Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of: )
TSA Stores, Inc. (The Sports Authority) ) CG Docket No. 02-278 )
Petition for Declaratory Ruling with )
Respect to Certain Provisions of the )
Florida laws and regulations )

PETITION FOR DECLARATORY RULING

TSA Stores, Inc. (“TSA”), pursuant to § 554(e) of the Administrative Procedure Act, 5 USC § 554(e), and § 1.2 of the Commission’s rules, 47 CFR § 1.2, respectfully requests the Commission to issue, on an expedited basis, a declaratory ruling that § 501.059, Florida Statute, is preempted as applied to interstate telephone calls made to residential lines using a prerecorded voice, where the call is made to a person with whom the caller has an established business relationship at the time the call is made. As explained further herein, the subject section of the Florida statute is preempted by § 227 of the Telephone Consumer Protection Act (“TCPA”) and the implementing regulations of this Commission. The requested relief is necessary in order to terminate a controversy and remove uncertainty concerning TSA’s conflicting obligations under state and federal law, and should be granted on an expedited basis in order to prevent continued enforcement action against a client of TSA by the State of Florida.
DISCUSSION

On or about January 7, 2004, The Sports Authority Florida, Inc. was served with a complaint for permanent injunction, civil penalties and other statutory relief ("Complaint") by the State of Florida, Department of Agriculture and Consumer Services. (The Sports Authority Florida was merged into TSA Stores, Inc. at the end of 2003.) That document is attached hereto as “Exhibit A,” amended as per number of violations, Amended Complaint attached as “Exhibit B.” According to the Complaint, TSA violated § 501.059(4) of Florida statutes which makes it unlawful for telephone solicitors to make or cause any unsolicited telephone sales call to residents of the State of Florida if such residents’ number appears on the then quarterly “do-not-call” listing. Complaint, ¶ 8. Florida also alleged that TSA violated § 501.059(7), which makes it unlawful to knowingly allow a telephone sales call to be made if such call involves an automated system for the playing of a recorded message when a connection is completed to the number called without a live operator introducing the recorded message. Id.

TSA has hired Smart Reply to place recorded calls to customers of TSA. At all times, all calls placed by Smart Reply pursuant to this contract are placed solely to consumers with whom TSA has an “established business relationship” as that term is defined in the regulations implementing the Telephone Consumer Protection Act, 47 CFR § 64.1200(f)(3), and/or to consumers who have expressly consented to receive telephone calls from TSA providing their telephone number to TSA. 7 FCC Rcd 8752, ¶ 31.

TSA does maintain an internal “do-not-call” list as required by federal law and does not place telephone calls to persons who have made a “do-not-call” request to TSA.
At all times the messages delivered on behalf of TSA by Smart Reply complied with the disclosure requirements found in the FCC’s Regulations. 47 CFR § 64.1200(b).

In its Answer to the Department’s Complaint, TSA pointed out that the cited portion of the Florida statute is in direct conflict with the Commission’s regulations implementing the TCPA. The Answer is attached hereto as “Exhibit C,” Amended Answer attached hereto as “Exhibit D.” Specifically, § 501.059(7)(a) of the Florida statute states that “[n]o person shall make or knowingly allow a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called.” Although Florida law exempts calls to established customers from the definition of “unsolicited telephonic sales call,” Florida Statute § 501.059(1)(c)(3), the Department has still attempted to enforce this statute against TSA despite the fact that its calls were placed solely to existing customers of TSA.

TSA has compiled spreadsheets setting forth each alleged telephone number called in violation of state law as well as the date that person made a purchase from TSA, thus meeting the federal definition of “established business relationship.” These exhibits can be provided upon request but are confidential and a trade secret, and will be used in response to the above referenced lawsuit, but are not attached to this document because TSA does not wish to publish the telephone numbers of its customers. TSA is willing to provide these documents under appropriate protective provisions.

By contrast, the Commission’s rules provide that a person or entity may initiate a telephone call to a residential line “using an artificial or prerecorded voice to deliver a message without the express prior consent of the called party . . ” if the call is made “to
any person with whom the caller has an established business relationship at the time the call is made.”

In its TCPA Order released July 3, 2003, the Commission invited “any party that believes a state law is inconsistent with § 227 of our rules [to] seek a declaratory ruling.” In that same Order, the Commission described the principles that would guide its resolution of such petitions:

Although section 227(e) gives states authority to impose more restrictive intrastate regulations, we believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. The record in this proceeding supports the finding that application of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities.

The provisions of the Florida statute that restrict the use of prerecorded messages, without creating an “established business relationship” exception, are inconsistent with the Commission’s rules when applied to interstate calls. The State of Florida’s attempt to enforce that prohibition as to interstate calls subjects TSA to the “multiple, conflicting regulations” that the Commission has declared its intention to avoid.4 Specifically, in

1 47 CFR § 64.1200(a)(2), (a)(2)(iv)


3 Id. at 14064 ¶ 83 (emphasis added).

4 The Florida statute applies to “telephone solicitors,” which are defined to include “any natural person, firm, organization, partnership, association, or a subsidiary or affiliate thereof, doing business in this state, who makes or causes to be made a telephonic sales call, including, but not limited to, calls made by use of automatic dialing or recorded message devices.” Fla. Stat. § 501.059(1)(e) (emphasis added). “Doing business in this state,” in turn, is defined by the statute as “businesses who conduct telephonic sales calls from a location in Florida or from other states or nations to consumers located in Florida.” Id. § 501.059(1)(h) (emphasis added). By pursuing a complaint concerning an interstate call placed to a Florida
order to comply with Florida’s law, TSA must block all interstate calls to Florida residents with whom it has an EBR, or must arrange not to use prerecorded messages in connection with those calls.

The State of Florida’s action also creates a controversy and subjects TSA to uncertainty concerning its obligations, thereby satisfying the standard for declaratory relief under the Administration Procedure Act and the Commission’s rules. Accordingly, TSA requests that this Commission declare that § 501.059(7)(a) of the Florida statute is preempted. Because interruption of TSA’s ability to leave prerecorded messages in Florida will disrupt TSA’s operations and is likely to cause significant loss of revenue TSA asks that the requested relief be granted on an expedited basis.

Dated: February 1, 2005

Respectfully submitted,

COPILEVITZ & CANTER, LLC

______________________________
William E. Raney
423 West Eighth Street, Suite 400
Kansas City, Missouri 64105
816-472-9000
816-472-5000 (Facsimile)

resident, the Department has signaled its intention to rely upon this statutory grant of interstate authority to prohibit conduct that is lawful under the TCPA, contrary to congressional intent and this Commission’s announced policy.

5 “The Commission may, in accordance with § 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.” 47 CFR § 1.2.
CERTIFICATE OF SERVICE

I, William E. Raney, do hereby certify that I have on this 1st day of February, 2005, had copies of the foregoing delivered to the following, via Electronic Mail, as indicated:

Louis Stolba
Florida Department of Agriculture & Consumer Services
Division of Consumer Services
2005 Apalachee Parkway
Tallahassee, FL  32399-6500
Via Email: Stolbal@doacs.state.fl.us

Erica McMahon
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC  20554
Via Email: Erica.McMahon@fcc.gov

Best Copy and Printing, Inc.
Portals II
445 12th Street, S.W., Room CY-B402
Washington, DC  20554
Via Email: FCC@BCPIWEB.COM

William E. Raney
EXHIBIT A
IN THE CIRCUIT COURT FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,
DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,

Plaintiff,

vs.

CASE NO.
THE SPORTS AUTHORITY FLORIDA
INC., a Florida corporation,

Defendant.

Complaint For Permanent Injunction,
Civil Penalties and Other Statutory Relief

Plaintiff, State of Florida Department of Agriculture and Consumer Services, sues the
Defendant, The Sports Authority Florida, Inc., a Florida corporation, and alleges as follows:

ALLEGATION COMMON TO ALL COUNTS

1. This is an action for permanent injunction, civil penalties and other statutory relief,
brought pursuant to Section 501.059, Florida Statutes.

2. This Court has jurisdiction pursuant to the provisions of said statute.

3. Plaintiff, State of Florida, Department of Agriculture and Consumer Services, is the
enforcing authority pursuant to Section 501.059(8) Florida Statutes, and is authorized to seek the
relief sought herein pursuant to the provisions of said statute and such other statutes authorizing
such relief. Plaintiff has performed all conditions precedent to be performed by Plaintiff or such
conditions have occurred.

4. The amount in controversy exceeds the minimum jurisdictional limit of this Court.
5. Defendant, The Sports Authority Florida, Inc., is a Florida corporation with its principal place of business in Broward County, Florida. Defendant is doing business within the State of Florida as defined in Section 501.059(1)(b), Florida Statutes. This cause of action accrued in Orange County, Florida by virtue of Defendant making, or causing to be made, a telephonic sales call to consumers in Orange County, Florida and Defendant playing, or causing to be played, a recorded message when the number called is answered.

6. Defendant at all times material heretofore, has engaged in the business of selling consumer goods or services, or for the purpose of obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services. Defendant in conducting its business is making telephonic sales calls and playing a recorded message when the number called is answered to citizens of the State of Florida.

7. From, on or before November 2002 Defendant has been making unsolicited telephonic sales calls to citizens of the State of Florida whose names appear on the then-current quarterly no-sales solicitation calls listing published by the department. A list of the consumers called and the dates of such calls are described on Exhibit “A” attached hereto and by reference made a part hereof. Further, as a separate and distinct violation of Florida Statutes, Defendant made or knowingly allowed a telephonic sales call to be made with an automated system for the playing of a recorded message when a connection is completed to a number called without having a live operator introduce the recorded message.

8. Section 501.059(4), Florida Statutes, makes it unlawful for a telephone solicitor to make or cause to be made any unsolicited telephonic sales calls to residents of the State of Florida if such residents number appears on the then-current quarterly listing. Section 501.059(7), Florida
Statutes, makes it unlawful to make or knowingly allow a telephonic sales call to be made if such call involves an automated system for the playing of a recorded message when a connection is completed to a number called without a live operator introducing the recorded message.

9. Unless the Defendant is enjoined from engaging further in the acts and practices herein complained, the continued activities of Defendant will result in damage to the consuming public.

COUNT I
(Injunctive Relief)

10. Plaintiff realleges paragraphs 1 through 9, above.

11. Section 501.059(8), Florida Statutes, that the department may seek injunctive relief to prohibit the improper telephonic solicitations in violation of said statute. This is an action for permanent injunction.

12. The Defendants acts and practices as set forth herein constitute a violation of Section 510.059, Florida Statutes.

13. Unless Defendant is permanently enjoined from engaging further in such acts and practices as herein described, the activities of the Defendant will cause injury to the consuming public.

COUNT II
(Civil Penalties)

14. Plaintiff realleges paragraphs 1 through 9, above.

15. Defendant had actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that its acts, as described above, were in violation of Section 501.059, Florida Statutes.
16. Defendant is therefore liable for civil penalties in the amount up to $10,000.00 per violation under Section 501.059(8), Florida Statutes.

WHEREFORE, the Plaintiff, State of Florida, Department of Agriculture and Consumer Services, requests this Court to grant the following relief:

A. Grant a permanent injunction against Defendant, through their officers, agents, employees or any other persons who act under, by through or on behalf of Defendant, prohibiting such persons from violating Chapter 501.059, Florida Statutes;

B. Grant such further relief as follows:
   (i) Assess against Defendant civil penalties in the amount of $10,000.00 for each act or practice found to be in violation of Chapter 501.059, Florida Statutes;
   (ii) Waive any posting of bond in the action;
   (iii) Award reasonable attorney fees and costs to Plaintiff herein should the Court find there is a complete absence of justiciable issue of either law or fact raised by the Defendant or if the Court finds bad faith on the part of the Defendant; and
   (iv) Grant such other and further relief as this Court deems just and proper.

CHARLES H. BRONSON
COMMISSIONER OF AGRICULTURE

By: ____________________________
   Louis E. Stolba, Senior Attorney
   Florida Department of Agriculture and Consumer Services
   Room 520 - Mayo Building
   407 South Calhoun Street
   Tallahassee, Florida 32399-0830
   Telephone No. (850) 245-1000
| E-Mail: THE SPORTS AUTHORITY, INC., 3383 N ST RD 7, FORT LAUDERDALE, FL 33319 |
| Received | Order Period | No Sales List Purchase Request | Quarter | Area Codes Originated | Format Type |
| Date of Call | RM | Consumer Number | Case Number | Consumer Name/Address | |
| 09/03/2003 | 005 | 561-426-9227 | 0304-31349 | PISTER, NANCY, 531 PINE DR, ORLANDO, FL 32825-7817 | YES |
| 09/03/2003 | 005 | 305-448-3432 | 0200-31075 | CUDDE, CHRISTOPHER, 1247 ANASTASIA AVE, CORAL GABLES, FL 33134-8038 | YES |
| 09/27/2003 | 005 | 727-944-6760 | 0304-31363 | DUNNING, ROBERT, 5600 80TH ST N APT D302, SAINT PETERSBURG, FL 33705-5864 | YES |
| 09/27/2003 | 005 | 561-944-6590 | 0200-31742 | MUSH, JAMES & LINDA, 1190 GULFSTREAM WAY, SIESTA ISLAND, FL 34249-2276 | YES |
| 09/19/2003 | 005 | 561-700-6973 | 0200-31224 | ZACCARO, STEPHEN, 2300 CAYO DEL MAR APT 308, BOCA RATON, FL 33432-7156 | YES |
| 09/19/2003 | 005 | 321-631-5857 | 0300-31121 | FRICK, ROBBIN C, 126 TRON WAY, ROCKLEDGE, FL 32955-2247 | YES |
| 09/18/2003 | 005 | 407-456-9911 | 0300-30668 | HERBERT, MERRY A, 12008 WINDERMERE CROSSING CIR, WINTER GARDEN, FL 34787-5518 | YES |
| 09/18/2003 | 005 | 321-777-4762 | 0300-31390 | GREEN, HOLLY & MARIL, 480 HERITAGE AVE, SATELITE BEACH, FL 32937-3047 | YES |
| 09/19/2003 | 005 | 727-487-2845 | 0300-31394 | HOER, FREDERICK, 5810 3RD ST S, SAINT PETERSBURG, FL 33710-5304 | YES |
| 09/20/2003 | 005 | 772-236-8886 | 0200-32823 | MARTIN, DIANE M, 1725 SE CLEARMONT ST, PORT SAINT LUCIE, FL 34983-4805 | YES |
| 09/20/2003 | 005 | 800-556-5387 | 0200-31979 | MOSKOS, TY, 10315-247TH AV, OCA, FL 34485-8800 | YES |
| 09/20/2003 | 005 | 561-426-9227 | 0300-31349 | PISTER, NANCY, 531 PINE DR, ORLANDO, FL 32825-7817 | YES |
| 09/20/2003 | 005 | 305-448-3432 | 0200-31075 | CUDDE, CHRISTOPHER, 1247 ANASTASIA AVE, CORAL GABLES, FL 33134-8038 | YES |
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| 09/20/2003 | 005 | 561-944-6590 | 0200-31742 | MUSH, JAMES & LINDA, 1190 GULFSTREAM WAY, SIESTA ISLAND, FL 34249-2276 | YES |
| 09/20/2003 | 005 | 561-700-6973 | 0200-31224 | ZACCARO, STEPHEN, 2300 CAYO DEL MAR APT 308, BOCA RATON, FL 33432-7156 | YES |
| 09/20/2003 | 005 | 321-631-5857 | 0300-31121 | FRICK, ROBBIN C, 126 TRON WAY, ROCKLEDGE, FL 32955-2247 | YES |
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| 09/20/2003 | 005 | 772-236-8886 | 0200-32823 | MARTIN, DIANE M, 1725 SE CLEARMONT ST, PORT SAINT LUCIE, FL 34983-4805 | YES |
STATE OF FLORIDA,
DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES

Plaintiff,

vs. 

CASE NO. 6:14-CV-115-Orl-18JGG
Circuit Court Case No. 03-CA-10535

THE SPORTS AUTHORITY FLORIDA INC., a Florida corporation,

Defendant.

Amended and Supplemental Complaint for Permanent Injunction, Civil Penalties and Other Statutory Relief

Plaintiff, State of Florida Department of Agriculture and Consumer Services, sues the Defendant, The Sports Authority Florida, Inc., a Florida corporation, and alleges as follows:

ALLEGATIONS COMMON TO ALL COUNTS

1. This is an action for permanent injunction, civil penalties and other statutory relief, brought pursuant to Section 501.059, Florida Statutes.

2. This Court has jurisdiction pursuant to the provision of said statute.

3. Plaintiff, State of Florida Department of Agriculture and Consumer Services, is the enforcing authority pursuant to Section 501.059(8) Florida Statutes, and is authorized to seek the relief sought herein pursuant to the provisions of said statute. Plaintiff has performed all conditions precedent to be performed by Plaintiff or such conditions have occurred.

4. The amount in controversy exceeds the minimum jurisdictional limit of this Court.

5. Defendant, The Sports Authority Florida, Inc., is a Florida corporation with its principal place of business in Broward County, Florida. Defendant is doing business within the State of Florida as defined
in Section 501.059(1)(h), Florida Statutes. This cause of action accrued in Orange County, Florida by virtue of Defendant making, or causing to be made, unlawful telephonic sales calls to consumers in Orange County, Florida and Defendant playing, or causing to be played, a recorded message when the number called is answered.

6. Defendant, at all times material hereto, has engaged in the business of selling consumer goods or services, or for the purpose of obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services. Defendant in conducting its business is making telephonic sales calls and playing a recorded message when the number called is answered to citizens of the State of Florida.

7. From, on or before November 2002 Defendant has been making unsolicited telephonic sales calls to citizens of the State of Florida whose names appear on the then-current quarterly no-sales solicitation calls listing published by the department. A list of the consumers called and the dates of such calls are described on Exhibit "A" attached hereto and by reference made a part hereof. Further, as a separate and distinct violation of Florida Statutes, Defendant made or knowingly allowed a telephonic sales call to be made with an automated system for the playing of a recorded message when a connection is completed to a number called without having a live operator introduce the recorded message.

8. Section 501.059(4), Florida Statutes, makes it unlawful for a telephone solicitor to make or cause to be made any unsolicited telephonic sales calls to residents of the State of Florida if such residents number appears on the then-current quarterly listing. Section 501.059(7), Florida Statutes, makes it unlawful to make or knowingly allow a telephonic sales call to be made if such call involves an automated system for the playing of a recorded message when a connection is completed to a number called without a live operator introducing the recorded message.

9. Unless the Defendant is enjoined from engaging further in the acts and practices herein complained, the continued activities of Defendant will result in damage to the consuming public.
COUNT I
(Injunctive Relief)

10. Plaintiff realleges paragraphs 1 through 9, above.

11. Section 501.059(8), Florida Statutes, that the department may seek injunctive relief to prohibit the improper telephonic solicitations in violation of said statute. This is an action for permanent injunction.

12. The Defendants' acts and practices as set forth herein constitute a violation of Section 510.059, Florida Statutes.

13. Unless Defendant is permanently enjoined from engaging further in such acts and practices as herein described, the activities of the Defendant will cause injury to the consuming public.

COUNT II
(Civil Penalties)

14. Plaintiff realleges paragraphs 1 through 9, above.

15. Defendant had actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that its acts, as described above, were in violation of Section 501.059, Florida Statutes.

16. Defendant is therefore liable for civil penalties in the amount up to $10,000.00 per violation under Section 501.059(8), Florida Statutes.

WHEREFORE, the Plaintiff, State of Florida Department of Agriculture and Consumer Services, requests this Court to grant the following relief:

A. Grant a permanent injunction against Defendant, through their officers, agents, employees or any other persons who act under, by through or on behalf of Defendant, prohibiting such persons from violating Chapter 501.059, Florida Statutes;

B. Grant such further relief as follows:

(i) Assess against Defendant civil penalties in the amount of $10,000.00 for each act or practice found to be in violation of Chapter 501.059, Florida Statutes;

(ii) Waive any posting of bond in the action;
(iii) Award reasonable attorney fees and costs to Plaintiff herein should the Court find there is a complete absence of justiciable issue of either law or fact raised by the Defendant or if the Court finds bad faith on the part of the Defendant; and

(iv) Grant such other and further relief as this Court deems just and proper.

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing has been served on Daniel N. Brodersen, Esq., 2601 Technology Drive, Orlando, FL, 32804 and William E. Raney, 423 W. Eighth Street, Suite 400 Kansas City, MO 64105 by regular U.S. Mail, postage prepaid, on this 19th day of May, 2004

By: ____________________________
Louis E. Stolba, Esq.
FBN 121249
Room 520 - Mayo Building
407 South Calhoun Street
Tallahassee, Florida 32399-0800
Telephone No. (850) 245-1000
Facsimile No. (850) 245-1001

Attorney for State of Florida Department of Agriculture and Consumer Services
Do Not Call (for Legal)
Parent Case Number: 0310-33992

Number of Complaints: 66

Business: THE SPORTS AUTHORITY, INC., 3383 N ST RD 7, FORT LAUDERDALE, FL 33319

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Note: "Desc" is subject category 3 of subject code - Recorded Message
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Note: "Dcss" is subject category 3 of subject code - Recorded Message

Report Prepared by: The Florida Department of Agriculture and Consumer Services, Division of Consumer Services
Report Date: 05/14/2004
Report Generated by: ROBERT CARRUTHERS

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Note: "Desc" is subject category 3 of subject code - Recorded Message

Report Prepared By: The Florida Department of Agriculture and Consumer Services, Division of Consumer Services
Data Source: Division of Consumer Services HACCD Oracle Database
EXHIBIT C
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

STATE OF FLORIDA,
DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES

Plaintiff,

vs.

THE SPORTS AUTHORITY FLORIDA, INC.,
A Florida corporation,

Defendant.

Circuit Court Case No. 03 CA 10555

ANSWER

COMES NOW, Defendant The Sports Authority Florida, Inc., by and through counsel, and hereby answers Plaintiff’s Complaint as follows:

1. Defendant neither admits nor denies the allegations set forth in paragraph 1 of Plaintiff’s Complaint.

2. Defendant denies the allegations set forth in paragraph 2 of Plaintiff’s Complaint.

3. Defendant denies the allegations set forth in paragraph 3 of Plaintiff’s Complaint.

4. Defendant denies the allegations set forth in paragraph 4 of Plaintiff’s Complaint.

5. Defendant denies the allegations set forth in paragraph 5 of Plaintiff’s Complaint.

6. Defendant denies the allegations set forth in paragraph 6 of Plaintiff’s Complaint.

7. Defendant denies the allegations set forth in paragraph 7 of Plaintiff’s Complaint.

8. Defendant denies the allegations set forth in paragraph 8 of Plaintiff’s Complaint.

9. Defendant denies the allegations set forth in paragraph 9 of Plaintiff’s Complaint.
COUNT I

10. Defendant incorporates by reference its responses to paragraphs 1 through 9 as set forth above.

11. The allegation set forth in paragraph 11 is a legal conclusion and does not require a response from Defendant.

12. Defendant denies the allegations set forth in paragraph 12 of Plaintiff’s Complaint.

13. Defendant denies the allegations set forth in paragraph 13 of Plaintiff’s Complaint.

COUNT II

14. Defendant incorporates by reference its responses to paragraphs 1 through 13 as set forth above.

15. Defendant denies the allegations set forth in paragraph 15 of Plaintiff’s Complaint.

16. Defendant denies the allegations set forth in paragraph 16 of Plaintiff’s Complaint.

AFFIRMATIVE DEFENSES

I. Plaintiff’s claims are preempted by federal law.

1. Defendant restates its responses to the previous paragraphs and incorporates same herein.

2. All of the telephone calls relevant to the allegations in the Complaint were placed from The Sports Authorities’s calling company, Smart Reply’s, phone center in California, and therefore were interstate calls.

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3. At all times Defendant placed telephone calls only to consumers with whom it had an established business relationship.

4. The FCC has passed regulations allowing businesses to place telephone calls to consumers with whom it has an established business relationship using recorded voice messages. 47 C.F.R. § 64.1200(a)(2)(iv). "Established business relationship" is defined as:

A prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

47 C.F.R. § 64.1200(f)(3).

5. Defendant complies with these federal laws.

6. Four federal appellate cases and one state appellate case have repeated the finding that states have no jurisdiction over interstate calls due to preemption by the TCPA. Chair King, Inc. v. Houston's Cellular Corp., 131 F.3d 507, 513 (5th Cir. 1997); In'tl Sci. Tech. Inst., Inc. v. Inacom Communications, Inc., 106 F.3d 1146, 1154 (4th Cir. 1997); Moser v. FCC, 46 F.3d 970, 972 (9th Cir. 1995); Nicholson v. Hooters of Augusta, 136 F.3d 1287, 1288 (11th Cir. 1998); and Omnibus Int'l, Inc. v. AT&T, Inc., 111 S.W.3d 818, 823 (Tex. Ct. App. 2003) ("States have no independent regulatory power over interstate telemarketing activities...").

7. The FCC has repeatedly ruled that this forum and laws, such as this Florida law, do not apply to interstate calls and are preempted by the TCPA and FCC. See, e.g., FCC Report and Order, CG Docket No. 02-278, ¶ 84 (July 3, 2003).

II. Defendant has made a good faith effort to comply with applicable Florida law.

8. Defendant restates its responses to the previous paragraphs and incorporates same.
9. Defendant has implemented, with due care, reasonable procedures to prevent telephone calls in violation of this Florida law. Any errors with regard to this process were made in good faith and have been corrected as shown by lack of subsequent complaints.

III. The Complaint fails to state a claim upon which relief may be granted.

10. Defendant restates its responses to the previous paragraphs and incorporates same herein.

11. The Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, having fully answered Plaintiff’s Complaint, Defendant prays that this Court dismiss this action with prejudice and for such other relief as the Court deems just and proper.

Dated: February ____, 2004

Respectfully submitted,

BOGIN, MUNNS & MUNNS

By: __________________________
Daniel N. Brodersen, Esq.
Florida Bar No.: 664197
2601 Technology Drive
Orlando, FL 32804
Telephone: (407) 578-1334
Facsimile: (407) 578-2801

William E. Raney
COPILEVITZ & CANTER, LLC
423 W. Eighth Street, Suite 400
Kansas City, MO 64105
Telephone: (816) 472-9000
Facsimile: (816) 472-5000

ATTORNEYS FOR DEFENDANT
THE SPORTS AUTHORITY
FLORIDA, INC.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via facsimile transmission and U.S. mail to: Louis E. Stolba, Esquire, Florida Department of Agriculture and Consumer Services, Room 520 – Mayo Building, 407 South Calhoun Street, Tallahassee, Florida 32399-0800 this ____ day of February, 2004

__________________________
Attorney
DEFENDANT'S ANSWER

COMES NOW, Defendant The Sports Authority Florida, Inc., by and through counsel, and hereby answers Plaintiff’s Amended Complaint as follows:

1. Paragraph i does not state an allegation which requires a response by Defendant.
2. Defendant admits the allegations set forth in paragraph 2 of Plaintiff’s Amended Complaint.
3. Defendant neither admits nor denies the allegations set forth in paragraph 3 of Plaintiff’s Amended Complaint.
4. Defendant neither admits nor denies the allegations set forth in paragraph 4 of Plaintiff’s Amended Complaint.
5. Defendant admits the allegations set forth in paragraph 5 of Plaintiff’s Amended Complaint.
6. Defendant admits the allegations set forth in paragraph 6 of Plaintiff’s Amended Complaint.
Complaint.

7. Defendant denies the allegations set forth in paragraph 7 of Plaintiff’s Amended Complaint.

8. The cited sections of Florida law speak for themselves and require no response from Defendant.

9. Defendant denies the allegations set forth in paragraph 9 of Plaintiff’s Amended Complaint.

10. Defendant incorporates by reference its responses to paragraphs 1 through 9 as set forth above.

11. The cited sections of Florida law speak for themselves and require no response from Defendant.

12. Defendant denies the allegations set forth in paragraph 12 of Plaintiff’s Amended Complaint.

13. Defendant denies the allegations set forth in paragraph 13 of Plaintiff’s Amended Complaint.

14. Defendant incorporates by reference its responses to paragraphs 1 through 13 as set forth above.

15. Defendant denies the allegations set forth in paragraph 15 of Plaintiff’s Amended Complaint.

16. Defendant denies the allegations set forth in paragraph 16 of Plaintiff’s Amended Complaint.

AFFIRMATIVE DEFENSES

I. Plaintiff’s claims are preempted by federal law.
1. Defendant restates its responses to the previous paragraphs and incorporates same herein.

2. All of the telephone calls relevant to the allegations in the Complaint were placed from The Sports Authority’s calling company, Smart Reply’s, phone center in California, and therefore were interstate calls.

3. At all times Defendant placed telephone calls only to consumers with whom it had an established business relationship.

4. The FCC has passed regulations allowing businesses to place telephone calls to consumers with whom it has an established business relationship using recorded voice messages. 47 C.F.R. § 64.1200(a)(2)(iv). “Established business relationship” is defined as:

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47 C.F.R. § 64.1200(f)(3).

5. Defendant complies with these federal laws.

6. Four federal appellate cases and one state appellate case have repeated the finding that states have no jurisdiction over interstate calls due to preemption by the TCPA. Chair King, Inc., v. Houston’s Cellular Corp., 131 F.3d 507, 513 (5th Cir. 1997); Int’l Sci. Tech. Inst., Inc. v. Inacom Communications, Inc., 106 F.3d 1146, 1154 (4th Cir. 1997); Moser v. FCC, 46 F.3d 970, 972 (9th Cir. 1995); Nicholson v. Hooters of Augusta, 136 F.3d 1287, 1288 (11th Cir. 1998); and Omnibus Int'l, Inc. v. AT&T, Inc., 111 S.W.3d 818, 823 (Tex. Ct. App. 2003) ("States have no
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II. Defendant has made a good faith effort to comply with applicable Florida law.

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9. Defendant has implemented, with due care, reasonable procedures to prevent telephone calls in violation of this Florida law. Any errors with regard to this process were made in good faith and have been corrected as shown by lack of subsequent complaints.

III. The Complaint fails to state a claim upon which relief may be granted.

10. Defendant restates its responses to the previous paragraphs and incorporates same herein.

11. The Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, having fully answered Plaintiff’s Complaint, Defendant prays that this Court dismiss this action with prejudice and for such other relief as the Court deems just and proper.

Dated: June __, 2004

Respectfully submitted,

BOGIN, MUNNNS & MUNNNS

By: __________________

Daniel N. Brodersen, Esq.
Florida Bar No.: 664197
2601 Technology Drive
Orlando, FL 32804

4
Telephone: (407) 578-1334
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__________________________
Attorney