UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

J.T. HAND, individually and on behalf of a class of all others similarly situated, Plaintiff, v. BEACH ENTERTAINMENT KC, LLC d/b/a SHARK BAR, THE CORDISH COMPANIES, INC., ENTERTAINMENT CONSULTING INTERNATIONAL, LLC, Defendants.	Case No. 4:18-cv-00668-NKL

ORDER

Pending before the Court are Plaintiff's motion for class certification, Doc. 123, Plaintiff's motion for partial summary judgment, Doc. 140, Defendants' motion for summary judgment, Doc. 137, and Defendants' motion to exclude expert testimony, Doc. 133. For the reasons stated below, Plaintiff's motion for partial summary judgment is denied. Defendants' motion for summary judgment is granted in part and denied in part. Defendants' motion to exclude expert testimony is denied. Plaintiff's motion for class certification is granted in part and denied in part.

I. BACKGROUND[1]

Plaintiff J.T. Hand's Second Amended Class Action Complaint against Defendants Beach Entertainment KC, LLC d/b/a Shark Bar ("Shark Bar"), the Cordish Companies, Inc. ("Cordish

[1] For the purposes of the summary judgment motions, all facts are viewed in the light most favorable to the nonmoving party. *Cottrell v. Am. Family Mut. Ins. Co., S.I.*, 930 F.3d 969, 971 (8th Cir. 2019).

Companies"), and Entertainment Consulting International, LLC ("ECI") alleges violations of the Telephone Consumer Protection Act and its implementing regulations. *See* Doc. 56 (Second Amended Complaint). The Second Amended Complaint states that between April 25, 2014, and April 4, 2018, Plaintiff and putative class members received text messages that they had not consented to from Defendants advertising Shark Bar's products and services. Specifically, Plaintiff Hand alleges the following causes of action:

- Count I (the ATDS Claim) – violations of 47 U.S.C. § 227(b)(1)(A)(iii) for using an ATDS to send text messages without consent;
- Count II (the Procedural Claim) – violations of 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(d) for sending text messages without first implementing adequate procedures to prevent telemarketing calls or text messages to persons who request not to receive calls or text messages by that entity;
- Count III (the Do-Not-Call Claim) – violations of 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(c)(2) for making more than one telephone solicitation to a person on the NDNCR in a twelve-month period;
- Count IV (the Revocation Claim) – violations of 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(d)(3) for transmitting more than one advertising and/or telemarketing text message and/or telemarketing phone call within any twelve-month period after being requested to stop.

Hand seeks to certify two classes under Count I —the SendSmart Class and Txt Live Class—and one class under Count III—the Do Not Call Class.

Shark Bar is one of a series of drinking establishments located within the Kansas City Power & Light District, which is a retail, entertainment, office, and residential district located in downtown Kansas City, Missouri. Doc. 138-17 (Kyle Uhlig Declaration). As part of its promotions, Shark Bar offered contests, giveaways, and events to individuals through text messages. *Id*. Shark Bar contends these messages were sent to Shark Bar's patrons who visited and voluntarily provided their contact information in order to enter to win one of these prizes or events. *Id*. Shark Bar claims it obtained putative class members' contact information when

guests signed in to a hosted happy hour on a sign-in sheet[2] in order to receive drink specials, *see* Doc. 172-22 (Happy Hour Check-In Email), or when they filled out a paper card providing their name, phone number, email, and birthday, *see* Doc. 168-47 (Sample Shark Bar Paper Card). Shark Bar claims that upon collecting contact information, its employees manually entered the information into the bar's texting platform and subsequently shredded the sign-in sheets or paper cards. Doc. 172-6 (Kyla Bradley Deposition), p. 91.

Hand does not dispute that Shark Bar obtained individuals' contact information in these ways, although he maintains that he did not provide his contact information to Shark Bar. Doc. 172 (Hand's Response to Defendant's Statement of Facts), pp. 17–18. Shark Bar's records show that Hand's contact information was first entered into its contact database on November 2, 2013. Doc. 138-11 (Txt Live Contact Database Screenshot). The record accurately reflects Hand's name, gender, phone number, and email address, however the birthdate in the system is twenty-three days earlier than Hand's actual birthdate. Doc. 138-9 (Hand Deposition), pp. 95–96. Hand asserts that he did not provide his contact information to Shark Bar on November 2, 2013 or any time thereafter. *Id*. at pp. 96–97. Hand recalls having visited Shark Bar twice—once on May 7, 2016, when he also purchased drinks, and once on May 13, 2016. *Id*. at p. 98; Doc. 138-18 (Shark Bar Transaction Record).

From 2015–2017, Hand received four text messages from Shark Bar. The first message was sent on March 18, 2015 stating "Hi Jt, it's Kyle at Shark Bar. Happy Early Bday! We'd love to have you on a Fri or Sat to party and drink free! Text /bday' to book!" Doc. 138-20 (Hand

[2] Although the record is not perfectly clear, there is evidence to suggest that sign-in sheets were a much less frequently used form of data collection. *See* Doc. 164-3 (Kyle Uhlig Deposition), p. 87 ("It was very, very, very rare, less than a handful of times in the 10 years Shark Bar's been open that we had data sheets. That [] would be my guess.")

SendSmart Text Record). Shark Bar sent the same message again the following year on February 24, 2016. *Id*. The third and fourth texts from Shark Bar, sent on September 6, 2017 and December 14, 2017, again offered to host a party, stating "Hello Jt it's Kyle from Shark Bar KC. You entered to win a free party with us and we picked your name today! Text yes for more info!" and "Hi Jt! It's Kyle at Shark Bar. It's been awhile since we've seen you! We would like to invite you in for a VIP party with great specials. Interested?" Doc. 138-21 (Hand Txt Live Text Record). Hand did not accept any of the offers in these texts, and at some point during the four-year class period, he claims he responded by texting "stop," but the messages continued. Doc. 172-23 (Hand Deposition), pp. 89–90. Shark Bar disputes that Hand texted "stop," as their records do not reflect receiving that message. Hand has been registered on the national do-not-call registry as of June 7, 2012. Doc. 124-17.

During the relevant time period, Shark Bar used two different platforms to send its promotional messages. From 2014 through approximately March 2016, Shark Bar used the platform SendSmart to send its messages. Doc. 138-2 (Defendant Interrogatory Answers). ECI contracted with SendSmart's third-party owner in order to allow the venues ECI consulted with, including Shark Bar and other Kansas City Power & Light venues, to use the systems. Doc. 144-6 (SendSmart Service Agreement). "Cordish Co" and "Cordish/ECI" are listed as the client on the SendSmart Service Agreement and payor for the account on the SendSmart invoices. *Id*. at p. 15; Doc. 172-9 (SendSmart Invoices). Beginning in March 2016, ECI, Shark Bar, and other Kansas City Power & Light venues began transitioning from SendSmart to the newly developed texting system Txt Live, including importing all the venues' contacts from SendSmart into Txt Live. Doc. 138-2. ECI contracted with a software development company to build Txt Live for

ECI and the venues ECI worked with, including the Kansas City Power & Light venues. Doc. 144-12 (Kyle Uhlig Email); Doc. 144-13 (Txt Live Software Development Agreement).

SendSmart and Txt Live functioned in essentially the same way. A venue employee imported contacts into the system database, either by individually typing in the contact's information or by uploading a spreadsheet of contacts in a comma-separated values (CSV) file. Doc. 138-3 (David Yasnoff Declaration); Doc. 138-5 (Blake Miller Deposition). In order for SendSmart or Txt Live to send a message to a phone number, the phone number needed to be uploaded by a system user; the platforms could not generate phone numbers independently. Doc. 172, p. 25. To send text messages, a venue employee logged into the system, identified the number of individuals to be texted, narrowed the potential group of recipients by selecting the characteristics of those individuals if desired (e.g. recently added contact, birth date, etc.), typed out a message or selected a pre-saved message in the system, and pressed send. Doc. 138-17, ¶¶ 15, 18; Doc. 172-21 (Kyle Uhlig Deposition), p. 51. When a venue employee narrowed down the potential contacts to be messaged, either by determining a certain number of contacts and/or by filtering the contact characteristic, the system would then use a "shuffle" function to randomly select which contacts would be messaged. Doc. 172-30 (Blake Miller Deposition); Doc. 172-31 (Benjamin Rodriguez Deposition); Doc. 172-39 (Txt Live and SendSmart Screenshots). If a recipient responded by asking a question or by accepting the venue's offer for a giveaway or event, a venue employee could then message back and forth with the recipient in SendSmart or Txt Live regarding details. Doc. 138-17.

The precise nature of the relationship between Shark Bar, ECI, and Cordish Companies as well as ECI's and Cordish Companies' involvement with the messaging campaigns are disputed. ECI is a consultant firm located in Maryland that provides marketing and customer

service-related support for restaurants, bars, and nightclubs. Doc. 138-14 (Keith Hudolin Declaration). On January 1, 2015, ECI and Shark Bar signed a "Consulting Agreement" authorizing ECI as "Consultant" to provide "advice and counsel" on accounting, human resources, legal, and insurance matters. Doc. 138-15 (ECI / Shark Bar Consulting Agreement), p. 2. ECI was also to provide "web-based and paid advertising and marketing services for [Shark Bar] based on demands and input provided by [Shark Bar's Owner Beach Entertainment KC, LLC]." *Id*. ECI also provided these services to other Kansas City Power & Light venues with staff operating out of the district. Doc. 172-4; Doc. 172-10. The agreement disclaims any agency relationship. *Id*. at p. 4. Jacob Miller, the President and a nonmember manager of Shark Bar, signed the agreement on behalf of Shark Bar. *Id*. In addition to his position with Shark Bar, Jacob Miller also holds the titles of Senior Vice President and Chief Revenue Officer of ECI and "Executive Vice President with Cordish," and he reports directly to Cordish Companies Principal and ECI President Reed Cordish. Doc. 168-15 (Jacob Miller Deposition), pp. 6–8; Doc. 172 (Plaintiff's Suggestions in Opposition to Defendants' Motion for Summary Judgment), p. 14 n. 3.

As part of ECI's marketing consulting, ECI allowed Kansas City Power & Light venues access to SendSmart and Txt Live in order to send text messages promoting their venues. Doc. 138-14. ECI developed detailed district-wide policies for how venues including Shark Bar should collect data and use the SendSmart and Txt Live platforms. Doc. 172-13 (ECI Email on SMS Platform Training) Doc. 172-14 (ECI Txt Live Training Guide); Doc. 172-15 (ECI Email on message phrasing); Doc. 172-16 (ECI Email on Marketing Meetings and Data Collection District Policy); Doc. 172-17 (ECI Agenda for Shark Bar Marketing Meeting); Doc. 172-18 (ECI Email on message phrasing to avoid spam filters); Doc. 172-19 (ECI Email on trying to

standardize campaigns across districts); Doc. 172-20 (Email on Data Collection Policies); Doc. 172-22. ECI policies included guidelines on data collection as well as instructions on when to send messages, how to follow up with recipients, and how venues should word their messages to both maximize response rates and avoid being flagged as spam. *Id*. The policies were implemented and enforced through regular meetings between Kansas City based ECI staff and Kansas City Power & Light venues. Doc. 172-10 (Email Kansas City Venue Marketing Agenda); Doc. 172-20. If venues did not attend the district-wide meetings covering data collection policies and procedures, they would be unable to access the messaging platforms or have the ability to collect data. *Id*. Although Defendants claim that venues reimbursed ECI for their use of SendSmart and Txt Live, Doc. 138-14, ¶ 9, they did not produce records of reimbursement payments from Shark Bar to ECI or Cordish Companies. Doc. 168-17 (Defendant Request for Production Response). Data that was collected on sign-in sheets was forwarded to ECI for electronic storage. Doc. 172-6, pp. 87–90.

Cordish Companies is a corporation incorporated in Maryland. Doc. 138-16 (Robert Fowler Declaration), ¶ 3. On The Cordish Companies' website www.Cordish.com, it promotes itself as a real estate developer that owns and manages the businesses it creates, including the Kansas City Power & Light District, and it claims that its Kansas City office manages the entertainment block of Kansas City Power & Light, KC Live!. Doc. 172, pp. 9–10. Defendants claim, however, that these statements are inaccurate, and they point to a disclaimer located on the "Terms and Conditions" page of its website, which states that "Cordish Companies, The Cordish Companies, The Cordish Company, Cordish, Entertainment Consulting International and ECI are trade names for a group of corporations, limited liability companies and partnerships" that do not actually own any of the properties described on the website. Doc. 189-2. Defendants contend

that the Cordish Companies "is a passive company that conducts no business or operations, has no employees and does not own any property, including in the state of Missouri." Doc. 138-16. Further, "[t]he name 'Cordish' functions primarily as a trade name often used to describe real estate developments around the country, which are each owned by a separate and distinct legal entity." *Id*. at ¶ 4.

Plaintiff disputes this and, in addition to the statements regarding ownership and management on the corporation's website, offers evidence indicating that Cordish Companies is more than just a passive entity and that it oversees the Kansas City Power & Light District's operation and marketing scheme. For example, in Shark Bar's 2009 Change of Registered Agent form submitted to the State of Missouri, Shark Bar appended a Power of Attorney form signed by a representative of the Cordish Companies that listed Beach Entertainment KC, LLC and other Kansas City Power & Light venues among the Cordish Companies' "Subsidiaries." Doc. 168-8 (Beach Entertainment, LLC, Change of Registered Agent).

Further, Hand points to individuals who claim they have worked for or were hired by the Cordish Companies, many of whom have simultaneous or subsequent positions with ECI or Shark Bar. For example, Lauren Bust was the Director of Digital Strategy at the Cordish Companies and testified that she went to the Cordish Companies to work everyday, that her and others' email addresses ended in @cordish.com, that she was supervised by John Cordish, that her work included working with other Cordish Companies employees to develop campaigns for some of the commercial properties owned by Cordish Companies and performing Txt Live messaging analysis, and that she understood Cordish Companies to be a real estate marketing firm. Doc. 172-40 (Lauren Bust Deposition), pp. 13–14, 28–32, 58; Doc. 172-29 (Lauren Bust Email to ECI and Cordish individuals). Another individual, Ashley St. Pierre, stated that she

previously worked for the Cordish Companies and used an @cordish.com email address prior to becoming employed with ECI and working with Kansas City Power & Light venues. Doc. 172-3 (Ashley St. Pierre Deposition). The former General Manager of Shark Bar Mark Musselman was hired and supervised by Jim Watry, the District Manager for ECI and the Cordish Company. Doc. 172-4 (Mark Musselman Deposition), pp. 7–11; Doc. 172, p. 8. Musselman later became ECI's District Manager for the KC Live! entertainment block of the Kansas City Power & Light District, and his work included creating a guide to the district-wide data collection policy. Doc. 172-4, pp. 7–11; Doc. 172-10. Jacob Miller, the President and a nonmember manager of Shark Bar, signed the Shark Bar/ECI Consulting Agreement on behalf of Shark Bar, and has also held the titles of Senior Vice President and Chief Revenue Officer of ECI and "Executive Vice President with Cordish," and reports directly to Reed Cordish, Cordish Companies Principal and ECI President. Doc. 168-15, pp. 6–8; Doc. 172, p. 14 n. 3. When it came time to transition from SendSmart to a new text messaging platform vendor, these decisions were sent for approval to Reed Cordish. Doc. 172-8 (Email regarding new texting platforms). Reed Cordish also weighed in on the effectiveness of the district-wide marketing and data collection guides. Doc. 172-10. Finally, a former sales builder for Shark Bar testified that prior to her position with Shark Bar, she was hired as a marketing intern in the Kansas City Power & Light District by Rachel Waller, former Marketing Manager and current Director for Marketing for the Cordish Companies at Kansas City Power & Light, and that as an intern she used an @cordish.com email address. Doc. 172-5 (Morgan Hughes Deposition).

II. MOTION FOR SUMMARY JUDGMENT

"Summary judgment is proper if, after viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmovant, no genuine issue of material fact exists

and the movant is entitled to judgment as a matter of law." *Higgins v. Union Pac. R.R. Co.*, 931 F.3d 664, 669 (8th Cir. 2019) (quotation marks and citation omitted); Fed. R. Civ. P. 56(a). While the moving party bears the burden of establishing a lack of any genuine issues of material fact, *Brunsting v. Lutsen Mountains Corp.*, 601 F.3d 813, 820 (8th Cir. 2010), the party opposing summary judgment "must set forth specific facts showing that there is a genuine issue of material fact for trial." *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir. 2007). The Court must enter summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

a. COUNT I: ATDS Claim

Count I of Hand's Second Amended Complaint alleges that Defendants used an automatic telephone dialing system to send text messages without human intervention to Hand's cellular telephone. The parties have filed cross-motions for summary judgment on Count I.

The TCPA prohibits using an automated telephone dialing system (ATDS) to make non-emergency calls without the prior express consent of the recipient. 47 U.S.C. § 227(b)(1). A text message qualifies as a "call" within the scope of the Act. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016), as revised (Feb. 9, 2016). 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). The parties dispute (1) the meaning of this definition and whether the messaging platforms at issue here—SendSmart and Txt Live—fall within the definition's scope and (2) whether the messaging platforms dial numbers without human intervention.

The Court will first address the ATDS definition issue. The TCPA empowers the Federal Communications Commission to prescribe regulations to implement the ATDS prohibition. From the TCPA's 1991 enactment through 2003, the FCC's regulations "adopted, without elaboration, the statutory definition of [an] ATDS." *Pinkus v. Sirius XM Radio, Inc.*, 319 F.Supp.3d 927, 929 (N.D. Ill. 2018). In response to changes in technology, the FCC issued Orders in 2003, 2008, and 2015 further elaborating on its interpretation of the ATDS definition. *See In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014 (2003); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C. Rcd. 559 (2008); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961 (2015). The FCC's 2015 Order was in part intended to clarify its prior interpretations of an ATDS. However, rather than providing clarity, the 2015 Order generated confusion within the telecommunications industry, and a number of regulated entities challenged the FCC's treatment of the ATDS definition. The various challenges were consolidated in the D.C. Circuit Court of Appeals, and in 2018, the D.C. Circuit set aside the FCC's treatment of the ATDS definition.[3] *ACA Int'l v. Fed. Commc'ns*

[3] There is some disagreement among courts as to whether the D.C. Circuit Court of Appeals' *ACA International* decision set aside the FCC's interpretation of an ATDS reflected throughout the 2003, 2008, and 2015 Orders or whether the invalidation was confined to the 2015 Order. The FCC defended its 2015 Order by claiming that the D.C. Circuit lacked jurisdiction to review the 2015 Order, because it "essentially ratifies the previous ones" from 2003 and 2008, and there was no timely appeal from those prior Orders. *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 701 (D.C. Cir. 2018). The D.C. Circuit rejected this argument, finding that "[w]hile the Commission's latest ruling purports to reaffirm the prior orders, that does not shield the agency's pertinent pronouncements from review. The agency's prior rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform." *Id*. The parties here have not argued that the FCC's treatment of the ATDS definition in the 2003 or 2008 Orders remains intact, and the Court agrees with the majority of courts that have concluded that *ACA International* set aside the FCC's full treatment of the ATDS definition as reflected in the 2003, 2008, and 2015 Orders. *See, e.g.*, *Glasser v. Hilton Grand Vacations Co., LLC*, No. 18-14499, 2020 WL 415811 (11th Cir. Jan. 27, 2020); *Marks v. Crunch San Diego, LLC*, 904 F.3d

Comm'n, 885 F.3d 687, 694 (D.C. Cir. 2018). The D.C. Circuit determined that the FCC's interpretation of the word "capacity" in the ATDS definition was unreasonably and impermissibly expansive, as it would include all smartphones. *Id*. at 700. Further, the D.C. Circuit found that the FCC's contradictory discussion of the functions a device must perform to qualify as an autodialer, including whether random or sequential number generation was required, failed to satisfy the requirement of reasoned decisionmaking. *Id*. at 703. Therefore, the FCC's treatment of those matters was set aside and "only the statutory definition of ATDS as set forth by Congress in 1991 remains." *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1049 (9th Cir. 2018).

In the wake of *ACA International*, courts across the country are grappling with the statutory definition of ATDS. Relevant here, the key question is whether a dialing system must have the capacity to randomly or sequentially generate telephone numbers in order to qualify as an ATDS. As stated by the Seventh Circuit, "the awkward statutory wording, combined with changes in technology, makes this a very difficult question." *Gadelhak, v. AT&T Services, Inc*., No. 19-1738, 2020 WL 808270, at *1 (7th Cir. Feb. 19, 2020). It is undisputed that SendSmart and Txt Live do not have the capacity to randomly or sequentially generate telephone numbers, and therefore the interpretive question is central to Defendants' liability.

The Court must "begin by analyzing the statutory language, assuming that the ordinary meaning of that language accurately expresses the legislative purpose." *United States v. I.L.*, 614

1041 (9th Cir. 2018); *Thompson-Harbach v. USAA Fed. Sav. Bank*, 359 F. Supp. 3d 606 (N.D. Iowa 2019); *Espejo v. Santander Consumer USA, Inc.*, No. 11 C 8987, 2019 WL 2450492 (N.D. Ill. June 12, 2019); *Pinkus v. Sirius XM Radio, Inc.*, 319 F.Supp.3d 927 (N.D. Ill. 2018); *Sessions v. Barclays Bank Del*., 317 F.Supp.3d 1208 (N.D. Ga. 2018); *Roark v. Credit One Bank, N.A.*, Civ. No. 16-173 (PAM/ECW), 2018 WL 5921652 (D. Minn. Nov. 13, 2018); *Marshall v. CBE Grp., Inc*., No. 216CV02406GMNNJK, 2018 WL 1567852 (D. Nev. Mar. 30, 2018).

F.3d 817, 820 (8th Cir. 2010) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 245, 130 S. Ct. 2149, 2152, 176 L. Ed. 2d 998 (2010)) (internal alterations omitted). "The Supreme Court has 'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id*. (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)).

The Court finds that the best reading of the plain text of the ATDS definition indicates that a system must include a random or sequential number generator. Recall that an ATDS is "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). The question is what role the term "using a random or sequential number generator" plays in the definition. Grammatically, "[w]hen two conjoined verbs ('to store or produce') share a direct object ('telephone numbers to be called'), a modifier following that object ('using a random or sequential number generator') customarily modifies both verbs." *Glasser v. Hilton Grand Vacations Co., LLC*, No. 18-14499, 2020 WL 415811, at *2 (11th Cir. Jan. 27, 2020). Further, "the sentence contains a comma separating the phrase 'to store or produce telephone numbers to be called' from the phrase 'using a random or sequential number generator.' That, too, indicates that the clause modifies both 'store' and 'produce' and does not modify just the second verb." *Id*. *See also Thompson-Harbach v. USAA Fed. Sav. Bank*, 359 F. Supp. 3d 606, 625 (N.D. Iowa 2019) ("The comma separating 'using a random or sequential number generator' from the rest of subsection (a)(1)(A) makes it grammatically unlikely that the phrase modifies only 'produce' and not 'store.'")

Hand does not object to this interpretation as a grammatical matter but rather claims that it leads to an incongruous result. Hand argues that "it makes little sense to read 'using a random or sequential number generator' to modify 'store' because a number generator is not a storage device." Doc. 172, p. 4. Rather, "the definition of ATDS could more appropriately be read as 'equipment which has the capacity (A) to [i] store [telephone numbers to be called] or [ii] produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *Id*. This interpretation was first advanced by the Ninth Circuit and was recently advocated by the Second Circuit. *See Marks*, 904 F.3d at 1052 ("[W]e read § 227(a)(1) to provide that the term automatic telephone dialing system means equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers."); *Duran v. La Boom Disco, Inc.*, No. 19-600-CV, 2020 WL 1682773, at *3 (2d Cir. Apr. 7, 2020) (same).

However, as reviewed by the Eleventh Circuit,

> [t]he regulatory record confirms that, at the time of [the TCPA's] enactment, devices existed that could randomly or sequentially create telephone numbers and (1) make them available for immediate dialing or (2) make them available for later dialing. Sometimes storage would happen; sometimes it wouldn't. Under this reading, § 227(a) occupied the waterfront, covering devices that randomly or sequentially generated telephone numbers and dialed those numbers or stored them for later dialing."

Glasser, 948 F.3d at *3. *See also Gadelhak*, 2020 WL 808270 at *4 ("The record before the FCC reveals that at the time of the statute's enactment, devices existed with the capacity to generate random numbers and then store them in a file for a significant time before selecting them for dialing.")

Hand argues that this interpretation renders the word "store" superfluous, because "equipment that produces numbers using a random number generator and dials them

automatically—whether immediately or after a time—is already captured by the definition." Doc. 190 (Hand Reply in Support of the Motion for Partial Summary Judgment), p. 4. However, other Courts have not found this possible redundancy to be fatal to this interpretation. *See, e.g.*, *Gadelhak*, 2020 WL 808270 at *5 ("That surplusage is not a deal breaker. Given the range of storage capacities among telemarketing devices at the time of enactment, it is plausible that Congress chose some redundancy in order to cover the waterfront." (internal citation and quotation omitted)); *Glasser*, 948 F.3d at *3 (finding that while this reading creates a superfluity problem, it is possible that "in the context of this kind of technology, 'produce' and 'store' operate more as doublets than independent elements" and it would choose "the least superfluous approach—one that acknowledges some redundancy between store and produce but does not read a key clause ('using a random or sequential number generator') out of the statute."); *DeNova v. Ocwen Loan Servicing*, No. 8:17-CV-2204-T-23AAS, 2019 WL 4635552, at *3 (M.D. Fla. Sept. 24, 2019) ("[T]he occasional redundancy with 'store' and 'produce' cannot overcome the natural and grammatical reading of the statute.") Furthermore, construing subsection (A) to encompass either dialing numbers from a stored list or dialing numbers that have been randomly or sequentially generated risks rendering the entire subsection (A) to be superfluous. It is unclear what other numbers a system could automatically dial beyond those that have either been programmed to it or those that have been internally generated randomly or sequentially. If this had been Congress' intent, it could have merely prohibited equipment that dials numbers automatically, which would have the same effect.

The FCC's contemporaneous interpretation of the TCPA further supports this interpretation. In a 1992 Order, the FCC explained that the ATDS prohibition would not apply to functions like "'speed dialing,' 'call forwarding,' or public telephone delayed message

services" because "the numbers called are not generated in a random or sequential fashion." *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8776 (1992). *See also Thompson-Harbach*, 359 F.Supp.3d at 625 (finding this interpretation "is also consistent with the FCC's 1995 ruling, in which the FCC described 'calls dialed to numbers generated randomly or in sequence' as 'autodialed.'" (quoting *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 FCC Rcd. 12391, 12400, 1995 WL 464817 (1995)).

Hand also argues the context and structure of the TCPA are incompatible with a definition that requires random or sequential number generation. For example, 47 U.S.C. § 227(b)(1) prohibits the use of an ATDS unless, among other exceptions, the call is made with the prior express consent of the called party or made solely to collect a debt owed to or guaranteed by the United States.[4] According to Hand, these provisions convey Congress' intent to include systems that dial from stored lists within the ATDS definition's scope, because a caller using an autodialer to call recipients with their prior express consent or to collect a government debt would likely be calling from a stored list rather than calling numbers generated randomly or sequentially. However, the prohibition of § 227(b)(1) applies not only to the use of an ATDS but also to the calls made using an artificial or prerecorded voice. Therefore, the consent and government debt exceptions would not be rendered useless as they still operate to provide an exception for telemarketers making calls using an artificial or prerecorded voice. *See Thompson-Harbach*, 359 F. Supp. 3d at 626 (finding that because the exception also applies to the

[4] The government debt exemption was added by Congress though the Bipartisan Budget Act of 2015. Pub. L. No. 114-74, §301(a) (2015). Earlier in this litigation, the Court found the government debt exception to be an unconstitutional restriction on free speech that was severable from the TCPA. *See Hand v. Beach Entm't KC, LCC*, No. 4:18-CV-00668-NKL, 2019 WL 5654351, at *1 (W.D. Mo. Oct. 31, 2019).

prohibition on the use of an artificial or prerecorded voice, "the existence of [the government debt] statutory exception does not render the Court's conclusion nonsensical.") *See also Pinkus*, 319 F. Supp. 3d at 939 (finding that these exceptions do "not change the fact that the best reading of 47 U.S.C. § 227(a)(1) requires that an ATDS have the capacity to generate numbers randomly or sequentially and then to dial them, even if that capacity is not deployed for practical reasons.")

Moreover, the practical implications of the interpretation advanced by Hand bolster the Court's decision here. In *ACA International*, the D.C. Circuit reviewed the FCC's interpretation of "capacity" as used in the ATDS definition, and found that the expansive interpretation, which would include within its scope any smartphone, was too broad:

> It is untenable to construe the term "capacity" in the statutory definition of an ATDS in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country. It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact.

ACA Int'l, 885 F.3d at 698. If, as Hand contends, all that is required to be an ATDS is for a device to store numbers and to dial them automatically, the ATDS definition would seemingly encompass most smartphones in operation today. *See Glasser*, 948 F.3d at 1309 ("Suddenly an unsolicited call using voice activated software (think Siri, Cortana, Alexa) or an automatic 'I'm driving' text message could be a violation worth $500."); *Gadelhak*, 2020 WL 808270 (finding the more expansive interpretation "would create liability for every text message sent from an iPhone. That is a sweeping restriction on private consumer conduct that is inconsistent with the statute's narrower focus . . . An iPhone of course can store telephone numbers; it can also send text messages automatically, for example by using the 'Do Not Disturb While Driving'

function.") Hand's proffered interpretation would draw into the scope of the TCPA's prohibition conduct that falls outside of the narrow focus that Congress intended the statute to address.

Therefore, in order to qualify as an ATDS, a device must have the capacity to generate numbers randomly or sequentially. A majority of courts outside the Ninth Circuit, including the Third, Seventh, and Eleventh Circuit Courts of Appeals, as well as the three district courts within the Eighth Circuit to have considered the issue, have similarly found that the best reading of the statute requires random or sequential number generation. *See Gadelhak,* 2020 WL 808270; *Glasser*, 2020 WL 415811; *Dominguez v. Yahoo, Inc.,* 894 F.3d 116 (3d Cir. 2018); *Eisenband v. Pine Belt Auto., Inc.*, No. CV178549FLWLHG, 2020 WL 1486045 (D.N.J. Mar. 27, 2020); *DeCapua v. Metro. Prop. & Cas. Ins. Co.*, No. CV 18-590 WES, 2020 WL 1303248 (D.R.I. Mar. 19, 2020); *Beal v. Outfield Brew House, LLC*, No. 2:18-CV-4028-MDH, 2020 WL 618839 (W.D. Mo. Feb. 10, 2020); *Thompson-Harbach*, 359 F.Supp.3d 606; *Hudson v. Ralph Lauren Corp*., 385 F. Supp. 3d 639 (N.D. Ill. 2019); *DeNova*, 2019 WL 4635552; *Smith v. Premier Dermatology*, No. 17 C 3712, 2019 WL 4261245, at *1 (N.D. Ill. Sept. 9, 2019); *Adams v. Safe Home Security, Inc.*, No. 3:18-vs-03098-M, 2019 WL 3428776 (N.D. Tex. Jul. 30, 2019); *Snow v. Gen. Elec. Co.*, No. 5:18-CV-511-FL, 2019 WL 2500407 (E.D.N.C. June 14, 2019), appeal dismissed, No. 19-1724, 2019 WL 7500455 (4th Cir. Dec. 30, 2019); *Gadelhak v. AT&T Servs., Inc.*, No. 17-CV-01559, 2019 WL 1429346, (N.D. Ill. Mar. 29, 2019); *Folkerts v. Seterus, Inc.*, No. 17 C 4171, 2019 WL 1227790 (N.D. Ill. Mar. 15, 2019); *Might v. Capital One Bank (USA), N.A.*, No. CIV-18-716-R, 2019 WL 544955 (W.D. Okla. Feb. 11, 2019); *Johnson v. Yahoo!, Inc*., 346 F.Supp.3d 1159 (N.D. Ill. 2018); *Pinkus*, 319 F. Supp. 3d 927; *Roark v. Credit One Bank, N.A.*, 2018 WL 5921652 (D. Minn. Nov. 13, 2018); *Fleming v. Associated Credit Servs.,*

Inc., 342 F. Supp. 3d 563 (D.N.J. 2018); *Keyes v. Ocwen Loan Servicing, LLC*, 335 F. Supp. 3d 951 (E.D. Mich. 2018).

It is undisputed that Txt Live and SendSmart did not randomly or sequentially generate numbers to be called but rather messaged numbers stored in a customer database. As an alternative argument, Hand claims that even if this Court finds that an ATDS must use a random or sequential number generator, Txt Live and SendSmart still qualify because they use a "shuffle function" to randomly select which numbers from the list of contacts to message. Hand points to no authority to support his claim that when Congress described a "random or sequential number generator," it was referring to the order in which a list of numbers are called. The legislative history indicates otherwise. *See, e.g.*, S. Rep. No. 102-178, at 2 (1991) (reviewing consumer complaints and noting that "some automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls"). Other courts have rejected this same argument. *See Beal v. Outfield Brew House, LLC*, No. 2:18-CV-4028-MDH, 2020 WL 618839, at *5 (W.D. Mo. Feb. 10, 2020) (considering the same argument with respect to SendSmart and Txt Live and finding "if the software can randomly select phone numbers, that is not the same as generating them. Instead, Plaintiff's argument is that the software can shuffle, or randomize, from the contacts that were already uploaded into the system manually. This does not constitute an ATDS."); *Pinkus*, 318 F.Supp.3d at 938 (finding that "using a random or sequential number generator" could not refer to how numbers are called because "numbers must necessarily be called in some order—either in random or some other sequence" and "if using a random or sequential number generator referred to the order in which numbers are dialed and not the process of generating them, the phrase would have followed, rather than preceded, 'dial such

numbers' in section (a)(1)(B)'"). The "shuffle" functions of SendSmart and Txt Live do not constitute random or sequential number generators under the TCPA.

Although the statutory interpretation is perhaps imperfect, it is the Court's "best reading of a thorny statutory provision." *Gadelhak*, 2020 WL 808270, at *8. Because it is undisputed that SendSmart and Txt Live do not have the capacity to randomly or sequentially generate numbers, the Court need not consider the parties' additional arguments regarding human intervention. Defendants' motion for summary judgment as to Count I is granted. Hand's motion for partial summary judgment as to Count I is denied.

b. COUNT III: Do-Not-Call Claim

Count III of Hand's Second Amended Complaint alleges Defendants violated 47 C.F.R. § 64.1200(c), which prohibits telephone solicitations to residential telephone subscribers who are registered on the national do-not-call registry. A telephone solicitation is defined as:

> 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, which is transmitted to any person, but such term does not include a call or message:
> (i) To any person with that person's prior express invitation or permission; [or]
> (ii) To any person with whom the caller has an established business relationship . . .

The TCPA provides a private right of action for individuals who have received more than one telephone call within any twelve-month period in violation of these regulations. *See* 47 U.S.C. § 227(c)(5). A plaintiff can recover up to $500 in statutory damages for each violation. *Id*.

Defendants argue that they are entitled to summary judgment on Count III because (1) § 64.1200(c) does not apply to receipt of text messages on a cell phone but rather solely applies to calls made to a "residential telephone subscriber;" and (2) Hand had an established business relationship with Shark Bar, barring recovery for two of the four texts at issue.

Defendants first argue that 47 C.F.R. § 64.1200(c) does not apply to receipt of text messages on a cell phone because these regulations only apply to calls made to a "residential telephone subscriber," defined as a traditional landline in a residence. However, while 47 C.F.R. § 64.1200(c) states that it applies to calls to "a residential telephone subscriber," the regulations go on to unambiguously provide that "[t]he rules set forth in paragraph (c) and (d) of this section are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers," as described in a 2003 FCC Order. 47 C.F.R. § 64.1200(e) (citing *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014 (2003)). None of the authorities cited by Defendants address § 64.1200(e) or the 2003 FCC Order finding "it is more consistent with the overall intent of the TCPA to allow wireless subscribers to benefit from the full range of TCPA protections." *Id*. at 14083. Other courts that have considered the application of § 64.1200(e) have concluded that a cell phone user can qualify as a residential telephone subscriber under § 64.1200(c) and (d). *See, e.g.*, *Stevens-Bratton v. TruGreen, Inc.*, No. 2:15-2472, 2020 WL 556405, at *4 (W.D. Tenn. Feb. 4, 2020) ("A cellular telephone can satisfy the residential telephone subscriber element of § 64.1200(c) & (d)"); *Izor v. Abacus Data Sys., Inc.*, No. 19-CV-01057-HSG, 2019 WL 3555110, at *2 (N.D. Cal. Aug. 5, 2019) (same); *Hodgin v. Parker Waichman Llp*, No. 3:14-CV-733-DJH, 2015 WL 13022289, at *3 (W.D. Ky. Sept. 30, 2015) ("[T]he FCC has been clear in interpreting 'residential subscriber' to include cell phones."). This Court agrees. A cell phone user can qualify as a residential telephone subscriber under 47 C.F.R. § 64.1200(c) and (d).

It is only in their Reply brief that Defendants assert that "even if the protections of the DNC provisions of the TCPA apply to cell phones . . . Plaintiff must still demonstrate that they apply in the circumstances related to his receipt of the text messages at issue here. None of the

decisions that Plaintiff relies upon were decided at the summary judgment stage and therefore do not address the required evidentiary showing." Doc. 189 (Defendants' Reply in Support of Summary Judgment), p. 17. Although the FCC has determined that the national do-not-call and internal do-not-call provisions do apply to cell phone users and presumes that those registered on the national do-not-call registry are residential subscribers, the agency notes in its 2003 Order that further proof may be required to show that a wireless subscriber uses their wireless phone in the same manner in which they would use their residential landline phone.[5] *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14039 (2003).

As an initial matter, Hand was unable to respond to this specific claim in his opposition to the motion as it was raised for the first time in a Reply brief. Defendants' Suggestions in Support of their Motion for Summary Judgment focuses solely on their argument that the TCPA's statutory language and structure indicate that cell phone users categorically do not

[5] The 2003 FCC Order does not further clarify what proof would demonstrate that a wireless subscriber is a residential subscriber for the purposes of the TCPA. Courts have rejected a plaintiff's claim that his or her cell phone use qualified him or her as a residential telephone subscriber where there was evidence that the individual maintained a traditional land line in addition to their wireless line, *see Stevens-Bratton v. TruGreen, Inc.*, No. 2:15-2472, 2020 WL 556405, at *3 (W.D. Tenn. Feb. 4, 2020), *Lee v. Loandepot.com, LLC*, No. 14-CV-01084-EFM, 2016 WL 4382786, at *6 (D. Kan. Aug. 17, 2016), or where there was evidence that the plaintiff used the number for business purposes, *see Mattson v. Quicken Loans Inc.*, No. 3:18-CV-00989-YY, 2019 WL 7630856, at *5 (D. Or. Nov. 7, 2019) (summary judgment granted for defendant on plaintiff's national do-not-call claim where it offered evidence that plaintiff's employer purchased the phone and that the phone bill was sent directly to the employer, indicating it was a business phone), *Shelton v. Target Advance LLC*, No. CV 18-2070, 2019 WL 1641353, at *6 (E.D. Pa. Apr. 16, 2019) ("[B]ecause Plaintiff held the Phone Number out to the world as a business phone number, he could not register it on the national do-not-call registry for purposes of avoiding business-to-business calls, such as those giving rise to this action."). Defendant has not pointed to any similar evidence here.

qualify as residential telephone subscribers.[6] *See* Doc. 138, pp. 11–13. *See also Myers v. KNS Dev. Corp.*, No. 2:17-CV-04076-NKL, 2017 WL 4202242, at *5 n. 4 (W.D. Mo. Sept. 21, 2017) ("Because this argument was raised for the first time on reply, the Court will not address it."). Further, in their Reply brief Defendants have neither cited to evidence in the record indicating Hand's particular cell phone use would prevent him from being a residential telephone subscriber nor claimed that there is an absence of evidence in the record to support this essential element. *See Celotex Corp.*, 477 U.S. at 323 ("Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." (quoting Fed. R. Civ. P. 56(c)). *See also Stevens-Bratton v. TruGreen, Inc.*, No. 2:15-2472, 2020 WL 556405, at *3 (W.D. Tenn. Feb. 4, 2020) (granting summary judgment for defendant where they presented evidence that plaintiff was not a residential telephone subscriber "because she provided both a cellular telephone number and a home telephone number in her service agreement with [defendant]" and plaintiff failed to offer sufficient evidence in response). Regardless, Hand stated in his answers to Defendants' First Interrogatories that the messages were sent to his personal cell phone number that he uses for

[6] To the extent that Defendants argue that an extension of these protections to cellular phone users is contrary to the TCPA's statutory text, *see* Doc. 138, pp. 11–12, "[t]he Hobbs Act provides that the courts of appeals have exclusive jurisdiction to determine the validity of FCC orders." *Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir. 2013) (quoting 28 U.S.C. § 2342 (2006)). Therefore, the Court "must interpret the regulation in a manner consistent with its plain language and the FCC's interpretation." *Id*. *But see PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055, 204 L. Ed. 2d 433 (2019) (raising without deciding the question of "whether the Hobbs Act's commitment of 'exclusive jurisdiction' to the courts of appeals requires a district court in a private enforcement suit like this one to follow the FCC's 2006 Order interpreting the Telephone Act.")

personal communications, and that he has a separate business cell phone that he uses to conduct business. Doc. 164-7, pp. 3–4. This is sufficient to overcome Defendants' Motion for Summary Judgment on this issue.

Defendants next argue that even if a cell phone user could qualify as a residential telephone subscriber, summary judgment would still be warranted on Hand's claims predicated on the September 2017 and December 2017 texts, because Hand had an established business relationship with Shark Bar.[7] Recall that in order to sustain a cause of action under 47 U.S.C. § 227(c)(5), a plaintiff must show that defendants sent more than one text in violation of the corresponding regulations within a twelve-month period. A text is not considered a telephone solicitation that violates the national do-not-call regulations if it is made to a person with whom the caller has an established business relationship. *See* 47 C.F.R. §§ 64.1200(c), 64.1200(f)(14). An established business relationship (EBR) is:

> a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call . . . , which relationship has not been previously terminated by either party.

47 C.F.R. § 64.1200(f)(5). "[A] potential recipient's existing business relationship with the defendant is an affirmative defense to the TCPA." *Elkins v. Medco Health Sols., Inc.*, No. 4:12CV2141 TIA, 2014 WL 1663406, at *8 (E.D. Mo. Apr. 25, 2014); *see also St. Louis Heart Ctr., Inc. v. Forest Pharm., Inc.*, No. 4:12-CV-02224, 2013 WL 1076540, at *2 n. 2 (E.D. Mo. Mar. 13, 2013) (same).

[7] Defendants do not move for summary judgment on this ground with respect to the two earlier texts sent to Hand in March 2015 and February 2016.

Hand visited Shark Bar twice in May 2016, and Shark Bar's records show he purchased drinks at one of those visits. *See* Doc. 138-18; Doc. 138-19 (Hand Transaction Records). Defendants argue that the September 2017 message sent to Hand falls within the eighteen-month EBR period formed by Hand's May 2016 purchase, and therefore it is not a telephone solicitation. Further, because the TCPA's private right of action requires more than one communication in violation of these regulations, Defendants argue that the December 2017 text cannot support Hand's claim, because even though it falls outside of the eighteen-month EBR window, there is no second telephone solicitation within a twelve-month period as required to sustain a cause of action under 47 U.S.C. § 227(c)(5).

The dispute here centers around what is needed to establish an EBR. Hand claims that in addition to evidence of Hand's purchase, Defendants must also point to evidence of a "two-way communication" to demonstrate an EBR was formed. Defendants argue that evidence of a recipient's purchase is sufficient, and that "the regulation specifically contemplates that this [two-way] communication occurs on the 'basis' of Plaintiff's purchase at Shark Bar." Doc. 189, p. 18.

Reviewing the legislative and FCC materials describing the EBR exception as well as courts that have applied the exception, the Court finds more support for Defendants' position here. Although the TCPA does not define an EBR, when first enacted in 1991 the statute included the EBR exception in the "telephone solicitation" definition. The legislative history indicates that Congress intended the relationship to be interpreted broadly and contemplated that it could be formed through a single purchase. *See, e.g.*, H. Rep. No. 102–317, at 14–15 (1991) ("[A]n 'established business relationship' [] could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity"); ("A person who

recently bought a piece of merchandise may receive a call from the retailer regarding special offers or information on related lines of merchandise"); (describing whether an EBR could extend to a business's affiliates, and finding that "a relationship established through the purchase of a piece of merchandise from a company's retail or catalogue division does not necessarily mean that a business relationship has been established between the customer and the company's other unaffiliated divisions or subsidiaries.") The FCC has likewise interpreted the term broadly. *See, e.g.*, *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14082–83, n. 382 (2003) ("[T]he EBR should not be limited by product or service. In today's market, many companies offer a wide variety of services and products. Restricting the EBR by product or service could interfere with companies' abilities to market them efficiently"); ("[I]f a consumer purchases a seller's products at a retail store or from an independent dealer, such purchase would establish a business relationship with the seller, entitling the seller to call that consumer under the EBR exemption.")

Courts applying the EBR exception have also found it applies solely on the basis of a purchase or transaction and do not discuss the need for a separate two-way communication. *See, e.g.*, *Krakauer v. Dish Network L.L.C.*, 311 F.R.D. 384, 387–88 (M.D.N.C. 2015) (An EBR "is created after an individual makes a purchase, inquiry, or application for products or services and lasts for a certain number of months."); *Elkins*, No. 4:12CV2141 TIA, 2014 WL 1663406, at *8 (E.D. Mo. Apr. 25, 2014) (EBR existed where plaintiff used defendant's prescription benefit management services to fill prescriptions at defendant's pharmacies); *Zelma v. Art Conway*, No. 2:12-CV-00256 DMC, 2013 WL 6498548, at *2 (D.N.J. Dec. 11, 2013) ("Plaintiff's election to receive a free Prevention Magazine subscription through the SkyMiles program is a sufficient 'transaction' to trigger the [EBR] exception [with Prevention Magazine]"); *Cubbage v. Talbots,*

Inc., No. C09-911BHS, 2010 WL 2710628, at *3 (W.D. Wash. July 7, 2010) ("In this case, Mitchell purchased at least one product at a Talbots store within the eighteen months prior to April of 2009, the date of the call. Therefore, Mitchell and Talbots had an established business relationship."); *Hovila v. Tween Brands, Inc.*, No. C09-0491RSL, 2010 WL 1433417, at *5 (W.D. Wash. Apr. 7, 2010) (calls made after plaintiff purchased merchandise at defendant's stores fell within EBR exception). Hand has cited no authority to support his position that more is required.

However, even if an EBR did exist, a text recipient's "seller-specific do-not-call request . . . terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller." 47 C.F.R. § 64.1200(f)(5)(i). Hand has testified that he made a seller-specific do-not-call request when he responded with "stop," and yet the text messages from Shark Bar increased. *See* Doc. 172-23, pp. 89–90, 115. Although he does not recall the precise date, if this request occurred prior to the September 2017 messages, Defendants would be unable to establish that the EBR was still in effect. Defendants argue that there is no evidence to support Hand's claim that he made a do-not-call request because Shark Bar's records do not reflect such a request, but Hand's testimony that he responded with "stop" sufficiently raises a dispute of fact. *See Harry Stephens Farms, Inc. v. Wormald Americas, Inc.*, 571 F.3d 820, 821 (8th Cir. 2009) (finding that "conflicting deposition testimony" presented a genuine issue of material fact that was inappropriate to resolve at summary judgment). Therefore, a dispute of fact remains as to whether Defendants had an EBR with Hand during the September 2017 and December 2017 texts. Defendants' motion for summary judgment on Count III is denied.

c. COUNT II: Procedural Claim

In Count II, Hand alleges that Defendants sent more than one telemarketing message within a twelve-month period without first instituting procedures to maintain a list of individuals who request not to receive telemarketing calls made by that entity, in violation of 47 C.F.R. § 64.1200(d). Per the regulations, these internal do-not-call procedures must meet certain minimum standards, including maintaining a written policy for keeping an internal do-not-call list, training personnel engaged in telemarketing, and recording when an individual requests to be put on an entity's do-not-call list. *See* 47 C.F.R. § 64.1200(d)(1)–(6).

Defendants argue that they are entitled to summary judgment on Count II because (1) § 64.1200(d) does not apply to receipt of text messages on a cell phone but rather solely applies to calls made to a "residential telephone subscriber;" (2) Hand lacks a private right of action to redress violations of 47 C.F.R. § 64.1200(d); and (3) Hand had an established business relationship with Shark Bar, barring recovery for two of the four texts at issue.

As an initial matter, for the same reasons discussed above with respect to Count III, Defendants' argument that as a cell phone user Hand cannot qualify as a residential telephone subscriber is rejected.

Next, Defendants argue that Hand lacks a private right of action to pursue this claim. "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 99 S. Ct. 2479, 2485, 61 L. Ed. 2d 82 (1979). Rather, "[i]f the statute itself does not display an intent to create a private remedy, then a cause of action does not exist." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856, 198 L. Ed. 2d 290 (2017) (internal quotations and alterations omitted).

Hand's Count II states a claim for violations of the regulatory provisions of 47 C.F.R. § 64.1200(d). The TCPA provides that an individual "who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection" may pursue a private right of action. 47 U.S.C. § 227(c)(5). Thus the question is whether 47 C.F.R. § 64.1200(d) was promulgated pursuant to § 227(c) of the TCPA or some other subsection. Defendants argue that 47 C.F.R. § 64.1200(d) was promulgated pursuant to § 227(d) of the TCPA, which directs the FCC to promulgate regulations setting the technical and procedural standards for telephone facsimile machines and artificial or prerecorded voice systems and does not include a private right of action. *See* 47 U.S.C. § 227(d). Because the requirements in 47 C.F.R. § 64.1200(d) are somewhat procedural in nature, Defendants argue, these regulations must have been promulgated pursuant to § 227(d) of the TCPA.

The Court disagrees. First, the substance of 47 C.F.R. § 64.1200(d) more directly corresponds to the substance of § 227(c) of the TCPA rather than § 227(d). The TCPA's § 227(c) requires the FCC to initiate rulemaking proceedings to evaluate, among other issues, the potential use of "industry-based or company-specific 'do not call' systems." Section 227(d), however, directs the FCC to revise regulations setting technical and procedural standards for telephone facsimile machines and artificial or prerecorded voice systems and does not address internal, company-specific do-not-call procedures. Even accepting Defendants' argument that the internal do-not-call standards described in § 64.1200(d) could fairly be characterized as "procedural," 47 U.S.C. § 227(d) restricts its applicability to technical and procedural standards of these particular devices whereas 47 C.F.R. § 64.1200(d) neither mentions nor restricts its applicability to these devices.

Further, the regulatory record indicates that when the internal do-not-call standards were first promulgated in 1992, they were promulgated pursuant to § 227(c). For example, § 227(c) is entitled "Protection of subscriber privacy rights," and the 1992 FCC Order establishing the internal do-not-call provisions states that "[t]he comments persuade us that we must mandate procedures for establishing company-specific do-not-call lists to ensure effective compliance with and enforcement of the requirements for protecting consumer privacy," which is then followed by a citation to the internal do-not-call standards. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8766 (1992). In 1992, these internal do-not-call procedures were enumerated in § 64.1200(e) of the regulations rather than their current location in § 64.1200(d). *Compare id*. at 8791 *with* 47 C.F.R. § 64.1200(d). The 1992 FCC Order discusses how, as required by § 227(c)(1)(A), the FCC weighed the costs and benefits of industry-based versus company-specific do-not-call systems and determined that the company-specific do-not-call procedures in § 64.1200(e) were the appropriate solution. *See* 7 F.C.C. Rcd. 8752 at ¶¶ 23–24. Further, at the time, § 64.1200(d) set requirements regarding "all artificial or prerecorded telephone messages delivered by an automatic telephone dialing system," and the 1992 FCC Order makes clear that these were promulgated pursuant to 47 U.S.C. § 227(d). *See id*. at ¶ 53 ("The TCPA mandates that all artificial or prerecorded telephone messages delivered by an autodialer state clearly the identity of the caller at the beginning of the message and the caller's telephone number or address during or after the message, § 227(d)(3)(A), and we adopt this requirement in our rules, 64.1200(d).")

Therefore, Defendants' argument that Hand lacks a private right of action for a violation of 47 C.F.R. § 64.1200(d) is rejected. Other courts have found the same. *See Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1265 (11th Cir. 2019) (reviewing the promulgation of

§64.1200(d) and finding that pursuant to 47 U.S.C. § 227(c)(5) "[t]he TCPA creates a private right of action for anyone who receives more than one call within a year from the same entity in violation of these regulations."); *Charvat v. GVN Michigan, Inc.*, 561 F.3d 623, 631 (6th Cir. 2009) (finding a private right of action for violations of 47 C.F.R. § 64.1200(d) under 47 U.S.C. § 227(c)(5)); *Rosenberg v. LoanDepot.com LLC*, No. CV 19-10661-NMG, 2020 WL 409634, at *11 (D. Mass. Jan. 24, 2020) ("The available record indicates that § 64.1200(d) was promulgated under § 227(c) and contains a private right of action."); *Valdes v. Century 21 Real Estate, LLC*, No. CV 2:19-05411, 2019 WL 5388162, at *3 (D.N.J. Oct. 22, 2019) (citing 47 U.S.C. § 227(c)(5) as "establishing a private right of action for violations of 47 C.F.R. §§ 64.1200(c) and (d)."); *Drew v. Lexington Consumer Advocacy, LLC*, No. 16-CV-00200-LB, 2016 WL 1559717, at *6 (N.D. Cal. Apr. 18, 2016) ("47 C.F.R. § 64.1200(c) and (d) are regulations promulgated under § 227(c)").

Finally, Defendants assert that they should not be liable for at least the two 2017 texts to Hand, because Shark Bar had an EBR that was formed after Hand visited and made purchases at the bar in May 2016. However, calls made to an individual with whom the caller has an EBR is an exception to the definition of telephone solicitations, and 47 C.F.R. § 64.1200(d) applies to calls made "for telemarketing purposes" and does not mention telephone solicitations. The regulations provide that telemarketing "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, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(12). Although this language parallels the definition of "telephone solicitation" in § 64.1200(f)(14), the telemarketing definition does not exclude calls made to a person with whom the caller has an EBR. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) ("[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.") Beyond briefly referring back to their EBR argument in Count III, *see* Doc. 138, p. 16, Defendants make no argument as to why entities making calls pursuant to an EBR would be exempt from maintaining internal do-not-call procedures as required by 47 C.F.R. § 64.1200(d). Therefore, the Court finds Defendants' argument inapplicable here.

For the reasons discussed above, Defendants' motion for summary judgment as to Count II is denied.

d. COUNT IV: Revocation Claim

In Count IV Hand alleges that Defendants violated 47 C.F.R. § 64.1200(d)(3) by sending multiple telemarketing messages to Hand within a twelve-month period after being asked to stop. As discussed above, 47 C.F.R. § 64.1200(d) provides that an entity may not "initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls" by that entity. 47 C.F.R. § 64.1200(d). Subsections (d)(1) through (d)(6) go on to list "minimum standards" that these procedures must meet. Subsection (d)(3) provides that when an entity receives a do-not-call request from a recipient, the entity must record the request on an internal do-not call list and "must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made." 47 C.F.R. § 64.1200(d)(3). Hand alleges that he made such a request, that it was not honored, and that therefore Defendants are liable for each violation of subsection (d)(3) independent of and in addition to their liability for their violations of subsection (d) as alleged in Count II.

Defendants first argue that they are entitled to summary judgment on Count IV because Hand lacks a private right of action for violations of 47 C.F.R. § 64.1200(d). For the reasons discussed above as to Count II, this argument is rejected.

Next, Defendants assert that Count IV should be stricken as duplicative of Count II pursuant to Federal Rule of Civil Procedure 12(f). Rule 12(f) provides that the Court may on its own "strike from a pleading . . . any redundant . . . matter." Fed. R. Civ. P. 12. The Court may do so where a plaintiff alleges multiple claims premised on the same factual allegations and seeking the same relief. *See Schupp v. CLP Healthcare Servs., Inc.*, No. 2:12-CV-04262-NKL, 2013 WL 150291, at *1 (W.D. Mo. Jan. 14, 2013) (striking a claim as duplicative where plaintiff alleged two redundant claims—one that she was wrongfully discharged under the MHRA and one that she was discriminatorily terminated under the MHRA); *Ladd v. St. Louis Bd. of Police Comm'rs*, No. 405CV916UNA RHK/AJB, 2006 WL 2862165, at *5 (E.D. Mo. Oct. 4, 2006) (dismissing as redundant two claims based on the same factual predicate and resulting in the same constitutional injury as a third claim).

Subsection (d) of 47 C.F.R. § 64.1200 prohibits initiating telemarketing calls without first instituting procedures that meet certain "minimum standards," and (d)(3) is one in a list of six enumerated "minimum standards." A failure to honor a recipient's do-not-call request is a violation of the regulations only insofar as it potentially represents a failure to institute the minimum standards as described by § 64.1200(d). Therefore, Hand cannot recover for both Defendants' alleged failure to meet § 64.1200(d)'s minimum standards generally under Count II and in addition recover separately for Defendants' failure to meet (d)(3)'s specific minimum standard of honoring a recipient's do-not-call request. His § 64.1200(d)(3) claim in Count IV is made pursuant to the same regulatory prohibition as his § 64.1200(d) claim in Count II and

would necessarily be premised on the same factual basis—that Defendants initiated a telemarketing call without first instituting the "minimum standard" of honoring do-not-call requests. *See Buja v. Novation Capital, LLC*, No. 15-81002-CIV, 2017 WL 10398957, at *4 (S.D. Fla. Mar. 31, 2017) ("[I]n order to prove a subsection (d)(3) violation, a plaintiff cannot rely solely on the fact that a provider failed to record or honor an individual's request to be placed on a DNC list. Rather, the plaintiff must establish that the calls he or she received were initiated prior to the implementation of proper procedures."); *Simmons v. Charter Commc'ns, Inc.*, No. 3:15-CV-317 (SRU), 2016 WL 1257815, at *13 (D. Conn. Mar. 30, 2016) ("[T]he failure to record a DNC request is not itself a violation of subsection (d)(3). However, it could be used as evidence of a failure to implement proper procedures prior to the initiation of a call." (internal citation omitted)).

Although Hand asserts that Count IV is distinct from Count II, Hand has pointed to no authority, and the Court is aware of none, where a Defendant has been found liable for both a violation of 47 C.F.R. § 64.1200(d) and an independent violation of one of the "minimum standards" enumerated by that subsection. Rather, courts have viewed a failure to institute a procedure that meets the "minimum standards" as the operative violation of § 64.1200(d). For example, in *Nece v. Quicken Loans, Inc.*, a district court struck pursuant to Rule 12(f) a plaintiff's claim under 47 C.F.R. § 64.1200(d)(3) because it was duplicative of Plaintiff's additional claim under § 64.1200(d). No. 8:16-CV-2605-T-23TBM, 2017 WL 2865047, at *2 (M.D. Fla. Jan. 3, 2017). Similarly, in *Benzion v. Vivint, Inc.*, a district court rejected a plaintiff's argument that subsection (d)(3) provided a private right of action for receiving a phone call after asking defendant to stop that was independent of the requirements of subsection (d). No. 12-61826-CIV, 2014 WL 11531368, at *5 (S.D. Fla. Jan. 17, 2014). The *Benzion* court

found that "Plaintiff's reliance on the language of subsection (d)(3) is misguided because the enumerated 'minimum standards' are simply the guidelines that the telemarketer must have in place before placing a call. Subsection (d)(3) does not create an independent cause of action separate from § 64.1200(d)." *See also Charvat v. GVN Michigan, Inc.*, 561 F.3d 623, 632 (6th Cir. 2009) (reviewing the language of 47 C.F.R. § 64.1200(d) and finding that "[t]he 'violation of the regulations' is [] the initiation of the phone call without having implemented the minimum procedures.")

Therefore, because Hand's Count IV is redundant of his Count II, the Court strikes Count IV pursuant to Rule 12(f).

e. Cordish Companies and ECI Liability

Finally, Defendants Cordish Companies and ECI move for summary judgment on all claims against them on the ground that they cannot be held either directly or vicariously liable for any conduct alleged against Shark Bar.[8] It is undisputed that neither Cordish Companies nor ECI physically sent the messages at issue here; rather, the messages were physically sent by Shark Bar. However, Hand still asserts that both Cordish Companies and ECI can be held directly liable, as they were so involved sending the calls as to be deemed to have initiated them. Alternatively, Hand argues that Cordish Companies and ECI can be held vicariously liable for Shark Bar given their level of control over Shark Bar's messaging campaigns.

[8] Cordish and ECI also briefly state that this Court lacks personal jurisdiction over them for the same reasons stated in their motion to dismiss. The Court previously found that Defendants were properly subject to personal jurisdiction at the motion to dismiss stage, *see* Doc. 148, Order, and Defendants have neither offered any argument nor pointed to any facts or law in support of this assertion in their motion for summary judgment. Therefore, the Court will not consider it. *See Milligan v. City of Red Oak*, 230 F.3d 355, 360 (8th Cir. 2000) (refusing to consider an assertion that was not supported by argument or case law in the party's briefing); *Meyer v. Currie Tech Corp.*, 329 F.R.D. 228, 237 (D. Neb. 2018) (same).

i. Direct Liability

Hand argues that ECI and Cordish Companies can be held directly liable for the text messages here, because while the entities did not physically press "send" to initiate the text messages, ECI and Cordish Companies were so involved in placing the calls that they should be deemed to have initiated them.

The TCPA's implementing regulations impose direct liability on a "person or entity" that "initiate[s]" a message in violation of the national do-not-call or internal do-not-call regulations. *See* 47 C.F.R. § 64.1200(c), (d). "[T]he FCC has concluded that 'a person or entity initiates a telephone call when it takes the steps necessary to physically place a telephone call'" and that "direct TCPA liability in this context generally does not extend to sellers who do not personally make the phone calls at issue, but only includes the telemarketers acting on behalf of those sellers." *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 960 (8th Cir. 2019) (quoting *In re Dish Network, LLC*, 28 F.C.C. Rcd. 6574, 6583 (2013)).

In *Golan*, the Eighth Circuit upheld a lower court's decision to refuse the plaintiff's proposed jury instruction on direct liability, because the proposed instruction "would have allowed the jury to find [the defendant] directly liable based on direct, personal participation, defined as 'active oversight of, or control over' the TCPA violation, or if he 'personally authorized' it. But to be held directly liable, a person must actually initiate the offending phone call, meaning the person takes the steps necessary to physically place a telephone call.'" *Golan v. FreeEats.com*, 930 F.3d at 961 (internal quotations omitted). Further, the Eighth Circuit found that the evidence did not support an instruction on direct liability. Although the Defendant "hired the direct violator, was involved in editing the call script, obtained [the individual who performed the voice-over on the call] to record the script, and approved and paid for the calls,"

this was insufficient for an instruction on direct liability. *Id*. "[W]hile such facts could show a significant level of control that might be sufficient to establish liability under an agency theory . . . they do not show [Defendant] actually initiated the calls. Only [the telemarketers], who made the calls at issue here, initiated the calls by 'taking the steps necessary to physically place the telephone calls.'" *Id*. (quoting *In re Dish Network, LLC*, 28 F.C.C. Rcd. at 6583).

Thus, under Eighth Circuit precedent in *Golan*, neither ECI nor Cordish Companies can be held directly liable, because only Shark Bar "initiated the calls by taking the steps necessary to physically place the [text messages]." *Id*. Although the FCC has found that a non-caller can be held directly liable where it is "so involved in placing the calls as to be deemed to have initiated them," such as when a smartphone application entity "automatically sends invitational texts of its own choosing to every contact in the app user's contact list with little or no obvious control by the user," *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7984 (2015), Defendants' alleged role here in orchestrating the text messaging campaigns is more analogous to the defendant's role in *Golan* and therefore direct liability is inapplicable. Cordish Companies and ECI's motion for summary judgment as to direct liability is granted.

ii. Vicarious Liability

Alternatively, Hand asserts that ECI and Cordish Companies can be held vicariously liable for Shark Bar's conduct. "'When Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules,' and such background legal principles apply unless the statute's text or context indicate otherwise." *Golan v. FreeEats.com*, 930 F.3d at 961. (quoting *Meyer v. Holley*, 537 U.S. 280, 285, 123 S.Ct. 824, 154 L. Ed. 2d 753 (2003)). "[A] defendant may be held vicariously liable for TCPA violations where the plaintiff

establishes an agency relationship, as defined by federal common law, between the defendant and a third-party caller." *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 877–79 (9th Cir. 2014), aff'd 136 S.Ct. 663 (2016). "Federal common law is in accordance with the Restatement of Agency." *Golan v. Veritas Entm't, LLC*, No. 4:14CV00069 ERW, 2016 WL 880402, at *4 (E.D. Mo. Mar. 8, 2016).

Hand does not specify which theory of vicarious liability he believes Defendants may be held liable under here.[9] Rather, the parties focus their dispute on whether there is sufficient evidence to find a principal/agent relationship exists at all.

"Agency is 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, and the agent manifests assent or otherwise consents so to act." Restatement (Third) Of Agency § 1.01 (2006); *see also S. Pac. Transp. Co. v. Cont'l Shippers Ass'n, Inc.*, 642 F.2d 236, 238 (8th Cir. 1981) ("Agency is a legal concept that depends upon the existence of certain factual elements: (1) the manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; and (3) the understanding of the parties that the principal is to be in control of the undertaking"). "A relationship is not one of agency within the common-law definition unless the agent consents to act on behalf of the principal, and the principal has the right throughout the duration of the relationship to control the agent's acts." Restatement (Third) Of Agency § 1.01 (2006).

"Normally the existence or nonexistence of a principal-agent relationship is a fact question left to the trier of fact. It is only where the facts are not in dispute and there is no real

[9] Under the TCPA, a principal may be held liable under a "broad range of agency principles, including not only formal agency, but also principles of apparent authority and ratification." *In the Matter of the Joint Petition Filed by Dish Network, LLC*, 28 F.C.C. Rcd. 6574, 6584 (2013).

issue for the jury to resolve that the trial court should rule on the agency issue as a matter of law." *Waterhout v. Associated Dry Goods, Inc.*, 835 F.2d 718, 720 (8th Cir. 1987). *See also Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1343 (8th Cir. 1976) ("Since [the agency] determination requires the finding and weighing of numerous facts, the ultimate resolution is appropriately left to the province of the jury in most instances.")

Defendants first assert that there can be no vicarious liability here because there is "no evidence of control to support an agency relationship." Doc. 138 (Defendants Suggestions in Support of Motion for Summary Judgment), pp. 19–20. "In the TCPA context, courts characterize the control necessary to establish agency as whether the principal 'controlled or had the right to control the agent and, more specifically, the manner and means of the text message campaign they conducted.'" *Wilson v. PL Phase One Operations L.P.*, No. CV DKC 18-3285, 2019 WL 4735483, at *4 (D. Md. Sept. 27, 2019) (quoting *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)).

As to ECI's control over Shark Bar's messaging activity, viewing the facts in the light most favorable to Plaintiff, a reasonable jury could find ECI controlled the manner and means of the text messaging campaigns here. ECI set and enforced Shark Bar's marketing policies and practices and developed district-wide policies for how, when, and with what phrasing text messages were permitted to be sent by Shark Bar and other Kansas City Power & Light venues, including by providing the data collection forms and messaging platforms. *See* Doc. 172-10; Doc. 172-15. In addition to being an account holder on SendSmart, ECI specifically developed Txt Live with a software development company for venues' use. Doc. 172-8; Doc. 172-9; Doc. 172-11 (ECI Txt Live Invoices). ECI then developed and oversaw the implementation and continued usage of the Txt Live program, including creating extensive usage guidelines for

crafting messages that were most likely to elicit a response and avoid being flagged as a spam message by common carriers. *See* Doc. 172-13; Doc. 172-14; Doc. 172-20; Doc. 172-22. ECI was in consistent contact with venues including Shark Bar and was able to monitor and bar venues' access to the platform. Doc. 172-20. In essence, every aspect of Shark Bar's use of SendSmart and Txt Live was in some way directed by ECI. Defendants point to ECI's Consulting Agreement with Shark Bar, which disclaims any agency relationship, but "[w]hether a relationship is characterized as agency in an agreement between parties . . . is not controlling." Restatement (Third) Of Agency § 1.02 (2006). Rather, "[w]hether a relationship is one of agency is a legal conclusion made after an assessment of the facts of the relationship and the application of the law of agency to those facts." *Id*. Viewing all facts and drawing all inferences in Plaintiff's favor, a reasonable jury could find Shark Bar was acting subject to the ECI's control with respect to its messaging activity. *See Golan v. Veritas Entm't, LLC*, No. 4:14CV00069 ERW, 2017 WL 2861671, at *10 (E.D. Mo. July 5, 2017) (where the calls at issue were to publicize a movie, plaintiffs demonstrated a dispute of fact regarding defendant's vicarious liability where they presented evidence that defendant edited the script, oversaw marketing for the movie, recruited the voiceover creator, and was the authority for implementation of the telemarketing scheme); *Mey v. Venture Data, LLC*, 245 F. Supp. 3d 771, 787 (N.D.W. Va. 2017) (principal maintained "substantial control" where principal wrote scripts for agent, developed code for agent's survey software, shared access to databases, worked with agent's calling teams including being consistently in touch and helping troubleshoot survey problems, provided numbers to call, and monitored calling data).

Hand also presents evidence to support the inference that Cordish Companies exerted control over Shark Bar's messaging campaign, although to a lesser degree than ECI. For

example, a 2009 Statement of Change of Registered Agent lists Beach Entertainment KC, LLC as a subsidiary of The Cordish Companies, Inc, along with other Kansas City Power & Light venues. Doc. 168-8. "Cordish Co" was also listed as the client and billed as an account holder for SendSmart along with ECI. Doc. 172-9. Cordish Companies Principal Reed Cordish is also President of ECI and participated in the marketing campaigns by recommending a guide for data collection to Kansas City venues as well as the selection of a new text messaging platform vendor in 2015. Doc. 172-8; Doc. 172-10. Individuals at Cordish Companies also oversaw—both through ECI and directly with Shark Bar—the marketing programming at Shark Bar. For example, Jake Miller is an "executive vice president with Cordish," a Vice President and Chief Revenue Officer of ECI, and a President and nonmember manager of Shark Bar, and he answers directly to Reed Cordish. Doc. 172, p. 14; Doc. 168-15, pp. 6–7. Mr. Miller signed Shark Bar's consulting agreement with ECI on behalf of Shark Bar, which included ECI's provision of web-based and paid advertising and marketing services. *Id*. Hand points to individuals who were hired by the Cordish Companies to support the marketing programs in Kansas City Power & Light and then transitioned to work either for ECI or Shark Bar. Doc. 172-3, pp. 16–18, 25; Doc. 172-5, pp. 9–12.

Defendants argue Cordish Companies could not exert control over Shark Bar because it conducts no business operations. Defendants offer an affidavit from an attorney with CTR Management, Inc., a real estate development services corporation that works with Cordish properties, stating that Cordish Companies "conducts no business or operations, has no employees and does not own any property." Doc. 138-16. However, the evidence presented by Hand and discussed above places this in dispute. The dispute is further underlined by statements on the Cordish Companies' website www.Cordish.com stating it owns and manages Kansas City

Power & Light and KC Live! out of its Kansas City office despite its disclaimer stating otherwise. Viewing all facts and drawing all reasonable inferences in Plaintiff's favor, a reasonable jury could conclude from this evidence that through Reed Cordish's policy dissemination, the Cordish Companies' provision of the text messaging platforms, and the Cordish Companies' placement of its marketing and management staff in positions of authority at both ECI and Shark Bar, that Shark Bar was acting subject to the Cordish Companies' control.

Defendants next argue that a second element of the agency relationship is absent here, because "[t]here 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." Doc. 138, pp. 19–20. "The common-law definition of agency requires as an essential element that the agent consent to act on the principal's behalf, as well as subject to the principal's control." Restatement (Third) Of Agency § 1.01 (2006).

Defendants are correct that Shark Bar's text messages do not explicitly mention ECI or Cordish Companies. However, Defendants' argument misses the full picture of the relationship among Cordish Companies, ECI, and Shark Bar that a reasonable jury could infer from Plaintiff's evidence. Viewing all facts and drawing all inferences in the light most favorable to Plaintiff, Cordish Companies developed the Kansas City Power & Light entertainment district and created ECI in order to implement a uniform marketing scheme among all of the district's venues. Cordish Companies even lists some of these venues as its subsidiaries and ensured that they all use the same text messaging platform for which Cordish Companies was listed as an account holder. Cordish Companies Principal Reed Cordish then, from the top down, approved the uniform policies on how each of these venues should draw business to the district by text messaging customers using these messaging platforms. Individuals associated with Cordish

Companies analyzed Txt Live messaging campaigns and contact databases to determine which campaigns were performing well, and they were placed in leadership roles at ECI, Shark Bar, and other Kansas City Power & Light venues, leading to uniform text message campaign policies across the venues. When Cordish Companies and ECI decided to transition away from the SendSmart messaging system, ECI then contracted with a software developer to create a new software and granted access to all Kansas City Power & Light venues for use. Although ECI claims all the venues reimbursed ECI for this use, ECI did not produce any documentation to Plaintiff during discovery. A reasonable jury could conclude that by adhering to the Kansas City Power & Light marketing scheme using messaging systems provided free of cost by Cordish Companies and ECI while under the direct supervision of ECI, Shark Bar had "consent[ed] to act on the principal's behalf" to draw business to the Kansas City Power & Light district. Restatement (Third) Of Agency § 1.01 (2006). *See Montague v. Heater*, 836 F.2d 422, 425 (8th Cir. 1988) (rejecting a principal's argument that the agent acted "solely on his own behalf and acted independently throughout" where there was evidence that the agent split profits with the principal and indicated he would need to consult with the principal before making the sale, among other factors); *In re Monitronics Int'l, Inc., Tel. Consumer Prot. Act Litig.*, No. 1:13-MD-2493, 2019 WL 7835630, at *4 (N.D.W. Va. Apr. 3, 2019) ("Where the purpose of telemarketing calls is to increase the flow of consumers to multiple businesses, then all of those businesses are 'sellers' under the TCPA" and therefore may be held vicariously liable); *Aranda v. Caribbean Cruise Line, Inc.*, 179 F. Supp. 3d 817, 833 (N.D. Ill. 2016) (holding that a reasonable jury could find an agency relationship where one defendant company that was not advertised on the telemarketing calls authorized a subagent second company to seek out leads and to authorize a third company to communicate vacation offers in a call campaign that would eventually create

business for the first company); *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1302 (D. Nev. 2014) (plaintiff sufficiently alleged an agency relationship where "there was a 'downhill' series of contractual relationships starting with the Lender Defendants down through Click Media, and the benefits of the text message (leads for potential payday lending customers) flowed back 'uphill' through Click Media and LeadPile to the Lender Defendants.")

Defendants cite to *Jones v. Royal Administration Services, Inc.*, 887 F.3d 443 (9th Cir. 2018) to support their argument, but *Jones* is distinguishable. In *Jones*, the Ninth Circuit found a seller could not be vicariously liable for the activity of its hired telemarketer where the telemarketer kept records and provided reports to the seller, collected payments for the seller, was required by the seller to operate lawfully, and used the seller's scripts when discussing the seller's products with consumers. *Id*. at 451. However, in *Jones*, the telemarketers were hired to sell for a number of entities, and there was "no evidence that [the telemarketer defendants] ever tried to sell [the seller defendant's product] to plaintiff" and therefore the seller defendant "never specifically controlled any part of any of the calls at issue in this case." *Id*. at 451. Furthermore, there was a lesser degree of oversight in *Jones* than here, because the seller defendant only visited the call center one dozen times over three years, whereas ECI had staff working out of the Kansas City Power & Light District who were in consistent contact with Shark Bar, including regular marketing strategy and policy dissemination meetings. *See, e.g.*, Doc. 172-17; Doc. 172-18; Doc. 172-20. The Ninth Circuit also found as determinative that the telemarketers provided their own equipment, yet Plaintiff here has offered proof that Cordish Companies and ECI provided the text messaging platforms, and ECI provided the data cards that Shark Bar used to collect the information. These facts distinguish this case from *Jones* such that conflicting inferences may be drawn, making the issue inappropriate for summary judgment.

"[W]hen the facts pertaining to the existence of an agency are conflicting, or conflicting inferences may be drawn from the evidence, the question is one of fact for the jury." *Am. Prairie Const. Co. v. Hoich*, 560 F.3d 780, 793 (8th Cir. 2009) (internal quotations omitted). While the evidence is not overwhelming, when viewing all facts and drawing all reasonable inferences in a light most favorable to Plaintiff, he has presented sufficient evidence that, when characterized properly, would permit a reasonable jury to find ECI and Cordish Companies vicariously liable for the text messages here.[10] Cordish Companies and ECI's motion for summary judgment as to their vicarious liability is denied.

III. MOTION TO EXCLUDE EXPERT REPORT

Defendants have moved to exclude the expert opinion of Plaintiff's expert Dr. Michael Shamos. Doc. 133. Dr. Shamos' expert report reviews the functionality and operation of the SendSmart and the Txt Live platforms. *See* Doc. 156-2 (Substitute Expert Report of Dr. Michael Shamos); Doc. 156-4 (Rebuttal Expert Report of Dr. Michael Shamos). As discussed above, the material facts related to the core functionality of the SendSmart and Txt Live platforms are undisputed. Plaintiff admits that the platforms do not have the capacity to generate random or

[10] Although decided at the motion to dismiss stage, a Maryland district court's review of a plaintiff's analogous allegations against ECI and Cordish for their use of Txt Live supports the Court's determination here:

> The complaint sets forth an agency relationship among the Defendants. At the top, Cordish wields say over any day-to-day operating decisions, including those regarding advertising, while ECI implements the advertising strategies to the various entities at base. Further, Plaintiffs specifically allege that Cordish and ECI are responsible for TXT Live! 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, while Cordish gives final approval over marketing, lists TXT Live! as one of its primary assets, and owns the domain names associated with TXT Live!

Wilson v. PL Phase One Operations L.P., No. CV DKC 18-3285, 2019 WL 4735483, at *5 (D. Md. Sept. 27, 2019) (internal citations omitted).

sequential phone numbers. Therefore, the Court need not reach Defendants' Motion to Exclude the Expert Opinion of Dr. Shamos, and it is denied as moot. *See Smith v. Premier Dermatology*, No. 17 C 3712, 2019 WL 4261245, at *7 (N.D. Ill. Sept. 9, 2019) (denying as moot defendant's motion to exclude expert report where the material facts related to the messaging platform's functionality were undisputed); *Thompson-Harbach*, 359 F. Supp. 3d at 633 (same).

IV. MOTION FOR CLASS CERTIFICATION

a. Txt Live and SendSmart Classes

Corresponding to Count I of his Second Amended Complaint alleging violations of the TCPA's prohibition against using an ATDS, Hand seeks to certify two classes—the SendSmart Class and the Txt Live Class:

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

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

Hand removed from this list any individuals whose information Shark Bar's records show as having been provided electronically as well as those who "responded positively" with one of eight words: "yes", "yeah", "yep", "sure", "ok", "okay", "bday", or "nye." *See* Doc. 128-2 (Shawn Davis Declaration).

As discussed, the Court has granted summary judgment to Defendants on Count I. Therefore, Plaintiff's motion to certify the SendSmart and Txt Live classes based on this claim is now moot, and the Court will deny the motion. *See Toben v. Bridgestone Retail Operations, LLC*, 751 F.3d 888, 896 (8th Cir. 2014) ("The Eighth Circuit has affirmed grants of summary judgment before class certification. Rule 23's Advisory Committee Notes similarly permit summary judgment rulings before class certification." (internal citations omitted));

Hechenberger v. W. Elec. Co., 742 F.2d 453, 455 (8th Cir. 1984) ("The normal rule is that when claims of the named plaintiffs are moot before class certification dismissal of the action is required."); *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984) ("To require notice to be sent to all potential plaintiffs in a class action when the underlying claim is without merit is to promote inefficiency for its own sake.")

b. Do Not Call Class

Hand also seeks to certify a third class—the Do Not Call Class—corresponding to Count III of his Second Amended Complaint alleging a violation of national do-not-call provisions of the TCPA and its implementing regulations. As discussed, a defendant faces liability under the TCPA when it makes more than one telephone solicitation within a twelve-month period to a number registered with the national do-not-call registry. *See* 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(c). A telephone solicitation is defined, in relevant part, as:

> 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, which is transmitted to any person, but such term does not include a call or message:
> (i) To any person with that person's prior express invitation or permission;
> [or]
> (ii) To any person with whom the caller has an established business relationship

47 C.F.R. § 64.1200(f)(14). A caller obtains an individual's "prior express invitation or permission" through a "signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed." *Id*. at § 64.1200(c)(2)(ii). Hand submits the following class definition:

- Do Not Call Class: All individuals on either the SendSmart or Txt Live Class Lists who received more than one text message from Shark Bar in any twelve-month period to a number included on the national do-not-call registry.

During the class period of April 25, 2014 through April 4, 2018, Shark Bar sent over 475,000 text messages to more than 73,000 phone numbers. These numbers comprise the SendSmart and Txt Live Class lists. For the purposes of demonstrating numerosity of the DNC class, Plaintiff cross-referenced a subset of 11,562 of these 73,000 numbers with the national do-not-call registry and narrowed the results to numbers that had received more than one message in any twelve-month period, resulting in a list of 4,860 individual phone numbers. *See* Doc. 128-2.

c. Class Certification Standard

Under Federal Rule of Civil Procedure 23, a motion for class certification involves a two-part analysis. First, under Rule 23(a), the proposed class must satisfy the requirements of "numerosity, commonality, typicality, and fair and adequate representation." *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Cir. 2013). Second, the proposed class must meet at least one of the three requirements of Rule 23(b). *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Hand seeks certification of a damages class under Rule 23(b)(3), requiring a plaintiff to show that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

The burden of proving that the class should be certified rests with the plaintiff. *See Luiken*, 705 F.3d at 372. A plaintiff will meet this burden only if, "after a rigorous analysis," the Court is convinced that the Rule 23 requirements are satisfied. *Comcast*, 133 S. Ct. at 1432 (quotation marks and citation omitted). The Court has broad discretion in deciding whether class certification is appropriate. *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 645 (8th Cir. 2012) (citation omitted).

Although "the TCPA clearly supports class-wide resolution in the abstract," *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 656 (4th Cir. 2019), "[t]here are no invariable rules regarding the suitability of a particular case filed under . . . the TCPA for class treatment; the unique facts of each case generally will determine whether certification is proper." *St. Louis Heart Ctr., Inc. v. Vein Centers for Excellence, Inc.*, No. 4:12 CV 174 CDP, 2017 WL 2861878, at *3 (E.D. Mo. July 5, 2017) (quoting *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 328 (5th Cir. 2008)) (internal alterations omitted).

i. Standing

The "irreducible constitutional minimum of standing requires a showing of injury in fact to the plaintiff that is fairly traceable to the challenged action of the defendant, and likely [to] be redressed by a favorable decision." *Braden v. Wal–Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009) (internal quotes omitted). An injury-in-fact is an invasion of a legally protected interest which is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotes and citations omitted). Because "[t]he constitutional requirement of standing is equally applicable to class actions[,]" a class must "be defined in such a way that anyone within it would have standing." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (internal quotes omitted). Although each member of a class is not required to "submit evidence of personal standing, a class cannot be certified if it contains members who lack standing." *Id*. (internal quotes omitted).

Defendants first assert that the class here includes members who lack a concrete injury as "many recipients of Shark Bar's text messages welcomed them." Doc. 164, p. 29. Although Defendants cite to two declarations from Shark Bar customers stating that they agreed to receive Shark Bar's messages, Doc. 164-30 (Sandy Anderson Declaration), Doc. 164-31 (Patrick

Kilgore Declaration), apparently these customers are not members of the putative class, *see* Doc. 178-1 (William Kenney Declaration), ¶ 8. Defendants point to no further evidence of their assertion that "many" recipients welcomed the messages or that any of those recipients are members of the putative class. Rather, Plaintiff's class is composed of individuals who affirmatively placed their phone numbers on the national do-not-call list yet subsequently received telephone solicitations from Defendants. *See Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1271 (11th Cir. 2019) ("[Standing] is not a problem for the class based on calls made to individuals on the National Do Not Call Registry, since those whose numbers are on the Registry and nevertheless received marketing calls suffered an injury that is traceable to [defendant's] misconduct."). Whether these individuals provided prior express invitation or permission under the TCPA is a question that goes to the merits of the claim, not whether the putative class members have standing. Further, that some class members may have positively responded to Shark Bar is also not dispositive of the standing issue. *See Aranda v. Caribbean Cruise Line, Inc.*, 202 F. Supp. 3d 850, 859 (N.D. Ill. 2016) ("This concrete injury is alleged to have been suffered by every plaintiff—even plaintiffs who completed the survey, spoke with a CCL representative, and accepted defendants' vacation offer had a right to be free from unsolicited telemarketing calls, just as a homeowner has a right to be free from trespass even if she accepts a gift from the trespasser after he commits the offense."). *See also Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006) ("[T]he fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing.")

Next, Defendants argue that the Eleventh Circuit's recent holding in *Salcedo v. Hanna*, 936 F.3d 1162, 1168-69 (11th Cir. 2019), that a single unwelcome text message was insufficient to confer standing, indicates that more is required to demonstrate standing here. As an initial

matter, by definition the putative Do Not Call class consists of recipients who received more than "a single unwelcome text message," and Plaintiff's initial analysis indicates that the 4,860-person sample group received 22,035 messages in total.

Further, Eighth Circuit precedent in *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 959 (8th Cir. 2019) convinces the Court that the injury here is sufficient to satisfy Article III standing. In *Golan*, the Eighth Circuit reviewed the injury-in-fact requirement in the context of the TCPA in light of the Supreme Court's holding in *Spokeo, Inc. v. Robins* that "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016). The *Golan* plaintiffs had received two answering machine messages stating, "Liberty. This was a public survey call. We may call back later." *Golan*, 930 F.3d at 955. Reviewing the TCPA's purpose and common law tort doctrine, the Eighth Circuit found that,

> [t]he harm to be remedied by the TCPA was the unwanted intrusion and nuisance of unsolicited telemarketing phone calls and fax advertisements. The harm here was the receipt of two telemarketing messages without prior consent. These harms bear a close relationship to the types of harms traditionally remedied by tort law, particularly the law of nuisance. It is not dispositive whether unsolicited telephone calls are actually actionable under any common law tort because Congress may elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law. Nor does it matter that the harm suffered here was minimal; in the standing analysis we consider the nature or type of the harm, not its extent.

Id. at 959 (internal citations, quotations, and alterations omitted). Here, putative class members similarly received multiple messages that they allegedly did not previously consent to. The Court finds this bears a close resemblance to the receipt of the two short answering machine messages in *Golan*. *See also Melito v. Experian Mktg. Sols*., Inc., 923 F.3d 85, 95 (2d Cir.), cert. denied sub nom. *Bowes v. Melito*, 140 S. Ct. 677, 205 L. Ed. 2d 440 (2019) (unconsented autodialed text messages represented injury-in-fact); *Van Patten v. Vertical Fitness Grp., LLC*,

847 F.3d 1037, 1043 (9th Cir. 2017) (two unconsented telemarketing text messages "present the precise harm and infringe the same privacy interests Congress sought to protect in enacting the TCPA."); *Susinno v. Work Out World Inc.*, 862 F.3d 346, 352 (3d Cir. 2017) (one prerecorded call to plaintiff's cell phone was a concrete harm under *Spokeo*).

Defendants claim that *Golan* does not control, because the *Golan* plaintiffs received two answering machine messages whereas the class here received text messages to their cell phone. *See Salcedo*, 936 F.3d at 1170 ("A single unwelcome text message will not always involve an intrusion into the privacy of the home in the same way that a voice call to a residential line necessarily does."). However, the fact that the messages were received on a home answering machine does not appear to have weighed in the Eighth Circuit's analysis; rather, the Eighth Circuit focused on unwanted intrusion and nuisance, both of which are similarly present in unwanted text messages to a cell phone—a ubiquitous device that most people remain tethered to day and night. Although the nuisance and intrusion of a text message is perhaps "minimal[,] in the standing analysis we consider the nature or type of the harm, not its extent." *Golan*, 930 F.3d at 955.

Therefore, the Court finds that Hand's Do Not Call class has demonstrated a concrete injury-in-fact and has standing.

ii. Ascertainability

Defendants claim that Hand has failed to set forth a reliable method of identifying class members such that the class is not ascertainable. The Eighth Circuit "has not addressed ascertainability as a separate, preliminary requirement" but rather "adheres to a rigorous analysis of the Rule 23 requirements, which includes that a class must be adequately defined and clearly ascertainable." *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir.

2016) (internal quotations omitted). However, "a dispute regarding the method for identifying class members calls for an independent discussion of whether a class is ascertainable." *McKeage v. TMBC, LLC*, 847 F.3d 992, 998 (8th Cir. 2017). Courts have found a class is ascertainable where class members can be identified by reference to objective criteria. *Id*.

First, Defendants contend that Hand's attempt at excluding recipients who "responded positively" by removing individuals from the class list who responded with one of eight words—"yes", "yeah", "yep", "sure", "ok", "okay", "bday", or "nye"—was not an adequate way to identify class members, because Defendants have pointed out four other individuals on the class list who did "respond positively" by accepting a happy hour offer without using these eight words. However, while perhaps Plaintiff's methodology was somewhat arbitrary, the Court cannot say that Plaintiff's class cannot be identified by reference to objective criteria. Plaintiff reviewed Defendants' own records and excluded those who responded with the above words, resulting in a comprehensive list of message recipients for SendSmart and Txt Live. After certification, Plaintiff will be able to cross-reference the remainder of the SendSmart and Txt Live lists with the national do-not-call list and isolate individuals who received more than one message within one year to derive a final class list. This is sufficient to show that class members are ascertainable. *See McKeage*, 847 F.3d at 998 (finding class membership was ascertainable where "class members were identified by reviewing [defendant]'s customer files according to objective criteria."); *Sandusky Wellness Ctr., LLC*, 821 F.3d at 997 ("[F]ax logs showing the numbers that received each fax are objective criteria that make the recipient clearly ascertainable."); *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 471 (6th Cir. 2017), as corrected on denial of reh'g en banc (Sept. 1, 2017) ("In the context of the TCPA, where fax logs have existed listing each successful recipient by fax number, our circuit

has concluded that such a record in fact demonstrates that the fax numbers are objective data satisfying the ascertainability requirement." (internal quotation omitted)).

Defendants further argue that for the Do Not Call class, Hand "failed to consider many of [the] other elements of this claim and therefore fails to identify putative class members." Doc. 164, p. 28. However, Hand would not be permitted to define his class according to the merits of his claim, because this would create a fail-safe class. *See Orduno v. Pietrzak*, 932 F.3d 710, 716 (8th Cir. 2019) (finding a fail-safe class "is prohibited because it would allow putative class members to seek a remedy but not be bound by an adverse judgment—either those class members win or, by virtue of losing, they are not in the class and are not bound."(internal quotations omitted)); *Lindsay Transmission, LLC v. Office Depot, Inc.*, No. 4:12-CV-221 CEJ, 2013 WL 275568, at *4 (E.D. Mo. Jan. 24, 2013) (rejecting a TCPA class as a fail-safe class because "the proposed class includes only those persons to whom defendant sent faxes without prior consent and with whom defendant did not have an established business relationship.") Further, a Plaintiff is not required to winnow down his class to only those who have a successful claim. Rather, "[h]ow many (if any) of the class members have a valid claim is the issue to be determined after the class is certified. Recipients of [telephone solicitations] who don't have rights under the Telephone Consumer Protection Act just wouldn't be entitled to share in the damages awarded to the class by a judgment or settlement." *Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities Inc.*, 747 F.3d 489, 492 (7th Cir. 2014) (internal citations and quotations omitted).

Thus, the Court finds that Plaintiff has set forth a reliable method to identify class members, and therefore the class is ascertainable.

iii. Rule 23(a)(1) – Numerosity

Rule 23(a)(1) requires that a class be sufficiently numerous to render joinder of all members impracticable.

Plaintiff submitted two class lists corresponding to the now-moot SendSmart and Txt Live classes, and his Do Not Call class consists of individuals on those lists who received more than one text message in one year and whose numbers were registered with the national do-not-call registry at the time they received the messages. The SendSmart and Txt Live class lists consist of 37,175 and 40,218 individuals respectively.[11] Plaintiff has not conducted a full analysis of how many individuals on these lists are registered on the national do-not-call registry but has submitted evidence that a comparison of a subset of 11,562 phone numbers from the

[11] Defendants object to Plaintiff's offer of Shawn Davis' declaration that details how Mr. Davis used the text message spreadsheets provided by Defendants to create a class list on the grounds that this represents an expert opinion that was not timely disclosed pursuant to Federal Rule of Civil Procedure 26(c). The declaration relays the steps that Mr. Davis, an employee of Plaintiff's counsel's firm Edelson PC, took to combine and cross-reference various spreadsheets provided by Defendants detailing the text messages sent, to filter out certain entries (e.g. duplicates, foreign numbers, those indicating "has_bad_number"), and to tabulate a final estimate of the class size. This type of analysis does not necessarily require expert testimony. *See Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.*, No. 15-CV-6314-YGR, 2017 WL 1806583, at *5 (N.D. Cal. May 5, 2017) (finding where Plaintiffs submitted a declaration relaying that the declarant combined call record Excel files using a data analytics program, removed all obviously incorrect numbers, and cross-referenced the numbers to separate cell and residential numbers, "expert testimony is not necessary to perform this type of tabulation."); *Kristensen v. Credit Payment Servs.*, 12 F.Supp.3d 1292, 1304 (D. Nev. 2014) (rejecting argument that the court could not rely on Plaintiff's counsel's declaration summarizing the data obtained from a mobile service provider in finding numerosity was satisfied). In the case cited by Defendants, *Giesmann v. Am. HomePatient, Inc.*, No. 4:14CV1538 RLW, 2017 WL 2709734 (E.D. Mo. June 22, 2017), the evidence at issue was a declaration from someone who had been retained as a forensic expert in over 300 cases, had declared that based on his expertise he would be able to locate missing fax transmission logs on a server, and had written a declaration that was "replete with information regarding [his] credentials as an expert in computer forensics and data recovery." *Geisman*, 2017 WL 2709734 at *2–3. This is far from the Davis declaration relaying the steps taken to combine the spreadsheets and apply select filters. The Court will consider the Davis declaration for the purposes of the motion for class certification.

class list to the national do-not-call registry indicated that 4,860 of these individuals received more than one text message in any twelve-month period.

Defendants also submit an untimely expert report objecting to the accuracy of this 4,860 figure by claiming that their expert's analysis revealed that "well over a hundred telephone numbers" were incorrectly determined to be on the national do-not-call registry at the time of receiving the text. *See* Doc. 164-29. Even if the Court were to accept this argument, Plaintiff's sampling still shows that the class is sufficiently numerous. "[A] plaintiff does not need to demonstrate the exact number of class members as long as a conclusion is apparent from good-faith estimates." *Barragan v. Evanger's Dog and Cat Food Co.*, 259 F.R.D. 330, 333 (N.D. Ill. 2009). Plaintiff's demonstration that even the sampling of the class contains at least thousands of members is enough to show that the class is sufficiently numerous. *See also Ark. Educ. Ass'n v. Bd. Of Educ.*, 446 F.2d 763, 765 (8th Cir. 1971) (twenty class members sufficient to satisfy numerosity); *Levine Hat Co. v. Innate Intelligence, LLC*, No. 4:16-CV-01132 SNLJ, 2018 WL 806762, at *2 (E.D. Mo. Feb. 9, 2018) (finding in a TCPA class action that "[n]umerosity is undeniably present because there are 10,031 putative class members."); *Backer Law Firm v. Costco Wholesale Corp.*, 321 F.R.D. 343, 348 (W.D. Mo. 2017) (numerosity in TCPA class action satisfied where plaintiff identified 1,552 persons who were sent fax transmissions).

Defendants further argue that Plaintiff has not shown whether any individuals in the putative class consented to be called, had an EBR with Defendants, or were business numbers, and therefore Plaintiff hasn't sufficiently demonstrated that the class is sufficiently numerous. However, a Plaintiff need not show that all class members will succeed on the merits in order to demonstrate numerosity at the class certification stage. *See Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir.2014) ("How many (if any) of the class members have a valid claim is the

issue to be determined after the class is certified.") To require a Plaintiff to demonstrate that Defendants' affirmative defenses do not apply to any class member would be an unreasonably high standard at class certification and inconsistent with the basic burden allocation framework of an affirmative defense.

Accordingly, Hand's Do Not Call class satisfies the numerosity requirement.

iv. Rule 23(a)(2) – Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). A plaintiff must show that the claims "depend upon a common contention" that "is capable of class wide resolution," such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541 (2011). Commonality "'does not require that every question of law or fact be common to every member of the class . . . and may be satisfied, for example, where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.'" *Downing v. Goldman Phipps PLLC*, No. 13-206 CDP, 2015 WL 4255342, at *4 (E.D. Mo. July 14, 2015) (quoting *Paxton v. Union Nat. Bank*, 688 F.2d 552, 561 (8th Cir. 1982)). Commonality is easily satisfied in most cases. *See Wineland v. Casey's General Stores, Inc.*, 267 F.R.D. 669, 674 (S.D. Iowa 2009) ("The burden imposed by [the commonality] requirement is light and easily met in most cases.").

With respect to the Do Not Call class, Plaintiff advances the primary question of whether Defendants sent "telephone solicitations," defined as "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, which is transmitted to any person . . ." 47 C.F.R. § 64.1200(f)(14). Further,

Plaintiff asserts that whether Cordish and ECI can be held liable for the text messages sent by Shark Bar is also a common question that is capable of classwide resolution.

The Court agrees that these questions are common to all respective class members, and their resolution will be critical to the validity of the claims. Determining whether the text messages—which are all documented in Defendants' records, contain the same or similar language, and based on Plaintiff's evidence appear to have been sent for the same purpose—are telephone solicitations will resolve an issue that is central to each class members' claims in one stroke. *See Golan v. Veritas Entm't, LLC*, No. 4:14CV00069 ERW, 2017 WL 193560, at *5 (E.D. Mo. Jan. 18, 2017) (whether calls constituted telephone solicitations was a question common to the class). *See also Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 998 (8th Cir. 2016) (finding a TCPA class should be certified where "[a] common contention, capable of classwide resolution, is whether class members received an unsolicited fax advertisement violating the TCPA."); *Holtzman v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013) ("Class certification is normal in litigation under [the TCPA], because the main questions, such as whether a given fax is an advertisement, are common to all recipients."). So too is the question of Cordish Companies' and ECI's liability a question capable of classwide resolution. *See, e.g.*, *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1306 (D. Nev. 2014) (finding agency determinations in TCPA class action "can be resolved on a class-wide basis"); *Makaron v. Enagic USA, Inc.*, 324 F.R.D. 228, 234 (C.D. Cal. 2018) (defendant's liability for the calling practices of its distributors was a common question).

Defendants do not directly argue that commonality is not met but rather focus their arguments on whether common questions predominate, and therefore the Court will address these concerns when analyzing 23(b)(3) predominance below.

Therefore, the Court finds that Hand has met his burden of demonstrating that there are questions of law or fact common to the class.

v. Rule 23(a)(3) – Typicality

The typicality requirement is met when the claims or defenses of the representative party are typical of those of the class. Fed. R. Civ. P. 23(a)(3). "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996) (citing *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 831 (8th Cir. 1977)). Class representatives need not share identical interests with the class, only common objectives and legal and factual positions. *Uponor Inc., F1807 Plumbing Fittings Products Liability Litig.*, 716 F.3d 1057, 1064 (8th Cir. 2013). The requirement "is fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995).

Hand argues that he satisfies the typicality requirement because both he and the putative class received more than one telephone solicitation text messages from Defendants in a twelve-month period after placing their numbers on the national do-not-call registry. Therefore, their claims arise from the same course of conduct and give rise to the same remedial theory under the TCPA.

Defendants respond that because Hand contends that he never provided his contact information to Shark Bar despite Shark Bar's records indicating that his information was uploaded to their database on November 2, 2013, this assertion defeats Hand's ability to represent a class of persons who did submit their information to Shark Bar because "many—if not most—individuals included in Plaintiff's proposed classes would not dispute completed

Paper Cards (or another form) as Plaintiff does." Doc. 164, p. 25. Notably, Shark Bar has not submitted direct evidence from "many if not most" class members, or any class members at all, asserting that they submitted their information on Paper Cards or sign-in sheet.

The Court finds that Hand's claim is typical of the class here. The claims here arise out of the same conduct—the sending of text messages to individuals registered on the national do-not-call registry. These facts give rise to the same legal and remedial theory under the TCPA. Defendants have failed to sufficiently explain why the factual differences they cite necessarily indicate that Hand's interests are not "sufficiently parallel to the interests of the other class members to assure a vigorous representation of the class." *Donaldson*, 554 F.2d at 831 (finding typicality met where factual differences in a class representative's hiring and work were "not enough to make [her] claims atypical"). *See also Toney v. Quality Res., Inc.*, 323 F.R.D. 567, 585 (N.D. Ill. 2018) (typicality satisfied where plaintiff "received a call from [defendant] to her cell phone marketing a Sempris product, like the other proposed class members" and therefore "her claim has the same essential characteristics as the class at large."); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 491–92 (N.D. Ill. 2015) ("[Plaintiff's] claim that [defendant] violated the TCPA when it placed a prerecorded prescription reminder call to his cellular phone satisfies Rule 23(a)'s typicality requirement because the class consists of all persons who received such calls.") Hand's claims are typical of other class members, and despite any factual variations, his interests are sufficiently aligned such that he will vigorously represent the class.

Defendants cite to *Katz v. American Honda Motor Company*, No. 15-CV-4410-CBM-RAOX, 2017 WL 3084272 (C.D. Cal. June 29, 2017) to support their argument that differing evidence of consent between a class representative and the class renders the representative atypical, but the facts here are distinguishable. In *Katz*, it was "undisputed Plaintiff did not

provide prior express written consent to receive calls from Defendant" and Defendants "offer[ed] evidence of prior express written consent by some putative class members" in the form of signed lease agreements with consent language. *Katz*, 2017 WL 3084272 at *2. Here, however, it is disputed whether Hand submitted his information on a card and consented to the messages, and Defendants have not offered this type of direct evidence of prior consent from the class. Defendants contend that Shark Bar first received Hand's contact information when it was submitted with other customers to win contests and that they received prior express invitation or permission from those who entered to win these contests. Thus Hand has an interest in rebutting this theory by arguing that either Defendants did not collect all contact information in the way they claim to have or that this method does not constitute prior express invitation or permission. This is not antagonistic to other class members' interests but rather is in the interest of other class members.

Therefore, the Court finds that Hand has met his burden of showing that his claim is typical of the class.

vi. Rule 23(a)(4) – Adequacy

Rule 23(a)(4) requires that the class representative and class counsel will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23. The adequacy requirement is met where: "1) the representatives and their attorneys are able and willing to prosecute the action competently and vigorously; and 2) each representative's interests are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge." *Carpe v. Aquila, Inc.*, 224 F.R.D. 454, 458 (W.D. Mo. 2004) (internal quotes omitted). The requirement of adequacy "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

As an initial matter, Hand's attorneys in this litigation have extensive experience prosecuting TCPA class actions and will competently and vigorously represent Hand and the Do Not Call class in this action. *See* Doc. 128, pp. 9–10. Defendants do not contest that Plaintiff's counsel is qualified and committed to represent the class here. Hand has also demonstrated his ability and willingness to prosecute the claim here, including by participating in discovery and appearing for a deposition.

As discussed above, Hand's interests are sufficiently similar to those of the class, and despite any factual differences, it is unlikely that their goals and viewpoints will diverge. Hand alleges that he was sent four unsolicited text messages while he was registered with the national do-not-call registry, and he seeks the same statutory damages as absent class members. Thus, Hand's interest in the outcome of the case is sufficiently strong to ensure vigorous representation.

Defendants argue that Hand is subject to unique defenses with respect to his lack of familiarity with the case and his credibility. *See Kassover v. Computer Depot, Inc.*, 691 F. Supp. 1205, 1213 (D. Minn. 1987), aff'd, 902 F.2d 1571 (8th Cir. 1990) ("A plaintiff subject to unique defenses, especially as to his credibility and his demonstrated lack of familiarity with the suit, is an inadequate class representative.")

As to Hand's knowledge of the case, Defendants argue Hand is unaware of information concerning the case, such as the precise number of texts he received, where the case is pending, or whether the Court has issued any rulings. However, "the requirement that a named Plaintiff have an understanding of the litigation only requir[es] one to be aware of the basic facts underlying the lawsuit." *In re Dollar Gen. Corp. Motor Oil Mktg. & Sales Practices Litig.*, No. 16-02709-MD-W-GAF, 2019 WL 1418292, at *14 (W.D. Mo. Mar. 21, 2019) (internal

quotations omitted). Hand has demonstrated his knowledge of the basic facts of the case by testifying that his claim his based on unsolicited text messages sent by Kyle from Shark Bar for which he never gave permission and that were allegedly sent in violation of the Telephone Consumer Protection Act. *See* Doc. 178-3. He also demonstrated an understanding that he is seeking to represent a class of individuals who experienced similar conduct. *Id*. This is sufficient and distinguishes Hand from Defendants' cited authority. *See Johnson v. U.S. Beef Corp.*, 2006 WL 680918, at *7 (W.D. Mo. Mar. 6, 2006) (representative plaintiffs were inadequate where they admitted they had "no knowledge" of the class allegations or allegedly discriminatory policies or stated they had "no interest in representing the class").

As to Hand's credibility, Defendants assert that Hand's "personal circumstances, as opposed to those of the class generally, would become the focus of this litigation." Doc. 164, p. 25. Defendants appear to be referring to Hand's contention that he never provided his phone number to Shark Bar set against Shark Bar's records indicating that on November 2, 2013, Hand's accurate name, gender, email address, and phone number and his inaccurate birthday were entered into Shark Bar's database. Hand also testified that prior to preparing for his deposition with his counsel, he was unaware that his girlfriend was represented by the same counsel in a similar TCPA case.

"For an assault on the class representative's credibility to succeed, the party mounting the assault must demonstrate that there exists admissible evidence so severely undermining plaintiff's credibility that a fact finder might reasonably focus on plaintiff's credibility, to the detriment of the absent class members' claims." *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 728 (7th Cir. 2011) (quoting *Dubin v. Miller*, 132 F.R.D. 269, 272 (D.Colo. 1990)). Despite their general allusions that Plaintiff is being dishonest about whether he did

provide his information to Shark Bar and his lack of knowledge of his girlfriend's case, Defendants have not presented evidence that is so severely undermining of plaintiff's credibility. Hand has continually maintained that he did not provide his contact information to Shark Bar. Defendants' contact database does not definitively prove that this is a fabrication. A class representative's credibility is not undermined merely because he disputes the accuracy of a defendant's evidence.

Moreover, "few plaintiffs come to court with halos above their heads; fewer still escape with those halos untarnished." *Dubin v. Miller*, 132 F.R.D. 269, 272 (D. Colo. 1990). *See also Gooch v. Life Inv'rs Ins. Co. of Am.,* 672 F.3d 402, 431 (6th Cir. 2012) (class representative was adequate despite "dubious" statements and omissions that "relate[d] to [plaintiff's] lack of insight to his wife's finances, possessions, and work habits" but were "not necessarily connected to his credibility" and did not convince the court that the "interests of absent class members are in jeopardy as a result of [plaintiff's] credibility."); *Sherman v. Am. Eagle Exp., Inc.*, No. CIV.A. 09-575, 2012 WL 748400, at *7 (E.D. Pa. Mar. 8, 2012) ("[Plaintiff's] allegedly false characterization of her tax return filings, although possibly impeachment evidence, does not go to the heart of the claims or defenses, and is not so damning it renders her representation inadequate.") Hand's credibility does not indicate the class will be inadequately represented here.

Finally, Defendants assert that Hand's friendship with class counsel, William Kenney, raises questions as to whether this is a plaintiff-driven or a lawyer-driven case. However, the mere relationship between named Plaintiff and class counsel, without more, generally will not support a finding that the named Plaintiff is inadequate. *See Stern v. DoCircle, Inc.*, No. SACV 12-2005 AG JPRX, 2014 WL 486262, at *7 (C.D. Cal. Jan. 29, 2014) ("[T]he Court does not

believe that, without more, some preexisting relationship between a named plaintiff and counsel makes the plaintiff an inadequate class representative."); *Lewis v. Goldsmith*, 95 F.R.D. 15, 20 (D.N.J. 1982) (finding named plaintiff was adequate when there was "no concrete evidence to indicate that plaintiff's familial relationship might hinder his representation of the class," and that "it would seem a bit anomalous that an individual whose uncle has developed a reputation as a competent securities lawyer should be prohibited from turning to his uncle for assistance").

Defendants cite to *London v. Wal-Mart Stores, Inc.*, but there the Eleventh Circuit found a class representative was not adequate where "the personal *and* financial ties between [plaintiff] and [class counsel] are very close." 340 F.3d 1246, 1255 (11th Cir. 2003) (emphasis in original). In *London*, the named plaintiff was not only class counsel's long-time friend but also his former stockbroker, indicating the named plaintiff would have a financial incentive to advocate for an increase in counsel's attorney's fees at the expense of absent class members. *Id*. at 1254–55. There is no evidence that such financial ties exist here, and the Court finds that the personal ties that do exist are not so substantial so as to render Hand an inadequate representative.

Therefore, the Court finds that Hand has met his burden of showing that he and class counsel are adequate to represent the class.

vii. Rule 23(b)(3)

Hand seeks certification pursuant to Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and [that] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently

cohesive to warrant adjudication by representation." *Amchem,* 521 U.S. at 623. It "'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Orduno v. Pietrzak*, 932 F.3d 710, 716 (8th Cir. 2019) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016)). "A class may be certified based on common issues even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371, 375 (8th Cir. 2018) (internal quotations omitted). "When deciding whether common issues predominate over individual issues under Rule 23(b)(3), the court should conduct a 'rigorous analysis' including an 'examination of what the parties would be required to prove at trial.'" *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 611 (8th Cir. 2011) (quoting *Avritt*, 615 F.3d at 1029).

Hand argues that common questions predominate here because the primary element required to establish a prima facie case of a violation of 47 C.F.R. § 64.1200(c)—that the messages here were telephone solicitations—can be established through common evidence. Defendants claim that class certification should be denied because individualized issues predominate over these common questions regarding (1) whether class members granted prior express invitation or permission, (2) whether class members had an EBR with Defendants, and (3) whether class members are residential telephone subscribers.

First, Defendants' argue that issues of prior express invitation or permission predominate. The initiator of a telephone solicitation will not be liable where they have "obtained the subscriber's prior express invitation or permission" through "a signed, written agreement between the consumer and seller which states that the consumer agrees to be

contacted by this seller and includes the telephone number to which the calls may be placed." 47 C.F.R. § 64.1200(c)(2)(ii).

As an initial matter, Hand argues that the Court need not consider potential individualized issues with prior express invitation or permission, because this is not an element of the prima facie case but rather an affirmative defense to be proven by Defendants. The Court agrees that prior express invitation or permission is an affirmative defense. *See Backer Law Firm, LLC v. Costco Wholesale Corp.*, No. 4:15-CV-00327-SRB, 2017 WL 6388974, at *6 (W.D. Mo. Nov. 28, 2017) (finding consent to be an affirmative defense); *Benzion*, 2014 WL 11531368 at *6 (finding prior express invitation or permission is an affirmative defense); *St. Louis Heart Ctr., Inc. v. Forest Pharm., Inc.*, No. 4:12-CV-02224, 2013 WL 1076540, at *2 n. 2 (E.D. Mo. Mar. 13, 2013) (finding consent to be and affirmative defense). However, "[w]hile the existence of individual defenses may be important in a court's decision to certify a class, the relevance of such defenses must be subjected to the same rigorous inquiry as plaintiffs' claims." *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d at 619 (internal citation omitted). "Courts determine whether issues of individualized consent defeat commonality and predominance in . . . TCPA cases on a case-by-case basis after evaluating the specific evidence available to prove consent." *Physicians Healthsource, Inc., v. A-S Medication Sols., LLC*, 318 F.R.D. 712, 725 (N.D. Ill. 2016).

In the TCPA context, there are some circumstances where individualized issues of consent may predominate. For example, in *Gene And Gene LLC v. BioPay LLC*, 541 F.3d 318, 328 (5th Cir. 2008), the Fifth Circuit found individualized issues of consent would predominate on the plaintiff's claim that the defendant had sent unsolicited fax advertisements to putative class members. Defendant BioPay presented evidence "that BioPay culled fax numbers from

purchased databases but also periodically culled fax numbers from various other sources—from information submitted by merchants through BioPay's website, from information submitted at trade shows BioPay attended, and also from lists of companies with which BioPay or its affiliates had an established business relationship." *Id*. at 329. Given the variability of these potential consent mechanisms, whether these individuals had provided their fax number with the requisite consent could not be established with class-wide proof, and therefore the Fifth Circuit denied class certification. *Id*. Similarly, in *Newhart v. Quicken Loans Inc.*, No. 9:15-CV-81250, 2016 WL 7118998 (S.D. Fla. Oct. 12, 2016), the defendants presented evidence that some of the calls at issue were made for telemarketing purposes and therefore would require written consent, but other calls were not made for that purpose and therefore oral consent would suffice. *Id*. at *4. With respect to the latter category, there was evidence that consent was obtained "via email, website submissions, loan modification applications, inbound calls from borrowers, outbound calls placed to landline phones during which borrowers asked to be called back on a cellular telephone, online portals, and other means." *Id*. at *5 (internal citations omitted). Thus, the *Newhart* court found that individualized issues of consent would predominate.

However, where consent was achieved through a common method, courts have generally found the common question of consent to be capable of classwide resolution. *See, e.g.*, *McCurley v. Royal Seas Cruises, Inc.*, 331 F.R.D. 142, 174 (S.D. Cal. 2019) ("Consent can be resolved on a classwide basis if consent was obtained in an identical or substantially similar manner from class members . . . Evidence that will typically defeat predominance is evidence that prior express consent was provided in a variety of contexts and, as such, would likely require highly individualized inquiries." (listing cases)); *Esparza v. SmartPay Leasing, Inc.*, No. C 17-03421 WHA, 2019 WL 2372447, at *3 (N.D. Cal. June 5, 2019) ("SmartPay's consent defense

will not require a one-by-one inquiry. Rather, it will only require[] general testimony about SmartPay's uniform practices and procedures in presenting putative class members with its terms of use online."); *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 686 (S.D. Fla. 2013) ("Whether the provision of a phone number on admissions paperwork equates to express consent is a question common to all class members, because all class members filled out paperwork at the time of treatment. On this defense, all class members will prevail or lose together, making this another common issue to the class.")

Defendants position here is that they obtained the requisite prior express invitation or permission when class members filled out and submitted their contact information on the Paper Cards or sign-in sheets. *See* Doc. 128-4; Doc. 164-14, ¶ 6. Although the physical copies of these were subsequently shredded, *see* Doc. 128-4, there is evidence in the record that is common to all class members that indicates this was their general policy, including the Txt Live and SendSmart contact database, sample Paper Cards, testimony from Shark Bar staff describing data collection policies, and staff training materials. *See, e.g.*, Doc. 164-3 (Kyle Uhlig Deposition); Doc. 164-4 (Kyla Bradley Deposition discussing data collection policies); Doc. 164-14, (Kyle Uhlig Declaration relaying data collection policies); Doc. 164-15; Doc. 164-17 (Txt Live Contact Database Excerpt). None of this evidence depends on facts particular to each class member. Rather, this evidence "presents a pattern of alleged consent that is uniform across the class and amenable to class-wide resolution." *Toney*, 323 F.R.D. at 588. The record before the Court indicates that the entry forms Defendants used to collect contact information were the same or substantially similar throughout the class period, and Shark Bar's alleged policy of collecting and recording that information was uniform. Thus, this case presents a pattern of alleged consent that is uniform across the class and amenable to class-wide resolution. *See also*

McKeage v. TMBC, LLC, 847 F.3d 992, 999 (8th Cir. 2017) ("[E]vidence gleaned during discovery showed that it was [defendant]'s corporate policy to require all customers to sign the standard form contract governed by Missouri law. Thus, this case presented a "classic case for treatment as a class action."); *Physicians Healthsource, Inc. v. A-S Medication Sols., LLC*, 318 F.R.D. 712, 723 (N.D. Ill. 2016) ("From the information provided by Defendants, it appears that Allscripts engaged in a 'standardized course of conduct' in obtaining the consent, if consent was obtained").

Defendants cite to *Ung v. Universal Acceptance Corporation*, 319 F.R.D. 537 (D. Minn. 2017), but the facts here are distinguishable. In *Ung*, the issue was whether a company's calls to the credit references of vehicle financing applicants were made after receiving prior express consent. *Id*. at 539. There was evidence indicating that consent may have been provided through an intermediary, and because the calls were not telemarketing calls, consent could have been provided orally. *Id*. at 539. The *Ung* court found that the evidence showed "that the issue of consent is unique to each individual class member. Liability in each instance, or the extent thereof, will hinge on whether the class member orally consented to be called when contacted by Universal; voluntarily provided his or her cell phone number, either directly or through the car purchaser; appeared at the time of the purchase and agreed to be contacted; or provided his or her consent in some other way." *Id*. at 540–41. Therefore, "the circumstances surrounding consent are not susceptible to generalized, class-wide proof." *Id*. at 541 (internal quotations omitted). Here, there are no issues of oral consent or consent through an intermediary; rather, Defendants claim they only obtained contact information and consent in one common way—through their Paper Cards or sign-in sheets. Defendants also cite to *Hunter v. Time Warner Cable Inc.*, No. 15-CV-6445 (JPO), 2019 WL 3812063, at *16 (S.D.N.Y. Aug. 14, 2019), where the defendant

argued that even if there was a class-wide methodology for showing absence of consent from the class members themselves, there was still a question of whether consent was provided through an intermediary, such as a family member or an agent. The Court concluded that the case was therefore inappropriate for class treatment, because there was "no generalized means of proof to resolve whether Time Warner retains consent to call a particular class member on the basis that consent originated with a relative." *Hunter*, No. 2019 WL 3812063 at *16. Defendants here have not claimed that the requisite prior express invitation or permission was potentially obtained through an intermediary, and therefore that question does not present individualized issues.

Defendants next claim that "far from relying upon 'common' evidence of consent, Defendants have demonstrated that other evidence of consent exists." Doc. 164, p. 19. However, this "other evidence" is merely evidence that would corroborate their theory that each class member they texted had at some point visited Shark Bar and provided their contact information, which was then uploaded into their SendSmart or Txt Live systems. For example, for some class members, Defendants claim that purchase records dated near the date on which Shark Bar's records reflect a class member's information was uploaded to their database would corroborate that the class member had in fact visited Shark Bar on that date and could confirm the accuracy of the information provided. But Defendants may not manufacture an individualized issue merely because they seek to corroborate their common theory of consent in an individualized way. If this were the case, surely any class action defendant could defeat class certification by claiming that individual class member testimony was needed to corroborate an affirmative defense that otherwise would apply to the class as a whole. Moreover, to the extent that Defendants find it advantageous to use transaction evidence to bolster their affirmative

defense, the Court sees no reason and why their computerized records of transactions could not be cross-referenced with a class list.

Defendants also argue that class members' positive responses after receiving a text from Shark Bar further would support their theory that prior express invitation or permission had been obtained. The Court fails to see how a positive response necessarily demonstrates that the recipient provided the requisite prior express invitation or permission in the first instance. However, to the extent that a positive response potentially bars recovery for subsequent text messages, *see Zemel v. CSC Holdings LLC*, 2018 WL 6242484, at *5 (D.N.J. Nov. 29, 2018) ("When an individual sends a message inviting a responsive text, there is no TCPA violation."), Defendants may review their records to defend against their liability for those texts. Although analyzing the messages sent to class members may be time consuming, it does not require an individualized factual inquiry and therefore cannot prevent class certification. *See Dennington v. State Farm Fire & Cas. Co.*, No. 4:14-CV-04001, 2016 WL 11596076, at *5 (W.D. Ark. Aug. 24, 2016) ("Although individual review of the files is required, the review is necessary to answer objective questions without the need to resort to 'mini-trials' on any particular question").

Further, Plaintiff apparently sought to reduce the number of positive responses among class members by excluding individuals who responded to Shark Bar's messages with "yes", "yeah", "yep", "sure", "ok", "okay", "bday", or "nye." *See* Doc. 128-2. Defendants have pointed to only four class members who remain on the class list despite having responded positively. "A class may be certified based on common issues even though other important matters will have to be tried separately, such as . . . some affirmative defenses peculiar to some individual class members," *Stuart*, 910 F.3d at 375 (internal quotations omitted), and Defendants have not persuaded the Court that such individualized issues, if any, regarding

positive responses will predominate here.

Defendants further argue that "putative class members have, even after the filing of this lawsuit, signed up again to receive the very text messages that Plaintiff complains of." Doc. 164, p. 19. Again, the Court fails to see how the fact that Defendants' records reflect that a class member's contact information was entered multiple times necessarily demonstrates the requisite prior express invitation or permission. Defendants also note that "[i]ndividualized issues may also exist regarding whether certain putative class members subsequently agreed to arbitrate their claims, given their decision to enter contests with terms that incorporate arbitration provisions." *Id*. at n. 8. Apparently in June 2019, Shark Bar held a contest to win concert tickets where entry required submitting one's contact information. *See* Doc. 164-26. The "Terms and Conditions" linked on the online entry form included an arbitration provision. Doc. 164-27. However, Shark Bar only points to two putative class members who entered this contest. Further, they submit a declaration stating that "[i]ndividuals who entered this contest and opted in to receive text messages after populating the form reflected in Exhibit L are maintained in Shark Bar's records." Doc. 164-14, ¶ 29. Therefore, to the extent that the arbitration provision does impact a select few class members' ability to succeed on a claim,[12] these class members will be easy to locate in Defendants' records. This affirmative defense peculiar to some class members will not bar class certification. *Stuart*, 910 F.3d at 375.

Finally, Defendants argue that "there will be individualized issues as to customers' personal interactions with Shark Bar's staff and their expectations of receiving text messages when they completed contest entry forms." Doc. 164, p. 20. The Court fails to see, however, how testimony regarding a customer's expectations or conversations with Shark Bar would

[12] The Court takes no position on the validity or applicability of this arbitration provision.

demonstrate that Shark Bar had received the requisite prior express invitation or permission under the TCPA. Again, Defendants may not manufacture an individualized issue merely because they seek to corroborate their common theory of consent in an individualized way.

In sum, based on the record before the Court, individual issues of prior express invitation or permission will not predominate here. Although prior express invitation or permission is likely to be a primary issue at trial, there is evidence in the record here that is common to the class to support Defendants' position that such prior express invitation or permission was obtained. The additional individual inquiry that Defendants claim is essential to their defense is not evidence of prior express invitation or permission but rather evidence that would corroborate their position that the individuals listed in their contact database as recipients of messages visited Shark Bar and potentially provided the requisite prior express invitation or permission. Defendants cannot manufacture individualized issues by claiming individual testimony is required to corroborate what is otherwise a common theory. Defendants failed to retain the physical copies of the forms that they allege demonstrate the requisite prior express invitation or permission, and the Court will not deny class certification because Defendants now contend that an individual inquiry is necessary to corroborate that consent. To do so would "create an incentive for a person to violate the TCPA on a mass scale and keep no records of its activity, knowing that it could avoid legal responsibility for the full scope of its illegal conduct." *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 250 (N.D. Ill. 2014). *See also Mullins v. Direct Digital, LLC*, 795 F.3d 654, 668 (7th Cir. 2015) ("[R]efusing to certify on this basis effectively immunizes defendants from liability because they chose not to maintain records of the relevant transactions"); *Meinders D.C., Ltd v. Emery Wilson Corp.*, No. 14-CV-596-SMY-SCW, 2016 WL 3402621, at *6 (S.D. Ill. June 21, 2016) (finding where Defendant argued

individualized issues of consent predominated because it routinely elicited consent prior to sending faxes, but did not have records of that consent, "[Defendant] may not rely on its own failure to obtain and retain records of who consented to receiving fax advertisements in order to defeat class certification in this matter."); *Zyburo v. NCSPlus, Inc*., 44 F. Supp. 3d 500, 503 (S.D.N.Y. 2014) ("[D]efendant has not made a sufficient showing to defeat class certification, since, by its own admission, the defendant keeps poor or nonexistent records of which class members have given consent to the underlying creditor. Defendant is in effect asking the Court to reward its imperfect record-keeping practices by precluding class certification.") Therefore, the Court finds that individualized issues of prior express invitation or permission do not predominate here.

Next, Defendants argue that individualized inquiries will be required to determine whether an EBR existed as to each text recipient, which "can be shown only through an individualized and time-consuming analysis of credit card transactions and other records." Doc. 164, p. 22. Recall that an EBR is a "prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call." 47 C.F.R. § 64.1200(f)(5). As discussed above, the Court has concluded that evidence of a prior purchase at Shark Bar is sufficient to demonstrate an EBR here.

However, that cross-referencing various credit card records and the class list could be "time consuming" is not a bar to class certification. The question on class certification is whether that process would require an individualized factual inquiry for each class member, and cross-referencing records is precisely the type of objective analysis that makes an issue capable

of class-wide resolution. *See Dennington v. State Farm Fire & Cas. Co.*, No. 4:14-CV-04001, 2016 WL 11596076, at *5 (W.D. Ark. Aug. 24, 2016) ("Although individual review of the files is required, the review is necessary to answer objective questions without the need to resort to 'mini-trials' on any particular question"). *See also Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 540 (6th Cir. 2012) ("[T]he need to manually review files is not dispositive. If it were, defendants against whom claims of wrongful conduct have been made could escape class-wide review due solely to the size of their businesses or the manner in which their business records were maintained.").

Defendants further argue that "some individuals likely paid in cash or another companion paid the bill" and cite to Kyle Uhlig's declaration stating that "Shark Bar does not have a record of individuals who paid for food or beverages in cash." Doc. 164-14, ¶ 18. Defendants do not provide examples of class members who paid in cash or even offer general assertions about the percentage of Shark Bar's transactions that are paid in cash. "[T]he mere mention of a defense is not enough to defeat the predominance requirement of Rule 23(b)(3)." *Bridging Cmtys. Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1126 (6th Cir. 2016). "[A]llowing such speculation to dictate the outcome of a class-certification decision would afford litigants in future cases wide latitude to inject frivolous issues to bolster or undermine a finding of predominance." *Id*. (citation omitted). *See also Toney*, 323 F.R.D. at 587 ("While it is plaintiff's burden to meet the predominance test, opposition to predominance based on theory, not evidence, is not a weighty objection." (internal quotations omitted)). As to whether "another companion paid the bill" for a class member, the Court fails to see how a companion's paying the bill for a class member would create an EBR between the business and that class member. Defendants offer no authority to support this position.

On the record before it, the Court is not convinced that Defendants' EBR defense will require an individual inquiry of each class member such that the Court would need to resort to "mini trials" to resolve the issue. The evidence available makes the issue capable of class wide resolution and Defendants have not provided a sufficient basis for the Court to conclude that any remaining individual issues regarding an EBR will predominate here.

Finally, Defendants argue that determining whether an individual is a residential telephone subscriber presents individualized inquiries. However, Defendants have failed to put forth any evidence or specific allegations to support their assertion that this will be an individualized issue that predominates at trial. The only evidence Defendants offer to support their contention that this issue will devolve into individualized questions is a statement from Shark Bar Sales Builder Kyle Uhlig stating that "several happy hours were held by local business treating their employees." Doc. 164-14. Defendants provide no estimation of how many of their hosted happy hours were business events, nor do they provide any specific examples of businesses or individuals representing businesses on the class list who hosted a happy hour. Moreover, the fact that a happy hour was used by an individual to host their employees does not necessarily mean that they received the text from Shark Bar on a business number that would disqualify them from being a residential subscriber. Again, "the mere mention of a defense is not enough to defeat the predominance requirement of Rule 23(b)(3)." *Bridging Cmtys. Inc.*, 843 F.3d at 1126.

Further, as a practical matter, Shark Bar's text messaging campaigns were used to encourage individuals and their friends to visit the bar and consume alcohol, often in the evenings and on weekends. *See, e.g.*, Doc. 164, p. 11 (text message to class member stating, "It's Kyle from Shark Bar. You entered and I selected you. A VIP party for you and your friends with

gift cards drinks and more! Interested?", followed by, "Great! U drink FREE & your guests get drink discounts! I can book any Friday (7-11p) & Saturday (8-11p) in 30 days.") Shark Bar also asked individuals for their birthdays and invited them to host parties with their friends. *See, e.g.*, *id*. (text message to class member stating, "Happy Birthday month [DL]! Shark Bar would like to invite you & your friends in for an exclusive party with drink specials. Interested? – Kyle").

When confronted with a similar question, a North Carolina district court rejected a defendant's argument that because the plaintiff had failed to remove wireless numbers associated with businesses from its class list, individualized inquires would be required. *Krakauer v. Dish Network L.L.C.*, 311 F.R.D. 384, 396 (M.D.N.C. 2015), aff'd, 925 F.3d 643 (4th Cir. 2019). Although the defendant had pointed to "a few dozen numbers that appear to be business or mixed use," the defendant had failed to provide evidence to support its contention that there were "hundreds" or "many others," and therefore "[o]n the record before the court, to the extent resolution of these issues presents individual questions, these questions appear few in number, straightforward, and peripheral to the central issues in this litigation." *Id*. Defendants here have made even less of a showing, only asserting in a declaration that "several" happy hours were hosted by local businesses without any further elaboration.

Thus, given Defendants' failure to offer any evidence to indicate that individualized issues will predominate on this question, as well as the overall structure of Shark Bar's happy hour program and the messages it sends, the Court is not convinced based on the record before it that the residential subscriber issue will devolve into individualized questions that will predominate the litigation.

Therefore, the Court finds that common questions of fact and law predominate.

2. Superiority

The final requirement of Rule 23(b)(3) is that the class action form be superior to other methods of adjudication, an analysis that "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974). In determining whether superiority is met, a court considers:

> (A) the class members' interest in individually controlling the prosecution of separate actions;
> (B) the extent and nature of any litigation concerning this controversy already commenced by potential class members;
> (C) the desirability of concentrating the litigation of the claims in this forum; and
> (D) the difficulties likely to be encountered in managing a class action.

Rule 23(b)(3).

These considerations weigh heavily in favor of class certification. As to the first and second factor, Hand is the only class member to have come forward seeking to act as lead plaintiff in this class action, and there is no evidence before the Court that there is any other case concerning the claims at issue here against Shark Bar. Further, the costs of prosecuting each class member's claims individually would likely exceed each member's damages. *See Backer Law Firm v. Costco Wholesale Corp.*, 321 F.R.D. 343, 351 (W.D. Mo. 2017) (finding a class action was the superior method of adjudication of a TCPA claim because the claims pertained to the same federal statute, the class members had been identified, and it was a "negative value suit" because there is no statutory provision for recovery of attorneys' fees and even if taken to small claims court, "the filing/service fees and time spent on an individual action may exceed the $500 penalty and still be economically unfeasible for many class members.") Thousands of putative class members would have to bring claims individually if a class is not certified. In light

of the predominance of common questions, alternatives to class litigation would be more burdensome and far less efficient than participation in class litigation. The third factor, the desirability of concentrating the litigation of claims in this forum, also favors certification. Shark Bar is located in this district and thus the conduct at issue took place here. Finally, the Court finds no serious difficulties in managing a class action, and to the extent that some may arise, the benefits of adjudicating this case as a class action outweigh the possible costs in comparison to other methods of adjudication, because requiring several thousands of other lawsuits against Defendants would create unnecessary costs and burden.

Defendants express concern regarding the amount of damages sought here and contend "a class action is not superior, where, as here, a class action threatens Shark Bar's business viability." Doc. 164, p. 23. Defendants have not identified a case where a federal court denied a TCPA class certification due to the prospect of substantial statutory damages. Further, "[w]hile Defendants may face a potentially larger liability in a class action, it does not follow that any damages awarded would be disproportionate. The text of the statute makes absolutely plain that, in Congress's judgment, damages of $500 for each violation, or triple that if the violations are willful, are proportionate and appropriate compensation for the consumer." *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 691 (S.D. Fla. 2013). Should Defendants be found liable and the damages awarded be disproportionate to the offense, they may choose seek relief from this Court. *See Golan v. FreeEats.com, Inc.*, 930 F.3d at 962 (affirming a district court's reduction of the TCPA statutory damages award of $1.6 billion for unsolicited calls under the Due Process Clause because it was "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.") The potential that

Defendants could face a high damages award if found liable for their conduct is not a sufficient reason to deny class certification here.

Thus, the Court finds that Hand has met his burden of showing a class action is the superior method for adjudicating the claims of the proposed class members.

* * *

Therefore, the Court finds that the Do Not Call class satisfies the requirements of Rule 23(a) and 23(b)(3) and grants Plaintiff's motion to certify this class. As discussed, the Court denies as moot the motion as to the SendSmart and Txt Live classes.

V. CONCLUSION

For the reasons stated above, Plaintiff's motion for partial summary judgment is denied. Defendants' motion for summary judgment is granted in part and denied in part. Defendants' motion to exclude expert testimony is denied.

Plaintiff's motion for class certification is granted in part and denied in part, with the Do Not Call class defined as discussed above.

Pursuant to Federal Rule of Civil Procedure 23(g), the Court appoints William C. Kenney, Benjamin H. Richman, Michael Ovca, and Eve-Lynn J. Rapp as class counsel.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: April 27, 2020
Jefferson City, Missouri