

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, LCC  
d/b/a SHARK BAR

THE CORDISH COMPANIES, INC.

ENTERTAINMENT CONSULTING  
INTERNATIONAL, LCC

*Defendants.*

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

**REPLY SUGGESTIONS IN SUPPORT OF MOTION TO DISMISS  
SECOND AMENDED CLASS ACTION COMPLAINT**

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## **PRELIMINARY STATEMENT**

Plaintiff's opposition ("Opposition" or "Opp.") does not dispute that the TCPA<sup>1</sup> is riddled with content- and speaker-based exemptions that render it unconstitutional. The Opposition does not even attempt to defend the constitutionality of the National Do Not Call Registry ("NDNCR") regulatory provisions. Moreover, Plaintiff's reliance on different circuits' interpretations of the TCPA's ATDS restrictions only illustrates the restrictions' vagueness. This Court should declare the TCPA unconstitutional.

Plaintiff also fails to provide any basis for personal jurisdiction over his claims against Maryland-based ECI and Cordish (the "Maryland Entities"). Plaintiff does not dispute that neither of the Maryland Entities are subject to general jurisdiction. Although specific jurisdiction requires contacts tethered to the claims asserted, Plaintiff relies on a handful of irrelevant marketing emails and other documents that do not establish that ECI or Cordish had anything to do with the text messages allegedly sent to Plaintiff. Because Plaintiff has failed to establish his *prima facie* case of jurisdiction over the Maryland Entities, the Court should dismiss the claims against them for this separate reason.

## **ARGUMENT**

### **I. THE TCPA IS UNCONSTITUTIONAL.**

#### **A. The Challenged Exemptions Are Not Severable**

Plaintiff does not contest that the TCPA is constitutionally infirm or that the ATDS and NDNCR restrictions are subject to strict scrutiny. (*See* Opening Br. 2, 11-14.) Instead, Plaintiff suggests that the Court should leave the statute intact and sever only the challenged exemptions. (Opp. 12.) But severance is improper if the unconstitutional provision is an integral part of the

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<sup>1</sup> Terms defined in Defendants' opening brief ("Opening Brief" or "Opening Br.") have the same meaning herein.

entire statute. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 917-18 (8th Cir. 1997). Because Congress intended the exemptions to be a key part of the TCPA, Plaintiff's severance argument fails.<sup>2</sup>

The fact that Congress viewed the TCPA's exemptions as integral to the statute is plain. After the FCC issued its now invalid and overly expansive definition of what qualified as an ATDS, Congress immediately carved out calls promoting the collection of private, government-guaranteed debts from the purview of the statute. See Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588 (2015). Further, before enacting the TCPA, Congress found that "while the evidence presented to the Congress indicates that automated or pre recorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for [certain calls]." See Pub. L. No. 102-243, § 2 at ¶ 13. It is thus clear that Congress intended the restrictions to work in tandem with the exemptions and they may not be severed.

Even if the Court could properly sever the TCPA's exemptions from the statute to render it constitutional, Plaintiff is requesting that the constitutionally-repaired version of the TCPA be applied retroactively to Defendants' conduct. This request violates principles of retroactivity. Only Congress may determine whether a statute applies retroactively. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994) (noting the "requirement that Congress first make its intention clear" before applying a statute retroactively). Neither the Ninth nor the Fourth Circuit addressed the issue of retroactivity, so their conclusions have no bearing on this argument.

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<sup>2</sup> Plaintiff's reliance on the Ninth Circuit's decision in *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019), and Fourth Circuit's decision in *Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019), should not be given weight. While the Fourth and Ninth Circuits have correctly found that the government debt exemption fails strict scrutiny, instead of invalidating the entire ATDS provision, the courts relied on a dated severability clause, severing the government debt exemption from the TCPA. See *Duguid*, 926 F.3d at 1156; *AAPC*, 923 F.3d at 171. This remedy causes the TCPA to further restrict protected speech by not incentivizing citizens to raise challenges to the unconstitutional portions of the TCPA because such a challenge will likely expand the TCPA's reach.

## **B. The Definition of “ATDS” Is Unconstitutionally Vague**

The TCPA’s ATDS provisions are void for vagueness by failing to clearly define what constitutes an ATDS. (Opening Br. 15.) The lack of a clear definition violates due process because before incurring liability, a party does not know what is prohibited and is subjected to arbitrary enforcement of the TCPA. *See FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253-54 (2012). Plaintiff provides no basis to conclude otherwise.

*First*, the FCC’s 2015 interpretation of ATDS promulgated by the FCC has been struck down as overly broad and arbitrary by the D.C. Circuit in *ACA Int’l v. FCC*, 885 F.3d 687, 700-01 (D.C. Cir. 2018). The D.C. Circuit’s decision underscores the lack of clarity concerning conduct that is—and is not—unlawful. *Second*, even the court in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1051 (9th Cir. 2018), which Plaintiff relies to argue that the definition of an ATDS is not vague, concluded that the definition of an ATDS could not be gleaned from a “straightforward interpretation based on the plain language alone. Rather, the statutory text is ambiguous on its face.” Moreover, numerous Courts—including in this Circuit—have *rejected* the Ninth Circuit’s interpretation,<sup>3</sup> further demonstrating that the ATDS restrictions are void for vagueness. Until the FCC completes its pending rulemaking clarifying the definition of an ATDS, the public remains in a “significant fog of uncertainty.” *ACA Int’l*, 885 F.3d at 703.

## **II. THE COURT LACKS PERSONAL JURISDICTION OVER ECI AND CORDISH.**

### **A. Plaintiff Concedes That This Court Lacks General Jurisdiction Over the Maryland Entities**

The Maryland Entities established that they are not subject to general jurisdiction in Missouri. (Opening Br. 5-6.) Plaintiff did not, because he could not, argue that general jurisdiction

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<sup>3</sup> *See, e.g., Thompspon-Harbach v. USAA Fed. Sav. Bank*, 359 F. Supp. 3d 606, 625-26 (N.D. Iowa 2019); *Roark v. Credit One Bank, N.A.*, No. CV 16-173 (PAM/ECW), 2018 WL 5921652, at \*3 (D. Minn. Nov. 13, 2018).

exists over the Maryland Entities, conceding the issue. *See, e.g., Jarrett v. Henkel Corp.*, No. 4:15-CV-0832-DGK, 2016 WL 409819, at \*2 (W.D. Mo. Feb. 2, 2016) (“A Plaintiff’s failure to address a defendant’s arguments on a motion to dismiss operates as an abandonment of those claims.”).

**B. The Court Lacks Specific Personal Jurisdiction Over the Maryland Entities**

Specific jurisdiction requires a connection between the forum, the defendant, and the litigation, which the Maryland Entities demonstrated is absent here. (Opening Br. 6-9.) In response, Plaintiff submits a handful of irrelevant documents and his counsel’s erroneous interpretations. Plaintiff’s Opposition fails for several reasons.

*First*, Plaintiff does not allege any facts *specific to the Maryland Entities* regarding the text messages allegedly *sent to Plaintiff*. Rather, the Complaint merely lumps Shark Bar and the Maryland Entities together in connection with the allegedly unlawful activity. *See, e.g., SAC ¶¶ 8, 15-19, 48-61* (asserting allegations against “Defendants”). The text messages Plaintiff alleges he received were sent by Shark Bar employees. (Opening Br. 8.) Plaintiff cannot lump the Maryland Entities in with Shark Bar to support jurisdiction. *See Wallach v. Whetstone Partners, LLC*, No. 4:16 CV 450 CDP, 2016 WL 3997080, at \*4 (E.D. Mo. July 26, 2016) (dismissing TCPA claim where “there is no evidence to support the bare allegation that [defendant] contacted [plaintiff] or had any contact with Missouri to support the exercise of personal jurisdiction”).

*Second*, Plaintiff’s argument that both ECI and Cordish have “numerous significant ties” to Missouri based on a Missouri Secretary of State registration for ECI, a few ECI employees allegedly living in Missouri, and irrelevant deposition testimony (Opp. 5-6) is inapposite because none of these purported contacts evidence any involvement by the Maryland Entities’ with the text messages allegedly sent to Plaintiff. *See Myers v. Casino Queen, Inc.*, 689 F.3d 904, 912 (8th Cir. 2012) (specific personal jurisdiction requires “a relationship between the forum, *the cause of action*, and the defendant”) (emphasis added). Jurisdiction over the Maryland Entities would only



be permissible if they purposefully directed their activities to Missouri, “and the litigation results from alleged injuries that ‘arise out of or relate to’ those activities.” *Id.* ECI and Cordish had no role in directing activities—here, sending the text messages—to Plaintiff. Plaintiff’s Opposition contains no allegations that Cordish issued any specific directives to Shark Bar; instead, Cordish is only lumped together with ECI in Plaintiff’s arguments pertaining to agency (*see infra* Part II.C.). The fact that ECI is registered in Missouri (as required by law) is inconsequential. *Fullerton v. Smith & Nephew, Inc.*, No. 1:18CV245 RLW, 2019 WL 2028712, at \*3 (E.D. Mo. May 8, 2019) (collecting cases concluding “the mere presence of a registered agent in Missouri is insufficient to establish jurisdiction.”). That ECI has employees living and working in Missouri is irrelevant if those employees were not involved in sending the text messages that form the basis of Plaintiff’s Complaint. Even accepting Plaintiff’s interpretation that ECI or Cordish were the “account holders” of the SendSmart account used to send some of the at-issue text messages and developed the Txt Live! platform (Opp. 7-8), these actions would be insufficient to support jurisdiction. *See Castillo v. Caesars Entm’t Corp.*, No. No. 18-cv-05781-EMC, 2018 WL 6199682, \*3 (N.D. Cal Nov. 28, 2018) (distinguishing role of the party using texting software from the “very limited role” of a third-party that developed and maintained the software); *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 594 (8th Cir. 2011) (contacts such as “scattered e-mails, phone calls, and a wire transfer of money” to a forum state are insufficient to support jurisdiction).<sup>4</sup>

*Third*, the two declarations submitted by Defendants refute the conclusory allegations regarding ECI and Cordish’s purported involvement regarding the text messages allegedly sent to Plaintiff. (Opening Br. 8.) Cordish is a passive Maryland corporation without any employees or

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<sup>4</sup> Plaintiff’s reliance on *Keim v. ADF MidAtlantic, LLC*, 199 F. Supp. 3d 1362 (S.D. Fla. 2016) is misplaced, as the defendants in that case were responsible for sending text messages into the forum through the acts of their alleged agents. *Id.* at 1369-70. Unlike in *Keim*, there is no agency relationship between Shark Bar and the Maryland Entities and the Complaint is devoid of any allegations sufficient to establish any agency.

property. (Fowler Decl. ¶ 3.) ECI is a Maryland corporation and that during the class period ECI's policy and practice was that it did not send text messages, but rather individuals from the venues that it provides services for, such as Shark Bar, sent text messages. (Hudolin Decl. ¶ 7.)

Because the Maryland Entities raised this meritorious challenge, Plaintiff must establish jurisdiction through affidavits, testimony, or documents—not mere pleading. *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1073-74 (8th Cir. 2004). Plaintiff's attempt to refute these declaration fails. Notably, Plaintiff submitted the declaration of his counsel, William Kenney, which contains no exhibit that points to Cordish's involvement in Shark Bar's text messaging practices. Further, the Kenney Declaration does not rebut that Cordish is a passive company without ties to the alleged conduct at issue, or that Cordish is a trade name used primarily to describe real estate developments owned by separate legal entities. (Fowler Decl. ¶ 3.)

The Kenney Declaration also does not establish jurisdiction over ECI. For example, attempting to show that Shark Bar and ECI executed and intended to perform an operating agreement in the Western District of Missouri, Plaintiff submits deposition-transcript excerpts from a different case. (Opp. 6 (citing Kenney Decl. Ex. F).) Those excerpts, however, show that the deponent was involved in decisions relating to *capital expenditures* (furniture and heaters) at entities such as Shark Bar. (Ex. F at 54:13-55:15.) This is irrelevant to specific jurisdiction because it is wholly unrelated to the messages at issue.

Moreover, the Kenney Declaration's reliance on ECI's limited involvement in sending text messages in an unrelated case bears no weight here. (Opp. 9.) First, Mr. Kenney is not qualified to testify as an expert with respect to call records, nor has he provided the Court with the document he purportedly analyzed. *See, e.g., Shiferaw v. Sunrise Senior Living Mgmt., Inc.*, No. LACV1302171JAKPLAX, 2014 WL 12585796, at \*23–24 (C.D. Cal. June 11, 2014) (barring

attorney declaration when not offered as expert because it was “based on scientific, technical, or other specialized knowledge”). His analysis is also irrelevant and inaccurate. The text messages at issue fall outside of the proposed class period in this case,<sup>5</sup> and Plaintiff does not allege he received them. Indeed, the document Plaintiff cites illustrates the limited nature of that campaign. *See Seefeldt v. Entm’t Consulting Int’l, LLC*, No. 4:19-cv-00188-SNJL, (Dkt. No. 52) (W.D. Mo.) (“In connection with a specific campaign that took place in the summer of 2018, certain ECI employees sent a limited number of text messages to certain . . . customers to offer them a coupon[.] . . . Plaintiff Michael Seefeldt was one of the customers who received this message.”) (emphasis added). Plaintiff does not allege he received a similar coupon to use at Shark Bar, because he did not. That limited campaign has no bearing on ECI’s general policy and practice of not sending text messages and in no way establishes that ECI sent a text message to *Plaintiff*.

Other testimonial exhibits to the Kenney Declaration also cannot prove that ECI has significant contacts with Missouri. Attempting to show the relationship between ECI and Cordish, Plaintiff submits the deposition testimony of Ms. Kyla Bradley and Mr. Kyle Uhlig. (Kenney Decl. Exs. I, J.) Ms. Bradley, however, testified that a marketing employee she communicated with worked in Baltimore, Maryland, and she was unsure if ECI was the employee’s actual employer. (*Id.* Ex. I 23:6-25.) Ms. Bradley also testified that she only communicated with a different employee on a wide scope basis for big-picture items and suggestions. (*Id.* Ex. I 24:12-22.) And Mr. Uhlig testified that he worked with a SendSmart executive to review usage graphs and to consider switching texting platforms in July 2014, with only a little bit of help from ECI employees. (*Id.* Ex. J 54:10-55:10.). This testimony does not demonstrate that ECI employees had enough involvement with text messages allegedly sent by Shark Bar to Plaintiff to confer

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<sup>5</sup> Mr. Kenney’s purported analysis appears to lump in venues unrelated to Shark Bar.

specific jurisdiction, and it certainly does not demonstrate that ECI played an “integral role” in the alleged TCPA violations. (Opp. 6.)

Nothing submitted by Plaintiff refutes the Fowler or Hudolin declarations; accordingly, dismissal of ECI and Cordish is proper. *See Dotzler v. Perot*, 899 F. Supp. 416, 421 (E.D. Mo. 1995) (granting defendants’ motion to dismiss when plaintiff’s evidence failed to refute the testimony within defendants’ affidavits). There is no jurisdiction over the Maryland Entities.

**C. Jurisdiction Does Not Exist Based on “Agency” or “Alter Ego” Theories**

Plaintiff’s claim that this court has personal jurisdiction over the Maryland Entities based on either an “alter ego” theory or an “agency relationship” with Shark Bar is without merit. (Opp. 11). Neither can predicate jurisdiction over the Maryland Entities in Missouri.

*i. Shark Bar Is Not An Alter Ego of ECI or Cordish*

Plaintiff claims that Shark Bar, ECI, and Cordish have an “overlapping web” of persons in control and thus serve as “alter egos” of one another. (Opp. 10-12.) Not so. In any event, this “extraordinary” standard is only met after Plaintiff demonstrates a “unity of interest and ownership” between the two entities. *HOK Sport, Inc. FC Des Moines, L.C.*, 495 F.3d 927, 935 (8th Cir. 2007). Plaintiff has not met this heightened standard.

Plaintiff asserts that ECI exercised a high degree of control over Shark Bar but makes no similar argument about Cordish’s role; thus, there is no indication whatsoever that Cordish and Shark Bar are alter-egos. (Opp. 11 (stating that “*ECI* was in charge of a litany of Shark Bar’s operations”).) Plaintiff’s alter-ego allegations involving ECI also fail.

In *Goellner-Grant v. Platinum Equity, LLC*, 341 F. Supp. 3d 1022, 1029 (E.D. Mo. 2018), the court found that a parent company did not maintain the requisite control over the subsidiary to support alter-ego liability merely because the parent assisted in a “rebranding initiative[,]” helping to shape and maintain their customer base, and that the parent “marketed and reaped the benefit of

[the subsidiary's] presence and sales in Missouri.” These allegations were not sufficient to show that the parent “dominates” the subsidiary. *Id.* Moreover, the court reasoned that allegations of “macro-management” are not a sufficient basis for finding that one entity controlled and dominated the other to such a degree that corporate formalities should be disregarded. *Id.* at 1030.<sup>6</sup>

Here, Plaintiff alleges that ECI functions to “effectuate and oversee all, or substantially all, of the advertising and/or marketing decisions of [its] venues, including Shark Bar.” (SAC ¶¶ 5-6.). Even more so than the defendant in *Goellner-Grant*, ECI does not “dominate and control” Shark Bar—the two entities do not even have a parent-subsidary relationship.<sup>7</sup> Plaintiff’s allegations, even if true, do not demonstrate macro-management of Shark Bar by ECI. ECI is not an alter-ego of Shark Bar. *See* 341 F. Supp. 3d at 1030.

ii. *Shark Bar Is Not an Agent of the Maryland Entities*

To prove an agency theory, Plaintiff must establish both the fact that an agency relationship exists and the scope of the agent’s authority. *See Romak USA, Inc. v. Rich*, 384 F.3d 979, 985 (8th Cir. 2004). Plaintiff has done neither.

*First*, the SAC contains no allegations concerning any purported agency relationship between Shark Bar and the Maryland Entities. Indeed, rather than alleging that Shark Bar acted on behalf of ECI and Cordish, the SAC concedes that the texts at issue “contained Shark Bar’s

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<sup>6</sup> Plaintiff argues that Ex. G of the Kenney Declaration specifically sets out “the minutia of the day-to-day control ECI has over Shark Bar” and states that this agreement proves the relationship between the entities differs from the general ownership interest in *General, LLC v. Ryder Systems, Inc.*, No. 4:18-CV-00442 JAR, 2018 WL 4961497, at \*2-5 (E.D. Mo. Oct. 15, 2018) (Opp. 11-12). First, the court in *General* never claimed there was a “general ownership interest”; rather, the court simply stated that plaintiff failed to show how purported actions by defendant’s subsidiaries were attributable to defendant and therefore held that the subsidiary’s contacts could not be imputed to the parent corporation. Second, Ex. G expressly *limits* the services that ECI agreed to provide for Shark Bar to areas such as accounting, marketing services, human resources, legal and insurance. (*See* Kenney Decl. Ex. G at ¶ 4.) Moreover, the Agreement specifically states that it does not create an agency relationship between the parties. (*Id.* ¶ 11.2.)

<sup>7</sup> Plaintiff misinterprets a document to claim there is a subsidiary relationship between Shark Bar and the Maryland Entities. There is not, but even if there were, such a relationship would be insufficient to confer personal jurisdiction over the Maryland Entities.

brand name and location” and “encouraged [Plaintiff] to visit Shark Bar with his friends or associates.” (See, e.g., SAC ¶¶ 16, 65, 73-76.) Thus, Plaintiff fails to predicate jurisdiction on any theory of agency liability, and Plaintiff’s agency theory should be rejected on this basis.

*Second*, Plaintiff argues that an agency relationship should be implied between Shark Bar and ECI because, according to Plaintiff’s bald allegations, “ECI was empowered to issue specific directives – including with respect to Shark Bar’s marketing – that Shark Bar carried out, and which resulted in a direct benefit to ECI.” (Opp. 12). These claims are insufficient to establish agency. *Viasystems*, is instructive on this point. In *Viasystems*, the court found that the plaintiff did not establish a *prima facie* case that specific jurisdiction could be asserted based on an alleged agency relationship between a manufacturer and distributor when plaintiff’s “only argument is based on scattered statements on [the distributor’s] website . . . to the effect that [the distributor] is the [manufacturer’s] ‘at-home partner[.]’ and ‘representative[.]’” 646 F.3d at 596. Because the plaintiff did not provide evidence that the manufacturer “controlled and dominated” the distributor’s affairs such that the corporate existence was disregarded, the court refused to confer personal jurisdiction. *Id.* Plaintiff’s reference to a handful of emails covering the topic of marketing are insufficient to plead a claim that an agency relationship existed. (See Opening Br. 8-10.); see also *Smith v. State Farm Mutual Automobile Insurance Co.*, 30 F. Supp. 3d 765, 777-80 (N.D. Ill. 2014) (dismissing two defendants where plaintiff failed to allege facts supporting agency theory).

### **CONCLUSION**

Accordingly, Defendants respectfully request that the Court dismiss the SAC with prejudice.

Dated: July 16, 2019

By: /s/ Jacqueline M. Sexton  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 16<sup>th</sup> day of July, 2019, a true and correct copy of the above and foregoing document was filed with the Court's CM-ECF system which will provide notice to all counsel of record.

*/s/ Jacqueline M. Sexton* \_\_\_\_\_

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