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

J.T. HAND, individually and on behalf of all others similarly situated, *Plaintiff*, vs. BEACH ENTERTAINMENT KC, LLC d/b/a SHARK BAR, et al., *Defendants*.	Case No.: 4:18-cv-668-NKL Hon. Nanette K. Laughrey

REPLY SUGGESTIONS IN SUPPORT OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases:

United States Circuit Court of Appeals Cases:

United States District Court Cases:

Rules and Statutory Provisions:

Other Authorities:

PLAINTIFF'S RESPONSES TO DEFENDANTS' STATEMENT OF ADDITIONAL MATERIAL FACT RELIED ON IN THEIR OPPOSITION

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

RESPONSE: Denied that either TXT Live! or SendSmart required a human to specifically identify the recipients. "Winners" would be chosen "randomly" such that users would not know to whom text messages would ultimately be sent. *See Sendsmart-launch-create*, Vimeo, https://vimeo.com/165045443 at 2:40 (noting SendSmart "is gonna grab randomly" 100 numbers from a larger list meeting certain criteria); Ex. A, Deposition of Kyle Uhlig ("Uhlig Dep.") at 16:17–17:19, 25:11–26:5; 74:16–75:18; 78:23–79:11; Ex. B, Substitute Expert Report of Dr. Michael Shamos ("Shamos Rept.") ¶¶ 44–52, 77–78, 90–93; Ex. C, Deposition of Kyla Bradley ("Bradley Dep.") at 116:21–117:23; Ex. D (Mr. Uhlig admits that [redacted]).)[1] For example, in one of the campaigns sent to Plaintiff, [redacted] (Ex. E (screenshot of contacts and campaign page).) Further denied that users had to "create the message" as they could use [redacted] (Shamos Rept. ¶ 77; Uhlig Dep. at

[1] Unless otherwise specified, all exhibits are attached to the Declaration of William C. Kenney filed herewith.

51:16–19.) In fact, saved messages were used the majority of the time, and, within a single campaign, all of the text messages say the same thing. (Uhlig Dep. 51:16–19; *see also* Ex. F, Deposition of Montana Asher ("Asher Dep.") at 40:3–8.) For instance, Mr. Uhlig sent text messages [redacted], (Shamos Rept. ¶ 77), and [redacted], (Kenney Decl. ¶ 24). Admitted users had to click send in order for a campaign to launch, but—notably—[redacted]. (*See* Uhlig Dep. at 51:7–52:6.)

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

RESPONSE: Denied. [redacted] (*See* Shamos Rept. ¶¶ 36–55 ([redacted]); 58–72 ([redacted]); Ex. G, Deposition of Blake Miller ("Miller Dep.") at 89:19–92:5, 121:10–122:24; Ex. H, Deposition of Benjamin Rodriguez ("Rodriguez Dep.") at 69:8–70:22; Ex. I, Amended Expert Report of Dr. Michael Mitzenmacher ("Mitzenmacher Rept.") ¶¶ 54–55; Ex. J, Deposition of Dr. Michael Mitzenmacher ("Mitzenmacher Dep.") at 128:14–21.) In addition, as Dr. Shamos opined:

[redacted]

[redacted]

(Ex. K, Rebuttal Report of Dr. Michael Shamos ("Shamos Rebuttal Rept.") ¶ 26 (emphasis in original.) SendSmart did not purport to function differently. *See Sendsmart-launch-create*, Vimeo, https://vimeo.com/165045443 at 2:40 (noting SendSmart "is gonna grab randomly" 100 numbers from a larger list meeting certain criteria).

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

RESPONSE: Defendants' assertion that the Platforms cannot "produce[] . . . telephone numbers to be called that were created using a random or sequential number generator" is vague, and unsupported by Defendants' cited evidence. To the extent that Defendants' mean the Platforms themselves do not create entirely new telephone numbers to be called using random or sequential number generators, admitted. Denied that the Platforms are not capable of "storing telephone numbers to be called that were created using a random or sequential number generator." Telephone numbers that were created using a random or sequential number generator could be uploaded to the Platforms' databases, just like any other phone number. (*See* Shamos Rept. ¶¶ 32, 85.) In fact, [redacted] (Ex. U, Deposition of Dr. Michael Shamos ("Shamos Dep.") at 164:14-166:16.)

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

RESPONSE: Admitted that numbers must be manually uploaded to the Platforms. [redacted] (Mitzenmacher Rept. ¶ 102 n.133; Shamos Rept. ¶¶ 32, 85, 87.) Denied that this information was provided only by Shark Bar customers. Plaintiff did not provide his contact information to Shark Bar and began receiving marketing text messages from the bar even before he first visited. (Ex. L, Deposition of J.T. Hand ("Hand Dep.") 75:23–76:11; 90:20–93:13; 96:23–97:8; Ex. M (Pl.'s Resps. to Defs.' Interrog. Nos. 5, 7); *see also* Ex. N ([redacted].) Mr. Uhlig testified that [redacted] (Uhlig Dep. at 102:21–103:10; Ex. O (Mr. Uhlig stating that [redacted].) Further, Lauren Bust testified [redacted] (Ex. P, Deposition of Lauren Bust ("Bust Dep.") at 75:9–76:1; Ex. Q ([redacted].)

5. Each SendSmart user account [redacted]

[redacted] (Smith Opp. Decl. Ex. B (Yasnoff Decl.) ¶¶ 10-12.)

RESPONSE: Admitted that user accounts, [redacted] Admitted that a user could, but did not have to, [redacted] Denied that users would only contact "customers." Plaintiff did not provide his contact information to Shark Bar and began receiving marketing text messages from the bar even before he first visited. (Hand Dep. at 75:23–76:11; 90:20–93:13; 96:23–97:8; Ex. M (Pl.'s Resps. to Defs.' Interrog. Nos. 5, 7).

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

RESPONSE: Admitted that a user could, but did not have to, select criteria to identify groups of individuals to text. (Bradley Dep. at 116:21–117:23; Uhlig Dep. at 25:11–27:7; 74:16–18; Shamos Rept. ¶¶ 88–93, 97.) Denied that users would only identify "customers" to be contacted. Plaintiff did not provide his contact information to Shark Bar and began receiving marketing text messages from the bar even before he first visited. (Hand Dep. at 75:23–76:11; 90:20–93:13; 96:23–97:8; Ex. M (Pl.'s Resps. to Defs.' Interrog. Nos. 5, 7).

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

RESPONSE: Defendants do not contend that Mr. Hand was ever sent a message after

a user specifically selected him when identifying individuals to text "one-by-one," and this fact is otherwise irrelevant to Plaintiff's claims such that no response is necessary. To the extent a response is required, admitted that this was possible in SendSmart.

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

RESPONSE: Admitted that a user *may* limit the total number of contacts. Denied that SendSmart does not randomly select contacts, or that date of contact necessarily determines who will be contacted. (Bradley Dep. 116:21–117:23; Uhlig Dep. at 25:11–27:7; 74:16–18; Shamos Rept. ¶¶ 88–93); *Sendsmart-launch-create*, Vimeo, https://vimeo.com/165045443 at 2:40 (demonstration explaining that SendSmart "is gonna grab randomly" 100 numbers from a larger list meeting certain criteria). And, as described in Plaintiff's Response to Defendants' Statement of Additional Material Fact ("RSAMF") ¶ 4, Plaintiff denies that SendSmart was limited to texting "customers."

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

[redacted]).)

RESPONSE: Admitted that a user types or pastes a saved message into SendSmart. Admitted that could include variables (like a user's name) that the SendSmart system would populate as it processed the campaign. (Mitzenmacher Rept. ¶ 36.)

10. A user must transmit a text message by clicking the launch button on the SendSmart Platform, which is necessary to send any text messages (Uhlig Decl. ¶ 15), and the resulting transmission is akin to sending a message by smartphone. (Smith Opp. Decl. Ex. E (Mitzenmacher Rep.) ¶¶ 37, 38; *id*. Ex. B (Yasnoff Decl.) ¶ 15.)

RESPONSE: Admitted that a user had to click launch in order to send a campaign, but—notably—[redacted]. (Shamos Rept. ¶¶ 92–93; Uhlig Dep. at 50:4–19; 67:24–68:11).) Denied that the resulting transmission is akin to when a user directs a smartphone to place a call or send a message. Smartphones cannot randomly select contacts to be texted, make use of message variables, or [redacted] (Mitzenmacher Dep. at 160:20–163:15; Shamos Dep. at 168:13–170:5; *see also* Shamos Rept. ¶ 81; Miller Dep., at 122:19–123:4.)

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

RESPONSE: Defendants do not contend that Mr. Hand ever engaged in back-and-forth text-message conversation, and this fact is otherwise irrelevant to Plaintiff's motion for summary judgment such that no response is necessary. To the extent a

response is required, admitted that SendSmart had this capability.

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

RESPONSE: Denied that individuals texted through TXT Live! are derived only though contact information provided by customers. Plaintiff did not provide his contact information to Shark Bar and began receiving marketing text messages from the bar even before he first visited. (Hand Dep. at 75:23–76:11; 90:20–93:13; 96:23–97:8; Ex. M (Pl.'s Resps. to Defs.' Interrog. Nos. 5, 7); *see also* Ex. N ([redacted]).) Mr. Uhlig testified that [redacted] (Uhlig Dep. at 102:21–103:10; Ex. O (Mr. Uhlig stating that [redacted]).) Further, Lauren Bust testified [redacted] (Bust Dep. at 75:9–76:1; Ex. Q ([redacted]).) Admitted that contact phone numbers were uploaded into TXT Live!. Denied that the recipients were determined by the users input

or that a user could review the filters application in real-time. As described in RSAMF ¶¶ 2, 14, 20, contacts were ultimately randomly determined by TXT Live! itself, and users would not know who would specifically be texted. (*See* Uhlig Dep. at 79:8–11; Asher Dep. at 18:5–17; Shamos Rept. ¶¶ 44, 68–69; Mitzenmacher Dep. at 127:18–128:10; Ex. R, Deposition of Dana Biffar ("Biffar Dep.") at 141:18–142:12.)

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

RESPONSE: Admitted that users *may* specify the number of customers to contact, but the number of cell phone numbers that TXT Live! can dial in a single campaign only depends on the number of cell phone numbers that are stored in Txt Live's MySQL database, [redacted]. (Shamos Rept. ¶¶ 57, 97; Uhlig Dep. 63:24–64:17; *see also* Ex. S, Deposition of Steve Klingbeil at 17:12–18:2.)

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

RESPONSE: Denied that TXT Live! users were, in all circumstances, able to view members of the campaign before it was sent. While it was possible in some instances for TXT Live! users to do so, for example when creating a campaign by specifically searching for and picking individual contacts to add, or [redacted] At that point, [redacted]

[redacted] (*See* Shamos Rept. ¶¶ 36, 57–72 ([redacted]); Miller Dep. at 89:19–92:5, 121:10–122:14; Uhlig Dep. at 78:23–25; Bradley Dep. at 112:25–115:20.) This process was accomplished through [redacted] (Rodriguez Dep. at 69:8–70:22; Shamos Rept. ¶¶ 68–69; Mitzenmacher Rept. ¶¶ 54–55; Mitzenmacher Dep. at 128:14–21.) Thus, [redacted]. (Ex. S ([redacted]); Uhlig Dep. at 75:6–18, 78:23–25; Bradley Dep. at 112:3–115:20 (noting that [redacted]); Mitzenmacher Rept. ¶ 71; Shamos Rept. ¶ 57.) TXT Live! users can only see which contacts have been campaigned after they respond; they have no way of knowing who will be texted prior to initiating a campaign. (Uhlig Dep. at 79:8–11; Asher Dep. at 18:5–17; Shamos Rept. ¶ 44; Mitzenmacher Dep. at 127:18–128:10; Rodriguez Dep. at 69:8–70:22.)

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

RESPONSE: Admitted that TXT Live! could not compose messages itself. Although, as discussed in RSAMF ¶ 17, it made use of variables to automatically include certain fields of information in outgoing messages, such as name.

16. On the TXT Live! Platform, a user must manually type or enter the content

of a message. (*Id*.)

RESPONSE: Denied that users were required to "manually type or enter the content of a message" as they could use pre-saved messages that already existed within the system. (Uhlig Dep. at 51:16–19.) In fact, saved messages were used the majority of the time, and, within a single campaign, all of the text messages say the same thing. (Uhlig Dep. 51:16–19; *see also* Asher Dep. at 40:3–8.) For instance, Mr. Uhlig sent text messages [redacted]. (Shamos Rept. ¶ 77.)

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

RESPONSE: Admitted that a variable is an instruction to populate the message with specified information. TXT Live! would then [redacted]. (Shamos Rept. ¶ 36; Mitzenmacher Dep. at 116:16–24; Bradley Dep. at 113:21–114:1.) Denied that users had to type in variables each time a message was sent, as they could use pre-saved messages that already included variables in them. (*See* RSAMF ¶ 16.) When variables were used, TXT Live! would [redacted]. (*See* Mitzenmacher Dep. at 116:16–24; Bradley Dep. at 113:21–114:1.)

18. In drafting a new message on the TXT Live! Platform, a user may manually select a saved message to create a new message to send. (Smith Opp. Decl. Ex. I

(Mitzenmacher Dep.) 116:4-10.) Any of the saved messages were previously typed in by a user. (*Id*.)

RESPONSE: Admitted that users could select pre-saved messages that already existed within the system. (Uhlig Dep. at 51:16–19.) In fact, saved messages were used the majority of the time, and, within a single campaign, all of the text messages say the same thing. (Uhlig Dep. 51:16–19; *see also* Asher Dep. at 40:3–8.) For instance, Mr. Uhlig sent text messages [redacted]. (Shamos Rept. ¶ 77.) Admitted that at some point in time a user had to type in the message one time.

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

RESPONSE: Defendants do not contend that Mr. Hand ever engaged in back-and-forth text-message conversation, and this fact is otherwise irrelevant to Plaintiff's claims such that no response is necessary. To the extent a response is required, admitted that TXT Live! had this capability.

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

RESPONSE: Admitted that users had to click send in order for a campaign to launch, but—notably—[redacted] (Shamos Rept. ¶¶ 55–57, 77, 83; Uhlig Dep. at 50:4–19; 67:24–68:11; Ex. T (Uhlig Dep. Exhibit No. 5).) Denied

that the resulting transmission is akin to when a user directs a smartphone to place a call or send a message. Smartphones cannot send messages like TXT Live! can, including by randomly selecting contacts to be called, [redacted] or using variables to input contact names. (Mitzenmacher Dep. at 160:20–163:15; Shamos Dep. at 168:13–170:5; *see also* Shamos Rept. ¶ 81; Miller Dep., at 122:19–123:4.).

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

RESPONSE: Admitted that there is no scheduling functionality. Notably, however, users could send [redacted] (Shamos Rept. ¶ 56.)

22. Plaintiff's [redacted] (Smith Opp. Decl. Ex. G (Shamos Dep.) 71:21-72:15, 74:24-76:3, 119:3- 18, 122:3-14), and [redacted] (*id*. 81:23-82:7; 53:17- 23; *see id*. Ex. E (Mitzenmacher Rep.) ¶¶ 37, 38, 120, 123-27.)

RESPONSE: Admitted that Plaintiff's expert analyzed whether the SendSmart and TXT Live! systems met certain technical criteria. (*See* Shamos Rept. ¶¶ 12, 21–22, 25–27, 31) Denied that Plaintiff's expert made any legal conclusions about whether they met the statutory requirements of an ATDS under the TCPA. (Shamos Rept. ¶¶ 10, 14.) Denied that

Plaintiff's expert testified an ATDS under the TCPA would necessarily include smartphones. (*See* Shamos Dep. at 75:19–76:3; 116:7–118:2.) Dr. Shamos's report doesn't mention smartphones at all. (*See generally* Shamos Rept.) Denied that Dr. Shamos testified the platforms' dialing process—which [redacted] Dr. Shamos and Dr. Mitzenmacher testified that [redacted], including by randomly selecting contacts to be called, [redacted], or using variables to input contact names. (*See* Mitzenmacher Dep. at 160:20–163:15; Shamos Dep. at 168:13–170:5; *see also* Shamos Rept. ¶ 81; Miller Dep., at 122:19–123:4.)

INTRODUCTION

In their Opposition (Dkt. 165, the "Opp") to Plaintiff's Motion for Partial Summary Judgment (Dkt. 144, the "Mot."), Defendants reassert their view about what is required for technology to be an "automatic telephone dialing system" ("ATDS") under the TCPA, urging the Court to follow a skewed reading of the statute adopted in *Dominguez*—which even district courts in the Third Circuit have acknowledged is flawed—over the thoroughly reasoned analysis in *Marks*. Defendants repeat much of what has been said in briefs already, and provide little in the way of any new or convincing argument in support. As Plaintiff has pointed out before, whichever of the competing definitions of an ATDS this Court chooses to adopt, Defendants' SendSmart and TXT Live! software qualifies as an ATDS. Defendants' platforms each dial numbers automatically from a stored list, and they use random number generation to select lists of contacts to be called and then dial those numbers. Plaintiff's Motion should be granted.

ARGUMENT

I. A System Need Not Generate Numbers to Be an ATDS.

Defendants take it as given that coming up with phone numbers out of thin air is the immutable, defining characteristic of an ATDS. That is not the case. Indeed, as explained in Plaintiff's Motion, the language in the ATDS provision is ambiguous—a point that Defendants do not address—and courts disagree whether the phrase "using a random or sequential number generator" modifies both "store" and "produce," or just "produce." (Mot. at 2–3.) After undertaking a comprehensive analysis of the statute—one lacking in Defendants' cited authority—the Ninth Circuit concluded that the definition of an ATDS includes "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." *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1050–51 (9th Cir. 2018).

Since *Marks* was decided, courts around the country have adopted its analysis. *See Allan v. Pennsylvania Higher Educ. Assistance Agency*, 398 F. Supp. 3d 240, 244 (W.D. Mich. 2019); *Gonzalez v. HOSOPO Corp.*, 371 F. Supp. 3d 26, 34 (D. Mass. Apr. 9, 2019); *Espejo v. Santander Consumer USA, Inc.*, No. 11 C 8987, 2019 WL 2450492, at *7 (N.D. Ill. June 12, 2019) ("These structural and contextual features of the TCPA lead the Court to believe that the 'language in the statute indicates that equipment that made automatic calls from lists of recipients was also covered by the TCPA.'") (quoting *Marks*, 904 F.3d at 1051); *Adams v. Ocwen Loan Servicing, LLC*, 366 F. Supp. 3d 1350, 1355 (S.D. Fla. 2018) ("Upon the Court's independent review of the relevant case law, the Court agrees with the reasoning and conclusions of post-*ACA* decisions which hold that 'the statutory definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator.'") (quoting *Marks*, 904 F.3d at 1043); *Getz v. DIRECTV, LLC*, 359 F. Supp. 3d 1222, 1229 (S.D. Fla. 2019).

Rather than wrestle with the reasoned analysis in *Marks*, Defendants simply cite cases adopting Defendants' view, primarily *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 119–21 (3d Cir. 2018). (*See* Opp. at 28.) But unlike *Marks*, *Dominguez* contains no analysis of why it interpreted the ATDS provision to require random or sequential number production. *See Dominguez*, 894 F.3d at 117; *see also Marks*, 904 F.3d at 1052 n.8 (cabining *Dominguez* as an "unreasoned assumption" and noting it "avoided the interpretive questions raised by the statutory definition of [an] ATDS"); *Gonzalez*, 371 F. Supp. 3d at 32 (*Dominguez* "seems to have assumed that a device must itself be capable of generating random or sequential telephone numbers to qualify as an ATDS"). This is hardly surprising: the central question *Dominguez* was answering related to a

system's "present capacity" to function as an autodialer, not the "store or produce" issue before *Marks* or this Court. *Dominguez*, 894 F.3d at 117–18. It's equally disingenuous to say the Sixth Circuit "interpreted" the ATDS definition to require number generation. (Opp. at 28.) The two-page, unpublished decision in *Gary v. TrueBlue, Inc.* didn't address the issue of dialing numbers from a stored list at all, No. 18-2281, 2019 WL 5251261, at *1 (6th Cir. Sept. 5, 2019).

This failure to actually grapple with the statutory definition extends from *Dominguez* to the cases relying on it, as well as others that Defendants cite. In *Roark v. Credit One Bank, N.A.*, the court failed to undertake any independent statutory analysis of why the ATDS definition would require random or sequential number generation. No. CV 16-173 (PAM/ECW), 2018 WL 5921652, at *2 (D. Minn. Nov. 13, 2018).[2] And in *Johnson v. Yahoo!, Inc.*, the court acknowledged *Marks* and other authority finding that number generation was not required to qualify as an ATDS, but concluding—without any statutory analysis—that "I read the statute differently, and it is not ambiguous." 346 F. Supp. 3d 1159, 1162 (N.D. Ill. 2018). The *Folkerts v. Seterus, Inc.* court not only failed to reason why number generation was required, but went so far as to require that "Plaintiffs must point to evidence that the system Defendant used to call them had the present capacity to store, produce, **and** dial numbers at random or in sequence." No. 17 C 4171, 2019 WL 1227790, at *6–*7 (N.D. Ill. Mar. 15, 2019) (emphasis added). This is directly contrary to the statutory definition of an ATDS, which requires equipment "to store **or** produce telephone numbers to be called . . . ." 47 U.S.C. § 227(a)(1)(A) (emphasis added).

The cases Defendants cite that did undertake a definitional analysis based their reasoning

[2] *Roark* also misreads *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) as requiring numbers be randomly or sequentially generated and dialed in order to qualify as an ATDS. *Roark*, 2018 WL 5921652, at *2. But *ACA Int'l* specifically left open this question open. 885 F.3d at 702–03; *see also Duran v. La Boom Disco, Inc.*, 369 F. Supp. 3d 476, 489 (E.D.N.Y. 2019) (explaining that "the D.C. Circuit expressly declined to endorse either interpretation" defining ATDS to include system dialing from a list).

on "the punctuation canon" to reach their conclusions that the phrase "using a random or sequential number generator" must modify both "store" and "produce." *Thompson-Harbach v. USAA Fed. Sav. Bank*, 359 F. Supp. 3d 606, 625 (N.D. Iowa 2019) (citation omitted); *Adams v. Safe Home Sec. Inc.*, No. 3:18-CV-03098-M, 2019 WL 3428776, at *3 (N.D. Tex. July 30, 2019). Not only is *Thompson* the only case in the entire Circuit to specifically mention the canon, its application here is suspect because it has the effect of writing "store" out of the ATDS provision, as do other cases adopting the *Dominguez* paradigm, as *Marks*, *Gonzalez*, and the line of cases endorsing their reasoning have held. If random or sequential number generation is required, a system would always qualify as an ATDS regardless of whether it stored the numbers or not. For example, the *Smith v. Premier Dermatology* court—which "quibble[d] with the grammatical analysis of" a prior case requiring number generation—noted "the word 'store' ensures that a system that generated random numbers and did not dial them immediately, but instead stored them for later automatic dialing . . . is an ATDS." No. 17 C 3712, 2019 WL 4261245, at *5 (N.D. Ill. Sept. 9, 2019) (internal quotation omitted). "Store" is superfluous here, as 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. *See also DeNova v. Ocwen Loan Servicing*, No. 8:17-CV-2204-T-23AAS, 2019 WL 4635552, at *3–*4 (M.D. Fla. Sept. 24, 2019) (acknowledging this "occasional redundancy," making same error as in *Smith*). The "cardinal principle" that courts "must give effect, if possible, to every clause and word of a statute" thus cautions against such a reading. *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation omitted).

In addition to writing out the word "store," Defendants' proffered construction would have the Court eliminate exceptions to liability that are specifically enumerated in the statute.

(Opp. at 29 n.2). Congress prohibited "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C.A. § 227(b)(1)(A). Implicitly acknowledging the exemptions for calls made only to consumers with prior express consent or to collect a government backed-debt require preset lists and are incompatible with the random-number generation requirement espoused by *Dominguez*, (*see* Mot. at 4 (citing *Marks*, 904 F.3d at 1051)), Defendants suggest that these exemptions may apply only to calls using an artificial or prerecorded voice, (Opp. at 29 n.2 (citing *Gadelhak v. AT&T Servs., Inc.*, No. 17-CV-01559, 2019 WL 1429346, at *5 (N.D. Ill. Mar. 29, 2019)). But *Gadelhak* offers no support—from Congress, caselaw, or otherwise—to support its assertion that the enumerated exceptions would only apply to artificial or prerecorded voice calls notwithstanding the statute's plain language.

Tellingly, there isn't even a coherent interpretation of the ATDS provision across Defendants' cited authority. *Compare Safe Home*, 2019 WL 3428776, at *3 ("Thus, 'using a random or sequential number generator' modifies both 'to store' and 'to produce.'") *with Gadelhak*, 2019 WL 1429346, at *5) ("[T]he phrase 'using a random or sequential number generator' modifies neither 'store' nor 'produce,' but instead actually modifies 'telephone numbers to be called.'"). And FCC Commissioner Michael O'Rielly did not analyze *Marks* or opine on what *Marks* supposedly misinterpreted when speaking at a trade conference for debt collectors, advocating that "'robocall' is not a bad word." Remarks of FCC Commissioner Michael O'Rielly, (May 16, 2019), docs.fcc.gov/public/attachments/DOC-357496A1.pdf, at 3.

Not only does the *Marks* interpretation make more sense linguistically, it also makes more sense from a technical perspective. As Dr. Shamos explained, storage of numbers is not carried out using a random or sequential number generator, (Shamos Rept. ¶ 25), a fact that

several courts have found significant. *See Gonzalez*, 371 F. Supp. 3d at 34 (discussing that "it is unclear how an ATDS—or indeed anything—could 'store' numbers 'using' a number generator"); *see also Marks*, 904 F.3d at 1050 (endorsing view that "a number generator is not a storage device; a device could not use 'a random or sequential number generator' to store telephone numbers"). Defendants do not put forward any technical explanation as to how this might be possible. For his part, Dr. Mitzenmacher, Defendants' expert, was not aware of any dialing systems in operation during the relevant time period that would meet each of his requirements as an ATDS. (Mitzenmacher Dep. 163:5–15; 201:16–203:1.) Nor does Defendants' cited authority, *DeNova*, provide any technical answer. (Opp. at 29 n.3.) Instead, *DeNova* sidesteps the problem by saying that the numbers that are being "stored" are those that have *already* been generated using a random or sequential number generator. 2019 WL 4635552, at *3-4. Doing so, as discussed, renders "store" superfluous. (*See* pp. 3–4, *supra*.)

II. The Systems Randomly Determine Who Will Be Texted.

Even if this Court were to read in a requirement that the systems must randomly generate numbers in order to qualify as an ATDS, the ultimate finding is the same. Both TXT Live! and SendSmart have the present capacity to randomly select lists of telephone numbers to be called, a fact that is not credibly in dispute. (*See* Mitzenmacher Dep. at 117:15–120:3; Shamos Rept. ¶¶. 31, 45, 47, 48 59–60; *see also* Biffar Dep. at 141:18–142:12; Miller Dep. at 92:4-5; *Sendsmart-launch-create, Vimeo*, https://vimeo.com/165045443 at 2:40.) Defendants try to paint *ACA Int'l* as precluding such software from being an ATDS. (Opp. at 30.) But *ACA Int'l* specifically left open this question. *ACA Int'l*, 885 F.3d at 702–03. *Gadelhak*, 2019 WL 1429346, at *1, and *Smith v. Navient Sols., LLC*, No. CV 3:17-191, 2019 WL 3574248, at *9 (W.D. Pa. Aug. 6, 2019) similarly fail to address dialing systems like those at issue here, which *randomly* selects

"winners" to be texted, not rote reordering. (*See* Shamos Rept. ¶ 69-70 (pointing out the code's [redacted]); Mitzenmacher Rept. ¶¶ 54–55 (same); Mitzenmacher Deposition, at 118:12-119:7, 124:17-24.) Defendants' attempt to construe this randomization process as a feature that "limits" the number of persons contacted has no bearing on whether the systems are each an ATDS. And in any event, this rings hollow when the indisputable facts show that [redacted]. (Miller Dep. at 122:19–123:4). Fundamentally, were Defendants' view on this correct—that randomly generating lists of numbers out of a database, and then dialing those numbers did not qualify as an ATDS—any telemarketer in the country could avoid all liability whatsoever under the TCPA by doing nothing more than uploading a sequential list of numbers in an area code (for example, each of the approximately 4.8 million possible Kansas City, Missouri phone numbers beginning with 816), to software that, like those here, randomly dials numbers from that list.

III. There Was No Human Intervention in the Dialing of the Numbers.

Finally, Defendants try to highlight as much human interaction with their systems as they can to show they are not automated. But there is no human intervention where it matters: in the dialing of the numbers, the hallmark of an ATDS. A machine does not need to be sentient to be an ATDS. The undisputed facts show that in a matter of a few button clicks, Defendants could automatically deliver thousands of advertising texts to unwitting recipients. In short, the level of "human intervention" required by Defendants' systems does not disqualify either of them from being classified as an ATDS. *See, e.g.*, *In re Collecto, Inc.*, No. 14-MD-02513-RGS, 2016 WL 552459, at *4 (D. Mass. Feb. 10, 2016) (discussing that "the FCC's definition of an ATDS is based on the capacity of a dialer to operate without human intervention, and not on whether *some* act of human agency occurs at some point in the process") (emphasis in original).

For both TXT Live! and SendSmart, a user's involvement is limited to [redacted] (*See* Shamos Rept. ¶¶ 36, 57–72 (describing the sequence of code); Miller Dep. at 89:19–92:5, 121:10–122:14; Uhlig Dep. at 25:11–26:5; 78:23–25; Bradley Dep. at 112:25–115:20.) As Defendants' employees make clear, the systems' critical use was to [redacted] (Bradley Dep. at 74:16–75:18; 116:2–117:23; Uhlig Dep. at 16:17–17:19; 25:11–26:5;79:8–11; Asher Dep. at 18:5–17.).

The few cases Defendants cite are readily distinguishable because in each instance, a human selected each specific number that is dialed—a point that Defendants leave unmentioned. *See Ramos v. Hopele of Fort Lauderdale, LLC*, 334 F. Supp. 3d 1262, 1265 (S.D. Fla. 2018) (discussing that defendant had to manually create a list of specific numbers, including removal of landline numbers); *Duran*, 369 F. Supp. 3d at 490 (addressing same system as *Ramos*, in which "the program can only be used to send messages to specific identified numbers" and do "not have the ability to generate randomized or sequential lists of contact cell phone numbers"). In *Ramos* and *Duran*, the specific numbers that were going to be texted were known to the users when they were creating the messages and before messages were sent. TXT Live! and SendSmart are not so limited; [redacted]. And *Ammons v. Diversified Adjustment Service, Inc.*, which required "a 'clicker agent,' [to] physically click a dialog box *to launch each individual call*," No. 218CV06489ODWMAAX, 2019 WL 5064840, at *5 (C.D. Cal. Oct. 9, 2019) (emphasis added), is a far cry from the

systems here, which [redacted]. The type of restricted, one-to-one ratio between button press and text message sent that was present in *Ammons* is missing here; Defendants' employees were not required to select a specific individual or click send with respect to each individual text message.

Defendants' attempt to distinguish *Gonzalez* and *Espejo* as dealing with predictive dialers instead of texting platforms falls flat. Like a predictive dialer, the specific recipients of any given text are not known to Defendants' employees. As the *Sterk v. Path, Inc.* court held in addressing a similar platform: "the equipment used by [the defendant], which makes calls from a stored list without human intervention is comparable to the predictive dialers that have been found by the FCC to constitute an ATDS . . . . It is the ultimate calling from the list by the automated equipment that is the violation of the TCPA." 46 F. Supp. 3d 813, 819 (N.D. Ill. 2014).[3]

Finally, Defendants' concern about smartphones being construed as autodialers is unwarranted. When Congress last amended the TCPA in 2015, smartphones had long been in regular use, and the FCC and courts had regularly construed the type of system that dials numbers from a stored list as an ATDS. *See Marks*, 904 F.3d at 1052 (recounting history of FCC and court orders and noting that "Congress left the definition of ATDS untouched" and that it "gave the interpretation [that an ATDS includes devices that could dial numbers from a stored list] its tacit approval"). Appellate courts have faced this argument before and do not find it troublesome. *See, e.g.*, *Duguid v. Facebook, Inc.*, No. 17-15320, 2019 WL 2454853, at *4 (9th

[3] Whether a case involved predictive dialers is irrelevant to analyzing the ATDS provision. If anything, it provides additional support for the *Marks* interpretation: predictive dialers can be paired with predetermined lists of numbers to be called. *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14091 (2003); *see Ramos*, 334 F. Supp. 3d at 1273 (holding ATDS definition includes "any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists") (internal citations and quotations omitted).

Cir. June 13, 2019) (acknowledging "Facebook's argument that any ATDS definition should avoid implicating smartphones," but noting it "provide[d] no reason to adopt" Facebook's proposed distinction in the ATDS provision); *see also Sterk*, 46 F. Supp. 3d at 820 (rejecting defendant's argument that "the FCC's interpretation leads to absurd results where even a cell phone could constitute an ATDS if able to make calls from a list").

It does not follow from Dr. Shamos' statement that [redacted] that every smartphone owner is a TCPA violator or violator-in-waiting. Any court considering the example posited in *ACA Int'l*—a person sending an invitation to a backyard barbeque to a number obtained from a mutual friend—would be right to throw out a TCPA case brought by the recipient; the result of such an application would be absurd. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (noting that in "rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling"). But when it comes to the facts of this case, and the application of the TCPA to them, Defendants' argument founders completely. No one contends that a stock iPhone or Android device can function as TXT Live! and SendSmart do; this includes the designers of the TXT Live! platform, (*see* Miller Dep., at 122:19–123:4), as well as both parties' experts, (Mitzenmacher Dep. at 160:20–163:15; Shamos Dep. at 168:13–170:5; *see also* Shamos Rept. ¶ 81). Defendants' attempt to treat software that can [redacted] the same as an off-the-shelf smartphone should be rejected. Defendants' systems are squarely captured by the plain statutory definition of an ATDS, and Defendants are the type of telemarketer that Congress sought to regulate. *See ACA Int'l*, 885 F.3d at 698. Defendants' fictional application of the ATDS provision to a smartphone does not save its argument.

CONCLUSION

The Court should grant Plaintiff's Motion for Partial Summary Judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 19, 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