UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

J.T. HAND, individually and on behalf of all others similarly situated,

Plaintiff,

v.

BEACH ENTERTAINMENT KC, LLC d/b/a SHARK BAR, et al.,

Defendants.

Case No.: 4:18-cv-668-NKL

Hon. Nanette K. Laughrey

PLAINTIFF'S REPLY SUGGESTIONS IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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Setting aside Plaintiff Hand's straightforward class definitions, Defendants seek to inject one hypothetical concern after another in an attempt to show that individual inquiries will be required at every turn. In reality, the core issues of Plaintiff's and the proposed class's claims—and Defendants' defenses to them—turn on common evidence.[1]

I. INDIVIDUAL ISSUES DO NOT PREDOMINATE.

Defendants' primary argument is that individualized issues predominate over common questions. That is not the case. "The predominance inquiry requires an analysis of whether a prima facie showing of liability can be proved by common evidence or whether this showing varies from member to member." *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013). And here, Defendants do not dispute that each of the elements required to establish liability can be proved by common evidence. Specifically, Defendants do not dispute (1) whether the SendSmart system qualifies as an ATDS is a common question, (2) whether the TXT Live! system qualifies as an ATDS is a common question, (3) whether the text messages constitute "telephone solicitation" is a common question, and (4) whether Cordish and ECI can be liable for the text messages sent by Shark Bar is a common question. Instead, Defendants point to three affirmative defenses that they claim raise individualized issues that destroy predominance: consent, existing business relationship, and non-residential subscriber.

Even if these defenses actually raised individual issues (which, as explained below, they do not), that wouldn't defeat predominance in light of the undisputedly common questions underlying Plaintiff's prima facie case. This Court has previously explained, "where common issues otherwise predominated, courts have usually certified Rule 23(b)(3) classes even though

[1] To circumvent Local Rule 7.0(d), the Opposition includes 16 pages of argument masquerading as "Factual Background." Plaintiff limits his Reply to the arguments raised in the Opposition's 13-page "Argument" section and respectfully requests that argument found elsewhere be stricken or ignored.

individual issues were present in one or more affirmative defenses." *Cromeans v. Morgan Keegan & Co.*, 303 F.R.D. 543, 561 (W.D. Mo. 2014) (internal citation omitted); *see also Eastwood v. S. Farm Bureau Cas. Ins. Co.*, 291 F.R.D. 273, 286 (W.D. Ark. 2013) ("Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class.") (internal citation omitted). Predominance is satisfied in spite of Defendants' challenges.

A. Defendants' consent argument does not destroy predominance.

Defendants argue that consent is an individual question that destroys predominance. It does not. Consent here requires a signed, written agreement. (Mot. at 13.) Having shredded the paper cards and sign-in sheets that could easily answer the question as to whether such consent existed, Defendants are left grasping at straws as to what evidence could establish a signed, written agreement between Shark Bar and members of the classes.

For example, Defendants point to "positive responses" from putative class members to the text messages. (Opp. at 19.) But contrary to Defendants' assertion, a positive response to a text message is not evidence that the recipient had previously provided a signed, written agreement to receive text messages as required here. *See Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 492-93 (N.D. Ill. 2015) ("The problem with these [arguments] is that they incorrectly equate appreciating [defendant's calls] with the issue of legal significance, namely, whether recipients provided prior express consent to receive prerecorded phone calls[.]"); *Aranda v. Caribbean Cruise Line, Inc.*, 202 F. Supp. 3d 850, 858-59 (N.D. Ill. 2016) (rejecting argument that positive responses precluded certification, noting that "even plaintiffs who [respond positively to a caller] ha[ve] a right to be free from unsolicited telemarking 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.").

Regardless, even if a positive response were evidence of prior express consent,

Defendants point to just four putative class members—"MG," "DL," "AC," and "SW"—(out of tens of thousands) who responded positively to a Shark Bar text. Indeed, in crafting the proposed class lists, Plaintiff sought to exclude as many such people as possible. (Mot. at 2 n.2.)[2] That a few such people may remain in the proposed classes—and this Court is free to exclude the four identified by Defendants—does not destroy predominance. *See Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371, 375 (8th Cir. 2018) (the existence of "some affirmative defenses peculiar to some individual class members" does not destroy predominance); *Bridging Communities, Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1126 (6th Cir. 2016) ("Even where defendants point to some evidence that a defense will indeed apply to some class members … courts routinely grant certification because Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class.") (internal quotations omitted).

Defendants also point to declarations from two of Mr. Uhlig's friends, Sandy Lee Anderson and Patrick Kilgore. (*See* Exs. A, B, C.)[3] Each states they submitted their contact information—not their signature—on paper cards, and that they agreed to receive text messages from Shark Bar. (Exs. A, B ¶¶ 3–4.)[4] But neither Ms. Anderson nor Mr. Kilgore are class members, as the class lists reflect. (*See* Kenney Decl. ¶ 8.) Even if they were, again, identifying a handful of class members who may have individual defenses doesn't destroy predominance. In any case, it's only because Defendants shredded the paper cards and sign-in sheets that they need to rely on customer declarations to try to establish consent. Defendants can't destroy

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[2] Plaintiff's attempt to exclude such people is in no way an "implicit[] conce[ssion] that individuals who responded positively … expressly consented to receiving text messages and therefore have no TCPA claim[.]" (Opp. at 18.) As explained above, such people *do* have TCPA claims; positive response is not evidence of prior express written consent. Plaintiff's exclusion of such people stemmed from a desire to avoid distracting sideshows during class certification proceedings, which, apparently, was unsuccessful.

[3] Unless noted, all exhibits are attached to the Declaration of Bill Kenney, filed herewith.

[4] In addition to being irrelevant, the declarations were untimely produced. (Kenney Decl. ¶ 5).

predominance by using their own sloppy recordkeeping to argue that individualized evidence is required to assert their consent defense. *See Zyburo v. NCSPlus, Inc.*, 44 F. Supp. 3d 500, 503 (S.D.N.Y. 2014) (rejecting request "to reward its imperfect record-keeping practices by precluding class certification[]"); *Saulsberry v. Meridian Fin. Servs., Inc.*, 2016 WL 3456939, at *9 (C.D. Cal. Apr. 14, 2016) (endorsing argument would create a "perverse incentive run[ning] counter to the protective intent of the TCPA").

Finally, if the Court is concerned that Defendants—despite their shoddy recordkeeping—should be allowed to rely on each individual class member's testimony regarding prior express written consent, such testimony can be solicited during a claims process. If, for example, Mr. Hand is ultimately successful in establishing Defendants' liability for text messages made to class members without their prior express written consent, class members can—during a claims administration process—declare under penalty of perjury that they did not sign any such agreement with Shark Bar. *See Mullins v. Digital Direct, LLC*, 795 F.3d 654, 666-68 (7th Cir. 2015); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1132 (9th Cir. 2017). Any potential need for individual declarations of this sort should not defeat class certification. *See Briseno*, 844 F.3d at 1132 ("[W]e see no reason to refuse class certification simply because [a class member] will present her affidavit in a claims administration process after a liability determination has already been made."); *Mullins*, 795 F.3d at 667-68.

B. Defendants' established business relationship and non-residential subscriber arguments do not destroy predominance.

Defendants also argue that whether the parties had an established business relationship ("EBR") or whether any of the numbers texted were non-residential defeats predominance. (Opp. at 21-22.) These defenses only apply to Plaintiff's DNC Class and don't preclude predominance.

First, Defendants argue their EBR defense will require "an individualized and time

consuming analysis of credit card transactions and other records." (Opp. at 22.) In Defendants' view, an EBR is shown simply through a purchase at Shark Bar. That is not correct. An EBR is "formed by a voluntary two-way communication" between a caller and a called party. 47 C.F.R. § 64.1200(f)(5). Receipts are not a "two-way communication" establishing an EBR, and Defendants point to no other potential evidence of such communications. "[T]he mere mention of a defense is not enough to defeat the predominance requirement of Rule 23(b)(3)." *Bridging Communities*, 843 F.3d at 1126. Even if evidence of a two-way communication sufficient to establish an EBR for some members of the proposed DNC Class existed, courts routinely find this does not defeat class certification. *See Krakauer v. Dish Network L.L.C.*, 311 F.R.D. 384, 398 (M.D.N.C. 2015), *aff'd*, 925 F.3d 643 (4th Cir. 2019) (16 class members with potential EBR not sufficient); *Reliable Money Order, Inc. v. McKnight Sales Co.*, 281 F.R.D. 327, 338 (E.D. Wis. 2012), *aff'd*, 704 F.3d 489 (7th Cir. 2013) (noting "such issues [individual consent and EBR] are minor and can certainly be handled within the framework of a class action.").[5]

For similar reasons, whether a class member is residential subscriber is not an individualized inquiry defeating predominance. The FCC presumes that wireless numbers that are registered on the National Do-Not-Call Registry ("NDNCR") (i.e., the numbers of nearly every member of the proposed DNC Class) are residential numbers. *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14039 (2003). And Defendants don't identify a single business in the proposed DNC Class. Again, mere mention of a defense is not enough; even if Defendants had identified a few non-residential numbers in the DNC Class, that would not prevent certification. *See*, *Krakauer*, 311 F.R.D. at 396.

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[5] *Lindsay Transmission, LLC v Office Depot, Inc.*, 2013 WL 275568 (E.D. Mo. Jan. 24, 2013) is inapposite, the class was stricken because it was defined to be fail-safe, not because of EBR issues. *Id.*, at *4.

II. NUMEROSITY, SUPERIORITY, AND "ASCERTAINABILITY" ARE ESTABLISHED.

A. The Classes are Sufficiently Numerous.

Defendants try to create an insurmountable hurdle out of Rule 23(a)(1)'s numerosity requirement, (Opp. at 27), but numerosity is met so long as there are more than 20 class members, *see Arkansas Educ. Ass'n v. Bd. of Educ.*, 446 F.2d 763, 765 (8th Cir. 1971). The TXT Live! and SendSmart Class lists contain and individuals. And while Defendants seek to strike Mr. Shawn Davis's explaining how the lists were generated,[6] doing so would not change the content or size of the TXT Live! and SendSmart Class lists, which would be the same and would *still* be sufficiently numerous. And while Plaintiff did not present this Court with a comprehensive list of people in the proposed DNC Class, this Court is "entitled to make common sense assumptions in order to support a finding of numerosity." *Biben v. Card*, 1986 WL 1199, at *3 n.7 (W.D. Mo. Jan. 6, 1986) (internal quotations omitted). Here, it is reasonable to assume that a significant number of the tens of thousands of people "on either the SendSmart or TXT Live! Class Lists … received more than one text message from Shark Bar in any twelve-month period to a number included on the [NDNCR]." (Mot. at 2); *see also Biben*, 1986 WL 1199 at *3 (finding it "reasonable to assume that a considerable number of the 1,500 or so stock owners were active in buying and selling" shares). Plaintiff showed that the DNC Class contains at least people. (Mot. at 5.) Even crediting the wholly unsupported contention this includes "well over 100" erroneous entries, (Taylor Decl. ¶ 22), leaves thousands of people in the DNC Class.

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[6] Defendants paint Mr. Davis as an undisclosed expert. But his declaration makes clear he did nothing more than combine and sort Defendants' own spreadsheets. This administrative help in using Microsoft Excel does not transform him into an expert. *Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.*, 2017 WL 1806583, at *5-6 (N.D. Cal. May 5, 2017) (collecting cases). Mr. Taylor on the other hand literally includes an "Expert Report" purporting to opine on the efficacy of the NDNCR. His report, not Mr. Davis's, should be stricken. *See Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1008 (8th Cir. 1998).

B. A Class Action to Resolve These Negative-Value Suits Is Superior.

Defendants also contend that the proposed classes fail Rule 23(b)(3)'s superiority requirement because class members have not filed individual cases against the bar and because the TCPA provides incentives for individual lawsuits. (Opp. at 23.) First, Rule 23(b)(3) requires an inquiry into the existence of other lawsuits not to speculate into putative class members'—or non-class members' in Defendants' examples—personal reasons for suing (or not), (*see* Opp. at 23), but to determine whether putative class members have demonstrated an interest in "control[ing] their own litigation." *Robin Drug Co. v. PharmaCare Mgmt. Servs., Inc.*, 2004 WL 1088330, at *6 n.2 (D. Minn. May 13, 2004). Here, that no other lawsuits exist shows there are no conflicting interests and favors certification. *Id.* at *6. Second, while the TCPA provides for statutory damages, courts routinely acknowledge that individual TCPA cases are "negative value suit[s]," where "class members would spend more money to litigate their suits than what they can individually gain." *Backer Law Firm v. Costco Wholesale Corp.*, 321 F.R.D. 343, 350-51 (W.D. Mo. 2017). For the reasons Hand identified, class proceedings are superior. (Mot. at 15.)

C. Class Membership Turns on Objective Criteria.

Defendants contend the classes fail Rule 23's implicit ascertainability requirement. (Opp. at 28.) The Eighth Circuit has no "separate, preliminary requirement of ascertainability;" it—like most other circuits—requires a "proposed class definition [to] identif[y]class members by objective criteria." *Murphy v. Gospel for Asia, Inc.*, 327 F.R.D. 227, 235 (W.D. Ark. 2018) (quoting *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016)). It's hard to imagine, however, a more objective criterion for class membership than that proposed here for the SendSmart and TXT Live! Classes: a person is in the SendSmart Class if they're on the SendSmart Class List, and in the TXT Live! Class if they're on the TXT Live!

Class list. *See Backer Law Firm v. Costco Wholesale Corp.*, 321 F.R.D. 343, 348 (W.D. Mo. 2017) ("[P]roducing the Class List . . . allows the class to be ascertained with certainty."). And while Plaintiff did not produce a comprehensive DNC Class list, membership in that class is still determined by three objective criteria: a person is in the DNC Class if (1) they are on either the SendSmart or TXT Live! Class Lists, (2) they received more than one text message in any twelve-month period, and (3) their number was registered on the NDNCR when both texts were made.[7] Thus, no subjective determinations govern membership in any of the classes.

III. HAND IS A TYPICAL AND ADEQUATE PLAINTIFF.

Defendants contend that Mr. Hand is atypical and inadequate under Rule 23. But "[s]erious challenges to typicality and adequacy must be distinguished from petty issues manufactured by defendants to distract the judge from his or her proper focus under Rule 23(a)(3) and (4) on the interests of the class." *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 728 (7th Cir. 2011). Defendants' arguments fall squarely into the second bucket.

Defendants assert that "many—if not most—individuals included in Plaintiff's proposed classes would not dispute completing Paper Cards (or another form) as Plaintiff does," purportedly rendering him atypical. (Opp. at 25.) Declarations from two non-class members notwithstanding, Defendants fail to provide *any* support for their assertion. As Defendants shredded the evidence, they cannot provide examples of prior written consent provided by some class members and not by Hand. *Cf. Katz v. Am. Honda Motor Co.*, 2017 WL 3084272, at *3 (C.D. Cal. June 29, 2017); *see Zyburo*, 44 F. Supp. 3d at 503.

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[7] As explained, the DNC list was a sampling demonstrating numerosity, not a complete list of class members. Further comparison of the SendSmart and TXT Live! Classes against the NDNCR is easily accomplished through KCC, (Davis Decl. ¶ 16), Mr. Taylor's pages of praise for PossibleNow notwithstanding. To the extent Mr. Taylor suggests a comparison against the NDNCR is inherently unreliable and a class cannot be certified, courts disagree. *See Abante*, 2017 WL 1806583, at *4.

Without explanation, Defendants say Mr. Hand is "not credible." (Opp. at 26.) "For an assault to 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*, 637 F.3d at 728. Defendants' attack on Mr. Hand's credibility doesn't even come close. *See In re Dollar Gen. Corp. Motor Oil Mktg. & Sales Practices Litig.*, 2019 WL 1418292, at *14-15 (W.D. Mo. Mar. 21, 2019).

Defendants argue Mr. Hand knows nothing about the case. (Opp. at 26.) But "[a] proposed representative's knowledge of the case need not be robust," 1 Newberg on Class Actions § 3:67 (5th ed.); he need only be "aware of the basic facts of the case," *Dollar Gen.*, 2019 WL 1418292 at *14. *See also Mayo v. UBS Real Estate Secs.*, 2011 WL 1136438, at *4 (W.D. Mo. Mar. 25, 2011). Here, Mr. Hand knows the basic facts underlying his TCPA litigation, (Ex. D, Deposition of J.T. Hand at 56:6-11; 57:8-16; 60:11-61:2; 72:8-10; 72:19-73:15; 74:22-76:11; 84:12-24; 114:23-115:1), and his role as class representative, (*id.* at 76:21-77:3; 77:14-17). This sets him apart from the plaintiffs in Defendants' authority. *See Johnson v. U.S. Beef Corp.*, 2006 WL 680918, at *7 (W.D. Mo. Mar. 14, 2006) (plaintiff "kn[e]w nothing" about case; only involved because of parent); *Kassover v. Comput. Depot, Inc.*, 691 F. Supp. 1205, 1213-14 (D. Minn. 1987) (plaintiff admitted he had "no facts" behind claim).

Nor is Mr. Hand's friendship with one of his attorneys problematic. (Opp. at 26.) Absent the type of "personal *and* financial ties" with counsel in *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1254-55 (11th Cir. 2003) (plaintiff was his counsel's stockbroker)—which is not claimed to be present here—friendship alone does not render a plaintiff inadequate to represent a class. *See Holt v. Noble House Hotels & Resort, LTD*, 2018 WL 5004996, at *6-7 (S.D. Cal. Oct.

16, 2018) (30-year friendship between plaintiff and counsel not disqualifying).

IV. ABSENT CLASS MEMBERS HAVE STANDING.

Finally, Defendants argue that the classes contain individuals who lack Article III standing. But rather than addressing the nuances of Article III standing, Defendants rehash their merits arguments. As the Eighth Circuit has warned, "it is crucial … not to conflate Article III's requirement of injury in fact with a plaintiff's potential causes of action, for the concepts are not coextensive." *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 909 (8th Cir. 2016) (internal quotations omitted); *see also Stuart*, 910 F.3d at 377 ("Although couched as disputes about standing, [defendant's] arguments really go to the merits of plaintiffs' claims."). Even if—as Defendants argue—some members of the proposed classes consented to receiving the texts at issue, that is a (non-predominating) merits issue separate from Article III standing. Circuit law is clear that consumers have Article III standing to pursue TCPA claims in federal court. *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 957-59 (8th Cir. 2019).

Relegating *Golan* to a footnote, Defendants cite *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019) to assert a TCPA claim based on one text message lacks Article III standing. *Salcedo* created a split with at least two other courts on the issue—*Van Patten v. Vertical Fitness Grp., Inc.*, 847 F.3d 1037, 1043 (9th Cir. 2017), and *Melito v. Experian Mktg. Sols, Inc.*, 923 F.3d 85, 93-94 (2d Cir. 2019). A third case, *Sussino v. Work Out World Inc.*, 862 F.3d 346, 351-52 (3d Cir. 2017), holds that receipt of a single phone call is a concrete injury. While *Golan* involved two calls, it expressly drew upon the decisions in *Van Patten*, *Melito*, and *Sussino*. The Eight Circuit was unconcerned with the number of calls, writing "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." *Golan*, 930 F.3d at 959. Article III presents no obstacle to class certification.

Mr. Hand's Motion for Class Certification should be granted.

Date: December 5, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 5, 2019, the foregoing document was electronically filed with the Court's Electronic Filing System and will be served electronically on all registered attorneys of record.

/s/ Bill Kenney
William C. Kenney