

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARIA AGNE, ERIN CHUTICH, and  
JERROD CHUTICH, on their own behalf and  
on behalf of other similarly situated persons,

Plaintiffs,

v.

PAPA JOHN'S INTERNATIONAL, INC., et  
al.

Defendants.

NO. 2:10-CV-01139 JCC

DEFENDANTS RAIN CITY PIZZA, L.L.C.;  
EDWARD TALIAFERRO; KEVIN  
SONNEBORN; SEATTLE PJ PIZZA, L.L.C.;  
PJ SOUND PIZZA, L.L.C; PAPA  
WASHINGTON, L.L.C; PAPA  
WASHINGTON II, L.L.C; ROSE CITY  
PIZZA, L.L.C;

ANSWER AND AFFIRMATIVE  
DEFENSES TO 5<sup>TH</sup> AMENDED  
COMPLAINT

(Jury Demanded)

COMES NOW the defendants Rain City Pizza, L.L.C., Seattle PJ Pizza,  
L.L.C., Rose City Pizza, L.L.C., PJ Sound Pizza, L.L.C., Papa Washington, L.L.C., Papa  
Washington II, L.L.C., Edward Taliaferro and Kevin Sonneborn, and in answer to Plaintiffs'  
Fifth Amended Complaint on file herein, admits, denies and alleges as follows<sup>1</sup>:

<sup>1</sup> Unless otherwise indicated, "defendants" refer to these prescribed answering defendants.

1           1.       In answer to Paragraph 1, including all subparts, of Plaintiffs' Fifth Amended  
2 Complaint, defendants have insufficient knowledge or information to either admit or deny  
3 said allegations and therefore, deny same.

4           2.       In answer to Paragraph 2 of Plaintiffs' Fifth Amended Complaint, defendants  
5 have insufficient knowledge or information to either admit or deny said allegations and  
6 therefore, deny same.

7           3.       In answer to Paragraph 3 of Plaintiffs' Fifth Amended Complaint, defendants  
8 have insufficient knowledge or information to either admit or deny said allegations and  
9 therefore, deny same.

10          4.       In answer to Paragraph 4, defendants admit that messages were sent to some  
11 pre-selected telephone numbers but deny that said messages were sent on the device  
12 described.

13          5.       In answer to Paragraph 5 of Plaintiffs' Fifth Amended Complaint, defendants  
14 have insufficient knowledge or information with respect to charges allegedly incurred to  
15 either admit or deny and therefore deny those allegations; and further deny the balance of said  
16 allegations in the paragraph.

17          6.       In answer to Paragraph 6 of Plaintiffs' Fifth Amended Complaint, defendants  
18 deny the allegations set forth therein.

## 19                               **II. JURISDICTION AND VENUE**

20          7.       In answer of Paragraph 7, defendants admit the allegations contained therein.

21          8.       In answer to Paragraph 8, defendants have insufficient knowledge or  
22 information to either admit or deny said allegations and therefore, deny same.

23          9.       In answer to Paragraph 9, defendants have insufficient knowledge or  
24 information to either admit or deny said allegations and therefore, deny same.  
25

1           10.     In answer to Paragraph 10, defendants have insufficient knowledge or  
2 information to either admit or deny said allegations and therefore, deny same.

3           11.     In answer to Paragraph 11, the Plaintiffs' 5<sup>th</sup> Amended Complaint, defendants  
4 Rose City Pizza, L.L.C. and Papa Washington II, L.L.C., deny they did business in King  
5 County and/or Washington State; as to these remaining defendants, they admit they did  
6 business in Washington State but deny the balance of said paragraph.

7                                   **III. THE DEFENDANTS**

8           12.     In answer to Paragraph 12, including all subparts thereof, of Plaintiffs' Fifth  
9 Amended Complaint, defendants have insufficient knowledge or information to either admit  
10 or deny said allegations and therefore, deny same.

11           13.     In answer to Paragraph 13, defendants have insufficient knowledge or  
12 information to either admit or deny said allegations and therefore, deny same.

13           14.     In answer to Paragraph 14, defendants have insufficient knowledge or  
14 information to either admit or deny said allegations and therefore, deny same.

15           15.     In answer to Paragraph 15, defendants have insufficient knowledge or  
16 information to either admit or deny said allegations and therefore, deny same.

17           16.     In answer to Paragraph 16, defendants have insufficient knowledge or  
18 information to either admit or deny said allegations and therefore, deny same.

19           17.     In answer to Paragraph 17 of Plaintiffs' Fifth Amended Complaint, defendants  
20 deny the allegations set forth therein; by way of further answer to these subparagraphs in  
21 Paragraph 17, defendants respond:

22                   a.     In answer to subparagraph a, to the extent that said paragraph contains  
23 charging allegations against these answering defendants, they are denied;

24                   b.     In answer to subparagraph b, to the extent that said paragraph contains  
25 charging allegations against these answering defendants, they are denied;

1 c. In answer to subparagraph c, defendants admit that Rain City Pizza,  
2 L.L.C., ceased to operate as a limited liability company; but except as expressly  
3 admitted, deny the balance of said subparagraph;

4 d. In answer to subparagraph d, defendants deny the allegations set forth  
5 therein;

6 e. In answer to subparagraph e, defendants admit Rose City Pizza, L.L.C.,  
7 is among other things, an Oregon limited liability company domiciled in Washington;  
8 and further admit, Sonneborn and Taliaferro own an interest in business entities which  
9 operate multiple Papa John's branded restaurants in Washington State but except as  
10 expressly admitted, deny the balance of said subparagraph;

11 f. In answer to subparagraph f, defendants admit that Seattle PJ Pizza,  
12 L.L.C., is a Washington limited liability company domiciled in Washington State but  
13 except as expressly admitted, deny the balance of said subparagraph;

14 g. In answer to subparagraph g, defendants admit that Papa Washington,  
15 L.L.C., is a Washington limited liability company, but except as expressly admitted,  
16 deny the balance of said subparagraph;

17 h. In answer to subparagraph h, defendants deny the allegations set forth  
18 therein.

19 i. In answer to subparagraph i, defendants admit that PJ Sound Pizza, L.L.C.,  
20 is a limited liability company domiciled in Washington State, and further admit that  
21 Sonneborn, manages PJ Sound Pizza, L.L.C., but except as expressly admitted, deny  
22 the balance of said subparagraph;

23 18. In answer to Paragraph 18 of the Fifth Amended Complaint, defendants admit  
24 that the principle place of business of the L.L.C. named defendants who may be defined as  
25 "constituents" in the Fifth Amended Complaint was and/or is Redmond, but except as

1 expressly admitted, are without knowledge or information sufficient to respond to the balance  
2 of said paragraph and therefore, deny same.

3 19. In answer to Paragraph 19 of Plaintiffs' Fifth Amended Complaint, defendants  
4 admit that the telephone number (206) 938-3000 belongs to a Papa John's branded restaurant,  
5 but except as expressly admitted, are without knowledge or information sufficient to either  
6 admit or deny the balance thereof, and therefore, deny same.

7 20. In answer to Paragraph 20, said allegations amount to a legal conclusion and  
8 do not require a responsive pleading; otherwise, defendants deny the allegations set forth  
9 therein.

10 21. In answer to Paragraph 21, defendants have insufficient knowledge or  
11 information to either admit or deny said allegations and therefore, deny same.

12 22. In answer to Paragraph 22 of Plaintiffs' Fifth Amended Complaint, defendants  
13 admit that PJ CORPORATE'S Agreement provides for marketing of Papa John's branded  
14 products, goods, and services; but except as expressly admitted, have insufficient knowledge  
15 or information to either admit said allegations, and therefore deny the balance thereof.

16 23. In answer to Paragraph 23 of Plaintiffs' Fifth Amended Complaint, to the  
17 extent that said paragraph contains charging allegations against these answering defendants,  
18 said allegations are denied.

19 24. In answer to Paragraph 24 of Plaintiffs' Fifth Amended Complaint, to the  
20 extent that said paragraph contains charging allegations against these answering defendants,  
21 said allegations are denied.

22 25. In answer to Paragraph 25 of Plaintiffs' Fifth Amended Complaint, defendants  
23 have insufficient knowledge or information to either admit or deny said allegations and  
24 therefore, deny same.

25 26. In answer to Paragraph 26 of Plaintiffs' Fifth Amended Complaint, defendants  
deny the allegations set forth therein.

**IV. GENERAL ALLEGATIONS**

27. In answer to Paragraph 27 of Plaintiffs' Fifth Amended Complaint, to the extent that said paragraph contains charging allegations against these answering defendants, they are denied.

28. In answer to Paragraph 28 of Plaintiffs' Fifth Amended Complaint, to the extent that said paragraph contains charging allegations against these answering defendants, they are denied.

29. In answer to Paragraph 29 of Plaintiffs' Fifth Amended Complaint, to the extent that said paragraph contains charging allegations against these answering defendants, they are denied.

30. In answer to Paragraph 30 of Plaintiffs' Fifth Amended Complaint, to the extent that said paragraph contains charging allegations against these answering defendants, they are denied.

31. In answer to Paragraph 31 of Plaintiffs' Fifth Amended Complaint, to the extent that said paragraph contains charging allegations against these answering defendants, they are denied.

32. In answer to Paragraph 32 of Plaintiffs' Fifth Amended Complaint, defendants deny.

a. In answer to subparagraph 32a of Plaintiffs' Fifth Amended Complaint, defendants admit that OnTime4U was provided a list of telephone numbers and paid to send messages to those telephone numbers but except as expressly admitted, deny the balance of said paragraph;

b. In answer to subparagraph 32b of Plaintiffs' Fifth Amended Complaint, defendants admit OnTime4U was provided telephone numbers and paid to send messages to those telephone numbers; but except as expressly admitted, deny the balance of said paragraph;

1           c.       In answer to subparagraph 32c of Plaintiffs' Fifth Amended Complaint,  
2 defendants have insufficient knowledge or information to either admit or deny said  
3 allegations and therefore, deny same.

4       33.       In answer to Paragraph 33 of Plaintiffs' Fifth Amended Complaint, and  
5 subparagraphs a-e thereof, to the extent that said paragraph and subparagraphs contain  
6 charging allegations against these answering defendants, defendants are without knowledge or  
7 information sufficient to either admit or deny same and therefore, deny same.

8       34.       In answer to Paragraph 34 of Plaintiffs' Fifth Amended Complaint, defendants  
9 admit.

10       35.       In answer to Paragraph 35 of Plaintiffs' Fifth Amended Complaint, defendants  
11 are without knowledge or information sufficient to either admit or deny said allegations and  
12 therefore, deny same.

13       36.       In answer to Paragraph 36 of Plaintiffs' Fifth Amended Complaint, defendants  
14 are without knowledge or information sufficient to either admit or deny said allegations and  
15 therefore, deny same.

16       37.       In answer to Paragraph 37 of Plaintiffs' Fifth Amended Complaint, and  
17 subparagraphs a-n, and each of them, these answering defendants are without knowledge or  
18 information sufficient to either admit or deny said allegations and therefore, deny same.

19       38.       In answer to Paragraph 38 of Plaintiffs' Fifth Amended Complaint, defendants  
20 have insufficient knowledge or information to either admit or deny said allegations and  
21 therefore, deny same.

22       39.       In answer to Paragraph 39 of Plaintiffs' Fifth Amended Complaint, defendants  
23 admit that they did not affirmatively advise customers that customer telephone numbers  
24 would be used to send texts to customers; but, except as expressly admitted, deny the balance  
25 of said allegations.

1           40.     In answer to Paragraph 40 of Plaintiffs' Fifth Amended Complaint, defendants  
2 admit that they received some complaints related to the general receipt of commercial text  
3 messages; but, except as expressly admitted, deny the balance of said allegations.

4           41.     In answer to Paragraph 41 of Plaintiffs' Fifth Amended Complaint, defendants  
5 have insufficient knowledge or information to either admit or deny said allegations and  
6 therefore, deny same.

7           42.     In answer to Paragraph 42 of Plaintiffs' Fifth Amended Complaint, defendants  
8 have insufficient knowledge or information regarding their constructive knowledge to either  
9 admit or deny and therefore, deny; but, as to their personal knowledge, said allegations are  
10 denied.

11           43.     In answer to Paragraph 43 of Plaintiffs' Fifth Amended Complaint, defendants  
12 admit.

13           44.     In answer to Paragraph 44 of Plaintiffs' Fifth Amended Complaint, defendants  
14 deny.

15           45.     In answer to Paragraph 45 of Plaintiffs' Fifth Amended Complaint, the  
16 allegations relate to a legal conclusion and require no responsive pleading; but, said  
17 allegations are otherwise denied.

18           46.     In answer to Paragraph 46 of Plaintiffs' Fifth Amended Complaint, defendants  
19 deny that the plaintiffs have no protection or absent a legal remedy, but, as to the balance of  
20 said allegations, defendants have insufficient knowledge or information to either admit or  
21 deny said allegations and therefore, deny same.

## 22                                   **V. CLASS ACTION ALLEGATIONS**

23           47.     In answer to Paragraph 47 of Plaintiffs' Fifth Amended Complaint, defendants  
24 deny the allegations contained therein.

25           48.     In answer to Paragraph 48 of Plaintiffs' Fifth Amended Complaint, defendants  
deny the allegations contained therein.



51. In answer to Paragraph 51 of Plaintiffs' Fifth Amended Complaint, defendants deny.

52. In answer to Paragraph 52 of Plaintiffs' Fifth Amended Complaint, defendants deny.

53. In answer to Paragraph 53 of Plaintiffs' Fifth Amended Complaint, defendants have insufficient knowledge or information to either admit or deny said allegations and therefore, deny same.

54. In answer to Paragraph 54 of Plaintiffs' Fifth Amended Complaint, defendants deny.

55. In answer to Paragraph 55 of Plaintiffs' Fifth Amended Complaint, defendants are without knowledge or information sufficient to either admit or deny said allegations and therefore, deny same.

56. In answer to Paragraph 56 of Plaintiffs' Fifth Amended Complaint, defendants deny.

57. In answer to Paragraph 57 of Plaintiffs' Fifth Amended Complaint, defendants deny.

58. In answer to Paragraph 58 of Plaintiffs' Fifth Amended Complaint, these answering defendants incorporate their answers to the incorporated paragraphs as though set forth at length herein.

1           59.     In answer to Paragraph 59 of Plaintiffs' Fifth Amended Complaint, defendants  
2 have insufficient knowledge or information to either admit or deny said allegations and  
3 therefore, deny same.

4           60.     In answer to Paragraph 60 of Plaintiffs' Fifth Amended Complaint, defendants  
5 deny.

6           61.     In answer to Paragraph 61 of Plaintiffs' Fifth Amended Complaint, defendants  
7 deny.

8           62.     In answer to Paragraph 62 of Plaintiffs' Fifth Amended Complaint, defendants  
9 deny.

10          63.     In answer to Paragraph 63 of Plaintiffs' Fifth Amended Complaint, defendants  
11 deny.

12          64.     In answer to Paragraph 64 of Plaintiffs' Fifth Amended Complaint, defendants  
13 deny.

14                                   **VII. SECOND COUNT**

15          65.     In answer to Paragraph 65 of Plaintiffs' Fifth Amended Complaint, defendants  
16 incorporate their answers to the incorporated paragraphs as though set forth at length herein.

17          66.     In answer to Paragraph 66 of Plaintiffs' Fifth Amended Complaint, defendants  
18 have insufficient knowledge or information to either admit or deny said allegations and  
19 therefore, deny same.

20          67.     In answer to Paragraph 67 of Plaintiffs' Fifth Amended Complaint, defendants  
21 deny.

22          68.     In answer to Paragraph 68 of Plaintiffs' Fifth Amended Complaint, defendants  
23 deny.

24          69.     In answer to Paragraph 69 of Plaintiffs' Fifth Amended Complaint, defendants  
25 deny.

1           70.     In answer to Paragraph 70 of Plaintiffs' Fifth Amended Complaint, defendants  
2 deny.

3           71.     In answer to Paragraph 71 of Plaintiffs' Fifth Amended Complaint, defendants  
4 deny.

5           72.     In answer to Paragraph 72 of Plaintiffs' Fifth Amended Complaint, defendants  
6 deny.

7           73.     In answer to Paragraph 73 of Plaintiffs' Fifth Amended Complaint, defendants  
8 deny.

9  
**VIII. THIRD COUNT**

10          74.     In answer to Paragraph 74 of Plaintiffs' Fifth Amended Complaint, these  
11 answering defendants incorporate their answers to the incorporated paragraphs as though set  
12 forth at length herein.

13          75.     In answer to Paragraph 75 of Plaintiffs' Fifth Amended Complaint, defendants  
14 deny.

15          76.     In answer to Paragraph 76 of Plaintiffs' Fifth Amended Complaint, defendants  
16 deny.

17          77.     In answer to Paragraph 77 of Plaintiffs' Fifth Amended Complaint, defendants  
18 deny.

19  
**AFFIRMATIVE DEFENSES**

20          Defendants have not yet had a full opportunity to conduct a reasonable inquiry into the  
21 facts underlying this action. However, based upon their knowledge, information, and belief,  
22 they wish to impose the following affirmative defenses, some or all of which may ultimately  
23 be supported by the facts to be revealed in discovery and investigation in this matter. Upon  
24 request and after having conducted discovery, defendants will withdraw those affirmative  
25 defenses, if any, that are unsupported by the facts as revealed in pretrial discovery and  
investigation. By way of affirmative defenses, defendants allege as follows:

- 1           1.     The 5<sup>th</sup> Amended Complaint, and each and every alleged cause of action  
2           therein, fails to state a claim upon which relief can be granted.
- 3           2.     The plaintiffs, and each of them, legally consented to the receipt of commercial  
4           texts messaging, in that, and not by way of limitations, plaintiffs willfully and  
5           voluntarily provided their cellular telephone numbers with the reasonable  
6           expectation of subsequent use by the defendants for commercial purposes  
7           related to that specific commercial purpose i.e. the purchase of pizza related  
8           products, goods and services;
- 9           3.     The 5<sup>th</sup> Amended Complaint, and each and every alleged cause of action set  
10          forth therein fails to state a claim for relief under the Telephone Consumer  
11          Protection Act , 47 U.S.C. § 227, in that, and not by way of limitations, these  
12          answering defendants neither made or initiated a phone call, and any claimed  
13          transmission was not generated by an automatic telephone dialing system, as  
14          defined by law or statute;
- 15          4.     These answering defendants owed no duty of due care to the plaintiffs and  
16          therefore there is no basis for a claim of negligence;
- 17          5.     Plaintiffs, and each of them, by their conduct, or failure to act, waived any  
18          expectation of privacy related to the use of their cellular telephone number;
- 19          6.     The plaintiffs, and each of them, are not entitled to equitable relief since the  
20          equities do not preponderate in their favor;
- 21          7.     The plaintiffs, and each of them, are not entitled to equitable relief since they  
22          are, on information and belief, guilty of unclean hands and laches;
- 23          8.     Plaintiffs' injuries and damages, if any, were proximately caused by or  
24          contributed to by the fault of co-defendants and/or unnamed persons or entities  
25          so as to bar or reduce these defendants' liability, if any, herein.
9.     There has been a failure to mitigate damages, if any.
10.    The plaintiffs lack standing to pursue the remedies set forth in their 5th  
          Amended complaint.

13. Plaintiffs' claim assented, and remedies prayed for, effectively amount to a violation of defendants' rights to due process and equal protection as guaranteed by the state and federal constitutions.

Defendants reserve the right to add further affirmative defenses, and to make such claims, cross claims, counterclaims or Fourth-party claims as discovery progresses and as plaintiffs more specifically sets forth their claims.

WHEREFORE, having fully answered Plaintiffs' 5<sup>th</sup> Amended Complaint, defendants pray for judgment as follows:

1. That plaintiffs take nothing by their complaint and that it be dismissed with prejudice;
2. That defendants should be allowed its attorney's fees, costs and expenses incurred herein to the fullest extent allowed by law, including RCW 4.84;
3. An apportionment of liability with co-defendants, and unidentified third persons and/or entities, as provided for in RCW 4.22.050, et seq; and
4. For such other and further relief as the court may deem just and proper.

1 DATED this 13th day of August, 2012.

2  
3 LAWRENCE & VERSNEL PLLC

4 By:-----/s/-----

5 Joseph P. Lawrence, Jr., WSBA No. 19448  
6 Joan L. Roth, WSBA No. 8979  
7 701 5th Avenue, Suite 4120  
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**DECLARATION OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the below date, a true copy of ***Defendants Rain City Pizza, et al Answer and Affirmative Defenses to Plaintiff's 5<sup>th</sup> Amended Complaint***, was served on the persons listed below in the manner shown, as follows:

I hereby certify that I served the foregoing document on the individuals below by the following method:

Albert Kirby Kirby Law Group 93 S. Jackson St., Ste. 63230 Seattle, WA 98104-2818	<input checked="" type="checkbox"/> CM/ ECF Notification <input type="checkbox"/> FedEx <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Via Overnight Mail
James Howard Jessica M. Andrade Dorsey & Whitney LLP 701 Fifth Ave, Suite 6100 Seattle, WA 98104	<input checked="" type="checkbox"/> CM/ ECF Notification <input type="checkbox"/> FedEx <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Via Overnight Mail
Robert Wisnovsky 270 Wells Fargo Dr. Jacksonville, OR 97530	<input type="checkbox"/> CM/ ECF Notification <input type="checkbox"/> FedEx <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Via Overnight Mail
John S. George PO Box 375 Jacksonville, OR 97530	<input type="checkbox"/> CM/ ECF Notification <input type="checkbox"/> FedEx <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Via Overnight Mail
Donald W. Heyrich Daniel Kalish Lisa A. Burke Cindy M. Lin Heyrich Kalish McGuigan PLLC 1325 Fourth Ave., Ste. 540 Seattle, WA 98101	<input checked="" type="checkbox"/> CM/ ECF Notification <input type="checkbox"/> FedEx <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Via Overnight

1  
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