

The Honorable David G. Estudillo

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NATHEN BARTON,

Plaintiff,

v.

ALLEVIATE TAX LLC, and JOHN DOE 1-
10,

Defendants.

Case No. 3:23-cv-06071

**DEFENDANT ALLEVIATE TAX LLC’S
MOTION TO DISMISS FOR FAILURE
TO STATE A CLAIM UNDER FEDERAL
RULE 12(B)(6)**

Noting Date: January 12, 2024

Defendant Alleviate Tax LLC (“Alleviate”) hereby moves this Court for an order dismissing Counts 6 and 11 of Plaintiff Nathen Barton’s (“Plaintiff”) First Amended Complaint (“FAC”) for the failure to state a claim for which relief may be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. INTRODUCTION.

Counts 6 and 11 of the FAC must be dismissed as they do not plausibly allege any claim for which relief may be granted.

The “Seller Identification” claim in Count 6 must be dismissed because no private right of action exists. The right of action under Section 227(c) is confined to regulations prescribed under the authority granted to the Federal Communications Commission (“FCC”) in that specific section

1 of the Telephone Consumer Protection Act of 1991 (“TCPA”). The limited authority granted by
2 Congress in Section 227(c) does not extend to, among other things, the authority to enforce the
3 identification requirements outlined in Section 64.1200(d)(4). *See Worsham v. Travel Options,*
4 *Inc.*, No. JKB-14-2749, 2016 WL 4592373, at *7 (D. Md. Sept. 2, 2016) (dismissing the plaintiff’s
5 claim under 47 C.F.R. § 64.1200(d)(4) because there is no private right of action); *Burdge v. Ass’n*
6 *Health Care Mgmt., Inc.*, No. 1:10-CV-00100, 2011 WL 379159, at *4 (S.D. Ohio Feb. 2, 2011)
7 (same); *Worsham v. Direct Energy Servs., LLC*, No. CV SAG-20-00193, 2021 WL 948819 (D.
8 Md. Mar. 12, 2021), motion for relief from judgment denied, No. 1:20-CV-00193-SAG, 2021 WL
9 2451641 (D. Md. May 12, 2021), and *aff’d*, No. 21-1677, 2022 WL 1261998 (4th Cir. Apr. 28,
10 2022) (same). Consequently, Plaintiff’s claim under Section 64.1200(d)(4) must be dismissed.

11 Count 11 must also be dismissed due to Plaintiff’s failure to plausibly allege that Alleviate
12 uses a device that “automatically dials telephone numbers.” The Ninth Circuit ruling in *Williams*
13 makes it clear that a plaintiff *must* allege that a defendant uses a device that “automatically
14 announces” and “automatically dials.” *Williams v. MCIMetro Access Transmission Servs. Inc.*,
15 363 F. App’x 518, 519 (9th Cir. 2010). As Plaintiff has failed to do so here, Count 11 must be
16 dismissed.

17 Accordingly, Alleviate requests that this Court dismiss Counts 6 and 11 of Plaintiff’s FAC.

18 **II. PLAINTIFF’S ALLEGATIONS.**

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20 Plaintiff alleges that Alleviate Tax, or a third-party telemarketer acting on its behalf, made 23
21 telephone calls that utilized prerecorded voice message technology to his residential phone
22 numbers, which are listed on the National DNC Registry. FAC at ¶¶ 38, 41, 44, 66, 83, 214, 229,
23 and 231. Plaintiff alleges that he did not give consent for any of these communications. *Id.* 45-47.
24 Additionally, Plaintiff claims that none of these calls disclosed the identity of the business,
25 individual, or entity responsible for initiating them. *Id.* at ¶ 78.

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1 Case No. 5:08-CV-125, 2009 WL 3157399, at *3 n. 3 (W.D.N.C. Sept. 28, 2009) (an individual
2 does not have a private right of action against a telemarketer for failure to identify itself during a
3 pre-recorded telemarketing calls); *Worsham*, 2016 WL 4592373 at *7 (Section 227(d) does not
4 provide for a private right of action); *Boydston v. Asset Acceptance LLC*, 496 F. Supp. 2d 1101,
5 1110 (N.D. Cal. 2007) (same). Count 6 of Plaintiff’s Complaint seeks to impose liability upon
6 Alleviate for its alleged failure to identify the name of the individual initiating the alleged calls
7 and the name of the person or entity on whose behalf the calls were made. FAC at ¶¶ 402-03.
8 Because Plaintiff has no private right of action for Alleviate’s alleged failure to identify the name
9 of the individual initiating the alleged calls and the name of the person or entity on whose behalf
10 the calls were made, Count 6 must be dismissed.

11 **C. Count 11 Must Be Dismissed Because Plaintiff Fails To Plausibly Allege That**
12 **Alleviate Utilized An “Automatic Dialing and Announcing Device.”**

13 Under RCW 80.36.400(2), the use of an automatic dialing and announcing device for purposes
14 of commercial solicitation is prohibited. RCW 80.36.400(2). The statute is clear that it is
15 specifically targeting systems that *both* automatically dial telephone numbers *and* transmit a
16 recorded or artificial voice message upon establishing a connection. RCW 80.36.400(1)(b)
17 (“‘Automatic dialing and announcing device’ is a system which automatically dials telephone
18 numbers and transmits a recorded or artificial voice message once a connection is made.”);
19 *Williams*, 363 F. App’x at 519. Indeed, the Ninth Circuit’s decision in *Williams* also makes it
20 abundantly clear that both are necessary for a violation of the statute. *Id.* (“[T]he use of a device
21 that merely automatically dials telephone numbers—but does not play a recorded message once a
22 connection is made—does not violate RCW 80.36.400.”).

23 Here, Plaintiff has failed to allege any facts indicating that Alleviate employed an automatic
24 dialing and announcing device as defined under RCW 80.36.400. The mere use of a device that
25 automatically “transmit[s] a recorded or artificial voice message upon establishing a connection,”
26 without more, does not fall within the scope of the statute. As RCW 80.36.400(1)(a) explicitly
27 requires, the device must also “automatically dial telephone numbers.”

1 Given that Plaintiff's FAC lacks any allegations that Alleviate's system automatically dials any
2 telephone numbers, as required by the statute, he has not stated a viable claim under RCW
3 80.36.400. As such, Count 11 must be dismissed.

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5 **IV. CONCLUSION**

6 **WHEREFORE**, based on the foregoing, Alleviate respectfully requests that this Honorable
7 Court dismiss Counts 6 and 11 of Plaintiff's FAC under Fed. R. Civ. P. 12(b)(6).

8 DATED this 21st day of December, 2023.

9 By /s/ Kristin Nealey Meier

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 21st day of December, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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I HEREBY CERTIFY, that on this 21st day of December, 2023, I served a copy of the above and foregoing via email to the following:

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