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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ROBERT LEE TAYLOR, SR.,  
individually and on behalf of all others  
similarly situated,

Plaintiff,

v.

UNIVERSAL AUTO GROUP I, INC., a  
Washington corporation, d/b/a/ TACOMA  
DODGE CHRYSLER JEEP,

Defendants.

CASE NO. C 13-5245 KLS

ORDER ON MOTION FOR  
SUMMARY JUDGMENT

Mr. Taylor alleges that the recorded phone calls made on behalf of the Defendant to Mr. Taylor violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (TCPA), the Washington Automatic Dialing and Announcing Device statute, R.C.W. 80.36.400 (WADAD) and the Washington Consumer Protection Act, R.C.W. 19.86 *et seq.* (WCPA).

This matter now comes before the Court on the Defendant's Motion for Summary Judgment. Having reviewed the pleadings filed by the parties, the Court concludes that the motion should be Granted in part and Denied in part.

1 **FACTS**

2 Tacoma Dodge Chrysler Jeep (Tacoma Dodge) opened for business in December 2009,  
3 after Chrysler had closed its prior dealerships in the area and entered bankruptcy. Tacoma  
4 Dodge operates in the same location as the prior dealership. Mr. Taylor purchased two vehicles  
5 and had them serviced at the prior dealership.

6 After Tacoma Dodge opened for business it sent a pre-recorded “welcome” phone  
7 message recorded by the new owner to customers of the prior dealership – including Mr. Taylor.  
8 There is no evidence before the Court as to how this call was initiated or what specifically was  
9 said. It also appears from Mr. Taylor’s declaration that he has no memory of receiving such a  
10 call. Dkt. 34, p. 2, line 24 – 25.

11 Mr. Taylor first conducted business with Tacoma Dodge in February 2010 and last  
12 conducted business with them on July 9, 2011.

13 Around May 2011 Tacoma Dodge began participating in a call program “that Chrysler  
14 promoted as fostering positive customer relations.” The program involved thanking customers  
15 for their business and reminding service customers when a vehicle was due, or past due, for  
16 maintenance. Tacoma Dodge used a Chrysler “preferred vendor” called “OneCommand” to  
17 make the recorded calls. According to the Defendant, the calls were only made to existing  
18 customers of the Tacoma Dodge “who had provided Tacoma Dodge with telephone numbers at  
19 which they wished to be contacted.” Dkt. 29, p. 2-3.

20 It is undisputed that Mr. Taylor received five recorded calls made by OneCommand on  
21 behalf of Tacoma Dodge. Dkt. 29, p. 3. The calls, made on July 11, October 7 and October 11,  
22 2011 and April 4 and July 3, 2012, were all to the same number which Mr. Taylor identifies as  
23 his cell phone. Tacoma Dodge records show a second phone number but no calls were made to  
24

1 that number. All of these calls were made after Mr. Taylor last took his vehicles to Tacoma  
2 Dodge for servicing, which was July 9, 2011.

3 The last recorded call was on July 3, 2012. On that date Mr. Taylor sent an email to  
4 Tacoma Dodge advising that Tacoma Dodge had violated the law. In response to this email  
5 Tacoma Dodge immediately removed Mr. Taylor's name from the service reminder call  
6 program. Tacoma Dodge changed its customer relations program from telephone to email in  
7 October 2013.

8 Mr. Frost, Service Director for the Defendant, asserts that Mr. Taylor "provided" Tacoma  
9 Dodge with his phone numbers. He states that it is the "usual and customary business practice"  
10 for Tacoma Dodge to "ask each customer how he or she wishes to be contacted. This contact  
11 information is noted on the service order and approved by the customer signing it." He asserts  
12 that the numbers appearing on the service order were "provided" by Mr. and Mrs. Taylor and  
13 that they authorized Tacoma Dodge to contact them at either number. Dkt. 29, p. 2. The Court  
14 notes that there are no declarations from the individuals who actually interacted with Mr. Taylor  
15 stating what they actually did or said.

16 On the other hand, Mr. Taylor clearly states (based on his personal knowledge) that he  
17 never "provided" his phone number to Tacoma Dodge. Mr. Taylor admits, however, that he had  
18 provided his phone numbers to the prior dealership. According to Mr. Taylor, "[t]he only thing  
19 asked of me by Defendant Tacoma Dodge about my telephone number when I brought vehicles  
20 in for service was whether that was a good number to reach me to let me know my vehicle was  
21 ready to pick up." Dkt. 34, p. 3. Clearly the phone number Mr. Taylor advised Tacoma Dodge  
22 to use was his cell phone number, which is also the number used by OneCommand.

1 **SUMMARY JUDGMENT – LEGAL STANDARD**

2 Summary judgment is proper where “the pleadings, depositions, answers to  
3 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
4 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter  
5 of law.” Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The  
6 Court must draw all reasonable inferences in favor of the non-moving party. *See F.D.I.C. v.*  
7 *O’Melveny & Meyers*, 969 F.2d 744, 747 (9<sup>th</sup> Cir. 1992), *rev’d on other grounds*, 512 U.S. 79  
8 (1994). The moving party has the burden of demonstrating the absence of a genuine issue of  
9 material fact for trial. *Anderson, supra, at p. 257*. Mere disagreement, or the bald assertion that  
10 a genuine issue of material fact exists, no longer precludes the use of summary judgment.  
11 *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468  
12 (9<sup>th</sup> Cir. 1987).

13 Genuine factual issues are those for which the evidence is such that “a reasonable jury  
14 could return a verdict for the non-moving party.” *Anderson, supra, at 248*. Material facts are  
15 those which might affect the outcome of the suit under governing law. In ruling on summary  
16 judgment, a court does not weigh evidence to determine the truth of the matter, but “only  
17 determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549  
18 (9<sup>th</sup> Cir. 1994)(citing *O’Melveny & Meyers, supra, at 747*). Furthermore, conclusory or  
19 speculative testimony is insufficient to raise a genuine issue of fact to defeat summary judgment.  
20 *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 60 F.3d 337, 345 (9<sup>th</sup> Cir. 1995).  
21 Similarly, hearsay evidence may not be considered in deciding whether material facts are at issue  
22 in summary judgment motions. *Id. at 345*; *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d  
23 665, 667 (9<sup>th</sup> Cir. 1980).

1 **TELEPHONE CONSUMER PROTECTION ACT**

2 Mr. Taylor alleges violation of 47 U.S.C. § 227(b)(1)(A)(iii). This statute provides as  
3 follows:

4 It shall be unlawful for any person within the United States, or any person outside  
the United States if the recipient is within the United States –

5 (A) to make any call (other than a call made for emergency purposes  
6 or made with the prior express consent of the called party) using any  
automatic telephone dialing system or an artificial or prerecorded voice –

7 ...  
8 ...

(iii) to any telephone number assigned to a paging service,  
cellular telephone service, specialized mobile radio service, or other  
radio common carrier service, or any service for which the called party  
is charged for the call;

10 The TPCA was enacted in 1991 in order to “ ‘protect the privacy interests of residential  
11 telephone subscribers by placing restrictions on unsolicited, automated telephone calls ... by  
12 restricting certain uses of facsimile machines and automatic dialers.’ ” *Satterfield v. Simon &  
13 Schuster, Inc.*, 569 F.3d 946, 954 (9<sup>th</sup> Cir. 2009)(quoting legislative history).

14 **DISCUSSION – TPCA**

15 There are three elements to a TCPA claim: (1) the defendant called a cellular telephone  
16 number; (2) using an automatic telephone dialing system; (3) without the recipient’s prior  
17 express consent. *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3e 1036, 1043 (9<sup>th</sup> Cir. 2012).

18 The Defendant relies on two arguments in support of its motion to dismiss the Plaintiff’s TPCA  
19 claim. The first argument is that the Defendant was not charged for the calls, which the  
20 Defendant asserts is a requirement under the statute. The second argument is based on the  
21 affirmative defense of consent.

22 **I. CHARGE REQUIREMENT**

23 The Defendant asserts that Plaintiff’s claim alleging violation of the TPCA fails because  
24 he did not allege that the calls made on behalf of Tacoma Dodge resulted in him being charged

1 for the calls. The Plaintiff responds that the phrase “for which the called party is charged for the  
2 call” only modifies the preceding language - “any service” – and not the preceding list. The  
3 Court agrees with that assertion.

4 This Court agrees with the analysis of the Eleventh Circuit Court of Appeals in *Osorio v.*  
5 *State Farm Bank*, 746 F.3d 1242 (11<sup>th</sup> Cir. 2014) regarding the charge requirement.

6 In the end, we go back to the basic question of whether the TCPA itself  
7 exempts all auto-dialed calls for which there is no charge. The applicable canons  
8 of construction indicate that it does not. To repeat the key language, the Act  
9 prohibits autodialed calls “to any telephone number assigned to a paging service,  
10 cellular telephone service, specialized mobile radio service, or other radio common  
11 carrier service, or any service for which the called party is charged for the call.”  
12 47 U.S.C. § 227(b)(A)(1)(iii)<sup>1</sup>. The rule of the last antecedent requires the phrase  
13 “for which the called party is charged for the call,” *id.*, “to be applied to the  
14 words or phrase immediately preceding [i.e., “any service”], and ... not to be  
15 construed as extending to or including others more remote,” *see Bingham, Ltd. v.*  
16 *United States*, 724 F.2d 921, 925 n.3 (11<sup>th</sup> Cir. 1984) (internal quotation marks  
17 Omitted); namely, “paging,” “cellular telephone,” or “mobile radio” services,  
18 47 U.S.C. § 227 (b)(A)(1)(iii). We therefore presume that Congress did not  
19 intend the phrase “for which the called party is charged for the call” to apply  
20 to cellular telephone services.

21 *Osorio, Id.* at p. 1257.

22 The Court in *Osorio* also noted that an interpretation of 47 U.S.C. § 227(b)(1)(A)(iii) that  
23 exempts all autodialed calls to cellular phones for which the called party is not charged per call  
24 would clash with § 227(b)(2)(C) of the same statute. 47 U.S.C. § 227(b)(2)(C) states the  
Commission “may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii)  
of this subsection calls to a telephone number assigned to a cellular telephone service that are not  
charged to the called party, subject to such conditions as the Commission may prescribe as  
necessary in the interest of the privacy rights this section is intended to protect.” As noted by the  
Eleventh Circuit, “[t]he provision allowing for the promulgation of exemptions would be

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<sup>1</sup> The Court notes the incorrect cite. The appropriate citation is to 47 U.S.C. § 227 (b)(1)(A)(iii).

1 meaningless if, as State Farm proposes, § 227(b)(1)(A)(iii) already exempts all calls for which  
2 the party is not charged per call.” *Osorio, Id.* at p. 1258.

3 The Defendant’s motion is to dismiss based on the Plaintiff incurring no charge for the  
4 calls is **DENIED**.

## 5 **II. AFFIRMATIVE DEFENSE OF CONSENT**

6 Defendant also asserts, as an affirmative defense, that Mr. Taylor consented to receiving  
7 the calls by providing his phone number to Tacoma Dodge. Mr. Taylor denies that he  
8 “provided” his phone number to Tacoma Dodge but rather that he only affirmed that his cell  
9 phone number “was a good number to reach me to let me know my vehicle was ready to pick  
10 up.” Dkt. 34, p. 3, Declaration of Robert L. Taylor.

11 “Prior express consent is an affirmative defense, meaning that the defendant bears the  
12 burden of proving it.” *Olney v. Job.Com, Inc.*, 2014 WL 1747674 (E.D. CA 2014) citing to  
13 *Pinkard v. Wal-Mart Stores, Inc.*, 2012 WL 5511039, at \*3 (N.D. Ala. Nov.9, 2012).

14 To obtain summary judgment, therefore, the Defendant “must come forward with evidence  
15 which would entitle it to a directed verdict if the evidence went uncontroverted at trial.” *C.A.R.*  
16 *Transportation Brokerage Co. v. Darden Restaurants*, 213 F.3d 474, 480 (9<sup>th</sup> Cir. 2000).

17 While the parties disagree regarding the words that should be used to describe how the  
18 Defendant obtained Mr. Taylor’s cell phone number, it is clear that he confirmed his cell phone  
19 number shown on the various service orders and he authorized the Defendant to utilize that  
20 phone number. It is also undisputed that the calls made to Mr. Taylor’s cell phone number were  
21 all business related.

22 The undersigned agrees with the Central District of California’s analysis of the consent  
23 defense set forth in great detail in *Baird v. Sabre Inc.*, 2014 WL 320305 (C.D. Cal). As noted,  
24 “[i]n a 1992 rulemaking action implementing the TCPA, the FCC ruled that ‘persons who

1 knowingly release their phone numbers have *in effect* given their invitation or permission to be  
2 called at the number which they have given, absent instructions to the contrary.’ *In re Rules &*  
3 *Reg’s Implementing the Tel. Consumer Prot. Act of 1991, 7 F.C.C.R. 8752, 8769 ¶ 31 (1992).”*  
4 *Baird, Id.* at 82.

5 The Court in *Baird* defined the question in that case as follows: “whether the earlier  
6 1992 Order defined ‘prior express consent’ so that the mere act of providing a cellphone number  
7 to a business in connection with a transaction constitutes the consent required under the TCPA to  
8 receive autodialed calls.” The Court answered that question in the affirmative. Under the FCC’s  
9 definition set forth above, it is undisputed that Mr. Taylor “knowingly released” his phone  
10 number to the Defendant, and by doing so gave permission to be called at that number by an  
11 automated dialing machine. *See, also, Van Patten v. Vertical Fitness Group, LLC,*  
12 *2014 WL 2116602 (S.D.Cal.).*

13 The Defendant’s motion to dismiss the Plaintiff’s TPCA claim based on the affirmative  
14 defense of consent is **GRANTED as it pertains to all the calls made by the Defendant in 2011**  
15 **and 2012.** Neither of the parties adequately addressed the pre-recorded phone message sent by  
16 the Defendant in December 2009. In fact, the Court is not certain that the Plaintiff’s claim is  
17 based on that call since he was not aware it was made prior to the Defendant’s filing their motion  
18 for summary judgment.

19 **WASHINGTON AUTOMATIC DIALING AND ANSWERING DEVICES ACT**  
20 **R.C.W. 80.36.400**

21 Under the WADAD, “[n]o person may use an automatic dialing and announcing device  
22 for purposes of commercial solicitation.” R.C.W. 80.36.400(2). Any violation of the WADAD  
23 is a *per se* violation of Washington’s Consumer Protection Act. R.C.W. 80.36.400(3).

24 “Commercial solicitation” is defined as “the unsolicited initiation of a telephone conversation for



1 the purpose of encouraging a person to purchase property, goods, or services.” R.C.W.  
2 80.36.400(1)(b).

### 3 DISCUSSION

4 Mr. Taylor also asserts that the Defendant violated the Washington Automatic Dialing  
5 and Answering Devices Act (WADAD) when it made the calls in 2011 and 2012. As noted  
6 above, with regard to the TCPA, it is unclear if Mr. Taylor is alleging a violation of the WADAD  
7 based on the December 2009 call the Defendant admits making to the Plaintiff.

8 With regard to R.C.W. 80.36.400(2), the Defendant asserts (1) that the calls made in 2011  
9 and 2012 are excluded by virtue of the language in R.C.W. 80.36.390(1); (2) that the calls were  
10 not “unsolicited” and (3) that the calls did initiate a telephone conversation.

#### 11 **I. WADAD (R.C.W 80.36.400) and TELEPHONE SOLICITATION (R.C.W. 80.36.390)**

12 The Defendant suggests that R.C.W. 80.36.390(1) “Telephone solicitation” is a related  
13 statute and that the Court should incorporate definitions from that statute into R.C.W. 80.36.400.  
14 More specifically, the Defendant suggests that the exclusion from the definition of “telephone  
15 solicitation” of “calls regarding an item that has been purchased by the called party from the  
16 company or organization during a period not longer than twelve months prior to the telephone  
17 contact” should apply. If it does, then the calls made by the Defendant were with regard to prior  
18 work done on Mr. Taylor’s vehicles and the need to do more work according to a maintenance  
19 schedule. If this exception applies to R.C.W. 80.36.400, then the Defendant did not violate the  
20 WADAD. The undersigned does not, however, agree with that suggestion.

21 It appears that the WADAD statute very specifically targets only calls made by an  
22 automatic dialing and announcing device “which automatically dials telephone numbers and  
23 plays a recorded message once a connection is made.” R.C.W. 80.36.400 and WAC 480-120-  
24 253. In addition, the Legislative finding does not support Defendant’s suggestion. “The

1 legislature finds that the use of automatic dialing and announcing devices for purposes of  
2 commercial solicitation: (1) Deprives consumers of the opportunity to immediately question a  
3 seller about the veracity of their claims; (2) subjects consumers to unwarranted invasions of their  
4 privacy; and (3) encourages inefficient and potentially harmful use of the telephone network.

5 The legislature further finds that it is in the public interest to prohibit the use of automatic dialing  
6 and announcing devices for purposes of commercial solicitation.” Wash.Rev.Code § 80.36.400  
7 [1986 c 281 § 1]. This legislative history does not support incorporation of language from  
8 R.C.W. 80.36.390(1)

## 9 **II. UNSOLICITED vs. CONSENT**

10 The Defendant’s argument regarding the calls being “unsolicited” in context of the  
11 WADAD not clear. However, the undersigned concludes that the calls, for purposes of the state  
12 statute, were unsolicited.

13 Unfortunately, the WADAD does not define the term “unsolicited,” and the Washington  
14 courts have not yet interpreted its meaning within the context of the statute. As noted by Judge  
15 Lasnik, “The common, ordinary meaning of the word ‘unsolicited’ is ‘not asked for’ or ‘not  
16 requested.’ ” *Hovila v. Tween Brands*, 2010 WL 1433417 (W.D.Wash.). While express consent  
17 by the recipient may constitute a request, the evidence before this Court is that Mr. Taylor  
18 expressly agreed to receive a phone call when his vehicle was ready to be picked up. He did not  
19 expressly agree to more.

20 The Defendant appears to suggest that a ruling by the FCC regarding unsolicited calls to  
21 cellular telephones should apply to the case at hand. However, as noted by Judge Lasnik in the  
22 *Hovila* case, “[t]he federal and state statutes are not sufficiently similar for the Court to  
23 incorporate TCPA definitions into the WADAD.” *Id.* at \*12. There is even less reason to  
24 incorporate rulings by the FCC into the state statute. For purposes of this summary judgment

1 motion, the undersigned DENIES the Defendant's motion based on the argument that the calls  
2 were not unsolicited.

3 **III. CALLS DID NOT INITIATE A TELEPHONE CONVERSATION**

4 The third defense raised by the Defendant under the WADAD is that the calls did not  
5 initiate a telephone conversation. This Court agrees with the analysis and conclusions of Judges  
6 Leighton<sup>2</sup>, Robart<sup>3</sup> and Pechman<sup>4</sup>. The calls made in 2011 and 2012 on behalf of the Defendant  
7 invited the Plaintiff to return the call and schedule an appointment. The undersigned concludes  
8 that the calls initiated a conversation within the meaning of WADAD. The Defendant's motion  
9 to dismiss the Plaintiff's claims under WADAD and the Consumer Protection Act are DENIED.

10 **CLASS ACTION CLAIM**

11 The undersigned declines to rule on the Defendant's motion to deny certification when  
12 the Plaintiff's motion to certify has not been filed with the Court.

13 **SUMMARY**

14 With regard to the Defendant's summary judgment motion (Dkt. 28) to dismiss the  
15 Plaintiff's claims under the TCPA, the motion is **GRANTED** as to all calls made in 2011 and  
16 2012. The Defendant's motion to dismiss the Plaintiff's claims under the WADAD and  
17 Consumer Protection Act are **DENIED**.

18 DATED this 1<sup>st</sup> day of July, 2014.

19  
20 

21 Karen L. Strombom  
22 United States Magistrate Judge

23 <sup>2</sup> *Anderson v. Domino's Pizza, Inc.*, 2012 WL 1684620 (W.D. Wash.)

24 <sup>3</sup> *Hartman v. United Bank Card Inc.*, 2012 WL 4758052 (W.D. Wash.)

<sup>4</sup> *Meilleur v. AT&T, Inc.*, 2011 WL 5592647 (W.D. Wash.)