IN THE UNITED STATES DISTRICT COURT
FOR THE 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., AND ENTERTAINMENT CONSULTING INTERNATIONAL, LLC *Defendants.*	Case No.: 4:18-cv-668-NKL REDACTED VERSION ORAL ARGUMENT REQUESTED

DEFENDANTS' SUGGESTIONS IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

W. James Foland #25022
Jacqueline M. Sexton #53262
Foland, Wickens, Roper,
Hofer & Crawford, P.C.
1200 Main Street, Suite 2200
Kansas City, MO 64105
(816) 472-7474
jfoland@fwpclaw.com
jsexton@fwpclaw.com

Lauri A. Mazzuchetti (*pro hac vice*)
Whitney M. Smith (*pro hac vice*)
Glenn T. Graham (*pro hac vice*)
KELLEY DRYE & WARREN LLP
One Jefferson Road
Parsippany, New Jersey 07054
(973) 503-5900
lmazzuchetti@kelleydrye.com
wsmith@kelleydrye.com
ggraham@kelleydrye.com

David I. Zalman (*pro hac vice*)
KELLEY DRYE & WARREN
101 Park Avenue
New York, NY 11201
(212) 808-7800
dzalman@kelleydrye.com
Attorneys for Beach Entertainment KC, LLC d/b/a Shark Bar, The Cordish Companies, Inc., and Entertainment Consulting International, LLC

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In opposition to Plaintiff's cross-motion ("Cross-Motion" or "Cr. Mot.") for partial summary judgment, pursuant to Fed. R. Civ. P. 56(a), defendants Beach Entertainment KC, LLC d/b/a Shark Bar ("Shark Bar"), The Cordish Companies, Inc. ("Cordish Companies"), and Entertainment Consulting International, LLC ("ECI," and collectively with Cordish Companies and Shark Bar, "Defendants"), state as follows:

PRELIMINARY STATEMENT

Defendants established in their motion for summary judgment (Dkt. 137) that they did not text Plaintiff using an ATDS, for two independent reasons: *first*, the Platforms[1] do not generate telephone numbers using a random or sequential number generator, nor do they automatically dial them; and *second*, significant human intervention was required to send any message—from uploading and selecting recipient numbers, to creating messages, through pressing a button to send any messages. Plaintiff's Cross-Motion does not controvert any material facts presented in Defendants' opening brief—instead, it relies entirely on Plaintiff's incorrect legal interpretations. But Plaintiff's interpretation of an ATDS has been rejected within this Circuit and elsewhere. And, in any event, the undisputed amount of human intervention required to send messages dooms Plaintiff's claim regardless of whether this Court applies the definition of ATDS as Plaintiff proposes. In the event the Court does not conclude that the Platforms must generate the telephone numbers in order to qualify as an ATDS (as Defendants maintain it should), Plaintiff's Cross-Motion should still be denied, even if it accepts the expansive definition of ATDS that Plaintiff proposes. It is undisputed that the Platforms cannot send text messages without human intervention, which was Plaintiff's theory in his SAC, and the

[1] Terms defined in Defendants' Suggestions in Support of Their Motion for Summary Judgment ("Def. Mot.") have the same meaning herein.

amount of human intervention required to send text messages dooms Plaintiff's claim. While courts have held that equipment similar to these Platforms do not qualify as an ATDS as a matter of law, given the level of human intervention required to send a text message, should this Court disagree, the issue of whether the Platforms qualify as an ATDS should be resolved by the jury.

RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

1. **PROPOSED FACT:** Beach Entertainment KC, LLC d/b/a Shark Bar ("Shark Bar") is a bar located in the Power & Light District in downtown Kansas City, Missouri. See Shark Bar, Kansas City Power & Light District, https://powerandlightdistrict.com/eat-and-drink/shark-bar.

RESPONSE: Admitted.

2. **PROPOSED FACT:** Shark Bar employed [redacted] (Ex. A, Deposition of Mark Musselman at 26:23–30:14; Ex. B, Deposition of Kyle Uhlig ("Uhlig Dep.") at 14:7–14, 17:24–18:10, 18:17–19:2, 22:19–25:3, 27:7–28:23, 49:12–15.) Shark Bar's marketing initiatives w[redacted] (Ex. C, Shark Bar–Hand00025256; Ex. D, Shark Bar–Hand00000443.)

RESPONSE: Controverted in part. Defendants admit that Shark Bar employed "promotional builders" or "sales builders" and that its marketing initiatives were detailed in "Sales Agendas" or "Marketing Agendas." The remainder of the statement, however, is controverted because the purpose of the sales building program was to draw customers to Shark Bar during off-peak nightlife hours – [redacted] (Declaration of Whitney M.

Smith dated December 2, 2019 (“Smith Opp. Decl.”) (Ex. K (stating that the goal of using Txt Live was “to create new and repeat business during slower business periods”).).

3. PROPOSED FACT: These promotional builders used two text messaging platforms to send messages promoting the bar: SendSmart and TXT Live!. (Ex. E, Shark Bar Supp. Interrog. Resp. No. 4.)

RESPONSE: Controverted in part. Defendants admit that during the relevant time, Shark Bar employees used the SendSmart and Txt Live platforms (“Platforms”) to send text messages to customers who signed up to receive text messages about the contests they had entered. The remainder of the statement, however, is controverted because not all text messages sent through the Platforms “promoted” Shark Bar. (Smith Opp. Decl. Ex. J.)

4. PROPOSED FACT: The first messaging platform was called SendSmart, which Defendant Entertainment Consulting International (“ECI”) [redacted]. (Ex. F, SendSmart Master Services Agreement.)

RESPONSE: Admitted.

5. PROPOSED FACT: SendSmart [redacted] (“Shamos Rept.”) ¶¶ 87.)

RESPONSE: Controverted in part. Defendants admit that their employees manually uploaded customer contact information, including phone numbers, to SendSmart, which were stored in a database. Defendants further state that individuals who worked for Shark Bar, not SendSmart, contacted customers and SendSmart cannot send text messages without a human being identifying the recipient(s), creating the messages and hitting the send button. (Smith Opp. Decl. Ex. F (Shamos Rep.) ¶¶ 85-93; Smith Opp. Decl. Ex. G (Shamos Dep.) 108:8-11, 100:1-6);

see also id. at 78:16-79:1, 83:14-84:17, 85:12-15, 88:10-15, 89:14-90:9, 92:21-93:12, 94:20-23, 98:11-18, 99:10-11, 100:1-6, 101:16-18, 108:8-11, 123:5-12, 126:13-128:24.)

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. PROPOSED FACT: To "campaign" to those numbers [redacted] a [redacted] (Ex. H, Deposition of Kyla Bradley ("Bradley Dep.") at 116:21–117:23; Uhlig Dep. at 25:11–27:7; 74:16–18; Shamos Rept. ¶¶ 88–93.) The employee would t[redacted]. (Ex. I, Expert Report of Dr. Michael Mitzenmacher ("Mitzenmacher Rept.") ¶ 35.) The employee would then click "Launch," at which point the SendSmart system would determine which contacts would be texted. *See* Sendsmart-launch-create, Vimeo, https://vimeo.com/165045443 at 2:40 (noting SendSmart "is gonna grab randomly" 100 numbers from a larger list meeting certain criteria); Uhlig Dep. at 25:11–26:5; Shamos Rept. ¶¶ 90–93.) The messages [redacted]. (Miztenmacher Rept. ¶ 36; Shamos Rept. ¶ 93.)

RESPONSE: Controverted in part. Defendants admit that, after numbers provided by Shark Bar's customers were manually added to the SendSmart platform, a Shark Bar employee would log into SendSmart, identify the specific contacts or criteria of customers he or she wanted

to contact, and set the number of customers he or she wanted to text message. Defendants also admit that a Shark Bar employee would type or insert a message to send to the group of identified individuals, which could include variables (such as a customer's name), that the user selected to populate the message. (Smith Opp. Decl. Ex. I (Mitzenmacher Dep.) at 85:2-15 (explaining "to be clear, the user composes the message," which may include typing "a special symbol . . . to denote in that message that field should be replaced with the [information specified by the user]").) Defendants further admit that it was necessary for the user to press "launch" in order to send a text message, but the remainder of the statement is controverted because SendSmart does not "determine which contacts would be texted." [redacted] (Smith Opp. Decl. Ex. B (Yasnoff Decl.) ¶ 12.) SendSmart does not allow random selection among contacts identified through a user's search criteria. (*Id.* ¶¶ 12-13; Ex. E (Mitzenmacher Rep.) ¶¶ 32-35.)

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.

7. PROPOSED FACT: These campaigns w[redacted]. (Bradley Dep. at 116:2–117:23; Uhlig Dep. at 25:11–26:5.) Shark Bar employees [redacted]. (Uhlig Dep. at 74:16–75:18.) As one Shark Bar employee stated, [redacted] (Uhlig Dep. at 16:17–17:19, 25:11–26:5.)

RESPONSE: Controverted in part. SendSmart does not "randomly select" contacts, nor are recipients unknown: the recipients, derived from set customer contact information manually uploaded to the Platform after it was provided by customers, are determined by the user's input (Smith Opp. Decl. Ex. B (Yasnoff Decl.) ¶¶ 7-10; *id.* Ex. E (Mitzenmacher Rep.) ¶¶ 33-34, 62, 73-74; Uhlig Decl. ¶¶ 9, 16), which does not include any generation or production of random phone numbers. (Smith Opp. Decl. Ex. I (Mitzenmacher Dep.) at 118:12-120:17.) Defendants further dispute Plaintiff's description of "randomly selected," which does not accurately describe Mr. Uhlig's cited testimony. When asked what SendSmart was used for, Mr. Uhlig explained that a [redacted] t [redacted] (Smith Opp. Decl. Ex. H (Uhlig Dep.) at 25:19 – 26:5).

8. PROPOSED FACT: SendSmart was well-equipped for this task because i [redacted]. (Uhlig Dep. at 51:7–52:6 (estimating [redacted]. The only [redacted]. (Uhlig Dep. at 48:2–49:3.)

RESPONSE: Controverted in part. SendSmart's training materials s [redacted]. (Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) ¶ 35 (citing to Hand000021708, at 2).) When asked how many text messages he could send at once with SendSmart, Mr. Uhlig testified as follows: "[redacted] Mr. Uhlig further testified that, for various reasons, he limited the number of individuals he attempted to contact when sending text messages through SendSmart. (Smith Opp. Decl. Ex. H (Uhlig Dep.) at 48:2-49:3).

Plaintiff further mischaracterizes Mr. Uhlig's testimony [redacted] (*Id.* at 50:13-52:6) Defendants further deny that the number of text messages that can be sent through the SendSmart platform is legally relevant to the analysis of whether the platform constitutes an ATDS under the TCPA.

9. PROPOSED FACT: This meant that SendSmart could send [redacted]. As SendSmart's CEO made clear [redacted] (Shamos Rept. at ¶ 83; Uhlig Dep. at 53:1–54:4; Ex. J, Uhlig Dep. Exhibit No. 3

[redacted]) Thus, unlike manually dialed telephone calls to individual phone numbers, [redacted]. (*See* Uhlig Dep. at 48:2–4.)

RESPONSE: Controverted. Plaintiff fails to cite admissible evidence to support the proposed affirmative fact. Thus, Shark Bar denies it. Plaintiff i[redacted] (*See* Smith Opp. Decl. Ex. H (Uhlig Dep.) at 48:2–4.) When asked [redacted] (*See Id.* at 48:2–7.). Plaintiff also incorrectly cites [redacted] s[redacted] (Kenney Decl. Ex. J.) In addition, [redacted]. (Smith Opp. Decl. Ex. H (Uhlig Dep.) at 54:2-4). Nor did Mr. Uhlig [redacted]

[redacted]

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.

10. PROPOSED FACT: Records produced by SendSmart ("SendSmart SMS Logs") show [redacted]. (Kenney Decl. ¶¶ 29–32.) Of those [redacted]. (Kenney Decl. ¶ 33.) Plaintiff J.T. Hand was among the recipients of texts advertising Shark Bar sent through the SendSmart System. (Group Ex. K (text Plaintiff received sent through SendSmart, Excerpts from the SendSmart SMS Logs, and SendSmart MySQL Insert Commands).)

RESPONSE: Controverted in part. Mr. Kenney's purported analysis of the SendSmart records is a summary of record evidence that should be provided by an expert – not an attorney. Thus, these purported "facts" are not supported by admissible evidence. *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"). In further response, Defendants state that Shark Bar employees had to manually compose any

messages that were sent through the SendSmart platform. (Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) Figure 11.) The user could either type the message directly or paste a message into SendSmart's interface. (*Id.* at ¶ 36.) The user could also manually insert contact-specific information into the message body, such as a contact's name or birthday. (*Id.*) This user-generated message could be the same for each recipient, or it could include variables, such as the recipient's name. (Smith Opp. Decl. Ex. B (Yasnoff Dec.) ¶ 14). A "variable" is an instruction typed in by a user as a user creates a message. (Smith Opp. Decl. Ex. I (Mitzenmacher Dep.) 116:16-117:14.) Any saved messages were "previously typed messages that [a user] had typed in previously" that a user could then choose to use in drafting a new message. (*Id.* 116:4-10.)

With respect to Plaintiff, on March 18, 2015 and February 24, 2016, Mr. Uhlig sent Plaintiff text messages offering him the opportunity to book a party for his birthday, which was recorded in Shark Bar's system as [redacted]. (Uhlig Decl. Ex. C; Smith Opp. Decl. Ex. J.) Plaintiff's description of these text messages as "advertising" is a legal conclusion that is not proper for a statement of facts.

11. PROPOSED FACT: Around May 19, 2014, Mr. Uhlig—a former District Sales Manager for the Kansas City Live! Block—started looking into "[redacted] (Uhlig Dep. at 54:14–19, 57:23–58:8, 58:19–59:1.) He worked with [redacted] (Uhlig Dep. at 55:8, 57:23–60:8.)

RESPONSE: Controverted in part. Defendants admit that Mr. Uhlig, [redacted].

[redacted]

(Kenney Decl. Ex. B (Uhlig Dep.) at 58:4-59:1.)

12. PROPOSED FACT: While [redacted] (Uhlig Dep. at 59:2–60:8; Ex. L, Uhlig Dep. Exhibit No. 4.) However, Mr. Uhlig testified that he [redacted] (Uhlig Dep. at 60:3–8.)

RESPONSE: Controverted. With respect to a May 19, 2014 email marked as Exhibit 4 at Mr. Uhlig's deposition and referenced in Paragraph 12 of Plaintiff's statement of proposed facts, Mr. Uhlig testified a [redacted] (Uhlig Dep. 58:8 – 59: 15). [redacted] is irrelevant to the analysis of whether SendSmart constitutes an ATDS under the TCPA.

13. PROPOSED FACT: Ultimately, [redacted] (Ex. M, [redacted].)

RESPONSE: Controverted in part. Defendants admit that ECI worked [redacted] (Kenney Decl. Ex. M.)

14. PROPOSED FACT: Mr. Uhlig worked with TXT Live!' [redacted] (Uhlig Dep. at 22:19-24:11, 61:16–21, 62:25–63:1.) [redacted] (See Uhlig Dep. 76:20–79:11; Bradley Dep. 115:24–117:23; Ex. N, Deposition of Blake Miller ("Miller Dep.") at 22:20–23:15.)

RESPONSE: Admitted.

15. PROPOSED FACT: Shark Bar started using TXT Live! in early 2016 to send messages promoting happy hour events. (Ex. E, Shark Bar Supp. Interrog. Resp. No. 4.)

RESPONSE: Controverted in part. Defendants admit that in or around March 2016, Shark Bar began to transition to using the Txt Live Platform. The remainder of the statement, however, is controverted. Shark Bar's promotional builders used Txt Live! to communicate with customers to inform them that they won a happy hour or other event. (Uhlig Decl. ¶ 11.) These communications frequently resulted in two-way, back-and-forth communications with a customer to schedule and plan the details of an event. (Uhlig Decl. ¶ 12.) Thus, not all text messages "promot[ed] happy hour events." (Smith Opp. Decl. Ex. J.)

16. PROPOSED FACT: TXT Live! [redacted] (Bradley Dep. at 110:16–19; Ex. C, Deposition of Benjamin Rodriguez ("Rodriguez

Dep.") at 97:4–25.) There were [redacted] contacts in the TXT Live! database that were associated with Shark Bar. (Mitzenmacher Rept. ¶ 102 n.133.)

RESPONSE: Controverted in part. Defendants [redacted] (Kenney Decl. Ex. H (Bradley Dep.) at 110:16-19; *id.* Ex. C (Rodriguez Dep.) at 97:4-25.)

17. PROPOSED FACT: [redacted] (Bradley Dep. at 111:14–115:20; Ex. P, Deposition of Dr. Michael Mitzenmacher ("Mitzenmacher Dep.") at 75:6–17.) In fact, TXT Live! h[redacted] (Mitzenmacher Dep. at 75:6–17; Shamos Rept. ¶ 36; Mitzenmacher Rept. ¶ 48.)

RESPONSE: Controverted in part. Plaintiff [redacted] Thus, Shark Bar denies this characterization and further states that the cited testimony concerns [redacted]. (Kenney Decl. Ex. H, Bradley Dep. at 111:14–115:20.) Nor do t[redacted] (Kenney Decl. Ex. P, Mitzenmacher Dep. 75:6–17.) Paragraph [redacted]. (Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) ¶ 48.) Further, [redacted] (*Id.* ¶ 49.)

18. PROPOSED FACT: To send a campaign, a u[redacted]. (Shamos Rept. ¶¶ 36, 37–43; Mitzenmacher Rept. ¶ 48; Bradley Dep. at 111:14–112:2; Uhlig Dep. at 62:2–24; Rodriguez Dep. at 40:12–42:7.) Selecting [redacted] (Shamos Rept. ¶ 58; Uhlig Dep. 63:24–64:17; see also Ex. Q, Deposition of Steve Klingbeil at 17:12–18:2.)

RESPONSE: Admitted. However, Defendants state that the [redacted] referenced in Paragraph 18 are the result of user-imposed limitations on the number of individuals to contact. (Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) ¶ 58.) Defendants further state that a user may also manually select each number he or she wishes to contact through Txt Live! (*Id.* ¶ 52.) Defendants further deny that the number of text messages that can be sent through the Txt Live! platform is legally relevant to the analysis of whether the platform constitutes an ATDS under the TCPA.

19. PROPOSED FACT: The [redacted] (Shamos Rept. ¶ 45; Uhlig Dep. at 51:16–19.) TXT Live! users u[redacted]. (Uhlig Dep. 51:16–19; see also Ex. R, Deposition of Montana Asher ("Asher Dep.") at 40:3–8.) The messages [redacted] (Shamos Rept. ¶ 36; Mitzenmacher Dep. at 116:16–24; Bradley Dep. at 113:21–114:1.)

RESPONSE: Controverted in part. Defendants admit that a Txt Live! user [redacted]. (Smith Opp. Decl. Ex. I (Mitzenmacher Dep.) at 116:4-10.) Defendants further state that a "variable" is an instruction typed in by a user as a user creates a message. (*Id.* at 116:16-117:14.)

The proposed fact that Txt Live! users [redacted] Mr. Uhlig, w[redacted] (Smith Opp. Decl. Ex. H (Uhlig Dep.) 51:16-19) (emphasis added.) To the extent Plaintiff relies upon the testimony of Montana Asher for the proposed fact, Ms. Asher worked for a separated venue, Budweiser Brew House, that was not even located in KCPL. (Smith Opp. Decl. Ex. L (Asher Dep. 6:4-12.)) Therefore, Ms. Asher's testimony is irrelevant to the manner in which Shark Bar used the Platforms. Further, [redacted] (Kenney Decl. Ex. R, Asher Dep., at 40:3–8.) Further, for the reasons set forth in Defendants' suggestions in support of its 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.

20. PROPOSED FACT: Next, the TXT Live! user w[redacted]. (Bradley Dep. at 112:25–115:20; Miller Dep. at 120:24–122:14; Shamos Rept. ¶¶ 48, 57; Mitzenmacher Rept. ¶ 52; see also Uhlig Dep. at 67:4–19.)

RESPONSE: Controverted in part. Defendants admit that a user of Txt Live! s[redacted]. (Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) ¶¶ 54-55, 58.) By setting filters, a user of Txt Live! [redacted] (*Id.* ¶ 53.) [redacted]. (*Id.*) [redacted]. (*Id.*) [redacted]. (*Id.* ¶ 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.

21. PROPOSED FACT: Finally, after setting t[redacted]. (Mitzenmacher Rept. ¶ 53; Shamos Rept. ¶ 67.) At that point, the TXT Live! code [redacted]. (See Shamos Rept. ¶¶ 36, 57–72 (describing the sequence of code); Miller Dep. at 89:19–92:5, 121:10–122:14; Uhlig Dep. at 78:23–25; Bradley Dep. at 112:25–115:20.) T[redacted]

[redacted]

(Rodriguez Dep. at 69:8–70:22; Shamos Rept. ¶¶ 68–69; Mitzenmacher Rept. ¶ 54; Mitzenmacher Dep. at 128:14–21.)

RESPONSE: Controverted in part. Defendants admit that a user [redacted]. (Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) ¶ 54.) [redacted] (*Id.* ¶ 55.) [redacted] (*Id.* ¶ 54.) [redacted]. (*Id.*)

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. (Smith Opp. Decl. Ex. F (Shamos Rep.) ¶¶ 67–69.)

22. PROPOSED FACT: Thus, [redacted]. (Ex. S [redacted]; Uhlig Dep. at 75:6–18, 78:23–25; Bradley Dep. at 112:3–115:20 (noting that [redacted]); Mitzenmacher Rept. ¶ 71; Shamos Rept. ¶ 57.) TXT Live! users [redacted]. (Uhlig

Dep. at 79:8–11; Asher Dep. at 18:5–17; Shamos Rept. ¶ 44; Mitzenmacher Dep. at 127:18–128:10.)

RESPONSE: ***Controverted in part.*** Txt Live! does not [redacted] (Smith Opp. Decl. Ex. C (B. Rodriguez Dep. 105:1-107:15, 109:2-110:22); *id.* Ex. D (B. Miller Dep. 102:1-16, 104:2-105:9, 105:14-108:17); *see also id.* Ex. G (Shamos Dep. 100:24-101:1); *id.* Ex. E (Mitzenmacher Rep.) ¶¶ 62, 65-74; Uhlig Decl. ¶ 9.) Txt Live does not generate or produce random numbers (Smith Opp. Decl. Ex I (Mitzenmacher Dep.) 118:12-120:17). In addition, the [redacted]. (Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) ¶ 55.) The user's [redacted]. (*Id.* ¶ 121.) Moreover, the user can then engage in back-and-forth text-message conversations through Txt Live. (*Id.* ¶ 60; Uhlig Decl. ¶ 12.) Further, when asked whether [redacted]" (Mitzenmacher Dep. at 127:18–128:8.)

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.

23. PROPOSED FACT: Once the TXT Live! system i[redacted]. (Shamos Rept. ¶ 72; Miller Dep. at 34:8–36:15, 123:5–124:10; Rodriguez Dep. at 42:8–43:13, 54:7–56:5; see also Mitzenmacher Dep. at 127:11–17.)

RESPONSE: Controverted in part. Defendants admit that [redacted]. (Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) ¶ 108 n. 139). Rather, a human user must go through a multi-step process to set up a campaign, and then starts dialing by pressing a "send" button. (*Id.*) From there, [redacted]. (*Id.* ¶¶ 125-27.) Mr. Miller testified t[redacted]. (Smith Opp. Decl. Ex. D (Miller Dep.) at 34:8–36:15).

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.

24. PROPOSED FACT: One TXT Live! user [redacted]

[redacted]. (Uhlig Dep. at 77:5–78:22.) TXT Live! was used to [redacted]. (Shamos Rept. ¶¶ 56–57, 77; Uhlig Dep. at 50:4–19; 67:24–68:11; Ex. T, Uhlig Dep. Exhibit No. 5; Asher Dep. at 16:24–18:25; Miller Dep. at 122:19–123:1.) TXT Live! could send the same text message to 2,082 phone numbers in 420 seconds, which is 4.9 text messages per second for 7 minutes continuously. (Ex. U, Deposition of Dana Biffar at 125:13–127:7.)

RESPONSE: Controverted in part. Defendants admit that it was possible for Txt Live! to send text messages to 100 or to 1,000 recipients but denies that it was common practice for more than 100 text messages to be sent in single campaign—in fact, approximately 83.3% of the campaigns were sent to 50 or fewer recipients. (Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) ¶ 138.) Defendants further deny that the number of text messages that can be sent through the Txt Live! platform is legally relevant to the analysis of whether the platform constitutes an ATDS under the TCPA.

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.

25. PROPOSED FACT: The ability [redacted] (Ex. V (advising how to avoid spam filters); Ex. W, Uhlig Dep. Exhibit No. 6.)

RESPONSE: Controverted in part. Plaintiff fails to cite admissible evidence to support the proposed affirmative fact. Thus, Shark Bar denies it. Txt Live! users [redacted]. (Kenney Decl. Exs. V & W.) Defendants further deny that the number of text messages that can be sent through the Txt Live! platform is legally relevant to the analysis of whether the platform constitutes an ATDS under the TCPA.

26. PROPOSED FACT: Records produced by Think Big show that Shark Bar used TXT Live! to send as many as [redacted] outgoing text messages to as many as [redacted] unique phone numbers between April 25, 2014 and April 4, 2018. (See supra at ¶ 16, citing Mitzenmacher Rept. ¶ 102 n.133; Mitzenmacher Rept. ¶ 135.) Of those messages, [redacted] (Shamos Rept. ¶ 77.)

RESPONSE: Controverted in part. Defendants admit that Shark Bar sent approximately [redacted] outgoing text messages through the Txt Live! platform over a multi-year period. (Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) ¶ 135.) As Dr. Mitzenmacher explains, this is an average of 274 text messages per day. (*Id.*) Defendants deny that over [redacted] (*Id.* ¶ 136.) Further, [redacted]. (*Id.*) Therefore, this statement is controverted.

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.

27. PROPOSED FACT: Mr. Hand received texts through the TXT Live! system advertising Shark Bar. (Group Ex. X (Screenshots of TXT Live texts to Hand); Group Ex. K (TXT Live! records showing texts to Hand).)

RESPONSE: Controverted in part. Defendants admit that Mr. Uhlig sent Plaintiff two text messages through the Txt Live! platform: one on September 6, 2017, informing Plaintiff that he won a free party; the other on December 14, 2017, inviting Plaintiff to enjoy a VIP party. (Uhlig Decl. Ex. D.) Defendants state that the referenced exhibits include two additional text messages that Mr. Uhlig sent to Mr. Hand through SendSmart, not the Txt Live platform. (Kenney Decl. Exs. X & K.) Defendants further state that whether each of these text messages constitutes "advertising" is a legal conclusion for the Court to resolve

28. PROPOSED FACT: On May 17, 2018, Plaintiff's counsel sent a letter requesting that Shark Bar provide them with a copy of Shark Bar's written policies and procedures to ensure compliance with the TCPA as of April 25, 2014, February 13, 2018, and April 4, 2018; however, Shark Bar never responded to Plaintiff's written request. (Ex. Y, May 2018 Email Thread.) Shark Bar never identified any publicly-available documents setting forth any TCPA policies, and instead claimed to be "exempt from the obligation to download and scrub against the [National Do Not Call Registry] . . ." (Ex. E, Shark Bar Supp. Interrog. Resp. Nos. 14–16.)

RESPONSE: Controverted. Defendants deny that they "never responded" to Plaintiff's written request because they produced any applicable policies and procedures during the course of discovery. (Smith Opp. Decl. Ex. A (Shark Bar Supp. Interrog. Resp. Nos. 14–

16).) Defendants further state that this proposed fact is not relevant to any argument related to Plaintiff's partial motion for summary judgment.

29. PROPOSED FACT: The marketing manager overseeing the Power & Light District, (Bradley Dep. at 16:9–25), could not i[redacted]. (Bradley Dep. at 12:20–16:8.) Shark Bar's Promotional Builder—and former District Sales Manager for the Kansas City Live! Block, (Uhlig Dep. at 22:19–24:11)—who [redacted]. (Uhlig Dep. at 79:12–80:6.)

RESPONSE: Controverted. Shark Bar trained its employees that it should only send text messages to individuals who provided consent to receive such communications and to opt-out anyone who indicated a desire not to receive such communications out of the receipt of any further text messages. (Uhlig Decl. ¶ 13.) Ms. Bradley testified that [redacted]

[redacted] (Kenney Decl. Ex. H, Bradley Dep. 13:5-16:8.) Defendants further state that this proposed fact is not relevant to any argument related to Plaintiff's partial motion for summary judgment.

MATERIAL FACTS RELIED UPON IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

1. Neither SendSmart nor Txt Live! can send text messages without a human being identifying the recipient(s), creating the messages, and hitting the send or launch button. (Smith Opp. Decl. Ex. B (Yasnoff Decl.) ¶ 16; *id.* Ex. C (B. Rodriguez Dep.) 105:1-107:15, 109:2-110:22; Ex. D (B. Miller Dep.) 102:1-16, 104:2-105:9, 105:14-107:19, 107:20-108:17, 111:12-112:12; Uhlig Decl. ¶¶ 15-16; Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) ¶¶ 14, 62-74.)

2. The Platforms are not capable of generating telephone numbers randomly or sequentially. (Smith Opp. Decl. Ex. B (Yasnoff Decl.) ¶ 7; *id.* Ex. C (B. Rodriguez Dep.) 105:1-107:15, 109:2-110:22; *id.* Ex. D (B. Miller Dep.) 102:1-16, 104:2-105:9, 105:14-108:17; *see also id.* Ex. G (M. Shamos Dep.) 100:24-101:1.)

3. The Platforms are not capable of producing or storing telephone numbers to be called that were created using a random or sequential number generator. (Smith Opp. Decl. Ex. B (Yasnoff Decl.) ¶ 7; *id.* Ex. C (B. Rodriguez Dep.) 105:1-107:15, 109:2-110:22; *id.* Ex. D (B. Miller Dep.) 102:1-16, 104:2-105:9, 105:14-108:17; *see also id.* Ex. G (M. Shamos Dep.) 100:24-101:1.)

4. A Shark Bar employee must manually upload contact information, provided by Shark Bar customers, to the Platforms. (Smith Opp. Decl. Ex. B (Yasnoff Decl.) ¶ 6; *id.* Ex. C (B. Rodriguez Dep.) 91:16-22; *id.* Ex. D (B. Miller Dep.) 30:18-31:7, 33:5-12, 80:18-81:6, 28:13-29:15; Ex. E (Mitzenmacher Rep.) ¶¶ 15, 22, 23, 27-31, 44-48, Fig. 29.)

5. Each SendSmart user account c [redacted] (Smith Opp. Decl. Ex. B (Yasnoff Decl.) ¶¶ 10-12.)

6. On the SendSmart Platform, a user specifies criteria to identify those customers most appropriate to contact. (Smith Opp. Decl. Ex. B (Yasnoff Decl.) ¶¶ 8, 14-15; Uhlig Decl. ¶ 16.)

7. On the SendSmart Platform, a user may directly select the customers one-by-one that it seeks to message. (Smith Opp. Decl. Ex. B (Yasnoff Decl.) ¶ 9.)

8. On the SendSmart Platform, a user [redacted]. (*Id.* ¶ 10.) I [redacted]. (*Id.* ¶ 12.) [redacted] (*Id.* ¶¶ 12-13; Ex. E (Mitzenmacher Rep.) ¶¶ 34.)

9. On the SendSmart Platform, a user types or pastes the contents of a message to create it. (*Id.* Ex. B (Yasnoff Decl.) ¶ 14.) A user may enter variables that will populate information within the text message the user creates. (*Id.* Ex. I (Mitzenmacher Dep.) 85:2-15 (explaining [redacted]").)

10. A user must transmit a text message by clicking the launch button on the SendSmart Platform, which is necessary to send any text messages (Uhlig Decl. ¶ 15), and the

resulting transmission is akin to sending a message by smartphone. (Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) ¶¶ 37, 38; *id.* Ex. B (Yasnoff Decl.) ¶ 15.)

11. A user can engage in back-and-forth text-message conversations through SendSmart. (Uhlig Decl. ¶ 12.)

12. Recipients of messages sent through the Txt Live! Platform are derived from set customer contact information, provided by customers to Shark Bar, manually uploaded to the Platform and determined by the user's input (Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) ¶¶ 32-38), which does not include any generation or production of random numbers (Smith Opp. Decl. Ex. I (Mitzenmacher Dep.) 118:12-120:17). The user's input determines the population of recipients, and the user can review the application of the user's filters in real-time. (Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) ¶ 121.)

13. Users of the Txt Live! Platform may specify the number of customers to contact. (*Id.* ¶ 53.)

14. Users of the Txt Live! Platform may view and manually add or remove individuals from any given campaign before sending any messages. (*Id.* ¶¶ 51-52 & Figures 19-20.)

15. A user of the Txt Live! Platform determines the content of the messages. (Uhlig Decl. ¶ 15.)

16. On the Txt Live! Platform, a user must manually type or enter the content of a message. (*Id.*)

17. On the Txt Live! Platform, a variable is an instruction to populate the message with specified information typed in by a user as a user creates a message. (Smith Opp. Decl. Ex. I (Mitzenmacher Dep.) 116:16-117:14.)

18. In drafting a new message on the Txt Live! Platform, a user may manually select a saved message to create a new message to send. (Smith Opp. Decl. Ex. I (Mitzenmacher Dep.) 116:4-10.) Any of the saved messages were previously typed in by a user. (*Id.*)

19. A user can engage in back-and-forth text-message conversations through Txt Live! (Uhlig Decl. ¶ 12.)

20. On the Txt Live! Platform, a user must press the send button to send a text message (Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) ¶ 40), and the resulting transmission initiated by the user is akin to when a user directs a smartphone to place a call or send a message (*id.* ¶¶ 120, 123-27).

21. Neither the SendSmart nor Txt Live! Platforms can schedule messages to be sent at a later date or time. (Uhlig Decl. ¶¶ 15, 18.)

22. Plaintiff's [redacted] (Smith Opp. Decl. Ex. G (Shamos Dep.) 71:21-72:15, 74:24-76:3, 119:3-18, 122:3-14), and t[redacted] (*id.* 81:23-82:7; 53:17-23; *see id.* Ex. E (Mitzenmacher Rep.) ¶¶ 37, 38, 120, 123-27).

ARGUMENT

Plaintiff cross-moves for partial summary judgment on the issue of whether Defendants used an ATDS despite the undisputed record that the Platforms (i) are unable to generate telephone numbers, and (ii) cannot send text messages without significant human intervention by a Shark Bar employee. (Pl. Stmt. ¶¶ 5, 6, 18-21; Cr. Mot. 7.) These facts are fatal to Plaintiff's Cross-Motion.

I. DEFENDANTS DID NOT USE AN ATDS TO SEND TEXT MESSAGES

A. THE PLATFORMS DO NOT GENERATE TELEPHONE NUMBERS

Courts in this Circuit and elsewhere have held that a plain reading of the TCPA requires that, to qualify as an ATDS, a dialing system must "generate" telephone numbers, and not merely store or dial them. (Cr. Mot. 5-9) Thus, many courts—including the Third and Sixth Circuit Courts of Appeals and *every district court within the Eighth Circuit to address the issue*—have interpreted the definition of an "ATDS" as technology that calls phone numbers that were *generated* randomly or sequentially. *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 119-21 (3d Cir. 2018); *Gary v. Trueblue, Inc.*, No. 18-2281, 2019 WL 5251261, at *4-6 (6th Cir. Sept. 5, 2019); *Roark v. Credit One Bank, N.A.*, Civ. No. 16-173 (PAM/ECW), 2018 WL 5921652, at *3 (D. Minn. Nov. 13, 2018); *Thompson-Harbach v. USAA Fed. Sav. Bank*, 359 F. Supp. 3d 606, 624 (N.D. Iowa Jan. 9, 2019); *see also Folkerts v. Seterus, Inc.*, No. 17 C 4171, 2019 WL 1227790, at *7 (N.D. Ill. Mar. 15, 2019) (granting summary judgment for defendant where plaintiff lacked evidence that the system "had the present capacity to store, produce, and dial numbers using a random or sequential generator"); *Smith v. Premier Dermatology*, No. 17-c-3712, 2019 WL 4261245, at *6 (N.D. Ill. Sept. 9, 2019) (granting summary judgment in defendant's favor, because the "[the system] only had the capacity to send text messages to client-provided phone numbers."); *DeNova v. Ocwen Loan Servicing*, No. 8:17-cv-2204-T-23AAS, 2019 WL 4635552, at *4 (M.D. Fla. Sept. 24, 2019) (same).

Plaintiff concedes the Platforms lack this capability, stating that [redacted] (Cr. Mot. 7.) In an effort to nevertheless shoehorn the Platforms into the statutory definition of an ATDS, Plaintiff relies almost exclusively on *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2019) in

support of his claim that the Court should ignore the plain language of the TCPA.[2] But *Marks* has been sharply criticized since it was decided last year, including by courts within this Circuit, because it effectively rewrites the statutory text. (*See* Def. Mot. 5, n.4 (citing Eighth Circuit cases); *see also Adams v. Safe Home Security, Inc.*, No. 3:18-cv-03098-M, 2019 WL 3428776, at *3 (N.D. Tex. Jul. 30, 2019) (disagreeing with *Marks* and concluding that the "clause [related to random or sequential number generator] more readily refers to both the storage and generation of numbers");[3] *Johnson v. Yahoo!, Inc.*, 346 F. Supp. 3d 1159, 1162 (N.D. Ill. 2018) (disagreeing with *Marks* and stating that "[t]he phrase 'using a random or sequential number generator' applies to the numbers to be called and an ATDS must either store or produce those numbers (and then dial them). Curated lists developed without random or sequential number generation capacity fall outside the statute's scope.") *Marks* was also recently criticized by FCC Commissioner Michael O'Rielly, describing it as an "extremely misguided and breathtakingly expansive definition of ATDS." https://www.fcc.gov/document/orielly-remarks-aca-intl-

[2] Plaintiff argues that certain of the TCPA's exceptions from liability favor his overly broad definition of an ATDS, but, as courts have repeatedly found, these exceptions do not support Plaintiff's interpretation. (Cr. Mot. 3-4) (citing *Marks*; *Allan v. Pennsylvania Higher Educ. Assistance Agency*, No. 2:14-cv-54, 2019 WL 3890214, at *3 (W.D. Mich. Aug. 19, 2019). 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." *Gadelhak*, 2019 WL 1429346, at *5; *Thompson-Harbach*, 369 F. Supp. 3d at 626. Moreover, as the court in *Adams* observed, the legislative history of the TCPA permitted the FCC to "allow businesses to call consumers with whom the business had an 'established business relationship'" and that to do so, the devices used would "have to be able to store those customers phone numbers, making it unlikely that Congress was attempting to ban that feature." 2019 WL 3428776, at *4. Plaintiff's proffered interpretation of an ATDS similarly asks this Court to conclude that Defendants potentially violated the law by contacting its own customers, simply because the Platforms store contact information, after customers provided it.

[3] Courts have also rejected Plaintiff's claim that it is not possible to "store" numbers using a random or sequential number generator. In *DeNova*, 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 (quoting *Johnson v. Yahoo!, Inc.*, 346 F. Supp. 3d 1159, 1162 n.4 (N.D. Ill. 2018) (alterations in original)).

washington-insights-conference. This Court should likewise reject *Marks* and apply the statutory requirement that the Platforms must generate numbers to qualify as an ATDS under the TCPA.

Plaintiff recognizes the weight of authority is against his proffered interpretation of an ATDS and argues that the Platforms qualify as an ATDS under the statute even if this Court requires that the Platforms generate numbers to fall within the definition. (Cr. Mot. 6-8.) This argument is meritless. Plaintiff asserts that the Platforms qualify as an ATDS because t[redacted] (*Id.* (arguing that the Platforms qualify as an ATDS because [redacted]) As Defendants previously demonstrated, there is no support for this argument and in fact, the part of the process that Plaintiff argues is "random" [redacted] Plaintiff's claim that such self-imposed limitations should somehow subject trigger the TCPA is unsupported. In fact, the D.C. Circuit, in its binding decision in *ACA International*, along with other courts, expressly rejected the argument that a system could qualify as an ATDS by "randomly" selecting numbers to dial from a list because "numbers must necessarily be called in some order—either in random or some other sequence." *ACA International v. FCC*, 885 F.3d 687, 702 (D.C. Cir. 2018)); *Gadelhak*, 2019 WL 1429346, at *7; *Smith v. Navient Sols., LLC*, No. CV 3:17-191, 2019 WL 3574248, at *9 (W.D. Pa. Aug. 6, 2019) (holding that because system "automatically sorts, filters, reorders and re-sequences telephone numbers based on rules and strategies that have been preprogrammed into the system . . . system does not actually *generate* numbers to be called, either randomly or sequentially.") (emphasis in original).

B. THE PLATFORMS COULD NOT SEND TEXTS WITHOUT HUMAN INTERVENTION

Even if this Court does not require that the Platforms to "generate" telephone numbers to qualify as an ATDS, the Platforms do not constitute an ATDS under any other interpretation because of the human intervention required to send text messages. (Def. Mot. 9-10.) Plaintiff admits that a Shark Bar employee had to (i) log into the Platform, (ii) select the type of customers that it wished to campaign, (iii) type or select the content of the text message; and (iv) press a send or launch button to send a text message. (Pl. Stmt. ¶¶ 6, 18-21.) Every court that has considered a platform similar to the ones at issue here have held that they do not constitute an ATDS. (Def. Mot. 9-10 (citing cases).)

Notwithstanding this authority, Plaintiff asks this Court to expand the definition of an ATDS to include any technology that can merely "store" phone numbers and "dial" in an effort to sweep these admittedly manual Platforms within the scope of the TCPA. (Cr. Mot. 2-5.) This interpretation of the TCPA is not only inconsistent with the statute's plain language, but also suffers from the very defect that the D.C. Circuit found "untenable" in *ACA International.* 885 F.3d at 698.

Moreover, even under the Ninth Circuit's flawed analysis in *Marks*, the Platforms do not constitute an ATDS because they did not "automatically" dial numbers.[4] *See also Ammons v. Diversified Adjustment Serv., Inc.*, No. 218CV06489ODWMAAX, 2019 WL 5064840, at *5 (C.D. Cal. Oct. 9, 2019) (applying *Marks* and granting summary judgment where calling system "goes far beyond triggering a system to run automatically. It requires human interaction to

[4] In *Marks*, the technology at issue was more automated than the Platforms because it allowed users to schedule text messages to be sent at a future time. However, the defendant did not argue that the technology at issue did not automatically dial numbers and the Ninth Circuit did not address the issue and remanded the case for further proceedings. 904 F.3d at 1053.

initiate each call.") In support of his Cross-Motion, Plaintiff identifies several manual steps required in order to send a text message through either Platform. (Pl. Stmt. ¶¶ 6, 18-21.) Despite these undisputed facts, Plaintiff [redacted] (Cr. Mot. 5.) This assertion (i) ignores that each and every text sent required a human to initiate it; (ii) ignores the level of human interaction required to respond to text recipients on an individual basis after a campaign is sent, and (iii) incorrectly interprets the law.

First, Plaintiff's contention that the Platforms are an ATDS because Defendants employees could send text messages without manually dialing the digits of each phone number fails.[5] *Ammons*, 2019 WL 5064840, at *5. Plaintiff ignores that to send texts using the Platforms, a human must load phone numbers into the Platforms, type out the content of a text message and then send it. (Pl. Stmt. ¶¶ 6, 18-21.) The interpretation urged by Plaintiff would require a finding that group messaging on a smart phone, which also does not required manually dialing each phone number before sending a text (even to a group of people), would be deemed using an ATDS. (Smith Opp. Decl. Ex. E, Mitzenmacher Rep. ¶¶ 112-13.) Plaintiff's argument about c[redacted]. Every modern day phone, including smart phones, relies upon code to transmit a call or text message to a telecommunications provider. As such, the resulting transmission after Defendants' employees initiated a text is akin to when a user directs a smartphone to place a call or send a message, and in fact, any time a text message or phone call is placed by a user. (*Id.* ¶¶

[5] This is also contrary to Plaintiffs' theory in the SAC, which was that the equipment qualified as an ATDS because it is "unattended by human beings, and the equipment does, in fact, send text messages automatically, *i.e.*, without human intervention." (SAC ¶ 52.)

112, 114.) The D.C. Circuit rejected any interpretation of the term ATDS that would capture smartphones. *ACA Int'l*, 885 F.3d at 698.

Moreover, the record is clear that the user of the Platforms makes the decision to transmit the message by hitting send, which courts have consistently held removes a platform from the purview of an ATDS. For example, in *Ramos v. Hopele of Fort Lauderdale, LLC*, 334 F. Supp. 3d 1262, 1275 (S.D. Fla. 2018), the court granted summary judgment in defendant's favor because "[i]f [defendant] had not ultimately pressed 'send' to authorize the . . . platform to send the text message, nothing would have occurred and no text message would have been sent." *See also Duran v. La Boom Disco, Inc.*, 369 F. Supp. 3d 476, 492 (E.D.N.Y. 2019) ("[B]ecause a user determines the time at which the . . . programs send messages to recipients, they operate with too much human involvement to meet the definition of an autodialer . . . [and] a sua sponte grant of summary judgment against plaintiff is appropriate."); (Def. Mot. 8-10 (citing cases)). The courts in *Ramos* and *Duran* concluded that the platforms in those cases were not an ATDS, even though it was possible to schedule a time to send a text message at a later time on those platforms. The Platforms here have no such capabilities. (Uhlig Decl. ¶¶ 15, 18.) Further, these courts also rejected the argument, relied upon by Plaintiff here, that a system constitutes an ATDS because it could "fire off thousands of texts at a designated time." *Duran*, 369 F. Supp. 3d at 490.

Second, in support of his claim that the Platforms constitute an ATDS, Plaintiff attempts to rely upon two cases, *Gonzalez v. HOSOPO Corp.*, 371 F. Supp. 3d 26 (D. Mass. 2019)[6] and

[6] *Gonzalez* was decided in the context of a motion to dismiss – not summary judgment. Likewise, Plaintiff's citation to *Getz v. DirectTV, LLC*, 359 F. Supp. 3d 1222, 1230 (S.D. Fla. 2019) is unavailing because this case was also decided on a motion to dismiss, where the court credited, as required, the plaintiff's allegations that the platform at issue was able to send messages "without human intervention. *Id.* The court specifically held that defendants could renew their argument that the platform did not constitute an ATDS on summary judgment.

Espejo v. Santander, Inc., 2019 WL 2450492 (N.D. Ill. June 12, 2019), both of which were decided in the context of predictive dialers[7] in connection with calls – not text messages. (Cr. Mot. 6.) These cases provide no support for Plaintiff's position that the Platforms constitute an ATDS, as other courts have held when analyzing text platforms. *See, e.g.*, *Duran*, 369 F. Supp. 3d at 491 (distinguishing cases involving predictive dialers because a computer, not a human being, decides when to send a text message); *Ramos*, 334 F. Supp. 3d at 1275-76 (noting the FCC expressly ruled that predictive dialers fit the definition of an ATDS). Plaintiff concedes that in order to send a text message through the Platforms, human action and judgment was required to determine when to send the text message, the content of the message and the universe of intended recipients. Finally, in the event the Court disagrees that this level of human intervention required to send a text message is not sufficient, as a matter of law, to conclude that the Platforms are not an ATDS, then this is a factual question for the finder of fact to resolve. Thus, while Defendants maintain that the undisputed facts warrant summary judgment in their favor, to the extent the Court concludes that there is an issue of fact in this record, such a conclusion supports denial of Plaintiff's Cross-Motion.

CONCLUSION

Defendants respectfully requests that the Court deny Plaintiff partial summary judgment, grant summary judgment in Defendants' favor, and award any other relief the Court deems just and proper.

Dated: December 2, 2019 Respectfully submitted,

By: */s/ Jacqueline M. Sexton* */s/ Lauri A. Mazzuchetti*

[7] "[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. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers ***at random***. . . . " *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091 ¶ 131 (2003)(emphasis added). It has no application in the context of text messages. Neither of the Platforms were predictive dialers and Plaintiff does not contend that they were.

W. James Foland #25022
Jacqueline M. Sexton #53262
Foland, Wickens, Roper,
Hofer & Crawford, P.C.
1200 Main Street, Suite 2200
Kansas City, MO 64105
(816) 472-7474
jfoland@fwpclaw.com
jsexton@fwpclaw.com

Lauri A. Mazzuchetti (*pro hac vice*)
Whitney M. Smith (*pro hac vice*)
Glenn T. Graham (*pro hac vice*)
KELLEY DRYE & WARREN LLP
One Jefferson Road
Parsippany, New Jersey 07054
(973) 503-5900
lmazzuchetti@kelleydrye.com
wsmith@kelleydrye.com
ggraham@kelleydrye.com

David I. Zalman (*pro hac vice*)
KELLEY DRYE & WARREN
101 Park Avenue
New York, NY 11201
(212) 808-7800
dzalman@kelleydrye.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 2nd day of December, 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
Jacqueline M. Sexton