**UNITED STATES DISTRICT COURT**
**DISTRICT OF MARYLAND**

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| BEAUFORT NICKSON,<br><br>Plaintiff,<br><br>v.<br><br>ALLEVIATE TAX, LLC,<br><br>Defendant. | Civil Action No. 8:25-cv-01042-TDC |

**MEMORANDUM OF LAW IN SUPPORT OF**
**DEFENDANT ALLEVIATE TAX, LLC'S MOTION TO DISMISS**

Defendant Alleviate Tax, LLC ("Alleviate"), by and through its undersigned counsel, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"), submits this Memorandum of Law in Support of its Motion to Dismiss and, in support thereof, state as follows:

## I. INTRODUCTION

Under the Supreme Court's pleading standards in *Iqbal* and *Twombly*, a plaintiff cannot withstand a motion to dismiss with "threadbare recitals of the elements of a cause of action supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Yet, that is precisely what Plaintiff offers here.

Plaintiff's allegation—that Alleviate made four calls to his cellular phone using an "automatic telephone dialing system" ("ATDS") in violation of 47 U.S.C. § 227(b) and 47 C.F.R. § 64.1200(a)(1)-(2)—is unsupported by factual allegations that would render such conduct plausible. Simply asserting ATDS usage, without more, is the type of conclusory pleading *Iqbal*

and *Twombly* expressly forbid and is insufficient to state a claim upon which relief can be granted. Plaintiff's Complaint is devoid of any details that would suggest Alleviate utilized ATDS technology.

Crucially, this is not an omission that can be cured. At the June 9, 2025 Case Management Conference, Plaintiff was given the opportunity to amend his Complaint and add factual allegations regarding Alleviate's purported use of an ATDS. In open court, Plaintiff forthrightly admitted that he has no further facts to allege. Thus, by his own admission, amendment would be futile.

As such, Alleviate seeks an order from this Court dismissing Count I of Plaintiff's Complaint with prejudice.

## II. PLAINTIFF'S ALLEGATIONS

Plaintiff alleges Alleviate made four nonconsensual calls to his cellular phone number that was registered on the National Do Not Call ("DNC") Registry. Complaint ("Compl.") at ¶¶ 12, 18. He further alleges these calls utilized ATDS technology—which has the present and/or future capacity to store, produce and/or dial such numbers using a random and/or sequential number generator. Compl. at ¶ 18.

Plaintiff alleges that, when he answered Alleviate's second call, he heard a beeping sound before hearing a voice, and when he answered Alleviate's third and fourth calls, he heard beeping sounds and a short pause prior to hearing a voice. *Id.* at ¶¶ 14-16. Plaintiff further alleges that the calls were automated "because the calls were not manually made and were generic scripted telemarketing calls [that] never referenced Plaintiff directly by his name;" because he heard "beeping sounds with short pauses before a live person came on the call," and because the calls were made "using spoofed phone numbers." *Id.* at ¶¶ 19-20. Additionally, Plaintiff alleges

Alleviate "uses an (ATDS) with the capability to generate, create, produce, dial and transmit, random, sequential or customized "Spoofed" phone numbers which transmit false caller identification information to consumers "AT WHIM" and en masse." *Id.* at ¶ 21.

## III. LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6) "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

A motion to dismiss brought pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006). A complaint need only satisfy the standard of Rule 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007). That showing must consist of more than "a formulaic recitation of the elements of a cause of action" or "naked assertion[s] devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted) (quoting *Twombly*, 550 U.S. at 555).

In ruling on a motion to dismiss, the well-pleaded allegations are accepted as true and viewed in the light most favorable to the party asserting the claim. *Twombly*, 550 U.S. at 555. However, "[f]actual allegations must be enough to raise a right to relief above a speculative level." *Twombly*, 550 U.S. at 555. "[C]onclusory statements or a 'formulaic recitation of the elements of a cause of action will not [suffice]." *EEOC v. Performance Food Grp., Inc.*, 16 F. Supp. 3d 584, 588 (D. Md. 2014) (quoting *Twombly*, 550 U.S. at 555). "[N]aked assertions of wrongdoing necessitate some 'factual enhancement' within the complaint to cross 'the line between possibility

and plausibility of entitlement to relief." *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 557).

## IV. ARGUMENT – COUNT I SHOULD BE DISMISSED WITH PREJUDICE FOR FAILURE TO STATE A PLAUSIBLE CLAIM UNDER THE TCPA.

### A. Plaintiff Fails To Plausibly Allege The Use Of An ATDS.

The TCPA prohibits making "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system ... to any telephone number assigned to a ... cellular telephone service ..." *Boger v. Citrix Sys., Inc.*, No. 8:19-CV-01234-PX, 2020 WL 1033566, at *2 (D. Md. Mar. 3, 2020) (quoting 47 U.S.C. § 227(b)(1)(A)). The Supreme Court held that "[t]o qualify as an 'automatic telephone dialing system' under the TCPA, a device must have the capacity either to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1165 (2021)).

To prevail on a claim under 227(b), a plaintiff must satisfy his burden to prove use of an ATDS. *Worsham v. Direct Energy Servs., LLC*, No. CV SAG-20-00193, 2021 WL 948819, at *4 (D. Md. Mar. 12, 2021), aff'd, No. 21-1677, 2022 WL 1261998 (4th Cir. Apr. 28, 2022) (holding that the plaintiff bore the burden of proof and failed to carry that burden because the calls he identified did not involve any prerecorded devices or messages, he could not establish how those calls were dialed, and he had adduced no evidence of the use of any ATDS equipment); *see also* 47 U.S.C. § 227(a)(1). "[C]ourts have consistently determined that, in order to state a claim, plaintiffs must allege some facts permitting an inference that an ATDS was used to transmit the communications at issue." *Thomas-Lawson v. Koons Ford of Baltimore, Inc.*, No. CV SAG-19-3031, 2020 WL 1675990, at *4 (D. Md. Apr. 6, 2020) (granting motion to dismiss ATDS claims

because the bald and conclusory facts alleged by the plaintiff did not suggest that the defendant used an automatic system of any sort).

Here, Plaintiff alleges that Alleviate placed four unsolicited telemarketing calls to him using an ATDS "which has the present and/or future capacity to store, produce and/or dial such numbers using a random and/or sequential number generator." Compl. at ¶ 18. However, Plaintiff is merely parroting the definition of an ATDS under the TCPA. *See* 47 U.S.C. § 227(a)(1). Plaintiff cannot depend on a "formulaic recitation" of the elements of his cause of action, without any factual support. *See e.g.*, *Sprye v. Ace Motor Acceptance Corp.*, No. CV PX 16-3064, 2017 WL 1684619, at *5 (D. Md. May 3, 2017) (plaintiff's allegations that the defendant contacted his cellular phone via an "automatic telephone dialing system, as defined by 47 U.S.C. § 227(a)(1)" were insufficient to sustain an ATDS claim); *see also Worsham v. Disc. Power, Inc.*, No. CV RDB-20-0008, 2021 WL 3212589, at *3 (D. Md. July 29, 2021), amended on reconsideration, No. CV RDB-20-0008, 2021 WL 5742382 (D. Md. Dec. 1, 2021), aff'd, No. 22-1942, 2023 WL 2570961 (4th Cir. Mar. 20, 2023) (dismissing with prejudice plaintiff's ATDS claims because plaintiff alleged that the calls "were all initiated and made with an 'automated telephone dialing system' ("ATDS") as defined by 47 U.S.C. § 227(a)(1) and 47 C.F.R. § 64.1200(f)(2)" without asserting any facts to support the allegation that ATDS was used).

In *Boger v. Citrix Sys., Inc*, for example, the complaint alleged that when the plaintiff accused the defendant's representative of using an ATDS, the representative did not deny it and instead indicated that he did not know how the call "got through." *Boger v. Citrix Sys., Inc.*, No. 8:19-CV-01234-PX, 2020 WL 1033566, at *3 (D. Md. Mar. 3, 2020). This Court found that the plaintiff's allegations suggested that the defendant knew that its dialing system constituted an

ATDS, and plausibly used (or misused) an ATDS such that its representative could not explain how he managed to dial a cell phone number. *Id.*

Unlike the plaintiff in *Boger*, whose allegations pointed to an agent's evasiveness as potential evidence of knowing ATDS misuse, Plaintiff here pleads no such suggestive facts. Instead, while making the sweeping allegation that Alleviate "uses an (ATDS) with the capability to generate, create, produce, dial and transmit, random, sequential or customized 'Spoofed' phone numbers which transmit false caller I.D. information to consumers 'AT WHIM' and en masse," Plaintiff's own Complaint deflates any sinister inference from this so-called "spoofing." Compl. at ¶¶ 15, 21. When Plaintiff "confronted Alleivate's representative about the use of "spoofed" numbers, the agent provided a perfectly straightforward and non-technical explanation: Alleviate simply uses "local phone numbers to avoid tong distance charges". *Id.*

Plaintiff's additional allegations that "the calls were not manually made and were generic scripted telemarketing calls [that] never referenced Plaintiff directly by his name" are likewise contradicted by the interaction details he provides in his Complaint. *Id.* at ¶ 20. After an initial unanswered call (the content of which Plaintiff therefore cannot know), his accounts of the three subsequent, answered calls show responsive, individualized dialogues, not generic scripts. *Id.* at ¶¶ 14-16. These conversations allegedly involved different agents with distinct openings: one directly asked if Plaintiff had "any tax issues we can assist you with;" another, identifying himself as "Jose," offered a different greeting and then tailored his explanation of Alleviate's services when Plaintiff engaged with questions; and a third agent provided a more service overview before offering a specialist transfer. *Id.* Such varied, interactive exchanges, clearly adapting to Plaintiff's own queries and participation, are the converse of the impersonal, "generic scripted" calls that he alleges. Thus, Plaintiff's distinct interactions with each caller negates any allegation that the calls

used "generic" telemarketing scrips. *See Nickson v. Advanced Mktg. & Processing, Inc.*, No. CV DLB-22-2203, 2023 WL 4932879, at *5-6 (D. Md. Aug. 2, 2023) (dismissing ATDS claims because the complaint did not allege that the defendant called others using the same number or that the plaintiff received a "scripted telemarketing" pitch, which may be indicative of the call being placed to numerous potential customers) ("Speaking with a live person generally undercuts allegations of ATDS use."); *Thomas-Lawson v. Koons Ford of Baltimore, Inc.*, No. CV SAG-19-3031, 2020 WL 1675990, at *4 (D. Md. Apr. 6, 2020) (dismissing ATDS claims where the single text message included in the complaint not generic but rather highly personalized). And as such, negate and inference of ATDS usage by Alleviate.

In fact, nearly identical allegations levelled by Plaintiff herein have previously been dismissed in a different case. *See Nickson*, 2023 WL 4932879 at *5 ("Nickson offers the following allegations relevant to ATDS use: (1) PMC used "spoofed" phone numbers; (2) "the frequency in which the calls came in," namely five calls over an eighteen-day span; (3) during each call in which a live representative spoke, Nickson first heard a beeping sound and short pause; and (4) additional TCPA claims against PMC have been filed in multiple courts. But none of these allegations suggests the calls were dialed by equipment that can store or produce telephone numbers "using a random or sequential number generator" and that can "dial such numbers.""). In its order granting the motion to dismiss Plaintiff's ATDS claims, the court emphasized that he did not allege that the calls were prerecorded, contained the same message, or were not manually made. *Id.*; *see also Thomas-Lawson v. Koons Ford of Baltimore, Inc.*, No. CV SAG-19-3031, 2020 WL 1675990, at *4 (D. Md. Apr. 6, 2020) ("Plaintiff has not even pled whether the calls or messages she received involved a human or robotic speaker, and alleges no facts on which to rest a plausible claim that her number was dialed automatically.") Here too, Plaintiff's allegations are similarly deficient.

Plaintiff does not allege the use of prerecorded messages or robotic voice, and instead, repeatedly states that he was connected to a *live voice.* Compl. at ¶¶ 16, 19. As such, the Complaint does not plausibly allege the use of an ATDS. *See Nickson*, 2023 WL 4932879 at *5 ("Speaking with a live person generally undercuts allegations of ATDS use.").

As Plaintiff has not alleged facts permitting a plausible inference of ATDS use under the controlling *Iqbal/Twombly* standard, Count I must be dismissed.

**B. Count I Should Be Dismissed With Prejudice Because Amendment Would Be Futile.**

The Supreme Court has indicated that leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or *the amendment would be futile*. *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962) (emphasis added).

Granting leave to amend is futile when a plaintiff cannot present any additional allegations that would allow their claims to survive a motion to dismiss. *Green-Wright v. Fed. Nat'l Mortg. Ass'n*, No. CV GLR-15-2476, 2016 WL 337644, at *4 (D. Md. Jan. 28, 2016) (granting defendant's Rule 12(b)(6) motion to dismiss with prejudice and denying plaintiff's motion for leave to amend where the plaintiff did not present any additional allegations that would enable her claims to survive, and in fact, presented no additional allegations whatsoever); *see also Evans v. Beneficial Fin. I, Inc.*, No. CIV.A. DKC 14-1994, 2015 WL 535718, at *7 (D. Md. Feb. 9, 2015) (denying leave to amend because plaintiff offered no factual allegations to cure the deficiencies in the original complaint).

Here, Plaintiff himself admitted in open court that there were no changes or additions he could possibly make to his ATDS allegations in Count I of his Complaint. At the Case

Management Conference held on June 09, 2025, Plaintiff was given an opportunity to amend his ATDS claim and add additional factual allegations. However, Plaintiff stated that he had nothing more to add. Therefore, by Plaintiff's own admission, leave to amend Count I of his Complaint would be futile.

Accordingly, Count I of Plaintiff's complaint should be dismissed with prejudice.

## V. CONCLUSION

For the foregoing reasons, Alleviate respectfully requests that this Court dismiss with prejudice Count I of Plaintiff's Complaint for its failure to state a claim upon which relief can be granted.

Respectfully submitted,

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