

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARIA AGNE, on her own behalf and on
behalf of other similarly situated persons,

Plaintiff,

v.

PAPA JOHN'S INTERNATIONAL, INC., a
Delaware corporation; PAPA JOHN'S USA,
INC., a Kentucky corporation; RAIN CITY
PIZZA, L.L.C., an unknown business entity;
EDWARD TALIAFERRO, individually and
d/b/a RAIN CITY PIZZA, L.L.C., GREAT
WESTERN DINING, and ROSE CITY
PIZZA, L.L.C.; KEVIN SONNEBORN,
individually and d/b/a RAIN CITY PIZZA,
L.L.C., GREAT WESTERN DINING, ROSE
CITY PIZZA, L.L.C., SEATTLE PJ PIZZA,
L.L.C., PJ SOUND PIZZA, L.L.C., PAPA
WASHINGTON, L.L.C., and PAPA
WASHINGTON II, L.L.C.; ROSE CITY
PIZZA, L.L.C., an Oregon limited liability
company; SEATTLE PJ PIZZA, L.L.C., a
Washington limited liability company; PJ
SOUND PIZZA, L.L.C., a Kansas limited
liability company; PAPA WASHINGTON,
L.L.C., a Washington limited liability
company; PAPA WASHINGTON II, L.L.C.,
an unknown business entity; ON TIME 4 U,
L.L.C., an unknown business entity; ROBERT
WISNOVSKY, individually and d/b/a ON
TIME 4 U, L.L.C.; JOHN S. GEORGE,
individually and d/b/a ON TIME 4 U, L.L.C.;
and JTF ENTERPRISES, INC., a Florida
corporation,

Defendants.

Case No. 2:10-cv-01139-JCC

**PLAINTIFF'S FOURTH AMENDED
COMPLAINT – CLASS ACTION**

JURY DEMAND

PLAINTIFF'S FOURTH AMENDED COMPLAINT
(Case No. 2:10-cv-01139-JCC)

KIRBY LAW GROUP
93 S. Jackson St. #63230
Seattle, WA 98104-2818
Ph: (206) 414-9950
Fax: (866) 845-6302

1 Plaintiff MARIA AGNE (“Representative Plaintiff”), on her own behalf and on behalf of
 2 all other similarly situated persons (collectively “Plaintiffs”), by and through her counsel, brings
 3 this Fourth Amended Complaint against Defendants PAPA JOHN’S INTERNATIONAL, INC.,
 4 PAPA JOHN’S USA, INC., RAIN CITY PIZZA, L.L.C., EDWARD TALIAFERRO, KEVIN
 5 SONNEBORN, ROSE CITY PIZZA, L.L.C., SEATTLE PJ PIZZA, L.L.C., PJ SOUND PIZZA,
 6 L.L.C., PAPA WASHINGTON, L.L.C., PAPA WASHINGTON II, L.L.C., ON TIME 4 U,
 7 L.L.C., ROBERT WISNOVSKY, JOHN S. GEORGE, and JTF ENTERPRISES, INC.
 8 (collectively “Defendants”) to obtain from each of them all damages, attorney fees, costs, and
 9 other remedies which Plaintiffs are entitled to recover under law and equity.

10 I. INTRODUCTION

11 1. In April 2010, Representative Plaintiff received multiple unsolicited telephone
 12 calls on her cellular telephone. When these calls connected with her cellular telephone, she
 13 received unsolicited visual messages. These visual messages presented text which identified their
 14 subject to be “Large Pizza Special”. Each of these visual messages then played a substantively
 15 identical slideshow of images and text upon Representative Plaintiff’s cellular telephone. The
 16 first visual message sent to Representative Plaintiff, which Representative Plaintiff received on
 17 April 10, 2010, included the following images and text:



a.



b. ; and

c. "Large 2 Topping
Pizza with
2 liter soda
For only \$11.00
*sales tax
not included
(Not valid with
any other special,
delivery charge will
apply) offer expires
4/12/10
Please use Promo
Code: TXT001
To order please call:
(206)938-3000
TO OPT OUT
OF FUTURE MESSAGES
LIKE THESE REPLY
WITH YOUR WIRELESS
NUMBER IN THE BODY
OF THE MESSAGE
OR CALL 1-877-992-4848
Ext 4
To order, please call:
(206)938-3000
To opt out of future
messages like these,
reply to this email with
YOUR WIRELESS NUMBER
IN THE BODY OF THE
MESSAGE, or call
877-992-4848 ext." [sic].

2. The multiple visual messages received by Representative Plaintiff in April 2010 were substantively identical to each other. For example, Representative Plaintiff received a visual message on April 24, 2010, that included the same subject text and images as the first message and also included the following text, which differs only slightly from the first message:

“Large 2 Topping
 Pizza with
 2 liter soda
 For only \$11.00
 *sales tax
 not included
 (Not valid with
 any other special,
 delivery charge will
 apply) offer expires
 4/25/10
 Please use Promo
 Code: TXT001
 To order please call:
 (206)938-3000
 TO OPT OUT
 OF FUTURE MESSAGES
 LIKE THESE REPLY
 WITH YOUR WIRELESS
 NUMBER IN THE BODY
 OF THE MESSAGE
 OR CALL 1-877-992-4848
 Ext 4
 To order, please call:
 (206)938-3000
 To opt out of future
 messages like these,
 reply to this email with
 YOUR WIRELESS NUMBER
 IN THE BODY OF THE
 MESSAGE, or call
 877-992-4848 ext.” [sic].

3. These visual messages were short message service (SMS) text messages and/or multi-media service (MMS) text messages containing SMS-like text messages (hereon referenced collectively as “text messages”).

4. These text messages are representative of numerous unsolicited text messages which were received by thousands of persons like Representative Plaintiff. All such text

1 messages were sent to telephone numbers assigned to cellular telephone subscribers. All such
2 text messages were sent without the prior, express consent of their recipients.

3 5. These text messages were sent to Representative Plaintiff and numerous persons
4 like her by means of a device which made automated telephone calls. This device could send
5 thousands of messages, whether voice or visual, in a day and, in fact, did so. This device had the
6 capacity to send these messages to telephone numbers which were either randomly-generated or
7 pre-selected. This device sent these messages to telephone numbers pre-selected by Defendants.

8 6. These text messages were injurious to Representative Plaintiff and her property.
9 These text messages caused Representative Plaintiff to lose use and enjoyment of her cellular
10 telephone. These text messages occupied a significant amount of the limited storage capacity of
11 Representative Plaintiff's cellular telephone. Representative Plaintiff incurred monetary charges
12 to receive these text messages. These text messages invaded the privacy of Representative
13 Plaintiff, annoyed her, and constituted harassment. These text messages required her attention
14 and wasted her time. The other recipients of such text messages incurred the same or
15 substantively similar injuries and damages as Representative Plaintiff. These text messages were
16 inherently injurious and caused damages as set forth by federal and state statutes and in accord
17 with the allegations of this complaint and proof to be presented at trial.

18 7. The Defendants, their agents, their civil co-conspirators, their predecessors-in-
19 interest, and/or persons they controlled caused Representative Plaintiff and thousands of persons
20 like her to receive the unsolicited text messages referenced in this complaint.

21 **II. JURISDICTION AND VENUE**

22 8. Defendants maintain that the jurisdiction of the United States District Court for
23 the Western District of Washington at Seattle is appropriate under the Class Action Fairness Act.

24 9. Representative Plaintiff is a resident of King County in Washington State.

25 10. Many of the wrongful acts and omissions referenced in this complaint occurred,
26 were initiated, were furthered, or were given assistance in King County and Washington State.

11. Many of the Defendants domicile in King County of Washington State.

12. Defendants do business in King County and Washington State or else did business in Washington State at times referenced in this complaint.

III. THE DEFENDANTS

13. PAPA JOHN'S INTERNATIONAL, INC. ("PJ'S INTERNATIONAL") purports to be a Delaware corporation domiciled in Kentucky. PAPA JOHN'S USA, INC. ("PJ'S USA") purports to be a Kentucky corporation domiciled in Kentucky. PJ'S USA is an alter ego and/or agent of PJ'S INTERNATIONAL. For example, at times relevant to this complaint:

a. All of PJ'S USA officers are contemporaneously officers of PJ'S INTERNATIONAL. As of June 29, 2010, the two CEOs of PJ'S USA were contemporaneously CEOs of PJ'S INTERNATIONAL; the president of PJ'S USA was contemporaneously the president of PJ'S INTERNATIONAL; the thirty vice-presidents of PJ'S USA were contemporaneously vice-presidents of PJ'S INTERNATIONAL; the secretary and assistant secretaries of PJ'S USA were contemporaneously the secretary and assistant secretaries of PJ'S INTERNATIONAL; the treasurer and assistant treasurer of PJ'S USA were contemporaneously the treasurer and assistant treasurer of PJ'S INTERNATIONAL.

b. For at least five years prior to the initiation of this lawsuit, PJ'S USA and PJ'S INTERNATIONAL filed all of their reports and disclosures with the Kentucky Secretary of State on the same days and even at the same times.

c. The officers of PJ'S INTERNATIONAL enjoy and assert complete and exclusive control over the daily operations and business of PJ'S USA.

d. The business of PJ'S USA by and through its officers is conducted at the same places, and at the same times, and by the same people as the business of PJ'S INTERNATIONAL.

e. If a distinction can be made between PJ'S USA and PJ'S

INTERNATIONAL, then PJ'S USA is an agent of PJ'S INTERNATIONAL. For example, service of a complaint and summons upon PJ'S USA's registered agent in Washington State was followed by PJ'S INTERNATIONAL filing a notice of appearance before PJ'S USA did the same even though PJ'S INTERNATIONAL's registered agent had not been served with the complaint or summons.

14. PJ'S INTERNATIONAL asserts and exerts such complete direction, supervision, and control over the daily operations and business of PJ'S USA, intermixing and intermingling the business of PJ'S INTERNATIONAL and PJ'S USA so thoroughly, that no genuine distinction can be made between the two purportedly different entities with regard to the issues which are the subject matter of this complaint. Thus, PJ'S INTERNATIONAL and PJ'S USA are referenced hereon together as PJ'S CORPORATE.

15. PJ'S CORPORATE is at the apex of an international consortium which makes billions of dollars in revenue a year by marketing and selling Papa John's branded pizza and pizza-related products, goods, and services. The Papa John's brands include, without limitation, "Papa John's" and "Papa John's Pizza".

16. PJ'S CORPORATE markets Papa John's branded pizza and pizza-related products, goods, and services to persons throughout the United States.

17. PJ'S CORPORATE owns, manages, operates, supervises, and controls Papa John's branded restaurants throughout the United States.

18. PJ'S CORPORATE also has combined by agreement or otherwise with other persons (referenced hereon as "affiliates") who have joined with PJ'S CORPORATE to market and sell pizza and pizza-related products and services under the Papa John's brands to consumers in Washington State and elsewhere in the United States. Some of these affiliates are referenced herein collectively as "CITY PIZZA," which includes without limitation the following:

a. CITY PIZZA includes EDWARD TALIAFERRO ("TALIAFERRO").

1 b. CITY PIZZA includes KEVIN SONNEBORN (“SONNEBORN”).

2 c. CITY PIZZA includes TALIAFERRO and SONNEBORN jointly,
3 severally, and doing business as RAIN CITY PIZZA, LLC (“RAIN CITY”). RAIN CITY
4 might have once operated as a limited liability company, but if so, RAIN CITY ceased to
5 be a limited liability company no later than September 30, 2008, which is the date that the
6 Washington Secretary of State affirms that RAIN CITY ceased to operate as a limited
7 liability company. Since at least September 30, 2008, TALIAFERRO and SONNEBORN
8 have operated the business of RAIN CITY as a general partnership, a joint venture, or in
9 some other similar arrangement in which they retain personal responsibility and liability
10 for the acts and omissions related to the operations and business of RAIN CITY. In
11 December 2009, an agent of RAIN CITY publically confirmed that RAIN CITY was
12 operated as a partnership. Since at least September 30, 2008, TALIAFERRO and
13 SONNEBORN have jointly operated, managed, controlled, and supervised multiple Papa
14 John’s branded restaurants in Washington State that are licensed to do business under the
15 name of their general partnership and/or joint venture together.

16 d. CITY PIZZA includes TALIAFERRO and SONNEBORN jointly,
17 severally, and doing business as GREAT WESTERN DINING (“GW DINING”). GW
18 DINING is neither registered as a business entity nor licensed to do business under its
19 name of GW DINING. Nevertheless, TALIAFERRO, SONNEBORN, and other persons
20 have joined together in a general partnership, a joint venture, or some other similar
21 relationship to do business under the name of GW DINING, jointly operating, managing,
22 controlling, and supervising dozens of Papa John’s branded restaurants in Washington
23 State and elsewhere in the United States.

24 e. CITY PIZZA includes ROSE CITY PIZZA, L.L.C., which purports to be
25 an Oregon limited liability company domiciled in Washington State. SONNEBORN and
26 TALIAFERRO own, operate, supervise, manage, and/or do business as ROSE CITY

1 PIZZA, L.L.C. and other business entities which altogether own, operate, supervise,
2 control and/or manage multiple Papa John's branded restaurants in Washington State and
3 elsewhere in the United States.

4 f. CITY PIZZA includes SEATTLE PJ PIZZA, L.L.C., which purports to be
5 a Washington limited liability company domiciled in Washington State. SONNEBORN
6 owns, operates, supervises, manages, and/or does business as SEATTLE PJ PIZZA,
7 L.L.C. and other business entities which altogether own, operate, supervise, control
8 and/or manage multiple Papa John's branded restaurants in Washington State.

9 g. CITY PIZZA includes PAPA WASHINGTON, L.L.C., which purports to
10 be a Washington limited liability company domiciled in Washington State.
11 SONNEBORN owns, operates, supervises, manages, and/or does business as PAPA
12 WASHINGTON, L.L.C. and other business entities which altogether own, operate,
13 supervise, control and/or manage multiple Papa John's branded restaurants in
14 Washington State.

15 h. CITY PIZZA includes PAPA WASHINGTON II, L.L.C., which is not a
16 limited liability company and is an unknown business entity domiciled in Washington
17 State. SONNEBORN owns, operates, supervises, manages, and/or does business as
18 PAPA WASHINGTON II, L.L.C. and other business entities which altogether own,
19 operate, supervise, control and/or manage multiple Papa John's branded restaurants in
20 Washington State.

21 i. CITY PIZZA includes PJ SOUND PIZZA, L.L.C., which purports to be a
22 Kansas limited liability company domiciled in Washington State. SONNEBORN owns,
23 operates, supervises, manages, and/or does business as PJ SOUND PIZZA, L.L.C. and
24 other business entities which altogether own, operate, supervise, control and/or manage
25 multiple Papa John's branded restaurants in Washington State.

26 19. The principal place of business for each of the constituents of CITY PIZZA is at

1 the same location in Redmond, Washington. At this location, the constituents of CITY PIZZA
2 intermingle their operational and marketing resources to effect their common purpose and design
3 to profit from the marketing and selling of pizza and pizza-related services and products using
4 the Papa John's brands as instructed by, permitted by, directed by, and/or agreed with PJ'S
5 CORPORATE. The constituents of CITY PIZZA have combined by agreement or otherwise
6 with each other and with PJ'S CORPORATE to manage, supervise, direct, and control the
7 operations and marketing for numerous pizza restaurants utilizing the Papa John's brands in
8 Washington State and elsewhere in the United States. For example, a written agreement between
9 constituents of CITY PIZZA and PJ'S CORPORATE confirm that PJ'S CORPORATE retains
10 actual and ultimate control over the means, methods, and manner which CITY PIZZA and all
11 other persons can market products, goods, and services using the Papa John's brands. This
12 agreement also requires the constituents of CITY PIZZA to combine their marketing resources
13 and efforts with each other and to combine their marketing resources and efforts with other
14 affiliates of PJ'S CORPORATE. This agreement is typical of agreements which PJ'S
15 CORPORATE has with its affiliates.

16 20. The telephone number of (206) 938-3000 belongs to a Papa John's branded
17 restaurant in Seattle, Washington. This is one of the pizza restaurants for which the constituents
18 of CITY PIZZA combined and joined with each other and with PJ'S CORPORATE to manage,
19 supervise, direct, and control its operations and marketing. This is also the restaurant which text
20 messages received by Representative Plaintiff in April 2010 directed her to call with her
21 telephone if she wished to order a Papa John's branded "Large 2 Topping Pizza with 2 liter soda
22 For only \$11.00".

23 21. One or more of the constituents of CITY PIZZA are alter egos and/or agents of
24 one or more of the other constituents of CITY PIZZA. The constituents of CITY PIZZA have
25 acted as if they are alter egos of each other with regard to the subject matter of this complaint.

26 22. The Papa John's brands are extremely valuable to PJ'S CORPORATE. To ensure

1 that these brands preserve and grow their value, PJ'S CORPORATE requires all of its affiliates
 2 to spend significant amounts of time and money in marketing the Papa John's brands. PJ'S
 3 CORPORATE provides instruction, assistance, supervision, and direction concerning such
 4 marketing practices. Moreover, PJ'S CORPORATE reserves and maintains actual and ultimate
 5 control over all marketing done by anyone with regard to the Papa John's brands. In this context,
 6 PJ'S CORPORATE preserves for itself a contractual right to terminate its relationship with any
 7 affiliate who fails to market the Papa John's brands as approved or directed by PJ'S
 8 CORPORATE. Such a termination would create a significant financial hardship for the affiliate,
 9 likely putting them out of business. In this context, CITY PIZZA and other affiliates of PJ'S
 10 CORPORATE engaged in the marketing practices referenced in this complaint only with the
 11 approval or direction of PJ'S CORPORATE.

12 23. PJ'S CORPORATE and CITY PIZZA combined by agreement or otherwise with
 13 each other, with other affiliates of PJ'S CORPORATE, and with marketing vendors who all
 14 joined together to market and advertise Papa John's branded products, goods, and services to
 15 consumers through telephonic devices. Some of these marketing vendors are referenced
 16 collectively in this complaint as "ONTIME4U."

17 24. ONTIME4U includes ON TIME 4 U, L.L.C., which purports to be a business
 18 entity domiciled in Oregon. Despite its name, ON TIME 4 U, L.L.C. is not a limited liability
 19 company.

20 25. ONTIME4U also includes JOHN S. GEORGE ("GEORGE") and ROBERT
 21 WISNOVSKY ("WISNOVSKY"), individually, jointly, severally, and doing business as ON
 22 TIME 4 U, L.L.C. and On Time 4 U. WISNOVSKY and GEORGE at times relevant to this
 23 complaint operated ON TIME 4 U, L.L.C. and its successors, if any, between them as a general
 24 partnership, a joint venture, or some similar type of business arrangement. WISNOVSKY
 25 enjoyed the title of Managing General Partner of ONTIME4U.

26 26. Beginning about October 2009 and continuing thereafter, ONTIME4U also

1 includes JTF ENTERPRISES, INC. (“JTF”), which purports to be a Florida corporation
 2 domiciled in Oregon. In or about October 2009, JTF combined by agreement and otherwise into
 3 a general partnership, joint venture, or some other similar type of business relationship with
 4 GEORGE and WISNOVSKY to accomplish the unlawful business purposes and unlawful
 5 actions of ONTIME4U referenced in this complaint. For example, JTF helped the other
 6 constituents of ONTIME4U to develop and maintain business relationships with PJ’S
 7 CORPORATE, CITY PIZZA, and other PJ’S CORPORATE affiliates and received a share of all
 8 revenue derived from the use of an automated telephone dialing system (“ATDS”) to send
 9 unsolicited commercial text messages on behalf of PJ’S CORPORATE, CITY PIZZA, and other
 10 PJ’S CORPORATE affiliates. JTF also obtained the benefit of numerous commercial text
 11 messages sent on its own behalf at no cost in exchange for joining with the other constituents of
 12 ONTIME4U in their business efforts. JTF acted to further these purposes and its agreements
 13 through James (a/k/a “Jim”) Fry, who is an owner, officer, and agent of JTF at all times relevant
 14 to this complaint.

15 27. Each of the Defendants negligently, recklessly, willfully, and/or intentionally
 16 caused, initiated, contributed to, assisted with, combined together to, and/or agreed to
 17 accomplish the injurious and unlawful acts and omissions referenced in this complaint.

18 **IV. GENERAL ALLEGATIONS**

19 28. At times relevant to this complaint, ONTIME4U is a business venture which
 20 markets itself as specializing in providing automated telephone calling services on behalf of
 21 other businesses. Beginning in 2008, ONTIME4U focused its business upon using an automated
 22 telephone dialing system (“ATDS”) to call telephone numbers and, once a telephone connection
 23 is made, deliver prerecorded voice and visual messages in exchange for valuable consideration
 24 from ONTIME4U’s customers. All of ONTIME4U’s customers were businesses who were
 25 trying to use such messages to induce consumers to purchase products, goods, or services.
 26

1 29. The ATDS utilized by ONTIME4U is a device comprised of about three to four
2 interconnected computers. This ATDS also included a load balancer and/or one or two routers
3 which routed traffic between the computers to prevent the transmission of prerecorded telephone
4 messages from being delayed on one computer when another computer sat idle. Such
5 functionality was necessary because of the high volume of telephone messages which the ATDS
6 sent in an automated manner. While the ATDS had the capacity to generate a randomized list of
7 telephone numbers to which it could send prerecorded messages, ONTIME4U generally targeted
8 the transmission of prerecorded telephone messages to telephone numbers provided by
9 ONTIME4U's customers.

10 30. Prior to about October 2009, ONTIME4U focused its business upon providing
11 automated telephone reminder services on behalf of healthcare providers. For example,
12 ONTIME4U would use its ATDS to send prerecorded telephone messages on behalf of a
13 doctor's office to remind patients of their medical appointments. Such messages were generally
14 voice messages.

15 31. About October 2009, JTF joined with ONTIME4U, and ONTIME4U began
16 focusing its business upon using its ATDS to send unsolicited text messages to the cellular
17 telephones of consumers in order to market products, goods, and services on behalf of other
18 businesses. For example, ONTIME4U would use its ATDS to send prerecorded text messages on
19 behalf of a restaurant. These messages would generally contain limited-time offers to purchase
20 products, goods, or services from the restaurant over the telephone through telephone
21 conversations.

22 32. The device which ONTIME4U used to send prerecorded text messages was the
23 same device ONTIME4U used to send prerecorded voice messages.

24 33. Beginning about October 2009, PJ'S CORPORATE, CITY PIZZA, and other
25 affiliates of PJ'S CORPORATE engaged ONTIME4U to use its ATDS to send prerecorded,
26 unsolicited text messages to cellular telephone numbers which they provided to ONTIME4U.

1 These messages were designed to induce consumers to order Papa John's branded products,
2 goods, and services through telephone conversation. The text messages that Representative
3 Plaintiff received in April 2010 are typical of the unsolicited text messages which ONTIME4U
4 began to send about October 2009 on behalf of PJ'S CORPORATE, CITY PIZZA, other
5 affiliates of PJ'S CORPORATE. For example:

6 a. In or about November 2009, ONTIME4U sent at least 30,000 unsolicited
7 text messages to convince thousands of consumers to purchase Papa John's branded
8 products, goods, and services from a number of different Papa John's branded restaurants
9 located in Washington State and Oregon. CITY PIZZA engaged ONTIME4U to send
10 these messages on behalf of PJ'S CORPORATE and itself. CITY PIZZA paid
11 ONTIME4U about \$900 to send these unsolicited messages. CITY PIZZA provided
12 ONTIME4U with lists of telephone numbers to which ONTIME4U sent the unsolicited
13 messages.

14 b. In or about April 2010, ONTIME4U sent at least 35,000 unsolicited text
15 messages to convince thousands of consumers to purchase Papa John's branded products,
16 goods, and services from a number of different Papa John's branded restaurants located
17 in Washington State. CITY PIZZA paid ONTIME4U about \$1000 to send some of these
18 unsolicited messages. CITY PIZZA provided ONTIME4U with lists of telephone
19 numbers to which ONTIME4U sent the unsolicited messages.

20 c. From about October 2009 through at least April 2010, PJ'S CORPORATE
21 and many of its affiliates throughout the United States engaged ONTIME4U for a
22 number of promotional campaigns in which ONTIME4U sent text messages like those
23 received by Representative Plaintiff. In each promotional campaign, ONTIME4U sent no
24 less than 5,000 unsolicited text messages to cellular telephone numbers provided by PJ'S
25 CORPORATE and its affiliates.

26 34. From the time of ONTIME4U's first engagement by an affiliate of PJ'S

1 CORPORATE, PJ'S CORPORATE was made aware of ONTIME4U's use of its ATDS to send
2 unsolicited text messages to market Papa John's branded products, goods, and services. PJ'S
3 CORPORATE approved of the sending of all such messages and otherwise directed that these
4 messages be sent. But for PJ'S CORPORATE's approval and directives, Representative Plaintiff
5 and thousands of people like her would not have received the unsolicited commercial text
6 messages referenced in this complaint. For example:

7 a. PJ'S CORPORATE convenes an annual meeting which invites all of its
8 affiliates and other persons approved by PJ'S CORPORATE. PJ'S CORPORATE
9 convened such an annual meeting about November 2009. PJ'S CORPORATE invited
10 ONTIME4U to attend the meeting and scheduled ONTIME4U to make presentations
11 concerning its services to PJ'S CORPORATE and its affiliates. During this meeting, PJ'S
12 CORPORATE manifested its approval and direction for its affiliates and its employees to
13 engage ONTIME4U to send uninvited text messages to solicit sales of Papa John's
14 branded products, goods, and services. PJ'S CORPORATE caused its affiliates and
15 employees in Washington State and elsewhere in the United States to use ONTIME4U's
16 services to send such unsolicited commercial text messages.

17 b. In or about November 2009, ONTIME4U met with John Schmatter and
18 James Ensign to discuss ONTIME4U's services. Mr. Schmatter was the Chairman of the
19 Board of Directors of PJ'S CORPORATE and also a Chief Executive Officer of PJ'S
20 CORPORATE. Mr. Ensign was a vice president of marketing for PJ'S CORPORATE.
21 Mr. Schmatter and Mr. Ensign ratified the use of ONTIME4U's services to market the
22 Papa John's brands, approved the current and future use of ONTIME4U's services to
23 market the Papa John's brands, and conspired to direct and otherwise encourage affiliates
24 and employees of PJ'S CORPORATE throughout the United States to use ONTIME4U's
25 services or a similar service to send unsolicited text messages to market Papa John's
26 branded products, goods, and services.

1 c. PJ'S CORPORATE sent written directives to its corporate operators and
2 affiliates to utilize ONTIME4U to send unsolicited text messages to market Papa John's
3 branded products, goods, and services. PJ'S CORPORATE otherwise approved of its
4 affiliates and its employees to engage ONTIME4U to send such unsolicited text
5 messages.

6 d. PJ'S CORPORATE and its affiliates utilized a computer program created,
7 owned, and maintained by PJ'S CORPORATE in order to provide ONTIME4U with the
8 cellular telephone numbers to which ONTIME4U sent unsolicited text messages which
9 marketed Papa John's branded products, goods, and services. PJ'S CORPORATE
10 trained, instructed, and directed its employees and its affiliates to use this computer
11 program in order to provide ONTIME4U with information (e.g., cellular telephone
12 numbers) which ONTIME4U needed to send these text messages.

13 e. Soon after ONTIME4U began sending unsolicited commercial text
14 messages on behalf of PJ'S CORPORATE and/or affiliates of PJ'S CORPORATE, PJ'S
15 CORPORATE began receiving notice of complaints from recipients of such messages.
16 However, PJ'S CORPORATE continued to approve and direct its affiliates and
17 employees to engage ONTIME4U to send such unwanted messages.

18 35. Attached as *Exhibit 1* is a true copy of an email which TALIAFFERO received on
19 or about December 21, 2009, from Kevin Stepusin.

20 36. On and about December 21, 2009, Kevin Stepusin was a business director for
21 PJ'S CORPORATE who was responsible for substantive communications between PJ'S
22 CORPORATE and its affiliates in the Western Region of the United States.

23 37. Kevin Stepusin sent the email evidenced by *Exhibit 1* to about forty PJ'S
24 CORPORATE employees and affiliates, including constituents of CITY PIZZA.

25 38. The Defendants caused text messages to be sent to Plaintiffs. Plaintiffs, including
26 Representative Plaintiff, received such text messages. All of these text messages shared

1 characteristics which include, but are not limited to, the following:

2 a. These text messages were uninvited and unsolicited. These text messages
3 were sent to Plaintiffs without Plaintiffs' prior express consent.

4 b. Each of the text messages cost money for its recipient to receive it.
5 Cellular telephone service providers do not permit cellular telephone users to receive
6 such text messages for free.

7 c. These text messages contained a limited-time offer to purchase Papa
8 John's branded products, goods, and/or services. For example, text messages contained
9 an offer to purchase one or more Papa John's branded pizza-related products at a
10 discounted price if the recipient ordered such from a Papa John's branded restaurant by a
11 near deadline set forth in the text message.

12 d. Each text message contained a promotional code. By the recipients using
13 the promotional code when redeeming the offer, or else because of other characteristics
14 of the messages, Defendants were able to track the efficacy of this marketing stratagem.

15 e. The text messages contained telephone ordering instructions, which
16 included the telephone number of a Papa John's branded restaurant at which the limited-
17 time offer could be redeemed by the recipient of the text message.

18 f. The text messages included "opt out" instructions by which the text
19 message represented that recipients would not receive future text messages if they replied
20 to the text message with a text message of their own or else called a telephone number
21 which was provided.

22 g. Each text message was sent by means of an ATDS.

23 h. The transmission of each text message utilized a portion of the cellular
24 telephone infrastructure of at least one cellular telephone service provider. For example,
25 each text message had to be routed through at least one cellular telephone service
26 provider for each Plaintiff to receive the text message. It would sometimes take about a

1 day for cellular telephone providers to deliver these text messages given the large volume
2 of text messages sent by the ATDS.

3 i. Each text message caused Plaintiffs to lose limited storage capacity on
4 their cellular telephones.

5 j. None of the text messages provided the Plaintiffs an opportunity to
6 question the veracity of the offers in these text messages immediately upon their receipt.

7 k. The text messages invaded the privacy of Plaintiffs.

8 l. The text messages annoyed and harassed Plaintiffs.

9 m. The text messages caused injuries and damages to Plaintiffs and Plaintiffs'
10 property in accord with proof to be presented at trial.

11 n. The text messages which Representative Plaintiff received in April 2010
12 are typical of those text messages which Defendants sent to all Plaintiffs.

13 39. The text messages sent as referenced in this complaint inefficiently used cellular
14 telephone services such as to cause higher prices for consumers, including Plaintiffs.

15 40. PJ'S CORPORATE and CITY PIZZA permitted ONTIME4U to have direct
16 access to their computer database which contained the cellular telephone numbers and other
17 private information of Plaintiffs. PJ'S CORPORATE and/or CITY PIZZA had obtained such
18 private information from Plaintiffs without advising Plaintiffs that (a) they were collecting and
19 maintaining such information in a database, (b) they would permit third-parties to access this
20 information, and (c) they would use this information to send Plaintiffs unsolicited commercial
21 text messages.

22 41. Every time that unsolicited commercial text messages were sent as referenced in
23 this complaint, the Defendants received numerous complaints from many of the recipients of
24 these messages. For example, in November 2009, the Defendants received several hundred
25 complaints from some of the Plaintiffs. These Plaintiffs complained that they had not given
26 consent to the Defendants to send text messages. These Plaintiffs complained about having to

1 pay money for receiving the text messages. These Plaintiffs complained about receiving
2 messages late at night. These Plaintiffs complained about opting-out yet still receiving text
3 messages.

4 42. Many Plaintiffs continued to receive unsolicited commercial text messages after
5 they opted-out of receiving future text messages pursuant to such instructions in the unsolicited
6 text messages they received as referenced in this complaint.

7 43. By November 2009, the Defendants knew personally or constructively that
8 causing the transmission of unsolicited commercial text messages was unlawful.

9 44. In April 2010, PJ'S CORPORATE sent a memorandum to its corporate
10 operators of Papa John's branded restaurants and to its affiliates, including constituents of
11 CITY PIZZA, which contained the following statements:

12 In recent months, our Customer Support and Digital Marketing teams have
13 received complaints about unsolicited SMS and MMS messages being sent to
14 mobile phones. Investigation of these messages lead to a company called
15 OnTime4U, which has been contracting with Papa John's franchisees and
16 corporate operators to send such messages to customers by exporting customer
17 telephone numbers from our PROFIT point of sale system. OnTime4U believes
18 that this form of direct marketing is legal because of a 'transactional relationship'
19 with a previous customer.

20 Papa John's Legal and Digital Marketing departments do not believe that the
21 transactional relationship exception applies in this context and have concluded
22 that the practice and process of sending UNSOLICITED messages to mobile
23 devices is most likely ILLEGAL and poses a potentially serious risk of liability
24 and tarnishment of the image and goodwill of the Papa John's brand.

25 45. In negligent, reckless, conscious, and/or willful disregard of the illegality and
26 wrongfulness of sending these text messages, of the injuriousness of sending these text
messages, and of the numerous complaints made by recipients of such messages, the Defendants
caused, authorized, permitted, directed, or else contracted for unsolicited text messages to be sent
as referenced in this complaint.

46. As a proximate consequence of Defendants' acts and omissions referenced in this
complaint, Plaintiffs received unsolicited commercial text messages which injured Plaintiffs and

1 Plaintiffs' property.

2 47. Absent a legal remedy, Plaintiffs have no protection from Defendants and others
3 like them from causing the transmission of an endless series of unsolicited commercial text
4 messages to their cellular telephones. For example, in other countries which provide consumers
5 with no civil remedy against those who send unsolicited text messages, consumers can expect to
6 receive numerous unwanted and injurious text messages on their cellular telephones every day.

7 **V. CLASS ACTION ALLEGATIONS**

8 48. Representative Plaintiff brings this class action on behalf of herself and as a
9 representative of the following class of persons (the "National Class") entitled to remedies under
10 federal law including, but not limited to, damages:

11 All persons in the United States of America who were sent, to their cellular
12 telephone numbers, at least one unsolicited text message which marketed a Papa
13 John's branded product, good, or service on behalf of PJ'S CORPORATE or an
14 affiliate of PJ'S CORPORATE.

15 49. Representative Plaintiff also brings this class action on behalf of herself and as a
16 representative of the following persons (the "Washington Subclass") who are entitled to
17 remedies under Washington State law including, but not limited to, damages:

18 All persons in Washington State who were sent, to their cellular telephone
19 numbers, at least one unsolicited text messages which marketed a Papa John's
20 branded product, good, or service on behalf of PJ'S CORPORATE or an affiliate
21 of PJ'S CORPORATE.

22 50. Plaintiffs' claims satisfy the numerosity, commonality, typicality, adequacy of
23 representation and superiority requirements for class action certification pursuant to Federal Rule
24 of Civil Procedure, Rules 23(a) and Rules 23(b)(1), 23(b)(2), and/or 23(b)(3) as referenced in
25 this complaint and in accord with proof.

26 51. Defendants have available to them lists which identify the names, addresses, and
telephone numbers of all of the members of this class. Based upon information provided by the
Defendants, there are thousands of such persons. Joinder of so many class members in to a single
action is impracticable. In fact, given the number of class members, the only way to deliver

1 substantial justice to all members of the class is by means of a single class action.

2 52. There are questions of fact and law common to the class, which predominate over
3 any questions affecting only individual members. The questions of law and fact common to the
4 class arising from Defendants' conduct include, without limitation, the following:

5 a. Whether Defendants negligently and/or willfully caused violations of the
6 Telephone Consumer Protection Act, 47 U.S.C. § 227, when sending unsolicited text
7 messages to Representative Plaintiff and the National Class?

8 b. Whether Defendants negligently and/or willfully caused violations,
9 including *per se* violations, of the Washington Consumer Protection Act, RCW 19.86.10,
10 *et seq.*, when sending unsolicited text messages to Representative Plaintiff and the
11 Washington Subclass?

12 c. What are the statutory damages that the Defendants must pay for each of
13 the unsolicited text messages that the Defendants caused to be sent to the Plaintiffs?

14 d. Whether Defendants engaged in a civil conspiracy to accomplish the
15 sending of unsolicited text messages to Plaintiffs?

16 e. Whether any Defendants are vicariously or otherwise liable for their
17 agents or assigns or other Defendants sending unsolicited text messages to Plaintiffs?

18 f. Which Defendants are alter egos of another Defendant?

19 53. The questions referenced above predominate over any questions affecting only
20 individual persons, and a class action is superior with respect to considerations of consistency,
21 economy, efficiency, fairness and equity, to other available methods for the fair and efficient
22 adjudication of Plaintiffs' claims.

23 54. Representative Plaintiff's claims are typical of those of the class in that she, just
24 like the other members of the class, was the victim of the unlawful marketing practices
25 referenced in this complaint. The text messages which Representative Plaintiff received in April
26 2010 are typical of the text messages which other members of the class received.

1 55. A class action is the appropriate method for the fair and efficient adjudication of
2 this controversy. Defendants have acted in a general manner to the injury and damage of the
3 class. The presentation of separate actions by individual class members could create a risk of
4 inconsistent and varying adjudications, establish incompatible standards of conduct for
5 Defendants, and/or substantially impair or impede the ability of class members to protect their
6 interests.

7 56. Representative Plaintiff is an adequate representative of the class because she is a
8 member of the class and her interests do not conflict with the interests of the members of the
9 class she seeks to represent. The interests of the members of the class will be fairly and
10 adequately protected by Representative Plaintiff. Also, Representative Plaintiff is represented by
11 a team of attorneys who together have extensive, multi-jurisdictional experience representing
12 clients in complex class action litigation.

13 57. Maintenance of this action as a class action is a fair and efficient method for the
14 adjudication of this controversy. It would be impractical and undesirable for each of the
15 thousands of persons who comprise the class to bring separate actions. The maintenance of such
16 separate actions would place a substantial and unnecessary burden on the courts and could result
17 in inconsistent adjudications, while a single class action can determine, with judicial economy,
18 the rights of all class members.

19 58. If this action is not certified as a class action, then given the number of class
20 members, the only way that the court system will not be overburdened by a multiplicity of suits
21 over the subject matter of this complaint is if members of the class cannot or do not pursue an
22 action against Defendants for reasons altogether unrelated to the merits of their claims (e.g.,
23 challenges in accessing legal counsel, the mundane realities of surviving in a challenging
24 economy, et cetera). Most Plaintiffs can obtain legal representation for their claims only through
25 a class action. The only practical way to ensure that all members of the class are afforded an
26 opportunity to obtain substantial justice with regard to the wrongs and injuries inflicted upon

1 them by Defendants is to resolve the subject matter of this complaint through a class action.

2 **VI. FIRST COUNT**
3 **Violations of the Telephone Consumer Protection Act**
4 *(Representative Plaintiff and the National Class vs. Defendants)*

5 59. Plaintiffs reassert and re-allege the allegations set forth in the above paragraphs as
6 if the same were alleged herein this count.

7 60. At all times material herein, Plaintiffs have been entitled to the rights, protections,
8 and benefits provided under the Telephone Consumer Protection Act, 47 U.S.C. § 227.

9 61. Negligently, recklessly, willfully, and/or intentionally, Defendants directly and/or
10 vicariously engaged in acts, omissions, and/or other conduct as referenced herein this complaint
11 that violates the Telephone Consumer Protection Act. Defendants directly and/or vicariously
12 used an ATDS to initiate tens of thousands of unsolicited telephone calls to Plaintiffs' cellular
13 telephone numbers. These telephone calls delivered unsolicited commercial text messages to the
14 cellular telephones of Representative Plaintiff and the other Plaintiffs as referenced in this
15 complaint.

16 62. Investigations conducted by PJ'S CORPORATE have confirmed that the
17 Defendants violated the Telephone Consumer Protection Act with the sending of text
18 messages as referenced in this complaint.

19 63. Plaintiffs are entitled to recover \$500 in damages from the Defendants for each
20 violation of the Telephone Consumer Protection Act.

21 64. Additionally, Plaintiffs are entitled to all damages referenced herein and in accord
22 with proof, attorneys' fees, costs, treble damages, and other remedies allowed by the Telephone
23 Consumer Protection Act or else otherwise permitted by law.

24 65. The Defendants will continue their unlawful conduct in the future absent (a) a
25 judicial declaration which clearly states the illegality of their conduct and (b) an injunction
26 barring the Defendants from engaging in such illegal conduct in the future.

VII. SECOND COUNT

Violations of the Washington Consumer Protection Act
(Representative Plaintiff and the Washington Subclass vs. Defendants)

66. Plaintiffs reassert and re-allege the allegations set forth in the above paragraphs of this complaint as if the same were alleged herein this count.

67. At all times material to this complaint, Plaintiffs have been entitled to the rights, protections, and benefits provided under the Washington Consumer Protection Act.

68. As referenced in this complaint and in accord with proof to be presented at trial, Defendants engaged in unfair or deceptive acts and practices.

69. These acts and practices occurred in the scope of Defendants' combined conduct of marketing and selling Papa John's branded products, goods, and services to consumers residing in Washington State. These acts and practices occurred in the conduct of Defendants' trade and commerce in Washington State.

70. As referenced in this complaint and in accord with proof to be presented at trial, Defendants and/or their agents injured Plaintiffs in their business or property.

71. As referenced in this complaint and in accord with proof to be presented at trial, Defendants and/or their agents violated provisions of Washington State statutory law, including but not limited to RCW 19.190.060. Such statutory violations constitute *per se* violations of the Washington Consumer Protection Act.

72. Defendants' acts and practices as referenced herein and in accord with proof at trial were the proximate causes of these injuries.

73. For each of the Defendants' violations of the Washington Consumer Protection Act referenced in this complaint, Plaintiffs are entitled to recover from Defendants at least \$500 in damages in accord with RCW 19.190.040, in accord with the facts referenced in this complaint, in accord with any other applicable law, and/or in accord with proof to be presented at trial. Plaintiffs are also entitled to recover attorneys' fees, costs, treble damages, and other remedies allowed by RCW 19.86.10, *et seq.*, and any other applicable statutes.

1 74. The Defendants will continue their unlawful conduct in the future absent (a) a
2 judicial declaration which clearly states the illegality of their conduct and (b) an injunction
3 barring the Defendants from engaging in such illegal conduct in the future.

4 **VIII. THIRD COUNT**
5 **Negligence**

6 *(Representative Plaintiff and the Washington Subclass vs. Defendants)*

7 75. Plaintiffs reassert and re-allege the allegations set forth in the above paragraphs as
8 if the same were alleged herein this count.

9 76. Consistent with the acts and omissions of the Defendants that are referenced in
10 this complaint, the Defendants breached duties of care, including the duty of ordinary care, to
11 Plaintiffs. Defendants permitted, suffered, required, ratified, directed, and/or otherwise
12 proximately caused the acts and omissions that have damaged Plaintiffs as referenced in this
13 complaint.

14 77. If any of the Defendants and/or their agents had not been negligent (or worse) in
15 their supervision, management, direction, instruction, training, guidance, assistance, and/or
16 control of each other, their agents, themselves, or other culpable persons, then the marketing
17 practices referenced herein would have comported with all applicable law, ONTIME4U and
18 others would not have gained access to the Plaintiffs' private information, and/or none of the text
19 messages referenced in this complaint would have been sent to the telephonic devices of
20 Plaintiffs.

21 78. For such reasons and/or otherwise as a consequence of Defendants' negligence
22 proximately causing violations of Plaintiffs' privacy and other injuries to Plaintiffs and/or their
23 property, Plaintiffs are entitled to recover from Defendants the damages referenced in this
24 complaint and in accord with proof to be presented at the trial of this matter.

25 **IX. PRAYER FOR RELIEF**

26 WHEREFORE, on behalf of herself and all others similarly situated, Representative
Plaintiff demands judgment against Defendants and prays that this Court to do the following:

DECLARATION OF SERVICE

I, the undersigned, certify that on the below date, a true copy of the foregoing document will be or has been served on the persons listed below in the manner shown as follows:

Joseph P. Lawrence
Vanessa M. Vanderbrug
Tracy J. Pearson
LAWRENCE & VERSNEL, PLLC
4120 Columbia Center
701 Fifth Avenue
Seattle, WA 98104

☐ Legal Messenger
☐ Facsimile
☐ United States Mail, First Class
☐ Direct Email
☒ CM/ECF Notification
☐ Other: _____

James Howard
Jessica M. Andrade
DORSEY & WHITNEY LLP
701 Fifth Avenue, Suite 6100
Seattle, WA 98104

☐ Legal Messenger
☐ Facsimile
☐ United States Mail, First Class
☐ Direct Email
☒ CM/ECF Notification
☐ Other: _____

Robert Wisnovsky
270 Wells Fargo Dr.
Jacksonville, OR 97530

☐ Legal Messenger
☐ Facsimile
☐ United States Mail, First Class
☒ Direct Email
☐ CM/ECF Notification
☐ Other: _____

John S. George
P.O. Box 375
Jacksonville, OR 97530

☐ Legal Messenger
☐ Facsimile
☐ United States Mail, First Class
☒ Direct Email
☐ CM/ECF Notification
☐ Other: _____

Dated this 3rd day of November 2011.

/s/ Albert H. Kirby
Albert H. Kirby, WSBA #40187