of a private conversation without the consent  
7 of all parties. The Court acknowledged that the facts in *State vs. Smith, supra*, were very bizarre.  
8 An off duty police officer shot and killed an informant who had a tape recorder under his  
9 clothing. The tape recorder recorded the events that transpired. These included shouting by both  
10 the victim, Kyreacos, and the defendant, Smith, gun fire and running. The Court held that these  
11 do not constitute a “private conversation” within the meaning of the statute. The Court held the  
12 tape recording did not violate RCW 9.73.030(2) and was admissible. In reaching this  
13 conclusion, the Court defined the term “conversation” as meaning an “oral exchange, discourse  
14 or discussion”. In the case at bar, it is impossible for the recipient of a pre-recorded call to have  
15 “an oral exchange, discourse or discussion” with a machine. The call at issue could not lead to a  
16 telephone conversation. It only delivered a pre-recorded message. Plainly, it fell outside the  
17 clear language of RCW 80.36.400.  
18  
19  
20

21 In other Washington statutes, the law clearly distinguishes between communications –  
22 which are the one sided delivery of information and “conversations” which require an exchange  
23 of information between at least two parties. For example, RCW 9.61.300 in defining the

24 DOMINO'S REPLY TO PL'S RESPONSE  
25 TO FOUR OUR FAMILIES SUMMARY JUDGMENT -3

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1 criminal act of telephone harassments, notes that it can be violated by a "telephone call to other  
2 such person", noting that liability attaches "whether or not a conversation ensues".

3  
4 In RCW 9.73.095, a statute prohibiting the interception, recording and divulging of  
5 offender conversations, the law recognizes that conversations are communications between at  
6 least two persons, and provides special protection for "any conversation between an offender or  
7 resident and an attorney".  
8

9  
10 RCW 80.36.390 contains a definition of "telephone solicitation" to be "used in this  
11 section" only. In RCW 80.36.390, telephone solicitation is defined as "the unsolicited initiation  
12 of a telephone call". The use of the word "call" is in sharp contrast to the very next statutory  
13 section, RCW 80.36.400 which uses the word "conversation" instead of "call". Deliberately  
14 choosing to differentiate terms, the Legislature clearly knew the difference between the initiation  
15 of a "telephone call" and the initiation of a "telephone conversation".  
16

17 RCW 19.158.020 also distinguishes between a call and a conversation. RCW 19.158.020  
18 defines "commercial telephone solicitation" as "an unsolicited **call** to a person initiated by a  
19 salesman and a **conversation** for the purpose of inducing the person to purchase or invest in  
20 property, goods or services". RCW 19.158.020(2). (Emphasis Added). This definition uses the  
21 term "call" and "conversation" to refer to two entirely different concepts. To trigger the terms of  
22 RCW 80.36.400, a conversation has to take place. Merely placing a call and playing a recorded  
23 message is not enough to invoke the terms of RCW 80.36.400. The definition of "commercial  
24

25 DOMINO'S REPLY TO PL'S RESPONSE  
26 TO FOUR OUR FAMILIES SUMMARY JUDGMENT -4

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1 telephone solicitation” in RCW 19.158.020 dovetails perfectly with defendants’ interpretation of  
2 RCW 80.36.400 in this case. RCW 80.36.400 prohibits the use of ADAD’s to initiate a  
3 telephone conversation between an actual or potential customer and a marketer. The mere  
4 playing of a recorded message indicating the price of a product is not enough to trigger the terms  
5 of RCW 80.36.400.  
6

7  
8 Plaintiff’s attempt to redefine the clear statutory language of RCW 80.36.4009 should be  
9 rejected. The Washington Legislature could have used the word “telephone call” to prohibit the  
10 type of recorded message the plaintiff received. It could have added language that liability  
11 attached “whether a conversation ensues or not” as used in RCW 9.61.301. However, the  
12 Legislature chose not to do this. The Legislature clearly distinguished between “telephone call”  
13 and “telephone conversation”. It specifically defined the term “commercial solicitation” in the  
14 statute at issue to mean a telephone conversation.  
15

16 In the case at bar there was no “conversation”. One cannot converse with a machine.  
17 The defendants’ interpretation of the term “conversation” is in accord with the Washington  
18 statutes that distinguish between “call” and “conversation”. It is also consistent with the  
19 Washington State Supreme Court’s interpretation of the term “conversation” in the case of *State*  
20 *vs. Smith, supra*, that interpreted the term “conversation” to mean “an oral exchange, discourse  
21 or discussion”. There was no oral exchange, discourse or discussion between Carolyn Anderson  
22 and the pre-recorded message advertising a special price for pizzas at the Parkland Spanaway  
23

24 DOMINO'S REPLY TO PL'S RESPONSE  
25 TO FOUR OUR FAMILIES SUMMARY JUDGMENT - 5  
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Domino's store.

Defendant Four Our Families' Motion for Summary Judgment should be granted.

DATED: March 30, 2012.

DUNLAP & SODERLAND, P.S.



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9 I declare under penalty of perjury under the laws of the State of Washington that the  
10 foregoing is true and correct.

11 DATED at Seattle, Washington this 30<sup>th</sup> day of March, 2012.

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14 Gail M. Garner

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24 CERTIFICATE OF SERVICE – 2

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