

101406

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

DIANA MEY, individually and on behalf of a class of all persons and entities similarly situated,

Plaintiff,

CIVIL ACTION NO. 09-C-238

v.

THE PEP BOYS – MANNY, MOE & JACK, SOUTHWEST VEHICLE MANAGEMENT, INC. and LANELOGIC INC., d/b/a CAROFFER.COM,

Defendants.

2010 JAN 15 PM 4 30
BRENDA L. MILLER
CIRCUIT COURT
OF OHIO COUNTY

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On December 18, 2009, this matter came before the Court on Defendant Pep Boys' Motion to Dismiss Plaintiff's class action complaint. The motion was joined by Defendant Lanelogic, Inc., d/b/a/ Caroffer.com ("Lanelagoic"). Upon consideration of Defendant Pep Boy's motion, Plaintiff's opposition thereto,¹ and the argument of counsel presented on the record at the hearing of this matter, the Court finds as follows:

Plaintiff filed her class action complaint (the "Complaint"), claiming that Defendants Pep Boys, Southwest Vehicle Management, Inc. and Lanelogic Inc. d/b/a Caroffer.com (collectively, "Defendants") violated the Federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, when Defendants allegedly left Plaintiff a prerecorded voicemail message at her residence in response to a classified ad that was posted on the Internet website craigslist.com. Because the Court finds that the subject

¹ Counsel for Defendant Pep Boys stated that they did not get served with a copy of Plaintiff's Opposition. Pep Boys did not object to the filing of the opposition nor did it request a continuance of the hearing. Thus, in ruling on Defendant Pep Boy's Motion to Dismiss, Plaintiff's opposition was considered by the Court.

call was not a telephone solicitation or an unsolicited advertisement as defined by the TCPA and the regulations promulgated there under, the Court grants Defendant's Motion and dismisses this action with prejudice.

II. FACTUAL BACKGROUND

Taking the allegations of Plaintiff's complaint as true, as the Court must when considering a motion to dismiss for failure to state a claim upon which relief could be granted, the Court finds as follows:

In or around early June 2008, Plaintiff's son "listed a used automobile for sale on the internet site craigslist.com and provided the residential phone number for the Mey [Plaintiff's] home as a contact number." Complaint, ¶ 27. Then, on or about June 12, 2008, Plaintiff received a phone message at her residence, at the number listed. *Id.*, at ¶ 28. In pertinent part, the message, which Plaintiff alleges was initiated using an auto-dialer and a prerecorded message (*id.*, at ¶ 26), stated: "Hello. I'm calling you about the vehicle you have listed for sale. At Caroffer.com we're willing to give you a cash offer right now." *Id.*, at ¶ 28 (emphasis added).² Plaintiff alleges that she does not have a business relationship with Defendants nor did she consent to Defendants leaving her a message on her residential telephone number.

² The full message alleged in Plaintiff's Complaint is as follows:

Hello. I'm calling you about the vehicle you have listed for sale. At Caroffer.com we're willing to give you a cash offer right now. All you have to do is go to Caroffer.com, tell us about your vehicle and we'll give you an offer in minutes. One of our real buyers will return an offer that we are willing to take for your vehicle. If you accept the offer, simply drop off your car at the nearest participating Pep Boys to pick up your check. It's that easy at Caroffer.com. There are no hassles, no fees, and no salesman trying to sell you another car. It's that easy and you get your check immediately. www.carooffer.com. Give us a try. You'll be glad you did.

Id.

Based on these facts, Plaintiff's Complaint alleges three counts: (1) Negligent Violation of the TCPA Sending Unsolicited Prerecorded Phone Messages; (2) Injunctive Relief to Bar Future TCPA Violations; and (3) Injunctive Relief Preservation of Evidence. Plaintiff requests injunctive relief, class certification, and further relief as the Court deems just and equitable.

Defendants argue that the allegations set forth in Plaintiff's complaint establish as a matter of law that they did not violate the TCPA because the alleged call was made in response to Plaintiff's son's classified advertisement which listed Plaintiff's phone number and therefore, it does not constitute a telephone solicitation or an unsolicited advertisement. Plaintiff's oppose Defendants' Motion on the grounds that the phone call was made for a commercial purpose to offer Defendants' car buying service and was left without plaintiffs' "express consent" as that term is defined under the TCPA.

III. LEGAL STANDARD FOR A MOTION TO DISMISS

A motion to dismiss under Rule 12(b)(6) enables the trial court to weed out unfounded suits. *Williamson v. Harden*, 214 W. Va. 77, 79, 585 S.E.2d 369, 371 (2003). A "plaintiff may not fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint." *Id.* The federal courts have likewise held that the "purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint." *Edwards v. City of Goldsboro*, 178 F.3d 231, 233 (4th Cir. 1999).

"Dismissal for failure to state a claim is proper 'where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Murphy v. Smallridge*, 196 W. Va. 35, 37, 468 S.E.2d 167, 168 (W. Va. 1996) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984)). "[E]ssential material facts must appear on the face of the complaint," and "more detail is required than the bald statement that the plaintiff has a valid claim of some type against

the defendant.” *Fass v. Nowasco Well Serv.*, 177 W. Va. 50, 52, 350 S.E.2d 562, 564 (W. Va. 1986). The complaint must set forth facts sufficient to support the claim asserted. *Id.*

Although the trial court should use its power to dismiss cases under Rule 12(b)(6) carefully, “the rule remains a valuable tool to control a court’s docket.” *Williamson*, 214 W. Va. at 80, 585 S.E.2d at 372.

IV. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE TCPA

In Count One (“Negligent Violation of the TCPA Sending Unsolicited Prerecorded Phone Messages”), Plaintiff alleges that Defendant Pep Boys negligently caused “pre-recorded telemarketing solicitations” to be sent to her home, and to other members of the class, in violation of the TCPA and the Federal Communications Commission (“FCC”)’s promulgating regulations. Complaint, ¶ 47.

The TCPA declares it “unlawful for any person within the United States . . . to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call . . . (I) will not adversely affect the privacy rights that [the TCPA] is intended to protect; and (II) do not include the transmission of any *unsolicited advertisement*.” 47 U.S.C. § 227(b)(1)(B), (2)(B)(ii)(I)-(II) (emphasis added).

Congress enacted the TCPA in response to the “growing number of telephone marketing calls and certain telemarketing practices thought to be an invasion of consumer privacy and even a risk of public safety.” *See Federal Communications Commission Report and Order In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14014, at 14018 (superseded by statute, 47 U.S.C. §227). The legislation was designed to preserve “the tranquility and privacy of [a person’s home] . . . [from] intrusive and annoying interruptions,” and required the FCC to initiate rulemaking to “protect residential telephone subscribers’

privacy rights” so that residential home owners would not receive telephone solicitations “to which they object.” See Telephone Consumer Protection Act, 137 Cong. Rec. H11307 (1991); 47 U.S.C. § 227(c); *International Science & Tech. Inst. v. Inacom Communs.*, 106 F.3d 1146, 1150 (4th Cir. 1997); *Omerza v. Bryant & Stratton*, 2007 Ohio 5216, *P14, 2007 Ohio App. LEXIS 4612, **5 (Ohio Ct. App., Lake County Sept. 28, 2007) (“Congress enacted the TCPA in response to the ‘abuses by the telemarketing industry,’ including the pervasive problems associated with the receipt of unwanted telemarketing calls”) (citations omitted); *Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1243 (10th Cir. 2004) (“[do-not-call regulations] allow[] consumers who feel susceptible to telephone fraud or abuse to ensure that most commercial callers will not have an opportunity to victimize them”). The privacy question must be read in context of the type of privacy contemplated by the TCPA. See, e.g., *Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 640 (4th Cir. 2005).

Here, the Complaint alleges that Defendant Pep Boys sent an unsolicited advertisement to her residential home, without her express consent. However, Plaintiff overlooks her specific allegations that address the pivotal issue in this case—whether the message identified in her Complaint was a telephone solicitation or an unsolicited advertisement. Based on the facts set forth in the Complaint, the unequivocal answer to this question is “no”. As a result, the Complaint fails to state a cause of action under the TCPA, and Counts One, Two and Three must be dismissed.

A. *The Subject Message Does Not Encourage The “Purchase, Rental or Investment In Property, Goods, Or Services”.*

Plaintiff’s Complaint fails to establish that the message she received encouraged the purchase, rental, or investment in property, goods or services. The key telemarketing term for the FCC is “telephone solicitation” defined as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or

investment in, property, goods, or services, which is transmitted to any person.” 47 C.F.R. § 64.1200(f)(9). The FCC has determined that with regards to telephone solicitations, “the prerecorded message rule should not turn on the caller’s characterization of the call, but on the **purpose of the message.**” *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Part II, 68 Fed. Reg. 143, at 44162.

Based on the allegations of Plaintiff’s Complaint, the subject telephone call was initiated for the purpose of communicating Defendants’ interest in extending a bona fide offer or to engage in negotiations that might culminate in a bona fide offer for the car Plaintiff’s son advertised on criagslist.com. Although Plaintiff characterizes the message she received as promoting a “service” rather than an offer, she ultimately concedes that after a recipient of Defendants’ message followed the steps in the message, “an offer would be extended for the Car.” Plaintiff’s Response to Defendant Pep Boys’ Motion to Dismiss at 12. In this case, the message contained in Plaintiff’s Complaint indicates only that the Defendants wanted to extend an offer to purchase her son’s car and “[t]he payment of money is not a good, service, franchise or an intangible.” *Charvat v. Dish TV Now, Inc.*, 2008 Ohio 2019, *P10, 2008 Ohio App. LEXIS 1719, **5 (Ohio Ct. App., Franklin County April 29, 2008). Thus, the message Plaintiff received was not a prohibited telephone solicitation.

B. Defendants’ Alleged Message Is Not An Unsolicited Advertisement.

The TCPA permits the FCC to exempt calls that are non-commercial and commercial calls that do not “adversely affect the privacy rights that [the TCPA] is intended to protect.” 47 U.S.C. § 227(b)(2)(B). The FCC specifically exempts calls made for a commercial purpose, which do not include an unsolicited advertisement. *See* 47 C.F.R. § 64.1200(c)(1)-(2). An “unsolicited advertisement” is “any material

advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person *without that person's prior express invitation* or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5) (emphasis added).

Since calls that do not contain an "unsolicited advertisement" are exempt under Section 64.1200(c)(2), the question in this case is whether the allegedly automated message at issue contained an "unsolicited advertisement." While case law on this issue is sparse, the FCC, which is one of two regulatory agencies with authority under the TCPA, has discussed a remarkably similar situation involving real estate related classified ads and concluded that a response to such ads by a potential buyer or buyer's agent does not constitute an unsolicited advertisement and does not violate the TCPA.

In the FCC's *Second Order on Reconsideration*, the FCC addressed comments raised regarding the national do-not-call registry and other FCC telemarketing regulations. *See Second Order on Reconsideration*, CG Docket No. 02-278, FCC 05-28, adopted February 10, 2005, and released February 18, 2008 (hereinafter, "*Second Order*"), at ¶ 1. While the FCC declined to further exempt certain entities or calls from the national do-not-call regulations, it did clarify its application of "telephone solicitations" to entities allegedly making such calls. *Id.*, at ¶¶ 2, 15. The FCC stated:

... we clarify that a telephone solicitation would include calls by real estate agents to property owners for the purpose of offering their services to the owner, whether the property listing has lapsed or not. In addition, a person who, after seeing an advertisement in a newspaper, calls the advertiser to offer advertising space in the same or different publication, is making a telephone solicitation to that advertiser. We find, however, that calls by real estate agents who represent only the potential buyer to someone who has advertised their property for sale, do not constitute telephone solicitations, **so long as the purpose of the call is to discuss a potential sale of the property to the represented buyer. The callers, in such circumstances, are not encouraging the called party to "purchase, rent or invest in property, as contemplated by the definition of 'telephone solicitation.'**" They are instead calling in

response to an offer to purchase something from the called party.

See id., at ¶ 15 (emphasis added). The FCC further noted that “[a] caller **responding to a classified ad would not be making a telephone solicitation,**” provided that the purpose of the call was to purchase the product advertised. *Id.*, at n.39 (citations omitted) (emphasis added). The FCC has concluded that when an individual responds to a classified ad, and conveys interest in purchasing the product offered in the classified ad, then such a response does not constitute an unsolicited advertisement, as required to trigger a violation of the TCPA.³

This case is nearly identical to the factual scenario contemplated by the FCC: a response to a seller’s classified ad—with a residential number voluntarily posted for public distribution—and thus, the message in this case does not constitute an unsolicited advertisement subject to TCPA enforcement because the person posting the classified is expressly *inviting* a call using the number in the classified ad.

Here, Plaintiff states that her son posted an automated message on an internet service that hosts classified advertisements. Compliant, ¶ 27. She admits that her residential number was posted as the contact number. *Id.* Having used the number as listed, Plaintiff states that the message sent on behalf of Defendant Pep Boys was in

³ It has been found, in the context of the TCPA, that “an agency’s commentary regarding its own rules is due even greater deference than the court gives rules” and that a court “must follow the FCC’s commentary unless it is at odds with the regulation it explains.” *See Charvat v. Dispatch Consumer Servs., Inc.*, 2002 Ohio 2838 at P23, 37, and 38, 769 N.E.2d 829, 832-33. *See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844, 104 S. Ct. 2778, 2782 (1984) (“The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given **controlling weight** unless they are arbitrary, capricious, or manifestly contrary to the statute.”) (emphasis added); *Pelissero v. Thompson*, 170 F.3d 442, 446 (4th Cir. 1999); *see also Schneider v. Susquehanna Radio Corp.*, 260 Ga. App. 296, 300, 581 S.E.2d 603, 606 (Ga. Ct. App. 2003) (citing same in the context of the TCPA).

direct response to her son's classified ad and was allegedly for the purpose of purchasing her son's car. *Id.*, at ¶ 28; *Second Order*, at n.39. The facts alleged in this case are the antitheses of the definition of "unsolicited"⁴ because Plaintiff's son requested unknown third parties interested in buying his car to contact him at Plaintiff's number. Since the facts alleged in Plaintiff's Complaint establish, as a matter of law, that Defendants did not leave an unsolicited advertisement, her TCPA claims fail.⁵

C. Since Plaintiff Fails To State A Claim Under The TCPA, Counts Two And Three Must Be Dismissed.

The TCPA provides that an action "based on a violation" of the TCPA or the regulations prescribed under the TCPA may be subject to injunctive relief, as requested under Count Two of the Complaint. *See* 47 U.S.C. §227(b)(3). Under Count Three, Plaintiff additionally requests injunctive relief for the preservation of evidence. Because these Counts rely on a valid claim of a TCPA violation, and because the Complaint fails to sufficiently set forth facts supporting a TCPA violation, Plaintiff's requested recovery is inappropriate.

WHEREFORE, it is herby **ORDERED** that Defendants' Motion to Dismiss is **GRANTED**; it is further **ORDERED** that this case is **DISMISED WITH PREJUDICE**.

The Clerk is directed to send certified copies of this Order to all counsel of record as follows:

⁴ www.dictionary.com defines "unsolicited" as follows: "Not looked for or requested; unsought: an unsolicited manuscript; unsolicited opinions."

⁵ Plaintiff argues that Defendant did not have express consent to leave her a prerecorded message. The issue of express consent is only relevant if the message Plaintiff received was a either a telephone solicitation or an unsolicited advertisement. Since the Court finds that the message at issue is neither, the Court need not address whether Plaintiff provided express consent.

John W. Barrett, Esquire
Jonathan R. Marshall, Esquire
Bailey & Glasser LLP
209 Capitol Street
Charleston, West Virginia 25301

Edward A. Broderick, Esquire
The Law Office of Edward A. Broderick
727 Atlantic Avenue, Second Floor
Boston, Massachusetts 02111

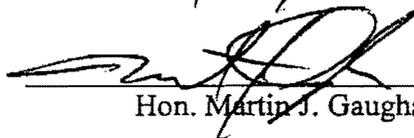
Gary Klein, Esquire
Roddy Klein & Ryan
727 Atlantic Avenue, 2nd Floor
Boston, Massachusetts 02111

Matthew P. McCue, Esquire
The Law Office of Matthew P. McCue
179 Union Avenue
Framingham, Massachusetts 01790

Keith J. George, Esquire
Jeffrey A. Kimble, Esquire
John J. Meadows, Esquire
Robinson & McElwee PLLC
Post Office Box 128
Clarksburg, West Virginia 26302-0128

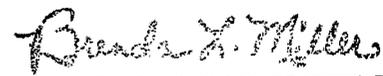
Michael Mallow, Esquire
Aurele A. Danoff, Esquire
Loeb & Loeb LLP
10100 Santa Monica Boulevard
Suite 2200
Los Angeles, California 90067

ENTER: 1/15/10



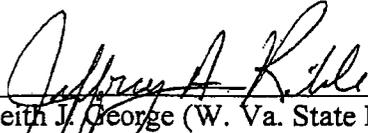
Hon. Martin J. Gaughan

A copy, Teste:



Circuit Clerk

SUBMITTED BY:



Keith J. George (W. Va. State Bar I.D.: 5102)
Jeffrey A. Kimble (W. Va. State Bar I.D.: 4928)
John J. Meadows (W. Va. State Bar I.D.: 9442)
Robinson & McElwee PLLC

Michael Mallow
Aurele A. Danoff
Loeb & Loeb LLP

Attorneys for Defendant The Pep Boys – Manny,
Moe & Jack

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

2010 JUN 11 09 11 37

DIANA MEY, individually and on behalf of a
class of all persons and entities similarly
situated,

BRONDA MILLER

Plaintiff,

CIVIL ACTION NO. 09-C-238

v.

THE PEP BOYS – MANNY, MOE & JACK,
SOUTHWEST VEHICLE MANAGEMENT,
INC. and LANELOGIC INC., d/b/a
CAROFFER.COM,

Defendants.

**ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF
UNDER RULES 59 AND 60**

On May 7, 2010, this matter came before the Court on Plaintiff Diana Mey's ("Plaintiff") Motion for Relief under Rules 59 and 60 (the "Motion for Relief"). Upon consideration of Plaintiff's Motion for Relief, Defendant The Pep Boys – Manny, Moe & Jack's ("Defendant Pep Boys") opposition thereto, and the argument of counsel presented on the record at the hearing of this matter, the Court finds as follows:

Plaintiff filed her class action complaint (the "Complaint"), claiming that Defendants Pep Boys, Southwest Vehicle Management, Inc. and LaneLogic Inc. d/b/a Caroffer.com (collectively, "Defendants") violated the Federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, when Defendants allegedly left Plaintiff a prerecorded voicemail message at her residence in response to a classified ad that was posted on the Internet website craigslist.com. In dismissing Plaintiff's case, the Court ruled that the subject call was

not a telephone solicitation nor an unsolicited advertisement as defined by the TCPA and the regulations promulgated there under.

Plaintiff's Motion for Relief essentially reargues the points and facts that were already presented in her opposition to Defendants' Motion to Dismiss and fails to identify new facts, new law or new arguments that would justify a reconsideration of the Court's prior ruling let alone a reversal of the Court's ruling. The Court's prior ruling of the Motion to Dismiss was based on Plaintiffs' allegations, which were presumed to be true for the purposes of Defendants' Motion to Dismiss. Having determined that the classified advertisement on craigslist.com by Plaintiff's son constituted an express invitation to be contacted by Defendants or any other party seeking to purchase Plaintiff's son's car, the call Plaintiff received does not violate the TCPA. None of the evidence offered by Plaintiff, whether it was attached to Plaintiff's opposition to the Motion to Dismiss, presented at the Motion to Dismiss hearing or presented in support of Plaintiff's Motion for Relief is properly considered in conjunction with Defendants' Motion to Dismiss or Plaintiff's Motion for Relief nor would such evidence have any impact on the Court's fundamental holding that the allegations of Plaintiff's Complaint when taken as true establish that the subject call was not a telephone solicitation nor an unsolicited advertisement. Thus, the Court denies Plaintiff's Motion for Relief.

I. PROCEDURAL HISTORY

In or about late July 2009, Plaintiff filed her class action Complaint against Defendants for alleged violations of the TCPA. On or about September 2, 2009, Defendant Pep Boys filed a Rule 12(b)(6) Motion to Dismiss Counts One Through Three of Plaintiff's Complaint on the basis that Plaintiff's Complaint failed to allege a violation of the TCPA because neither Defendant Pep Boys, nor anyone on its behalf, engaged in unlawful telemarketing activities as defined by the TCPA.

On December 18, 2009, the Court heard argument on Defendant Pep Boys' Motion to Dismiss and Plaintiff's opposition to the Motion to Dismiss. After reviewing the motion papers and hearing argument of counsel, the Court concluded that the subject call, which was admittedly made in response to Plaintiff's son's classified advertisement, was neither a telephone solicitation nor an unsolicited advertisement, and ordered this matter dismissed.

In her present Motion for Relief, Plaintiff argues that the phone call was made for a commercial purpose to offer Defendants' car buying service and was left without Plaintiff's "express consent" as that term is defined under the TCPA. Defendant Pep Boys' opposes Plaintiff's Motion for Relief on the grounds that Plaintiff identified no new facts that impact this case and all of the arguments raised in Plaintiff's Motion for Relief were argued in her opposition to the Motion to Dismiss and at the hearing of this matter. Defendant Pep Boys further argues that nothing in Plaintiff's Motion for Relief changes the pivotal facts of this case, that: (1) Plaintiff's son invited Defendants' alleged message when he listed his car on craigslist.com, including Plaintiff's telephone number as the appropriate call back number; and (2) Defendants' message did not constitute a telephone solicitation or unsolicited advertisement.¹

II. LEGAL STANDARD FOR A MOTION FOR RELIEF UNDER RULES 59 AND 60.

A. *Motions for Reconsideration Are Generally Not Favored.*

The cases on point repeatedly state that Rule 59(e) relief is an "extraordinary remedy" – one "that should be used sparingly." *American Reliable Ins. Co. v. Stillwell*, 212 F. Supp. 2d 621, 632 (N.D. W. Va. 2002). *See also Woodrum v. Thomas Memorial Hospital Foundation, Inc.*, 186 F.R.D. 350 (S.D. W. Va. 1999) ("Because of the interests in finality and

¹ Plaintiff also presented a Federal Communications Commission ("FCC") citation that Plaintiff submitted to the Court on April 30, 2010, arguing that the FCC citation impacts the Court's decision. The Court believes the FCC citation has no relevance to and is not properly before the Court on Plaintiff's Motion for Relief of the granting of Defendants' Motion to Dismiss.

conservation of judicial resources, Rule 59(e) motions should be granted sparingly.”). Due to “the narrow purposes for which they are intended, Rule 59(e) motions typically are denied.” *Westfield Ins. Co. v. White*, 19 F. Supp. 2d 615, 616 (S.D. W. Va. 1998) (quoting Charles Wright, et al., Federal Practice And Procedure § 2810.1 (2d Ed. 1995)).

While Rule 59(e) permits limited post-judgment relief, it is not appropriate to use the motion as a way “to ask the court to rethink what the court has already thought through – rightly or wrongly.” *Stillwell*, 212 F. Supp. 2d at 632 (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 100 (E.D. Va. 1983)). Such motions are not to be used as a vehicle for making arguments that were not first presented prior to judgment:

Rule 59(e) motions may not be used ... to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance ... In general “reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.”

Pacific Ins. Co., 148 F.3d at 403 (emphasis added) (quoting 11 Wright et al, Federal Practice and Procedure § 2810.1, at 124 (2d Ed. 1995)). See also *In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996) (Posner, J.) (“A motion under Rule 59(e) is not authorized to ‘enable a party to complete presenting his case after the court has ruled against him.’”) (quoting *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995)).

1. Legal Standard for Rule 59

Rule 59(e) is silent on what a movant must establish in order to succeed on such a motion. Although the West Virginia Supreme Court of Appeals has, on several occasions, elaborated the standard for reviewing appeals from Rule 59(e) motions, it has never set forth the substantive standards that guide the circuit court’s original disposition of such a motion. The federal courts, however, have done so for the virtually identical Federal Rule of Civil Procedure 59(e). Courts in the Fourth Circuit use a three-part test to determine whether to alter or amend judgment under this rule:

Although Rule 59(e) does not itself provide a standard under which a district court may grant a motion to alter or amend a judgment, we have previously recognized that there are three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.

Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998) (citing *EEOC v. Lockheed Martin Corp., Aero & Naval Sys.*, 116 F.3d 110, 112 (4th Cir. 1997) and *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993)).

2. Legal Standard for Rule 60

Likewise, under Rule 60(b), a party is permitted to seek relief from an order of the court if the relief sought is based upon a proper ground or grounds (such as mistake, inadvertence, excusable neglect, unavoidable cause, newly discovered evidence, fraud, void judgment, satisfaction, or any other justifiable reason) and is timely brought before the court.

The moving party must surmount a rather high standard in order to successfully be relieved from judgment. After all, the Supreme Court of Appeals of West Virginia has determined that Rule 60(b) seeks to maintain a balance between the venerable doctrine of res judicata and a court's mandate to ensure that justice is done. See *N.C. v. W.R.C.*, 173 W.Va. 434, 317 S.E.2d 793 (1984). Hence, an order will not be vacated under Rule 60(b) unless, in the sole discretion of the court, extraordinary circumstances so dictate. See *Coffman v. West Virginia DMV*, 209 W.Va. 736, 551 S.E.2d 658 (2001) (finding that extraordinary circumstances must be present to justify granting a motion for relief from judgment); see also *Intercity Realty Co. v. Gibson*, 154 W.Va. 369, 175 S.E.2d 452 (1970) (holding that motions for relief from judgment are committed to the sole discretion of the Court). The court should not grant the motion if its decision was informed by the extensive pleadings of the parties and made after a full and fair consideration of the issue. See *Kerner v. Affordable Living, Inc.*, 212 W.Va. 312, 570 S.E.2d 571 (2002) (per curiam).

III. PLAINTIFF'S MOTION FOR RELIEF PRESENTS NO NEW ARGUMENTS AND ANY ADDITIONAL PROPOSED EVIDENCE NEED NOT BE CONSIDERED IN THE CONTEXT OF A MOTION TO DISMISS.

A review of Plaintiff's opposition to the Motion to Dismiss, the December 18, 2009 hearing transcript, and the Court's Order establish that Plaintiff is trying to re-argue her case raising the same arguments she previously raised.

A. *All Material Arguments Raised in Plaintiff's Present Motion for Relief Have Been Presented, Considered, and Properly Rejected by the Court.*

Plaintiff argues that the call at issue in this case was a telephone solicitation and an unsolicited advertisement because the "purpose of the message" was "to encourage the Plaintiff to purchase the Defendants' services." Motion for Relief, at p. 6. She makes this argument notwithstanding her inclusion of the specific message at issue which indicated the purpose of the call was to make an offer on her son's car per his invitation for random unknown people or entities that use craigslist.com to call Plaintiff's number for this purpose. Plaintiff also argues that notwithstanding her son's classified ad, *she* does not have a business relationship with Defendants nor did she consent to Defendants leaving her a message on her residential telephone number. *See id.* at p. 9 ("Plaintiff never consented to receive the call."). She further argues that there is TCPA liability for the use of a robocall, rather than a "live caller." *Id.* at p. 8. This same argument was raised in Plaintiff's opposition to Motion to Dismiss, at p. 7 ("The Defendants did not have prior express consent to initiate a robocall to the Mey home."); *id.* at p. 14 ("the TCPA is a remedial consumer protection statute specifically intended to prohibit intrusive robocalls."). Plaintiff also raised this argument at the December 18, 2009 hearing, as evidenced in the transcript to the December 18, 2009 hearing, at p. 7:8-10 ("no one in the household gave prior expressed consent to Pep Boys to send them a robocall.").

Plaintiff also argues in her Motion for Relief that the call she received was a telephone solicitation and unsolicited advertisement because inspection fees would be generated, reconditioning fees for repairs would be assessed, and the use of such terms as “direct traffic” and “entice” customers were present in alleged press materials. Motion for Relief, at p. 7. She specifically cites to a “\$99.00 mandatory inspection fee.” *Id.* at p. 5. These are the same arguments made in Plaintiff’s opposition to the Motion to Dismiss, at p. 12 (“Defendants’ purpose in sending the unsolicited robocall to the May Home was unquestionably to promote its service, Caroffer.com.”); *id.* (“Defendants proposed – through the Call – that Ms. Mey follow a series of steps to take advantage of its service. . . . inviting Ms. Mey to visit www.caroffer.com to “Give us a try.”) (emphasis in original). She also raised these arguments at the December 18, 2009 hearing, at p. 11:7-8 of the hearing transcript (“This is an advertisement inviting the consumer to go to a website.”); *id.* at p. 8:17-20 (“The consumer then has to take the car to a nearby Pep Boys and the consumer has to pay a fee, a service fee of \$99 to have that car inspected by Pep Boys.”).

1. The Court Correctly Concluded that Plaintiff’s Allegations Establish that the Telephone Call Was Not a “Telephone Solicitation.”

The Court’s opinion dismissing Plaintiff’s Complaint was well-founded under established case law. First, the Court held that as a matter of law, Defendant Pep Boy’s call to Plaintiff’s residence was not a “telephone solicitation,” as that term is defined under the TCPA. “Telephone solicitation” is defined as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.” 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(9). The Court concluded, based on Plaintiff’s own allegations, and after having reviewed Plaintiff’s opposition brief and considering Plaintiff’s oral presentation, that Pep Boy’s telephone call was not a prohibited telephone solicitation because “the subject telephone call was initiated for the purpose of communicating Defendants’ interest in extending a bona fide offer or to engage in

negotiations that might culminate in a bona fide offer for the car Plaintiff's son advertised on craigslist.com. . . . [T]he message contained in Plaintiff's Complaint indicates only that the Defendants wanted to extend an offer to purchase her son's car and the payment of money is not a good, service, franchise or an intangible." Court Order dated January 15, 2010, at p. 6 (internal quotations and citation omitted).

Plaintiff fails to set forth any intervening change in controlling law, or any other recognized basis for the Court revisiting its decision and thus, her Motion for Relief must be denied.

2. The Court Correctly Concluded that Plaintiff's Allegations Established that the Telephone Call Was Not an "Unsolicited Advertisement."

The Court also held that Pep Boy's telephone call was not an "unsolicited advertisement" under the TCPA. Prerecorded messages that are made for a commercial purpose but do not include or introduce "unsolicited advertisements" are not actionable. 47 C.F.R. § 64.1200(c)(1)-(2). An "unsolicited advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person *without that person's prior express invitation* or permission, in writing or otherwise." 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(13) (emphasis added).

Plaintiff essentially argues that the call was an advertisement due to "the generation of nonrefundable inspection fees, the generation of profits from auto repairs performed by Pep Boys, the intention of directing customers to Pep Boys, where they can browse the store and purchase yet more goods and services." Motion for Relief, at p. 8. This argument, in the context of Plaintiff's numerous citations to congressional intent and legal precedent, evades the Court's ruling that "[t]he privacy question must be read in context of the type of privacy contemplated by the TCPA." Court Order dated January 15, 2010, at p. 5 (citations omitted). The Court found that "the message in this case does not constitute an unsolicited advertisement subject to TCPA enforcement because the person posting the classified is

expressly *inviting* a call using the number in the classified ad.” *Id.* at p. 8 (emphasis original). “[W]hen an individual responds to a classified ad, and conveys interest in purchasing the product offered in the classified ad, then such a response does not constitute an unsolicited advertisement, as required to trigger a violation of the TCPA.” *Id.* “The facts alleged in this case are the *antitheses of the definition of ‘unsolicited’* because Plaintiff’s son requested unknown third parties interested in buying his car to contact him at Plaintiff’s number.” *Id.* at p. 9 (emphasis added). Nothing in Plaintiff’s Motion for Relief compels the Court to alter its ruling.

B. Plaintiff’s “Newly” Discovered Evidence is Not Properly Before the Court on A Motion to Reconsider the Granting of a Motion to Dismiss.

Newly obtained evidence provides a ground for a motion for relief from judgment or order only when “significant new evidence, not earlier obtainable in the exercise of due diligence has come to light.” *State ex rel. Frazier & Oxley v. Cummings*, 591 S.E.2d 728, 738 (W.Va. 2003) (quoting *U.S. v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993)). Movant “at a minimum must show that the evidence was discovered since the adverse ruling and that the [movant] was diligent in ascertaining and securing this evidence.” *Powderidge Unit Owners Association v. Highland Properties, LTD.*, 474 S.E.2d 872 (W.Va. 1996).

Secondly, the court must adduce that if the motion for reconsideration is granted that the newly discovered evidence must likely be “sufficient to permit a different outcome.” *Powderidge*, 474 S.E.2d at 886. Evidence that is merely cumulative will not justify a new trial or rehearing.

The fact that Plaintiff thinks that the alleged “recently-obtained documents” may now bolster her previously made arguments do not support her position for reconsideration, and moreover, need not be considered by the Court as any additional proposed evidence would take this present motion out of the nature of a motion to dismiss. The Court does not need to rule whether or not the documents were available to Plaintiff at the Motion to Dismiss hearing

because the Court believes that these documents do not dictate a different outcome in the context of Defendants' Motion to Dismiss. Moreover, the evidence presented in Plaintiff's Motion for Relief is not "new", it is merely cumulative. Therefore, Plaintiff provides no basis for this Court to reconsider its ruling on Defendants' Motion to Dismiss.

WHEREFORE, it is hereby **ORDERED** that Plaintiff's Motion for Relief Under Rules 59 and 60 is **DENIED**; it is further **ORDERED** that this case is **DISMISED WITH PREJUDICE**.

The Clerk is directed to send certified copies of this Order to all counsel of record as follows:

John W. Barrett, Esquire
Jonathan R. Marshall, Esquire
Bailey & Glasser LLP
209 Capitol Street
Charleston, West Virginia 25301

Edward A. Broderick, Esquire
The Law Office of Edward A. Broderick
727 Atlantic Avenue, Second Floor
Boston, Massachusetts 02111

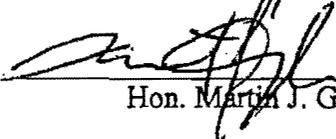
Gary Klein, Esquire
Roddy Klein & Ryan
727 Atlantic Avenue, 2nd Floor
Boston, Massachusetts 02111

Matthew P. McCue, Esquire
The Law Office of Matthew P. McCue
179 Union Avenue
Framingham, Massachusetts 01790

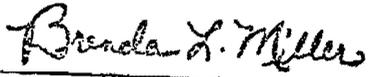
Keith J. George, Esquire
Jeffrey A. Kimble, Esquire
John J. Meadows, Esquire
Robinson & McElwee PLLC
Post Office Box 128
Clarksburg, West Virginia 26302-0128

Michael Mallow, Esquire
Aurele A. Danoff, Esquire
Loeb & Loeb LLP
10100 Santa Monica Boulevard
Suite 2200
Los Angeles, California 90067

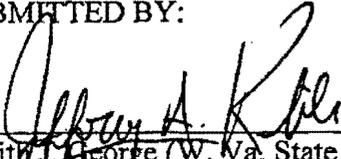
ENTER: 6/10/10


Hon. Martin J. Gaughan

A copy, Testc:


Circuit Clerk

SUBMITTED BY:


Keith J. George (W. Va. State Bar I.D.: 5102)
Jeffrey A. Kimble (W. Va. State Bar I.D.: 4928)
John J. Meadows (W. Va. State Bar I.D.: 9442)
Robinson & McElwee PLLC

Michael Mallow
Aurele A. Danoff
Loeb & Loeb LLP

Attorneys for Defendant The Pep Boys – Manny,
Moe & Jack

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

DIANA MEY, individually and on behalf
of a class of all persons and entities
similarly situated,

Plaintiff,

v.

Civil Action No. 09-C-238

THE PEP BOYS -MANNY, MOE & JACK,
SOUTHWEST VEHICLE MANAGEMENT, INC.,
and LANELOGIC, INC., d/b/a CAROFFER.COM,

Defendants.

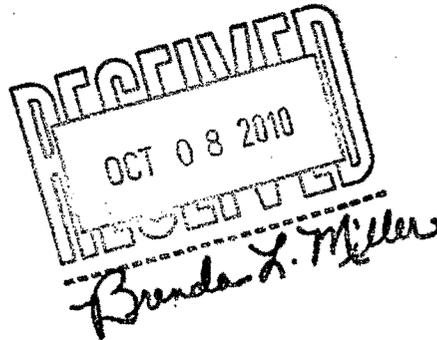
CERTIFICATE OF SERVICE

The undersigned hereby certifies the foregoing PETITIONER'S DOCKETING STATEMENT was served, on October 8, 2010, upon counsel via e-mail and U.S. Mail, first class, postage prepaid, to:

J.H. Mahaney, Esq.
Charles F. Bellomy, Esq.
Huddleston Bolen, LLP
611 Third Avenue
Huntington, West Virginia 25701

Keith J. George, Esq.
Jeffrey A. Kimble, Esq.
John J. Meadows, Esq.
Robinson & McElwee PLLC
Post Office Box 128
Clarksburg, West Virginia 26302

Michael Mallow, Esq.
Aurele A. Danoff, Esq.
Loeb & Loeb LLP
10100 Santa Monica Boulevard, Suite 2200
Los Angeles, California 90067




John W. Barrett, Esquire (WVSB ID #7289)