UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

J.T HAND, individually and on behalf of all others similarly situated,	
Plaintiff,	**Case No.: 4:18-cv-668-NKL**
vs.	
BEACH ENTERTAINMENT KC, LLC d/b/a SHARK BAR	**Hon. Nanette K. Laughrey**
	REDACTED VERSION
THE CORDISH COMPANIES, INC.	ORAL ARGUMENT REQUESTED
ENTERTAINMENT CONSULTING INTERNATIONAL, LLC	
Defendants.	

DEFENDANTS' SUGGESTIONS IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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Defendants Beach Entertainment KC, LLC d/b/a Shark Bar ("Shark Bar"), The Cordish Companies, Inc. ("Cordish"), and Entertainment Consulting International, LLC ("ECI") (collectively, "Defendants"), hereby submit the following suggestions in opposition to Plaintiff's Motion for Class Certification ("Motion" or "Mot.").

PRELIMINARY STATEMENT

This is not a case about unsolicited or nuisance text messages. Plaintiff's Telephone Consumer Protection Act ("TCPA") claims, rather, arise out of text messages that customers specifically and explicitly agreed to receive when they voluntarily participated in Shark Bar's happy hour program (the "Happy Hour Program"). Plaintiff seeks to expose Shark Bar to class-wide, annihilating damages, in excess of $200,000,000. Yet, the putative classes would improperly include thousands of customers who have no claim against Shark Bar because, among other things, they agreed to receive text communications from Shark Bar, desired to participate in the Happy Hour Program and/or had an established business relationship with Shark Bar.

Indeed, Shark Bar offered its customers the chance to win a happy hour party by completing a contest entry card or electronic form available at either at Shark Bar or online. By completing these forms, customers consented to receive text messages and enabled Shark Bar to legally send text messages and/or place calls relating to the Happy Hour Program should it use an "automatic telephone dialing system" ("ATDS").[1] Plaintiff, however, claims that he never completed any such form and never sought to participate in the Happy Hour Program. Shark Bar's records show that: (a) Plaintiff, a repeat customer at Shark Bar, was first recorded by Shark Bar as having signed up to participate in the Happy Hour Program on or about November 2, 2013; (b) the contest entry

[1] As set forth in Defendants' motion for summary judgment (Dkt. 137), Shark Bar did not use an ATDS to send text messages to its customers.

form accurately captured Plaintiff's name, gender, cellular phone number and email address. Plaintiff, however, claims that he never provided Shark Bar his cellular phone number and never agreed to receive text messages.

Plaintiff seeks to represent a class comprised of persons who would not dispute that they agreed to receive text messages from Shark Bar, and desired to receive such messages as participants in the Happy Hour Program. As a result, individualized inquiries predominate over common questions with respect to key issues – such as consent and standing – rendering the case unsuitable for class treatment. Courts around the country have consistently refused to grant class certification in cases, like this one, alleging violations of the TCPA where evidence demonstrates that putative class members consented to receive the very text messages that are the subject of the putative class action. Plaintiff ignores these cases and instead, conclusorily states that TCPA class actions are "routinely" certified, hoping that this Court will not conduct the rigorous analysis required under Rule 23.

Even if Plaintiff could meet the requirements of Rule 23(b), which he cannot, the record also establishes that he cannot satisfy Rule 23(a) given that he disputes he even provided his contact information to Shark Bar. As a result, he is not an adequate or typical representative of the putative classes. He also faces unique credibility attacks given that he lacks knowledge of key issues concerning his claims, [redacted] pursuing TCPA claims against other venues located in the Kansas City Power & Light District.

In sum, Plaintiff's Motion should be denied because Plaintiff fails to demonstrate: (i) predominance; (ii) numerosity, commonality, typicality or adequacy; (iii) the proposed classes are ascertainable; and (iv) putative members of the proposed classes have standing.

FACTUAL BACKGROUND

Shark Bar's Happy Hour Program. Shark Bar is a restaurant and bar located inside of the Kansas City Power & Light District ("KCPL") in Kansas City, Missouri. *See* https://powerandlightdistrict.com/eat-and-drink/shark-bar (last visited Nov. 21, 2019). Shark Bar offered its customers the opportunity to win a happy hour event, where such customers could host guests and receive a certain amount of free food, drinks, and other perks during a planned event. During the purported class period,[2] Shark Bar held thousands of happy hours and similar events for the Happy Hour Program participants. (Uhlig Decl. ¶ 5.) Many customers were repeat entrants for the happy hour contests, meaning that they completed multiple entry forms. (*Id.* ¶ 7.)

Customers could complete an entry form to participate in the Happy Hour Program through a variety of ways, which changed over time, including by completing (i) a paper card available at Shark Bar ("Paper Card"), (ii) a sign-in sheet, (iii) a Google form, or online contest entry form. (*Id.* ¶ 6.) There is no dispute that Shark Bar's electronic contest entry forms, as well as the Paper Cards (since at least April 2015), included consent and disclosure language as set forth below:

> BY PROVIDING US YOUR CONTACT INFORMATION AND AFFIXING YOUR SIGNATURE BELOW, YOU CONSENT TO RECEIVING CALLS, TEXT MESSAGES AND EMAILS VIA AN AUTOMATED MEANS REGARDING PROMOTIONS, SPECIALS AND OTHER MARKETING OFFERS. YOUR CONSENT TO RECEIVE CALLS, TEXT MESSAGES AND EMAILS IS NOT A CONDITION OF PURCHASE. DATA/MESSAGE RATES MAY APPLY.

(Uhlig Decl. Ex. A; *see also id.* Ex. B; Declaration of Lauri A. Mazzuchetti ("LM Decl.") Ex. A.) Most customers who entered to win a happy hour completed a Paper Card while present at Shark Bar. (Uhlig Decl. ¶ 10.) Shark Bar employees would often communicate with customers about the Happy Hour Program, and inform them that they would be notified by text message if they

[2] Plaintiff alleges that the "Class Period" refers to the period between April 25, 2014 and April 4, 2018. (Mot. 8.)

won an event. (*Id.* ¶ 9.) Shark Bar's customers knew that Shark Bar would communicate about the Happy Hour Program by text message. (Declaration of Sandy Lee Anderson ("Anderson Decl.") ¶ 4; Declaration of Patrick Kilgore ("Kilgore Decl.") ¶ 4.) Shark Bar communicated by text message only with contest winners, who had agreed to receive text messages, to inform them that they had won, and to plan the happy hour event.[3] (Uhlig Decl. ¶ 19.)

While Shark Bar did not maintain the Paper Cards themselves for consumer privacy and other reasons, it did maintain detailed records that identify the persons who completed and signed the Paper Cards, the information that they provided on the Paper Cards, and the approximate date on which the Paper Card was submitted. (Uhlig Decl. ¶¶ 11, 13.) Shark Bar obtained contact information ***only*** from its customers; it never obtained contact information from any other source. (*Id.* ¶ 10.)

Shark Bar never required any customer to participate in these contests; rather, participation was completely voluntary.[4] (*Id.* ¶ 8.) Many Shark Bar customers hosted multiple happy hours, and repeatedly entered to win. (*Id.* ¶ 7.) Contest entrants utilized the happy hours for both social and business purposes. (*Id.*) Indeed, a significant number of the happy hours held were by local businesses treating their employees or business associates. (*Id.*) Shark Bar trained its employees that they could only send text messages to individuals who provided consent to receive such

[3] Defendants dispute Plaintiff's characterization of Ms. Bust's testimony and any implications that flow from their characterization. (Mot. 8 n.3, 9 n.5.) Given, however, that this mischaracterization does not drive the resolution of this Motion, Defendants reserve any challenge to this purported evidence for the merits of the litigation.

[4] Plaintiff's allegation that Shark Bar employees "fudge" sign-in information in order to increase their commissions is baseless. (Mot. 9 n.5.) Shark Bar employees testified that while *other* venues in the KCPL were "fudging" the number of guests that checked in, this was not the case for Shark Bar employees. (LM Decl. Ex. B (Uhlig Tr.) 84:7-13.) Moreover, even if Shark Bar employees [redacted]. (*Id.* 85:13-87:24.) When Shark Bar employees were paid for a data card, the data card needed to be "[redacted]" (*Id.* Ex. C (Bradley Tr.) 59:5-60:11.) Plaintiff provides no explanation as to how any Shark Bar employee could manufacture accurate names, phone numbers and other personally identifiable information and there is none.

communications and to honor any requests by customers who no longer desired to receive text message communications. (*Id.* ¶ 22.)

Plaintiff's Experience with Shark Bar. Plaintiff claims that he never completed any form whatsoever to participate in the Happy Hour Program. (SAC ¶ 63.) Notwithstanding this allegation, however, Plaintiff's contact information is included in Shark Bar's records of customers who submitted their contact information to win contests. (LM Decl. Ex. E.) This record accurately reflects [redacted]. (*Id.* (Pl. Tr.) 93:20-96:5.) Shark Bar's records reflect that Plaintiff's information was first recorded on or about November 2, 2013. (*Id.* Ex. E.)

Plaintiff cannot recall whether he visited Shark Bar on or before November 2, 2013. (LM Decl. Ex. D (Pl. Tr.) 96:17-22.) Plaintiff, however, is a repeat customer of KCPL; he has patronized numerous venues within KCPL since 2013. (*Id.* Ex. D (Pl. Tr.) 64:8-69:15.) During the relevant time, [redacted]. (*Id.* 69:16-69:25.)

A Shark Bar Employee Sent Text Messages to Plaintiff to Notify Him that He Won a Happy Hour. Kyle Uhlig has worked for Shark Bar since 2008 and has been the primary individual responsible for planning happy hours at Shark Bar during the Class Period. (Uhlig Decl. ¶¶ 1, 4.) Over a four year period, Mr. Uhlig sent Plaintiff a total of four text messages, offering him happy hour events at Shark Bar. In March 2015, and then again in February 2016, Mr. Uhlig sent Plaintiff a text message offering him an event for his birthday, which was recorded in Shark Bar's system as occurring in March. (Uhlig Decl. Ex. H, LM Decl. Ex. E.) In 2017, Mr. Uhlig sent Plaintiff two more text messages: one in September 2017, informing Plaintiff that he won a free party; the other in December 2017, inviting Plaintiff to enjoy a VIP party. (Uhlig Decl. Ex. I.) Plaintiff did not respond to Mr. Uhlig's messages. (*Id.*; *see also id.* Ex. H.)

Plaintiff further alleges that he continued to receive text messages after he asked for Shark Bar to stop sending him text messages. (SAC ¶ 69.) He also testified that he asked Shark Bar to stop sending text messages by texting "stop" and [redacted]. (LM Decl. Ex. D (Pl. Tr. 84:12-24; 115:14-20.) Shark Bar has no record of Plaintiff ever making any such request, and Plaintiff was unable to produce any record supporting that he made such request. Indeed, the text logs maintained of each and every text communication sent by Shark Bar to its customers, or received by Shark Bar from its customers, do not reflect any request by Plaintiff to not receive future messages. Rather, the text logs show that the texts to Plaintiff, were infrequent — Plaintiff received only 4 over a four-year period. (Uhlig Decl. Exs. H, I.) If Plaintiff had indicated to Shark Bar, by response text or otherwise, that he did not want to receive future messages, Shark Bar's practice was to honor such a request. (Uhlig Decl. ¶ 22.)

Plaintiff continued to patronize Shark Bar after receiving text messages from it. Plaintiff visited Shark Bar [redacted]. (Uhlig Decl. Exs. D-E; LM Decl. Ex. D (Pl. Tr.) 98:5-11, 102:19-106:6; *id.* Ex. F (Pl. Resp. Interrog. No. 2.) Plaintiff again visited Shark Bar [redacted]. (LM Decl. Ex. D (Pl. Tr.) 98:21-99:16, 106:24-109:18; *id.* Ex. F.) In addition to Shark Bar, Plaintiff also visited another venue within KCPL [redacted]. (*Id.* Ex. D (Pl. Tr.) 107:2-22.)

Plaintiff's Credibility. This case is one of nine lawsuits filed by Plaintiff's counsel, asserting TCPA claims against bars and restaurants that have similar happy hour programs. *Beal v. Outfield Brew House, LLC*, No. 2:13-CV-4028-MDH (W.D. Mo.); *Smith v. Truman Road Development, LLC*, No. 4:18-cv-00670-NKL (W.D. Mo.); *Taylor v. KC Vin, LLC et al.*, No. 4:19-cv-00110-DGK (W.D. Mo.); *Hand v. ARB KC, LLC et al.*, No. 4:19-cv-00108-BCW (W.D. Mo.); *Doohan v. CTB Investors, LLC*, No. 4:19-cv-00111-FJG (W.D. Mo.); *Cecil v. Irish Pub KC, LLC*,

4:18-cv-00669-GAF, Dkt. 38 (W.D. Mo.); *Wilson et al. v. Pl Phase One Operation L.P., d/b/a Xfinity Live! Philadelphia and 1100 Social*, No. 1:18-cv-03285 (D. Md.); *Cecil v. Kansas City Live, LLC d/b/a Kansas City Power & Light District a/k/a Kansas City Live!*, No. 1816-CV19821 (Mo. Cir. Ct.). [redacted]. (LM Decl. Ex. D (Pl. Tr.) 19:2-15; 42:13-43:14.))

Plaintiff testified at his deposition [redacted]. (*Id.* 19:2-15.) Plaintiff testified [redacted]. (*Id.* 19:2-15; 42:13-43:14.) Andy Doohan, [redacted] is the named plaintiff in *Doohan v. CTB Investors, LLC*, No. 4:19-cv-00111-FJG (W.D. Mo.), a case complaining about text messages sent by PBR Big Sky. (*Id.* 19:2-15; 42:13-43:14.) [redacted]. (*Id.* 18:11-24).

[redacted] named plaintiff in *Cecil v. Irish Pub KC, LLC*, No. 4:18-cv-00669-GAF (W.D. Mo.), as well as *Cecil v. Kansas City Live, LLC d/b/a Kansas City Power & Light District a/k/a Kansas City Live!*, No. 1816-CV19821 (Mo. Cir. Ct.), complaining about text messages that she received from other venues located in the KCPL.[5] (LM Decl. Ex. D (Pl. Tr.) 26:15-27:2). [redacted]. (LM Decl. Ex. D (Pl. Tr.) 26:15-27:2.)

[5] Ms. Cecil filed her action against McFadden's at the same time Plaintiff filed the instant action against Shark Bar; but Ms. Cecil has since voluntarily dismissed her claims. *Cecil v. Irish Pub KC, LLC*, No. 4:18-cv-00669-GAF, Dkt. 38 (W.D. Mo.). She likewise voluntarily dismissed her state court action on February 15, 2019. *Cecil v. Kansas City Live, LLC*, No. 1816-cv19821 (Mo. Cir. Ct.). Defendants attempted to serve Ms. Cecil with a subpoena in order to take her deposition, but were unable to effect service upon her. (LM Decl. G.)

Plaintiff is Unaware of His Claims. While Plaintiff admits that he has been to Shark Bar, as well as several other bars in the KCPL, numerous times since 2013, he cannot recall any details about any of his visits. (LM Decl. Ex. D (Pl. Tr.) 64:8-69:15.). During his deposition, [redacted] (*Id.* 73:16-90:16, 118:23-25.) Plaintiff [redacted]. (*Id.* 79:14-80:4.) Contrary to the relief set forth in the SAC (Prayer for Relief, ¶¶ (e)-(f)), [redacted] (*Id.* 73:16-75:22.)

Plaintiff's Motion and Proposed Classes. Plaintiff asserts four claims against Defendants. In Count I, Plaintiff alleges that Defendants violated Section 227(b)(1)(A)(iii) of the TCPA (SAC ¶¶ 83-90), which prohibits making a non-emergency call, or a call without the prior express consent of the called party, using an ATDS to a cellular telephone number (the "ATDS Claim"). 47 U.S.C. § 227(b)(1)(A)(iii). In Count II, Plaintiff alleges that Defendants violated the regulations set out in 47 C.F.R. § 64.1200(d) (SAC ¶¶ 91-101), which requires a company to institute certain procedures before calling a residential telephone subscriber on a landline for a telemarketing purpose (the "Procedural Claim"). 47 C.F.R. § 64.1200(d). In Count III, Plaintiff alleges that Defendants violated Section 227(c) of the TCPA and the regulation set out in 47 C.F.R. § 64.1200(c)(2) (SAC ¶¶ 102-12), which prohibits telephone solicitations, as defined by the TCPA, to residential telephone subscribers who registered their numbers on the National Do Not Call Registry ("NDNCR") (the "DNC Claim"). 47 U.S.C. §227(c); 47 C.F.R. § 64.1200(c). In Count IV (SAC ¶¶ 113-22), Plaintiff alleges that Defendants sent Plaintiff two or more telemarketing text

messages within any twelve-month period, after Plaintiff requested Defendants to stop (the "Revocation Claim"). 47 C.F.R. § 1600(d)(3).

Plaintiff has abandoned his putative class Procedural and Revocation Claims, and only seeks to certify a class with respect to his ATDS and DNC Claims. (Mot. 1, n. 1.) With respect to these claims, Plaintiff seeks to certify the following classes:

- SendSmart Class: All individual who received one or more text messages from Shark Bar sent using the SendSmart text messaging system, as reflected in the SendSmart Class List.

- Txt Live! Class: All individuals who received one or more text messages from Shark Bar using the Txt Live! text messaging system, as reflected in the Txt Live! Class List.

- Do-Not-Call ("DNC") Class: All individuals on either the SendSmart or Txt Live! Class Lists who received more than one text message from Shark Bar in any twelve-month period to a number included on the NDNCR.

In a footnote in his moving brief, Plaintiff concedes that he does not actually seek to certify classes based on the class definitions above. Rather, he proposes to exclude, without explanation, certain phone numbers from the putative classes that would otherwise fit within his class definitions, including "numbers of recipients who responded positively to a Shark Bar text," as well as "phone numbers that Shark Bar records show were provided by customers electronically." (Mot. 7, n. 2.) Plaintiff has submitted purported class lists ("Class Lists") to the Court, which he claims reflects individuals who are members of the putative classes, subject to his list of exclusions. (Dkt. 147.)

Shark Bar's Customers Understood and Enjoyed the Happy Hour Program. Between April 2014 and April 2018, Shark Bar held thousands of happy hours and other parties as a result of these contests, with tens of thousands of guests in attendance. (Uhlig Decl. ¶ 5.) Customers understood that they were providing their phone numbers to receive notice by text message about winning a happy hour. (*Id.* ¶ 9; Kilgore Decl. ¶ 4; Anderson Decl. ¶ 4.) It is undisputed that many

customers provided unquestionably positive responses to Shark Bar's messages. (Uhlig Decl. ¶ 21; *id.* Exs. J & K.) Shark Bar's employees also regularly spoke with Shark Bar's customers, and confirmed that they understood that Shark Bar would announce contest winners via text messages. (*Id.* ¶ 9.) This is confirmed by declarations submitted by recipients of Shark Bar's text messages. (Kilgore Decl. ¶ 4; Anderson Decl. ¶ 4.)

Other than the instant lawsuit, and other than a request to no longer receive text messages or an occasional online post, Shark Bar received no complaints concerning text messages. (Uhlig Decl. ¶ 15.) This lawsuit poses an existential threat to Shark Bar's ability to remain in business. (Declaration of Robert Fowler ("Fowler Decl.") ¶ 7.)

Records of Consent. The Class Lists are comprised of persons who completed Paper Cards while at Shark Bar consenting to receive text messages, including persons who (i) responded positively to Shark Bar's messages, (ii) signed up again to receive text messages following the institution of this lawsuit, (iii) engaged in transactions at Shark Bar around the time that records reflect they provided their consent and contact information, and/or (iv) received communications from Shark Bar as the result of a wrong number.

Positive Responses. To attempt to exclude recipients who "responded positively" to Shark Bar's text messages, Plaintiff asserts he endeavored to exclude anyone who responded with the following words: [redacted] (Declaration of Shawn Davis ("Davis Decl.") ¶ 12.).[6] Plaintiff, however, did not exclude other positive responses,

[6] Mr. Davis was not disclosed to Defendants as an expert witness prior to June 14, 2019, the deadline set forth in the Court's scheduling order (Dkt. 64, 100), notwithstanding that he offers analysis of text logs as well as the NDNCR, which is frequently the subject of expert testimony. (Declaration of John Taylor ("Taylor Decl.") ¶ 5); *see also Sandoe v. Bos. Sci. Corp.*, No. CV 18-11826-NMG, 2019 WL 5424203, at *4 (D. Mass. Oct. 23, 2019). Mr. Davis, who was disclosed to Defendants for the first time in this Motion, states that he is "an employee at Edelson PC." (Davis Decl. ¶ 2.) A review of Edelson PC's website, however, shows that he is the Director of Digital Forensics, a Master of Information Technology with a specialization in Computer and Network Security and an Adjunct Professor for the School of Applied Technology at the Illinois Institute of Technology, who "has experience testifying in federal court." (LM Decl. Ex. H.) At least once, Mr. Davis served as an expert for Edelson, LLC, a

which require an individualized review to identify. For example, customer "MG" is included as a member of the Txt Live Class, and had the following exchange with Shark Bar:

- Mr. Uhlig: Hi [MG]! It's Kyle from Shark Bar. You entered and I selected you. A VIP party for you and your friends with gift cards drinks and more! Interested?
- Customer: Of course!
- Mr. Uhlig: Great! U drink FREE & your guests get drink discounts! I can book any Friday (7-11p) & Saturday (8-11p) in 30 days. Would 12/29 12/30 1/5 or 1/6 work for you?
- Customer: 1/5 might work! I just need to double check!
- Mr. Uhlig: Perfect if it works I just need your email and I'll send you a confirmation and all the details?!
- Customer: Sounds great! I:)m just waiting on a few people to get back to me and I:)ll send over my email! :)

(Uhlig Decl. Ex. K.)

Likewise, customer "DL" is listed as a purported member of the Txt Live Class, and engaged in the following exchange with Shark Bar:

- Mr. Uhlig: Happy Birthday month [DL]! Shark Bar would like to invite you & your friends in for an exclusive party with drink specials. Interested? – Kyle
- Customer: Very interested! Any chance we could do Friday the 26th starting at like 11pm? We are having a party that night and will be able to get a lot of people there for y:)all.
- Mr. Uhlig: Sounds amazing however I can't do any other time than 8-11pm. Will that work? Can you come early?
- Customer: Ah dang. The party is at a venue from 7-11. We may have to find another night to come in
- Mr. Uhlig: Oh bummer! Yeah for sure. Just let us know.

predecessor entity of Plaintiff's counsel, Edelson PC, in support of plaintiff's motion for class certification. (LM Decl. Ex. I.)

(Uhlig Decl. Ex. K.)

Subsequent Entrants. Putative class members have also signed up to again receive the very text messages that are the subject of Plaintiff's claim, following the institution of this lawsuit. (Uhlig Decl. Exs. L, N.) For example, records reflect that on August 12, 2019, customer "AC" entered to win complimentary bottle service and two suite tickets to see the Jonas Brothers on September 22, 2019. (*Id.* Ex. N.) She also provided her contact information, including her phone number and agreed to receive text messages concerning marketing and other offers from Shark Bar. (*Id.*) Shark Bar's records reflect that she previously provided her contact information in or around December 2013 and received text messages from Shark Bar on June 25, 2015, September 30, 2015, August 24, 2016, September 24, 2016, May 12, 2016, July 6, 2017, October 4, 2017, and January 3, 2018. (*Id.* Ex. K.) On May 12, 2016, "AC" engaged in the following back and forth conversation with Mr. Uhlig:

- Mr. Uhlig: Hi [AC] it's Kyle from Shark Bar KC. You entered to win a free party with us and we picked your name today! Text yes for more details! :)
- Customer: Yes!
- Mr. Uhlig: Great! You drink FREE & your guests get drink discounts! I can do most Fridays 7-10p. Would Friday 5/20 or 5/27 work for you?
- Customer: What about tomorrow? we are planning on coming!
- Mr. Uhlig: Tomorrow is perfect! I'll email you a confirmation and all the details to [redacted]! Thanks!
- Customer: [redacted] is the new one. Thank you!
- Mr. Uhlig: Thank you! Looking forward to showing you a great time at the beach!
- Mr. Uhlig: Hi it's Kyle at Shark Bar! I have you down for your party tomorrow from 7pm to 10pm! Do you know about how many guests will be joining you?
- Customer: No not yet!

- Mr. Uhlig: Just confirming your party tonight! Still able to attend? Do you know about how many will be joining you?
- Customer: We want to but I can't find 5 friends to come that early
- Mr. Uhlig: Sorry to hear that! Let me know if you'd like to reschedule for another date? I can book up to 30 days out for any Friday or Saturday!

(*Id.* Ex. K.)

Similarly, records reflect that, on July 26, 2019, customer "AA" entered to win the same contest. (*Id.* Ex. N.) At that time, she provided her contact information, including her phone number, and agreed to receive text messages concerning marketing and other offers from Shark Bar. (*Id.* Ex. N.) Shark Bar's records reflect that she previously provided her contact information in or around July 2017 and received text messages from Shark Bar on August 31, 2017 and December 15, 2017. (*Id.* Ex. K.) While "AA" did not respond to either of the text messages she received from Shark Bar, she confirmed her desire to receive such messages by signing up again to receive text messages in connection with the Jonas Brothers giveaway.

By entering to win this contest and agreeing to receive text messages after April 2018, these customers also agreed to arbitrate any disputes concerning the receipt of text messages. (*Id.* Ex. M.)

Transaction Records. Shark Bar's records also corroborate, in many instances, customers for whom Shark Bar has record of completing a Paper Card were, in fact, at Shark Bar at the time they did so. Indeed, evidence, such as identifying transactions that place the customer at Shark Bar around the time in which the customer provided his or her contact information, confirm consent. Only visits during which a customer paid for their own purchases at Shark Bar with a credit or debit card would be included in the transaction search. (*Id.* ¶ 18.)

For example, Shark Bar's records reflect that customer "CM", a repeat customer of Shark Bar, entered to win a happy hour during an "April 2016" visit and provided the following information:

(*Id.* Ex. C.) Based upon a search for CM's information in publicly-available databases, the information set forth above is accurate. (LM Decl. Ex. J.) Shark Bar's records further reflect that CM visited Shark Bar and made purchases there on at least April 2, 2016. She also visited on February 20, 2016. (Uhlig Decl. Ex. F.) As noted above, given Shark Bar's practices for obtaining customer information, CM completed a Paper Card with the consent and disclosure language set forth above. (*Id.* Ex. A.) On May 12, 2016, Mr. Uhlig texted CM stating "Hi [CM] it's Kyle from Shark Bar KC. You entered to win a free party with us and we picked your name today! Text yes for more details! :)." (*Id.* Ex. K.)

Similarly, customer "SW", a purported member of the SendSmart Class, was a repeat customer of Shark Bar, visiting and making purchases on at least June 13, 2014, August 1, 2014, September 19, 2014, October 31, 2014, February 8, 2015, April 2, 2016, April 8, 2016, and July 15, 2016. (*Id.* Ex. F.) Records also reflect that during an "April 2016" visit, she provided the following information:

(*Id.* Ex. C.) This information was also provided on a Paper Card with the consent and disclosure language described above. (*Id.* Ex. A.) As noted, SW visited Shark Bar at least twice

in April 2016 before her information was added to the Txt Live system on or around April 14, 2016. (*Id.* Ex. F.) SW also engaged in repeated, back-and-forth communications with Shark Bar, which confirmed the accuracy of the information provided, and also demonstrates SW's consent to be contacted by text. (*Id.* Ex. K.) For example:

- Mr. Uhlig: Hi [SW] it's Kyle from Shark Bar KC. You entered to win a free party with us and we picked your name today! Text yes for more details! :)
- Customer: Yes
- Mr. Uhlig: Great! You drink FREE & your guests get drink discounts! I can do most Fridays 7-10p. Would Friday 5/13 or 5/20 work for you?
- Customer: 5/20 would work better
- Mr. Uhlig: Perfect! I just need your email and I'll send you a confirmation and all the details?!
- Customer: [redacted]
- Mr. Uhlig: Thank you! Looking forward to showing you a great time at the beach!
- Customer: Awesome! Thanks!

(*Id*. Ex. K.)

Wrong Numbers. Plaintiff's proposed class further includes individuals who received the text messages as the result of a wrong phone number. For example, Shark Bar attempted to text customer "BC" at the phone number [redacted] on December 2, 2014. (*Id.* Ex. J.) However, this was a wrong number, and belonged to an individual from Iowa named Nate:

- Mr. Uhlig: Hi [BC], it's Kyle from Shark Bar. You entered to win a free party with us and we picked your name today! Text, \yes\" for more details! :)
- Customer: Hi kyle. This is not [BC]. This is [redacted] from Iowa. Maybe a 309 area code? Checked out the web. Sounds like legit business.
- Customer: Regardless, I did not enter and would not be able to accept. I hope u are able to track down the winner!

- Mr. Uhlig: Sorry [redacted]. I'll Opt you out so you're not bugged again. Thank you!

(Uhlig Decl. Ex. J.)

In fact, Shark Bar's record for BC's phone number, which is actually [redacted] was off by one digit. (LM Decl. Ex. K.) Records reflect that this individual was then opted out of the receipt of further text messages. (Uhlig Decl. Ex. G.) Plaintiff included this wrong number in Plaintiff's proposed SendSmart Class.

Customer Declarations. Further, Shark Bar's customers who received text messages have also provided sworn declarations that (i) they voluntarily provided their contact information to Shark Bar on a paper card, and (ii) expected and wanted to receive text messages from Shark Bar. (Anderson Decl. ¶¶ 3-4; Kilgore Decl. ¶¶ 3-4.)

Putative Class Members Received Only A Single Text. Plaintiff's Txt Live and SendSmart Class Lists contain thousands of individuals who received only a single text. (LM Decl. ¶ 15.)

Potential Damages. According to Plaintiff, the proposed SendSmart Class includes approximately 37,175 individuals who received approximately 95,128 text messages. (Davis Decl. ¶ 9.) According to Plaintiff, the proposed Txt Live! Class includes approximately 40,218 individuals who received approximately 77,484 text messages. (*Id.* ¶ 13.) Plaintiff is seeking damages that are, at a minimum $47,564,000 on behalf of the SendSmart Class, based upon the $500 statutory damages available for ATDS violations. (SAC, Prayer For Relief, ¶ (e).) Plaintiff further seeks to treble those damages, for a total damages award for the SendSmart Class in the amount of $142,692,000. (*Id.*) With respect to the Txt Live! Class, Plaintiff is seeking damages that are, at a minimum, $38,742,000. (*Id.*) Plaintiff further seeks to treble those damages, for a total damages award for the Txt Live! Class in the amount of $116,226,000. (*Id.*) Thus, Plaintiff seeks a total damages award in the amount of $258,918,000. (*Id.*)

LEGAL STANDARD

The class action device is an exception to the general rule that litigation must be prosecuted by the individual named parties only. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Under Rule 23, Plaintiff must establish: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of class representative and class counsel. *See* Fed. R. Civ. P. 23(a). Plaintiff must also demonstrate that (i) common questions predominate, (ii) a class action is superior, and (iii) that a class is ascertainable. *See* Fed. R. Civ. P. 23(b). Plaintiff fails to meet his burden.

ARGUMENT

I. PLAINTIFF FAILS TO SATISFY THE REQUIREMENTS OF RULE 23(B)(3)

A. Individualized Issues Predominate Over Common Questions.

"Rule 23(b)(3) requires that common questions predominate over individual questions. . . Thus, simply showing that common questions of law or fact exist under Rule 23(a)(2) is insufficient. . . ." *Hartis v. Chi. Title Ins.*, 2010 WL 11545067, at *3 (W.D. Mo. Sept. 20, 2010). Where evidence necessary to adjudicate a claim "varies from [class] member to [class] member, then it is an individual question," and class certification should be denied. *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005). Plaintiff cannot establish predominance.

i. Plaintiff's SendSmart and TXT Live! Classes

Count I of Plaintiff's Complaint seeks to certify two ATDS Classes – a "SendSmart Class" and a "TXT Live! Class." To prove his ATDS claim, Plaintiff must establish: (1) Shark Bar called a cellular telephone; (2) using an ATDS; (3) without the recipient's prior express consent. *See* 47 U.S.C. § 227(b)(1)(A)(iii). Plaintiff's Motion seeks to isolate whether Shark Bar used an ATDS (which it did not) to send text messages as the only issue relevant to this claim. (Mot. 16-18.) Plaintiff wrongly contends that (i) consent is an affirmative defense that the Court may ignore for

purposes of this Motion and (ii) "what little evidence exists is common to all class members." (Mot. 18.) These contentions are baseless.

(a) The Court Must Consider Evidence of Consent on this Motion

Courts regularly deny class certification in TCPA cases when confronted with individualized questions about consent.[7] *See, e.g.*, *Ung v. Universal Acceptance Corp.*, 319 F.R.D. 537, 539-41 (D. Minn. 2017); *Lindsay Transmission, LLC v. Office Depot, Inc.*, at *4-5 (E.D. Mo. Jan. 24, 2013) (individualized issues regarding consent made class treatment inappropriate). Indeed, one court recently found that it was "in good company" when it rejected this very argument and denied class certification in a TCPA case, concluding it was "joining the 'chorus of other courts faced with TCPA class actions that have found such individualized inquiries on the consent issue precluded class certification." *Hunter v. Time Warner Cable, Inc.*, 2019 WL 3812063, at *17 (S.D.N.Y. Aug. 14, 2019) (quoting *Ung*, 319 F.R.D. at 541).

(b) The Consent Analysis Requires an Individualized Inquiry

Plaintiff's claim that evidence of consent is the same as to all putative class members is wrong. He ignores the individualized inquiry that would be required to determine whether each individual consented to receive text messages. Plaintiff implicitly concedes that individuals who responded positively or provided electronic consent expressly consented to receiving text messages and therefore have no TCPA claim; he seeks to exclude such people from the proposed classes, notwithstanding that they would otherwise fall within Plaintiff's class definition. While Plaintiff claims that he never completed any contest entry from, he asks this Court to ignore the majority of other individuals reflected on his Class Lists filled out Paper Cards with consent

[7] For this reason alone, Plaintiff cannot rely upon *Sandusky Wellness Center, LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 998 (8th Cir. 2016) to argue that class certification in TCPA cases is "normal." *Sandusky* is a TCPA fax case that focused on a common question of whether the fax at issue constituted an "advertisement" and did not deal in any respect with issues of consent.

language that is nearly identical to the disclosure that appears on Shark Bar's electronic forms. Plaintiff offers no basis to distinguish between (i) the spreadsheets reflecting individuals who populated these electronic records and (ii) the spreadsheets reflecting individuals who completed a Paper Card. And with good reason – there is none. Similarly, many individuals who responded positively and those that did not respond completed virtually identical forms. There is no basis to conclude that those who did not respond thus did not consent.

Second, Plaintiff's Class Lists include individuals whose evidence of consent is demonstrated by their positive responses. Plaintiff's attempt exclude such individuals from the Class List by using search terms was ineffective. Defendants have identified individuals who responded positively to Shark Bar's texts, but are included in Plaintiff's Class Lists. The only way to accurately determine whether a putative class member responded positively is to analyze individual text messages and their context. An individualized, text-by-text inquiry would be required to identify class members and whether text messages to such individuals are actionable. Plaintiff concedes that responsive text messages, and the invitation for Shark Bar to respond to them, is evidence of consent. *See Zemel v. CSC Holdings LLC*, 2018 WL 6242484, at *5 (D.N.J. Nov. 29, 2018) ("When an individual sends a message inviting a responsive text, there is no TCPA violation.").

Third, far from relying upon "common" evidence of consent, Defendants have demonstrated that other evidence of consent exists. For example, putative class members have, even after the filing of this lawsuit, signed up again to receive the very text messages that Plaintiff complains of.[8] Moreover, Shark Bar's transaction records corroborate that customers provided

[8] Individualized issues may also exist regarding whether certain putative class members subsequently agreed to arbitrate their claims, given their decision to enter contests with terms that incorporate arbitration provisions. *See, e.g.*, *Decker v. Bookstaver*, 2010 WL 2132284, at *3 (E.D. Mo. May 26, 2010).

consent while visiting the bar/restaurant, and confirm the accuracy of the information provided.[9] The Court would need to engage in an individualized inquiry to determine whether they agreed to receive the texts at issue, which defeats predominance. *See Hartis*, 2010 WL 11545067, at *3-4.

Finally, given that customers completed Paper Cards and other entry forms while they were at Shark Bar, there will be individualized issues as to customers' personal interactions with Shark Bar's staff and their expectations of receiving text messages when they completed contest entry forms. The testimony already given by recipients of Shark Bar's text messages (Anderson Decl. ¶¶ 3-4, Kilgore Decl. ¶¶ 3-4), entitles Shark Bar to test, on an individual basis, each putative class member's expectation concerning the receipt of text messages. If, for example, a putative class member admitted she completed the Paper Card and/or that she knew that she would receive text messages, Shark Bar would be entitled to judgment on that person's claim. Plaintiff's claims, as a result, are inappropriate for class treatment.

Given the overwhelmingly positive response to Shark Bar's text messages, it is unlikely that many text recipients would, as Plaintiff does here, dispute that they entered to win the contest or consented to receive text messages. Indeed, as one District Court in this Circuit recently opined, "the best place to find proof of consent may rest with the [persons called] themselves." *Ung*, 319 F.R.D. at 541. But even where a text recipient did not recall, or disputed, that they had completed an entry form, Shark Bar's records, such as credit card transaction records, can corroborate that the customer had in fact consented. In sum, Plaintiff cannot demonstrate predominance.

ii. Plaintiff's DNC Class

[9] Plaintiff's cases concerning "common" legal questions fail to support certification here. (Mot. 10-12, 16-18.) In *In re State Farm Fire & Cas. Co.*, 872 F.3d 576 (8th Cir. 2017), the court concluded that common facts did not predominate and denied certification. *Id.* at 577. *Backer Law Firm v. Costco Wholesale*, 321 F.R.D. 343, 348-49 (W.D. Mo. 2017), which Plaintiff cites to support his predominance argument, was a fax case with little evidence of consent. By contrast Shark Bar provided detailed and concrete evidence of consent from putative class members.

Plaintiff also seeks to certify a DNC Class in Count III of his Complaint under the DNC provisions of 47 U.S.C. § 227(c). (Mot. 1.) The private right of action created by TCPA Section 227(c)(5) is limited to redress for *residential telephone subscribers* who have received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations governing "*telephone solicitations*." 47 U.S.C. § 227(c)(5).

Both Congress and the FCC have defined "telephone solicitation" to *exclude*, among other things, "a call or message (A) to any person with that person's *prior express invitation or permission*, [or] (B) to any person with whom the caller has an *established business relationship* [(an 'EBR')]." 47 U.S.C. § 227(a)(4) (emphasis added); 47 C.F.R. § 64.1200(f)(14). Plaintiff ignores these requirements and incorrectly focuses on the text messages' content to argue that common questions predominate. (Mot. 16-17.)

Consent. The Court should deny class certification with respect to Count II because, as with Count I, individualized issues predominate with respect to consent. Section I.A, *supra*.

EBR. For purposes of the TCPA's DNC provisions, EBR is defined to include relationships with customers who engaged in a transaction with the caller "within the eighteen (18) months immediately preceding the date of the telephone call." 47 C.F.R. § 64.1200(f)(5). Shark Bar's credit card records, and Plaintiff's admissions, demonstrate that Plaintiff had an EBR.

Plaintiff concedes he visited Shark Bar and made purchases on [redacted] (LM Decl. Ex. F (Pl. Resp. Interrog. No. 2); Uhlig Decl. Exs. D-E.) The next text message Plaintiff received was on September 6, 2017 – within 18 months of his most recent transaction at Shark Bar. (*Id.* Ex. I.) Thus, this text message is not actionable because it was within the scope of Plaintiff's EBR with Shark Bar. Because the September 2017 text message did not qualify as a "telephone solicitation" sufficient to trigger the TCPA's protections, Plaintiff cannot demonstrate

that the December 2017 text message was received "in violation of the regulations prescribed under this subsection." 47 U.S.C. § 227(c)(5). Plaintiff did not receive a second "telephone solicitation" in 2017 and he has no claim on the December 2017 text. *Hamilton v. Spurling*, 2013 WL 1164336, at *12 (S.D. Ohio Mar. 20, 2013) ("Having established only one violation of the TCPA[], Plaintiff cannot prevail on claims raised under [Section 227(c)(5)].").

Accordingly, even Plaintiff cannot prevail on his DNC Claim related to, at a minimum, his 2017 texts because of his EBR with Shark Bar. Whether an EBR existed as to each and every other text recipient, can be shown only through an individualized and time consuming analysis of credit card transactions and other records. And, even then, the search is not conclusive of whether a text recipient has an EBR with Shark Bar, given that some individuals likely paid cash or another companion paid the bill. (Uhlig Decl. ¶ 18.) For this reason alone, class certification should be denied as to Plaintiff's DNC Claim. *See, e.g.*, *Lindsay Transmission*, 2013 WL 275568, at *5 (holding class treatment inappropriate in TCPA case due to individualized issues of whether an EBR existed with absent class members).

Residential Telephone Subscribers. TCPA Section 227(c) only applies to calls to residential telephone subscribers.[10] *See Cunningham v. Rapid Responses Mon. Servs., Inc.*, 251 F. Supp. 3d 1187, 1201 (M.D. Tenn. 2017); *Lee v. Loandepot.com, LLC*, 2016 WL 4382786, at *6 (D. Kan. Aug. 17, 2016). Yet local businesses regularly participated in Shark Bar's Happy Hour Program. (Uhlig Decl. ¶ 7.) This is fatal to any TCPA claim.

In *Lee*, for example, the court granted summary judgment dismissing a DNC claim because the plaintiff failed to "come forward with any evidence showing how he used his cellular phone."

[10] As set forth in Defendants' motion for summary judgment (Dkt. 137), Plaintiff's DNC Claim also fails because calls (or texts) to cell phones do not fall within the definition of a "residential telephone subscriber."

2016 WL 4382786, at *7. Here, each putative class member would have to offer evidence as to whether their particular cellular phone falls within the TCPA's definition of "residential." Such evidence is necessarily individualized and demonstrates the impropriety of class certification.

B. Plaintiff Fails To Demonstrate Superiority.

Plaintiff's claim that "there is no evidence of any other case concerning the claims at issue here" (Mot. 19) does not establish that a class action is "superior" to resolving TCPA claims against Shark Bar individually. Plaintiff ignores the obvious explanation for the absence of lawsuits against Shark Bar – that very few, if any, individuals are aggrieved by Shark Bar's text messages. (Anderson Decl. ¶¶ 2-7; Kilgore Decl. ¶¶ 2-7.) Indeed, the evidence demonstrates that recipients of Shark Bar's text messages welcomed them. (*See, e.g.*, Uhlig Decl. Exs. J-K.) Shark Bar has received no complaints concerning its text messages, other than isolated requests to opt out or an occasional online post. (*Id.* ¶ 15.) Plaintiff, though, is seeking damages in excess of *$258 million* for persons who are not aggrieved and have no claim against Shark Bar. Plaintiff should pursue his claims on an individual basis – as he has elected to do with respect to Counts II and IV of the SAC. *Smith v. Microsoft Corp.*, 297 F.R.D. 464, 469 (S.D. Cal. 2014) (TCPA's statutory remedy "is designed to provide adequate incentive for an individual plaintiff to bring suit on his own behalf."). As Commissioner Michael O'Rielly of the FCC, stated: "it's not consumers who ultimately reap the proceeds of judgments and settlements, but attorneys; the average recovery for TCPA class members is a few measly dollars, whereas the average recovery for a plaintiff's lawyer is well over $2 million." (LM Decl. Ex. L.) Thus, a class action is not superior, where, as here, a class action threatens Shark Bar's business viability. (Fowler Decl. ¶ 7.)

II. PLAINTIFF FAILS TO SATISFY THE REQUIREMENTS OF RULE 23(A)

The commonality, typicality and adequacy requirements "serve as guideposts for determining whether … maintenance of a class action is economical and whether the named

plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 626, n. 20 (1997). Given the overlap concerning these elements, courts may consider whether these requirements are met together. *Id.* In addressing numerosity, "the Court should examine the number of persons in a proposed class, the nature of the action, the size of the individual claims and the inconvenience of trying individual claims, as well as other factors." *Doran v. Missouri Dep't of Social Serv.*, 251 F.R.D. 401, 404 (W.D. Mo. 2008). Plaintiff cannot meet his burden.

A. Plaintiff Is Subject To Unique Defenses

Courts in similar TCPA actions have held that questions related to each class members' consent precludes satisfaction of the commonality and typicality elements. *See Balthazor v. Cent. Credit Servs., Inc.*, 2012 WL 6725872, at *5 (S.D. Fla. Dec. 27, 2012). Likewise, "the presence of a common legal theory does not establish typicality when proof of a violation requires individualized inquiry." *Elizabeth M. v. Montenez*, 458 F.3d 779, 787 (8th Cir. 2006).

The common issues that Plaintiff identifies are whether (i) Shark Bar used an ATDS, (ii) Cordish and ECI are liable for Shark Bar's alleged conduct, and (iii) the text messages constitute a "telephone solicitation." (Mot. 10-12.) Plaintiff ignores the critical issue of consent, and as demonstrated above in Section I.A, such individualized inquires exist. Indeed, the record is clear that time-consuming, individualized inquiries are required to determine whether each class member consented to receive text messages. This would include analyzing the date and time each individual visited Shark Bar, the accuracy of the information that individual provided, and the details of each response. Given that text recipients testified that they wanted text messages, each putative class member should be individually questioned concerning their particular experience.

Plaintiff himself claims he did not complete a Paper Card or provide his phone number to Shark Bar. (Mot. 9.) The record shows that Shark Bar recorded Plaintiff's contact information –

including his name, gender, email address, birthday, and phone number – in its system on November 2, 2013. (LM Decl. Ex. E.) While Plaintiff alleges he texted the word "stop," there is no record of this request.[11] (*Id.* Ex. D 118:23-25, 119:12-19; Uhlig Decl. Exs. H & I.)

Given that many – if not most – individuals included in Plaintiff's proposed classes would not dispute completing Paper Cards (or another form) as Plaintiff does, his repeated denials defeat his ability to represent a class of persons who entered to win the contests. *Katz v. Am. Honda Motor Co., Inc.*, 2017 WL 3084272, at *4 (C.D. Cal. June 29, 2017) (where plaintiff did not provide consent, but other class members did, plaintiff could not represent the class). Plaintiff's additional claim, compared to most putative class members who are undisputed customers, that he had not visited Shark Bar when he began to receive text messages further renders him atypical. (Mot. 9.)

Further, it is well-settled that a "plaintiff subject to unique defenses, especially as to his credibility and demonstrated lack of familiarity with the suit, is an inadequate class representative." *Kassover v. Comput. Depot, Inc.*, 691 F. Supp. 1205, 1213 (D. Minn. 1987), *aff'd*, 902 F.2d 1571 (8th Cir. 1990). Plaintiff alleges he never provided his phone number to Shark Bar, yet Shark Bar's records demonstrate that he did. (LM Decl. Ex. D (Pl. Tr.) 92:2-97:3; *id.* Ex. E.) Indeed, the phone number and email address—which Plaintiff admitted he has shared with "[a] lot of people" — suggest that either Plaintiff does not recall entering or perhaps one of his acquaintances did so. (*Id.* Ex. D (Pl. Tr.) 94:1-95:23.)

Plaintiff's personal circumstances, as opposed to those of the class generally, would become the focus of this litigation, which renders the case inappropriate for class treatment. *In re Milk Products Antitrust Litig.*, 195 F.3d 430, 436-37 (8th Cir. 1999); *see CE Design Ltd. v. King*

[11] Plaintiff's allegation that opt-out requests were not complied with is unfounded. Shark Bar's general practices included removing customers from contact lists if they conveyed they were no longer interested in receiving event offers. (Uhlig Decl. ¶ 22; Ex. G.) While the practice was not followed in a few, isolated instances (Pl. Ex. Q), this shows the individualized nature of the inquiry.

Architectural Metals, Inc., 637 F.3d 721, 726 (7th Cir. 2011) ("[N]amed plaintiff who has serious credibility problems or who is likely to devote too much attention to rebutting an individual defense may not be an adequate class representative").

B. Plaintiff Lacks Knowledge of the Case and Is Not Credible

[redacted]. (LM Decl. Ex. D (Pl. Tr.) 79:14-20, 80:8-16, 118:21-25.) Moreover, Plaintiff testified that [redacted].

Nor could Plaintiff offer support for his claim he texted "stop" to Shark Bar in response to a text message he received, or the number of texts he received after he requested to opt out. Indeed, notwithstanding that records show Plaintiff received only four texts over a four-year period from Shark Bar, Plaintiff could not provide an approximate number of text messages for which he is seeking recovery. (*Id.* (Pl. Tr.) 26:15-27:2, 84:20-90:16, 116:9-22, 118:23-25, 119:12-19.)

This lack of knowledge demonstrates that Plaintiff is either uninformed about the litigation or faces further credibility problems. Under such circumstances, courts regularly deny certification. *Johnson v. U.S. Beef Corp.*, 2006 WL 680918, at *6-7 (W.D. Mo. Mar. 6, 2006). This uncertainty is compounded by the fact that Plaintiff is a long-time acquaintance of class counsel, Mr. Kenney, with common social connections. The two gentlemen used to "hang out" in Columbia, Missouri while Mr. Kenney was in school and Mr. Kenney represents Plaintiff's roommate's brother in another TCPA case. (LM Decl. Ex. D (Pl. Tr.) 19:2-15; 42:13-43:14.) Since Plaintiff is unfamiliar with details of his claims, this raises the question as to whether this is a lawyer-driven case that only conveniently found a claimant. *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 (11th Cir. 2003) (plaintiff inadequate where counsel was old friend).

C. Plaintiff Has Failed to Establish Numerosity

Plaintiff cannot demonstrate that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiff alleges that there are 37,175 people in the SendSmart Class, 40,218 people in the TXT Live! Class, and at least 4,680 individuals in the DNC Class. (Mot. 10.) Plaintiff attempts to meet this requirement through the declaration of Shawn Davis, who offers testimony on the size of each class. As set forth above, this declaration is untimely and the Court should not consider it. *Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1008 (8th Cir. 1998) ("A party that . . . fails to disclose information required by Rule 26(a) . . . shall not be permitted to use [the nondisclosed information] as evidence" "unless such failure is harmless" or there was "substantial justification" for the failure."). In *Geismann v. Am. HomePatient, Inc.*, 2017 WL 2709734, at *6 (E.D. Mo. June 22, 2017), the court struck a declaration submitted in support of a TCPA class certification motion, because the plaintiff did not timely disclose the witness as an expert. The same result should be reached here.

Even if the Court does consider it, however, these numbers, standing alone, are insufficient to demonstrate numerosity because a "rigorous analysis" is required. *Southwell v. Mortg. Inv'rs Corp. of Ohio, Inc.*, 2014 WL 3956699, at *2 (W.D. Wash. Aug. 12, 2014). In *Southwell*, the court denied plaintiff's class certification motion, holding that numerosity deficiencies barred certification when "[p]laintiffs present no proof (nor even any argument) that the numbers accurately represent what they purport them to represent." *Id.* at *3. Despite a declaration by plaintiff's expert regarding how these numbers were achieved, the court found that there were several factors which could affect the accuracy of the totals, including: (1) whether any individuals on the NDNCR consented to be called; (2) whether any individuals had an EBR with defendant; and (3) whether the phone numbers were business numbers. *Id.* Mr. Davis's declaration suffers

from the same defects and also relies upon inaccurate data to reach his conclusions (Taylor Decl. ¶¶ 5-6, 15-24; LM Decl. ¶ 16), demonstrating that numerosity is not satisfied.

III. PLAINTIFF FAILS TO SET FORTH A RELIABLE METHOD TO IDENTIFY CLASS MEMBERS

Rule 23 implicitly requires that a class "must be adequately defined and clearly ascertainable." *Hicks v. Sw. Energy Co.*, 330 F.R.D. 183, 189 (E.D. Ark. 2018). A class may be ascertainable when its members can be identified by reference to objective criteria. *Id.* Plaintiff addresses this element in a footnote, and states that class members can be identified, in part by removing "phone numbers of recipients who responded positively to a Shark Bar text." (Mot. 7, n.2.) This fails to satisfy Plaintiff's burden, particularly given the individualized inquiry required.

Plaintiff did not account for many important factors when determining the individuals within each class. (Davis Decl. ¶¶ 8-9, 12-13, 15-16.) For the SendSmart and TXT Live! Classes, Mr. Davis, simply included all text recipients reflected on Shark Bar's contact list who did not respond with using one of eight (8) arbitrary words that Mr. Davis somehow concluded reflect consent. (*Id.* ¶¶ 8-9, 12-13.) Mr. Davis's effort to exclude individuals who responded positively obviously failed. As demonstrated above, even a cursory review of the Class Lists reflect that they contain individuals who responded positively to Shark Bar's messages. For the DNC Class, Mr. Davis failed to consider many of other elements of this claim and therefore fails to identify putative class members. (*Id.* ¶¶ 14-16.) Further, a review of his work reveals that he relied upon inaccurate data that created errors in his report on which individuals he identified as registered on the NDNCR. (Taylor Decl. ¶¶ 4, 6, 21-23; LM Decl. ¶ 16.)

IV. MANY PROPOSED CLASS MEMBERS LACK STANDING

A district court may not certify a class if it contains members who lack standing. *See Zurn Pex Plumbing Prod. Liab.*, 644 F.3d 604, 616 (8th Cir. 2011). "If members who lack the ability

to bring a suit themselves are included in a class, the court lacks jurisdiction over their claims." *Id*. To show standing, a plaintiff must establish "injury in fact . . . that is fairly traceable to the challenged action of the defendant." *Id.* Thus, to certify a class, Plaintiff must demonstrate that he and *all* putative class members actually suffered a concrete injury, not just a procedural or technical TCPA violation. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Rule 23(a) "effectively limit[s] the class claims to those fairly encompassed by the named plaintiff's claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). Thus, each putative class member must have "suffered the same injury" as each other and the named plaintiff. *Id.* at 2551. Plaintiff cannot make this showing.

First, many recipients of Shark Bar's text messages welcomed them, including those identified in Plaintiff's Class Lists. (Uhlig Decl. Exs. J & K; Anderson Decl. ¶¶ 4-5; Kilgore Decl. ¶¶ 4-5.) Courts have repeatedly held that such individuals lack standing to assert a claim. *See Legg v. PTZ Ins. Agency*, 321 F.R.D. 572, 577 (N.D. Ill. 2017) (where putative class members expected to receive calls, even if their consent was not technically sound, lack of harm precluded certification). Other putative class members lack standing because they completed forms nearly identical to those completed by persons Plaintiff has excluded from the Class Lists. *See Mayo*, 2012 WL 4361571, at *5 ("[T]he question is not whether a large number of putative class members lack standing, but does this fact foreclose class certification. . . . The Court holds it does.")

Second, in *Salcedo v. Hanna*, 936 F.3d 1162, 1168-69 (11th Cir. 2019), the Eleventh Circuit recently held that a plaintiff who asserted a TCPA claim on the basis of a single text message lacked Article III standing to pursue the claim. *Id.* at 1172 ("The chirp, buzz, or blink of a cell phone receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face. Annoying, perhaps, but not a basis for invoking the

jurisdiction of the federal courts.") Plaintiff's proposed Txt Live and SendSmart Classes include thousands of putative class members who only received a single text message. (LM Decl. ¶ 15.) Thus, these individuals lack standing.

Plaintiff attempts to establish his own standing by claiming that Shark Bar's text messages invaded his privacy, caused him to incur charges for allegedly unwanted text messages, and otherwise damaged his property. (SAC ¶ 61.) There is, however, no similar evidence with respect to putative class members. The Eleventh Circuit also noted the comparatively decreased privacy interest in text messages received on a person's cell phone.[12] *See Salcedo*, 936 F.3d at 1170 ("A single unwelcome text message will not always involve an intrusion into the privacy of the home in the same way that a voice call to a residential line necessarily does."). This reasoning demonstrates that the individual circumstances of every single text message that is at issue is relevant to determine whether a putative class member has standing, which is fatal to this Motion.

CONCLUSION

Defendants respectfully request that the Court deny Plaintiff's Certification Motion.

Dated: November 21, 2019

By: */s/ Jacqueline M. Sexton*

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[12] For this reason, the Eighth Circuit's ruling in *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 958-59 (8th Cir. 2019) concerning standing based upon the receipt of ***two answering machine messages***, does not control.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of November, 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*

Attorneys for Defendants Beach Entertainment KC, LLC d/b/a Shark Bar, The Cordish Companies, Inc., and Entertainment Consulting International, LLC