IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MICHAEL BRADSHAW, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CHW GROUP, INC. d/b/a CHOICE HOME WARRANTY,

Defendant.

Case No. 2:24-cv-00114-MEF-JBC

Motion Return Date: June 3, 2024

ORAL ARGUMENT REQUESTED

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS AND/OR STRIKE CERTAIN IMPROPER ALLEGATIONS FROM PLAINTIFF'S FIRST AMENDED COMPLAINT

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RULES

CHW Group, Inc. d/b/a Choice Home Warranty ("CHW") hereby respectfully moves (i) to dismiss the "First Amended Class Action Complaint" (*see* Dkt. 11, "FAC") filed by Plaintiff Michael Bradshaw ("Plaintiff") in the above-captioned matter, in its entirety and with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1); and (ii) alternatively, to strike the improper class and other allegations therein pursuant to Fed. R. Civ. P. 12(f) and/or 23. In support, CHW states as follows:

INTRODUCTION

Like its fatally-flawed predecessor, the FAC alleges, in a conclusory fashion and without adequate requisite factual support, that Plaintiff received calls and text messages, that he admits he ***originally solicited in the first place***, that he concludes were initiated by either "Choice Home Warranty and/or its agents" without his consent in violation of the Telephone Consumer Protection Act (47 U.S.C. § 227, *et seq*., the "TCPA"). However, his FAC also falls far short of complying with federal pleading standards despite his amendments, as it lacks sufficient non-conclusory facts supporting his two asserted claims. As the FAC represents Plaintiff's second failed attempt to state a plausible claim here, he should not be offered a third chance, which would likely result in another equally faulty pleading ripe for dismissal. Thus, the entire FAC should be dismissed ***with prejudice*** for at least the following reasons:

First, the FAC should be dismissed under Rule 12(b)(6), as Plaintiff fails to state plausible claims under the TCPA or to plead adequate facts supporting such

claims. To begin, to successfully plead any TCPA claim under any TCPA provision, all plaintiffs must first allege a viable theory of liability—*i.e.,* direct or vicarious liability. Here, Plaintiff still does not plead sufficient, non-conclusory facts supporting a plausible inference either that CHW: (i) itself, and not a third party, "physically" placed each call at issue, as required to plead direct TCPA liability; or (ii) was in a common law agency relationship with (the touchstone of which is having sufficient "control" over) any third party who did physically call him and its calling campaign, as required to plead vicarious TCPA liability. This pleading defect alone is fatal to Plaintiff's entire FAC. Indeed, countless federal courts in and beyond this Circuit have recognized that simply taking an "either/or" pleading approach and concluding that "the defendant and/or its agents called me" (like what Plaintiff merely did here) is insufficient to avoid dismissal of any TCPA claim on these bases under Rule 12(b)(6).

Second, Plaintiff's claim under Section 227(b) of the TCPA in Count I should be dismissed for the additional reason that he still fails to plead facts, beyond his conclusions, supporting an inference that any call he received involved an "artificial or prerecorded voice," as required. While courts do not expect a plaintiff to know the exact technical specifications at this stage, they have consistently held that plaintiffs cannot simply parrot the statutory text and avoid dismissal. Yet that is all Plaintiff did.

Third, assuming *arguendo* there even is a private cause of action for alleged violations of the TCPA's "internal" "Do Not Call" ("DNC") requirements, which

Plaintiff has invoked for his claim in Count II and is disputed below,[1] his allegations regarding CHW's supposed lack of internal DNC policies and procedures are wholly conclusory, speculative, and contradicted by other "facts" alleged in the FAC. As such, Count II should also be dismissed under Rule 12(b)(6) on these grounds, too.

Fourth, if it does not dismiss the entire FAC, the Court should at least dismiss the FAC in part under Rule 12(b)(1) for lack of federal subject matter jurisdiction. That is because Plaintiff still does not allege actual facts suggesting he is at imminent risk of a possible future injury, which is indisputably what is required to have standing under Article III of the U.S. Constitution to seek injunctive relief in any federal case.

Alternatively, while the entire FAC should be dismissed on the multiple dispositive grounds above, Plaintiff's FAC also still contains various "superfluous historical" allegations, in the form of anonymous hearsay posts on third party websites, having nothing to do with the parties and claims in this case. Further, it is readily apparent that Plaintiff's class allegations are also facially defective, such that certification cannot be granted as pled. Therefore, should the Court not dismiss the FAC in whole or in part for any reason, it should nevertheless strike Plaintiff's plainly-improper class and other allegations from the FAC now under Rules 12(f) and/or 23, before the parties and Court waste time and effort in discovery relating to them.

[1] These rules are found in the TCPA's implementing regulations, *i.e.,* 47 C.F.R. § 64.1200(d), which several courts have held do not afford a private cause of action.

APPLICABLE LEGAL STANDARDS

A. Rule 12(b)(6): Failure to State a Claim for Relief

Fed. R. Civ. P. 12(b)(6) provides for dismissal where (as here) a plaintiff fails to sufficiently plead a claim for relief. Of course, any legal claim brought in any federal court mandates the pleading of sufficient facts, and a "bare assertion" or "conclusory allegation[s]" will not suffice. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007). A "formulaic recitation of the elements" of a claim likewise fails to meet the requisite pleading standard. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Moreover, when ruling on this Motion, this Court "need not credit the non-movant's conclusions of law or unreasonable factual inferences." *Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc.*, 450 F.3d 130, 133 (3d Cir. 2006). Thus, while this Court must generally accept well-pled factual allegations as true under Rule 12(b)(6), it need not do so for conclusory allegations, unwarranted or unreasonable inferences, and legal conclusions. *See, e.g., Bridges v. Torres*, 809 F.App'x 69, 71 (3d Cir. 2020); *Santiago v. Warminster Township,* 629 F.3d 121, 128 (3d. Cir. 2010); *Morse v. Lower Merion Sch. Dist.,* 132 F.3d 902, 906 (3d Cir. 1997).

B. Rule 12(b)(1): Lack of Federal Subject Matter Jurisdiction

A complaint is also properly dismissed under Fed. R. Civ. P. 12(b)(1) for lack of federal subject matter jurisdiction where the plaintiff lacks standing under Article III of the U.S. Constitution. *See, e.g., Buckley v. Early Warning Servs., LLC.,* 2021 WL 5413887, at *1 (E.D. Pa. Sept. 28, 2021). Requests for certain forms of relief—

like injunctive relief for example, as Plaintiff requests in this case—may also be dismissed under Rule 12(b)(1) where the plaintiff lacks Article III standing to seek such relief. *See, e.g., Miller v. Time Warner Cable Inc.,* 2016 WL 7471302, at *2–4 (C.D. Cal. Dec. 27, 2016) (dismissing request for injunctive relief in TCPA case for lack of standing where there were no allegations suggesting possible future harm). This Court need not accept as true bald conclusory allegations under Rule 12(b)(1), either. *See Finkelman v. Nat'l Football League*, 810 F.3d 187, 194 (3d Cir. 2016).

C. Rules 12(f) and 23: Striking Improper Class and Other Allegations

Under Rule 12(f), this Court "may strike from a pleading … any redundant, immaterial, impertinent, or scandalous matter." Further, it is well-accepted that where (as here) "the issues are plain enough from the pleadings" to determine that a case should not proceed as a class action under Rule 23, a court may properly resolve class certification at the pleadings stage on a motion to strike under Rule 12(f), before the plaintiff has even moved to certify a class. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982); *Royal Mile Co. v. UPMC*, 40 F. Supp. 3d 552, 578 (W.D. Pa. 2014). While motions to strike may be generally disfavored, courts have found they may (and indeed ***should*** in appropriate cases) properly strike faulty class allegations prior to class certification under Rule 12(f) where "the complaint itself demonstrates that the requirements for maintaining a class action cannot be met" under Rule 23. *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 205 n.3 (D.N.J. 2003); *see also Royal*

Mile Co., 40 F. Supp. 3d at 586 (finding it was "'plain enough from the pleadings' that plaintiffs cannot meet the requirements of Rule 23"); *Yagman v. Allianz Ins.*, 2015 WL 5553460, at *4 (C.D. Cal. May 11, 2015) (striking class allegations because allowing untenable class claims to proceed beyond the pleadings "would inject significant uncertainty as to the scope of discovery and other pre-trial proceedings") (citing *Whittlestone, Inc. v. Handi–Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010)); *Twombly*, 550 U.S. at 558-59 (2006) (discussing the expense, burden, and potential for discovery abuse in allowing deficiently-pleaded claims to proceed to discovery).

ARGUMENT

I. Plaintiff's Entire FAC Should Be Dismissed Under Rule 12(b)(6) for Failure to State a Plausible Claim for Relief Under the TCPA.

In Count I of the FAC (¶¶ 86-88), Plaintiff invokes Section 227(b) of the TCPA, which provides, *inter alia*, that no person shall "make any call … using … an artificial or prerecorded voice … to any telephone number assigned to a … cellular telephone service" without the recipient's "prior express consent" 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1) & (2). In Count II of the FAC (¶¶ 90-93), Plaintiff seeks relief under the TCPA's "internal" DNC rules, which generally require any "person or entity making a call for telemarketing purposes" to "honor a residential subscriber's do-not-call request" made to them within a "reasonable time" and no later than 30 days, and to have internal policies and procedures in place meeting certain minimum standards. 47 U.S.C. § 227(c)(5) & (d); 47 C.F.R. § 64.1200(d). As shown below,

Plaintiff continues to fail to adequately plead actual facts in support of these claims.

A. Plaintiff Fails to Plead Facts Supporting a Theory of Liability.

For starters, Plaintiff fails to plead a viable theory of TCPA liability despite his amendments, which alone warrants dismissal of his entire FAC. "For a person to 'make' [or 'initiate'] a call under the TCPA [and thus be subject to any TCPA liability], the person must either (1) ***directly make*** the call, or (2) have an ***agency relationship*** with the person who made the call." *Pascal v. Agentra, LLC*, 2019 WL 5212961, at *2 (N.D. Cal. Oct. 16, 2019) (quoting *Abante Rooter & Plumbing v. Farmers Grp., Inc*., 2018 WL 288055, at *4 (N.D. Cal. Jan. 4, 2018)) (emphasis added). *See also Rogers v. Postmates Inc.*, 2020 WL 3869191, at *3 (N.D. Cal. July 9, 2020) ("There are two potential theories of liability under the TCPA: (1) direct liability; and (2) vicarious liability.") (citing *Thomas v. Taco Bell Corp*., 582 F.App'x 678, 679 (9th Cir. 2014)). Here, Plaintiff fails to sufficiently allege either theory.

As to the former theory, it is well-established that direct TCPA liability applies ***only*** to persons or entities that "initiate" telemarketing calls, and that to "initiate" in this context means to "***physically place***" a call or send a text. *Sheski v. Shopify (USA) Inc.*, 2020 WL 2474421, at *2 (N.D. Cal. May 13, 2020) (citing *In re Dish Network, LLC*, 2013 WL 1934349, 28 FCC Rcd. 6574, 6583 ¶ 26 (2013)) (emphasis added). *Accord Klein v. Just Energy Grp., Inc.*, 2016 WL 3539137, at *8 (W.D. Pa. June 29, 2016) ("[T]he verb 'make' imposes civil liability only on the party that [physically]

places the call or text.") (citation omitted)). This rule applies equally to claims brought under the TCPA's DNC provisions. *See, e.g., Donaca v. Dish Network, LLC*, 303 F.R.D. 390, 394-96 (D. Colo. 2014). Courts in the Third Circuit have likewise firmly adopted this rule, and thus have frequently dismissed conclusory TCPA claims at the pleadings stage (like Plaintiff's here) under Rule 12(b)(6) on this basis. *See, e.g., Smith v. Direct Building Supplies, LLC*, 2021 WL 4623275, at *3 (E.D. Pa. Oct. 7, 2021); *Smith v. Vision Solar LLC*, 2020 WL 5632653, at *3 (E.D. Pa. Sept. 21, 2020) (citing *Aaronson v. CHW Grp., Inc.,* 2019 WL 8953349, at *2 (E.D. Va. Apr. 15, 2019)); *Landy v. Nat. Power Sources, LLC,* 2021 WL 3634162, at *3 (D.N.J. Aug. 17, 2021).

Additionally, it is also well-settled that any TCPA plaintiff hoping to allege a viable direct liability theory and to survive a motion to dismiss under Rule 12(b)(6) must offer much more than just barebones legal conclusions and speculation that the defendant "made" or "initiated" the phone calls or text messages at issue. *See Frank v. Cannabis & Glass, LLC*, 2019 WL 4855378, at *2 (E.D. Wash. Oct. 1, 2019). *See also Brownlee v. Allstate Ins. Co.,* 2021 WL 4306160, at *1 (N.D. Ill. Sept. 22, 2021) (dismissing under Rule 12(b)(6) and holding that, to avoid dismissal on this basis, all TCPA plaintiffs must allege facts to "allow the Court to reasonably infer that defendant is [directly] liable for ***each call***" at issue) (emphasis added); *Metzler v. Pure Energy USA LLC*, 2023 WL 1779631, at *6 (S.D.N.Y. Feb. 6, 2023) (all TCPA plaintiffs must "allege facts from which the Court can plausibly infer that [d]efendant

has direct liability, even if it is also plausible that a third party made the call"); *Woodard v. Health Ins. All.*, 2024 WL 942629, at *3 (N.D. Ill. Mar. 5, 2024) (holding that all "TCPA actions must allege some facts which are distinguishable from the statutory language of the TCPA itself to state a claim and survive dismissal.").[2]

Instead, for direct TCPA liability to attach in this case, Plaintiff must plead actual specific facts—and not just bald conclusions—in his FAC suggesting that CHW itself literally picked up the phone and physically called him directly for each call. *See, e.g., Landy,* 2021 WL 3634162, at *3 (no direct TCPA liability where plaintiff did not sufficiently allege defendant itself physically placed the call); *Direct Building Supplies*, 2021 WL 4623275, at *3 (same); *Vision Solar*, 2020 WL 5632653, at *3 (allegations the "[d]efendant contacted or attempted to contact [plaintiff] from multiple telephone numbers confirmed to belong to [d]efendant" insufficient for direct liability) (citing *Aaronson,* 2019 WL 8953349, at *2 (dismissing where plaintiff "failed to plead facts sufficient to support a theory of direct liability under the TCPA because plaintiff's allegations d[id] not show plausibly that [CHW] actually, physically initiated the telephone calls at issue")). Plaintiff did not meet this standard.

[2] While various provisions of the TCPA use the terms "make" or "initiate" somewhat interchangeably, courts evaluating and dismissing conclusory direct TCPA liability claims like Plaintiff's (including those above and many others) have uniformly held that "make" or "initiate" in this context means to "physically" make the calls at issue. *See also Meeks v. Buffalo Wild Wings, Inc.*, 2018 WL 1524067, at *3–5 (N.D. Cal. Mar. 28, 2018); *Hicks v. Alarm.com*, 2020 WL 9261758, at *5 (E.D. Va. Aug. 6, 2020); *Scruggs v. CHW Grp., Inc.,* 2020 WL 9348208, at *8 (E.D. Va. Nov. 12, 2020).

As applied here, Plaintiff's FAC still does not plausibly allege that CHW itself—as opposed to some third party—physically initiated each of the calls or texts at issue in this case, as is indisputably required to plead direct TCPA liability under the weight of applicable authority cited above. For example, for the ***vast majority*** of the alleged calls in the FAC, Plaintiff still does not indicate whether he even answered them, let alone give the originating phone number or provide any content of the calls (even though some of these callers purportedly left voicemails), such that this Court could reasonably infer that CHW physically placed each call. *See*, *e.g.*, Dkt. 11, ¶¶ 30, 33-34, 40, 44-46, 53, 58, 61-62, 64, 68. Again, to state a plausible TCPA claim here, Plaintiff "***must*** allege in [his] [FAC] that [CHW] made ***each call*** that [he] seeks to hold it [directly] liable for," or face dismissal. *Brownlee*, 2021 WL 4306160, at *1 (emphasis added). *See also Direct Building Supplies,* 2021 WL 4623275, at *3 (dismissing where the complaint lacked such specific facts about the numbers and callers at issue); *Doyle v. GoHealth, LLC*, 2023 WL 3984951, at *4–6 (D.N.J. Mar. 30, 2023) (dismissing on this basis where the plaintiff did "not allege that the number associated with the call …belonged to [d]efendant"). Plaintiff plainly did not do so.

Similarly, while Plaintiff still alleges some calls originated from a 940 (Texas) area code number (where CHW is not located), and that some of those calls also resulted in voicemails, he continues to merely conclude without factual support that this Texas number "is operated by" CHW and still provides no content for those calls.

See, *e.g.*, Dkt. 11, ¶¶ 47-52, 54, 56-57, 62-63. While Plaintiff added stray references to his FAC about calls purportedly originating from two more numbers with different Texas (682 or 972) area codes that he also concludes are "owned/operated by" CHW (*id.*, ¶ 74) in an attempt to avoid dismissal, he does not tether these new numbers to any of the at-issue calls, nor does he provide any content of calls that ***he*** may have received from such numbers (if any), either. Such bald allegations are insufficient to plausibly allege direct TCPA liability. *See, e.g., Aaronson*, 2019 WL 8953349, at *2 ("[W]ithout any facts to explain why plaintiff believes the identified phone number is owned by [CHW], ... plaintiff has failed to plead facts sufficient to support a theory of direct liability under the TCPA because plaintiff's allegations do not show plausibly that [CHW] actually, physically initiated the telephone calls at issue.").

Plaintiff also now concludes that CHW's name was "explicitly stated" on some calls that he answered (but he does not specify on which calls), and that the few (if any) calls he actually answered were about "the solicitation of a home warranty plan." *See, e.g.,* Dkt. 11, ¶¶ 31-32, 66-67. However, federal courts have widely recognized that even a call allegedly offering the defendant's products, mentioning the defendant by name, and/or originating "from" someone associated with the defendant in some fashion does not allow for a plausible inference that the defendant itself (and not a third party) physically placed each call at issue, as is required to plead direct TCPA liability, standing alone. *See, e.g., Scruggs,* 2020 WL 9348208, at *7-10 (holding

conclusory allegations that one caller expressly stated he/she was "associated with" CHW and identified CHW by name were insufficient for direct or vicarious TCPA liability); *Barnes v. SunPower Corp.,* 2023 WL 2592371, at *3 (N.D. Cal. Mar. 16, 2023) (dismissing on this basis, even though one plaintiff allegedly spoke to someone "who identified herself as working for" defendant, and the other plaintiff purportedly received a "call back number" for defendant by the caller and received an email from defendant after the call); *Abante Rooter,* 2018 WL 288055, at *4 (holding allegations that the plaintiff received a call from someone purportedly calling on behalf of the defendant and who identified defendant by name were insufficient for direct TCPA liability); *Meeks*, 2018 WL 1524067, at *1-5 (finding no direct TCPA liability, even though at-issue texts identified the defendant by name); *Cunningham v. Daybreak Solar Power, LLC,* 2023 WL 3985245, at *2 (N.D. Tex. June 13, 2023) (holding the use of defendant's trade or marketing name was insufficient to show direct liability).

Of course, this makes logical sense. If all it took to demonstrate TCPA liability was for a communication to state the name of a defendant, there would be no need to distinguish between direct and vicarious liability theories in a complaint at all, and no TCPA case would ever be dismissed on these bases at the pleadings stage. Such is plainly not the law, as the many well-reasoned authorities above (and many others) show. That some callers mentioned a "home warranty plan" also does not support an inference of direct liability either, since CHW is obviously not the only home warranty

company in this country. *See Brownlee*, 2021 WL 4306160, at *1 (dismissing on this basis where caller was allegedly selling the same type of product as defendant, noting: "Defendant is not the sole seller of car insurance. Numerous other companies sell car insurance."). *See also Bennett v. Celtic Ins. Co.,* 2022 WL 865837, at *3 (N.D. Ill. Mar. 23, 2022) (dismissing on this basis and recognizing that "a defendant 'generally does not [physically] initiate calls [under the TCPA] placed by third-party telemarketers,' even if the third party had acted on its behalf") (citation omitted).

At best, Plaintiff's FAC still alleges (or, rather, merely concludes) that (i) prior to receiving the calls from the Texas (940) area code, he received one call from a toll-free number (800-495-6090) that he notes appears in CHW's "online privacy policy" and (ii) after the Texas calls, he subsequently received one call from a different toll-free number (800-814-4345), provided in a voicemail as a callback number for CHW. *See*, *e.g.*, Dkt. 11, ¶¶ 36-37, 69-70. However, Plaintiff does not indicate whether these numbers appeared ***on his Caller ID*** or if he is just assuming they did, let alone tie those two calls with the others that he alleges violated the TCPA. *See also Hicks*, 2020 WL 9261758, at *5 (holding that allegedly providing a call back number belonging to the defendant was insufficient for direct liability, without more); *Bank v. Vivint Solar, Inc.*, 2019 WL 2280731, at *2 (E.D.N.Y. Feb. 25, 2019), *report and rec. adopted*, 2019 WL 1306064 (E.D.N.Y. Mar. 22, 2019) (dismissing where "the Amended Complaint is silent as to the caller ID displayed during the Prerecorded Call").

Further, Plaintiff does not try to explain why CHW, an admittedly ***New Jersey-based*** company (*see* Dkt. 11, ¶ 2), would inexplicably call him initially from one toll-free number, then from ***three different Texas*** non-toll-free numbers (where CHW is indisputably not located), and then later from a completely ***different*** toll-free number. *See also Cornell Univ. v. Illumina, Inc.,* 2012 WL 1885129, at *5 (D. Del. May 23, 2012), *report and rec. adopted*, 2012 WL 2564888 (June 29, 2012) ("[W]hen deciding a Rule 12(b)(6) motion, 'a court is not to strain to find inferences favorable' to the non-moving party.") (quoting *Redden v. Smith & Nephew, Inc*., 2010 WL 2944598, at *3 (N.D. Tex. July 26, 2010)); *Curay-Cramer*, 450 F.3d at 133 (holding plaintiffs are only entitled to "reasonable" inferences in their favor under Rule 12(b)(6)).

In the end, however, Plaintiff's FAC only serves to confirm that ***he still does not actually know who physically placed each of the alleged violative calls***, and thus that he has not sufficiently alleged a direct TCPA liability theory.[3] For example, despite CHW having pointed this defect out in its previous motion to dismiss (*see* Dkt.

[3] Nor is Plaintiff entitled to any discovery to help him plead such facts at this stage. As one federal court aptly noted, "[a]s master of his [c]omplaint, it is [Plaintiff's] burden to state the facts within his knowledge that, taken as true, constitute a violation or violations of law [without the benefit of discovery]. [Plaintiff] possesses knowledge as to each and every telephone call he [allegedly] received from [CHW] and is perfectly capable of pleading facts to indicate to the Court that those calls violated the TCPA. As [Plaintiff] failed to plead these facts, his [FAC] must be dismissed pursuant to Rule 12(b)(6)." *See, e.g., Hyatt v. J.B. Hunt Transp. Servs., Inc*., 2015 WL 13648356, at *2 (W.D. Ark. June 16, 2015). *See also Hurley v. Messer,* 2018 WL 4854082, at *4 (S.D.W.Va. Oct. 4, 2018) (dismissing TCPA case in part on this basis, and noting that "allowing discovery where Plaintiff has failed to allege a plausible claim would be directly contrary to the mandates of *Iqbal* and *Twombly*").

8 at 13), Plaintiff still contradictorily alleges elsewhere in his FAC that CHW "***and/or its agents*** transmitted unwanted telephone calls to Plaintiff Bradshaw…." *See*, *e.g.*, Dkt. 11, ¶ 86 (emphasis added). *See also id.* ¶ 82 (a) (Plaintiff's class allegations, still likewise speculating whether CHW "or its agents placed pre-recorded voice messages calls to Plaintiff"). In other words, what Plaintiff really alleges here, at bottom, is that either CHW or countless unidentified third parties are at fault, which is insufficient to state a direct TCPA liability claim. *See, e.g., Bank v. Philips Elecs. N. Am. Corp.,* 2015 WL 1650926, at *2 (E.D.N.Y. Apr. 14, 2015) (holding similar allegations that the calls were "made by, or on behalf of, or with the authorization of, an authorized dealer of [defendant]" were "too conclusory to state a plausible [TCPA] claim"). Worse, such obviously "[c]ontradictory allegations … are [also] inherently implausible, and [thus] fail to comply with Rule 8, *Twombly*, and *Iqbal*" and cannot avoid dismissal under Rule 12(b)(6), either. *Hernandez v. Select Portfolio, Inc.,* 2015 WL 3914741, at *10 (C.D. Cal. June 25, 2015).[4] This Court should reach the same conclusion here.

Lastly, other than employing a couple of legal buzzwords (*e.g.*, "agents") as noted above, Plaintiff does not plead any facts remotely supporting an inference that CHW was in a common law agency relationship with any third party "agent" that called him, let alone that CHW had any "control" over such an agent and its call

[4] As noted above and further below (*see* Section B at p. 19), there are other directly contradictory allegations in the FAC suggesting Plaintiff was called by a third party (in particular, posts on one of the third party websites on which he heavily relies).

campaign (which is the key touchstone of vicarious liability under the TCPA and must also be pled to avoid dismissal here[5]), even in a conclusory fashion. Moreover, Plaintiff's FAC also now appears to ***expressly concede*** that he is not alleging a vicarious liability theory here. *See* Dkt. 11, ¶ 75 (concluding the calls were from CHW "directly and not a third-party"). As such, the FAC should also be dismissed on vicarious liability grounds. *See, e.g., Zarichny v. Complete Payment Recovery Servs., Inc.*, 80 F. Supp. 3d 610, 619 (E.D. Pa. 2015) (dismissing where plaintiff did not plead allegations that could plausibly support his vicarious TCPA liability theories); *Landy*, 2021 WL 3634162, at *4 ("[a]n entity cannot be held [vicariously] liable under the TCPA 'merely because they stand to benefit from the call'") (citation omitted).

* * *

All told, Plaintiff's "either/or" pleading tactic has been rejected time and again by countless courts, both in and outside of the TCPA context. Because Plaintiff still does not properly allege plausible facts supporting a direct or vicarious TCPA liability theory, this Court should dismiss both of Plaintiff's TCPA claims under Rule 12(b)(6) on these bases alone. *See, e.g., Tuso v Lennar Corp.,* 2024 WL 1239474, at *4 (S.D. Fla. Mar. 22, 2024) ("Because [plaintiff] has failed to allege that the Defendant is liable—either directly or vicariously—his [TCPA] claims must be dismissed.");

[5] *See, e.g., Doyle v. Matrix Warranty Sols., Inc.,* 2023 WL 4188313, at *4 (D.N.J. June 26, 2023); *Daybreak Solar Power, LLC,* 2023 WL 3985245, at *3; *Rogers v. Assurance IQ, LLC*, 2023 WL 2646468, at *6 (W.D. Wash. Mar. 27, 2023).

Nelums v. Mandu Wellness, LLC, 2023 WL 5607594, at *9 (D.N.M. Aug. 30, 2023) (ruling similarly and recognizing it was not necessary to consider the other necessary elements of the plaintiff's claims because he had failed to allege a theory of liability).

B. Plaintiff Fails to Plead Facts Supporting Other Essential Elements of His Asserted TCPA "Prerecorded Call" Claim (Count I).

Beyond failing to plead a viable direct or vicarious TCPA liability theory, which alone warrants a complete dismissal here, Plaintiff's asserted "prerecorded call" claim under Section 227(b) of the TCPA in Count I fares no better on its own.

To avoid dismissal on this front, the FAC also "must include some factual allegations beyond 'the call had a prerecorded voice.'" *Smith v. Pro Custom Solar LLC*, 2021 WL 141336, at *3 (D.N.J. Jan. 15, 2021). *See also Manopla v. Sansone Jr's 66 Automall*, 2020 WL 1975834, at *2 (D.N.J. Jan. 10, 2020) (dismissing § 227(b) claim where plaintiff failed to allege facts "regarding the tenor, nature, or circumstances of the alleged calls" and "merely proffer[ed] the content of the message and conclusory allege[d] that Defendant utilized a pre-recorded message"). Again, while courts do not expect "technical specifications" about the delivery mechanism used, they do uniformly require plaintiffs to plead sufficient supporting details from which a "prerecorded message" as opposed to a live human speaking can be inferred. *Johansen v. Vivant, Inc*., 2012 WL 6590551, at *3 (N.D. Ill. Dec. 18, 2012).

Along these lines, courts in this Circuit have held that, to plausibly allege such a TCPA claim, a complaint must contain some factual allegations beyond merely

concluding any voice heard was "prerecorded," and instead must provide sufficient contextual details from which it can be inferred that such a voice (as opposed to a live speaker reading from a script) was used. *See, e.g., Trumper v. GE Capital Retail Bank,* 2014 WL 7652994, at *2 (D.N.J. July 7, 2014); *Manopla*, 2020 WL 1975834, at *2; *Pro Custom Solar LLC*, 2021 WL 141336, at *3. Myriad other courts have ruled similarly, and have consistently dismissed on this basis.[6] This Court should do so here.

In the present case, Plaintiff still alleges that he received: (i) various voicemails "playing the background noises of a call center" (which suggests that they were all live calls) and (ii) one voicemail on December 8, 2023 that he concludes was "pre-recorded." Dkt. 11, ¶¶ 48, 51, 55, 57, 63, 69-70. While Plaintiff does not explain why CHW would suddenly go from leaving him multiple live voicemails to leaving one "pre-recorded" voicemail (probably because this too is inexplicable), he concludes that he "believes this [one] voicemail [was] pre-recorded" in contrast to all the others: (i) "because it appears to start mid sentence, is generic, is commercial, and the delivery sounds robotic" and (ii) "other consumers have recorded and posted the identical voicemail online (with minor differences attributable to transcription software

[6] *See, e.g., Curry v. Synchrony Bank, N.A.,* 2015 WL 7015311, at *2-3 (S.D. Miss. Nov. 12, 2015); *Reo v. Caribbean Cruise Line, Inc.*, 2016 WL 1109042, at *4 (N.D. Ohio Mar. 18, 2016); *Saragusa v. Countrywide,* 2016 WL 1059004, at *4 (E.D. La. Mar. 17, 2016), *aff'd* 707 F.App'x 797 (5th Cir. 2017); *Aaronson*, 2019 WL 8953349, at *3; *Caruso v. Cavalry Portfolio Svcs.,* 2019 WL 4747679, at *4 (S.D. Cal. Sept. 30, 2019); *Winters v. Quicken Loans Inc.,* 2020 WL 5292002, at *4 (D. Ariz. Sept. 4, 2020); *Rogers*, 2023 WL 2646468, at *4; *Metzler*, 2023 WL 1779631, at *6.

errors)." *Id*. ¶¶ 71-72 (citing https://directory.youmail.com/phone/800-814-4345).

However, what Plaintiff tellingly omits from his FAC is that: (i) there are two other voicemail recordings on the same third party website on which he relies, neither of which are identical in content to the one Plaintiff claims to have received here; (ii) one of those is for an unrelated ***home security company*** (not CHW, which sells home ***warranty*** products), which further undermines his direct liability allegations;[7] (iii) the one that he claims is identical to the one he allegedly received is not completely identical in content;[8] (iv) one poster on that site purports to transcribe a different call from "Erica" with a different call back number,[9] which further suggests that the caller was reading from a script; (v) no one on that site claims the voicemails they received sounded "robotic" (or "pre-recorded") and, if anything, the posters suggest they were speaking with live persons, possibly reading from scripts; and (vi) none of the audio recordings posted are dated, let alone authenticated, so it is just as reasonable to infer Plaintiff himself posted this recording online to bolster his claim here. In short,

[7] Additionally, one poster on that website indicates they spoke with a live person from a "Pakistani call center" (as opposed to CHW itself which is indisputably based in New Jersey), while also noting the number used "is not associated with Choice Home Warranty anywhere on the internet" other than on ***that*** one particular website. *See* https://directory.youmail.com/phone/800-814-4345 (post dated Sept. 11, 2023).

[8] Plaintiff's rank speculation that there are "minor differences" between the two recordings "attributable to transcription software errors" is not a fact and should not be taken as true here. *See Thomas v. Varano,* 532 F. App'x 142, 146, n. 3 (3d Cir. 2013) ("Although discovery may ultimately reveal this statement to be true, at this point it is mere speculation and has no bearing on our Rule 12(b)(6) analysis.").

[9] *See* https://directory.youmail.com/phone/800-814-4345 (post dated Apr. 19, 2022).

Plaintiff's reliance on this website does not help, and instead undermines, his claim.

Regardless, others courts have rejected similar conclusory allegations as being insufficient to plausibly allege a claim under Section 227(b) of the TCPA. *See, e.g., Hicks*, 2020 WL 9261758, at *5 (dismissing such a claim where recordings on the same website cited here did not support the plaintiff's conclusions regarding the pre-recorded nature of the calls); *Metzler*, 2023 WL 1779631, at *6, nn. 12-13 (dismissing similar claim where plaintiff only received one allegedly "prerecorded" voicemail, and "[t]he voicemail [recording] itself provide[d] no indication that it was prerecorded as opposed to having been left by a caller reading from a script" and was not completely "identical" to the one the plaintiff received "based on the transcription provided"). This Court should rule similarly and dismiss Count I on this basis, too.

C. Plaintiff Fails to Plead Facts Supporting Other Essential Elements of His Asserted TCPA "Internal Do Not Call" Claim (Count II).

Plaintiff's continued attempt to state a claim under the TCPA's "internal" DNC regulations in Count II of the FAC also fails for at least three additional reasons:

First, Count II should be dismissed because there is no private cause of action for violations of the TCPA's "internal" DNC regulations, which are only technical and procedural in nature. As one court noted, Section 64.1200(d) "was ... promulgated under [Section] 227(d), a subsection of the TCPA which does not provide a private cause of action," as opposed to Section 227(c) which does. *Braver v. NorthStar Alarm Serv., LLC,* 2019 WL 3208651, at *14-15 (W.D. Okla. July 16, 2019) (granting

summary judgment on plaintiff's 64.1200(d) claim for this reason).[10] Because Section 64.1200(d) does not provide a private cause of action, Count II should be dismissed under Rule 12(b)(6) with prejudice. *See Wilson,* 422 F. Supp. 3d at 981-982.

In response to this Motion, CHW anticipates that Plaintiff may cite contrary opinions and argue that Section 64.1200(d) of the regulations falls under Section 227(c) of the TCPA, which does afford him a private right of action. However, many of the cases holding as much rely primarily, if not exclusively, on the deeply-flawed ruling in *Charvat v. NMP*, 656 F.3d 440 (6th Cir. 2011), or on cases relying on that faulty decision, where the Sixth Circuit merely "***state[d]***" that Section 64.1200(d) was promulgated under Section 227(c) of the TCPA rather than Section 227(d) "***without [any] analysis***." *Braver*, 2019 WL 3208651, at *15 (emphasis added). In stark contrast to *Charvat* and courts that have blindly followed that decision, numerous other federal district courts (including those cited above and others) have performed a ***thorough*** well-reasoned analysis of the TCPA's legislative history, and have agreed that there is no private cause of action under the internal DNC rules, which are technical and procedural in nature and thus promulgated under Section 227(d), which does not

[10] Several courts have dismissed Section 64.1200(d) claims like Plaintiff's under Rule 12(b)(6) on this same basis. *See, e.g., Wilson v. PH Phase One Operations L.P.*, 422 F. Supp. 3d 971, 981-982 (D. Md. 2019); *Worsham v. Travel Options, Inc.,* 2016 WL 4592373, at *4, 7 (D. Md. Sept. 2, 2016), *aff'd,* 678 F.App'x 165 (4th Cir. 2017); *Burdge v. Ass'n Health Care Mgmt. Inc.*, 2011 WL 379159, at *4 (S.D. Ohio Feb. 2, 2011); *Worsham v. Disc. Power, Inc.,* 2021 WL 5742382, at *3 (D. Md. Dec. 1, 2021), *aff'd*, 2023 WL 2570961 (4th Cir. Mar. 20, 2023). This Court should too, here.

afford litigants a private right of action. The Third Circuit has apparently yet to weigh in on this front. Accordingly, CHW respectfully submits this Court should follow the well-reasoned opinions above, reject *Charvat* and its progeny, rule here that Section 64.1200(d) of the TCPA's regulations does not afford Plaintiff private cause of action for alleged internal DNC violations, and dismiss Count II on this additional basis.

Second, even if this Court were to find that there is a private cause of action for alleged violations of the TCPA's internal DNC regulations (and it should not), Count II should still be dismissed because Plaintiff still does not allege, with sufficient non-conclusory supporting facts, that CHW failed to implement the minimum requisite procedures required by Section 64.1200(d) at the time of the alleged calls/texts.

As one federal district court correctly held when dismissing a similar TCPA claim on this basis, it is not enough for a plaintiff "simply [to] recite[] the requirements of 47 C.F.R. § 64.1200(d) and conclusorily allege[] that they were violated" to avoid dismissal. *Bailey v. Domino's Pizza, LLC*, 867 F. Supp. 2d 835, 842 (E.D. La. 2012). Many other courts have reached the same conclusion.[11] Furthermore, courts

[11] *See, e.g., Sterling v. Securus Techs., Inc.,* 2020 WL 2198095, at *5 (D. Conn. May 6, 2020) (holding bare assertions the defendant did not maintain an internal do-not-call list failed to state a claim); *Laccinole v. Rocket Mortg., LLC*, 609 F. Supp. 3d 68, 73 (D.R.I. 2022) ("[A]llegations concerning [the defendant's] supposed failure to implement the requisite procedures are mere recitations of the legal elements and must be discarded."); *Dobronski v. Horvath & Tremblay, LLC*, 2023 WL 7924707, at *2 (E.D. Mich. Nov. 16, 2023) (finding Section 64.1200(d) claim was deficiently pled, and dismissing it with prejudice, where the plaintiff's allegations did little more than recite the language of the regulations); *Callier v. Nat'l United Grp., LLC,* 2021 WL 5393829, at *7 & 9-10 (W.D. Tex. Nov. 17, 2021) (ruling similarly).

recognizing such a cause of action have also correctly recognized that the TCPA's "internal" DNC regulations do not prohibit "actually calling [or texting] an individual after the individual has requested placement on a[n] [internal] do-not-call list ... nor do the regulations specifically proscribe failing to record an individual's request to be placed on a do-not-call list." *Charvat v. DFS Servs. LLC,* 781 F. Supp. 2d 588, 592 (S.D. Ohio 2011) (citing *Charvat v. GVN,* 561 F.3d 623, 632 (6th Cir. 2009)).

In other words, a violation of Section 64.1200(d) only stems from "the initiation of the phone call without having [first] implemented the minimum procedures" and not when an internal DNC request is not honored or for other reasons (*e.g.*, training employees, having or providing a copy of a written internal DNC policy, maintaining the internal DNC list, etc.). *Charvat v. GVN,* 561 F.3d at 632. Put differently, the operative question here is whether the caller ***maintained*** such procedures in the first instance prior to initiating the alleged calls or texts, not merely whether additional call/texts were allegedly received after a request to be placed on the caller's internal DNC list. *See id.*; *see also Barr v. Macy's.com, LLC,* 2023 WL 6393480, at *4–6 (S.D.N.Y. Sept. 29, 2023) (dismissing internal DNC claim brought by the same counsel representing Plaintiff on this basis, recognizing that the "mere fact" a plaintiff allegedly receives a call or text after an internal DNC request is not a violation of the internal DNC regulations and thus insufficient to state a claim, standing alone) (citing *Simmons v. Charter Commc'ns, Inc.,* 222 F. Supp. 3d 121, 140 (D. Conn. 2016), *aff'd*,

686 F.App'x 48 (2d Cir. 2017)). This Court should rule similarly in the present case.

As applied here, Plaintiff's scant allegations regarding CHW supposed lack of internal DNC policies and procedures—which still appear mostly in a ***single paragraph***—are entirely conclusory and merely parrot the statutory text. *See, e.g.,* Dkt. 11, ¶ 91 ("Defendant placed calls to Plaintiff and members of the Class without implementing internal procedures for maintaining a list of persons who request not to be called/texted by the entity and/or by implementing procedures that do not meet the minimum requirements to allow the Defendant to initiate telemarketing calls/text messages.").[12] Yet, courts in jurisdictions recognizing such a cause of action have held that such naked allegations are insufficient to state a claim, without more. *See, e.g., Barr*, 2023 WL 6393480, at *5 (dismissing and rejecting nearly identical allegations).

Further, Plaintiff tellingly does <u>not</u> allege, for example, that he requested a copy of CHW's internal DNC policy at any point—which he could have done, per the statute (*see* 47 C.F.R. § 64.1200(d)(1))—and that CHW failed to provide it upon demand. That would not be a violation of the internal DNC rules by itself as noted above, but doing so might at least have given Plaintiff a minimal factual basis to allege whether CHW had internal procedures in place before he was called or texted. *See also Barr,* 2023 WL 6393480, at *5 (noting that requesting a copy of the defendant's

[12] *See also id.* ¶ 17 (concluding, without any factual support, that CHW "also systematically fails to remove consumer phone numbers from its dialing systems when consumers opt-out from receiving calls, as per Plaintiff's experience").

internal DNC policy might "bolster" such a claim); *Rahimian v. Adriano*, 2022 WL 798371, at *3 (D. Nev. Mar. 16, 2022) (ruling similarly and dismissing).

Third, Plaintiff contradicts himself by referring elsewhere in his FAC to CHW's online privacy policy, which expressly discusses how to make an internal DNC request (*see* Dkt. 11, ¶ 37), thus proving ***CHW did in fact have such internal DNC procedures in place*** at the time and therefore did not violate the regulations. *See also Garcia v. Munoz,* 2008 WL 2064476, at *7 (D.N.J. May 14, 2008) (citing *Gutierrez v. Peters*, 111 F.3d 1364, 1374 (7th Cir. 1997) ("[A] plaintiff can plead himself out of court by alleging facts which show that he has no claim….")).[13]

In sum, there are still zero facts in the FAC from which the Court could infer whether CHW did not have or maintain internal DNC procedures at the time of the alleged calls and texts, as is required to state such a claim (in jurisdictions where recognized) under the weight of federal applicable authority. And it contains directly contradictory facts undermining (if not precluding) such an inference. Thus, Count II of the FAC should be dismissed pursuant to Rule 12(b)(6) on this basis, as well. *See, e.g.*, *Bailey, Laccinole, Sterling, Callier, Dobronski, Barr, Simmons, Rahimian, supra.*

[13] This was true as of the time of the alleged calls here (November 2023). *See* https://web.archive.org/web/20231031093148/https://www.choicehomewarranty.com/privacy-policy/ (last visited May 6, 2024). *See also Pohl v. MH Sub I, LLC*, 332 F.R.D. 713, 716 (N.D. Fla. 2019) ("Numerous courts, including our sister courts, have taken judicial notice of web pages available through the WayBack Machine" under Fed. R. Evid. 201.) (collecting cases). In other words, Plaintiff effectively concedes that CHW did have an internal DNC policy at the time that he was called.

II. Plaintiff's Requests for Injunctive Relief Should Be Dismissed Under Rule 12(b)(1) for Lack of Federal Subject Matter Jurisdiction / Standing.

Additionally, among other remedies, Plaintiff generally seeks injunctive relief. *See, e.g.,* Dkt. 11, ¶¶ 19, 82, 84, Prayer. Yet, he does not still allege he is at risk of any future injury (*i.e.*, of receiving calls from or on behalf of CHW in the future), as is required to demonstrate Article III standing for injunctive relief, in TCPA cases or in others. *See, e.g., Miller,* 2016 WL 7471302, at *2–4 (dismissing request for injunctive relief in TCPA case on standing grounds where there were no plausible factual allegations suggesting possible future harm); *Schaevitz v. Braman Hyundai, Inc.,* 437 F. Supp. 3d 1237, 1251–52 (S.D. Fla. 2019) (same).[14] Thus, Plaintiff's bald requests for injunctive relief should be dismissed under Rule 12(b)(1), at the minimum.

III. Any Dismissal Should Be With Prejudice.

Finally, the Court should dismiss the FAC with prejudice. Courts in the Third Circuit and elsewhere routinely dismiss complaints with prejudice pursuant to Rule 12(b)(6) where, as here, a plaintiff already had a chance to amend and amendment failed to cure the complaint's deficiencies. *See, e.g., Warden v. Woods Servs.,* 2020 WL 1289194, at *3 (E.D. Pa. Mar. 17, 2020); *Frame v. Cal-W. Reconveyance Corp.,* 2011 WL 3876012, at *3 (D. Ariz. Sept. 2, 2011) (dismissing with prejudice where "despite the benefit and existence of fully-briefed motions to dismiss, [p]laintiff's

[14] *See also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (to have standing for injunctive relief, plaintiffs adequately plead that "the threatened injury is 'certainly impending,' or [that] there is a 'substantial risk' that the harm will occur.").

First Amended Complaint fail[ed] to cure the deficiencies noticed in [d]efendants' prior motions"). Here, Plaintiff has already amended. But despite being represented by counsel and having had the benefit of CHW's prior dispositive motion briefing, he ultimately did not cure all the fatal plead defects identified above, and in some ways made those defects worse by adding more inconsistent allegations that undermine his conclusions. If he had more (or any) actual facts to allege, he could (and indeed should) have pled them by now. That he did not shows any further amendment would be futile. He has already had two bites at the apple. A third should not be permitted.

IV. Alternatively, the Court Should Strike Certain Improper Allegations from the FAC Pursuant to Rules 12(f) and/or 23.

If the Court does not dismiss the FAC, it should nevertheless strike certain facially improper allegations from it, identified below, under Rules 12(f) and/or 23.

First, federal district courts, in the TCPA context and in others, have recognized that "'[s]uperfluous historical allegations are a proper subject of a [Rule 12(f)] motion to strike.'" *Hicks,* 2020 WL 9261758, at *5 (quoting *Woo v. Home Loan Group, L.P.*, 2007 WL 6624925, at *5 (S.D. Cal. Jul. 27, 2007) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994))). The same is true for allegations about complaints filed in other cases or, as particularly relevant here, online "complaints" posted anonymously by third parties. *See, e.g., Hicks,* 2020 WL 9261758, at *5-6 (striking similar allegations in TCPA case). In this case, paragraphs 18, 72, 73, and 74 of the FAC (and the associated

footnotes) contain numerous improper allegations that should be stricken in their entirety under Rule 12(f). These refer to anonymous posts on third party websites Plaintiff suggests are reflective of unsolicited calls to ***other*** consumers from or on behalf of CHW. Yet, nothing in those posts (which are pure hearsay) suggests that CHW is liable for the ***specific*** alleged calls to Plaintiff at issue ***here***. *See also Hicks,* 2020 WL 9261758, at *6 (noting such allegations "offer attenuated information that does little to support Plaintiff's claims"); *Fisher v. Alarm.com Holdings, Inc.*, 2018 WL 5717579, at *3 (N.D. Ill. Nov. 1, 2018) (ruling in a TCPA case that allegations involving defendant's alleged conduct in an unrelated case did nothing to support an inference defendant was liable in the case at bar). Thus, these unsubstantiated internet hearsay allegations about alleged calls to ***other*** unidentified persons are irrelevant, immaterial, have no bearing on ***Plaintiff's claims*** in ***this*** case, and only serve to unduly prejudice CHW. These allegations should be entirely stricken from the FAC.

Second, Plaintiff's proposed "Internal Do Not Call Class" definition (*see* Dkt. 11, ¶ 79), on its face, is impermissibly "fail-safe" in violation of Rule 23 and, therefore, should also be stricken. "A fail-safe class is 'one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim.'" *Zarichny,* 80 F. Supp. 3d at 623 (quoting *Messner v. Northshore University HealthSystem,* 669 F.3d 802, 825 (7th Cir. 2012)). Such facially defective classes are not permitted because they "shield[] the putative class members from receiving an

adverse judgment" and "either the class members win or, by virtue of losing, they are not in the class, and therefore not bound by the judgment." *Balassiano v. Fogo De Chao Churrascaria (Orlando) LLC,* 2020 WL 7365264, at *3 (M.D. Fla. Dec. 15, 2020), *report and rec. adopted*, 2021 WL 2019722 (Jan. 7, 2021) (citation omitted). As such, courts in this Circuit routinely strike impermissibly "fail safe" classes in TCPA cases at the pleadings stage—especially where the proposed class is limited to include only persons who did not provided their "consent" within the meaning of the TCPA, or (as here) who did not properly revoke their "consent." *See, e.g., Zarichny,*, 80 F. Supp. 3d at 623-26; *Martinez v. TD Bank USA*, 2017 WL 2829601, at *12 (D.N.J. June 30, 2017). Courts in other circuits have consistently done so, as well. *See, e.g., Lindsay Transmission, LLC v. Office Depot, Inc.,* 2013 WL 275568, at *4-5 (E.D. Mo. Jan. 24, 2013); *Sauter v. CVS Pharmacy, Inc.*, 2014 WL 1814076, at *8-9 (S.D. Ohio May 7, 2014); *Pepka v. Kohl's Dep't Stores, Inc.*, 2016 WL 8919460, at *1-5 (C.D. Cal. Dec. 21, 2016); *Dixon v. Monterey Fin. Servs., Inc.,* 2016 WL 4426908, at *2 (N.D. Cal. Aug. 22, 2016); *Tomaszewski v. Circle K Stores Inc.,* 2021 WL 2661190, at *2–3 (D. Ariz. Jan. 12, 2021); *Bryant v. King's Creek Plantation, LLC*, 2020 WL 6876292, at *3 (E.D. Va. June 22, 2020). This Court should rule similarly.

As applied here, the only persons who could possibly be members of Plaintiff's proposed "Internal" DNC class (as pled) are those who received calls after they "communicated their wish to not receive any further communications" (*i.e.*, revoked

consent) and, therefore, have a valid TCPA claim. Dkt. 11, ¶ 79. Consequently, membership in the proposed internal DNC class is expressly predicated on having a successful TCPA claim, rendering it impermissibly (and indeed classically) fail safe under Rule 23 and thus properly stricken at the pleadings stage under Rule 12(f), too.

CONCLUSION

For all these reasons, Court should enter an order (ii) dismissing the FAC, in its entirety and with prejudice, under Rules 12(b)(6) and 12(b)(1), or (ii) alternatively striking the improper allegations identified above under Rules 12(f) and/or 23.

Dated: May 6, 2024

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CERTIFICATE OF SERVICE

I hereby certify that, on May 6, 2024, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's electronic docket.

/s/ Kenneth D. Friedman