

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

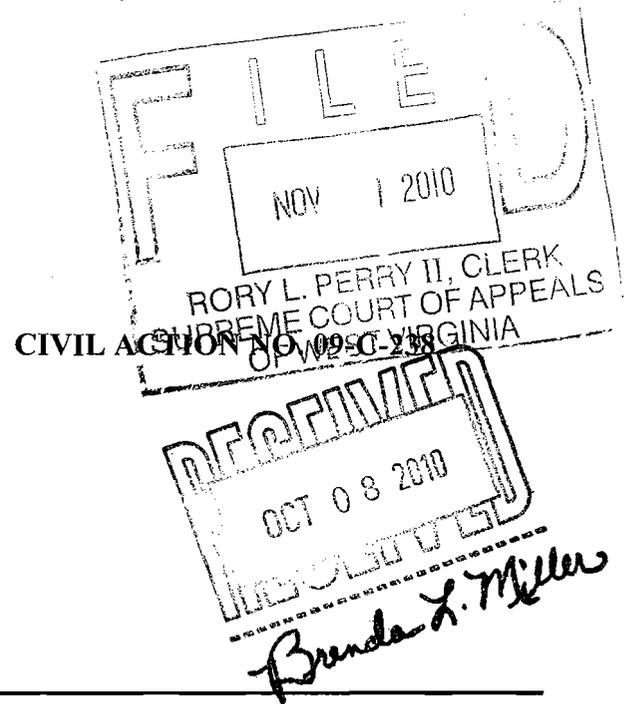
DIANA MEY,  
individually and on behalf  
of a class of all Persons and entities  
similarly situated,

Plaintiff,

v.

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

Defendants.



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PLAINTIFF'S PETITION FOR APPEAL

Appeal from the Circuit Court of Ohio County  
Honorable Martin Gaughan  
Civil Action No. 09-C-238

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## I. ARGUMENT SUMMARY

Automated telemarketing calls, or “robocalls,” are a nuisance. They also are illegal under the Telephone Consumer Protection Act, 47 U.S.C. § 227, unless the recipient gives prior express consent to receive the calls. Pep Boys placed a robocall to Diana Mey’s home to advertise its used-car buying service. Ms. Mey’s son had listed a car for sale on the internet, and Pep Boys apparently found her number through computer “screen-scraping” technology commonly used by email spammers and telemarketers. The robocall contained no offer to purchase the car, and neither Ms. Mey nor her son consented to receive the call. Ms. Mey filed this action alleging violations of the TCPA, and also filed a complaint with the FCC, the government agency charged with concurrent enforcement of the TCPA.

The FCC determined that the Pep Boys call violated the TCPA, and cited the company. The Circuit Court, however, dismissed Ms. Mey’s TCPA claims under Rule 12(b)(6). While this decision was wrong on the merits, the dismissal order’s chief defect is its disregard for the liberal standard governing Rule 12(b)(6) motions.

At bottom, the Circuit Court interposed its judgment on a matter where the complaint allegations must be taken as true. These allegations easily support a claim that the robocall advertised the availability of Pep Boys services, without prior express consent.

The Circuit Court was wrong to dismiss this case under Rule 12(b)(6), a point driven home by the FCC’s determination that the robocall violated the TCPA. The Circuit Court reached its decision based on facts most favorable to Pep Boys, and misapplied applicable law. The Court should grant this Petition and reverse the Circuit Court’s order dismissing the case.

## **II. THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE CIRCUIT COURT**

This consumer class action is about telemarketing calls made using computers that automatically dial home telephones and play prerecorded messages (“auto-dialer” or robocalls”). Congress virtually outlawed advertising in such a manner in 1991, when it enacted the Telephone Consumer Protection Act, 47 U.S.C. §227 (“TCPA”). Plaintiff Diana Mey alleges the Defendants, The Pep Boys – Manny, Moe & Jack (“Pep Boys”); Southwest Vehicle Management, Inc. and Lanelogic, Inc. (collectively the “Defendants”), violated the TCPA when they placed an unsolicited robocall advertisement to her home for the purpose of encouraging Ms. Mey to sell a car through Defendants’ joint venture, Caroffer.com.

In its motion to dismiss, the Defendants argued that the call is exempt from the TCPA because (1) Ms. Mey gave implicit consent to be contacted by robocall when her son listed his used car for sale on Craigslist, and provided his home phone number; and (2) the call was an offer to purchase a used car and was not an “advertisement” or “solicitation” as those terms are defined by the TCPA.

Following a hearing, on January 15, 2010, the Circuit Court granted the motion to dismiss and accepted the Defendants’ assertion that the TCPA did not apply to the call. Thereafter, Ms. Mey petitioned the Circuit Court to reconsider its decision and a hearing date was scheduled for May 7, 2010. On March 15, 2010, the Federal Communications Commission (“FCC”), the federal agency charged by Congress with the responsibility to enforce and interpret the TCPA, issued citations against Defendants Pep Boys and Lanelogic relating to the exact same robocalls at issue in this litigation, and found that the TCPA applied and was violated by the robocalls. (Ex. 2 & 3 to Pl.’s Suppl. Mem. Supp. Mot. for Relief.) Ms. Mey immediately brought this FCC action to the Circuit Court’s attention and advised the Circuit Court of this

development at hearing on May 7, 2010. Despite the FCC's determination that the call violated the TCPA, the Circuit Court did not defer to the FCC's finding and, instead, concluded that the TCPA did not apply. The Circuit Court, accordingly, refused to consider its earlier ruling and dismissed the Plaintiff's case. Finally, after the FCC cited Pep Boys for engaging in telemarketing in violation of the TCPA, Pep Boys petitioned the FCC to have the citation withdrawn. (Ex. G to Def.'s Opp'n Mot. for Relief.) In support of its request that the citation be withdrawn, Pep Boys made the same arguments before the FCC as it made before the Circuit Court. Recently, the FCC informed counsel for Ms. Mey that it has *denied* Pep Boys' request to withdraw the citation. (Aff. of Matthew P. McCue, attached as Ex. A.)

### III. STATEMENT OF FACTS AND BACKGROUND

In early June of 2008, Ms. Mey's son listed a used automobile for sale on the web site Craigslist.com. (First Am. Compl. ¶ 27.) Ms. Mey's son provided his residential phone number as a contact number. (*Id.*) Ms. Mey avers, and intends to prove through discovery, that the Defendants obtained her residential number by utilizing an automated computer tool, commonly referred to as "Screen Scraper" technology, which searched the internet for used car ads. Contact numbers for used car ads so identified were then downloaded into a database used by the Defendants to initiate robocalls via auto-dialer to consumers nation-wide. On June 12, 2008, Ms. Mey received a pre-recorded phone call promoting Pep Boys and Caroffer.com. (*Id.* ¶ 28.) The text of the call was 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 salesmen trying to sell you another car. It's

that easy and you get your check immediately. [www.caroffer.com](http://www.caroffer.com). Give us a try. You'll be glad you did.

(*Id.*).

Of note, the call did not ask for any specific person, and did not make any reference to the make or model of the car. The call did not make any monetary offer for the car whatsoever. Instead, the call represented to Ms. Mey that if she logged onto Caroffer.com (1) an offer would be made within minutes, (2) all Ms. Mey would have to do to collect her money was “drop off” the car at the nearest Pep Boys dealership, and (3) no fees would be charged.<sup>1</sup> These representations were false and misleading.

The “offer” made to an inquiring consumer on Caroffer.com was, in reality, conditional. To get a “final offer” from Pep Boys, a consumer seeking to sell their used car on Caroffer.com would have to take the car to the nearest Pep Boys for inspection – and agree to pay an inspection fee of \$99.00. If the car needed repairs, a determination unilaterally made by Pep Boys, the original “offer” extended by Caroffer.com was then rescinded. The consumer was then instructed that a new offer would be issued if recommended repairs were made to the car. This tactic was referred to by Pep Boys in their internal documents as the “upsell.” Pep Boys’ own documents explicitly describe the purpose of the inspection and repairs as to “*entice a consumer to move ahead with both accepting the bid and completing the repair work at Pep Boys.*” Accordingly, the claim that an offer would be made “within minutes” was false. A real offer would only be made after a consumer agreed to pay an inspection fee and to pay for

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<sup>1</sup> Because the call does not refer to anyone in the Mey household by name, and does not even mention the make or model of the car, it appears that the only information the Defendants had upon initiating the call was that someone in the Mey household wanted to sell a car. Indeed, it appears that the Defendants did not even know that the Mey family lives in West Virginia. Although the call instructs Ms. Mey to take the car to a nearby Pep Boys dealer, it fails to note that there are no Pep Boys dealerships in West Virginia. See <http://pepboys.know-where.com/pepboys/>.

recommended repairs. The claim that the consumer would only have to “drop off” their car to get paid was false. A consumer would have to first pay an inspection fee, and pay for recommended repairs. The claim that no fees would be charged was false. Pep Boys’ own internal documents detail that consumers were to be charged a \$99.00 inspection fee. Pep Boys’ documents further revealed that the inspection fees and repair profits would be split equally by Pep Boys and Lanelogic.<sup>2</sup>

#### IV. ASSIGNMENTS OF ERROR

- A. The Circuit Court incorrectly applied the standard for consideration of a motion to dismiss and erred in its conclusion that the First Amended Complaint should be dismissed.
- B. The Circuit Court erred in its determination that the Telephone Consumer Protection Act did not apply because the call was not an “advertisement” or a “telephone solicitation.”
- C. The Circuit Court failed to reconsider its initial decision to dismiss this case despite being informed that the Federal Communication Commission had conducted its own investigation as to the call, and had concluded that the call was subject to and, in fact, did violate the TCPA.
- D. The Circuit Court erred in its determination that the listing of a used car for sale on the internet gives rise to the requisite “prior express consent” to be contacted via robocall.

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<sup>2</sup> The above facts are derived directly from the Defendants’ own business records. (*See* Memorandum of Understanding between the Defendants (Ex. 2) (Bates #150-51) (“entice consumer to move ahead with both accepting the bid and completing the repair work at Pep Boys”); January 28, 2008 Agreement between the Defendants (Ex. 3) (Bates #133-135); Caroffer.com/Pep Boys Customer Service Manual (Ex. 4) (“It’s critical for you to be able to explain the reasons for the Final Offer on your customer’s vehicle may be less than the original offer they received from Caroffer”); “Up-Sell Reconditioning” document (Ex. 5), all attached to Pl.’s Suppl. Mem. Supp. Mot. for Relief as Exhibits 2-5, respectively.).

## V. POINTS AND AUTHORITIES RELIED UPON

### Cases

<i>Appalachian Power Co. v. State Tax Dep't of West Va.</i> , 466 S.E.2d 424 (W.Va. 1995).....	13
<i>Blitz v. Agean, Inc.</i> , 677 S.E.2d 1, 6 (N.C. App. 2009) .....	16
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<i>Hobar Agua y Vida en el Desierto, Inc. v. Suarez Medina</i> , 36 F.3d 177 (1st Cir. 1994).....	8
<i>Leckler v. Cashcall</i> , 554 F.Supp. 2d 1025 (N.D. Cal. 2008) .....	16
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<i>Smith v. Board of Education of County of Logan</i> , 341 S.E.2d 685 (W.Va. 1985) .....	13
<i>Stanley v. Sewell Coal Co.</i> , 285 S.E.2d 679 (W.Va. 1981) .....	8
<i>State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.</i> , 461 S.E.2d 516 (W.Va. 1995).....	7, 8
<i>Travel Travel, Kirkwood, Inc. v. Jen N.Y. Inc.</i> , 206 S.W.3d 387 (Mo. Ct. App. 2006).....	17
<i>United States v. Mead Corporation</i> , 533 U.S. 218 (2001) .....	13

### Statutes

47 C.F.R. § 64.1200(f)(12) .....	8
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**Regulations**

47 U.S.C. § 227 (a)(4)..... 8  
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47 U.S.C. § 227(b)(1)(B)..... 8, 11, 14  
47 U.S.C. § 227(b)(3). ..... 13  
Hobbs Act, 28 U.S.C. § 2342..... 16

**Other Authorities**

*Black’s Law Dictionary*, 276 (5<sup>th</sup> Ed. 1979) ..... 15  
*In the Matter of Rules and Regs. Implementing the TCPA of 1991*, 7 F.C.C.R. 2736, 2737 ¶ 25  
(April 17, 1992) ..... 10, 12, 15

**VI. STANDARD OF REVIEW**

“Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.” Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W.Va. 1995).

**VII. DISCUSSION OF LAW AND ANALYSIS**

**A. The Circuit Court erred in its application of the standard for consideration of a motion to dismiss.**

Under the “liberal standard” of Rule 12(b)(6), which “few complaints fail to meet,” dismissal requires the Defendants to show – *beyond doubt*, under *any* set of facts – that the Robocall the Defendants made to the Plaintiff regarding a car her son advertised for sale (a) was not made for the purpose of encouraging the purchase of good and services, *and* (b) was not made for the purpose of advertising the commercial availability of goods and services. Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 236 S.E.2d 207 (W.Va. 1977) (internal citation omitted);

see also *Highmark West Virginia, Inc. v. Jamie*, 655 S.E.2d 509, 513, n. 4 (W.Va. 2007) (“The standard expressed in *Chapman* and repeated in subsequent cases remains good law.”).

The Circuit Court failed to properly apply the liberal standard for assessing the sufficiency of the factual allegations in Plaintiff’s Complaint by simply disregarding Plaintiff’s plain allegations that the call was an unsolicited advertisement offering goods or services on behalf of Pep Boys—an allegation that was confirmed by the federal agency charged with enforcing the TCPA. For this reason alone, the Circuit Court’s Order granting Defendants’ motion to dismiss should be reversed.

**B. The Circuit Court erred in its determination that the Telephone Consumer Protection Act did not apply because the call was not an “advertisement” or a “telephone solicitation” subject to the Telephone Consumer Protection Act.**

The TCPA prohibits all robocalls that meet the statutory definition of a “telephone solicitation” or “advertisement.” 47 U.S.C. § 227(b)(1)(B).<sup>3</sup> The term “telephone solicitation” is broadly defined as “the initiation of a telephone call or message for the purpose of encouraging the purchase of ... goods or services[.]” 47 U.S.C. § 227 (a)(4); 47 C.F.R. § 64.1200(f)(12). The TCPA further broadly defines “advertisement” as “any material advertising the commercial availability or quality of any property, goods, *or services* which is transmitted to any person...” See 47 U.S.C. § 227(a)(5); 47 C.F.R. § 64.1200(f)(13).

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<sup>3</sup> It is well-established that remedial statutes such as the TCPA must be interpreted liberally, with all interpretive doubt decided in the plaintiff’s favor. See *Stanley v. Sewell Coal Co.*, 285 S.E.2d 679, 683 (W. Va. 1981) (remedial statutes are to be liberally construed); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516, 523 (W. Va. 1995) (“Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended.”). On the other hand, exemptions to remedial statutes are to be narrowly construed. *Hobar Agua y Vida en el Desierto, Inc. v. Suarez Medina*, 36 F.3d 177, 182 (1st Cir. 1994); *EEOC v. City of Janesville*, 630 F.2d 1254, 1258 (7th Cir. 1980).

1. *The call was an “advertisement” and/or a “solicitation” under the TCPA as it advertised and encouraged the availability and purchase of a service.*

In granting the motion to dismiss, the Circuit Court ruled that the call was not an “advertisement” or a “solicitation” subject to the TCPA, but instead was merely an “offer to purchase.” (Order Denying Mot. Relief.) The text of the call, however, provides:

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 salesmen trying to sell you another car. It's that easy and you get your check immediately. *www.caroffer.com*. Give us a try. You'll be glad you did.

In dismissing this case, the Circuit Court wrongly concluded that, beyond doubt and under any set of facts, the purpose of this message was to convey an offer to purchase the car and, accordingly, was neither an “advertisement” nor a “telephone solicitation.” No “offer,” however was extended at any point during the call. The call does not ask for any specific person at the Mey home, and does not make any reference to the make or model of the car. Instead, the call invites Ms. Mey to participate in the Defendants’ used car buying, auto inspection and auto repair service. The call, on its face, is not an offer.

Rather, Defendants proposed in the call that Ms. Mey follow a series of steps to take advantage of its service. First, Ms. Mey was required to go to *caroffer.com* to obtain what the Defendants loosely characterize as an “offer” for the used car. To obtain this “offer,” however, Ms. Mey would then have to take her car to a Pep Boys dealership (none of which exist in West Virginia) and agree, up front, to pay a \$99 inspection fee. Following inspection, Ms. Mey would then be presented with an “estimated reconditioning quote” for recommended repairs. If Ms. Mey refused to pay for the repairs, the purported “offer” made to her initially would be reduced.

Contrary to the Circuit Court's determination that the call was actually an offer to purchase, Ms. Mey submits it is in fact a classic "bait and switch." The customer is baited with the promise of a quick car sale and no fees. A customer, however, who takes the bait soon discovers they must pay an undisclosed \$99 inspection fee. The consumer then quickly learns that the "quick offer" made on Caroffer.com was actually a fiction. To get a real offer, the consumer must *pay* to have the car inspected and *pay* for recommended repairs.

In determining whether a particular pre-recorded call constitutes a "telephone solicitation," the key consideration is not the "caller's characterization of the call," but instead is "the purpose of the message." *See* Rules and Regs. Implementing the TCPA of 1991, 18 F.C.C.R. 14014, 14098 ¶ 141 (July 3, 2003). Accordingly, Pep Boys' characterization of the call as merely an "offer" is irrelevant.

The call was both an "advertisement" and a "solicitation" subject to the TCPA. At minimum, given the low hurdle Plaintiffs must clear on a motion to dismiss, the facts alleged in the complaint, and other facts obtained in discovery, establish that Ms. Mey can and indeed has alleged facts to support her claim under the TCPA and survive a motion to dismiss.

2. *That the call is subject to the TCPA is consistent with case law, Congressional intent, the text of the statute and its interpretation by the Federal Communications Commission.*

Telemarketers commonly attempt to avoid the application of the TCPA by asserting, as the Defendants argued and the Circuit Court accepted, that the call at issue is not an "advertisement" or a "solicitation." Equally commonly, courts reject these arguments. *See e.g., Charvat v. Crawford*, 799 N.E.2d 661 (Ohio App. 2003) (robocall that did not offer any items for sale but, instead, referred recipient to an 800 number to contact for more information was an "unsolicited advertisement" subject to the TCPA's prohibition against robocalls); *G.M. Sign, Inc.*

*v. MFG.Com, Inc.*, 2009 WL 1137751 (N.D.Ill. 2009) (an unsolicited fax offering free service to recipients was an advertisement subject to the TCPA); *Margulis v. P&M Consulting*, 121 S.W.3d 246 (Mo. Ct. of Appeals 2003) (rejecting contention that the robocall at issue was really a survey call exempt from the TCPA, and concluding that even though the call purportedly offered a free vacation, the purpose of the call was ultimately meant to convey information about commercially available services); *Rudgayzer & Gratt v. Enine, Inc.*, 779 N.Y.S.2d 882 (N.Y. App. 2004) (an unsolicited fax that merely identified a company's name and contact information was an "advertisement" even though the fax did not invite or even encourage the recipient to purchase any service); *Green v. Time Ins. Co.*, 629 F.Supp.2d 834 (N.D. Ill. 2009)) (The TCPA does not require that a unwanted and uninvited message make an overt sales pitch to its recipient in order for a cause of action to exist).

Furthermore, in enacting the TCPA, Congress explicitly intended to single out robocalls for strict regulation by flatly prohibiting the initiation of "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[.]" 47 U.S.C. § 227(b)(1)(B) (emphasis added). In enacting this provision, Congress recognized that "automated or prerecorded telephone calls, *regardless of the content or the initiator of the message*, [are] a nuisance and an invasion of privacy," and that "banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call . . . is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." 47 U.S.C. § 227; Congressional Statement of Findings Nos. 10 and 12. The Federal Communications Commission has echoed these concerns:

It is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls

placed by “live” persons. These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party, fill an answering machine tape of a voice recording service, and do not disconnect the line even after the customer hangs up the telephone. For all these reasons, *it is legitimate and consistent with the Constitution to impose greater restrictions on automated calls than on calls placed by lived persons.*

*In the Matter of Rules and Regs. Implementing the TCPA of 1991*, 7 F.C.C.R. 2736, 2737 ¶ 25 (April 17, 1992) (emphasis added).

The call made by the Defendants was not made by a live caller, but by a machine, and thereby implicates the strict yet sensible proscriptions of federal telephone privacy laws. The call raises all of the privacy and nuisance concerns that the TCPA was intended to address. Plaintiff never consented to receive the call. The call was a solicitation seeking to entice the Plaintiff into a marketing scheme intended to generate inspection and car repairs. The Plaintiff had no prior business relationship with the Defendants, and in fact Pep Boys did not even have a store in West Virginia, where the Plaintiff resides. The Circuit Court’s holding that the call was not an “advertisement” or a “telephone solicitation,” as those terms are defined by applicable law and regulations, was error and warrants reversal.

**C. The Circuit Court failed to reconsider its initial decision to dismiss this case despite being informed that the Federal Communication Commission had conducted its own investigation as to the call, and had concluded that the call was subject to and, in fact, did violate the TCPA.**

Contrary to the Circuit Court’s determination that the call at issue was not an unsolicited advertisement, the Federal Communications Commission, under these same facts, reached the opposite conclusion and found that the call did violate the TCPA. (Ex. 2 & 3 to Pl.’s Suppl. Mem. Supp. Mot. for Relief.) The FCC is expressly empowered by Congress to enforce and interpret the TCPA and to implement rules and regulations to ensure the TCPA is interpreted in a

manner consistent with the legislative intent to broadly protect consumers from intrusive telemarketing and to enforce the statute. 47 U.S.C. §§ 227(b)(2).<sup>4</sup>

In its March 15, 2009 citation letters to Defendants Pep Boys and Lanelogic, the FCC determined that the exact call at issue in this case, and identical to robocalls made to other consumers throughout the United States, “violated section 227(b)(1)(B) of the Act and section 64.1200(a)(2) [47 C.F.R. 64.1200(a)(1)] of the Commission’s rules.” This is exactly the same provision Plaintiff has alleged Pep Boys violated in this case. Following the issuance of the citations, Pep Boys, through counsel, petitioned the FCC to withdraw the citations, but the FCC refused to do so.

The practical effect of the FCC’s citation of Pep Boys and Lanelogic is that the agency charged with interpreting and enforcing the TCPA has determined that the conduct Plaintiff is challenging here in fact violates the TCPA. Where Congress has specifically authorized an agency to implement its statutory directives, that agency’s construction of the statute at issue is entitled to considerable weight and deference. *United States v. Mead Corporation*, 533 U.S. 218, 226-227 (2001); see *Chevron U.S.A. v. Normal Resources Defense Council*, 467 U.S. 837, 844 (1984) (interpretation of any act by the agency overseeing that act is due great deference). The West Virginia Supreme Court has specifically recognized and adopted these principles. Syl. Pt. 3, *Smith v. Board of Education of County of Logan*, 341 S.E.2d 685 (W.Va. 1985). (“Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.”) (internal quotations and cited authority omitted); see also *Appalachian Power Co. v. State Tax Dep’t of West Va.*, 466 S.E.2d 424 (W.Va. 1995) (adopting *Chevron* analysis).

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<sup>4</sup> The FCC’s enforcement powers and jurisdiction are not exclusive. Congress also provided consumers with a private right of action to enforce the TCPA. 47 U.S.C. § 227(b)(3).

Here, the FCC has interpreted its own statute and implementing regulations and has concluded that the very conduct at issue in this case violates the TCPA. Consistent with the longstanding principle that an agency's interpretation of its own rules and statute is entitled to great weight and deference, Plaintiff respectfully submits that the Circuit Court's dismissal was unwarranted.

**D. The Circuit Court erred in its determination that the listing of a used car for sale on the internet gives rise to the requisite "prior express consent" to be contacted via robocall.**

The Defendants argue, and the Circuit Court agreed, that the call made by the Defendants to the Mey home cannot be considered "unsolicited" because the Defendants obtained the Mey's residential phone number from a classified advertisement posted on Craigslist by Ms. Mey's son. In other words, by posting the residential phone number of the Mey home on his Craigslist classified ad, the Circuit Court concluded that Ms. Mey's son *implicitly* gave the Defendants the requisite "prior express consent" to contact the Mey home via autodialer and pre-recorded message. This argument fails for two reasons. First, advertising via robocall is prohibited unless the recipient has provided the sender with "prior *express* consent" to be contacted in such a manner. 47 U.S.C. § 227(b)(1)(B). Second, the TCPA's regulations expressly provide that the requisite "prior express consent" to initiate a robocall cannot exist where the phone number contacted was captured via automated technology.

*I. Consent to advertise via robocall must be explicit and specific, not implicated.*

In enacting the TCPA, Congress found that automated telephone calls that deliver an artificial or prerecorded voice message were more of a nuisance and a greater invasion of privacy than calls placed by "live" persons. *See In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C.R. 2736, 2737, at para. 25 (April 17,

1992). Accordingly, Congress only allowed the use of robocalls where the initiator has first obtained the “*prior express consent*” of the recipient to receive such a call in such a manner.

*Black’s Law Dictionary* defines “express consent” as:

“[t]hat directly given, either viva voce or in writing. It is positive, direct, unequivocal consent, requiring no inference or implication to supply its meaning.”

*Black’s Law Dictionary*, 276 (5<sup>th</sup> Ed. 1979). Similarly, it defines “express” as:

“[c]lear. Definite. Explicit... Declared in terms; set forth in words... Manifested by direct and appropriate language, as distinguished from *that which is inferred from conduct.*”

*Id.* at 521. “Implicit” consent is *not sufficient* to satisfy the TCPA’s requirement that “prior express consent” first be obtained by a consumer before a robocall is transmitted to that consumer. Under the facts alleged, which must be taken as true, no one in the Mey household gave prior express consent to receive the robocall. The Circuit Court’s conclusion that implicit consent was sufficient was in error.

Under the plain meaning of the TCPA, in order for the Defendants to lawfully transmit a robocall to the Mey home, they first must have obtained the Meys’ express consent to receive solicitations from the Defendants *via robocall*. See *In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C.R. 8752 at para. 29 (Oct. 16, 1992) (The TCPA allows autodialed and prerecorded message calls “*if the called party expressly consents to their use*”). There is no dispute, in this case, that *no-one* ever gave any of the Defendants prior express consent to transmit a robocall to the Mey home. The mere listing of the Mey telephone number on a Craigslist used car ad did *not* constitute prior express consent required under the TCPA to allow the Defendants to contact the Mey home via robocall.

Courts interpreting the TCPA and its regulations have also concluded that the mere provision of a consumer’s residential phone number does not constitute consent to receive

robocalls. In *Leckler v. Cashcall*, 554 F.Supp. 2d 1025 (N.D. Cal. 2008), for example, the plaintiff consumer provided her cell phone number directly to the defendant loan company in the course of applying for a loan. When plaintiff fell behind on her monthly payments, defendant began collection activities against her which included placing prerecorded calls to her cell phone and using an autodialer. Plaintiff had never expressly told defendant that it could contact her by means of prerecorded messages or an autodialer. *Id.* at 1027. The court granted plaintiff's motion for partial summary judgment under the TCPA, holding that, "in order for the [prior express consent] exemption of the TCPA to apply, the called party *must expressly consent not only to receiving telephone calls, but to receiving calls made by a caller using an automated dialer or prerecorded message.*" *Id.* at 1030 (emphasis added).<sup>5</sup>

Similarly, the North Carolina Court of Appeals has explained that for prior express consent to send facsimile advertisements to be valid under the TCPA, "*the recipient must be expressly told that the materials to be sent are advertising materials and will be sent by fax. In the absence of each clear prior notice, express invitation of permission to send fax advertisements is not obtained.*" *Blitz v. Agean, Inc.*, 677 S.E.2d 1, 6 (N.C. App. 2009) (citations omitted).

Other courts across the country have also recognized that implicit consent is insufficient to satisfy the TCPA's "prior express consent" requirement. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009) (reversing summary judgment for defendant publisher who sent a promotional text message after plaintiff had expressly agreed to receive promotions from "affiliates" of her ringtone provider, and finding that the express consent required by the TCPA

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<sup>5</sup> The *Leckler* decision was vacated six months later upon the parties' joint request, on the grounds that, under the Hobbs Act, 28 U.S.C. § 2342, the court had been without jurisdiction to review an FCC declaratory ruling which directly related to that case's fact pattern. *Leckler v. Cashcall*, No. C 07-04002 SI, 2008 U.S. Dist. LEXIS 97439 (N.D. Cal. 2008).

is “consent that is clearly and unmistakably stated”); *Travel Travel, Kirkwood, Inc. v. Jen N.Y. Inc.*, 206 S.W.3d 387, 392 (Mo. Ct. App. 2006) (plaintiff’s provision of its facsimile number to a defendant found insufficient to satisfy TCPA’s requirement of “prior express consent” to receive facsimile advertisements); *Clark v. Red Rose, Inc.*, No. 04CVF-150, 2004 WL 1146679 (Ohio Mun. May 3, 2004) (finding TCPA liability because consent “may not be implied from the fact that Plaintiff’s name or fax number may be found in a directory, membership list or other database”).

Because no one gave the Defendants prior *express* consent to contact the Mey home via robocall, and any *implicit* consent which might be inferred from the Craigslist posting is insufficient to exempt Defendants’ behavior under the TCPA, Defendants’ argument that it acquired the requisite “prior express consent” to initiate the call must fail.

2. *The FCC mandates that no prior express consent can exist where the number contacted was captured by automated technology.*

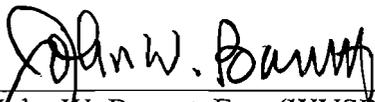
Plaintiff suspects, and intends to prove through discovery, that the Defendants obtained Ms. Mey’s residential phone number by utilizing an automated tool, known as a “Screen Scraper,” to search the Internet for phone numbers contained in used car postings. Plaintiff believes that phone numbers so identified were then downloaded into a database and used to contact consumers via auto-dialer and robocall, who had listed their used cars for sale on the Internet. In such circumstances, the FCC has ruled that “prior express consent” cannot be obtained where the phone number at issue has been “captured” via automated technology. *See In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C.R. 2736, 2737, at para. 31, footnote 67 (April 17, 1992) (if a caller’s number is “captured” or obtained via a Caller I.D., Automatic Number Identification service, or a similar device, without notice to the residential phone subscriber, the caller cannot be considered to have

given permission to receive autodialer or prerecorded voice message calls). For this additional reason, the Defendants' claim that they had the requisite consent to make the call fails.

**VIII. RELIEF PRAYED FOR**

For these reasons, the Court should accept this Petition and reverse the decision of the Circuit Court.

Diana Mey,  
By Counsel,



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IN THE CIRCUIT COURT OF OHIO COUNTY  
WEST VIRGINIA

DIANA MEY,

Plaintiff, Individually And On Behalf  
Of A Class Of All Persons and Entities  
Similarly Situated,

V.

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

Defendants.

CIVL ACTION NO. 09-C-238

**AFFIDAVIT OF MATTHEW P. MCCUE**

1. I make this affidavit in support of the Plaintiff's Petition for Appeal.
2. I am an attorney duly admitted to practice in the Commonwealth of Massachusetts, I am over 18 years of age, am competent to testify and make this affidavit on personal knowledge. I have been admitted to proceed in this court *pro hac vice*.
3. Along with my co-counsel in this action, John W. Barrett, Esq. and Jonathan R. Marshall, Esq. of Bailey & Glasser, LLP, Edward A. Broderick, Esq. of The Law Office of Edward A. Broderick, and Gary Klein, Esq. of Roddy, Klein & Ryan, I represent the plaintiff in this consumer class action.
4. On March 15, 2010, Citations were issued by the Federal Communications Commission against Pep Boys (Citation EB-10-TC-378) and LaneLogic



(EB-10-TC-379) for engaging in the use of pre-recorded telemarketing to promote their joint venture, Caroffer.com.

5. In issuing its Citation to Pep Boys, the FCC, at footnote 2, referred to 13 consumer complaints and disclosed that the auto-dialer calls at issue were being made from telephone number 214-540-8973.

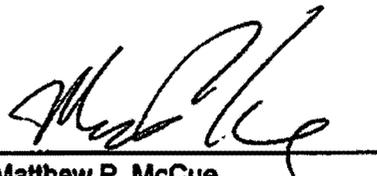
6. Ms. Mey was one of the 13 consumers who submitted nearly identical complaints to the FCC as to the telemarketing at issue. Ms. Mey also received the robocall at issue in this litigation from phone number 214-540-8973.

7. On April 12, 2010, following the issuance of the Citation to Pep Boys, counsel for Pep Boys petitioned the FCC with a lengthy letter requesting that the Citation be withdrawn.

8. Following Pep Boys request that the Citation be withdrawn, I corresponded on a number of occasions with Joshua P. Zeldis, the Assistant Division Chief of the FCC's Telecommunications Consumers Division Enforcement Bureau. Attorney Zeldis informed me that Pep Boys' request to have the Citation withdrawn was under internal review and consideration.

9. On August 18, 2010, Attorney Zeldis informed me via e-mail that "the response from Pep Boys has been reviewed and the citation has been upheld."

FURTHER AFFIANT SAITH NOT.

  
Matthew P. McCue

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.

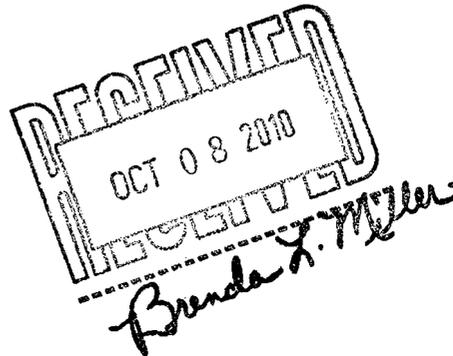
**Certificate of Service**

The undersigned certifies that a true and correct copy of the foregoing **Plaintiff's Petition for Appeal** was served upon counsel, by email and United States Mail, first-class postage prepaid, this 8<sup>th</sup> day of October, 2010:

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Jonathan R. Marshall, Esq.