

# **EXHIBIT A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

RUBEN ESCANO,

Plaintiff,

v.

CONCORD AUTO PROTECT, INC.,  
FOREVERCAR, LLC, LIBERTY MUTUAL  
GROUP, INC., LIBERTY MUTUAL AUTO  
AND HOME SERVICES, LLC, and DOES 1–  
10 INCLUSIVE AND ALL OF THEM,

Defendants.

Case No. 2:21-cv-00223 MV/CG

**JURY TRIAL DEMANDED**

**FIRST AMENDED COMPLAINT**

COMES NOW, Plaintiff Ruben Escano, undersigned, and for his causes of action against the Defendants states and alleges as follows:

**Nature of the Case**

1. This civil action is brought forth in accordance with the United States Telephone Consumer Protection Act (“TCPA”), codified as 47 U.S.C. § 227, and the New Mexico Unfair Practices Act (“NMUPA”), codified as N.M. Stat. Ann. § 57-12, to, *inter alia*, recover statutory damages for automatically-dialed and unsolicited telemarketing calls and text messages, and to enjoin such calls and text messages.

2. This civil action’s claims under the TCPA were originally brought forth by the filing of a complaint (hereinafter, the “Original Complaint”) on February 10, 2021 in the Sixth Judicial District in and for Grant County, New Mexico. The case was removed to federal court on March 12, 2021. This is the first amended complaint.

3. In enacting the TCPA, “Congress reported, “[m]any consumers are outraged over the proliferation of intrusive, nuisance [telemarketing] calls to their homes.” *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012) (quoting TCPA, 105 Stat. 2394, note following 47 U.S.C. § 227 (Congressional Findings)) (alterations in original).

### **The Parties**

4. Plaintiff RUBEN ESCANO is an individual and resident of Silver City, New Mexico, with a mailing address of 2311 Ranch Club Road, #2-180, Silver City, New Mexico 88061.

5. Defendant CONCORD AUTO PROTECT, INC. (“Concord”) is a for-profit corporation organized under the laws of the State of New York, with a principal address of 105 Oriental Boulevard, Brooklyn, New York 11235. Its registered agent is Alon Salman at the address of 1150 1st Avenue 501, King of Prussia, Pennsylvania 19406.

6. Defendant FOREVERCAR, LLC (“ForeverCar”) is a limited liability company organized under the laws of the State of Illinois, with a principal address of 954 West Washington Boulevard, Suite 340, Chicago, Illinois 60607. Its registered agent is ForeverCar Holdings, Inc. at that same address of 954 West Washington Boulevard, Suite 340, Chicago, Illinois 60607.

7. Defendant LIBERTY MUTUAL GROUP, INC. is a for-profit corporation organized under the laws of the State of Massachusetts, with a principal address of 175 Berkeley Street, Boston, Massachusetts 02116. Its registered agent is the Corporation Service Company at the address of 84 State Street, Boston, Massachusetts 02109.

8. Defendant LIBERTY MUTUAL AUTO AND HOME SERVICES, LLC is a limited liability company organized under the laws of the State of Massachusetts, with a principal

address of 175 Berkeley Street, Boston, Massachusetts 02116. Its registered agent is the Corporation Service Company at the address of 84 State Street, Boston, Massachusetts 02109.

9. Defendant DOES 1 – 10 INCLUSIVE AND ALL OF THEM are individuals or entities whose true names and liabilities are not yet known to Plaintiff. Along with the named-parties, these doe defendants may be vicariously or directly liable for the causes of action alleged herein. Their identities and liabilities may be revealed during discovery.

### **Demand for Jury Trial**

10. Plaintiff demands a jury trial.

### **Jurisdiction**

11. Plaintiff is a citizen of New Mexico and was in New Mexico at the time a substantial number of the communications described herein were received.

12. Defendants relied on and availed themselves of the telecommunications infrastructure of New Mexico when transmitting the calls in question.

13. Defendants offer and market their products or services to residents of New Mexico using means which they know could reach residents of New Mexico, and in the manner in which Defendants offered and marketed their products or services to Plaintiff as alleged herein.

14. Jurisdiction is proper pursuant to 47 U.S.C. § 227(b)(3) and § 227(c)(5).

### **Causes of Action**

#### **Introduction**

15. Beginning on May 13, 2020 and continuing through to February 5, 2021, Concord; ForeverCar; Defendant LIBERTY MUTUAL GROUP, INC.; Defendant LIBERTY MUTUAL AUTO AND HOME SERVICES, LLC; Defendant DOES 1 – 10 INCLUSIVE AND ALL OF

THEM (hereinafter and collectively, “Defendants”); and/or their agents placed, and/or directed the placement of, at least 35 automatically-dialed and unsolicited calls and text messages (hereinafter, the “communications”) to Plaintiff’s cell phone.

16. All of the communications offered vehicle service plans (hereinafter, “VSP”), for sale. The communications include at least 13 phone calls and at least 22 text messages.

17. Plaintiff’s cell phone number, ending in -8938, has been listed on the Federal Trade Commission’s National Do Not Call Registry for over a decade.

18. The FTC’s National Do Not Call Registry is available to telemarketers wishing to operate within the law.

19. During the phone calls, ForeverCar attempted to avoid legal reproach by spoofing the phone numbers from which it called so that Plaintiff’s cell phone, and any other telephones called, would show inaccurate caller ID information, and by instructing its employees not to immediately communicate the true name of the company calling even when Plaintiff, and any other telephone subscribers that were called, inquired as to the true name of the company.

20. All but one of the calls began with a prerecorded message announcing the calls with fictitious company names such as, “Hi this is Jennifer with Auto Health Services,” or “Thank you for calling Auto Warranty Services!” (Plaintiff did not call them—Plaintiff was the one who was called.) Other calls began with prerecorded messages such as, “We’ve been trying to reach you about your car’s extended vehicle warranty.” And others purported to be from government agencies, with prerecorded messages announcing the call as being from the “Vehicle Service Department.”

21. During their communications to Plaintiff, Defendants violated at least seven distinct prohibitions of the TCPA, at least 121 times, specifically: 47 U.S.C § 227(b)(1)(A)(iii),

§ 227(b)(1)(B), § 227(b)(1)(D), 47 C.F.R. § 64.1200(a)(7)(i), § 64.1200(b)(1), § 64.1200(b)(2), and § 64.1200(c)(2).

22. Defendants also violated at least six distinct prohibitions of the NMUPA at least 92 times, specifically: N.M. Stat. Ann. §§ 57-12-22(A), 57-12-22(B)(1), 57-12-22(B)(2), 57-12-22(B)(7), 57-12-22(C)(1), and 57-12-22(C)(2).

23. Concord operated on behalf of and under the direct, implied, or apparent authority of Defendant Liberty Mutual Group Inc. and Defendant Liberty Mutual Auto and Home Services, LLC (hereinafter and collectively, “Liberty Mutual”) when transmitting the at least 22 text messages in question.

24. All of the text messages instructed Plaintiff to click a link to Concord’s website where Plaintiff could then enroll—online and without speaking to anyone on the telephone—in a VSP.

25. ForeverCar operated on behalf of and with the direct, implied, or apparent authority of Liberty Mutual when transmitting the at least 13 phone calls in question.

26. ForeverCar enrolls its potential customers in VSPs on the telephone, instead of on the internet like Concord.

### **Relevant Facts and Law**

27. At no time, during the period in question, did Defendants have any prior business or contractual relationship with Plaintiff.

28. Accordingly, Defendants did not have an “established business relationship,” as defined by 47 C.F.R. § 64.1200(f)(6) and N.M. Stat. Ann. § 57-12-22(D)(1)(a), with Plaintiff.

29. Defendants’ communications to Plaintiff were initiated for the purpose of encouraging the purchase of goods or services.

30. Defendants have not received from Plaintiff any prior express invitation or permission to call him.

31. Accordingly, Defendants' communications to Plaintiff meet the definition of a "telephone solicitation" under 47 U.S.C. § 227(a)(4) and N.M. Stat. Ann. § 57-12-22(D)(4).

32. In transmitting the communications to Plaintiff, Defendants utilized equipment that has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers.

33. Accordingly, the equipment utilized was an "automatic telephone dialing system" (hereinafter, "ATDS") as defined by 47 U.S.C. § 227(a)(1).

### **Concrete Injury**

34. Defendants' communications to Plaintiff caused him concrete injuries in fact.

35. Defendants' communications caused a partial depletion of the charge of Plaintiff's cell phone's battery, a partial depletion of the lifespan of the LED backlight of the phone's display, and unwarranted wear and tear for at least both of those components.

36. Defendants' communications to Plaintiff, aggravated him, disrupted his days, and required him to divert attention away from his work and personal life to tend to and answer such unwarranted intrusions of his time.

37. Accordingly, Defendants' communications to Plaintiff were repeated invasions of his privacy.

### **The Calls and Text Messages**

38. On May 13, 2020, ForeverCar called Plaintiff from the phone number 435-291-3873.

39. During that May 13, 2020 call, a ForeverCar representative offered Plaintiff either of two different VSPs, which the representative called the “Platinum plan” and “Platinum Plus plan.”

40. On May 15, 2020, Concord sent Plaintiff a text message from the phone number 474747.

41. On May 22, 2020, Concord sent Plaintiff a text message from the phone number 474747.

42. On June 12, 2020, Concord sent Plaintiff a text message from the phone number 474747.

43. On July 3, 2020, Concord sent Plaintiff a text message from the phone number 474747.

44. On July 17, 2020, Concord sent Plaintiff a text message from the phone number 474747.

45. On July 27, 2020, ForeverCar called Plaintiff from the phone number 435-222-1105.

46. At the beginning of that January 27, 2020 call, Plaintiff heard a digital beep inconsistent with an ordinary, non-automatically-dialed telephone call.

47. On July 31, 2020, Concord sent Plaintiff a text message from the phone number 474747.

48. On August 7, 2020, Concord sent Plaintiff a text message from the phone number 474747.

49. On August 21, 2020, Concord sent Plaintiff a text message from the phone number 474747.

50. On August 28, 2020, Concord sent Plaintiff a text message from the phone number 474747.

51. On September 4, 2020, Concord sent Plaintiff a text message from the phone number 474747.

52. On September 18, 2020, Concord sent Plaintiff a text message from the phone number 474747.

53. On September 25, 2020, Concord sent Plaintiff a text message from the phone number 474747.

54. On October 2, 2020, Concord sent Plaintiff a text message from the phone number 474747.

55. Also on October 2, 2020, ForeverCar called Plaintiff from the phone number 970-233-3980.

56. On October 9, 2020, Concord sent Plaintiff a text message from the phone number 474747.

57. On October 13, 2020, ForeverCar called Plaintiff from the phone number 435-786-9954.

58. On October 23, 2020, Concord sent Plaintiff a text message from the phone number 474747.

59. On October 24, 2020, ForeverCar called Plaintiff from the phone number 201-270-0739.

60. On October 30, 2020, Concord sent Plaintiff a text message from the phone number 474747.

61. On November 23, 2020, ForeverCar called Plaintiff from the phone number 850-312-7212.

62. On November 27, 2020, Concord sent Plaintiff a text message from the phone number 474747.

63. On December 1, 2020, ForeverCar called Plaintiff from the phone number 201-357-3575.

64. On December 18, 2020, Concord sent Plaintiff a text message from the phone number 474747.

65. On December 22, 2020, ForeverCar called Plaintiff from the phone number 435-265-1187.

66. On December 24, 2020, Concord sent Plaintiff a text message from the phone number 474747.

67. On December 31, 2020, Concord sent Plaintiff a text message from the phone number 474747.

68. On January 4, 2021, ForeverCar called Plaintiff from the phone number 201-554-0993.

69. On January 5, 2021, ForeverCar called Plaintiff from the phone number 435-246-2569.

70. On January 7, 2021, ForeverCar called Plaintiff from the phone number 802-348-5631.

71. During that January 7, 2021 call, Plaintiff heard at least two seconds of silence at the beginning of the call, after he answered the call and said “hello.”

72. On January 15, 2021, Concord sent Plaintiff a text message from the phone number 474747.

73. On January 19, 2021, ForeverCar called Plaintiff from the phone number 435-246-2053.

74. During that January 19, 2021 call, a ForeverCar phone representative offered Plaintiff either of two different VSPs, which the phone representative called the “Platinum plan” and “Platinum Plus plan.”

75. Also during that January 19, 2021 call, Plaintiff heard at least two seconds of silence at the beginning of the call, after he answered the call and said “hello.”

76. On January 26, 2021, ForeverCar called Plaintiff from the phone number 385-254-0688.

77. During that January 26, 2021 call, Plaintiff heard at least two seconds of silence at the beginning of the call, after he answered the call and said “hello.”

78. On February 5, 2021, Concord sent Plaintiff a text message from the phone number 474747.

#### **Similar Content and Provenance of the Calls**

79. The content of all of the calls was substantially similar enough that a reasonable person would identify the calls as coming from the same entity.

80. The sales pitch a ForeverCar representative gave to Plaintiff during the very first call, on May 13, 2020, was similar in length, intonation, and verbiage as the pitch a ForeverCar representative gave during one of the terminal calls—specifically, the January 19, 2021 call. Both sales pitches ended with the ForeverCar representative asking Plaintiff which plan he thought would be best.

81. During the very last call, on January 26, 2021, a ForeverCar representative referenced a model of vehicle that Plaintiff had discussed only with the ForeverCar representative from the January 19, 2021 call.

82. When Plaintiff called back three of the phone numbers implicated in this lawsuit—specifically, each of the different phone numbers that initiated the January 5, 2021 call, the January 7, 2021 call, and the January 19, 2021 call—Plaintiff was met with the same voice message which stated, “Thank you for calling Auto Health Services.”

83. However, the prerecorded messages that commenced those actual three calls, did not announce the calls as coming from “Auto Health Services,” but rather other fake company names.

84. The October 24, 2020 call began with a prerecorded voice announcing the call as coming from “Auto Health Services.”

### **ForeverCar’s Telemarketing Operation**

85. ForeverCar offers VSPs for sale. ForeverCar offers such VSPs via telephone.

86. During the period of time in question, ForeverCar transmitted automatically-dialed telemarketing calls to telephone subscribers across the country, including Plaintiff, en-masse and in a non-targeted fashion.

87. ForeverCar initiated the calls to Plaintiff.

88. Accordingly, ForeverCar is directly liable for the calls.

89. ForeverCar offers at least two different kinds of VSPs, which it refers to as the “Platinum plan” and “Platinum Plus plan.” *See Getting Started | ForeverCar Vehicle Service Plans*, ForeverCar, <https://www.forevercar.com/getting-started>, archived at <https://perma.cc/8KKP-SH6E>.

90. ForeverCar’s website states that it contacts potential customers, “by voice or text using automatic dialing equipment.” *ForeverCar Consent to Electronic Communications*, ForeverCar, <https://www.forevercar.com/consent-to-electronic-communications> archived at <https://perma.cc/E4G7-7X86>.

91. ForeverCar initiates telemarketing calls to telephone subscribers, and at least some of those calls are initiated with an ATDS.

92. ForeverCar called Plaintiff on September 19, 2019.

93. During that September 19, 2019 call, Plaintiff clearly told a ForeverCar representative that Plaintiff had neither requested the call from ForeverCar nor inquired for information from ForeverCar.

94. Accordingly, during the September 19, 2019 call, Plaintiff revoked any consent that ForeverCar may have believed it had from Plaintiff to call his phone number.

95. Undeterred, ForeverCar continued to call Plaintiff.

96. Under the TCPA, a person may revoke consent to be called through any reasonable means clearly expressing a desire to receive no further messages from the caller. *See ACA International Et. Al v. Federal Communications Commission*, 885 F.3d 687, 692 (D.C. Cir. 2018).

97. This lawsuit does not include the September 19, 2019 call as part of its causes of action.

98. When calling telephone subscribers who ForeverCar thought had requested to be called, ForeverCar would announce itself as its true company name—i.e., “ForeverCar.” However, when calling telephone subscribers en-masse and who did not consent to be called, ForeverCar would instead use fake company names to avoid legal reproach, and would reveal

neither its true company name nor sponsor until several minutes into the call, and then only if a sale of a VSP was almost certain.

### **ForeverCar's Deceptive Trade Practices**

99. ForeverCar's trade practices are unfair and deceptive.

100. During the calls in question, ForeverCar attempted to deceive Plaintiff about the VSPs it was selling.

101. For example, during many of the calls, ForeverCar described the VSPs it was selling as "extended vehicle warranties." However, by definition, only vehicle manufacturers can offer vehicle warranties. ForeverCar is neither a vehicle manufacturer, nor authorized by a vehicle manufacturer to offer vehicle warranties.

102. Numerous consumers have complained about ForeverCar's deceptive trade practices, particularly those practices involving the VSPs which ForeverCar offered to Plaintiff during the 13 calls. Such complaints include:

- a. "ForeverCar is a scam." *How Trustworthy is ForeverCar?*, BestCompany, (May 21, 2021) <https://bestcompany.com/car-warranty/company/forever-car>, archived at <https://perma.cc/3HFD-Y5T6>.
- b. "Stay clear of ForeverCar[.]" *Id.*
- c. "BUYER BEWARE!" *Id.*
- d. "[A]t the end of the day this warranty is a waste of money." *Id.* And, "hopefully I can save future customers from being preyed upon." *Id.*

### **Concord's Telemarketing Operation**

103. Concord offers VSPs for sale. Concord offers such VSPs via text messages and its website.

104. Concord transmitted the text messages to Plaintiff.

105. Accordingly, Concord is directly liable for the text messages.

106. All of the text messages, with the exception of the February 20, 2020 text message, contained the words, “Concord Auto Protect,” in combination with phrases and characters such as, “Concord Auto Protect -Sale-10 Months Free+ \$0.00 Deductible+Tire &Rims” [sic].

**ForeverCar and Concord Operate as Liberty Mutual’s Agents**

107. Liberty Mutual does not offer VSPs directly to consumers.

108. Instead, ForeverCar and Concord offer VSPs directly to consumers on behalf of Liberty Mutual.

109. ForeverCar and Concord operated on behalf of Liberty Mutual and under its direct, implied, or apparent authority.

110. The communications were transmitted in a manner as alleged in the counts *infra*, at the direction of Liberty Mutual.

111. Liberty Mutual knew or should have known that the volume of telephone subscribers that ForeverCar and Concord enrolled in VSPs could not be achieved merely by calling or texting telephone subscribers without using an ATDS.

112. Liberty Mutual knew or should have known that ForeverCar and Concord each utilized an ATDS to transmit the communications in a manner as alleged in the counts *infra*.

113. Nonetheless, Liberty Mutual paid ForeverCar and Concord sales commissions for the VSP enrollments the two entities produced.

114. Accordingly, Liberty Mutual is vicariously liable for the calls because they were transmitted in a manner as alleged in the counts *infra* with the ratification of Liberty Mutual.

115. Liberty Mutual controlled ForeverCar and Concord throughout and at all times during the counts *infra*.

116. Liberty Mutual manifested assent to its right to control ForeverCar and Concord.

117. ForeverCar and Concord manifested assent to be controlled by Liberty Mutual.

118. Accordingly, Liberty Mutual is vicariously liable for the communications under the theory of respondeat superior.

119. The communications were consistent with Liberty Mutual's directions or statements telling ForeverCar and Concord what to do.

#### **ForeverCar Operates as Liberty Mutual's Agent**

120. During at least one of the calls alleged *supra*—including the January 19, 2021 call—a ForeverCar sales person told Plaintiff that the company he was calling from was “Liberty Mutual,” he works for “Liberty Mutual,” and the VSP he was offering was from “Liberty Mutual.”

121. Liberty Mutual authorized ForeverCar sales persons to represent themselves as Liberty Mutual employees.

122. Liberty Mutual authorized ForeverCar sales persons to represent that the VSPs that the ForeverCar sales persons offered for sale were being offered directly from Liberty Mutual.

123. Accordingly, Liberty Mutual is vicariously liable for the calls under the theory of apparent authority.

124. In the event that it is found that ForeverCar did not call Plaintiff, he hereby expressly reserves the right to amend this Complaint to allege that a Doe Defendant was the caller and operated as an agent of Liberty Mutual. To the fullest extent possible, all facts alleged as to ForeverCar, including facts regarding the agency relationship between ForeverCar and Liberty Mutual, are hereby expressly reserved to alternatively be alleged as to a Doe Defendant.

125. Plaintiff also alternatively alleges that Liberty Mutual initiated the calls and is thus directly liable for the calls.

126. Plaintiff also expressly reserves the right to alternatively allege that a Doe Defendant initiated the calls and was operating as ForeverCar and Liberty Mutual's agent.

127. During the period of time in which the communications were transmitted, a webpage on ForeverCar's website stated that, "[a] vehicle service plan from Liberty Mutual powered By [sic] ForeverCar is an affordable way to protect yourself from the hassles of car repair."

128. After being served with the Original Complaint, ForeverCar deleted the webpage from its website.

129. Another webpage on ForeverCar's website holds Liberty Mutual out as a partner in ForeverCar's VSP business. *See Liberty Mutual teams up with ForeverCar*, ForeverCar, <https://blog.forevercar.com/liberty-mutual-teams-up-with-forevercar-to-offer-peace-of-mind-with-vehicle-service-protection>.

130. During the period of time in question, ForeverCar offered VSPs from Liberty Mutual.

131. Liberty Mutual had an agreement with ForeverCar whereby Liberty Mutual would pay ForeverCar for the customers it enrolled in Liberty Mutual's VSPs. Liberty Mutual paid ForeverCar accordingly.

### **Concord Operates as Liberty Mutual's Agent**

132. Concord continued to send text messages to Plaintiff even after Concord received a written demand from Plaintiff which demanded that Concord stop sending text messages to him.

133. Concord stopped sending Plaintiff text messages only after Liberty Mutual was served with the Original Complaint, which alleged, *inter alia*, that Concord operated on behalf of Liberty Mutual to send the text messages to Plaintiff.

134. The 22 text messages that Concord transmitted to Plaintiff were transmitted closely in time to the 13 phone calls ForeverCar transmitted.

135. Liberty Mutual had an agreement with Concord whereby Liberty Mutual would pay Concord for the customers it enrolled in Liberty Mutual's VSPs. Liberty Mutual paid Concord accordingly.

136. Throughout each of the causes of action *infra*, ForeverCar and Concord were operating on behalf of, to the benefit of, at the direction of, under control of, and as agents of Liberty Mutual.

## **COUNTS**

### **COUNT I**

**Violations of 47 U.S.C. § 227(b)(1)(A)(iii): Utilizing an ATDS to transmit a telephone call or text message to a cell phone.**

**(All Defendants)**

137. Paragraphs 1–136 are hereby incorporated by reference.

138. When ForeverCar called Plaintiff's cell phone on the dates alleged *supra*, ForeverCar willfully or knowingly utilized an ATDS to do so.

139. When Concord sent text messages to Plaintiff's cell phone on the dates alleged *supra*, Concord willfully or knowingly utilized an ATDS to do so.

140. In so doing, Defendants willfully or knowingly violated 47 U.S.C. § 227(b)(1)(A)(iii).

## COUNT II

**Violations of 47 U.S.C. § 227(b)(1)(B): Utilizing an artificial or prerecorded voice to deliver a message to a telephone.**

**(ForeverCar and Liberty Mutual)**

141. Paragraphs 1–136 are hereby incorporated by reference.

142. When ForeverCar called Plaintiff’s cell phone on the dates alleged *supra*—with the exception of the July 27, 2020 call—ForeverCar willfully or knowingly utilized an artificial or prerecorded voice to deliver a message to Plaintiff’s phone.

143. In so doing, ForeverCar and Liberty Mutual willfully or knowingly violated 47 U.S.C. § 227(b)(1)(B).

## COUNT III

**Violations of 47 U.S.C. § 227(b)(1)(D): Using an ATDS in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.**

**(ForeverCar and Liberty Mutual)**

144. Paragraphs 1–136 are hereby incorporated by reference.

145. When ForeverCar called Plaintiff’s cell phone on the dates alleged *supra*, ForeverCar willfully or knowingly utilized an ATDS in such a way that two or more telephone lines of a multi-line business were engaged simultaneously.

146. In so doing, ForeverCar and Liberty Mutual willfully or knowingly violated 47 U.S.C. § 227(b)(1)(D).

## COUNT IV

**Violations of 47 C.F.R. § 64.1200(a)(7)(i): Allowing a more than two-second delay before responding to answered call.**

**(ForeverCar and Liberty Mutual)**

147. Paragraphs 1–136 are hereby incorporated by reference.

148. When ForeverCar called Plaintiff’s cell phone on the dates of January 7, 2021; January 19, 2021; and January 26, 2021, ForeverCar willfully or knowingly allowed more than two seconds of silence before responding to Plaintiff’s completed greeting.

149. In so doing, ForeverCar and Liberty Mutual willfully or knowingly violated 47 C.F.R. § 64.1200(a)(7)(i).

**COUNT V**

**Violations of 47 C.F.R. § 64.1200(b)(1): Transmitting a telephone call with an artificial or prerecorded message which does not state the identity of the business calling.**

**(ForeverCar and Liberty Mutual)**

150. Paragraphs 1–136 are hereby incorporated by reference.

151. When ForeverCar called Plaintiff’s cell phone on the dates alleged *supra*—with the exception of the July 27, 2020 call—ForeverCar willfully or knowingly utilized an artificial or prerecorded voice to deliver a message which did not state the true identity of the business calling.

152. In so doing, ForeverCar and Liberty Mutual willfully or knowingly violated 47 C.F.R. § 64.1200(b)(1).

**COUNT VI**

**Violations of 47 C.F.R. § 64.1200(b)(2): Transmitting a telephone call with an artificial or prerecorded message which does not state the telephone number of the business calling.**

**(ForeverCar and Liberty Mutual)**

153. Paragraphs 1–136 are hereby incorporated by reference.

154. When ForeverCar called Plaintiff's cell phone on the dates alleged *supra*—with the exception of the July 27, 2020 call—ForeverCar willfully or knowingly utilized an artificial or prerecorded voice to deliver a message which did not state the telephone number of the business calling.

155. In so doing, ForeverCar and Liberty Mutual willfully or knowingly violated 47 C.F.R. § 64.1200(b)(2).

### **COUNT VII**

#### **Violations of 47 C.F.R. § 64.1200(c)(2): Calling a telephone number on the Federal Trade**

#### **Commission's National Do Not Call Registry.**

#### **(All Defendants)**

156. Paragraphs 1–136 are hereby incorporated by reference.

157. When ForeverCar called Plaintiff's cell phone on the dates alleged *supra*, ForeverCar willfully or knowingly called a phone number registered on the Federal Trade Commission's National Do Not Call Registry and which ForeverCar knew or should have known was registered as such.

158. When Concord sent text messages to Plaintiff's cell phone on the dates alleged *supra*, Concord willfully or knowingly transmitted a text message to a phone number registered on the Federal Trade Commission's National Do Not Call Registry and which Concord knew or should have known was registered as such.

159. In so doing, Defendants willfully or knowingly violated 47 C.F.R. § 64.1200(c)(2).

### **COUNT VIII**

#### **Violations of N.M. Stat. Ann. § 57-12-22(A): Utilizing an ATDS with a prerecorded message to transmit a telephone call to a cell phone.**

**(ForeverCar and Liberty Mutual)**

160. Paragraphs 1–136 are hereby incorporated by reference.

161. Defendants have not received any consent from Plaintiff to transmit prerecorded messages to him.

162. When ForeverCar called Plaintiff’s cell phone on the dates alleged *supra*—with the exception of the July 27, 2020 call—ForeverCar willfully utilized an ATDS and prerecorded message to do so.

163. In so doing, ForeverCar and Liberty Mutual willfully violated N.M. Stat. Ann. § 57-12-22(A).

**COUNT IX**

**Violations of N.M. Stat. Ann. § 57-12-22(B)(1): Failing to disclose the name of the sponsor of a call within 15 seconds.**

**(ForeverCar and Liberty Mutual)**

164. Paragraphs 1–136 are hereby incorporated by reference.

165. When ForeverCar called Plaintiff’s cell phone on the dates alleged *supra*, although Plaintiff stayed on the line for at least 15 seconds and the calls lasted longer than 15 seconds, ForeverCar never disclosed the true name of the company calling nor the company’s sponsor during those initial 15-second periods.

166. ForeverCar thereby willfully failed to disclose the name of the sponsor of the phone call within 15 seconds of Plaintiff answering the call.

167. In failing to do so, ForeverCar and Liberty Mutual willfully violated N.M. Stat. Ann. § 57-12-22(B)(1).

**COUNT X**

**Violation of N.M. Stat. Ann. § 57-12-22(B)(2): Using a euphemism to mispresent the purpose of a call.**

**(ForeverCar and Liberty Mutual)**

168. Paragraphs 1–136 are hereby incorporated by reference.

169. During the January 26, 2021 call, ForeverCar called Plaintiff using a prerecorded message which announced the call as coming from the “Vehicle Service Department.”

170. In using the euphemism of “Vehicle Service Department,” rather than stating that the call was from a company attempting to sell a VSP, ForeverCar misrepresented the primary purpose of the call.

171. ForeverCar knew or should have known that using such a euphemism would induce Plaintiff, or any other telephone subscribers called, to believe that the call was from an official government entity, rather than from a telemarketing company attempting to sell a VSP.

172. ForeverCar thereby willfully misrepresented the purpose of the call as being about information from the “Vehicle Service Department.”

173. In so doing, ForeverCar and Liberty Mutual willfully violated N.M. Stat. Ann. § 57-12-22(B)(2).

**COUNT XI**

**Violations of N.M. Stat. Ann. § 57-12-22(B)(7): Initiating a call using an ATDS that allows for a more than two-second delay when call is answered.**

**(ForeverCar and Liberty Mutual)**

174. Paragraphs 1–136 are hereby incorporated by reference.

175. When ForeverCar called Plaintiff's cell phone on the dates alleged *supra*, ForeverCar willfully utilized an ATDS that dials and engages the telephone numbers of more than one person at a time but allows the possibility of a called person not being connected to the calling person for a period greater than two seconds.

176. In so doing, ForeverCar and Liberty Mutual willfully violated N.M. Stat. Ann. § 57-12-22(B)(7).

## COUNT XII

**Violations of N.M. Stat. Ann. § 57-12-22(C)(1): Making a telephone solicitation to a telephone number on the Federal Trade Commission's National Do Not Call Registry.**

**(All Defendants)**

177. Paragraphs 1–136 are hereby incorporated by reference.

178. When ForeverCar called Plaintiff's cell phone on the dates alleged *supra*, ForeverCar willfully transmitted a telephone solicitation to a phone number registered on the Federal Trade Commission's National Do Not Call Registry.

179. When Concord transmitted text messages to Plaintiff's cell phone on the dates alleged *supra*, Concord willfully transmitted a telephone solicitation to a phone number registered on the Federal Trade Commission's National Do Not Call Registry.

180. In so doing, Defendants willfully violated N.M. Stat. Ann. § 57-12-22(C)(1).

## COUNT XIII

**Violations of N.M. Stat. Ann. § 57-12-22(C)(2): Circumventing a Caller ID service.**

**(ForeverCar and Liberty Mutual)**

181. Paragraphs 1–136 are hereby incorporated by reference.

182. By ForeverCar spoofing its phone numbers when it called Plaintiff's cell phone on the dates alleged *supra*, ForeverCar willfully and intentionally circumvented Plaintiff's use of his caller ID service.

183. In so doing, Defendants willfully violated N.M. Stat. Ann. § 57-12-22(C)(2).

#### **COUNT XIV**

##### **Trespass to Chattels**

##### **(All Defendants)**

184. Paragraphs 1–136 are hereby incorporated by reference.

185. Defendants' communications to Plaintiff substantially interfered with, disturbed, and deprived him of the use and enjoyment of his cell phone.

186. Defendants knew, or should have known, that their communications to Plaintiff's phone, and the phones of other telephone subscribers called, would result in such interference and disturbance to the use of such personal property.

187. Accordingly, Defendants are liable to Plaintiff under the theory of trespass to chattels.

#### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff prays for judgment against Defendants as follows:

- A. pursuant to 47 U.S.C. § 227(b)(3)(B) and § 227(c)(5)(B), damages for each of the at least 121 violations of the TCPA committed by Defendants;
- B. pursuant to 47 U.S.C. § 227(b)(3) and § 227(c)(5), trebled damages for each of the willful or knowing violations of the TCPA committed by Defendants;

- C. pursuant to N.M. Stat. Ann. § 57-12-10(B), damages for each of the at least 92 violations of the NMUPA committed by Defendants;
- D. pursuant to N.M. Stat. Ann. § 57-12-10(B), damages for each of the willful violations of the NMUPA committed by Defendants;
- E. damages in accordance with the common law theory of trespass to chattels;
- F. for punitive damages sufficient to punish Defendants for their attempts to avoid legal reproach;
- G. pursuant to 47 U.S.C. § 227(b)(3)(A), § 227(c)(5)(A), and N.M. Stat. Ann. § 57-12-10(A), for an injunction ordering Defendants to cease their telemarketing communications to Plaintiff;
- H. pursuant to N.M. Stat. Ann. § 57-12-10(C), for Plaintiff's reasonable and necessary attorney's fees and costs;
- I. for pre and post-judgment interest;
- J. and for all other relief to which Plaintiff is justly entitled under New Mexico or Federal law.

Dated this 24th day of February, 2022.


Respectfully submitted,

By:



**Ruben Escano, pro se**  
2311 Ranch Club Road  
Suite #2-180  
Silver City, NM 88061  
(201) 527-8938

IT IS HEREBY CERTIFIED that on this 24th day of February, 2022, the foregoing was filed electronically through the CM/ECF system, causing all parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

By:   
**Ruben Escano, pro se**