UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

In support of their motion to dismiss pursuant to Rule 12(b)(2) and (6), defendants Beach Entertainment KC, LLC d/b/a Shark Bar ("Shark Bar"), The Cordish Companies, Inc. ("Cordish"), and Entertainment Consulting International, LLC ("ECI") (collectively, "Defendants") state:

PRELIMINARY STATEMENT

In this putative class action, plaintiff J.T. Hand ("Plaintiff") seeks potentially annihilating class-wide damages based on his claim that Defendants violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, *et seq.*, by sending promotional text messages to his cell phone and those of putative class members. Plaintiff alleges that Defendants sent text messages using an automatic telephone dialing system ("ATDS"), to numbers registered on the National Do-Not-Call Registry ("NDNCR"), and without complying with certain regulatory standards. Plaintiff's Second Amended Complaint ("SAC") fails because this Court lacks personal jurisdiction over defendants Cordish and ECI (the "Maryland Entities")—whom Plaintiff improperly lumps in with Shark Bar for jurisdiction purposes—and the SAC's claims are premised on a statutory framework that violates three separate clauses of the Constitution.

First, the TCPA's content- and speaker-based preferences at issue violate the First Amendment Free Speech Clause. These preferences do not withstand strict scrutiny because, as the Eighth Circuit has held, residential privacy is not a compelling interest, and the TCPA's provisions are not narrowly tailored to further that interest. *Second*, these preferences violate the Fifth Amendment Equal Protection Clause for the same reasons. Because they are not narrowly tailored to the government's interest, their differential treatment of certain speakers and their speech is unconstitutional. *Third*, the TCPA's definition of the term ATDS, compounded by the FCC's failure to provide adequate guidance, violates the Fifth Amendment Due Process Clause because it is unconstitutionally vague. Accordingly, Plaintiff's SAC must be dismissed.

FACTUAL BACKGROUND

I. THE TCPA CONTAINS CONTENT- AND SPEAKER-BASED RESTRICTIONS ON SPEECH

A. The ATDS Restrictions

When Congress enacted the TCPA provisions targeting ATDS use to place calls to cell phone numbers, it found that "residential telephone subscribers consider automated or prerecorded telephone calls, *regardless of the content or the initiator of the message*, to be a nuisance and an invasion of privacy." Pub. L. No. 102-243, § 2, ¶ 10, 105 Stat. 2394, 2394-95 (1991) (emphasis added). In 2015, Congress amended the TCPA to exempt calls placed to cell phone numbers using an ATDS "made solely to collect a debt owed to or guaranteed by the United States." Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588 (2015). The FCC then confirmed that the statute also categorically exempted both governmental entities and "agents" transmitting government "authorized" messages. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 16-72, 31 FCC Rcd 7394, 7398, 7403-04 ¶¶ 10, 17 (2016) ("July 2016 FCC Order"). Nothing in the statute prevents the FCC from enacting even more content-based restrictions. Thus, whether a message violates the ATDS restrictions turns on its content and speaker.

B. The National Do-Not-Call Registry Restrictions and Procedural Regulations

Section 227(c)(5) of the TCPA imposes liability for placing more than one "telephone solicitation" in a twelve-month period to a number on the NDNCR. The corresponding regulatory provision is also premised on the triggering event of "telephone solicitation." 47 C.F.R. § 64.1200(c). Because the statutory and regulatory definitions of "telephone solicitation" exempt non-profit organizations, the NDNCR provisions contain speaker-based exemptions. *See* 47 U.S.C. §227(a)(4)(C); 47 C.F.R. § 64.1200(f)(14)(iii). Similarly, the standards promulgated for entities placing calls for "telemarketing purposes" are also speaker-based restrictions because the

regulation specifically exempts non-profits from its application. 47 C.F.R. § 64.1200(d)(7).

II. THE DEFINITION OF THE TERM ATDS IS VAGUE

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). In 2015, the FCC broadened this definition to include not only equipment that has the "present ability" to dial in an automated manner, but also the "potential" or "future capacity" to do so. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, CG Docket No. 02-278, 30 FCC Rcd. 7961, 7971-72, 7974-76, 8089 (2015) ("2015 FCC Order"). FCC Commissioner Ajit Pai dissented, stating that it "dramatically expands the TCPA's reach" and is "flatly inconsistent with the TCPA." *Id.* at 8074. As Commissioner Pai cautioned, this definition gave rise to a flood of litigation.[1]

In March 2018, a unanimous D.C. Circuit panel set aside the FCC's broad ATDS interpretation. *ACA Int'l v. FCC*, 885 F.3d 687, 703 (D.C. Cir. 2018). The D.C. Circuit held that the FCC's determination that equipment could be an ATDS based on its "potential functionalities" was an "unreasonable, and impermissible, interpretation" of the TCPA. *Id.* at 695-97. The court explained that the "unreasonableness" of this "expansive understanding" was compounded by the FCC's prior rulings' "lack of clarity about which functions qualify a device as an [ATDS]," which themselves "fail[] to satisfy the requirement of reasoned decisionmaking." *Id.* at 703. Thus, the D.C. Circuit "set aside the Commission's treatment of those matters." *Id.*[2]

[1] In 2009, 100 complaints were filed relying on the TCPA call restrictions. In 2016 and 2017, 4,840 and 4,392 such actions were filed. *See* WebRecon LLC, WebRecon Stats for Dec 2017 & Year in Review, https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review (visited Jan. 28, 2019).

[2] The D.C. Circuit did not address the TCPA's unconstitutional content- and speaker-based speech restrictions or provide a meaningful definition for the term ATDS.

The D.C. Circuit made clear that the FCC needs to provide guidance to parties who are "left in a significant fog of uncertainty about how to determine if a device is an ATDS." *Id.* In May 2018, the FCC responded by issuing a public notice seeking comments on a new definition of ATDS that comports with *ACA Int'l*.[3] *See Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of The Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, CG Docket No. 18-152, CG Docket No. 02-278, DA 18-493 (May 14, 2018). The FCC has not yet released its Order addressing the remand of *ACA Intl*.

III. THE CURRENT LITIGATION

On March 26, 2019, Plaintiff filed an amended putative class action complaint alleging that he and others received text messages from Shark Bar between April 25, 2014 and April 4, 2018. (SAC ¶ 15.) Plaintiff alleges that Shark Bar obtained the recipients' phone numbers (*id.* ¶ 51), added them to a stored list of numbers (*id.*), and then used an ATDS to send messages to those numbers without complying with procedural regulations and despite the recipients' requests to stop and/or registration on the NDNCR (*see, e.g., id.* ¶¶ 19, 51, 57).

Plaintiff's Complaint asserts four counts, alleging that Shark Bar violated: (i) 47 U.S.C. § 227(b)(1)(A)(iii), by allegedly using an ATDS to send messages to Plaintiff and putative class members without consent ("ATDS Claim"); (ii) 47 C.F.R. § 64.1200(d), by allegedly failing to implement the regulation's policies and procedures, which Plaintiff alleges gives rise to a cause of action under 47 U.S.C. § 227(c)(5) ("Regulatory Claim"); (iii) 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(c)(2), by allegedly sending more than one message within any twelve-month period to Plaintiff and members of the putative class that registered their phone numbers on the NDNCR (the "NDNCR Claim"); and (iv) 47 C.F.R. § 64.1200(d)(3), by allegedly sending one or more

[3] Regardless of what definition applies, none of the text messages at issue were sent using an ATDS.

messages to Plaintiff and the putative class after they requested Shark Bar to cease messaging them and list their numbers on its internal do-not-call list, which Plaintiff alleges gives rise to a cause of action under 47 U.S.C. § 227(c)(5) (the "Revocation Claim")[4]. (*Id.* ¶¶ 83–122.) Plaintiff proposes four putative classes corresponding to the four counts he asserts. (*Id.* ¶¶ 73-76.) Plaintiff seeks statutory damages in the amount of $500 per violation on behalf of himself and the putative classes, which Plaintiff seeks to treble based on allegations that the purported violations were knowing and willful, as well as an injunction. (*Id.* ¶¶ 23–31.)

ARGUMENT

I. THE COURT SHOULD DISMISS THE MARYLAND ENTITIES BECAUSE IT LACKS PERSONAL JURISDICTION OVER THEM

"As the party asserting that personal jurisdiction exists, [Plaintiff has] the burden of proving facts sufficient to make a prima facie showing of jurisdiction." *Brouwer v. Wyndham Vacation Resorts, Inc.*, No. 2:14-cv-04112-NKL, 2014 WL 3828514, at * 3 (W.D. Mo. Aug. 4, 2014). Plaintiff fails to meet this burden.

A. There Is No General Jurisdiction Over the Maryland Entities

It is well established that a corporate entity is only subject to general jurisdiction where it is incorporated or has its principal place of business. *Daimler AG v. Bauman*, 134 S. Ct. 746, 761, n. 19 (2014) (general jurisdiction exists only where contacts are "so substantial and of such a nature as to render the corporation at home in that State," *i.e.* its formal place of incorporation or principal place of business); *see also BNSF Railway Co. v. Tyrell*, 137 S. Ct. 1549 (2017).

In support of personal jurisdiction, Plaintiff alleges that "Defendants' affiliations with the

[4] The Court should strike Plaintiffs' Revocation Claim as redundant of the Regulatory Claim. *See* Fed. R. Civ. P. 12(f). In support of his Regulatory 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.

state of Missouri are so 'continuous and systematic' as to render them at home in this District because Defendants' regular and systematic corporate decision-making is made in Kansas City, Missouri." (SAC ¶ 10.) These conclusory allegations that "Defendants" are "at home" are insufficient to establish general jurisdiction over Cordish and ECI—and are also blatantly false, as some of Plaintiff's counsel have admitted in a separate case filed against the Maryland Entities. *Compare* SAC ¶ 10 ("Defendants' affiliations with the state of ***Missouri*** are so 'continuous and systematic' as to render them at home in this District because Defendants' regular and systematic corporate decision-making is made in ***Kansas City, Missouri***") (emphasis added), *with Wilson v. Cordish Cos., Inc., et al*, No. 1:18-cv-03285-JKB (D. Md.) First Amended Complaint (Dkt. No. 25) ¶ 12 (Maryland Entities' "affiliations with the state of ***Maryland*** are so 'continuous and systematic' as to render them at home in this District, because Defendants' regular and systematic corporate decision-making is made within the ***Maryland*** offices") (emphasis added) (*See* Ex. A).

Plaintiff cannot impute jurisdiction over the Maryland Entities by claiming "Defendants" engaged in certain activities. *See Signature Holding Co. v. The City of Kimberling*, No. 3:10-cv-00129, 2011 WL 13119100, at *4 (S.D. Iowa Mar. 15, 2011) ("[T]he Court cannot—as Plaintiffs seem to suggest—lump all of the Defendants together for its analysis of the personal jurisdiction issue."). Indeed, far from alleging facts that establish the Maryland Entities are "at home" in Missouri, the SAC makes clear that both Cordish and ECI are Maryland corporate entities with their principle place of business in Baltimore, Maryland. (SAC ¶¶ 3-4.) Accordingly, there is no basis to assert general jurisdiction over the Maryland Entities. *Nexgen HBM, Inc. v. Listreports, Inc.*, No. 16-cv-3143-SRN/FLN, 2017 WL 4040808, at *8 (D. Minn. Sept. 12, 2017) (argument that court had general jurisdiction over a California corporation was "easily dispatched").

B. <u>There is No Specific Jurisdiction Over the Maryland Entities</u>

To establish specific jurisdiction, "there must be an affiliation between the forum and the

underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1780 (2017). Further, "[s]ince specific jurisdiction hinges on the connection between the defendant and the forum, the analysis must be specific to each defendant." *Nexgen HBM, Inc.*, 2017 WL 4040808, at *10; *Hanline v. Sinclair Global Brokerage Corp.*, 652 F. Supp. 1457, 1458 (W.D. Mo. 1987); *Signature Holding Co.*, 2011 WL 13119100, at *4 (same).

Plaintiff asserts no allegations that allow the Court to evaluate the Maryland Entities' contacts with this forum related to this action. This failure alone is sufficient to conclude the Court lacks specific jurisdiction over the Maryland Entities.

For example, in *Goans Acquisition, Inc. v. Merchant Solutions, LLC, et al.*, No. 12-00539-cv-S-JTM, 2012 WL 4957628, at *2-4 (E.D. Mo. Oct. 16, 2012), the court dismissed a TCPA claim for lack of personal jurisdiction against non-resident defendants where Plaintiff alleged generally that "Defendants transmitted or caused to be transmitted to Plaintiff's fax machine an unsolicited fax." Likewise, here, Plaintiff attempts to predicate jurisdiction upon similar allegations, by alleging that "Defendants" sent unlawful text messages to residents of this District. Yet Plaintiff fails to identify the alleged role that each defendant supposedly had with respect to the purported sending of text messages. (SAC ¶¶ 8, 15-19, 48-61.) Courts have repeatedly dismissed claims based on similar allegations. *See Nexgen HBM, Inc.*, 2017 WL 4040808, at *10 (granting motion to dismiss based on lack of personal jurisdiction where plaintiff "fails to distinguish between each Defendant's conduct"); *Hanline*, 652 F. Supp. at 1461 ("The vague allegations of plaintiff's amended complaint simply do not establish the existence of minimum contacts between defendants . . . and the State of Missouri").

Given that Cordish and ECI are located in Maryland, even accepting Plaintiff's allegations concerning the alleged conduct as true, none of their actions took place in Missouri. *See Goans Acquisition, Inc.*, 2012 WL 4957628, at *4. Further, Plaintiff fails to allege that any employee of the Maryland Entities sent any text messages at issue in this litigation—nor could it. Cordish has no employees and therefore no individual could possibly be engaged in sending text messages. (Declaration of Robert Fowler ¶ 3.) Moreover, no ECI employee has been engaged in sending text messages to Shark Bar customers; instead, these functions were performed by individuals employed directly by Shark Bar. (Declaration of Keith Hudolin ¶ 7.) Courts have found that no personal jurisdiction exists over separate corporate entities under such circumstances. *See Velez v. Portfolio Recovery Assocs.*, 881 F. Supp. 2d 1075, 1079-80 (E.D. Mo. 2012) (finding no personal jurisdiction over a parent company who did not have workers physically present or actively conducting business in the forum state); *Lyons v. Philip Morris Inc.*, 225 F.3d 909, 915 (8th Cir. 2000) (affirming dismissal of claims against holding company because it "has not manufactured, marketed, sold, or distributed" products in the forum state).

Further, the Cordish trade name is often used to describe real estate developments located around the country, each of which is owned by a separate and distinct legal entity. (Fowler Decl. ¶ 3; SAC ¶¶ 3, 14.) Rather than establishing that Cordish targeted Missouri, the SAC merely claims (albeit incorrectly) that Cordish owns venues across the country. (SAC ¶ 38) ("Cordish owns over 50 restaurants, bars, and live music venues ***around the country***.") (emphasis added). Likewise, ECI provided services to dining and entertainment districts that included not just Missouri venues, but to "multiple entertainment districts (and dozens of bars and restaurants within those districts) ***across the country*** . . . ." (SAC ¶ 41) (emphasis added). Absent any showing that a defendant expressly aimed its conduct into the forum state – as Plaintiff fails to do here – courts

have concluded that specific jurisdiction does not exist. *See Nexgen HBM, Inc.*, 2017 WL 4040808, at *11 (personal jurisdiction did not exist where marketing efforts "were not uniquely aimed" at the forum).

C. Plaintiff Cannot Predicate Personal Jurisdiction on Vicarious Liability

The "general rule" is that even in instances where "a parent corporation . . . owns a subsidiary—even wholly owns a subsidiary— [that company] is not present in a state merely because the subsidiary is there." *Epps v. Stewart Info. Services Corp.*, 327 F.3d 642, 650 (8th Cir. 2003) (affirming dismissal of complaint asserting claims against a parent company on the basis of lack of personal jurisdiction); *see also Velez*, 881 F. Supp. 2d at 1084. Cordish, ECI and Shark Bar do not have any parent-subsidiary relationship whatsoever. Indeed, the SAC admits that Shark Bar, ECI and Cordish are all separate entities. (SAC ¶¶ 2-4, 9.)

Thus, in order to predicate personal jurisdiction over the Maryland Entities on the basis of Shark Bar's contacts with Missouri, Plaintiff must provide a basis to impute such contacts to the Maryland Entities. To do so, Plaintiff must "demonstrate that two entities are alter-egos of one another, such that the 'corporate veil' may be pierced, [and] a plaintiff must show that there is such a unity of interest and ownership that the separate entities no longer exist[.]" *Velez*, 881 F. Supp. 2d at 1084. Courts in the Eighth Circuit have held that "the alter-ego doctrine is an 'extraordinary measure' reserved for 'exceptional circumstances.'" *Goellner-Grant v. Platinum Equity LLC*, 341 F. Supp. 3d 1022, 1029 (E.D. Mo. 2018). The SAC fails to allege sufficient facts that, if true, could invoke such exceptional circumstances.

Specifically, the SAC only alleges that "Cordish and ECI effectuate and oversee all, or substantially all, of the advertising and/or marketing decisions of their venues, including Shark Bar" and that Shark Bar's "day-to-day operations are dictated by and through ECI." (SAC ¶¶ 5-6.) This is not true. In any event, courts have held that such allegations are insufficient to establish

personal jurisdiction over a separate corporate entity. For example, in *General, LLC v. Ryder System, Inc.*, No. 4:18-cv-00442-JAR, 2018 WL 4961497, at *2-5 (E.D. Mo. Oct. 15, 2018), the court concluded that allegations that Ryder was "engaged in managing, administering and/or overseeing the subsidiary companies" operating under the Ryder "umbrella" was insufficient to "impute a subsidiary's contacts to a parent corporation for the purposes of specific personal jurisdiction."

Furthermore, allegations that Cordish "owns and manages" all of its businesses, that Txt Live is one of its "assets," and that Cordish registered the Txt Live domain name (SAC ¶¶ 38-39, 47) are also insufficient to establish personal jurisdiction over Cordish. *See Englert v. Alibaba.com Hong Kong Ltd.*, No. 4:11-cv-1560-RWS, 2012 WL 162495, at *4 (E.D. Mo. Jan. 19, 2012) (lack of personal jurisdiction because "the mere fact that Alibaba Holding owns the domain name for the alibaba.com website and the trademarks used by Alibaba Hong Kong is insufficient to confer jurisdiction"); *see also Cepia, L.L.C. v. Alibaba Group Holding Ltd.*, No. 4:11-cv-273 SNLJ, 2011 WL 5374747, at *4-6 (E.D. Mo. Nov. 8, 2011). Likewise, Plaintiff's conclusory allegations that "ECI developed the policies and procedures for creating text messaging campaigns and collecting lists of consumers' names and phone numbers for use in telemarketing campaigns" (SAC ¶ 46) are also insufficient to establish personal jurisdiction over a separate corporate entity. *Velez*, 881 F. Supp. 2d at 1084 ("Activities such as monitoring the subsidiary's performance . . . and articulating general policies and procedures are not sufficient to allow attribution of a parent's action to a subsidiary.")

Nor does the SAC offer any basis to impute Shark Bar's contacts with Missouri to the Maryland Entities on the basis of agency. "Although a court may exercise personal jurisdiction over a defendant through the acts of his agent, '[a] party who relies upon the authority of an agent

has the burden of proof regarding both the fact of the agency relationship and the scope of the agent's authority.'" *Desai v. Sterling Commercial Capital, LLC*, No. 06-00076-CV-W-HFS, 2006 WL 1445397, at *3 (W.D. Mo. May 23, 2006). Plaintiff alleges no facts in support of any theory of agency. Indeed, rather than alleging that Shark Bar acted on behalf of the Maryland Entities, the SAC concedes that the texts at issue "contained Shark Bar's brand name and location" and "encouraged [Plaintiff] to visit Shark Bar with his friends or associates." (*See, e.g.*, SAC ¶¶ 16, 65, 73-76.) Thus, Plaintiff fails to predicate jurisdiction on any theory of agency liability.

II. THE COURT SHOULD DISMISS PLAINTIFF'S CLAIMS BECAUSE THEY RELY ON UNCONSTITUTIONAL RESTRICTIONS

A. The Restrictions Violate the First Amendment Free Speech Clause

1. The Restrictions Are Subject to Strict Scrutiny

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed," and such laws are subject to strict scrutiny[5]. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227-28 (2015). "Speech restrictions based on the identity of the speaker" are subject to strict scrutiny and presumptively unconstitutional where "the legislature's speaker preference reflects a content preference." *Id.* at 2230. Here, because the restrictions forming the basis for Plaintiff's claims are both content- and speaker-based, strict scrutiny applies.

a. The ATDS Restrictions Are Subject To Strict Scrutiny Because Of Their Content-Based Discrimination

[5] *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995) and *Gresham v. Swanson*, 866 F.3d 853 (8th Cir. 2017), which addressed the constitutionality of certain exemptions to a Minnesota statute regulating the use of automatic dialing-announcing devices, are inapposite to the instant constitutional inquiry. Those cases upheld the exemptions at issue because the "permissions granted . . . do not reflect a content preference; they are based on an assumption of implied consent." *Gresham*, 866 F.3d at 856. Here, there can be no argument that the speaker-based exemptions to the TCPA reflect a content-preference. This is particularly clear given that, unlike the ATDS provisions of the TCPA, the Minnesota statute exempts more broadly any "messages to subscribers with whom the caller has a current business or personal relationship." Minn. Stat. § 325E.27.

On their face, the ATDS restrictions discriminate based on a call's content. The law "draws distinctions based on the message a speaker conveys," *Reed*, 135 S. Ct. at 2227—*i.e.*, a caller may use an ATDS to collect a government debt, but not, for example, to inform someone about a beneficial service, or (according to Plaintiff) communicate with a customer. This preferential treatment amounts to not just content discrimination, but to outright viewpoint discrimination—a "blatant" and "egregious form of content discrimination." *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995). The District of Minnesota —joining five other district courts[6]— correctly concluded that the government-debt and emergency-call exceptions render the TCPA content based and subject to strict scrutiny. *Greenley v. Laborers' Int'l Union of N. Am.,* 271 F. Supp. 3d 1128, 1149 (D. Minn. 2017).

b. The Restrictions Are Subject To Strict Scrutiny Because Of Their Speaker-Based Discrimination

As to Plaintiff's ATDS Claim, although the ATDS restrictions apply to "any *person* within the United States," 47 U.S.C. § 227(b)(1) (emphasis added), the statute excludes all government entities from the definition of a "person." *See* 47 U.S.C. § 153(39). Likewise, government agents communicating "authorized" messages are also exempt. *See* July 2016 FCC Order ¶¶ 1, 10, 11. Plaintiff's other claims allege violations of regulations and a statute that explicitly exclude non-profit speakers from their restrictions. *See* 47 U.S.C. § 227(a)(4)(c); 47 C.F.R. § 64.1200(d)(7); 47 C.F.R. § 64.1200(f)(14)(iii).

This preference for governmental entities, their agents, and non-profits "reflects a content preference" for certain types of speech. *Reed*, 135 S. Ct. at 2230. Indeed, the exemption of

[6] *See Am. Ass'n of Political Consultants v. Sessions*, No. 5:16-CV-252-D, 2018 WL 1474075, at *3-4 (E.D.N.C. Mar. 26, 2018), *vacated and remanded by Am. Ass'n of Political Consultants v. FCC*, No. 18-1588, 2019 WL 1780961 (4th Cir. Apr. 24, 2019); *Gallion v. Charter Commc'ns Inc.*, 287 F. Supp. 3d 920, 927 (C.D. Cal. 2018); *Mejia v. Time Warner Cable Inc.*, Nos. 15-CV-6445 (JPO), 15-CV-6518 (JPO), 2017 WL 3278926, at *14 (S.D.N.Y. Aug. 1, 2017); *Holt v. Facebook Inc., 240 F. Supp.* 3d 1021, 1032 (N.D. Cal. 2017); *Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036, 1043-44 (N.D. Cal. 2017).

government agents acting within the scope of their agency compounds the blatant preference for government-approved messages because in that case a private speaker's liability depends on whether its message is authorized by the government. Thus, it is all the more clear that the TCPA's nominally "speaker-based" preference for the government and its agents reflects a content-based preference for government messages, regardless of the speaker's identity and independently triggers strict scrutiny. *See id.* Similarly, the preferential treatment for nonprofit organizations violates the principle prohibiting the state from favoring one form of private speech over another. *Rosenberger*, 515 U.S. at 828. Thus, the restrictions at issue must withstand strict scrutiny.

2. The Restrictions Cannot Survive Strict Scrutiny

Strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); laws subject to it are "presumptively invalid." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817–18 (2000). The party seeking to enforce the law must prove that the content-based restriction is narrowly tailored to advance a compelling government interest. *Id.* at 813. Courts—including appellate courts—have already struck down state analogues of the TCPA under this exacting review. *See Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015)[7]; *Gresham v. Rutledge*, 198 F. Supp. 3d 965, 973 (E.D. Ark. 2016). Here, Plaintiff cannot meet his burden to prove that the restrictions at issue are constitutional.

First, the TCPA's purported goal—protecting citizens from unwanted automated communications or preserving "residential privacy"—is not a compelling interest. "The Supreme Court has never held that [residential privacy] is a compelling interest," and this Circuit does not believe it is. *Kirkeby v. Furness*, 92 F.3d 655, 659 (8th Cir. 1996).

[7] On April 24, 2019, the Fourth Circuit correctly concluded that the debt-collection exemption fails strict scrutiny. *See Am. Ass'n of Political Consultants*, 2019 WL 1780961. However, the Fourth Circuit wrongly concluded that severance was the appropriate remedy to repair what it recognized was an unconstitutional statutory provision.

Second, the TCPA is not narrowly tailored to achieve its interest of preventing unwanted calls. Narrow tailoring requires targeting "no more than the exact source of the 'evil' [the regulation] seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The "exact source" of the problem the TCPA seeks to remedy is "abusive telemarketing practices that threaten the privacy of consumers and businesses." *Ashland Hosp. Corp. v. Serv. Employees Int'l Union, Dist. 1199 WV/KY/OH*, 708 F.3d 737, 741 (6th Cir. 2013). Courts enjoin over-inclusive restrictions as not "narrowly tailored" because they restrict more speech than necessary, as here. *See Gresham*, 198 F. Supp. 3d at 972. The restrictions are also under-inclusive. Although Congress found automated or prerecorded calls offensive "*regardless of the content or the initiator of the message*," Pub. L. No. 102-243, § 2, ¶ 10 (emphasis added), the restrictions exempt several broad categories of intrusive speech *based on the content or initiator of the message*, without justification (*see supra* Part II.A.). *See Gresham*, 198 F. Supp. 3d at 972. There is no apparent explanation for how exempting non-profits from regulatory standards triggering liability for offending calls could further a residential privacy interest.

B. The Restrictions Violate the Equal Protection Clause

Equal protection claims arising from a statute's "differential treatment" may be "closely intertwined with First Amendment interests." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Id.* at 101.

Here, Plaintiff cannot show that the "differential treatment" of various types of speech and speakers embedded within his claims satisfies equal-protection scrutiny. For the same reasons stated above (*see supra* Part II.A.2.), the restrictions are not narrowly tailored to their intended interest. Thus, the restrictions Plaintiff relies on violate the Equal Protection Clause.

C. The ATDS Restrictions Violate the Fifth Amendment Due Process Clause

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Statutes must have "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Particularly in the context of protected expression, exacting precision is required. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997). Even in a facial vagueness challenge, the ordinance need not be vague in all applications to be void if it reaches a "substantial amount of constitutionally protected conduct." *Kolender*, 461 U.S. at 358 n.8. The need for definiteness is greater when affecting constitutionally protected rights rather than regulating mere economic behavior. *Village of Hoffman Estates*, 455 U.S. at 498.

The ATDS restrictions are unconstitutionally vague because they fail to give a person of ordinary intelligence adequate notice of what constitutes an ATDS. The D.C. Circuit admonished the FCC's ATDS guidance as unacceptably overbroad and inconsistent, leaving the public in a "significant fog of uncertainty." *ACA Int'l*, 885 F.3d at 703. That uncertainty has not been cured, as evidenced by a slew of inconsistent opinions resulting in the FCC's pending rulemaking.

As applied here, the statute's vague and overbroad restriction on Defendants' freedom of speech is evident and patently unconstitutional. When the messages were allegedly sent, nothing in the statute's language indicated that it applied broadly to a web-based platform that could not send text messages without human intervention at every phase of the process. Plaintiff's ATDS Claim should be dismissed because it relies on a statutory provision that is void for vagueness.

CONCLUSION

For the foregoing reasons, Shark Bar respectfully requests that the Court dismiss the SAC with prejudice.

Dated: April 26, 2019

By: */s/ Jacqueline M. Sexton*

W. James Foland #25022
Jacqueline M. Sexton #53262
Zach T. Bowles #70531
FOLAND, WICKENS, ROPER, HOFER, CRAWFORD P.C.
1200 Main St., Suite 2200
Kansas City, Missouri 64105
Telephone: (816) 427-7474
Facsimile: (816) 472-6262
jfoland@fwpclaw.com
jsexton@fwpclaw.com
zbowles@fwpclaw.com

AND

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

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of April, 2019, a true and correct copy of the above and foregoing document was filed with the Court's CM-ECF system which will provide notice to all counsel of record.

/s/ *Jacqueline M. Sexton*
ATTORNEYS FOR DEFENDANTS