UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

J.T HAND, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

BEACH ENTERTAINMENT KC, LLC d/b/a SHARK BAR

THE CORDISH COMPANIES, INC.

ENTERTAINMENT CONSULTING INTERNATIONAL, LLC

Defendants.

Case No.: 4:18-cv-668-NKL

REDACTED VERSION

ORAL ARGUMENT REQUESTED

REPLY SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Defendants[1] hereby submit the following reply suggestions and response to Plaintiff's statement of material facts in further support of their Motion.

PRELIMINARY STATEMENT

Plaintiff's opposition to summary judgment ("Opposition") fails to establish a disputed fact issue required to prevent summary judgment on his TCPA claims. First, with respect to Plaintiff's ATDS Claim, courts around the country have granted summary judgment for defendants, where, as here, the Platforms do not generate the telephone numbers that were texted. Plaintiff concedes this critical fact but urges the Court to rewrite the statute based upon an outlier decision by the Ninth Circuit in *Marks v. Crunch San Diego, LLC*. There is no basis to ignore the TCPA's plain language and the Court should enter summary judgment for Defendants.

With respect to Plaintiff's DNC, Procedural and Revocation Claims ("Non-ATDS Claims"), these claims also suffer from a myriad of legal and evidentiary deficiencies. First, Plaintiff fails to demonstrate that the text messages to his cell phone even warrant the protections of the DNC provisions of the TCPA. Second, given the nature of the Procedural and Revocation Claims, this Court should conclude – as others have done – that no private right of action exists under these regulations. Third, Plaintiff's purchases at Shark Bar preclude his DNC Claims based upon any text received in 2017. Moreover, Plaintiff's Revocation Claim is predicated upon his allegation that he texted "stop" in response to one of Shark Bar's texts – yet no record of this communication exists.

Finally, both Cordish Companies and ECI are entitled to summary judgment because Plaintiff fails to offer record evidence in support of his claim that Shark Bar acted as their agent, as required for liability to attach under the TCPA.

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[1] Terms defined in Defendants' opening suggestions ("Mot.") have the same meaning herein.

RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS RELIED UPON IN OPPOSITION TO DEFENDANTS' MOTION

1. The code underlying [REDACTED]

RESPONSE: Admitted.

2. Plaintiff's proffered expert, Dr. Michael Shamos, [REDACTED]

RESPONSE: Admitted that Dr. Shamos stated as such in his report. Defendants deny, however, that Dr. Shamos' opinions as to how to interpret the TCPA are admissible, as set forth in Defendants' pending motion to exclude the opinion and testimony of Plaintiff's proffered expert Dr. Michael Shamos (Dkt. 133). Further, courts have rejected Dr. Shamos' interpretation of the TCPA. In *DeNova v. Ocwen Loan Servicing*, the court opined that the inclusion of "store" ensures "'that a system that generated random numbers and did not dial [the numbers] immediately [] but instead stored [the] numbers for later automatic dialing' constitutes an ATDS." 2019 WL 4635552, at *3-4 (M.D. Fla. Sept. 24, 2019) (quoting *Johnson v. Yahoo!, Inc.*, 346 F. Supp. 3d 1159, 1162 n.4 (N.D. Ill. 2018) (alterations in original)).

3. Defendants' [redacted]

RESPONSE: Admitted that Dr. Mitzenmacher testified as set forth above. Defendants, however, deny that Dr. Mitzenmacher offered any legal interpretation of the TCPA and further state that courts that have reviewed the "consent" exception in the ATDS provisions of the TCPA have concluded that it does not eliminate the requirement under the statute that the platform must "generate" the telephone numbers in order to qualify as an ATDS. *Thompson-Harbach v. USAA Fed. Sav. Bank*, 369 F. Supp. 3d 606, 626 (N.D. Iowa 2019); *Gadelhak v. AT&T Servs., Inc.*, 2019 WL 1429346, at *5 (N.D. Ill. Mar. 29, 2019) ("[T]he consent exception is drafted in such a way that it also applies to calls made using artificial or prerecorded voice – not just those made using an ATDS," and thus, "the consent exception still does have an effect—it does not suffer the embarrassment of being nugatory—even if ATDS does not cover systems that dial from preset lists.")

4. When a [redacted]

RESPONSE: **Controverted in part.** Defendants state that it is unclear which "platform" Plaintiff references in the above statement, but admit that, after a user presses send in Txt Live,

text messages are sent using Twilio to recipients, a process that also incorporates Shoryuken and Amazon Web Services' Simple Queue Service. (Mitzenmacher Rep. ¶¶ 116-23; Fig. 29.) Defendants further state that the process of sending a text message using Twilio is similar to sending a text message using a smart phone. (Mitzenmacher Rep. ¶¶ 37-38, 123-27.)

Further, for the reasons set forth in Defendants' suggestions in support of their pending motion to exclude the opinion and testimony of Plaintiff's proffered expert Dr. Michael Shamos (Dkt. 133), Dr. Shamos' testimony and report are inadmissible and thus should be disregarded on this motion.

5. Users

RESPONSE: Controverted in part. Defendants admit that a user of Txt Live did not need to dial each of the numbers in a campaign, but further state that the transmission of campaigns were the product of human judgment and direction and therefore deny that the process was "automated." (Mitzenmacher Rep. Fig. 29, ¶¶ 119-23; Uhlig Decl. ¶¶ 15, 18.) Defendants further admit that the user does not, in each instance he or she sends a text message, determine which specific contact to text; however, the Txt Live platform applies user-selected criteria to identify the recipient population. (Mitzenmacher Rep. ¶¶ 50-53; Uhlig Decl. ¶¶ 15, 18.) By setting filters, a user of Txt Live! is able to specify a preliminary set of contacts who may receive a text message. (Mitzenmacher Rep. ¶ 53.) A person who is not in the preliminary set of contacts that the user has identified will not receive a message. (*Id.*) Next, the user is able to enter the number of contacts

that should be sent messages. (*Id.*) Defendants further state that a user of Txt Live may also select the specific recipients of text messages. (*Id.* ¶¶ 51-52.)

Further, for the reasons set forth in Defendants' suggestions in support of their pending motion to exclude the opinion and testimony of Plaintiff's proffered expert Dr. Michael Shamos (Dkt. 133), Dr. Shamos' testimony and report are inadmissible and thus should be disregarded on this motion.

6. Dr. Mitzenmacher

(Mitzenmacher Dep. at 147:13–148:1.)

RESPONSE: Controverted.

(Mitzenmacher Dep. 147:13-148:1.) Dr. Mitzenmacher was asked

(Declaration of Whitney Smith dated December 19, 2019 ("Smith Reply Decl.") Ex. M (Mitzenmacher Dep. 201:16-202:13).)

7. Cordish and ECI

RESPONSE: Controverted in part. Defendants state that (Kenney Decl. Ex. K) and that (*Id.* Ex. P.) Defendants deny that the information written on an invoice issued by a third-party in any way reflects whether Cordish Companies owns property, conducts any business or operations, or has any employees. (Fowler Decl. ¶ 3.)

While Plaintiff points to certain references to "Cordish" or employees of "Cordish Companies" (Pl. Resp. ¶ 3), these references are not to the named Defendant in this case, The Cordish Companies, Inc. (Declaration of Robert Fowler dated December 19, 2019 ("Fowler Reply Decl.") ¶¶ 4-8.) With respect to the statements on the website, the website provides as follows:

> Cordish Companies, The Cordish Companies, The Cordish Company, Cordish, Entertainment Consulting International and ECI are trade names for a group of corporations, limited liability companies and partnerships. Each mixed-use project, office building, multi-family residential building, casino, hotel, shopping center, parking garage, bar, restaurant, entertainment venue, business and property referenced on this website is owned and operated by a separate, single-purpose legal entity that is solely responsible for its obligations and liabilities. Each is a separate entity, with separate capital, ownership and management structures for each entity. Each entity is operated as an independent financial entity. No common operations or financial interdependency, and no intermingling of assets or liabilities of the separate entities, are intended to or should be deemed to exist as a result of the common reference to multiple entities under the name "Cordish", "The Cordish Companies", "The Cordish Company", Entertainment Consulting International, LLC and/or ECI on this website. No ownership by The Cordish Companies, The Cordish Company or Entertainment Consulting International, LLC of these properties or projects is expressed or implied.

(*Id.* Ex. A.)

Further, regarding Mr. Kenney's description of settlement negotiations, his description ignores that Plaintiff did not serve this action until July 25, 2018. (Dkt. 1.) Thus, Plaintiff's counsel was not "pursuing" this filed but unserved action at the time Mr. Fowler met with Plaintiff's counsel concerning settlement of the matter entitled *Beal v. Outfield Brew House, LLC*, Case No. 2:18-cv-04028-MDH. (Fowler Decl. ¶ 6.)

8. The data cards that were produced as Shark Bar – Hand00000001-2 do not disclose that Defendants will use an ATDS, and do not state that providing information is not a condition of purchase. (Ex. AU, Shark Bar – Hand00000001-2).

RESPONSE: Controverted in part. Ms. Bradley testified that ECI Marketing provided templates of forms that were used to allow customers to enter to win happy hours and other events at the venues ECI provided consulting services. (Bradley Dep. at 66:22–67:20.) As part of the consulting services that ECI provided to Shark Bar, it also would place orders for cards on which customers could enter to win a happy hour or other event. Defendants further state that Plaintiff's description of the data cards constitute an improper legal conclusion and refer the Court to Exhibit AU to make its own determination of the language set forth therein.

9.

RESPONSE: Controverted in part. Ms. Bradley testified that the process for recording contact information that was collected at Shark Bar was as follows

(Bradley Dep. 87:14-20.)

10. Shark Bar did [redacted]

RESPONSE: **Controverted.** Defendants maintained a record of do not call requests, which has been produced in this action. (Smith Reply Decl. Ex. N (Def. Supp. Resp. to Interrog. Nos. 14-16.) There is no record of any request by Plaintiff asking Shark Bar to stop sending him text messages. (Uhlig Decl. Exs. C & D.) Plaintiff did not (i) recall the date he allegedly requested Shark Bar to stop sending him text messages, (ii) know if he searched for any records supporting this request, and (iii) has failed to produce any record of his request to Shark Bar to stop sending him text messages, even after this information was requested again at his deposition. (Smith Decl. Ex. H (Pl. Tr. 84:12-85:7).)

11. Txt Live! [redacted]

RESPONSE: Controverted in part. Defendants deny that the deposition testimony referenced for Mr. Uhlig supports the proposed fact that he had administrator access to the Txt Live platform but admit that he had such access. Defendants further state that there is no evidence in the record that Mr. Uhlig (or any other individual with such access) used this access to send text messages to any individual who agreed to receive text messages from another venue, as opposed to Shark Bar.

ARGUMENT

I. Summary Judgment on the ATDS Claim Is Warranted

The Platforms do not qualify as an ATDS because they do not (a) produce telephone numbers to be called using a random or sequential generator, and (b) operate "automatically." (Mot. 4-10.) In Opposition, Plaintiff ***admits*** that "the SendSmart and Txt Live! systems ***do not randomly generate the numbers*** themselves." (Opp. 9; *see also* Pl. Resp. ¶¶ 30-31 (emphasis added).) Plaintiff also admits that, at a minimum, a user also must log into the Platforms, determine the content of the message,[2] and hit send to transmit any text messages. (*Id.* ¶¶ 34, 36, 37.) These critical admissions establish that summary judgment should be granted.

First, Plaintiff urges this Court to ignore the requirement – written into the statute – that a platform must "generate" telephone numbers in order be an ATDS. (Opp. 3-6.) Instead, Plaintiff argues that dialing numbers from a stored list is sufficient, relying almost entirely on *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018). (Opp. 4-5.) *Marks*, however, is contrary to two other circuit courts to consider the issue, *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018) and *Gary v. Trueblue, Inc.*, No. 18-2281, 2019 WL 5251261 (6th Cir. Sept. 5, 2019).[3] Further, *Marks* has been almost uniformly rejected by courts around the country, including within this Circuit. *Roark v. Credit One Bank, N.A.*, 2018 WL 5921652, at *3 (D. Minn. Nov. 13, 2018) (explicitly disagreeing with *Marks*); Mot. 5-6; *see also Gadelhak v. AT&T Servs., Inc.*, No. 17-CV-01559, 2019 WL 1429346, at *5 (N.D. Ill. Mar. 29, 2019) ("This Court respectfully disagrees with the Ninth Circuit's holding in *Marks*"); *Snow v. Gen. Elec. Co.,* No. 5:18-CV-511-FL, 2019 WL 2500407, at *6 (E.D.N.C. June 14, 2019) (following the Third Circuit's ruling in *Dominguez* over *Marks*, which "better comports with the plain language of the statute"); *DeNova v. Ocwen*

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[2] Plaintiff takes issue with whether the user created the message because he could elect to use a saved message or include "variables" that imported information, such as a name, into the text message. (Pl. Resp. ¶¶ 36.) These distinctions do not alter the fact that the content reflected in the text messages is a product of human judgment.

[3] Plaintiff attempts to dismiss these decisions as lacking "thorough analysis of the issue" (Opp. 6-7), but these decisions correctly apply the statutory language as written. Further "analysis" is only required if the Court were inclined to rewrite the statute, as the Ninth Circuit did.

Loan Servicing, No. 8:17-cv-2204-T-23AAS, 2019 WL 4635552 (M.D. Fla. Sept. 24, 2019) (rejecting *Marks*' interpretation); *Adams v. Safe Home Sec., Inc.*, No. 3:18-cv-03098-M, 2019 WL 3428776, at *3 (N.D. Tex. Jul. 30, 2019) (same). Plaintiff ignores all of this authority.[4]

Plaintiff also makes the meritless claim that even if this Court applies the "generation" requirement of the TCPA – as *Dominguez* and courts around the country have done – that the Platforms still qualify as an ATDS. (Opp. 8-9.) This argument is predicated upon the fact that the Platforms allowed Shark Bar to select contest winners among customers that met any criteria applied by the user. Plaintiff cites no authority to support his interpretation that imposing such limits triggers the TCPA. Indeed, the D.C. Circuit, in its binding decision in *ACA International*, expressly rejected Plaintiff's argument because "numbers must necessarily be called in some order—either in random or some other sequence." *ACA Int'l v. FCC*, 885 F.3d 687, 702 (D.C. Cir. 2018); *Smith v. Navient Sols., LLC*, No. CV 3:17-191, 2019 WL 3574248, at *9 (W.D. Pa. Aug. 6, 2019) (system that "automatically sorts, filters, reorders and re-sequences telephone numbers based on rules and strategies that have been preprogrammed into the system" was not an ATDS because it did not "actually *generate* numbers to be called") (emphasis in original); Mot. 8-9.[5] Plaintiff has conceded that the Platforms do not generate numbers.

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[4] Plaintiff attempts to manufacture an issue of fact by disputing whether phone numbers uploaded into the Platforms were, in fact, provided by Shark Bar's "customers." (Pl. Resp. ¶¶ 26, 30.) This argument is of no consequence because Plaintiff does not dispute that the Platforms did not generate the numbers that were texted. (Opp. 9.) Plaintiff's contention, however, is meritless in any event. For example, [redacted] (Kenney Decl. Ex. AE, ¶ 58, Mitzenmacher Rep. ¶ 135.) This sort of error rate is entirely consistent with Shark Bar's manual process of entering phone numbers into an Excel spreadsheet after a customer completed a paper form. (Smith Reply Decl. Ex. O (Uhlig Dep. 25:13 – 18).)

[5] Plaintiff also argues that the TCPA's consent exceptions support his flawed definition of an ATDS. (Opp. 5-6.) Numerous courts have rejected this argument. As the court explained in *Gadelhak*, "the consent exception is drafted in such a way that it also applies to calls made using artificial or prerecorded voice – not just those made using an ATDS," and thus, "the consent exception still does have an effect—it does not suffer the embarrassment of being nugatory—even if ATDS does not cover systems that dial from preset lists." 2019 WL 1429346, at *5; *Thompson-Harbach v. USAA Fed. Sav. Bank*, 369 F. Supp. 3d 606, 626 (N.D. Iowa 2019).

Even if, however, the Court is inclined to accept the interpretation of an ATDS set forth in *Marks*, Plaintiff's claim still fails for the additional reason that the Platforms do not operate "automatically." (Mot. 9.) There is no dispute that several steps in the process of sending a text message require human intervention.[6] (Pl. Resp. ¶¶ 31, 34, 36-38, 40-41.) Other courts considering similar text platforms have granted summary judgment on the basis that the platforms lacked automation.[7] (Mot. 9-10.) In *Ammons v. Diversified Adjustment Service, Inc.*, No. 218CV06489ODWMAAX, 2019 WL 5064840 (C.D. Cal. Oct. 9, 2019), the court, applying *Marks*, granted summary judgment in favor of defendant on the issue of ATDS because the required intervention "goes far beyond triggering a system to run automatically. It requires human interaction to initiate each call." *Id.* at *5.

Plaintiff concedes it was not possible to send texts without a human being pressing send. (Pl. Resp. ¶¶ 55, 58.) He attempts to dismiss the manual operation of the Platforms by arguing it was possible to send large numbers of texts at once. (Opp. 7-8.) This argument has also been rejected. In *Duran*, the court granted summary judgment for defendant *sua sponte*, even where plaintiff argued it was possible to "fire off thousands of texts at a designated time." 369 F. Supp. 3d at 490. Further, Plaintiff's contention that the "dialing" occurs after a human presses send

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[6] Plaintiff tries to create a factual dispute by arguing that Plaintiff received his texts as part of a "system group." (Pl. Resp. ¶ 59.) This is still a selection that was identified by the user. (Smith Reply Decl. Ex. P (Rodriguez Dep. 67:13 – 68:1; 74:14 – 22).)

[7] Rather than address the cases cited by Defendants, Plaintiff attempts to rely upon *Gonzalez v. HOSOPO Corp.*, 371 F. Supp. 3d 26 (D. Mass. 2019) and *Espejo v. Santander, Inc*., 2019 WL 2450492 (N.D. Ill. June 12, 2019), both of which were decided in the context of predictive dialers in connection with calls – not text messages. "[A] predictive dialer is equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091 ¶ 131 (2003)(emphasis added). Cases involving predictive dialers provide no support for Plaintiff's position that the Platforms are an ATDS, as other courts have held when analyzing text platforms. *See, e.g.*, *Duran v. LaBoom Disco*, 369 F.Supp. 3d 476, 491 (E.D.N.Y. 2019).

renders an ATDS indistinguishable from dialing on a smart phone.[8] (Opp. 10.) By construing the statute in this manner, group text messaging on a smart phone, which also does not require manually dialing each phone number, would constitute an ATDS. (Smith Decl. Ex. E, Mitzenmacher Rep. ¶¶ 52, 65.)

II. Summary Judgment Is Proper on the Non-ATDS Claims

A. Cell Phones Do Not Qualify for Protection as Residential Subscribers

Cell phones do not qualify for protections available to residential telephone subscribers under Section 227(c). (Mot. 11.) Plaintiff attempts to support his overly broad reading of the TCPA by cherry-picking language from an FCC Order. (Opp. 11-13.) This argument fails.

Contrary to Plaintiff's interpretation, the FCC stated that it will "presume" wireless subscribers who register on the NDNCR are residential subscribers, but "[s]uch a presumption . . . require[s] a complaining wireless subscriber to provide further proof of the validity of that presumption should [for an] enforcement action." *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14039 (2003). This ***presumption*** does not mean that Section 227(c) automatically applies to cell phone subscribers; instead, parties claiming violations related to text messages on a cell phone need evidence that their cell phones are entitled to the protections under the DNC provisions of the TCPA.

As the Eleventh Circuit recently observed, the TCPA is silent with respect to text messages. *Salcedo v. Hanna*, 936 F.3d 1162, 1169 (11th Cir. 2019) ("We first note what Congress has said in the TCPA's provisions and findings about the harms from telemarketing via text message

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[8] While Plaintiff claims Dr. Mitzenmacher was unaware of dialing systems that meet his definition of a "random number generator" during the "relevant time" (Opp. 10, n. 11), he specifically testified that this was how [redacted] [redacted] (Smith Reply Decl. Ex. M Mitzenmacher Dep. 201:16-202:13), which again reinforces Defendants' interpretation is consistent with Congress's intent at the time the TCPA was enacted, in 1991.

generally: ***nothing***.") (emphasis added). Thus, even if the protections of the DNC provisions[9] of the TCPA apply to cell phones (which other courts have rejected, *see* Mot. 11-12), Plaintiff must still demonstrate that they apply in the circumstances related to his receipt of the text messages at issue here. None of the decisions that Plaintiff relies upon were decided at the summary judgment stage and therefore do not address the required evidentiary showing. (Opp. 12-13.) The DNC provisions of the TCPA should not extend to Plaintiff's claims related to texts on his cell phone.

B. The Procedural and Revocation Claims Lack a Private Right of Action

Numerous courts have held that there is no private right of action for Plaintiff's purported claims under 47 C.F.R. § 64.1200(d). (Mot. 14-16.) In response, Plaintiff recites what even he acknowledges is a "lengthy" discussion of the history of Section 64.1200(d) (Opp. 17), to argue that the "procedures" set forth in this regulation were not issued pursuant to the "Procedural Standards" section of 227(d) of the TCPA. This argument lacks merit.

First, 47 C.F.R. § 64.1200(d) sets forth standards that are ***procedural*** in nature, tracking the language of 47 U.S.C. § 227(d), which courts have recognized in concluding no private right of action exists under these regulations. *See, e.g.*, *Worsham v. Travel Options, Inc.*, No. JKB-14-2749, 2016 WL 4592373, at *7 (D. Md. Sept. 2, 2016) (regulations "more appropriately viewed as setting procedural standards and, therefore, within the realm of the TCPA's subsection d, for which no private right of action exists"); *see also* Mot. 15.

Second, Plaintiff tries to obfuscate the analysis in *Burdge v. Association Health Care Management, Inc.*, by arguing that its assessment of 47 C.F.R. 64.1200(d) does not apply, since the *Burdge* court relies on an outdated version of the regulation. (Opp. 17.) This argument is

[9] As set forth in Section II.B., *infra*, Plaintiff has no private right of action to assert his claims under 47 C.F.R. § 64.1200(d), but to the extent a claim did exist, it would exist under the DNC provisions of the TCPA.

meritless as *Burdge* highlights how Section 227(d) authorized the promulgation of regulations regarding *technical and procedural* requirements that are reflected in Section 64.1200(d). 2011 WL 379159, at *4 (S.D. Ohio Feb. 2, 2011). Indeed, the court in *Burdge* rejected the argument Plaintiff advances here, which is that Section 227 (d), as well as the FCC's ability to issue regulations pursuant to it, should be read narrowly. This Court should reach the same conclusion.

C. Plaintiff Had an EBR with Shark Bar

The undisputed evidence shows that, within 18-months of at least one of the text messages at issue, Plaintiff visited Shark Bar and made purchases there. (Pl. Resp. ¶¶ 63-64.) Plaintiff does not dispute that the existence of an EBR with Shark Bar precludes him from establishing that he received a "telephone solicitation," as required to maintain his DNC Claim. (Opp. 18.) Plaintiff, however, opposes summary judgment on the ground that his purchases at Shark Bar are insufficient to establish an EBR with it. Plaintiff is wrong.

Evidence of these purchases alone is sufficient to establish an EBR. For example, in *Cubbage v. Talbots, Inc*., No. C09-911BHS, 2010 WL 2710628, at *3 (W.D. Wash. July 7, 2010), the court granted summary judgment on the grounds that the plaintiff had an EBR with defendant because she "purchased at least one product . . . within eighteen months prior to . . . the call." Therefore, the court granted summary judgment in favor of defendants, even where the plaintiff did not recall whether she provided her phone number at the time of the transaction. *Id.* at *1; *see also Elkins v. Medco Health Solutions, Inc.*, 2014 WL 1663406, at *8 (E.D. Mo. Apr. 25, 2014) (granting summary judgment where plaintiff's use of prescription services created an EBR). While Plaintiff argues that there is no evidence of a "two-way communication," the regulation specifically contemplates that this communication occurs on the "basis" of Plaintiff's purchase at Shark Bar. Nor does Plaintiff cite any authority to support his narrow reading of EBR.

D. Plaintiff's Revocation Claim Should Be Dismissed

No Evidence Exists. Plaintiff must establish that he made a do-not-call request that was not honored, including the date of such a request. (Mot. 16-17.) He has offered no evidence, other than his own, self-serving testimony to support this claim, which courts have held is insufficient to withstand summary judgment. *Lawrence v. Bayview Loan Servicing, LLC*, 666 F. App'x 875, 883 (11th Cir. 2016) ("ambiguous deposition testimony failed to present a genuine issue of material fact" on TCPA claim). Particularly where, as here, the method by which Plaintiff alleges he communicated "stop" should be reflected in a written record, Plaintiff cannot meet his burden.[10]

The Revocation Claim Is Duplicative. The Court should also strike Plaintiff's Revocation Claim because it is part of his Procedural Claim. (Mot. 17-18.) In Opposition, Plaintiff argues (i) the request is untimely, and (ii) the claims are not redundant because different conduct could conceivably support both claims. (Opp. 19-20.) These arguments fail.

First, as to timeliness, as Plaintiff concedes, Rule 12(f) allows a court to strike matters on its own accord, without limitation as to time. (Opp. 19.) Courts in this circuit have struck redundant claims at the summary judgment stage. *See Sherman v. Rinchem Co*., No. 10-CV-2062 PJS/FLN, 2011 WL 3471057, at *6 (D. Minn. Aug. 8, 2011). Second, Plaintiff offers hypothetical scenarios in which he could prevail on his Revocation Claim but not the Procedural Claim, and vice versa. (Opp. 20.) Yet none of this conjecture rebuts the reality that – even if a private right of action existed, which it does not – prevailing on the Revocation Claim provides Plaintiff a basis

[10] While Plaintiff cites what he claims are alleged instances in which Shark Bar did not immediately understand a recipient did not wish to receive further communications (Kenney Decl. Ex. AH), Plaintiff's inability to produce a similar record of his purported request underscores this evidentiary deficiency. Further, in light of the existence of written records in other circumstances, Plaintiff's cited cases (Opp. 17) are inapposite. *Henderson v. Munn*, 439 F.3d 497, 503 (8th Cir. 2006) (differing account of physical altercation); *Harry Stephens Farms, Inc. v. Wormald Americas, Inc.*, 571 F.3d 820, 821 (8th Cir. 2009) (differing accounts concerning plaintiff's state of mind).

to prevails on the Procedural Claim. (Mot. 19-20.) Further, because Plaintiff seeks the same relief for both claims, there is no reason to maintain them as separate counts. (*Id.*)

III. <u>SUMMARY JUDGMENT IN FAVOR OF CORDISH COMPANIES AND ECI IS PROPER</u>

Neither Cordish Companies nor ECI are directly or vicariously liable for the text messages Plaintiff received. (Mot. 19-20.) In Opposition, Plaintiff does not argue that either sent the texts he received – therefore, neither entity can be directly liable under the TCPA.[11] Instead, Plaintiff argues they are vicariously liable under agency principles. (Opp. 20-23.) Plaintiff has the burden of proving such a relationship. *Petri v. Mercy Health*, No. 4:15 CV 1296 CDP, 2016 WL 7048893, at *2 (E.D. Mo. Dec. 5, 2016).

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) Of Agency § 1.01 (2006); *see also S. Pac. Transp. Co. v. Cont'l Shippers Ass'n, Inc.*, 642 F.2d 236, 238 (8th Cir. 1981) ("[a]gency is a legal concept that depends upon the existence of certain factual elements: (1) the manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; and (3) the understanding of the parties that the principal is to be in control of the undertaking"). Plaintiff fails to establish the requisite

[11] Plaintiff attempts to rely upon a Declaratory Ruling by the FCC to suggest that a non-caller can be held directly liable for calls that violate the TCPA when the non-caller "is so involved in placing the calls as to be deemed to have initiated them." (Opp. 21, n. 15 (citing *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961 (2015).) However, in that decision, the FCC determined that the third-party in question did not initiate the text messages because the app user needed to take steps in determining whether to send a message, to whom to send a message, and when that message was sent. This is similar to the actions required by Shark Bar employees in order to send text messages. (Uhlig Decl. ¶¶ 15, 18.) The FCC further noted that even where the third-party had some control of the content of the text message, such control was insufficient to render it the initiator of the messages. *Id.* The record here is similar. Further, while Plaintiff disputes whether ECI sent text messages, he admits that any text messages were sent in [REDACTED] *i.e.*, after Plaintiff received the texts at issue and the putative class period. (Pl. Resp. ¶ 13.) There is no basis for direct liability.

elements of agency. First, he focuses solely on purported evidence of Cordish Companies' and ECI's alleged control over Shark Bar – he offers no evidence the parties agreed that Shark Bar could act "on their behalf." Indeed, none of the text messages even mention Cordish Companies or ECI. (Mot. 20.) Second, even with respect to "control," Plaintiff still fails to offer evidence sufficient to meet his burden.

Cordish Companies. Cordish Companies conduct no business or operations and therefore do not control Shark Bar or any other person or entity. (Mot. 20.) While Plaintiff attempts to manufacture an issue of fact regarding whether this entity has employees or had any role in the text messages at issue, these stray references to "Cordish" are not references to the named defendant in this case, The Cordish Companies, Inc. (Fowler Reply Decl. ¶¶ 4-8.) Indeed, as explained on the website upon which Plaintiff relies, references to "Cordish" and other variations are trade names and do not alter the fact that each of the entities described on the website is a separate legal entity, with separate capital, ownership and management structures.[12] (*Id.* Ex. A.)

ECI. With respect to ECI, the record is also insufficient to show the requisite level of control (in addition to Plaintiff's failure to offer any evidence on the other elements of agency). (Mot. 19-20.) First, although Plaintiff attempts to dismiss the reality that the Consulting Agreement between Shark Bar and ECI disclaims any agency relationship, this evidence is important to analyze agency. *See K.C. 1986 Ltd. P'ship v. Reade Mfg.*, 33 F. Supp. 2d 820, 828 (W.D. Mo. 1998) (Laughrey, J.) (disclaimer of agency provision "probative" in granting summary judgment for lack of agency). Further, while Plaintiff points to purported evidence related to ECI's consulting services, which included advice concerning the transmission of text messages, the

[12] The terms and conditions clarify any potential confusion that the Court noted in its ruling on the motion to dismiss. *Hand v. Beach Entertainment KC, LLC*, 2019 WL 5654351, at *6 (W.D. Mo. Oct. 31, 2019).

record is clear that Shark Bar's employees were responsible for crafting and sending the texts at issue. (*Id.*) The lack of control over this conduct precludes any agency relationship. In *Jones v. Royal Admin. Servs., Inc.*, the Ninth Circuit affirmed dismissal of a TCPA claim under an agency theory, because the alleged principal did not specifically control the calls at issue in the case. 887 F.3d 443, 451-53 (9th Cir. 2018). The court reached this conclusion, despite plaintiffs' evidence of requirements to (1) keep records and give weekly reports of interactions and sales with consumers who purchased defendant's products, (2) implement security measures to protect consumer information, (3) collect payments on behalf of defendant, (4) obtain defendant's approval before using sales literature to assist in the sale of defendant's products, (5) use the "scripts and materials" defendant approved and (6) comply with defendant's "guidelines and procedures." *Id.* Here, the record establishes that Shark Bar controlled whether, when, and to whom to send the texts and their content. (Stmt. ¶¶ 75, 82 – 85.)

CONCLUSION

Defendants respectfully request that the Court grant their motion for summary judgment, dismiss Plaintiff's claims, and grant any other relief the Court deems just and proper.

Dated: December 19, 2019 By: */s/ Jacqueline M. Sexton*

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