UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

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

SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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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 Shark Bar and Cordish, the "Defendants"), by and through their counsel, hereby submit the following suggestions and statement of uncontroverted material facts in support of their motion for summary judgment pursuant to Fed. R. Civ. P. 56(a).

STATEMENT OF UNCONTROVERTED MATERIAL FACTS

Pursuant to Local Rule 56.1(a), the following are the uncontroverted material facts supporting Defendants' motion for summary judgment ("Stmt."):

Defendants

1. Shark Bar is a bar located inside of the Kansas City Power & Light District ("KCPL") in Kansas City, Missouri. (Declaration of Kyle Uhlig ("Uhlig Decl.") ¶ 3.)

2. ECI is a consultant firm located in Baltimore, Maryland for businesses in the hospitality sector, including restaurants, bars, nightclubs, and live entertainment concepts, in various markets throughout the United States. (Declaration of Keith Hudolin ("Hudolin Decl.") ¶¶ 4, 5.) ECI provides, among other services, marketing and customer service-related support for more than 50 restaurants, bars and nightclubs in the United States, including Shark Bar. (*Id.*)

3. Cordish Companies is a passive company that does not have any employees, does not own any property, and does not conduct any business, including in the state of Missouri. (Declaration of Robert Fowler ("Fowler Decl.") ¶ 3.)

Shark Bar and KCPL

4. KCPL is a vibrant nine-block dining, shopping, office, entertainment and lifestyle neighborhood that opened in 2008. *See* https://www.visitkc.com/business-detail/kansas-city-power-light-district.

5. KCPL is an entertainment district and it – along with the venues located within it, such as Shark Bar – has been credited as "reenergize[ing]" downtown Kansas City. https://www.visitkc.com/business-detail/kansas-city-power-light-district.

Cordish Companies

6. Cordish Companies does not own Shark Bar, or any other property located in the KCPL. (Fowler Decl. ¶ 3.) Cordish Companies conducts no business, including, without limitation, any business related to sending text messages. (Fowler Decl. ¶¶ 3, 4.) Instead, the name "Cordish" – not referring to any specific entity -- functions primarily as a trade name that is often used to describe real estate developments around the country, which are each owned by a separate and distinct legal entity.[1] (*Id.*)

ECI

7. ECI provides consulting services to Shark Bar, as well as to other entertainment venues located around the country, including Maryland, Pennsylvania, Kentucky, Virginia, Georgia and Texas. (Hudolin Decl. ¶ 5.)

8. ECI typically enters into consulting agreements with its clients, including Shark Bar. (Hudolin Decl. ¶ 6, Ex. A.)

9. The consulting agreement ("Consulting Agreement") between Shark Bar and ECI details the specific services that ECI will provide to Shark Bar. (Hudolin Decl. Ex. A, § 4.)

[1] Plaintiff's counsel in this case has been targeting other venues located in KCPL with similar TCPA claims, as part of a coordinated litigation strategy to bring suit against venues Plaintiff's counsel believes are associated with the "Cordish" name. (Fowler Decl. ¶ 7.) Several of these cases are pending in this district. *Smith v. Truman Road Development, LLC*, Case No. 4:18-cv-00670-NKL (W.D. Mo.); *Taylor v. KC Vin, LLC et al.*, Case No. 4:19-cv-00110-DGK (W.D. Mo.); *Hand v. ARB KC, LLC et al.*, Case No. 4:19-cv-00108-BCW (W.D. Mo.); *Doohan v. CTB Investors, LLC*, 4:19-cv-00111-FJG (W.D. Mo.). Each of these actions poses an existential threat to the venue, in this case, Shark Bar. (Fowler Decl. ¶ 7), based on text messages that were requested and desired by the recipients.

10. The Consulting Agreement further includes an "Independent Contractor" provision:

11. ECI has contracted with a third-party, Think Big Partners, LLC, to create a text platform called Txt Live, which ECI allows the venues that it supports to utilize. (Hudolin Decl. ¶ 7.)

12. The venues, including Shark Bar, reimburse ECI for their use of Txt Live. (Hudolin Decl. ¶ 9.)

13. During the period April 25, 2014 through April 4, 2018, ECI's policy and practice was that it did not send text messages to customers of Shark Bar. (Hudolin Decl. ¶ 10)

14. Shark Bar is not an agent of ECI or vice versa. (Hudolin Decl. Ex. A, § 11.2.)

15. There is no record evidence showing that ECI directs and/or controls Shark Bar, or that ECI acts as an "agent" of Shark Bar or vice versa.

16. Nor is there any record evidence showing that ECI is the "alter ego" of Shark Bar, or vice versa.

Shark Bar's Happy Hour Contest

17. From time to time, Shark Bar offered certain contests, giveaways, and events to its customers who were interested in participating in such events. (Uhlig Decl. ¶ 4.)

18. Shark Bar never required any customer to participate in such contests or events; rather, participation was entirely voluntary. (Uhlig Decl. ¶ 8.)

19. During the relevant period, there were many different ways in which a customer could enter to win a happy hour event or be chosen for a giveaway and/or cocktail party. (Uhlig Decl. ¶ 6.)

20. For example, a customer could enter their information while at Shark Bar on a paper card, sign-in sheet or Google form, or online through website forms. (Uhlig Decl. ¶ 6.)

21. Many customers were repeat entrants for the happy hour contests, meaning that they completed multiple forms of entry. (Uhlig Decl. ¶ 7.)

22. Upon entering to win a contest, a customer generally agreed to receive text messages, calls and emails from Shark Bar concerning its marketing and other offers. (Uhlig Decl. ¶ 6.)

23. Shark Bar would communicate with winning customers by text message that they had won a happy hour or other event, and then, in many instances, would continue to communicate back and forth with the winning customer to plan the event. (Uhlig Decl. ¶¶ 11-12.)

24. 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.)

25. In the 2015-2016 period, thousands of happy hours and similar events were held for Shark Bar customers who entered to win a contest and participated in a text message

exchange with Shark Bar. (Uhlig Decl. ¶ 5.) Lists of individuals who hosted such events were produced at the document identified as Shark Bar - Hand00002803-2804.

The Text Message Platforms

26. During the relevant time, until approximately March 2016, Shark Bar employees used the SendSmart Platform to send text messages to customers who signed up to receive text messages about the contests they had entered. (Smith Decl. Ex. A (Shark Bar Resp. Interrog. No. 4).)

27. In or around March 2016, Shark Bar began to transition to using the Txt Live Platform. (*Id.*)

28. Mr. Uhlig used the Platforms to communicate with customers to inform them that they won an event. (Uhlig Decl. ¶ 11.)

29. 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.)

30. A user of the Platforms could only text individuals whose numbers had been entered into the system manually, either by importing information from a CSV file or individually typing in a number, after a customer provided his or her phone number to Shark Bar. (Smith Decl. Ex. B (Declaration of David Yasnoff, CEO of SendSmart ("Yasnoff Decl.") ¶ 6; *id.* Ex. C (B. Rodriguez Tr. 91:16-22); *id.* Ex. D (B. Miller Tr. 30:18-31:7, 33:5-12, 80:18-81:6, 28:13-29:15); *id.* Ex. E (Mitzenmacher Rep.) ¶¶ 15, 22, 23, 27-31, 44-48, Fig. 29.)

31. [redacted]

32. The Platforms are not capable of generating numbers randomly or sequentially. (Smith Decl. Ex. B (Yasnoff Decl.) ¶ 7; *id.* Ex. C (B. Rodriguez Tr. 105:1-107:15, 109:2-110:22); *id.* Ex. D (B. Miller Tr. 102:1-16, 104:2-105:9, 105:14-108:17); *see also id.* Ex. G (Shamos Tr. 100:24-101:1); *id.* Ex. E (Mitzenmacher Rep.) ¶¶ 62, 65-74.)

33. The only source of the numbers that Shark Bar used to send text messages were numbers that were provided directly by customers to Shark Bar. (Uhlig Decl. ¶ 9.)

34. For a Shark Bar employee to send a text message using either of the Platforms, an employee must first log into the system. (Uhlig Decl. ¶¶ 15, 18; Smith Decl. Ex. E (Mitzenmacher Rep.) ¶¶ 27, 44.)

35. Next, the user must select the number or numbers to which the user planned to send the messages. (Uhlig Decl. ¶¶ 15, 18; Smith Decl. Ex. B (Yasnoff Decl.) ¶¶ 8, 14-15; *id.* Ex. E (Mitzenmacher Rep.) ¶¶ 32-35, 49-53.)

36. Following that, the user must manually type or enter the content of the message. (Uhlig Decl. ¶¶ 15, 18; Smith Decl. Ex. B (Yasnoff Decl.) ¶¶ 8, 14-15; *id.* Ex. E (Mitzenmacher Rep.) ¶¶ 36, 53.)

37. Last, the user must press a button to transmit the text messages to the group selected. (Uhlig Decl. ¶¶ 15, 18; Smith Decl. Ex. B (Yasnoff Decl.) ¶ 15; *id.* Ex. E (Mitzenmacher Rep.) ¶¶ 37, 54.)

38. There is no functionality within either Platform to schedule messages to be sent at a later date or time. (Uhlig Decl. ¶¶ 15, 18.)

39. Nor can either Platform send text messages without a human being identifying the recipient(s), creating the messages and hitting the send button. (Smith Decl. Ex. B (Yasnoff Decl.) ¶ 16; *id.* Ex. C (B. Rodriguez Tr. 105:1-107:15, 109:2-110:22); *id.* Ex. D (B. Miller Tr.

102:1-16, 104:2-105:9, 105:14-107:19, 107:20-108:17, 111:12-112:12); *id.* Ex. E (Mitzenmacher Rep.) ¶¶ 14, 62-74; Uhlig Decl. ¶¶ 15, 18.)

40. Plaintiff's expert identifies [redacted]

41. Plaintiff's expert [redacted]

42. Plaintiff's expert testified [redacted]

Plaintiff's Name Was Entered to Win Events at Shark Bar

43. [redacted]

44. [redacted]

45. The only way that Shark Bar receives contact information for recipients of text messages is directly from the customers who visit the establishment. (Uhlig Decl. ¶ 9.)

46. Shark Bar's records show that Plaintiff provided his contact information to Shark Bar to enter to win a happy hour in or before fall 2013. (Smith Decl. Ex. J (Pl. Tr. Ex. 4).)

47. Plaintiff's contact information is included in Shark Bar's Txt Live records of customers who submitted their contact information to win contests. (Smith Decl. Ex. J (Pl. Tr. Ex. 4).)

48. [redacted]

49. Shark Bar's records reflect that Plaintiff's contact information was recorded in its system on or about November 2, 2013. (Smith Decl. Ex. J.)

50. [redacted]

51. [redacted]

52. Shark Bar's records further reflect that Plaintiff's contact information was added to the Txt Live Platform on August 13, 2016, shortly after Shark Bar began transitioning from using the SendSmart Platform to using the Txt Live Platform. (Smith Decl. Ex. H (Pl. Tr. Ex. 4); *id.* Ex. A (Shark Bar Resp. to Interrog. No. 4).)

Shark Bar Employee, Kyle Uhlig, Sent Text Messages To Plaintiff To Notify Him That He Had Won a Happy Hour

53. Kyle Uhlig has worked for Shark Bar since 2008.[2] (Smith Decl. Ex. K (Uhlig Tr.) 10:21-13:12).) Since he started working for Shark Bar, Mr. Uhlig's responsibilities have

[redacted]

included communicating with customers to book events at Shark Bar. (Smith Decl. Ex. K (Uhlig Tr. 13:16-14:14).)

54. [redacted]

55. To send these text messages, Mr. Uhlig had to manually (i) log on to SendSmart, (ii) type out and create the text message, and (iii) then press a button to send the message. (Uhlig Decl. ¶ 15.) If Mr. Uhlig had skipped any of these steps, no text message would have or could have been sent. (*Id.*)

56. Mr. Uhlig also applied certain criteria on the SendSmart platform to identify customers who met certain requirements, such as customers with upcoming birthdays, as this information was reflected for Mr. Hand. (Uhlig Decl. ¶ 16.)

57. After Shark Bar transitioned from the SendSmart Platform to the Txt Live Platform, Mr. Uhlig sent Plaintiff two more text messages: 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.)

58. To send each of these text messages, Mr. Uhlig had to manually (i) log on to Txt Live, (ii) type out and create the text message, and (iii) then press a button to send the message. (Uhlig Decl. ¶ 18.) If Mr. Uhlig had skipped any of these steps, no text message could have been sent. (Uhlig Decl. ¶ 18.)

59. Mr. Uhlig also applied certain criteria on the Txt Live platform to identify customers who met certain requirements, such as customers with upcoming birthdays, as this information was reflected for Mr. Hand. (Uhlig Decl. ¶ 16.)

60. Plaintiff did not respond to Mr. Uhlig's messages. (Uhlig Decl. Exs. C & D.) If Plaintiff had indicated to Shark Bar, by response text or otherwise, that he did not want to receive future messages, that request would have been immediately honored. (Uhlig Decl. ¶ 13.)

61. Plaintiff claims that he asked Shark Bar to stop sending him text messages but he does not recall the date of this alleged request. (Smith Decl. Ex. H (Pl. Tr. 84:12-85:7).)

62. There is no record of any request by Plaintiff to stop receiving text messages and Plaintiff could not identify any other evidence related to his alleged request. (Smith Decl. Ex. H (Pl. Tr. 84:12-85:7).)

Plaintiff Patronized Shark Bar After Receiving Text Messages from Shark Bar

63. [redacted]

64. [redacted]

Plaintiff's Claims

65. Plaintiff alleged that "[b]etween April 25, 2014 to April 4, 2018," Defendants used Txt Live to send text messages to Plaintiff's cellular telephone and those of putative class members for the purpose of "promoting Shark Bar." (Dkt. 56, Second Amended Complaint ("SAC") ¶ 48.)

66. Plaintiff alleges, on information and belief, that these text messages were sent to Plaintiff and putative class members without their "prior express consent in writing, or otherwise" for Defendants to send advertising messages or messages using an ATDS. (SAC ¶ 50.)

67. Plaintiff asserts four claims under the TCPA or its regulations.

68. 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).

69. 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).

70. 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).

71. In Count IV, 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") (SAC ¶¶ 113-22). 47 C.F.R. 1600(d)(3).

Plaintiff's Motion for Class Certification

72. In the SAC, Plaintiff sought to represent classes of allegedly similarly situated persons with respect to all four Counts. (SAC ¶¶ 73-76.)

73. On October 14, 2019, Plaintiff moved for class certification (Dkt. 124; the "Certification Motion").

74. In the Certification Motion, Plaintiff only seeks to represent putative classes relating to the ATDS Claim and DNC Claim. (*Id.* 1, n.1.)

PRELIMINARY STATEMENT

Plaintiff's claims are not actionable under the TCPA because they purport to arise from text messages (i) sent to Shark Bar's own customers, (ii) through Platforms that do not trigger the "autodialer" provisions of the statute, and (iii) to types of persons who are not entitled to seek relief under the TCPA. The record is devoid of any disputed issue of fact that would preclude summary judgment in Defendants' favor.

Plaintiff asserts four claims under the TCPA. First, Plaintiff claims that Shark Bar sent text messages using an ATDS. The undisputed facts, however, establish that the Platforms Shark Bar used to send text messages lacked the necessary capabilities required to qualify as an ATDS under the statute. Specifically, the Platforms: (a) do not generate numbers randomly or sequentially," as required to trigger the TCPA; and (b) cannot dial numbers "automatically," as required to be subject to the TCPA, because Shark Bar's employees were required to perform multiple manual steps to send a text message. Plaintiff's own expert agrees that Txt Live lacks these capabilities.[3]

Plaintiff also asserts a DNC Claim under Section 227(c) of the TCPA, which imposes additional requirements that Plaintiff is unable to satisfy. In the first instance, Plaintiff must be a "residential subscriber" in order to invoke these provisions, but the text messages to his cell phone do not qualify him as such. Second, Plaintiff must have received more than one "telephone solicitation" in a twelve-month period. Based on Plaintiff's patronage of Shark Bar, he has an "established business relationship," or EBR, with Shark Bar that removes at least one communication he received from the TCPA's definition of a telephone solicitation, consequently

[3] While Shark Bar generally obtained consent to send text messages to its customers such that any use of an ATDS would be authorized, given the lack of clarity concerning Plaintiff's entry into the system, Shark Bar reserves this defense for purposes of this motion. The atypical nature of Plaintiff's experience will be addressed in Defendants' forthcoming opposition to class certification.

defeating the claim as to half of the claimed messages for lack of multiple telephone solicitations within a twelve-month period.

Plaintiff also brings claims under the regulatory provisions of 47 C.F.R. § 64.1200(d) and attempt to shoehorn them into alleged violations of Section 227(c). As an initial matter, these claims fail on the ground that Plaintiff lacks any authority to enforce these regulatory provisions through a private right of action. Even if Plaintiff had such authority, these claims suffer from the same defects as the DNC Claim. Indeed, the fact that the claims lack merit is underscored by Plaintiff's abandonment of any effort to certify a class with respect to them.

Lastly, the Court lacks personal jurisdiction over both ECI and Cordish Companies, because they lack the requisite contacts with Missouri. Even if personal jurisdiction over these Defendants did exist, summary judgment is still warranted because the record is undisputed that they did not send the text messages at issue and Shark Bar was not acting on their behalf.

LEGAL STANDARD

A party is entitled to summary judgment where there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Bratton v. The Hershey Company*, No. 2:16-CV-4322-C-NKL, 2018 WL 934899, at *2 (W.D. Mo. Feb. 16, 2018) (Laughrey, J.) The movant bears the burden of identifying the bases for its motion and the portions of the record that demonstrate the absence of a genuine issue of material fact. *See Missouri ex rel Nixon v. Progressive Bus. Publ'ns*, 504 F. Supp. 2d 699, 703 (W.D. Mo. 2007). Once the moving party has met this burden, however, a party opposing summary judgment "may not rest on mere allegations or denials . . . but must set forth specific facts in the record showing that there is a genuine issue for trial." *Satcher v. Univ. of Ark. At Pine Bluff Bd. Of Trs.*, 558 F.3d 731, 734-35 (8th Cir. 2009) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)).

Further, where the moving party points out the absence of evidence to support the nonmoving party's case, the nonmoving party "must advance specific facts to create a genuine issue of material fact for trial." *Rolscreen Co. v. Pella Prods., Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995).

ARGUMENT

I. SUMMARY JUDGMENT ON THE ATDS CLAIM IS WARRANTED

To prove his ATDS claim, Plaintiff must establish that Shark Bar: (i) called (texted) his cell phone; (ii) using an ATDS; and (iii) without his prior express consent. 47 U.S.C. § 227(b)(1)(A). Plaintiff cannot establish the ATDS element of his claim.

The TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). Between 2003 and 2015, the Federal Communications Commission ("FCC") issued several declaratory rulings seeking to clarify what equipment qualifies as an ATDS. In 2003, the FCC ruled that "predictive dialers" qualify as an ATDS because they have the basic function of autodialing equipment—"the capacity to dial numbers without human intervention." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091-92 ¶ 132 (2003). The FCC's subsequent orders also focused on the absence of human intervention as the defining characteristic of an autodialer. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 566 ¶¶ 12-13 (2008); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 15391, 15392 ¶ 2 n.5 (2012).

In 2015, the FCC revisited the ATDS definition and declined to define a device's "capacity" in a manner confined to its "present capacity." Instead, it broadly construed a device's "capacity" to encompass its "potential functionalities" with modifications such as software

changes. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 7974 ¶ 16 (2015) ("2015 Order"). The FCC reiterated that the "basic function[ ]" of an autodialer is to "dial numbers without human intervention." *Id.* at 7975 ¶ 17.

Last year, in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), the D.C. Circuit vacated the FCC's overbroad interpretation of the term ATDS, and remanded that issue to the FCC for consideration consistent with the D.C. Circuit's ruling. The FCC has not yet issued its order on remand. In *ACA*, the D.C. Circuit concluded that the FCC's interpretation of an equipment's "capacity" was overbroad because it would "hav[e] the apparent effect of embracing any and all smartphones." *Id.* at 695-703. The D.C. Circuit explained that:

> If every smartphone qualifies as an ATDS, the statute's restrictions on autodialer calls assume an eye-popping sweep. . . . The TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent . . . .

Id. at 697. The D.C. Circuit held that any definition of an ATDS that would encompass smart phones would violate the Administrative Procedures Act and also found the FCC's rule-making regarding whether an ATDS must *generate* random or sequential numbers, rather than dial numbers from a list, failed to constitute reasoned decision-making and set aside those orders. *Id.* at 695-703. As a result, whether equipment functions as an ATDS is determined in light of the TCPA's statutory text. *See, e.g.*, *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 119-21 (3d Cir. 2018).

Since *ACA* was issued, courts have debated whether a technology must be able to generate (or create) numbers to dial to qualify as an ATDS. Regardless of which way courts have answered this question, every court that has addressed a text platform similar to the ones at issue here has found that they do not qualify as an ATDS because of the human intervention needed to send the text messages. The same result should be reached here.

A. The Platforms Cannot Generate Telephone Numbers

In the wake of *ACA*, numerous courts—including the Third and Sixth Circuits and every single court within this Circuit to consider the issue—have held that, for a system to qualify as an ATDS, it must produce numbers to be called "using a random or sequential number generator" rather than merely dialing from a stored list of numbers.[4] *Dominguez*, 894 F.3d at 121 (affirming award of summary judgment for defendant because the device lacked "the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers"); *Gary v. Trueblue, Inc.*, No. 18-2281, 2019 WL 5251261, at *4-6 (6th Cir. Sept. 5, 2019).

For example, in *Thompson-Harbach*, the defendant uploaded its clients' information into its dialer equipment and then used the dialer to create different "Campaigns," which the court described as a "program containing lists of stored telephone numbers that causes the dialing of those numbers based on various criteria." 359 F. Supp. 3d at 612 & n.5. The dialer could only call numbers on a "Campaign." *Id.* at 612. It could not independently generate other numbers to be called, nor was it capable of using a random number generator to generate random numbers for dialing. *Id.* The court granted summary judgment for defendant, explaining that because the system stored and called a number provided to the defendant by the plaintiff, the system lacked

[4] The Ninth Circuit found that the statutory definition of ATDS is ambiguous, and ultimately rewrote it to include "devices with the capacity to dial stored numbers *automatically*," regardless of how the stored numbers were generated. *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018) (emphasis added). Numerous courts have found the Ninth Circuit's interpretation renders the statute's qualification of "to store" superfluous and is at odds with both the text of the statute, as well as other courts considering the issue. *See, e.g.*, *Thompson-Harbach v. USAA Fed. Sav. Bank*, 359 F. Supp. 3d 606, 625-26 (N.D. Iowa 2019) (labeling the *Marks* "decision erroneous as a matter of statutory construction" and concluding that "the phrase 'using a random or sequential number generator' necessarily conveys that an ATDS must have the capacity to generate or store telephone numbers, either randomly or sequentially, and then to dial those numbers"). Even if this Court were persuaded by the *Marks* decision, however, Defendants are still entitled to summary judgment based upon the human intervention required to send a text message through Txt Live. *Marks*, 904 F.3d at 1053 (requiring a system to dial stored numbers "automatically"). The Platforms do not have these capabilities and require substantial human intervention to send a text message. (*See* Section I.A.)

the "critical" feature required to bring the system within the scope of the TCPA, which "is the capacity to randomly or sequentially produce or store a number and then call that number." *Id.* at 626. The Court reached this conclusion because, although the equipment could automatically dial stored numbers (something the Platforms cannot do), the equipment was unable to *generate* random numbers. *Id.* at 626-27; *see also Roark v. Credit One Bank, N.A.*, No. CV 16-173, 2018 WL 5921652, at *3 (D. Minn. Nov. 13, 2018) (granting summary judgment for defendant because "none of [the] systems has the actual capability of randomly/sequentially generating numbers to dial").

Gadelhak v. AT&T Servs., Inc., No. 17-CV-01559, 2019 WL 1429346 (N.D. Ill. Mar. 29, 2019) is also instructive. In that case, defendant AT&T sent text message to customers using an "automated process" to select numbers to text. After AT&T identified numbers to call, the list was then pared down and sent to AT&T's vendor to send pre-programmed text messages to the numbers remaining on the list. *Id.* at *1. The court held that the system did not qualify as an ATDS because "numbers stored by an ATDS must have been generated using a random or sequential number generator," and granted summary judgment in AT&T's favor. *Id.* at *6.

Summary judgment in Defendants' favor should also be granted here because the record is undisputed that the Platforms could not generate (or create) numbers randomly or sequentially; instead, a user could only text individuals whose numbers were provided by Shark Bar's customers and were entered into the system manually, by importing information from a CSV file or by typing in a number individually. (Stmt. ¶¶ 30-32.) Moreover, the testimony of the individuals who designed and maintain the Platforms that the systems is not capable of generating numbers randomly or sequentially is undisputed. (*Id.* ¶ 32.)

The Platforms' inability to generate numbers randomly or sequentially is fatal to the ATDS element of Plaintiff's claim. For example, the Third Circuit held that a plaintiff could not survive summary judgment where "the record indicates that the [service] sent messages *only to numbers that had been individually and manually inputted into its system by a user*." *Dominguez*, 894 F.3d at 121 (emphasis added); *see also Keyes v. Ocwen Loan Serv., LLC*, 335 F. Supp. 3d 951, 962-63 (E.D. Mich. 2018) (granting summary judgment for defendant where it contacted plaintiff from a list of stored numbers because "[t]he better reading of the Act, this Court will conclude, is that devices must be able to generate random or sequential numbers to be dialed to qualify as an ATDS"); *Fleming v. Assoc.Credit Servs., Inc.*, 342 F. Supp. 3d 563, 576 (D.N.J. 2018) ("Does a system that dials numbers from a list that was not randomly or sequentially generated when the list was created qualify as an ATDS? With only the statutory text to guide me, I am convinced that the answer is no."); *Johnson v. Yahoo!, Inc.*, 346 F. Supp. 3d 1159, 1162 (N.D. Ill. 2018) (system not an ATDS because "it dialed numbers from a stored list").

Plaintiff does not dispute these facts, and his own expert agrees that the Platforms do not generate numbers. Instead, a human being uploads numbers to the Platforms. (Stmt. ¶ 31.) Plaintiff also agrees that a user then applies specific criteria to available contacts to identify certain recipients prior to sending a text message. (*Id.* ¶¶ 40-41.) Plaintiff's expert, however, [redacted]

[redacted]

Plaintiff incorrectly argues that [redacted]

[redacted] Plaintiff is wrong. In fact, numerous courts have rejected this argument and held that there is nothing "random" about deliberately identifying a subset from a set list of numbers, and that merely placing numbers in some order does not, render them sequential. *See ACA*, 885 F.3d at 702 ("Anytime phone numbers are dialed from a set list, the database of numbers must be called in some order—either in a random or some other sequence"); *Gadelhak*, 2019 WL 1429346 at *6-7 (rejecting argument that system qualified as an ATDS because it was able to "randomly" select numbers to dial from a compiled list of numbers); *Johnson*, 346 F. Supp. 3d at 1162 ("Curated lists developed without random or sequential number generation capacity fall outside the statute's scope."); *see also* Stmt. ¶ 32.

Moreover, Plaintiff's expert [redacted]

[redacted] But this interpretation is directly at odds with the binding authority of the D.C. Circuit in *ACA*, which held that the definition of an ATDS could not be one that would also be so broad as to sweep in smartphones. 885 F.3d at 697.

B. The Platforms Require Human Intervention by Shark Bar Employees

Regardless of how the Court answers the question regarding the "random and sequential generator" requirement, there is no debate that, to qualify as an ATDS, Plaintiff must also

demonstrate that Shark Bar sent text messages using a system that could automatically send text messages without human intervention. *ACA*, 885 F.3d at 702. He cannot do so.

Courts have consistently dismissed TCPA claims involving similar text message platforms that required a human to send the texts at issue. *See, e.g., Ung v. Universal Acceptance Corp.*, 249 F. Supp. 3d 985, 989-91 (D. Minn. 2017) (no ATDS based on the "critical component" of human intervention because defendant stored contact information for individuals in its customer database and humans were required for the software to dial those numbers).

In *Duran v. La Boom Disco, Inc.*, 369 F. Supp. 3d 476, 489-90 (S.D.N.Y. 2019), the court granted summary judgment in favor of defendant *sua sponte* on the issue of ATDS because "a human agent must determine [the time to send the message], the content of the messages, and upload the numbers to be texted into the system." *Id.* The court in *Ramos v. Hopele of Fort Lauderdale, LLC*, 334 F. Supp. 3d 1262, 1268, 1274 (S.D. Fla. 2018), reached the same result, granting summary judgment where a user had to sign into the system, upload a list of numbers, create a list of customer phone numbers based on various criteria, write the message, program the date and time of delivery, the cell phone numbers scheduled to receive the message, and hit send.

These holdings are in accord with courts around the country. *Herrick v. GoDaddy.com LLC*, 312 F. Supp. 3d 792, 803 (D. Ariz. 2018) (no ATDS where a user "had to . . . log into the system, create a message, schedule a time to send it"); *Marshall v. CBE Grp., Inc.*, No. 2:16-cv-02406-GMN-NJK, 2018 WL 1567852, at *6-7 (D. Nev. Mar. 30, 2018) (system did not qualify as an ATDS where human must manually click a button to place a call); *Maddox v. CBE Grp., Inc.*, No. 1:17-cv-1909-SCJ, 2018 WL 2327037, at *4-5 (N.D. Ga. May 22, 2018) (same); *Fleming*, 342 F. Supp. 3d at 578 (same); *cf. Franklin v. Upland Software, Inc.*, No. 1-18-CV-00236-LY, 2019 WL 433650, at *2-3 (W.D. Tex. Feb. 1, 2019) (denying plaintiff summary judgment where

platform "require[s] significant human intervention" by requiring the customer "to log onto [the] platform and set up a mobile messaging campaign from a list of individuals who have opted into a messaging campaign," followed by "setting up the lists," and "draft[ing] the content of the text message and then select[ing] the date and time the text message is to be sent," and finally "schedul[ing] the text to be sent").

The undisputed facts demonstrate that the text messages Mr. Uhlig sent to Plaintiff required Mr. Uhlig to take precisely the same action that numerous courts have held constitute; human intervention and which render equipment to not fall within the definition of an ATDS. After Shark Bar received Mr. Hand's contact information, a Shark Bar employee manually entered his number into the SendSmart Platform. (Stmt. ¶ 30.) To send the text messages to Plaintiff, Mr. Uhlig manually logged onto the SendSmart or Txt Live Platform. (*Id.* ¶¶ 55, 58.) Next, he manually filtered the contacts available to him, applying specified criteria to determine to whom to send text messages. (*Id.* ¶¶ 55, 58.) Mr. Uhlig then manually typed or entered the content of the message he sent to Mr. Hand. (*Id.*) Finally, Mr. Uhlig hit a button on the respective Platform to send the text message. (*Id.*) Mr. Uhlig followed the same process to send later text messages to Mr. Hand on March 18, 2015, September 6, 2017, and December 14, 2017 which includes logging in, identifying contacts, determining message content, and pressing send. (*Id.*)

Plaintiff does not, and cannot, dispute these facts.[5] (*Id.* ¶¶ 40-41.) Thus, summary judgment on the ATDS claim is warranted.

[5] While Plaintiff's expert purports to offer evidence concerning the process after a user of Txt Live decides to hit the send button, as set forth above, the relevant inquiry is the level of human interaction required *prior* to sending a message—not the mechanics of the transmission after a human being decides to send a message. *Ramos*, 334 F. Supp. 3d at 1275 (program used by defendant "was not an ATDS" because "no text message would have been sent" if defendant "had not ultimately pressed 'send' to authorize the [texting] platform to send the text message").

II. SUMMARY JUDGMENT ON THE DNC CLAIM IS PROPER

Plaintiff's DNC Claim requires that he prove he (i) is a residential telephone subscriber, and (ii) received more than one "telephone solicitation," as defined by the TCPA, in a twelve-month period during which his number was listed on the Do-Not-Call Registry. 47 U.S.C. § 227(c)(5). The claim fails because Plaintiff is not a residential telephone subscriber. And, even if he were such a subscriber, Plaintiff's claims based upon at least the 2017 texts should be dismissed on summary judgment because Plaintiff had an EBR with Shark Bar at the time he received the September 2017 text, which precludes Plaintiff from establishing he received either of the 2017 messages as part of multiple telephone solicitations within a twelve-month period.

A. Plaintiff Is Not a Residential Telephone Subscribers

Section 227(c)'s private right of action is "limited to redress for violations of the regulations that concern residential telephone subscribers." *Cunningham v. Politi*, No. 418CV00362ALMCAN, 2019 WL 2519702, at *4 (E.D. Tex. Apr. 26, 2019), *report and recommendation adopted*, No. 4:18-CV-362, 2019 WL 2526536 (E.D. Tex. June 19, 2019); *see also* 47 C.F.R. § 64.1200(c).[6] Both the TCPA's plain language and its structure distinguish cell phones from residential phones.

As to the statutory text, "the language of the TCPA specifically provides that the regulations implemented pursuant to Subsection 227(c) concern only 'the need to protect residential telephone subscribers' privacy rights.'" *Cunningham v. Sunshine Consulting Grp., LLC*, No. 3:16-2921, 2018 WL 3496538, at *6 (M.D. Tenn. July 20, 2018) (quoting 47 U.S.C. § 227(c)(1)), *report and recommendation adopted*, No. 3:16-CV-02921, 2018 WL 5728534 (M.D.

[6] Although Defendants maintain that the FCC promulgated the provisions at 47 C.F.R. § 64.1200(d) under Section 227(d) (*see* Part III.A), even if they were promulgated under Section 227(c), they still apply only to residential telephone subscribers. 47 C.F.R. § 64.1200(d).

Tenn. Aug. 7, 2018). "The definition of residential is 'used as a residence or by residents,' and 'resident' is defined as 'living in a place for some length of time,' or 'one who resides in a place.'" *Shelton v. Fast Advance Funding, LLC*, 378 F. Supp. 3d 356, 363 n.7 (E.D. Pa. 2019) (quoting Merriam-Webster). Thus, "residential telephone" plainly "describes a telephone used by individuals in the home, and not a cellular telephone, which can be used anywhere." *Id.*

As to the statute's structure, "a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006). "[T]he TCPA specifically mentions 'cellular telephone service' in § 227(b) and § 64.1200(a)(1)(iii), indicating that both Congress and the FCC were aware of the distinction between a cellular telephone and a residential telephone and purposely protected only 'residential telephone subscribers' under § 227(c), § 64.1200(c) and (d)." *Shelton*, 378 F. Supp. 3d at 363 n.7.

This has led several courts to hold that Section 227(c)(5)'s private right of action does not apply to calls to cell phones. *See, e.g.*, *id.*; *Cunningham*, 2019 WL 2519702, at *4 (collecting cases); *Sunshine Consulting Grp., LLC*, 2018 WL 3496538, at *6. These holdings are further supported by the Eleventh Circuit's recent decision concerning the injury a TCPA plaintiff must assert in connection with a claim arising out of text messages. *Salcedo v. Hanna*, 936 F.3d 1162, 1168-69 (11th Cir. 2019). The Eleventh Circuit concluded that this injury was diminished both in the context of text messages and cell phones: "In particular, the findings in the TCPA show a concern for privacy within the sanctity of the home that do not necessarily apply to text messaging. . . . By contrast, cell phones are often taken outside of the home and often have their ringers silenced, presenting less potential for nuisance and home intrusion." This reasoning applies here

to exclude Plaintiff's receipt of text messages on his cell phone from the purview of Section 227(c)(5)'s private right of action.

B. Plaintiff's EBR with Shark Bar Precludes His Claim on Certain Texts

Even if Plaintiff's cell phone could qualify as a residential phone for § 227(c) purposes, summary judgment would still be warranted on claims predicated upon the September 2017 and December 2017 texts. The term "telephone solicitation" means the initiation of a telephone call or message "for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(14). A telephone solicitation does not include a call or message to, *inter alia*, any person (a) with whom the caller has an EBR or (b) with that person's prior express invitation or permission. 47 U.S.C. § 227(a)(4). Plaintiff's EBR with Shark Bar further supports summary judgment on texts he received in 2017.

An EBR includes, *inter alia*, 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).

Here, the undisputed facts demonstrate that Plaintiff is a repeat patron of Shark Bar (having visited multiple times), and that Shark Bar sent him messages within the scope of that EBR, which concerned other opportunities to visit and enjoy Shark Bar, as he had previously. (Stmt. ¶¶ 63-64.) The text message Plaintiff received on September 6, 2017 was within eighteen months of his May 2016 visit and purchases at Shark Bar, and was therefore within the scope of his EBR with Shark Bar. (*Id.* ¶ 57.) Thus, this text message does not qualify as a telephone solicitation and summary judgment on the September 2017 text message is warranted.

Further, an additional requirement for a claim under 47 U.S.C. § 227(c)(5) is that Plaintiff must have received "more than one telephone call [or text] within any 12-month period by or on

behalf of the same entity ***in violation of the regulations prescribed under this subsection***." *Id.* (emphasis added). Plaintiff received text messages from Shark Bar in March 2015, February 2016, September 2017 and December 2017. (Stmt. ¶¶ 54, 57.) As demonstrated above, the September 2017 text message does not qualify as a telephone solicitation, which leaves the December 2017 text as being received more than ***twenty*** months after the nearest possible telephone solicitation—the February 2016 text. (*Id.*) Thus, he did not receive a second "telephone solicitation" in 2017 and summary judgment with respect to the DNC Claim on the December 2017 text message is warranted as well. *Hamilton v. Spurling*, No. 3:11CV00102, 2013 WL 1164336, at *12 (S.D. Ohio Mar. 20, 2013) ("Plaintiff . . . has not met his burden of proving . . . that [defendant]'s . . . subsequent calls were also made in violation of the TCPA, or any of the TCPA Regulations. Having only established one violation of the TCPA Regulations, Plaintiff cannot prevail on claims raised under [Section 227(c)(5) of] the Act."); *see also Murphy v. DCI Biologicals Orlando, LLC*, No. 6:12-CV-1459-ORL, 2013 WL 6865772, at *9 (M.D. Fla. Dec. 31, 2013).

III. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON THE PROCEDURAL AND REVOCATION CLAIMS

Summary judgment on the Procedural and Revocation Claims is also warranted because there is no private right of action to pursue them. Separately, as to the Revocation Claim, there is no evidence of any opt out request to support the claim, and even if there were, the claim is otherwise duplicative of the Procedural Claim.

A. Plaintiff Lacks a Private Right of Action to Pursue Either Claim

Where a statutory scheme and its implementing regulations have expressly created a private right of action but have not expressly done so elsewhere in the same scheme, it is "highly improbable" that Congress—or here, the FCC—"absent mindedly forgot to mention an intended private action." *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979). "If the

statute does not itself so provide, a private cause of action will not be created through judicial mandate," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855-56 (2017), "no matter how desirable that might be as a policy matter, or how compatible with the statute," *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

Section 227(c) authorized the FCC to establish a national do-not-call list and promulgate regulations related to that list. 47 U.S.C.A. § 227(3). It also explicitly provides a private right of action for multiple calls within a 12-month span that violate those regulations. *Id.* at § 227(5). Section 227(d) authorizes the FCC to establish "technical and procedural standards" for calls; it does not provide a private right of action for violations of those regulatory standards.

In response to Section 227, the FCC promulgated regulations at 47 C.F.R. § 64.1200. 47 C.F.R. § 64.1200(c) tracks Section 227(c), addressing liability for calls made to numbers on the NDNCR contemplated in Section 227. 47 C.F.R. § 64.1200(d), however, does not track Section 227(c), does not concern liability, and does not address calls made to numbers on the NDNCR. Rather, 47 C.F.R. § 64.1200(d) delineates internal "procedures" and "standards" for maintaining an internal do-not-call list. *See* 47 C.F.R. § 64.1200(a).

Because of this structure, courts have recognized that the FCC promulgated 47 C.F.R. § 64.1200(d) under Section 227(d). *See Braver v. NorthStar Alarm Servs., LLC*, No. CIV-17-0383-F, 2019 WL 3208651, at *14-15 (W.D. Okla. Jul. 16, 2019) (Section 227(c) "only provides a cause of action to a person aggrieved 'under this subsection,'" and "§ 64.1200(d) was promulgated under § 227(d)"); *Worsham v. Travel Options, Inc.*, No. JKB-14-2749, 2016 WL 4592373, at *7 (D. Md. Sept. 2, 2016) (regulations "more appropriately viewed as setting procedural standards and, therefore, within the realm of the TCPA's subsection *d*, for which no private right of action exists"), *aff'd*, 678 F. App'x 165 (4th Cir. 2017); *Burdge v. Ass'n Health Care Mgmt, Inc.*, No.

1:10-cv-00100, 2011 WL 379159, at *4 (S.D. Ohio Feb. 2, 2011) (explaining that these the regulations "are technical and procedural in nature and were promulgated pursuant to [Section] 227(d)"). Although the court in *Charvat v. NMP, LLC*, 656 F.3d 440 (6th Cir. 2011), stated that the FCC promulgated 47 C.F.R. § 64.1200(d) under Section 227(c), "it does so without analysis." *Braver*, 2019 WL 3208651, at *15; *see also Worsham*, 2016 WL 4592373, at *7 (rejecting *Charvat* as "indicating, without analysis" that the FCC promulgated 47 C.F.R. § 64.1200(d) under Section 227(c)).

Indeed, the District of Maryland dismissed a similar claim against ECI and Cordish Companies (as well as other defendants) on this exact ground. *Wilson v. PH Phase One Operations L.P.*, No. CV DKC 18-3285, 2019 WL 4735483, at *6 (D. Md. Sept. 27, 2019) ("47 C.F.R § 64.1200(d) appears to fall within subsection d's scope, which does not provide a private right of action."). The same result should be reached here.

B. Plaintiff Is Not A Residential Subscriber and Did Not Receive the Requisite Number of Texts

Both the purported Procedural and Revocation Claims are premised on violations of the regulatory provisions at 47 C.F.R. § 64.1200(d), which only address calls "to a residential telephone subscriber." Because Plaintiff is not a residential telephone subscriber (*see* Part II.A), the Procedural and Revocation Claims fail for this separate reason. Moreover, in order to maintain these claims, Plaintiff would need to establish more than one "telemarketing" call within a twelve-month period. As established in Section II.B, he fails to do so at least for the 2017 texts.

C. There Is No Evidence of a Do-Not-Call Request

Even if Plaintiff could bring a claim under Section 64.1200(d)(3) (which he cannot), Plaintiff must establish that he made a do-not-call request that Shark Bar failed to honor by making

telemarketing calls to him more than thirty days after his request to not be called. 47 C.F.R. § 64.1200(d)(3). Plaintiff fails to meet his burden of establishing a do-not-call request

Plaintiff has the burden to prove that he made a do-not-call request to Shark Bar. There is no record of any do-not-call request in any of the text logs produced. Plaintiff has provided no evidence of any request, other than his vague and uncertain testimony, all of which is undercut by the absence of any record of such a request in the text logs. (Stmt. ¶ 62.)

Plaintiff cannot create a genuine factual issue by merely relying on his vague and unsupported allegations -- he must present specific facts. His failure to do so is fatal to his claim. *See, e.g.*, *Satcher*, 558 F.3d at 734–35 (non-movant cannot withstand summary judgment through allegations or denials but rather must establish a genuine issue by setting forth specific facts); *Keating v. Pittston City*, 643 F. App'x 219, 224-25 (3d Cir. 2016) (uncertain recollection cannot defeat summary judgment); *Chambers v. Troy-Bilt, L.L.C.*, 687 F. App'x 401, 403 (5th Cir. 2017) (regarding uncertain memory of relevant events, "[t]his type of speculation is not sufficient to create a genuine issue of material fact").

D. The Revocation Claim is Duplicative

In addition to awarding summary judgment on the grounds set forth above, the Court should also strike Plaintiff's Revocation Claim as duplicative of his Procedural Claim. Courts enjoy liberal discretion to strike material from a pleading that is "redundant, immaterial, impertinent, or scandalous." Fed. R. Civ. P. 12(f); *Nationwide Ins. Co. v. Cent. Missouri Elec. Co-op., Inc.*, 278 F.3d 742, 748 n.4 (8th Cir. 2001). "Under this standard, entire claims may be stricken if they are redundant." *Associated Indem. Corp. v. Small*, No. 06-00187-CVW-REL, 2007 WL 844773, at *2 (W.D. Mo. Mar. 19, 2007).

This Court strikes counts as redundant where they seek the same relief as another count that relies on mutually-relevant allegations. *See, e.g., id.* at *4 (concluding count ought to be stricken as redundant where it incorporated relevant allegations already included in first count and sought the same statutory damages); *Schupp v. CLP Healthcare Servs., Inc.*, No. 2:12-CV-04262-NKL, 2013 WL 150291, at *1 (W.D. Mo. Jan. 14, 2013) (citing courts' discretion to strike pleading material under Rule 12(f), dismissing claim as redundant where "[e]ach claim is premised on the same factual allegations and each claim seeks the same relief"). This practice is routinely followed in the context of TCPA claims. *See, e.g., Lutman v. Harvard Collection Servs., Inc.*, No. 2:15-CV-257-FTM-38CM, 2015 WL 4664296, at *2 (M.D. Fla. Aug. 6, 2015) (striking as redundant a TCPA claim that specified subsection within section identified in other claim).

In support of their Procedural Claim, Plaintiff alleges Shark Bar violated the standards promulgated at 47 C.F.R. § 64.1200(d), including recording and honoring requests to not receive calls—as required by 47 C.F.R. § 64.1200(d)(3), which is precisely the basis for Plaintiff's Revocation Claim. (*Compare* SAC (Procedural Claim) ¶ 104, *with id.* (Revocation Claim) ¶¶ 130–31).

If there was any ambiguity as to the redundancy of the Revocation Claim, Plaintiff resolves it by clarifying the scope of the subsections his Procedural Claim addresses: "47 C.F.R. § 64.1200(d)(1)–(6)." (*Id.* ¶ 106.) This includes Section 64.1200(d)(3), upon which Plaintiff's Revocation Claim is based. Thus, Plaintiff bases his Revocation Claim on the same allegations Plaintiff relies upon to support a theory of recovery under their Procedural Claim, both of which asserts a violation of the same subsection. The claims even seek the same injunctive relief and statutory damages. (*See* SAC ¶¶ 109, 117 (seeking "an injunction against future calls"); *id.* ¶¶ 108, 116 (claiming entitlement under Section 227(c)(5) to $500 in damages for each message at issue);

id. ¶¶ 112, 122 (requesting the Court treble the $500-per-message statutory damages to $1,500 per message).) As a result, striking the Revocation Claim would not prejudice Plaintiff, but maintaining it as a nominally separate count would, at a minimum, present a burdensome distraction and source of confusion.

IV. THE COURT SHOULD DISMISS CLAIMS AGAINST CORDISH COMPANIES AND ECI

In addition to the grounds for summary judgment in favor of all Defendants set forth above, this Court should also dismiss Plaintiff's claims against Cordish Companies and ECI on the ground that they cannot be liable for any conduct alleged against Shark Bar. In the first instance, there is no personal jurisdiction over these Defendants in Missouri for the reasons set forth in their pending motion to dismiss. (Dkt. 63.) In the event the Court concludes it has jurisdiction over these entities, however, they should be dismissed because (i) they did not send the texts at issue, and (ii) Shark Bar was not acting on either of their behalves.

First, "[t]he plain language of the TCPA assigns civil liability to the party who 'makes' a call." *Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d 1079, 1084 (C.D. Cal. 2012), *aff'd*, 582 F. App'x 678 (9th Cir. 2014). To be directly liable, the defendant must be the one who "initiates" the call. *See Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 960 (8th Cir. 2019) (citing § 227(b)(1)(B)). In *FreeEats.com*, the Eighth Circuit relied on the FCC's interpretation in finding that TCPA liability does not extend to sellers who do not personally make the phone calls at issue. *Id*. at 960. Similarly, here, it is undisputed that neither ECI, nor Cordish Companies sent the text messages that are the subject of Plaintiff's claim. Thus, no direct TCPA liability exists against either entity.

Second, while TCPA liability has been extended in certain, limited instances beyond the sender of the texts, there is no support for such a theory over ECI and Cordish Companies in this case. In the *Dish Network* matter, the FCC declared that liability for a TCPA violation may be

imputed to a party that did not itself place the calls if the party that placed the calls did so "on behalf of" that party. *In re Joint Petition filed by Dish Network, LLC*, 28 F.C.C.R. 6574, 6593 ¶ 48 (May 9, 2013). There is no evidence that Shark Bar was acting "on behalf of" either ECI or Cordish Companies, given that the text messages said nothing about either entity and explicitly related to events at Shark Bar. (Stmt. ¶¶ 6, 13, 54, 57.)

Further, while the FCC has stated that principles of agency may apply to determine whether a caller is acting on behalf of another entity, there is no support for any theory of agency here. "The classical definition of 'agency' contemplates 'the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control." *In re Monitronics Int'l, Inc., Telephone Consumer Protection Act Litig.*, 223 F. Supp. 3d 514, 519 (N.D. W.V. 2016), *aff'd sub nom. Hodgin v. UTC Fire & Security Americas Corp., Inc.*, 885 F.3d 243 (4th Cir. 2018). There is no evidence of any agreement, and no evidence of control to support an agency relationship.

First, Cordish Companies, as demonstrated, conducts no operations and therefore does not exercise "control" over Shark Bar or any other entity. (Stmt. ¶ 6.) Thus, there is no agency relationship between the two defendants. Second, ECI acted as a consultant to Shark Bar and provided certain support services to it. (*Id.* ¶ 7.) This is specifically set forth in the Consulting Agreement that explicitly disclaims any agency relationship between the parties. (*Id.* ¶ 9.) There is no record evidence that ECI controlled Shark Bar or vice versa. Nor is there any record evidence that supports any other theory of liability against either Cordish Companies or ECI.

CONCLUSION

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

Dated: October 25, 2019

By: */s/ Jacqueline M. Sexton*

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