

Honorable David G. Estudillo

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WA**

NATHEN BARTON,

Plaintiff

v.

Alleviate Tax LLC, and John Doe 1-10

Defendants.

Case No.: [3:23-cv-06071-DGE](#)

**RESPONSE TO DEFENDANTS’  
MOTION TO DISMISS  
DKT 11**

Noted for January 12, 2023

Barton responds to Dkt. 11. Their motion on 64.1200(d)(4) should be denied because the bulk of authorities supports Barton’s complaint. Their motion on RCW 80.36.400(2) should be denied because in this circuit WADAD and 227(b) artificial or prerecorded voice claims are considered together. In the alternative Barton should be allowed to amend his complaint to address any deficiencies.

**47 C.F.R. § 64.1200(d)(4)**

If the Defendants were candid with this Court, they would have admitted that few courts now support their position of no private right of action for 47 CFR § 64.12000(d)(4). While true that for a time some courts drew this conclusion, the vast majority of courts have now found that § [64.12000](#)(d) was promulgated under [TCPA 227](#)(c) which provides for a private right of action.

1 This is why the Defendants generally cite older cases. Their *Worsham* citation is newer  
 2 but the Defendants forgot to mention that subsequent to their cited cases, a Judge in that district  
 3 reversed himself<sup>1</sup> and found there is a private right of action under § [64.12000](#)(d)(4):

4 “Worsham alleges an error of law, and his argument is supported by a recent opinion of  
 5 the Court of Special Appeals of Maryland . . .

6 This Court dismissed these counts by concluding that 47 C.F.R. § 64.1200(d)(4) does not  
 7 provide a private right of action . . .

8 Whether 47 C.F.R. § 64.1200(d)(4) includes a private right of action turns on whether the  
 9 regulation was promulgated pursuant to § 227(c) or § 227(d) of the TCPA . . .

10 These decisions are persuasive. Collectively, their review of the regulatory history of 47  
 11 C.F.R. § 64.1200(d) and its place in the statutory scheme suggests that the regulation at  
 12 issue is best construed as a privacy protection that was originally promulgated pursuant to  
 13 § 227(c) . . . this Court respectfully departs from its prior decision in *Travel Options* and  
 14 adopts Chief Judge Fader’s reasoning articulated in *Lifestation*.”

15 *Travel Options* was one of the Defendants cited cases. Similarly, the Western District of  
 16 Oklahoma reversed in 2023’ [Braver v. Clear Sky Financial](#) and found a private right of action.

17 In concluding § [64.12000](#)(d)(4) was promulgated under § 227(c), the *Clear Sky Financial*  
 18 court cited recent decisions in [Bilek v. Nat’l Cong. of Emp’rs, Inc.](#),<sup>2</sup> *Fischman v. MediaStratX,*  
 19 *LLC*,<sup>3</sup> and *Callier v. Debt Mediators, LLC*<sup>4</sup> (“the Court agrees with the majority based on the  
 20 text and intent of the statute and regulations. It finds that § 64.1200(d) was promulgated under §  
 21 227(c)”). See also *Barrett v. Vivint, Inc.*,<sup>5</sup> *Moore v. Pro Custom Solar LLC*,<sup>6</sup> *Sorsby v.*

21 <sup>1</sup> [Worsham v. Discount Power, Inc.](#), CIVIL ACTION RDB-20-0008, (D. Md. Dec. 1, 2021)

22 <sup>2</sup> [Bilek v. Nat’l Cong. of Emp’rs, Inc.](#), 470 F. Supp. 3d 857, 863 (N.D. Ill. 2020)

23 <sup>3</sup> [Fischman v. MediaStratX, LLC](#), 2:20-CV-83-D, (E.D.N.C. Aug. 10, 2021)

24 <sup>4</sup> [Callier v. Debt Mediators, LLC](#), No. EP-21-CV-278-DB, 4 (W.D. Tex. May. 5, 2022)

<sup>5</sup> [Barrett v. Vivint, Inc.](#), Case No. 2:19-cv-00568-DBB-CMR, 18 (D. Utah May. 20, 2020)

<sup>6</sup> [Moore v. Pro Custom Solar LLC](#), 21 C 4395, 10 (N.D. Ill. Apr. 12, 2022)

1 *Truegreen Ltd.*,<sup>7</sup> *Boardman v. Green Dot Corp.*,<sup>8</sup> and *Robison v. 7PN, LLC*.<sup>9</sup> See also *Powers v.*  
2 *One Techs.*<sup>10</sup>:

3 “The Third, Sixth, and Eleventh Circuits have found that § 64.1200(d) was  
4 promulgated to protect privacy rights under 47 U.S.C. § 227(c) and thus that  
5 § 227(c)'s private right of action reaches violations of § 64.1200(d). The  
6 Fifth Circuit has not yet weighed in, but district courts within the Fifth  
7 Circuit have agreed that § 64.1200(d) was promulgated under § 227(c), and  
8 that there is a private right of action . . . This Court, in accord with others,  
9 finds that § 64.1200(d) was issued to further the privacy right in § 227(c).  
10 Thus, the private right of action contained in § 227(c) reaches violations of  
11 § 64.1200(d).”

12 *Powers* is a little dated. District courts in the First,<sup>11</sup> Seventh<sup>12</sup> and Eighth<sup>13</sup> have got on  
13 board, and with the reversal in *Braver* so has the Tenth.

14 The overwhelming majority of courts to rule on the issue have now adopted Barton’s  
15 position that it was promulgated under § 227(c) and has a private right of action.

#### 16 **RCW 80.36.400**

17 *Chesbro* dealt with artificial or prerecorded voice claims and that court held the text of  
18 the WADAD “is substantially similar to its federal counterpart [the TCPA], as its purpose” and  
19 so the § 227(b) and WADAD claims should be considered together.<sup>14</sup> The underlying complaint  
20 in *Chesbro* (Exhibit 1) makes the sole allegation “The calls consisted of a pre-recorded message  
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<sup>7</sup> *Sorsby v. Truegreen Ltd.*, Case No. 20-cv-2601, 10 (N.D. Ill. Dec. 23, 2020)

<sup>8</sup> *Boardman v. Green Dot Corp.*, 3:21-CV-00174-FDW-DSC, (W.D.N.C. Aug. 19, 2021)

<sup>9</sup> *Robison v. 7PN, LLC*, 569 F. Supp. 3d 1175, 1178 (D. Utah 2021)

<sup>10</sup> *Powers v. One Techs.*, Civil Action 3:21-CV-2091, 4 (N.D. Tex. Jul. 28, 2022)

<sup>11</sup> *Rosenberg v. LoanDepot.com LLC*, 435 F. Supp. 3d 308, 324 (D. Mass. 2020)

<sup>12</sup> See *Bilek supra*

<sup>13</sup> *Hand v. Beach Entm't KC, LLC*, 456 F. Supp. 3d 1099, (W.D. Mo. 2020)

<sup>14</sup> *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 919 (9th Cir. 2012).

1 delivered by an automatic dialing and announcing device”. Barton has a similar allegation in  
2 ¶413 of Dkt. 5:

3 “Defendants violated Washington State RCW 80.36.400(2) many times by  
4 calling Plaintiff’s cellular telephone number without consent, while using  
an automatic dialing and announcing device for commercial solicitation.”

5 The Defendants claim that

6 “The Ninth Circuit ruling in *Williams* makes it clear that a plaintiff must  
7 allege that a defendant uses a device that “automatically announces” *and*  
“automatically dials.””

8 Notwithstanding that Barton did allege that, that case is easily distinguishable “*Williams*  
9 proceeded on the legal theory that a device need not play a recorded message to qualify as an  
10 automatic dialing and announcing device”.

11 Barton made the same allegations with the same level of specificity about the same  
12 alleged violations as *Chesbro* and that was sufficient to earn a reversal of dismissal from the  
13 Ninth Circuit. It should be sufficient here.

14 If the Court finds otherwise, it should grant Barton the opportunity to amend his  
15 complaint to add further allegations that the Defendants automatically dialed Barton’s phone  
16 numbers with an announcement.

17 **Conclusion**

- 18
- 19 • The Defendants § 64.12000(d)(4) arguments have fallen on deaf ears in the First, Third,  
20 Fifth, Sixth, Seventh, Eighth, and Tenth Circuit district courts. Several appellate courts  
have now rejected these arguments. Likewise, they should fail here too.
  - 21 • The Defendants claimed that “Plaintiff’s FAC lacks any allegations that Alleviate’s  
22 system automatically dials any telephone numbers” while overlooking Barton’s ¶413 in  
23 Dkt. 5.
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/s/ Nathen Barton  
(Nathen Barton)

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Camas WA 98607

**CERTIFICATE OF SERVICE**

I hereby certify that I caused the foregoing document to be electronically filed with the Clerk of the Court using the Electronic Filing (CM/ECF) system, which will send notification of such filing to all counsel of record and all pro se parties registered to use the CM/ECF system.

s/ Nathen Barton  
Nathen Barton

12/21/2023  
(Dated)

HONORABLE RICHARD A. JONES

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

MICHAEL CHESBRO, an individual,

Plaintiff,

v.

BEST BUY STORES, L.P.,

Defendant.

NO. C10-00774 RAJ

**SECOND AMENDED  
COMPLAINT FOR DAMAGES,  
INJUNCTIVE AND  
DECLARATORY RELIEF**

Plaintiff Michael Chesbro, individually and as class representative for a National Class and Subclass of similarly situated individuals and a Washington State Class of similarly situated individuals, alleges as follows:

**I. PARTIES, JURISDICTION, VENUE**

1.1. Defendant Best Buy Stores, L.P. (“Best Buy”) is a Minnesota limited partnership with its principal offices in Richfield, Minnesota.

1.2. Plaintiff Michael Chesbro is a resident of Rainier, Washington, and the owner of the telephone on which he receives calls, including those which are the subject of this complaint.

1.3. The calls in question were received on Plaintiff Chesbro’s home telephone in Thurston County, Washington.



1 \$5.00; spending \$500 accrues 500 Points worth a \$10 Reward Certificate, and spending \$1000  
2 accrues 1000 points worth a \$20 Reward Certificate.

3 2.3. On information and belief, unbeknownst to Mr. Chesbro, Best Buy enrolled him  
4 in the Reward Zone Program when he purchased the computer from Best Buy Olympia in July  
5 2008. Mr. Chesbro never knowingly or intentionally joined or participated in the Reward Zone  
6 Program, nor did he wish to join or participate in any such program.

7 2.4. The purpose of Best Buy's Reward Zone Program is marketing. Under the  
8 program, because the Reward Certificates are for small dollar amounts, a customer must  
9 typically make additional purchases in order to utilize his or her Reward Certificates, thereby  
10 generating revenue for Best Buy.

11 2.5. Likewise, Best Buy's ADAD calls, including any references made to the  
12 Reward Zone Program and Mr. Chesbro's status in the Program, were made for the purpose of  
13 commercial solicitation, soliciting Plaintiff to purchase merchandise from Defendant and/or to  
14 participate in a program, the purpose of which is revenue generation. Plaintiff, in receiving the  
15 ADAD calls from Best Buy, understood that the calls were for the purpose of commercial  
16 solicitation. Best Buy is a for-profit company, and Plaintiff Chesbro knew that the company  
17 had no reason to be making automated calls to him that were not marketing or solicitation  
18 related.  
19 related.

20 2.6. Defendant Best Buy is responsible for making the above-described ADAD calls.  
21 Plaintiff did not provide prior consent, express or implied, to the receipt of ADAD solicitation  
22 calls from Defendant. Plaintiff's residential telephone number has been on the national do-not-  
23 call list since June 6, 2005, and was on the national do-not-call list when Best Buy made the  
24 above-referenced calls.  
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1           2.7. At the end of each pre-recorded call, the recording gave Plaintiff Chesbro the  
2 option of pressing a number, such as the number “1,” to stop the calls. When the calls began,  
3 Mr. Chesbro pressed that number, but, despite his effort to “opt out” in this manner, Best Buy  
4 continued to make ADAD solicitation calls to his residential telephone.

5           2.8. On November 11, 2008, at approximately 10:18 a.m., after receiving several  
6 ADAD calls from Defendant Best Buy and unsuccessfully requesting that Defendant take him  
7 off of its calling lists by “opting out,” Plaintiff Chesbro called Best Buy at 1-888-237-8289 (the  
8 number from which the calls originated). Plaintiff asked the Best Buy representatives  
9 answering his call to stop calling him and to cancel any membership in any program they  
10 thought he had joined. Customer Service representative “Ken” and Customer Service  
11 supervisor “Beth” denied any knowledge of the Reward Zone calls and were unable to address  
12 Mr. Chesbro’s concerns. Plaintiff Chesbro filed a Complaint with the Washington Attorney  
13 General Office, and Best Buy said they would put him on their “do not call” list.

14           2.9. On November 12, 2008, Plaintiff Chesbro filed a Complaint with the Consumer  
15 Protection Division of the Washington Attorney General’s Office. As a result of the processing  
16 of that Complaint, Best Buy advised the Attorney General’s Office on December 3, 2008 in  
17 part as follows:

18                   Best Buy has identified the automated call received by Mr.  
19                   Chesbro. This call was to advise Mr. Chesbro, a Reward Zone  
20                   member, that he currently has points available on his reward  
21                   Zone account and that they were about to expire not a solicitation  
22                   [sic]. At this time, Best Buy has placed Mr. Chesbro’s number  
23                   on [its] ‘do not call’ list.

24 Nevertheless, less than six months later, Best Buy resumed making one or more ADAD calls to  
25 Mr. Chesbro and, when Mr. Chesbro again complained to the Washington Attorney General’s  
26 Office, Best Buy responded, in part, as follows:

1 Mr. Chesbro did receive a call from Best Buy on June 27<sup>th</sup>. This  
2 call was not a marketing call but an operational call to  
3 announce upcoming changes to our Reward Zone program of  
4 which Mr. Chesbro is still a member...

5 2.10. Upon information and belief, Defendant placed a large number of substantially  
6 similar telephone calls to the telephones of persons in Washington State, including persons in  
7 King County, and to persons in other states.

8 2.11. Upon information and belief, Defendant intends to continue to send ADAD  
9 solicitation messages to the telephones of persons in Washington State and other states.

10 **III. CAUSES OF ACTION**

11 3.1. Plaintiff realleges the foregoing paragraphs as if fully stated herein. The  
12 following causes of action are, to the extent necessary, stated in the alternative.

13 **Count A. Violation of 47 U.S.C. § 227(b)(1)(B) (National Class)**

14 3.2. In placing ADAD calls to Plaintiff’s residential telephone line using an artificial  
15 or pre-recorded voice to deliver a message without the prior express consent of the called party,  
16 for a commercial purpose, Defendant Best Buy has violated 47 U.S.C. § 227(b)(1)(B).

17 3.3. As a result of said conduct, Plaintiff and members of the National Class have  
18 sustained damages. Plaintiff and all members of said Class are entitled to injunctive relief  
19 enjoining Defendant’s unlawful conduct, as well as statutory damages, including treble  
20 damages, for each of Defendant’s violations of the law.

21 **Count B. Violation of 47 CFR § 64.1200 et seq. (National Subclass)**

22 3.4. Defendant Best Buy has violated 47 CFR § 64.1200 et seq., by placing ADAD  
23 solicitation calls to Plaintiff Chesbro which left pre-recorded messages and by placing ADAD  
24 solicitation calls to Mr. Chesbro when his residential telephone number was on the National  
25 Do-Not-Call registry, when that number was or should have been on the Best Buy internal  
26  
27

1 Do-Not-Call registry, and, on information and belief, when one of more of such calls violated  
 2 Best Buy's own Do-Not-Contact Policy. Violations include, but are not limited, to violating  
 3 47 CFR § 64.1200(d)(3) entitled *Recording, disclosure of do-not-call requests*- by failing to  
 4 record such requests, place the subscriber's name and telephone number on the do not call list  
 5 at the time the request is made and, within a reasonable time from the date such request is  
 6 made, honor the request.

7  
 8 3.5. Any violation by Best Buy or its agents of the Do-Not-Call provisions of  
 9 47 CFR § 64.1200 entitles Plaintiff Chesbro and members of the related National Subclass to  
 10 damages pursuant to 47 U.S.C § 227(c)(5). Under 47 U.S.C. § 227(c)(5), Plaintiff and all  
 11 members of said Subclass are entitled to injunctive relief enjoining Defendant's unlawful  
 12 conduct, as well as statutory damages, including treble damages, for each of Defendant's  
 13 violations of the law.

14 **Count C. Violation of RCW 80.36.400 (Washington State Class)**

15  
 16 3.6. Defendant Best Buy has violated RCW 80.36.400 by making ADAD telephone  
 17 calls which automatically dial numbers and play a recorded message, for purposes of  
 18 commercial solicitation, to the telephones of Plaintiff and the Washington State Class.

19 3.7. As a result of said conduct, Plaintiff and members of the Washington State Class  
 20 have sustained damages. Plaintiff and all members of said Class are entitled to injunctive relief  
 21 enjoining Defendant's unlawful conduct, as well as statutory and other damages as set forth  
 22 below.

23  
 24 **Count D. Violation of RCW 19.86 (Washington State Class)**

25 3.8. Under RCW 80.36.400(3), Defendant's violation of RCW 80.36.400 constitutes  
 26 a violation of RCW 19.86, *et seq.*, the Washington Consumer Protection Act ("CPA").  
 27

1           3.9. As a result of said conduct, Plaintiff and members of the Washington State Class  
2 have sustained damages. Under the CPA, Plaintiff and all members of said Class are entitled to  
3 injunctive relief enjoining Defendant’s unlawful conduct, as well as statutory and other  
4 damages, and fees and costs as set forth below.

5                           **Count E. Violation of RCW 80.36.390 (Washington State Subclass)**

6           3.10. Defendant Best Buy, directly or through its agents, has violated RCW  
7 80.36.390(3) by making telephone calls to Plaintiff and members of the Washington State  
8 Subclass within a year of the date Plaintiff and members of said Subclass asked not to be called  
9 by Defendant again.

10           3.11. As a result of said conduct, Plaintiff and members of the Washington State  
11 Subclass have sustained damages. Plaintiff and all members of said Subclass are entitled to  
12 injunctive relief enjoining Defendant’s unlawful conduct, as well as statutory damages and  
13 attorney fees and costs, for each of Defendant’s violations of the law.  
14

15                           **Count F. Declaratory Relief Under The**  
16                           **Declaratory Judgment Act (28 U.S.C. § 2201 et seq.)**

17           3.12. Defendant used an automated dialing and announcement device to send a pre-  
18 recorded message to the telephones of persons in Washington, and made telephone calls to  
19 persons on the National Do-Not-Call registry, to persons on its own Do-Not-Call registry, and  
20 to persons in Washington State within a year of the date said persons asked not to be called by  
21 Defendant again, including by pressing “1” or some other number during a pre-recorded call in  
22 an attempt to “opt out” of future calls.  
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24           3.13. An actual controversy has arisen and now exists between Plaintiff and the other  
25 members of the classes, on the one hand, and Defendant, on the other hand, concerning their  
26 respective rights and duties.  
27

1 3.14. Plaintiff and the Classes are entitled to have their rights, status and legal  
2 relations relating to Defendant’s use of an automatic dialing and announcing device, and  
3 Defendant’s alleged Do-Not-Call violations, established by this Court.

4 **IV. CLASS ACTION ALLEGATIONS**

5 4.1. Plaintiff realleges the foregoing paragraphs as if fully stated herein.

6  
7 4.2. This class action is brought and may be maintained pursuant to FRCP 23(b)(2)  
8 and (b)(3). Plaintiff seeks to represent a National Class and Subclass and a Washington State  
9 Class and Subclass comprised of:

10 National Class: All persons who received a pre-recorded  
11 telephone message on their telephone from Defendant sent by  
12 automatic dialing machine without prior express consent, at any  
13 time for the period that begins 4 years from the date of this  
14 complaint to trial;

15 National Subclass: All persons who received pre-recorded  
16 telephone messages on their telephone from Defendant sent by  
17 automatic dialing machine after requesting to be placed on  
18 Defendant’s internal do-not-call list at any time for the period  
19 that begins 4 years from the date of this complaint to trial; and

20 Washington State Class: All Washington persons who received a  
21 pre-recorded telephone message on their telephone from  
22 Defendant sent by automatic dialing machine for purposes of  
23 commercial solicitation at any time for the period that begins 4  
24 years from the date of this complaint to trial.

25 Washington State Subclass: All Washington persons who  
26 received two or more calls from Defendant within a year of the  
27 date they asked not to be called by Defendant again, including  
those who pressed “1” or some other number during a pre-  
recorded call in an attempt to “opt out” of future calls.

28 4.3. **Numerosity.** The Classes are each so numerous that joinder of all members is  
29 impracticable. Upon information and belief the Classes each likely have more than 100  
30 members.

31 4.4. **Common Questions of Law and Fact.** The questions of law and fact are the  
32 same for all class members, including whether the Defendant’s conduct violated

1 47 U.S.C. § 227(b)(1)(B), 46 CFR § 64.1200, including (c)(2) and (d)(3), RCW 80.36.400 and  
 2 RCW 80.36.390.

3 4.5. **The Plaintiff’s Claims are Typical of the Class.** Plaintiff’s claims are typical  
 4 of the Classes in that they arise from Defendant’s repeated violation of 47 U.S.C.  
 5 § 227(b)(1)(B), 46 CFR § 64.1200, including (c)(2) and (d)(3), RCW 80.36.400 and the CPA,  
 6 and/or RCW 80.36.390 as to Plaintiff and all other class members.

7 4.6. **The Plaintiff Will Fairly and Adequately Protect Class.** Plaintiff will  
 8 adequately represent and protect the interests of the Classes because he has retained competent  
 9 and experienced counsel and his interests in the litigation are not antagonistic to the other  
 10 members of the Classes.

11 4.7. **A Class Action is Maintainable Under FRCP 23(b)(3).** The questions of law  
 12 and fact common to all members of the Classes predominate over questions affecting only  
 13 individual members of the Classes, because all members of the Classes were subjected to  
 14 Defendant’s unlawful use of one or more ADADs. The prosecution of separate actions by  
 15 individual members of the Classes against Defendant would create the risk of inconsistent or  
 16 varying adjudications and incompatible standards of treatment. On information and belief,  
 17 there are no other pending class actions concerning these issues. A class action is superior to  
 18 any other available means for the adjudication of this controversy. This action will cause an  
 19 orderly and expeditious administration of the Classes’ claims; economies of time, effort and  
 20 expense will be fostered; and uniformity of decisions will be ensured at the lowest cost and  
 21 with the least expenditure of judicial resources.

22 4.8. **A Class Action is Maintainable Under FRCP 23(b)(2).** Defendant has acted  
 23 on grounds generally applicable to Plaintiff and the Classes as alleged herein, thereby making  
 24

1 appropriate injunctive and declaratory relief, as well as incidental damages, with respect to the  
2 Classes as a whole.

3 **V. PRAYER FOR RELIEF**

4 WHEREFORE, the Plaintiff, on behalf of himself and the Classes and Subclasses of  
5 similarly situated individuals, respectfully requests that the Court enter judgment in his favor  
6 and in favor of the Classes and Subclasses for:

7 A. Certification of the Classes and Subclass pursuant to FRCP 23(b)(2) and FRCP  
8 23(b)(3);

9 B. Granting declaratory, equitable, and/or injunctive relief as permitted by law to  
10 ensure that Defendant will not continue to use automatic dialing and announcement devices to  
11 send messages to telephone subscribers, or continue to commit Do-Not-Call violations;

12 C. Judgment against Defendant for statutory damages of \$500 for each legal  
13 violation committed by Defendant (with the exception of violations of RCW 80.36.390 for  
14 which, in accordance with RCW 80.36.390(6) "...the Court shall award damages of at least one  
15 hundred dollars for each individual violation...) when it placed the calls in question to Plaintiff  
16 Chesbro and members of the Classes, including, where applicable, more than one legal  
17 violation per call, plus treble damages for each intentional or willful legal violation, and other  
18 damages, attorney's fees and costs as are permitted under federal and state law;

19 D. Judgment for attorney fees and costs of suit as permitted by applicable law; and

20 E. Any other or further relief which the Court deems fair and equitable.  
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DATED this 5th day of January, 2011.

TERRELL MARSHALL & DAUDT PLLC

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CERTIFICATE OF SERVICE

I, Kimberlee L. Gunning, hereby certify that on January 5, 2011, 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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DATED this 5th day of January, 2011.

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