

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

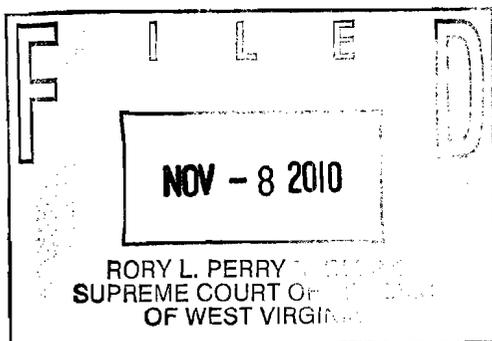
THE PEP BOYS – MANNY, MOE &
JACK, SOUTHWEST VEHICLE
MANAGEMENT, INC. and LANELOGIC
INC., d/b/a CAROFFER.COM,

Respondents.

Docket No. 101406

Circuit Court of Ohio County
Civil Action No. 09-C-238

RESPONSE TO PETITION FOR APPEAL



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INTRODUCTION

In June 2008, Plaintiff Diana Mey's son advertised his car for sale on craigslist.com and provided Plaintiff's residential phone number as a contact number. According to the Plaintiff, on June 12, 2008, she received a prerecorded phone message in response to her son's advertisement. The brief message inquired about the vehicle listed for sale and indicated an intention to make an offer to purchase it.

Over a year later, in July 2009, Plaintiff sued The Pep Boys – Manny, Moe & Jack ("Pep Boys"), Southwest Vehicle Management, Inc., and LaneLogic Inc. (collectively, "Defendants") for allegedly violating the Telephone Consumer Privacy Act ("TCPA"). Although the TCPA is intended to stop the *unsolicited* advertising of goods or services, Plaintiff filed a putative class action complaint against Defendants for leaving the message inquiring about her son's car—at the phone number he provided.

The TCPA does not ban all prerecorded commercial messages; its scope is tailored to protect only certain privacy interests. Pursuant to its Congressionally-delegated authority to exempt messages that do not affect the privacy rights the TCPA is intended to protect, the Federal Communications Commission ("FCC") has exempted commercial messages that do not contain an "unsolicited advertisement" or "telephone solicitation" from the TCPA—whether or not recipients consent to such messages.

Based on Plaintiff's allegations, Pep Boys moved to dismiss Plaintiff's TCPA claim because a telephone message responding to an advertisement at the contact number provided does not constitute (1) an "unsolicited advertisement" or (2) a "telephone solicitation" of goods or services, as those terms are defined and interpreted by the FCC. Accepting Plaintiff's allegations as true, the circuit court agreed with Pep Boys. As the

court observed, the disputed message was left in response to an express invitation in a classified ad—*viz.*, the very antithesis of an unsolicited advertisement. After full briefing and a hearing, the circuit court dismissed Plaintiff's claims with prejudice.

Two weeks after losing in circuit court, Plaintiff wrote to the FCC and requested that it issue a citation to Pep Boys for the message she received in 2008. The FCC obliged, issuing a citation for "apparently" violating the TCPA. Relying on this citation and documents produced *before* the court's dismissal order, Plaintiff moved for relief under West Virginia Rules of Civil Procedure 59 and 60. The circuit court properly rejected Plaintiff's efforts to undo its order based on legal arguments previously rejected, evidence already considered, and an FCC citation provoked by Plaintiff herself. As the court noted, Plaintiff made no new arguments that compelled a different result.

While Plaintiff deemed it "critical" that the FCC cited Pep Boys for an alleged TCPA violation, that form citation – issued without any investigation or adjudication – is not entitled to any deference by the courts. Contrary to Plaintiff's assertion, the citation does *not* constitute an administrative interpretation of the statute and is *not* entitled to deference. It is simply a routine and unsubstantiated response to Plaintiff's own complaint. It cannot undo a final judicial adjudication of Plaintiff's TCPA claim.

Plaintiff now petitions the Court to appeal the dismissal of her complaint pursuant to Rule 12(b)(6), as well as the subsequent denial of her motion for relief under Rules 59 and 60. Because there is no legal error in the circuit court's initial decision to dismiss the complaint based on Plaintiff's own allegations, and because Plaintiff presented no basis for the court to reverse its dismissal decision, Plaintiff's petition should be denied. This Court should not exercise its discretionary jurisdiction where the circuit court correctly

applied an unambiguous statute to Plaintiff's allegations, consistent with FCC guidance directly on point, and dismissed her claim based on receiving a single invited message.

STATEMENT OF THE CASE

A. Plaintiff Files a Class Action Suit Under the TCPA.

On July 30, 2009, Plaintiff filed a class action complaint against Defendants for allegedly violating the TCPA. Several days later, on August 3, 2009, Plaintiff amended her complaint. According to the complaint, "Lanelogic is a company that specializes in the sale of used automobiles over the internet" via its website at www.caroffer.com.

Compl. ¶¶ 16, 19. A consumer interested in selling a vehicle could log on to www.caroffer.com and "provide relevant information about the used car," at which point "a market price would be assigned to the car." *Id.* ¶ 19. "The consumer would then bring the car to a Pep Boys dealership to be inspected by a service professional. Once the condition of the vehicle was verified, a check would be issued to the consumer." *Id.*

In 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 home as a contact number." Compl. ¶ 27. According to the complaint, on June 12, 2008, Plaintiff received the following pre-recorded message at her home:

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.caroffer.com. Give us a try. You'll be glad you did.

Id. at ¶ 28 (emphasis added). Plaintiff alleged that she did not consent to Defendants leaving her this message. *Id.* at ¶¶ 29, 30.

Plaintiff's complaint asserted claims for (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." *Id.* ¶¶ 46-53.

B. Pep Boys Successfully Moves to Dismiss the Complaint.

On September 2, 2009, Pep Boys filed a motion to dismiss all three counts of the complaint based on Plaintiff's failure to allege that Pep Boys engaged in unlawful telemarketing activities as defined by the TCPA. More specifically, Pep Boys argued that even accepting Mey's allegations as entirely true, the alleged message responding to her son's classified advertisement at the number he himself provided did not constitute an "unsolicited advertisement" or "telephone solicitation" under the TCPA. *Mot. to Dismiss* at 5-9. Defendants Lanelogic, Inc. and Southwest Vehicle Management, Inc. joined in Pep Boys' motion to dismiss on November 25, 2009.

On December 17, 2009, Plaintiff opposed the motion to dismiss. Although Pep Boys had not moved to dismiss on the basis of "prior express consent," Plaintiff argued that she had not provided such consent to receive calls from Defendants. *Resp. to Mot. to Dismiss* ("Resp.") at 7-11. As to whether the alleged message constituted a prohibited "advertisement" or "solicitation" under the TCPA, Plaintiff argued that the message at issue did not "offer" to purchase her son's car but rather promoted services available at www.caroffer.com. *Id.* at 11-15. Notably, Plaintiff did *not* request leave to amend.

On December 18, 2009, the circuit court heard argument on Pep Boys' motion to dismiss. Relying on materials outside the face of the complaint, Plaintiff's counsel argued that the challenged message could not be considered an "offer" (as opposed to the

advertisement of services) because Pep Boys and Caroffer.com charged fees for reports, inspections, and repairs (if necessary) prior to making a final offer to purchase a used car. Dec. 18, 2009 Hrg. Tr. at 8-9, 11. Insisting that “common sense” proved it so, counsel argued that the challenged message was a commercial advertisement. *Id.* at 14:5-7. Conflating the separate statutory concepts of “prior express consent” and “unsolicited advertisement,” Plaintiff’s counsel repeatedly insisted that “prior express consent” is “what this case is all about.” *Id.* at 21:12-13. At no point during the hearing did Plaintiff’s counsel request leave to file an amended complaint.

Addressing Plaintiff’s reliance on information outside the pleadings, Pep Boy’s counsel reiterated the simple allegations of the complaint that defeated a TCPA claim as a matter of law: (1) Plaintiff’s son placed an ad to sell his car on Craig’s List; (2) he provided Plaintiff’s home number as a contact number; and (3) Plaintiff received a message inquiring about the car in response to that ad. *Id.* at 16. Counsel pointed out that whether delivered by “prerecorded message or live call, or a carrier pigeon,” a message left in direct response to an offer to sell a used car did not satisfy the definition of an “unsolicited advertisement.” *Id.* at 19-20. Addressing Plaintiff’s focus on the lack of “prior express consent” to Defendants’ message, counsel clarified that this case does not concern express *consent*, but rather an express *invitation* that negates any finding of an “unsolicited advertisement.” *Id.* at 22.

At the conclusion of the hearing, the circuit court concluded that the challenged message did not “contain any unsolicited advertisement” and stated its intention to dismiss the case. *Id.* at 21. By written order dated January 15, 2010, the circuit court concluded that the prerecorded message alleged in Plaintiff’s complaint, which was

admittedly made in response to a classified advertisement, was neither a “telephone solicitation” nor an “unsolicited advertisement” and dismissed the action with prejudice.

In its order, the circuit 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.” Jan. 15, 2010 Order at 8 (emphasis in original). According to the court, “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.” *Id.* The court deemed the alleged facts “the antithes[is] 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 9.

C. Plaintiff Seeks Relief from the Court’s Dismissal of Her Complaint.

On February 1, 2010, Plaintiff filed a motion for relief under Rules 59 and 60 of the West Virginia Rules of Civil Procedure. Plaintiff argued that documents received before the hearing on Pep Boys’ motion to dismiss showed that the prerecorded message at issue “was intended not only to lead to the sale of a car to the Defendants, but also to sell \$99 inspection service-fees, ‘up-sell’ auto repairs, and ‘entice’ customers to pay to ‘recondition’ the cars they intended to sell.” Mem. In Support of Motion for Relief under Rules 59 and 60 (“Mem. for Relief”) at 1. *See also id.* at 5. Because the dismissal order did not specifically address these unpled allegations, Plaintiff asked the circuit court to reconsider its ruling, vacate the dismissal order, and reinstate her case. *Id.* at 2-3.

On April 30, 2010, Plaintiff filed a supplemental memorandum in support of her motion for relief, notifying the circuit court that the FCC had issued Pep Boys a citation

on March 15, 2010, relating to the disputed message. *See* Suppl. Mem. In Support of Mot. for Relief under Rule 59 and 60 (“Suppl. Mem.”). This citation was apparently triggered by a complaint filed by Plaintiff on January 27, 2010. *Id.* Ex. 2. A dozen other complaints filed between May and September 2008 had not resulted in any prior citation. That’s not surprising given their characterization of the disputed call. Asked what property, goods, or services the message promoted, one complaint answered: “The recorded call was soliciting the purchase of our vehicle which they found advertised locally;” another complaint responded: “[T]hey offered to buy a vehicle that I have advertised for sale;” and a third stated: “Offer to buy my car.” *Id.*

Opposing Plaintiff’s motion, Pep Boys pointed out that Plaintiff had not raised any new facts that would warrant relief. *Opp.* to Motion for Relief under Rules 59 and 60 at 2. As Plaintiff’s own motion conceded, Plaintiff received the documents on which she relied *before* the hearing on Pep Boys’ motion to dismiss. Indeed, the so-called “bait-and-switch” scheme that Plaintiff described in its motion was argued at some length during the hearing on Pep Boys’ motion to dismiss. *Id.* As to the FCC citation, Pep Boys pointed out that there was no basis to set aside a final judicial decision after fully considering the parties’ respective positions in favor of a form citation charging an alleged violation issued by a regulator based on Plaintiff’s allegations alone. *Id.*

At the hearing on Plaintiff’s motion for relief, Plaintiff’s counsel rehashed the same unpled accusations discussed during the first hearing, but argued that the new FCC citation was the “critical fact” supporting Plaintiff’s motion. May 7, 2010 Hrg. Tr. at 7. In response, Pep Boy’s counsel pointed out that the citation was nothing more than a *charge* of wrongdoing based on Plaintiff’s complaint, not an actual adjudication of

wrongdoing. *Id.* at 12-13. As the boilerplate citation itself notes, it is addressed to an “alleged” violation of the TCPA. Suppl. Mem. Ex. 2 at 1, n.2.

At the conclusion of the hearing, the circuit court noted that Plaintiff’s “arguments were all made earlier” and nothing had changed for the court to reconsider its prior order. May 5, 2010 Hrg. Tr. at 16. On June 11, 2010, the court entered a final order denying Plaintiff’s motion, noting that Plaintiff was simply rearguing her case:

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.

As to Plaintiff’s purportedly “new evidence,” the circuit court observed that such evidence, even if considered, would have no impact on the court’s fundamental legal conclusions based on Plaintiff’s own allegations:

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.

June 11, 2010 Order at 2.

Four full months after the denial of her motion, Plaintiff filed a petition for appeal on October 8, 2010. For the reasons discussed below, her petition should be denied.

ARGUMENT

I. The Court Should Not Exercise Its Discretionary Appellate Jurisdiction in a Case Where There is No Probable Error, The Conduct at Issue Ended in 2008, and Plaintiff Is Entitled to No More than \$500 in Damages.

At present, there is no appeal as of right to this Court. *See* W. Va. Code § 58-5-1 (2005); *see also* *Billotti v. Dodrill*, 183 W.Va. 48, 54, 394 S.E.2d 32, 38 (1990). A party seeking review of a circuit court decision must file a petition for appeal. *See* W. Va. R. App. P. 3, 5, 7; W. Va. Const. art. VIII, § 4. An “appeal shall be allowed” only if the Court “is satisfied that there probably is error in the record, or that [the record] presents a point proper for the consideration of the court.” W. Va. Const. art. VIII, § 4. This Court’s decision to exercise “appellate jurisdiction is entirely discretionary. It may either grant or refuse review of any case.” <http://www.state.wv.us/wvsca/Supreme.htm>.

Plaintiff’s petition should be denied, as she cannot show that the circuit court “probably” erred in this case. The court applied the explicit language of the TCPA and its implementing regulations to the prerecorded message and, consistent with FCC guidance *directly* on point, found no statutory violation. There is no error in the circuit court’s dismissal of Plaintiff’s claim as a matter of law. There is certainly no error in dismissing her complaint *with* prejudice, as Plaintiff never sought leave to amend.

Nor is there any error in the circuit court’s refusal to reconsider its initial decision. Insofar as Plaintiff relies on the FCC citation in trying to show error below, (Pet. at 12-14), the FCC’s mere allegation of wrongdoing without any investigation, adjudication, or preclusive decision provides no basis for permitting an appeal. “[R]econsideration of a previous order is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.” 12 James Wm. Moore, *et al.*, *Moore’s Federal* —

Practice ¶ 59.30[4] (3d ed. 2009). Plaintiff presented no circumstances sufficient to invoke the “extraordinary remedy” afforded by Rules 59 and 60.

Not only is there no showing that the circuit court “probably” erred, but there are no special considerations in this case that make discretionary review necessary. There is no recurring conduct that requires judicial redress. The program between Pep Boys and Caroffer.com lasted less than a year and ended in November 2008. Opp. to Mot. for Relief under Rules 59 and 60, Ex. G at 6.

There are no considerations unique to West Virginia here. The TCPA is a federal statute that can be enforced not only by private action, but also by regulatory agencies. Plaintiff’s complaint – filed in 2010 after losing in court – was the only complaint *ever* lodged with the FCC by any West Virginia resident regarding the caroffer.com message. *Id.* Ex. E.

The financial stakes here are minimal. Plaintiff’s potential damages are \$500 at most. *See* 47 U.S.C. § 227(b)(3)(B) (authorizing private cause of “action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater”). No greater recovery is possible. Even if Plaintiff’s claim was legally cognizable, which it isn’t, Plaintiff could not pursue it on behalf of a class. *See, e.g., Gene and Gene LLC v. BioPay LLC*, 541 F.3d 318, 329 (5th Cir. 2008); *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 308-11 (Tenn. 2008).

Finally, the circuit court’s dismissal order does not conflict with any decision of this Court—or any other state or federal court in the United States. *Cf.* U.S. Supreme Court Rule 10 (noting that certiorari will be granted “only for compelling reasons” such as conflicts between federal courts of appeals or state courts of last resort).

In short, there are simply no compelling reasons for the Court to exercise its discretion to entertain Plaintiff's appeal.

II. The Court's Standard of Reviewing the Challenged Orders.

Plaintiff's complaint alleged only one substantive claim against Defendants for allegedly sending "pre-recorded telemarketing solicitations" to her home, and to other class members. Compl. ¶ 47. The circuit court found this claim untenable as a matter of law and dismissed the complaint with prejudice. This Court reviews an order dismissing a complaint for failure to state a claim *de novo*. See *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.* 194 W.Va. 770, 775, 461 S.E.2d 516, 521 (1995) ("Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.").

After the circuit court dismissed her complaint, Plaintiff moved for relief under Rules 59(e) and 60(b). The court denied her motion. The "standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." *Wickland v. Am. Travellers Life Ins. Co.*, 204 W.Va. 430, 435, 513 S.E.2d 657, 662 (1998).

The Court reviews the denial of relief under Rule 60(b) "for an abuse of discretion." *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W.Va. 692, 706, 474 S.E.2d 872, 886 (1996). "An appeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order." See *Kerner v. Affordable Living, Inc.*, 212 W.Va. 312, 313, 570 S.E.2d 571, 572 (2002) (per curiam).

III. The Court Properly Dismissed Plaintiff's TCPA Claim as a Matter of Law.

In 1991, Congress amended the Communications Act of 1934, 47 U.S.C. § 201, *et seq.*, with the enactment of the Telephone Consumer Protection Act of 1991 ("TCPA"), Pub.L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227). The TCPA was enacted to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and ... restricting certain uses of facsimile ([f]ax) machines and automatic dialers." S. Rep. No. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968. The TCPA directed the FCC to enact regulations "to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object" in "an efficient, effective, and economic manner." 47 U.S.C. § 227(c)(1), (2).

The TCPA makes it unlawful "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 is" exempted by the FCC. 47 U.S.C. § 227(b)(1)(B). The statute permits the FCC to exempt, by rule or order, "classes or categories of calls made for commercial purposes" that "(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." *Id.* at § 227(b)(2)(B)(ii)(I)-(II).

Subsequent to passage of the TCPA, the FCC adopted regulations implementing 47 C.F.R. § 64.1200, *et. seq.* Among other categories of exempted commercial calls, the FCC's regulations exempted prerecorded messages that do "not include or introduce an unsolicited advertisement or constitute a telephone solicitation." *Id.* § 64.1200(a)(2)(iii). Based on Plaintiff's own allegations, the circuit court concluded that the prerecorded

message in dispute did not contain an “unsolicited advertisement” or “telephone solicitation” in violation of the TCPA and dismissed Plaintiff’s complaint.

The court did not err. While Plaintiff alleges that the circuit court incorrectly applied the standard for reviewing a motion to dismiss, (Pet. at 5), the court’s order does not bear that out. The order makes clear that it accepted *all* Plaintiff’s allegations as true, as required by Rule 12(b)(6). See *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008). Indeed, although the Court noted that the evidence offered by Plaintiff in opposition to Pep Boys’ motion to dismiss and again at the hearing on that motion was not “properly considered in conjunction with Defendants’ Motion to Dismiss,” see W. Va. R. Civ. P. 12(b)(6), it nevertheless considered whether such evidence could support a claim under the TCPA and concluded that, in light of Plaintiff’s own allegations, it could not. June 11, 2010 Order at 2 (noting that Plaintiff’s allegations “were presumed” true).

Where the facts are undisputed, as they were for purposes of Pep Boys’ motion, a court’s interpretation of a statute or regulation is a pure question of law. See *Appalachian Power Co. v. State Tax Dep’t*, 195 W.Va. 573, 578, 466 S.E.2d 424, 429 (1995) (“Interpreting a statute or an administrative rule or regulation presents a purely legal question”). And where a claim fails as a matter of law, it can and should be dismissed at the outset. See, e.g., *Pagliara v. Johnson Barton Proctor & Rose, LLP*, 2010 WL 3940993, at *11 (M.D. Tenn. Oct. 6, 2010) (dismissing TCPA claim because “the TCPA does not apply to the defendant’s conduct”).

Here it was “clear that no relief could be granted under any set of facts” consistent with Plaintiff’s allegations. *Murphy v. Smallridge*, 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81

L. Ed. 2d 59, 65 (1984) and *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1957)).¹ As such, the circuit court correctly dismissed Plaintiff's TCPA claim as a matter of law.

A. The Circuit Court Correctly Concluded That the Disputed Message Did Not Contain an "Unsolicited Advertisement" under the TCPA.

Even if made for commercial purposes and even if delivered without prior express consent, a prerecorded message that lacks an "unsolicited advertisement" is not actionable under the TCPA. 47 C.F.R. § 64.1200(a)(2)(iii). The TCPA defines an "unsolicited advertisement" as "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).

According to the complaint, Plaintiff received a message stating: "[T]ell us about your vehicle and we'll give you an offer in minutes." Compl. ¶ 28 (emphasis added). This message – responding to Plaintiff's express invitation – is the very antithesis of an "*unsolicited advertisement*." Plaintiff's son invited unknown third parties interested in buying his car to contact him at Plaintiff's number.² As the circuit court concluded, "when an individual responds to a classified ad, and conveys interest in

¹ It is still unresolved whether this pleading standard is appropriate following the United States Supreme Court's decisions in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and *Ashcroft v. Iqbal*, --- U.S. ---, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). See *Roth v. DeFeliceCare, Inc.*, --- S.E.2d ----, 2010 WL 3859606 (W. Va. June 8, 2010) (Benjamin, J., dissenting) (noting that *Twombly* abrogated *Conley*'s pleading standard on which West Virginia's standard is based). Here, however, the distinction is immaterial; Plaintiff's own allegations defeat any possibility of relief under the TCPA.

² Because Plaintiff's son explicitly *invited* calls about his car, the TCPA cases discussed in Plaintiff's petition involving uninvited "robocalls" or facsimiles are simply not on point. Pet. at 10-11.

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.” Feb. 15, 2010 Order at 8. Consistent with this finding, the court concluded 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 8 (emphasis in original).

As she argued below, Plaintiff is emphatic that the prerecorded message left at her residence necessarily violates the TCPA because she did not expressly consent to receiving a prerecorded message. Pet. at 14-17. In so arguing, Plaintiff conflates the distinct concepts of “express *consent*” and “express *invitation*,” contrary to the “well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.” *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003). *See also Cunningham v. Scibana*, 259 F.3d 303, 308 (4th Cir. 2001) (“The use of different terms within related statutes generally implies that different meanings were intended.”). Even statutory words with “remarkably similar definitions” – such as “invitation” and “consent” here – “can still convey a unique or distinct meaning or flavor from words that are similar or even synonymous in nature because of their differing tone or usage within a sentence.” *McCarthy*, 322 F.3d at 656.

Plaintiff’s conflation of “invitation” and “consent” also ignores the structure of the FCC and its implementing regulations. The TCPA defines an “unsolicited advertisement” as material “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). If a message does not meet this threshold definition, then it is exempt under the FCC's regulations, 47 C.F.R. § 64.1200(a)(2)(iii), and there is no need to further consider whether the message was delivered without "prior express *consent* of the called party" resulting in a violation of the TCPA. 47 U.S.C. § 227(b)(1)(B) (emphasis added). Plaintiff's argument on this subject impermissibly collapses the rule into its exception.

Given that Plaintiff's son invited calls to her residence, the circuit court never needed to reach the issue of consent. As such, the court did not, as Plaintiff asserts, predicate its decision on a theory of "implied" consent. Pet. at 14.

B. The Circuit Court Correctly Concluded That the Disputed Message Did Not Contain a "Telephone Solicitation" under the TCPA.

The TCPA defines "telephone solicitation" as "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). Expressly excluded from the definition of "telephone solicitation" is a call or message "to any person with that person's prior express invitation or permission." *Id.* at § 227(a)(4)(A).

No matter what purported "facts" Plaintiff may argue on appeal, Plaintiff's complaint does not allege that the message left at her residence encouraged her to purchase any property, goods, or services. What it does allege is that (1) Plaintiff's "son listed a used automobile for sale on the internet site craigslist.com," (2) he provided her home phone number, and (3) she received a message inquiring about the vehicle listed for sale and expressing an interest in making an offer. Compl. ¶ 28. As Plaintiff's *own* counsel acknowledged, "Ms. Mey's son put an ad on the internet that said **I want someone to call me to buy my car.**" Dec. 18, 2009 Hrg. Tr. at 13:6-8 (emphasis added).

Based on Plaintiff's own allegations, the circuit court concluded that "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." Jan. 15, 2010 Order at 6. Because "the 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," the circuit court concluded that the message did not contain a "telephone solicitation." *Id.*

Although Plaintiff conceded below that the prerecorded message at issue was "intended ... to lead to the sale of a car," (Mem. for Relief at 1), Plaintiff insists that the prerecorded message at issue cannot be characterized as an offer to buy her son's car, but only as an advertisement of services. Pet. at 9-10. But in deciding whether a prerecorded message contains a telephone solicitation, "the purpose of the message" is paramount to the analysis. In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C.R. 14014, 14098 ¶ 141 (July 3, 2003).

In its final rules and regulations implementing the TCPA, the FCC specifically clarified what would constitute a "telephone solicitation" under the statute:

[W]e 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.

Final Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC Rules and Regulations, 70 F.R. 19330, 19331 (Apr. 13, 2005) (emphasis added).

The FCC further noted that a “**caller responding to a classified ad would not be making a telephone solicitation**, provided the purpose of the call was to inquire about or offer to purchase the product or service advertised.” *Id.* at 19331-32 (emphasis added). Under its own rules and regulations, the FCC has concluded that a call responding to a classified ad to inquire about an advertised product or service is not a telephone solicitation. Making an actual offer to purchase the advertised product is not required by the FCC—merely inquiring about the advertised product is an acceptable purpose. *Id.*

Congress has delegated to the FCC the authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions” of the Communications Act. 52 Stat. 588, 47 U.S.C. § 201(b). *See also AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78, 119 S. Ct. 721, 729-30 (1999). With respect to the TCPA, Congress specifically tasked the FCC with implementing rules and regulations to effectuate the TCPA’s purpose. 47 U.S.C. § 227(b)(2)(B)(ii); *id.* § 227(c)(1), (2).

The FCC’s regulations interpreting the TCPA – promulgated after public notice and comment – must be afforded great deference. *See Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2782, 81 L.Ed.2d 694 (1984) (“Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”). Indeed, the FCC’s “commentary regarding its own rules is due even greater deference than the court gives

rules” and must be followed “unless it is at odds with the regulation it explains.” *See Charvat v. Dispatch Consumer Servs., Inc.*, 95 Ohio St. 3d 505, 510, 769 N.E.2d 829, 833 (2002). The FCC’s “concrete guidance” on the subject of what constitutes a telephone solicitation is entitled to considerable deference from this Court. *Stinson v. United States*, 508 U.S. 36, 44, 113 S. Ct. 1913, 1918, 123 L. Ed. 2d 598 (1993).

This case is identical to the factual scenario contemplated by the FCC—the alleged message responded to a classified ad to inquire about the advertised product and make an offer. Given the significant deference owed to the FCC’s own interpretation of such a call, it cannot be deemed a “telephone solicitation” that violates the TCPA.

Plaintiff makes much of the fact that the message did not contain an actual monetary offer to purchase her son’s car. Pet. at 9. But under the FCC’s own rules and regulations, determining whether a call constitutes a “telephone solicitation” does not turn on whether an actual offer was made; calling to “discuss a *potential sale*” or “to inquire about” the advertised product is sufficient to remove it from the TCPA’s scope. 70 F.R. 19330, 19331-32 (emphasis added). Plaintiff herself has conceded that the prerecorded message was “intended ... to lead to the sale of a car.” Mem. for Relief at 1.

The FCC’s regulations simply cannot be construed to require that a call responding to an advertisement make a concrete, binding offer. Such a construction would not only contradict the plain language of the FCC’s own rules, but fly in the face of common sense and every day experience. Offers to purchase goods – whether homes or cars – are typically not made without inspection or discussion. Those responding to an advertisement for a car will often ask to test drive the vehicle or have it inspected before

making a firm offer. Real estate agents or potential home owners interested in an advertised house may want a home inspection before making an actual offer.

Similarly irrelevant to the question of whether the disputed message constituted a “telephone solicitation” is the fact that Pep Boys would financially benefit from the inspection of vehicles. Pet. 9-10. As interpreted by the FCC, the TCPA does not preclude a real estate agent from calling to discuss a potential sale of property, even though an agent will receive fees from the transaction if consummated. Whether a proposed sale will generate fees for third parties (such as real estate agents or vehicle inspection companies) is not the pivotal issue. Rather, the pivotal issue is one of privacy and whether the call was made to “discuss a potential sale” of real estate, in the case of the FCC’s hypothetical, or of a car, in this case.

To violate the TCPA, a message must offer a good or service. In this case, the message alleged in Plaintiff’s complaint indicates only an intent to make an offer for her son’s car. “The payment of money is not a good, service, franchise or an intangible.” *Charvat v. Dish TV Now, Inc.*, 2008 Ohio 2019, 2008 WL 1886311, at *2 (10th App. Dist. Apr. 29, 2008). Simply put, the message Plaintiff allegedly received did not encourage her to purchase, rent, or invest in property or services; thus, it is not actionable under the TCPA.

C. The Court Correctly Dismissed Plaintiff’s Complaint with Prejudice.

No matter how “strict” the TCPA may be, or how annoying it is to receive prerecorded messages, (Pet. at 11-12), the FCC has explicitly exempted certain commercial messages from the TCPA’s protection. A message that falls within the FCC’s exemptions cannot support a finding of TCPA liability, regardless of whether the recipient expressly consented to it. “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*, 196 W.Va. at 36, 468 S.E.2d at 168 (citation omitted). Because Plaintiff’s own allegations defeated her claim under the TCPA, the circuit court appropriately dismissed her complaint.

Moreover, because relief could not be “granted under any set of facts” consistent with Plaintiff’s initial allegations, the circuit court correctly dismissed her complaint with prejudice. *See Zehrbach v. Con-Way Cent. Express*, 2007 WL 2815636, at *1 (N.D. W. Va. Sept. 25, 2007) (“[P]laintiff’s asserted claims ... must be dismissed with prejudice as it appears to a certainty that there is no set of facts which could be proved to support a claim or which would entitle the plaintiff to relief.”). The dismissal with prejudice was particularly appropriate since Plaintiff *never* requested leave to amend. *See Mann v. Conlin*, 22 F.3d 100, 103 (6th Cir. 1994) (noting that where Plaintiffs “never requested leave to amend their complaint,” the argument was not properly before the court).

IV. The Circuit Court Properly Refused to Vacate Its Dismissal Order Where Plaintiff Relied on Previously Available Evidence, Repetitive Arguments, and an FCC Citation Entitled to No Deference.

After the circuit court dismissed her complaint, Plaintiff moved for relief under both Rules 59 and 60. In her motion, Plaintiff claimed to have “new evidence” warranting relief, but actually rehashed the factual and legal arguments her counsel initially made during the hearing on Pep Boys’ motion to dismiss. Thereafter, Plaintiff supplemented her motion to advise the court of a citation against Pep Boys issued by the FCC in response to a complaint filed by Plaintiff two weeks after the court dismissed her complaint. Plaintiff’s counsel described the citation as the “critical fact” supporting her request for relief. May 7, 2010 Hrg. Tr. at 7. But neither Plaintiff’s “new evidence” nor the FCC citation warranted relief from the circuit court’s dismissal of her case.

A. Neither Rule 59 Nor Rule 60 Provided a Basis for Relief from the Circuit Court's Dismissal Order.

Rule 59(e) allows a party to seek “to change or revise a judgment” entered as a result of a motion to dismiss. *James M.B. v. Carolyn M.*, 193 W.Va. 289, 293-94, 456 S.E.2d 16, 20-21 (1995). “A Rule 59(e) motion may not be used to relitigate old matters and is an extraordinary remedy that should be used sparingly.” *Am. Reliable Ins. Co. v. Stillwell*, 212 F. Supp. 2d 621, 632 (N.D. W. Va. 2002). It is improper to use Rule 59(e) “to ask the court to rethink what the court has already thought through – rightly or wrongly.” *Id.* (citation omitted). Given “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) (citation omitted).

Rule 59(e) itself is silent on what a movant must establish in order to succeed on such a motion, noting only that a motion to alter or amend the judgment must be filed in ten days. W. Va. R. Civ. P. 59(e). Although this Court's decisions identify the standard for reviewing appeals from Rule 59(e) motions, they do not explicitly identify the standard that guides the original disposition of such a motion. Federal caselaw does, however, and a “motion under Rule 59(e) of the Federal Rules of Civil Procedure” “is substantially the same as Rule 59(e) of the [West Virginia] Rules of Civil Procedure.” *Investors Loan Corp. v. Long*, 152 W.Va. 673, 682, 166 S.E.2d 113, 118 (1969).

Applying a virtually identical Rule 59(e), the Fourth Circuit recognizes “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.” *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998).

Under Rule 60(b), the court may relieve a party from a judgment or order on grounds of mistake, inadvertence, excusable neglect, unavoidable cause, newly discovered evidence, fraud, void judgment, satisfaction, or any other justifiable reason. W. Va. R. Civ. P. 60(b). The burden for relief under Rule 60(b) is high; such “motions should be granted in only the most extraordinary of circumstances.” *Coffman v. W. Va. DMV*, 209 W.Va. 736, 741, 551 S.E.2d 658, 663 (2001).

Plaintiff does not allege a change in controlling law, fraud, mistake, or the like. Rather, she argues that the circuit court erred in the first instance and then compounded its error by refusing to vacate its decision in light of “new evidence.” For the reasons discussed above, there is no “clear error of law” in the dismissal of her complaint.

Moreover, although Plaintiff argued that newly-obtained documents warranted relief under Rules 59(e) and 60(b), such evidence was available to Plaintiff before the hearing on Pep Boys’ motion to dismiss. Indeed, Plaintiff’s motion itself acknowledged that Plaintiff received the documents “*before* hearing on the Defendants’ motion to dismiss.” Mem. for Relief at 1 (emphasis added). The only “new evidence” presented by Plaintiff was an FCC citation that she herself triggered by filing a complaint after losing in court. But that “new evidence” did not undo the conclusions compelled by Plaintiff’s own allegations or require the circuit court to vacate its order.

B. Plaintiff’s Reliance on Previously Available Documents Did Not Compel a Different Result.

Newly discovered evidence may provide a basis for relief under Rules 59 and 60, but the “evidence must be truly new, in the sense that it was previously unavailable; a motion for reconsideration should not be used ‘as a vehicle to introduce new evidence that could have been adduced during pendency of the [previous] motion.’” *Anthony v.*

Runyon, 76 F.3d 210, 215 (8th Cir. 1996) (citation omitted). “To come within the ‘newly discovered’ evidence rule, the plaintiff at a minimum must show that the evidence was discovered since the adverse ruling and that the plaintiff was diligent in ascertaining and securing this evidence.” *Powderidge*, 196 W.Va. at 706 n.25, 474 S.E.2d at 886 n.25.

Moreover, it is not sufficient that the evidence is newly discovered; it must be “sufficient to permit a different outcome.” *Id.* at 706, 474 S.E.2d at 886.

In seeking relief under Rules 59 and 60, Plaintiff relied on documents produced by Defendants *prior* to the circuit court’s dismissal of the complaint. Mot. for Relief at 1. Not only did Plaintiff fail to authenticate these documents, but they were the very same documents extensively discussed by Plaintiff’s counsel during the first hearing.³ Dec. 18, 2009 Hrg. Tr. at 7-10 (discussing contract between Pep Boys and Caroffer.com, agreement with Lanelogic, and Pep Boys marketing literature). As such, the documents could not be deemed “newly discovered.”

Moreover, the documents were not sufficient to compel a different result. The documents did not and could not undo Plaintiff’s own allegations that required the dismissal of her claims. If anything, the documents reinforced that the accused message was in furtherance of a potential purchase. As Plaintiff argued in seeking relief, the “new” documents “demonstrate[d] that the robocall was intended **not only to lead to the sale of a car** to the Defendants, but also to sell \$99 inspection service-fees, ‘up-sell’ auto repairs, and ‘entice’ customers to pay to ‘recondition’ the cars they intended to sell, with

³ Plaintiff’s failure to authenticate her “new evidence” provides an independent basis to affirm the court’s denial of relief under Rules 59 and 60. *See Bogart v. Chapell*, 396 F.3d 548, 558(4th Cir. 2005) (affirming denial of relief under Rule 59(e) where “new evidence” “was never properly authenticated”); *Hill v. Noble*, 2009 WL 3818178, at *1 (W.D. Va. Nov. 16, 2009) (noting that document submitted in support of motion under Rules 59 and 60 was not authenticated).

the Defendants splitting all profits.” Mot. for Relief at 1 (emphasis added). Indeed, the documents themselves described the process as one starting with “Get an Accept” from the customer and ending with the car “On the lot.” *Id.*, Ex. 5 at 16. The whole model was designed to complete a transaction for the sale of a vehicle. *Id.*

Simply put, Plaintiff offered no “newly discovered” evidence to the circuit court and certainly not evidence “sufficient to permit a different outcome.” *Powderidge*, 109 W.Va. at 706, 474 S.E.2d at 886. The rehashing of evidence already considered by the court did not require the court to grant relief under either Rule 59(e) or Rule 60(b).

C. Plaintiff’s Reliance on Previously Asserted Arguments Did Not Compel a Different Result.

A “motion to reconsider is simply not an opportunity to reargue facts and theories upon which a court has already ruled.” *Powderidge*, 196 W.Va. at 706, 474 S.E.2d at 886. But that is exactly what Plaintiff’s motion for relief did.

In asking the circuit court to vacate its prior decision, Plaintiff argued that the message at issue was a telephone solicitation and an unsolicited advertisement because the “purpose of the message” was “to encourage the Plaintiff to purchase the Defendants’ services.” Mot. for Relief at 6. Plaintiff argued that the message could only be construed as the advertisement of services (rather than offer to purchase) because inspection fees would be generated and fees for repairs could be assessed. Mot. for Relief at 7.

But Plaintiff made this very same argument in opposing Pep Boy’s motion to dismiss. *See, e.g.*, Resp. at 12 (“Defendants’ purpose in sending the unsolicited robocall to the Mey 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.”). Her counsel also raised these arguments at the December 18,

2009 hearing. *See* Dec. 18, 2009 Hrg. Tr. at 11:7-8 (“This is an advertisement inviting the consumer to go to a website.”); *id.* at 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.”).

In seeking relief from the court’s dismissal, Plaintiff also argued that the use of a “robocall” rather than “live caller” somehow made the TCPA analysis “entirely different.” *Id.* at 8-9. But she had previously made this same argument prior to the dismissal of her complaint. *Resp.* at 14-15 (“[T]he TCPA is a remedial consumer protection statute specifically intended to prohibit intrusive robocalls.”).

Finally, Plaintiff argued that notwithstanding her son’s classified ad, she did not have a business relationship with Defendants nor did she consent to them leaving her a message. *See* Mot. at 9. But this, too, she had previously argued in opposing Pep Boy’s motion to dismiss. *See* *Resp.* at 7 (“Defendants did not have prior express consent to initiate a robocall to the Mey home.”); Dec. 18, 2009 Hrg. Tr. at 7:8-10 (“no one in the household gave prior expressed consent to Pep Boys to send them a robocall.”).

As the circuit court noted at the hearing on Plaintiff’s motion, the “arguments were all made earlier.” May 7, 2010 Hrg. Tr. at 16. There were “no new arguments” that compelled the court to change its earlier views. *Id.* Having considered all Plaintiff’s legal arguments before dismissing her case, the circuit court did not err in denying Plaintiff’s motion for relief.

D. A Form Citation Issued at Plaintiff’s Request Did Not Merit Administrative Deference or Compel a Different Result.

Apparently frustrated by the circuit court’s dismissal of her claims with prejudice, Plaintiff asked the FCC to issue a citation against Pep Boys for purported violations of

the TCPA. See Suppl. Mem. Ex. 2 (“This is a formal request that the Commission issue a Citation to Pep Boys for violations of the [TCPA] pursuant to section 503(b)(5) of the Telephone Consumer Protection Act.”). Without any investigation into the merits of Plaintiff’s claims, the FCC issued the requested citation.

Plaintiff argues that this Court must give “considerable weight and deference” to the FCC’s interpretation of the TCPA and its implementing regulations as applied to the facts of this case, citing *Chevron*. Pet. at 13-14. The problem is that no such interpretation exists.

At the Plaintiff’s own request, the FCC issued Pep Boys a citation for an “apparent[]” violation of the TCPA. Suppl. Mem. Ex. 2. Contrary to Plaintiff’s suggestion, the FCC citation is merely a complaint or “charge” consisting of allegations, not a decision of liability or a determination on the merits. Suppl. Mem. Ex. 2 at 1 n.2 (“We have attached 13 complaints at issue in this citation. The complaints address *alleged* TCPA violation(s). . .”) (emphasis added); 47 U.S.C. § 503(b)(5) (person “is sent a citation of the violation *charged*”) (emphasis added). It is simply a notice of apparent liability that the FCC must provide so that it may pursue penalties in the event of a future violation. *Id.* It is *not* a finding of actual wrongdoing. As such, the citation is entitled to no deference whatsoever. But even if considered an adjudication on the merits, which it is not, it would still not be entitled to the administrative deference that Plaintiff urges.

To begin with, the FCC’s form citation does not contain any actual interpretation of the TCPA. It simply notes that an alleged violation took place, without explaining how or why. Despite Plaintiff’s efforts to extrapolate a binding agency interpretation from a boilerplate form citation, (Pet. at 13-14), speculation and surmise are not entitled

to judicial deference—under *Chevron* or otherwise. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 716, 111 S. Ct. 2524, 2544 (1991) (Scalia, J., dissenting) (“Certainly private parties’ speculation as to what the Secretary could have thought warrants no deference.”); *SEC v. Sloan*, 436 U.S. 103, 118, 98 S. Ct. 1702, 1711-12, 56 L. Ed. 2d 148 (1978) (refusing to give deference to agency interpretation where Court could “only speculate as to the Commission’s reasons for reaching the conclusion that it did”).

Chevron deference, moreover, “does not apply to all statutory interpretations issued by agencies.” *Alvarado v. Gonzales*, 449 F.3d 915, 921 (9th Cir. 2006). After *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 121 S. Ct. 2164, 2170-71, 150 L. Ed. 2d 292 (2001), courts accord *Chevron* deference only to agency action promulgated in the exercise of congressionally-delegated authority to make rules carrying the force of law. *Id.* at 226, 234, 121 S. Ct. 2164, 2170-71, 2175. Agency interpretations promulgated in a non-precedential manner are “beyond the *Chevron* pale.” *Id.* See also *Hall v. EPA*, 273 F.3d 1146, 1156 (9th Cir. 2001) (“Interpretations of the Act set forth in such non-precedential documents are not entitled to *Chevron* deference.”).

Finally, the TCPA and its implementing regulations are clear. Any agency interpretation contrary to their plain language would not be entitled to deference. *Chevron*, 467 U.S. at 843, 104 S. Ct. 2772. Moreover, notwithstanding the deference due agency regulations, such as the exemption for certain commercial messages at issue in this case, it is still “emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Unlike the FCC’s citation based on an *alleged* TCPA violation, the circuit court fully considered the legal arguments of both parties, considered the facts alleged by

Plaintiff (both in her complaint and in her briefs), and then rendered a final judgment on the merits of Plaintiff's claims. Whether or not deference is given to non-final administrative decisions, "the courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 151, 105 S. Ct. 1102, 1120, 84 L. Ed. 2d 90 (1985).

In sum, Plaintiff's belated attempt to rely on an FCC citation that she herself provoked provided no reason for the circuit court to reconsider its decision dismissing Plaintiff's complaint. As such, the court's order denying relief under Rules 59 and 60 should be affirmed.

CONCLUSION

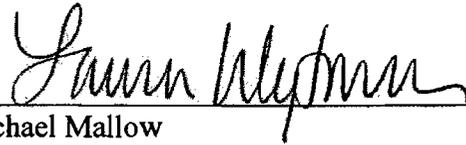
The circuit court correctly determined that the telephone message left at Plaintiff's residence – in response to an offer posted by her son on the internet – did not contain a "telephone solicitation" or "unsolicited advertisement" that violated the TCPA. Neither Defendants' documents, nor the FCC's citation, could change what Plaintiff herself had pled in her complaint. As such, the circuit court did not err in refusing to vacate its dismissal under either Rule 59 or 60, particularly when Plaintiff presented no new arguments and relied on an FCC citation entitled to no administrative deference.

Not only is there no error in the circuit court's decisions below, but there are no factors here that make discretionary appellate review appropriate. There are no facts or

legal issues unique to West Virginia; there is no recurring conduct at issue; there is no more than \$500 at stake; and there are no conflicting federal or state cases on point.

Because the circuit court did not “probably” err and because there are no special considerations necessitating this Court’s discretionary review, Pep Boys respectfully requests that the Court deny Plaintiff’s Petition to Appeal.

Respectfully submitted,



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Dated: November 8, 2010

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CERTIFICATE OF SERVICE

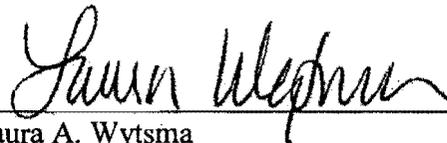
I, Laura A. Wytsma, counsel for Defendant-Respondent The Pep Boys – Manny, Moe & Jack, hereby certify that I have served a true and correct copy of the foregoing RESPONSE TO PETITION FOR APPEAL upon counsel by email and United States Mail, first-class postage prepaid, at the following addresses:

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