IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BILL KASPERS, on behalf of himself and all other similarly-situated citizens, owners or co-owners of residences, and residents of the Derby Hills residential subdivision in Sandy Springs, Fulton County, Georgia,	)	CLASS ACTION
Plaintiffs,	)	Civil Action No. 1:20-cv-02142-LMM
vs.	)	
VERIZON WIRELESS SERVICES, LLC,	)	
Defendant.	)	

BRIEF IN SUPPORT OF
DEFENDANT VERIZON WIRELESS SERVICES, LLC'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

STATUTES

OTHER AUTHORITIES

Defendant Verizon Wireless Services, LLC's ("Verizon") submits this brief in support of its Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim for which relief can be granted. Federal law governing radiofrequency ("RF") emissions from wireless service facilities preempts all of Plaintiff's claims and requires dismissal of this case with prejudice. Each count in Plaintiff's Complaint also fails because Plaintiff does not plead facts stating a viable claim under any of the five theories asserted.

INTRODUCTION

Bedrock principles of preemption law require the dismissal of this lawsuit. Plaintiff brings various tort claims alleging harm from radiofrequency emissions from a telephone pole and 5G antenna scheduled for installation in Plaintiff's neighborhood. Federal and state courts across the country have definitively held that federal law preempts such state-law tort suits challenging the safety of federally-regulated wireless phone technology. *See, e.g.*, *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315, 320 (6th Cir. 2017) (affirming preemption dismissal of claim that exposure to radiofrequency (RF) emissions would "endanger public health and safety"). Directly on point is the Sixth Circuit's decision in *Robbins v. New Cingular Wireless PCS*. *Id.* There, the Sixth Circuit recognized that federal law gives

the Federal Communications Commission (FCC) exclusive authority to set RF-emissions safety standards, and that state-law tort suits would stand as an "obstacle" to that authority by "shift[ing] the power to regulate RF [radiofrequency] emissions away from the FCC and into the hands of courts and state governments." *Id*. This case is indistinguishable, and preemption bars this and all other "RF-emissions-based tort suits." *Id*. Plaintiff's claims should be dismissed with prejudice.

Though Plaintiff's claims are entirely barred by preemption, the Complaint also fails to state any claims upon which relief can be granted based on manifest pleading principles, and all claims should be dismissed for failing to allege facts that, even if true, would entitle Plaintiff to relief.

SCIENTIFIC AND REGULATORY BACKGROUND

A cell phone functions by transmitting information between the phone's low-powered radio transmitter and an antennae, usually one mounted on a pole, tower, or other structure. *See Farina v. Nokia Inc.*, 625 F.3d 97, 104 (3d Cir. 2010) (dismissing lawsuit challenging cell-phone safety). The antennae mounted on poles or towers are often called base stations. When cell phones communicate with base stations, the phones and the base stations emit RF energy. *Id.* This case challenges

the planned installation of a telephone pole which will hold an antenna used to provide 5G wireless phone service, *i.e.*, a 5G base station.

The FCC has "exclusive" authority over the technical aspects of radio communications, including RF emissions. *Farina,* 625 F.3d at 105 (quoting *Head v. N.M. Bd. Of Examiners in Optometry*, 374 U.S. 424, 430 n.6 (1963)). In 1996, under the authority of the Telecommunications Act of 1996 (TCA), the FCC adopted maximum exposure standards for RF emissions from base stations and individual cell phones. *Id.* at 107. In 2013, the FCC launched an inquiry to assess whether it should amend its RF exposure standards, which apply to 5G antennae and devices just as they apply to other sources of RF emissions. Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies, 28 FCC Rcd 3498, 3570–89 ¶¶ 205-252 (2013) (2013 Notice of Inquiry). After reviewing the latest scientific research on the subject, the Commission concluded in an order issued in December 2019 that its existing RF limits "reflect the best available information concerning safe levels of RF exposure for workers and members of the general public." *See* Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields, 34 FCC

Rcd 11687, 11697 ¶ 2 (2019) (2019 RF Order).[1] The agency found no "data in the record to support modifying [the] existing exposure limits," and "no expert public health agency expressed concern" about them. *Id.* ¶ 10. The FCC further concluded that "as noted by the [Food and Drug Administration], there is no evidence to support that adverse health effects in humans are caused by exposures at, under, or even in some cases above, the current RF limits." *Id.* ¶ 12. Accordingly, the FCC terminated its RF inquiry in 2019 and "decline[d] to initiate a rulemaking to reevaluate the existing RF exposure limits." *Id.* ¶ 10.

STANDARD OF REVIEW

To survive a motion to dismiss, plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is not enough for a complaint to allege facts that create only a "sheer possibility that the defendant has acted unlawfully." *Id.* at 678. Plaintiffs are required to allege "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

[1] *Available at* https://docs.fcc.gov/public/attachments/FCC-19-126A1_Rcd.pdf.

"A complaint is also subject to dismissal under Rule 12(b)(6) when its allegations—on their face—show that an affirmative defense bars recovery on the claim." *Marsh v. Butler Cty., Ala.*, 268 F.3d 1014, 1022 (11th Cir. 2001). "[I]f the complaint itself demonstrates [federal preemption], a Rule 12(b)(6) dismissal would be proper." *Quiller v. Barclays Am./Credit, Inc.*, 727 F.2d 1067, 1069 (11th Cir. 1984), *on reh'g*, 764 F.2d 1400 (11th Cir. 1985); *see also Grant v. Gen. Elec. Credit Corp.*, 764 F.2d 1404, 1409 (11th Cir. 1985) (affirming dismissal based on federal preemption).

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE PREEMPTED BY THE FEDERAL TELECOMMUNICATIONS ACT OF 1996.

This Court should apply axiomatic preemption principles to dismiss this RF-emissions-based tort suit as guided by numerous analogous federal and state cases.

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl.2. "In accordance with that principle, when state law conflicts with federal law, state law must give way." *Guarino v. Wyeth, LLC*, 719 F.3d 1245, 1248 (11th Cir. 2013).

A. The Telecommunications Act Expressly Preempts Plaintiff's Claims.

"Express preemption applies where Congress, through a statute's express language, declares its intent to displace state law." *Robbins*, 854 F.3d at 319. The Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, "generally preserves the traditional authority of state and local governments to regulate the location, construction, and modification of wireless communication facilities like cell phone towers." *T-Mobile S., LLC v. City of Roswell, Georgia*, 574 U.S. 293 (2015) (quotations and citations omitted); *see* 47 U.S.C. § 332(7)(A). But the Act imposes "specific limitations" on that authority, and those limitations preempt Plaintiff's claims. *T- Mobile S., LLC*, 574 U.S. at 300 (quoting *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005)). Section 47 U.S.C. § 332(c)(7)(B)(iv) expressly prohibits states from providing precisely the type of relief sought by Plaintiff here:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

"Environmental effects within the meaning of [this section] include health concerns about the biological effects of RF radiation." *T-Mobile Ne. LLC v. Town of Ramapo*, 701 F. Supp. 2d 446, 460 (S.D.N.Y. 2009); *see also Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 88 (2d Cir. 2000) ("[T]he Act preempted state and

local governments from regulating the placement, construction or modification of personal wireless service on the basis of the health effects of RF radiation where the facilities would operate within levels determined by the FCC to be safe.").

Federal and state courts have interpreted this provision according to its plain terms and held that it preempts state regulation of wireless facilities, like base stations, based on the environmental effects of RF emissions. *See, e.g.*, *Farina v. Nokia, Inc.*, 625 F.3d 97, 119 (3d Cir. 2010) ("The fair reading of this statute . . . focuses on state and local decisions with respect to the physical infrastructure of the wireless network."); *Pinney v. Nokia*, 402 F.3d 430, 455 (4th Cir. 2005) (analyzing "facilities" in the context of Section 332(c)7 and finding that "§ 332(c)(7) deals with the authority of the states *over zoning and land use*, we conclude that Congress intended the term 'facility' to mean a structure or object, such as a base station or a mobile telephone switching office [], that falls within the states' zoning or land use authority" and focuses on "attachment to land" and is "part of the infrastructure . . . that provides wireless service coverage").

There is no allegation in the Complaint that the base stations here fail to comply with FCC regulations concerning RF emissions; nor could there be given that the base stations have yet to be built. Inasmuch as Plaintiff's claims seek to prevent deployment of base stations based on alleged health effects of RF emissions

from the 5G base station at issue, they are preempted by the plain language of 47 U.S.C. § 332(c)(7)(B)(iv), and Plaintiff's entire Complaint fails.

B. Plaintiff's Claims Are Also Impliedly Preempted.

Even if Plaintiff's claims were not expressly preempted, "state law can be impliedly preempted by federal law in cases of field preemption and conflict preemption." *Fresenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935, 939 (11th Cir. 2013) (citing *Arizona v. United States*, 567 U.S. 387 (2012)). Conflict preemption "arises in instances where (1) 'compliance with both federal and state regulations is a physical impossibility,' or (2) 'the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Fresenius*, 704 F.3d at 939 (quoting *Arizona*, 567 U.S. at 399). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects[.]" *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

Federal and state courts have uniformly dismissed claims related to alleged harmful effects of RF emissions on the basis of conflict preemption. *See, e.g.*, *Robbins*, 854 F.3d at 318 (affirming preemption dismissal of claim that exposure to radiofrequency (RF) emissions would "endanger public health and safety")*; Farina v. Nokia, Inc.*, 625 F.3d 97 (3d Cir. 2010) (affirming preemption dismissal of

putative class action alleging that cell phone antennas expose users to harmful RF emissions); *Fontana v. Apple Inc.*, 321 F. Supp. 3d 850 (M.D. Tn. 2018) (dismissing with prejudice as preempted a personal injury action for alleged injuries from iPhone RF exposure); *New Par v. City of Saginaw*, 301 F.3d 390, 398 (6th Cir. 2002), *abrogated in part on other grounds by City of Roswell*, 135 S. Ct. 808 (2015) ("[T]he Act explicitly prohibits local board decision-making 'on the basis of the environmental effects of radio frequency emissions'").

This Court should similarly apply conflict preemption to dismiss this RF-emissions-based tort suit involving health claims just as the Sixth Circuit did in *Robbins*. The plaintiffs in that case challenged the construction of "a 125-foot cell-phone tower" by filing suit against a cell-phone-service provider, requesting "damages and an injunction for [various] torts." *Robbins*, 854 F.3d at 318. Those plaintiffs claimed that the cell tower would "endanger public health and safety." *Id*. They relied on "an expert report surveying the scientific literature on radio frequency ('RF') emissions from cell-phone towers," which allegedly "linked living near cell-phone towers to higher rates of cancer, brain tumors, and a multitude of other health problems." *Id*. The district court dismissed the state-law tort claims because federal law "impliedly preempts claims based on RF emissions that comply with Federal Communications Commission ('FCC') standards." *Id*. at 319.

The Sixth Circuit affirmed. Guided by the general principle that "Congress can preempt state law either expressly or impliedly," *Robbins* surveyed implied conflict preemption, including "obstacle preemption, where 'the state law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id*. (quoting *Yates v. Ortho-McNeil-Janssen Pharm., Inc*., 808 F.3d 281, 294 (6th Cir. 2015)). The Sixth Circuit "agree[d]" with the district court that "obstacle preemption fits the bill" to justify the dismissal of an RF emissions tort suit. *Id*. This is so because "by delegating the task of setting RF-emissions levels to the FCC, Congress authorized the federal government—and not local governments—to strike the proper balance between protecting the public from RF-emissions exposure and promoting a robust telecommunications infrastructure." *Id.* at 319–20. "Allowing RF-emissions-based tort suits would upset that balance and impair the federal government's ability to promote the TCA's goals . . . Widespread litigation would also shift the power to regulate RF emissions away from the FCC and into the hands of courts and state governments." *Id.* (citing *Stanley v. Amalithone Realty, Inc.*, 94 A.D.3d 140 (2012)).

These well-established preemption principles also were applied in a New York case cited by the *Robbins* court in which the plaintiffs asserted various state law claims against the owner of a building with a cellular communications tower

based on plaintiffs' alleged exposure to RF emissions from the tower. *See Stanley v. Amalithone Realty, Inc*., 94 A.D.3d 140 (2012). The plaintiffs sought an injunction requiring removal of the cellular transmission antennas, along with damages for personal injury and property damage. *See id.* at 142. The court rejected plaintiffs' assertion that they were "not asking this Court to regulate RF emissions" (*id*. at 146) and affirmed the trial court's dismissal of the complaint. The court held that "all of plaintiffs' claims are premised on the notion that the RF emissions emanating from [the tower] are unsafe or dangerous" and were preempted because the plaintiffs had not alleged that they had been exposed to RF emission levels that exceeded "the permissible range of the FCC's guidelines." *Id.* at 145, 146. "To the extent that a law or regulation of this state conflicts with the [1996 Act] or any of the FCC's valid regulations under that statute, it is preempted and has no effect." *Id***.** at 145.

C. Conflict Preemption Principles Analyzed in Other RF Emission Cases Are Similarly Consistent.

Numerous federal and state courts in addition to *Robbins* and *Amalithone Realty* have applied obstacle conflict preemption to bar state-law actions based on alleged health effects of RF emissions. For example, in *Farina*, the Third Circuit upheld federal conflict preemption of a putative class action seeking to compel the provision of headsets to cell phone purchasers because of alleged adverse health effects from RF emissions. 625 F.3d at 133-34. The Third Circuit started by

surveying the science of RF emissions from cell phones and the FCC's determinations that "the evidence for production of harmful biological effects from low-level RF radiation is ambiguous and unproven," and that "any cell phone legally sold in the United States is a 'safe' phone." *Id*. at 105 (citations omitted). The court also explained the preemption legal framework in which "[f]ederal regulations preempt state laws in the same fashion as congressional statutes," and "[p]reemption can apply to all forms of state law, including civil actions based on state law." *Id*. at 115 (citations omitted).

Turning to obstacle conflict preemption, the Third Circuit noted that "[t]he Supreme Court's preemption case law indicates that regulatory situations in which an agency is required to strike a balance between competing statutory objectives lend themselves to a finding of conflict preemption." *Id*. at 123 (citing *Buckman Co. v. Plaintiffs' Legal Comm*., 531 U.S. 341, 348 (2001)). The *Farina* court then explained why conflicting state law is preempted because it upsets the federal policy balance struck by the FCC when setting RF safety standards:

> When Congress charges an agency with balancing competing objectives, it intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives. Allowing state law to impose a different standard permits a re-balancing of those considerations. A state-law standard that is more protective of one objective may result in a standard that is less protective of others.

Id. (citing *Geier v. Am. Honda Motor Co*., 529 U.S. 861, 875 (2000) (holding that imposition of liability in a tort suit would conflict with the federal agency's deliberate policy choice)).

Like the Sixth Circuit, the Third Circuit found that the TCA presented the FCC with competing "mandates to regulate the safety concerns of RF emissions and to ensure the creation of an efficient and uniform nationwide network." *Id*. at 125; *accord Robbins*, 854 F.3d at 320. *Farina* described the FCC's policy balancing as "establish[ing] a set of standards that limit RF emissions enough to protect the public and workers while, at the same time, leav[ing] RF levels high enough to enable cell phone companies to provide quality nationwide service in a cost-effective manner." *Farina*, 625 F.3d at 125. The Third Circuit found that RF emission claims are preempted because "[t]he inexorable effect of allowing suits like Farina's to continue is to permit juries to second-guess the FCC's balance of its competing objectives," and "[t]he FCC is in a better position to monitor and assess the science behind RF radiation than juries in individual cases." *Id*. at 133-34.

Numerous cases have rendered similar obstacle-preemption dismissals. *See, e.g*., *Bennett v. T-Mobile USA, Inc*., 597 F. Supp. 2d 1050, 1053 (C.D. Cal. 2008) (dismissing personal injury claims related to cell-phone use because "[t]o allow state claims such as these asserted by Plaintiff to proceed would be to question the

judgment of the FCC on the issue of RF emissions standards"); *Murray v. Motorola, Inc.*, 982 A.2d 764, 777 (D.C. 2009) (holding that plaintiffs' claims based on "allegations about the inadequacy of the FCC's RF radiation standard or about the safety of their FCC-certified cell phones . . . are preempted under the doctrine of conflict preemption"); *Firstenberg v. Monribot*, 350 P.3d 1215-16 (N.M. Ct. App. 2015) (affirming dismissal of injury claims because "lawsuits based on the premise that radiofrequency (RF) emissions from cell phones are harmful to human health are preempted under the doctrine of conflict preemption"); *Stanley*, 94 A.D.3d at 146 (dismissing claims as preempted because "[e]ntertaining plaintiffs' claims would require us to second guess the FCC's standards and engage in our own form of judicial regulation of RF emissions").

D. Plaintiff's Complaint Challenges the Safety of FCC-Regulated RF Emissions.

There can be no dispute that this action is a state-law RF-emissions-based tort suit. The Complaint plainly alleges that installing the 5G base station will "have a devastatingly adverse and potentially deadly effect on the health, well-being, livelihood and indeed the lives of themselves and the[] families and loved ones" of Plaintiff and members of the putative class. (Compl. ¶ Preamble.) In addition, Plaintiff asserts that Verizon's website fails to state anything "about the serious, toxic and potentially deadly health risks which necessarily follow the installation

and subsequent use of a 5G cell unit in a populated area as a result of the high-frequency (28 and 39 GHz) millimeter waves which are transmitted from the 5G cell unit." (Compl. ¶ 8.) Relying on unnamed reports, Plaintiff also alleges that "radiation from a 5G cell unit can cause cancer and other serious and potentially permanently debilitating health conditions in people of all ages." (*Id.*). And Plaintiff includes several allegations regarding the impact on housing prices he claims would result from "the toxic effects of the radiation waves emanating from a 5G cell unit on the nearby residents." (Compl. ¶ 9.) Plaintiff also claims that the installation and use of the 5G cell units will cause him and the class "to live in constant fear and dread regarding when and how seriously they will contract [] serious and potentially fatal health conditions and problems." (Compl. ¶ 10.)

Such tort-litigation, health-based attacks on the FCC's RF emissions standards are precisely the type of claims that *Robbins* and the above-cited cases dismissed because such claims would improperly "shift the power to regulate RF emissions away from the FCC and into the hands of courts and state governments." *Robbins*, 854 F.2d at 320. A finding for Plaintiff could only be based on agreeing with Plaintiff's premise that 5G cell units cause cancer or other negative health effects. Such a verdict is barred because it would be a tacit finding by a court that the FCC's RF-emissions standards are deficient. Plaintiff does not (and cannot)

allege that the RF emissions from Verizon's unbuilt 5G base station exceed any FCC regulations. The claims alleged in the Complaint are preempted, and it should be dismissed with prejudice.

II. THE COMPLAINT SHOULD ALSO BE DISMISSED BECAUSE IT FAILS TO PLEAD ANY VIABLE CLAIM.

The Telecommunications Act of 1996 preempts all of Plaintiff's claims. But the Complaint should also be dismissed in its entirety for the independent reason that it fails to state "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. This is true for all five of Plaintiff's claims as discussed below.

A. Count One Does Not State a Cognizable Claim for Trespass.

Count One is titled "Unlawful Trespass and Resulting Property Devaluation," but it fails to allege any set of facts that could constitute a trespass. Instead, the entire paragraph under this count is devoted to a discussion of how the installation of a 5G base station in Plaintiff's yard will lead to a future diminution in property value.

These allegations fail to address the basic elements of trespass and fail to state a claim against Verizon. Under O.C.G.A. § 51-9-1, which codifies common law trespass, an *unlawful* interference with the enjoyment of private property is the central element of a trespass. *See Ga.-Pac. Consumer Prods., LP v. Ratner*, 812 S.E.2d 120, 128 (Ga. Ct. App. 2018) ("GP has not acted unlawfully in the operation

of its manufacturing plant. As such, there can be no trespass."); *see also Pope v. Pulte Home Corp.*, 246 539 S.E.2d 842, 843-44 (Ga. Ct. App. 2000) ("A person commits trespass when he knowingly and without authority enters upon the land of another after having received prior notice that such entry is forbidden.").

Plaintiff's Complaint does not allege any unlawful entrance on his property. It merely alleges that an employee of Verizon's subcontractor approached Plaintiff's front door to notify him that it would be installing a telecommunications pole, and a conversation ensued that ultimately led to the subcontractor leaving and the filing of this lawsuit. (Compl. ¶ 7.) Plaintiff never alleges that Verizon (or its subcontractor) lacked the right to enter the property to install this 5G base station (*i.e.*, that it lacked the appropriate city permits),[2] and these facts, without more, cannot constitute a trespass.

Moreover, to the extent that the Complaint seeks injunctive relief against a future trespass, the Complaint fails for the same reason—there is no allegation that Verizon lacks authority to install a utility pole at the designated location. Plaintiff

[2] Plaintiff is likely aware that the City of Sandy Springs has a right-of-way easement over the portion of Plaintiff's property where Verizon intends to install a properly permitted utility pole pursuant to O.C.G.A. § 36-66C-6 and Section 50-153 of Sandy Springs' municipal codes. Plaintiff's Complaint ignores the issue of whether the installation of this pole is permissible under applicable law governing the location of utility poles, which are routinely placed in residential locations.

simply has not alleged any set of facts that could constitute an unauthorized entry or interference with his property and fails to state a claim for trespass. *See Webster v. Snapping Shoals Elec. Membership Corp.*, 176 335 S.E.2d 637, 639 (Ga. Ct. App. 1985) (holding that "the existence of [a] utility line was authorized and did not constitute a trespass" because the utility pole's installation was pursuant to an easement on plaintiff's property).

B. Count Two Fails to State a Claim.

Count Two is titled "Unlawful Taking of Property and of the Joy and Benefits of Home Ownership Under Color of Law," but it does not contain any allegations that resemble any cognizable claim under state or federal law. The paragraph under this count does not include any facts that relate to an "unlawful taking of property," but rather claims that Verizon "intentionally failed to inform" the City of Sandy Springs and its residents about a) actions that two foreign countries have taken to address 5G cell units, b) the findings of unspecified health studies related to 5G cell units, and c) a federal appellate decision from 2019 that involved an FCC order related to 5G antennae. (Compl. ¶ 15.) Even if these statements are all true, none of

them would entitle Plaintiff to any form of relief. Count Two does not contain any identifiable cause of action, and it fails to state a viable claim against Verizon.

C. Count Three Fails to State a Claim for Fraud.

Plaintiff's Complaint fails to allege any facts that relate to the elements of fraud, much less meet the heightened pleading requirements of Rule 9(b). In order to state a claim for fraud under Georgia law, a plaintiff must allege "(1) a false representation by the defendant; (2) scienter; (3) intention to induce the plaintiff to act or refrain from acting; (4) justifiable reliance by the plaintiff, and (5) damage to the plaintiff." *Brazil v. Janssen Research & Dev. LLC*, 249 F. Supp. 3d 1321, 1339 (N.D. Ga. 2016). To satisfy the particularity requirements of Rule 9(b), a plaintiff must also "plead facts as to time, place, substance of the defendant's alleged fraud, specifically the details of the defendant's allegedly fraudulent acts, when they occurred, and who engaged in them." *Id*.

The Complaint does not meet any of these requirements. For example, it does not allege any misrepresentation to Plaintiff, much less an intentional one. The Complaint only ambiguously states that "Verizon's failure to inform and provide notice to Plaintiff . . . is nothing more than fraud at all levels . . . ." (Compl. ¶ 16.) To the extent Plaintiff is claiming Verizon failed to inform him of alleged facts regarding 5G networks, the Complaint does not give any facts showing that Verizon

possessed non-public knowledge Plaintiff claims should have been disclosed or that Verizon had a duty to disclose anything to Plaintiff at all. *See* O.C.G.A. § 23-2-53 ("Suppression of a material fact *which a party is under an obligation to communicate* constitutes fraud.") (emphasis added). Nor has Plaintiff plead any facts from which a reasonable inference can be drawn that Verizon withheld certain information "to induce the plaintiff to act or refrain from acting[.]"[3] *Brazil*, 249 F. Supp. 3d at 1339. Nor does the Complaint allege that Plaintiff justifiably relied on any information (or omission) or was damaged by Verizon's actions. For all these reasons, Count Three should be dismissed for failure to state a claim.

D. Count Four Fails to State a Claim under 42 U.S.C. § 1983.

"To obtain relief under 42 U.S.C. § 1983, [a plaintiff] must show (1) that the [defendant] deprived her of a right secured under the Constitution or federal law and (2) that the deprivation occurred under color of state law." *Willis v. Univ. Health Servs.*, 993 F.2d 837, 840 (11th Cir. 1993). Plaintiff's Complaint fails to allege facts that might relate to either of these requirements such as, for example, what specific

[3] As stated above, Verizon did not (and does not) need Plaintiff's permission to install the pole. The City of Sandy Springs maintains a "right-of-way" easement over the location where Verizon intends to install the pole, and Verizon would not have had any reason to induce Plaintiff to do anything.

Constitutional right is at issue or how exactly Plaintiff has been deprived of that right.

In addition, to the extent Plaintiff's theory is that if a telephone pole were installed in the utility easement in his yard, it would somehow violate a constitutional right for purposes of 42 U.S.C. § 1983 (as opposed to being the routine, lawful installation of a telephone pole), then Plaintiff must plead facts to support that theory. Plaintiff ignores fact that the installation of this wireless service facility is lawful under applicable federal, state, and city laws and regulations, and instead, makes vague references to unspecified constitutional rights and to the alleged concealment of the adverse health effects of 5G RF emissions (which Plaintiff apparently uncovered in a short time on Google). Plaintiff's allegations are not sufficient to state a claim under any pleading standard.

E. Count Five Fails to State a Claim for Intentional Infliction of Emotional Distress.

Count Five should also be dismissed because the Complaint fails to allege any "extreme and outrageous" conduct. "In Georgia, to succeed on a claim of intentional infliction of emotional distress, Plaintiff must prove (1) intentional or reckless conduct; (2) extreme and outrageous conduct; (3) a causal connection between the wrongful conduct and the emotional distress; and (4) severe emotional distress." *Reese v. Emory Univ.*, No. 1:14-CV-2222-SCJ, 2015 U.S. Dist. LEXIS 193183, at

*13 (N.D. Ga. Jan. 29, 2015). Whether alleged conduct is egregious enough to sustain a claim for intentional infliction of emotional distress is a question of law. *Id*.

Here, Plaintiff's Complaint falls well short of alleging conduct that is extreme and outrageous. "The burden on a plaintiff asserting a claim for [intentional infliction of emotional distress] is heavy." *Porter v. Ocwen Loan Servicing, LLC*, No. 2:15-CV-154-RWS-JCF, 2016 U.S. Dist. LEXIS 185375, at *14 (N.D. Ga. Jan. 12, 2016) (internal quotations omitted) (recommending that the claim be dismissed). For behavior to be extreme and outrageous, a plaintiff must allege conduct that goes beyond a mere incident of rude or insensitive behavior. "Sharp or sloppy business practices" are not considered "as going beyond all reasonable bounds of decency as to be utterly intolerable in a civilized community." *McGinnis v. Am. Home Mortg. Servicing, Inc.*, 817 F.3d 1241, 1258 (11th Cir. 2016). The Complaint's allegations—that Verizon's subcontractor knocked on Plaintiff's door to inform him about the forthcoming installation of a telephone pole for a 5G cell—fails to meet Plaintiff's heavy burden. *See, e.g., Brown v. Suntrust Mortg., Inc.*, No. 2:12-CV-00120-RWS, 2012 U.S. Dist. LEXIS 178861, at *13 (N.D. Ga. Dec. 18, 2012) (dismissing a claim for IIED alleging that the defendant failed to give plaintiff material information at closing that ultimately resulted in a foreclosure). Again,

Plaintiff appears to allege that he *would be* emotionally distressed *if* the telephone pole were installed. That is not a present cause of action, nor could the lawful installation of a telephone pole ever meet the test of unconscionable conduct, and Plaintiff does not—and cannot—even allege that Verizon lacks the proper permits to install the pole.

Count Five also fails because the Complaint does not allege any facts suggesting that Plaintiff has or will suffer severe emotional distress. The Complaint only states that Plaintiff is owed damages because Verizon "intentionally inflict[ed] such emotional distress" upon Plaintiff. (Compl. ¶ 18.) This vague allegation is insufficient to support a plausible claim for IIED. *See Roberts v. JP Morgan Chase Bank, Nat'l Ass'n*, 802 S.E.2d 880, 885 (Ga. Ct. App. 2017) (affirming the dismissal of a claim for IIED because the "complaint says nothing at all about humiliation, embarrassment, fright, extreme outrage, or severe emotional distress") (internal quotations omitted).

For both of these reasons, Plaintiff's Count Five fails as a matter of law.

CONCLUSION

Dismissal should be with prejudice because leave to amend a complaint should not be granted where amendment would be futile or where the amended complaint would be subject to dismissal. *Frone v. City of Riverdale*, 521 F. App'x

789, 792 (11th Cir. 2013). The Complaint is fatally flawed in that no set of facts exist to state a plausible claim for relief. Accordingly, any attempt to amend the Complaint would be futile, and the Complaint would still be subject to dismissal. As such, and for all the foregoing reasons, Verizon respectfully requests that this Court grant its Motion to Dismiss in its entirety with prejudice.

Dated the 6th day of July, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Local Rules 5.1C and 7.1D, the foregoing was prepared in Times New Roman 14-point font, double-spaced, with a top margin of not less than 1.5 inches and a left margin of not less than 1 inch.

Dated the 6th day of July, 2020.

/s/ *Scott A. Elder*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the forgoing Brief in Support of Verizon's Motion to Dismiss has been served upon the counsel for the parties in interest herein via the Court's electronic case filing system:

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Dated the 6th day of July, 2020.

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