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

PLAINTIFF'S SUGGESTIONS IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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PLAINTIFF'S RESPONSES TO DEFENDANTS' STATEMENT OF UNCONTROVERTED MATERIAL FACTS

Defendants

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

RESPONSE: Admitted.

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

RESPONSE: Admitted that ECI is a consultant firm located in Baltimore, Maryland that provides services to over 50 Cordish-owned restaurants, bars, and nightclubs, including in Missouri with respect to Shark Bar. (*See*, Ex. A to the Hudolin Decl. (ECI-Shark Bar Management Contract); Ex. A[1] (reflecting ECI's Missouri address); Ex. B (ECI's registration to do business in Missouri).)

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

RESPONSE: Denied. Lauren Bust, a director of marketing strategy, [redacted]

[1] Unless otherwise specified, all exhibits referenced herein are attached to the contemporaneously-filed Declaration of William C. Kenney filed in support of Plaintiff's Suggestions in Opposition to Defendants' Motion for Summary Judgment.

“[redacted]. (Ex. C, Deposition of Lauren Bust (“Bust Dep.”) at 13:13–14:8.) Her LinkedIn profile states the same. *Lauren Bust*, LinkedIn, https://www.linkedin.com/in/laurenbust (listing position as Director, Digital Strategy at The Cordish Companies.) She [redacted] Cordish. (Bust Dep. at 31:22–32:16.) Ms. Bust further testified that [redacted] Bust Dep. at 58:5–8), [redacted] (*id*. at 31:8–13), and [redacted] (*id*. at 28:12–15.)

Ashley St. Pierre, who now works at ECI, [redacted] (Ex. D, Deposition of Ashley (“St. Pierre Dep.”) at 16:1–18:6.) Ms. St. Pierre testified that [redacted] (*Id*. at 25:10–19.)

Mark Musselman—former General Manager of Shark Bar and McFadden’s, and former District Manager for the KC Live! Block—testified that [redacted] (*see Jim Watry*, LinkedIn, https://www.linkedin.com/in/jim-watry-2a21a77), hi[redacted]. (Ex. E, Deposition of Mark Musselman (“Musselman Dep.”) at 7:14–8:16, 9:9–21, 10:23–11:18.) Mr. Musselman further testified that [redacted]

[redacted] (*Id*. at 19:3–20:14.) Reed Cordish also lists himself as a "Principal" at Cordish. Reed Cordish, *Our Team, The Cordish Companies*, https://cordish.com/about/team; Reed Cordish, *LinkedIn*, https://www.linkedin.com/in/reed-cordish.

Morgan Hughes—former marketing intern and sales manager for Shark Bar—testified [redacted] (*see* Rachel Waller, *LinkedIn*, https://www.linkedin.com/in/rachel-waller-0b261410), and [redacted]. (Ex. F, Deposition of Morgan Hughes ("Hughes Dep.") at 9:9–11:24.) Ms. Hughes further testified [redacted] (*Id*. at 11:25-12:18; Ex. G Deposition of Kyla Bradley ("Bradley Dep.) at 16:9–17:7.)

Cordish has represented time and again that it enters into development agreements with cities, including Kansas City, and that it "owns and manages" its businesses. *See Power & Light District Announces Fund to Cultivate Local Entrepreneurs*, The Cordish Companies https://cordish.com/news/articles/power---light-district-announces-fund-to-cultivate-local-entrepreneurs (addressing "The Cordish Company's financial commitment to Kansas City . . ."); *About Us*, The Cordish Companies, https://cordish.com/about ("The Cordish Companies still owns and manages virtually every business it has created."); *Kansas City Live*, The Cordish Companies, https://cordish.com/portfolio/kansas-city-live ("Kansas City Live!, in the heart [of] *Cordish's* Power & Light District . . .") (emphasis added); *Testimonials*, The Cordish Companies, https://cordish.com/about/testimonials?page=4 (statements from Kansas City's

mayor regarding "The Cordish Companies"). According to Cordish's website, "[t]oday, the Kansas City office of The Cordish Companies manages … the entertainment block, KC Live!." *Our History*, Kansas City Power & Light District, http://www.powerandlightdistrict.com/explore/our-history.

Shark Bar and KCPL

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

RESPONSE: Admitted as to the content of the linked article.

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

RESPONSE: Admitted as to the content of the linked article.

Cordish Companies

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

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

RESPONSE: Denied. Cordish lists Shark Bar as one of its "subsidiary entities." (Ex. H (corporate registration listing Beach Entertainment KC, LLC as a subsidiary entity).) Plaintiff further incorporates his response in Plaintiff's Response to Defendants' Statement of Material Fact ("RDSMF") ¶ 3, which sets out the myriad connections between Cordish and Kansas City and its employees. Furthermore, [redacted]) In fact, Reed Cordish—a Principal at The Companies and President of ECI (*Reed Cordish,* LinkedIn, https://www.linkedin.com/in/reed-cordish; *Our Team*, The Cordish Companies, https://cordish.com/about/[redacted]

While wholly irrelevant to the factual or legal issues in Defendants' summary judgment motion, Plaintiff also disputes a number of false statements contained in Fowler's declaration, such as his claim that "[p]rior to when Plaintiff began pursuing this action, I participated in a meeting with Plaintiff's counsel," and "[d]uring that meeting, … [Plaintiff's counsel and former counsel] threatened that if 'Cordish' did not pay a significant sum to them, they would target similar lawsuits against multiple other venues …" In reality, Plaintiff's counsel sent a spoliation letter on Shark Bar on February 15, 2018, advising Shark Bar that their client (Mr. Hand) intended on pursuing a claim against Shark Bar "for sending text messages promoting happy hours and other specials and events …" Plaintiff Hand put Defendants on notice of this lawsuit on February 15, 2018, and filed this lawsuit on April 25, 2018, only *after* which Defendants' former counsel requested a meeting. (Ex. M (February 15, 2018 letter).) As evidenced by Mr. Turner's May 17, 2018 email, that meeting did not take place until May 18, 2018, *i.e.*, nearly a month *after* this lawsuit was filed. (Ex. N (May 17, 2018 email asking if the meeting is "still on for tomorrow").) At that meeting, Defendants' representatives expressed that they were interested in exploring early settlement, and they requested that Plaintiff's counsel refrain from filing the additional lawsuits identified in the February 15, 2018 letter, and stated they would be in touch. (Kenney Decl. ¶ 17). Plaintiff's counsel did delay filing the additional lawsuits for a short period of time, however, Defendants never followed up regarding early settlement. (*Id.*) Only later did Plaintiff's counsel discover that Defendants used this delay to modify the website terms and conditions for all of their entertainment districts on April 5, 2018—including KCPL—to include arbitration clauses, class action waivers, and jury trial waivers. (*Id.*) Plaintiff additionally discovered that ECI had been sending "re-engagement" text messages to thousands of putative class members, attempting to lead them into replying "Y" and agreeing to new terms

and conditions, thus prejudicing their claims in this and other cases.[2] (*Id*.) On July 31, 2018, shortly after discovering Defendants' actions, Plaintiff's counsel filed lawsuits against the remaining venues identified in his February 15, 2018 letter, including *Hand v. ARB KC, LLC et al*., Case No. 4:19-cv-108-BCW (W.D. Mo.), *Taylor v. KC Vin, LLC et al*., Case No. 4:19-cv-110-DGK (W.D. Mo.), and *Doohan v. CTB Investors, LLC*, 4:19-cv-111-FJG (W.D. Mo.). (*Id*.) Plaintiff's counsel has always been open to consolidating all of these cases in order to conserve judicial time and resources, but Defendants have been adamant that they view each of these cases as separate and distinct. (*Id*.)

Finally, Plaintiff's counsel never requested or demanded any sum of money at the initial meeting with Defendants' representatives, let alone "a significant sum." (*Id*.) In fact, the *first and only* settlement demand that Plaintiff or his counsel have made with regards to this case was at mediation, which took place on December 17, 2018. (*Id*.)

ECI

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

RESPONSE: Admitted.

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

[2] *See* Plaintiff's Motion to Limit Defendant's Communications with Putative Class Members and for Corrective Sanctions, *Beal v. Outfield Brew House, LLC*, Dkts. 55-56, No. 2:18-cv-4028-MDH (W.D. Mo.); Plaintiff's Response to Defendants' Notice of Clarification with Respect to Briefing on Defendants' Motion to Dismiss, *Taylor v. KC VIN, LLC, et al*., Dkt. 62, No. 4:19-cv-110-DGK (W.D. Mo.).

RESPONSE: Admitted.

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

RESPONSE: Admitted. Notably, Allison Varlan—"Chief Financial Officer" and "Controller" of ECI signed for ECI. *See Allison Varlan*, LinkedIn, https://www.linkedin.com/in/allison-albright-varlan-a3593442/. Jacob Miller, "Senior Vice President" of ECI—who answers directly to ECI's "President" Reed Cordish—signed on behalf of Shark Bar. *See* Ex. O, Deposition of Jacob Miller ("Miller Dep.") at 6:7–7:4, *Cusimano v. Lounge KC, LLC and The Cordish Companies, et al.*, Nos. 1416-CV05138 and 1416-CV23362 (Dec. 10, 2015, Cir. Ct. of Jackson Cty., Mo.).[3] Specifically, the Consulting Agreement [redacted]" (Hudolin Decl. Ex. A, § 4.2.)

10. The Consulting Agreement further includes [redacted]" provision:

[redacted].

[3] Mr. Miller also holds the titles of: "executive vice president with Cordish" (*Leinenkugel's President Shares Why KC Has Its Only Restaurant*, The Cordish Companies, https://cordish.com/news/articles/leinenkugel-s-president-shares-why-kc-has-its-only-restaurant (noting the restaurant "is owned and operated by The Cordish Co.")); "Chief Revenue Officer" of ECI, (*Jake Miller*, LinkedIn, https://www.linkedin.com/in/jake-miller-284bb238/); and "President" and "nonmember manager" of KCLPA, the Living Room, Mosaic, Maker's Mark, Tengo Dos Sed, Shark Bar, PBR, McFadden's, and Pizza Bar, (Miller Dep. at 54:12-57:1).

Id. Ex. A, § 11.2 (emphasis added).

RESPONSE: Admitted that the consulting agreement states as such.

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

RESPONSE: Admitted.

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

RESPONSE: Denied. ECI is listed as the company that was ultimately billed for the use of Twilio—the telecommunications provider through which TXT Live! sends its messages. (Ex. P ([redacted]).) Plaintiff sought any records of payments from Shark Bar to ECI, Cordish, or any other third-party regarding the use of the platforms, but produced none showing any reimbursement to ECI or Cordish. (Ex. Q (Shark Bar Resp. to Pl.'s Request for Production No. 41).)

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

RESPONSE: Admitted that the Hudolin Declaration states as such. However, ECI nevertheless sent text messages to tens of thousands individuals—including individuals that had been to Shark Bar—attempting to get them to respond "Y" in order to agree to an arbitration clause, and waive their right to a jury trial, or to participate in a class action lawsuit. (*See* Kenney

Decl. ¶¶ 17, 53–54 (explaining how the list was constructed and referencing numbers texted in the summer 2018 campaign that are also in Shark Bar's database).)

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

RESPONSE: This is a legal conclusion for which no response is required. Furthermore, and in violation of L.R. 56.1, no record evidence is cited in support of this statement. Plaintiff further incorporates his responses in RDSMF ¶¶ 3, 6, 15.

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

RESPONSE: This is a legal conclusion for which no response is required. Furthermore, and is otherwise unsupported as required by Local Rule 56.1. Plaintiff further incorporates his responses in RDSMF ¶¶ 3 and 6. In addition, Kansas City-based employees supported Shark

"[redacted] (Ex. Y.) Failure to comply with these directions risked [redacted]. (Ex. Z; Bradley Dep. at 95:22–100:9).)

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

RESPONSE: This is a legal conclusion for which no response is required. Furthermore, and in violation of L.R. 56.1, no record evidence is cited in support of this statement. Plaintiff further incorporates his responses in RDSMF ¶¶ 3, 6, and 15, which lists individuals with common oversight and control over Shark Bar.

Shark Bar's Happy Hour Contest

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

RESPONSE: Admitted that Shark Bar offered events to individuals from whom it obtained contact information in order to [redacted]) Denied that this information was obtained solely from "customers who were interested in participating in such events." Guests were required to provide their contact information in order to check in at bar events and receive happy hour specials. (Ex. [redacted].) Further, Plaintiff did not provide his contact information to enter to win any contest, event, or happy hour at Shark Bar, and began receiving marketing text messages from the bar

before he had ever been there. (Ex. [redacted].)

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

RESPONSE: Denied. Guests were required to provide their contact information in order to check in at bar events and receive happy hour specials. (Ex. AB ("[redacted]").") (emphasis in original).)

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

RESPONSE: Admitted that there were different ways in which Shark Bar collected contact information.

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

RESPONSE: Admitted that these were ways in which Shark Bar collected contact information.

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

RESPONSE: Denied. Mr. Uhlig lacks personal knowledge to testify that "many customers completed multiple forms of entry [redacted]

22. Upon [redacted] (Uhlig Decl. ¶ 6.)

RESPONSE: Denied. As is [redacted]

[redacted]

23. S[redacted]

[redacted]

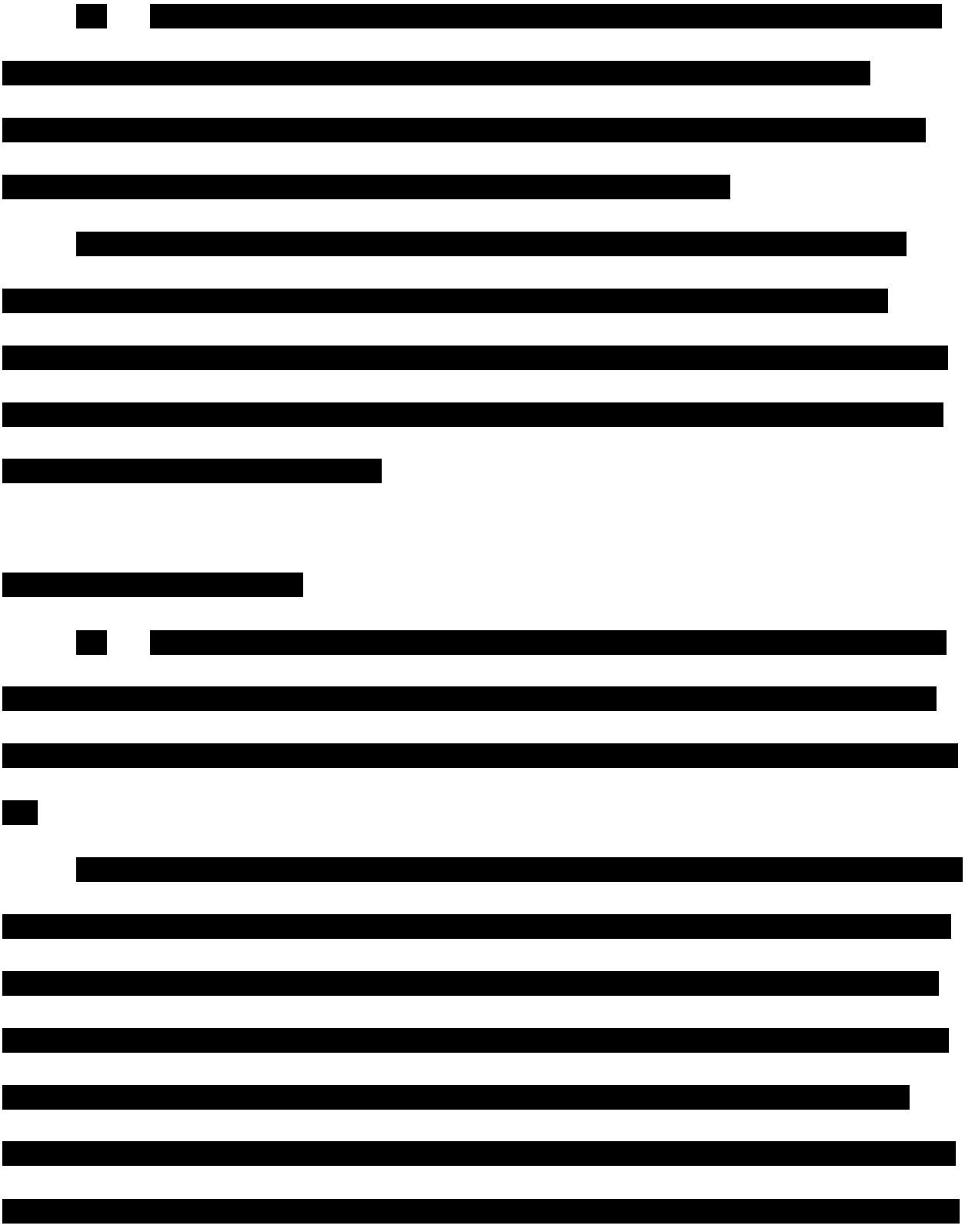
RESPONSE: Admitted that Defendants [redacted] to

[redacted]

24. Shark Bar [redacted]

individuals who [redacted]. (Uhlig Decl. ¶ 13.)

RESPONSE: [redacted]



[redacted]

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

RESPONSE: Admitted.

28. Mr. Uhlig used [redacted]

RESPONSE: Denied that the [redacted]

29. These communications [redacted]

[redacted]

RESPONSE: Denied that Shark Bar [redacted]

30. A user of the Platforms [redacted]

RESPONSE: Denied that [redacted]

[redacted]

31. Plaintiff's expert [redacted]

RESPONSE: Admitted. [redacted]

32. The Platforms are not [redacted]

RESPONSE: Denied. [redacted]

33. The only source [redacted]

RESPONSE: Denied. [redacted]

[redacted]

34. For a Shark Bar employee to [redacted]

RESPONSE: Admitted.

35. Next, the user [redacted] to send the messages. ([redacted]

RESPONSE: Denied. A [redacted]

[redacted]

36. Following that, the user must manually type or enter the content of the message.

[redacted]

[4]

[redacted]

RESPONSE: Denied that users were [redacted]

37. Last, the user must [redacted]

[redacted]

38. There is no [redacted]

[redacted]

RESPONSE: Admitted that there is no scheduling functionality. Notably, [redacted]

[redacted]

39. Nor can either Platform send text messages without a human being identifying the recipient(s), creating the messages and hitting the send button. ([redacted])

RESPONSE: Denied that either T[redacted]

[redacted]

[redacted] Further denied that users had [redacted]

40. Plaintiff's expert [redacted]

RESPONSE: Admitted.

41. Plaintiff's expert [redacted]

RESPONSE: Admitted.

42. Plaintiff's expert testified [redacted]

RESPONSE: Admitted that Plaintiff's [redacted]

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

43. Plaintiff is a repeat customer of KCPL; he has patronized numerous venues within KCPL over the course of years. (Smith Decl. Ex. H (Pl. Tr. 64:8-69:15).) Plaintiff began visiting KCPL in 2013 at the latest. (Smith Decl. Ex. H (Pl. Tr. 65:2-9; 16:14-19.)

RESPONSE: Admitted.

44. Plaintiff has known his counsel for several years and they would "hang out" together through mutual friends at the University of Missouri. (Smith Decl. Ex. I (Pl. Resp. Interrog. No. 17); *id*. Ex. H (Pl. Tr. 42:13-43:22).)

RESPONSE: Admitted.

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

RESPONSE: Denied. Plaintiff [redacted]en Shark Bar [redacted] Further, Mr. Uhlig testified [redacted]

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

RESPONSE: Denied that Shark Bar's records show Plaintiff provided his contact information to Shark Bar to enter to win a happy hour. [redacted]

[redacted]

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

RESPONSE: Admitted that Plaintiff's contact information is reflected in TXT Live!'s database. Denied that the [redacted]

48. This record accurately reflects Plaintiff's name, gender, phone number, email address, and phone number, but Plaintiff's full birthdate is off by about one month. (Smith Decl. Ex. H (Pl. Tr. 93:20-96:5).)

RESPONSE: Admitted.

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

RESPONSE: Admitted that Plaintiff's contact information was first uploaded into SendSmart's MySQL database on or about November 2, 2013. Shark Bar has [redacted]

[redacted]

50. Plaintiff cannot recall whether he visited Shark Bar before November 2, 2013. (Smith Decl. Ex. H (Pl. Tr. 96:17-22).)

RESPONSE: Admitted that [redacted]) Defendants have also not produced any records of financial transactions with Plaintiff prior to November 2, 2013.

51. During the relevant time, Plaintiff has lived and worked within 30 minutes of KCPL. (Smith Decl. Ex. H (Pl. Tr. 69:16-69:25).)

RESPONSE: While irrelevant, admitted.

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

RESPONSE: Admitted.

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

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

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

> [FN. 2] Mr. Uhlig transitioned to working for Shark Bar as a Form 1099 contractor in May 2016. (Smith Decl. Ex. K (Uhlig Tr. 12:20-21).)

RESPONSE: Admitted that Mr. Uhlig worked for Shark Bar since 2008, [redacted]

54. On March 18, 2015 and February 24, 2016, Mr. Uhlig sent Plaintiff a text message offering him the opportunity to book a party for his birthday, which was recorded in Shark Bar's system as March 26. (Uhlig Decl. Ex. C; Smith Decl. Ex. H (Pl. Tr. Ex. 4).)

RESPONSE: Admitted that [redacted]

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

have been sent. (*Id.*)

RESPONSE: Admitted that Mr. Uhlig had to log onto SendSmart. Denied that Mr. Uhlig had to type out and create the text messages that were sent through SendSmart. [redacted] For instance, Mr. Uhlig sent text messages containing the same three phrases through SendSmart over 125,000 times. (Kenney Decl. ¶¶ 59–60.) Admitted that [redacted]

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

RESPONSE: Admitted that certain filters could be applied, but denied that applying such criteria was required to send text messages. A[redacted]

57. After Shark Bar transitioned from the SendSmart Platform to the Txt Live Platform, Mr. Uhlig sent Plaintiff two more text messages: one on September 6, 2017, informing Plaintiff that he won a free party; the other on December 14, 2017, inviting Plaintiff to enjoy a VIP party. (Uhlig Decl. Ex. D.)

RESPONSE: Admitted that Defendants sent additional text messages to Plaintiff promoting Shark Bar.

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

RESPONSE: Admitted that Mr. Uhlig had to log onto TXT Live!. Denied that Mr. Uhlig had to type out and create the text message. [redacted] Admitted [redacted]

59. Mr. Uhlig also applied certain criteria on the Txt Live platform to identify customers who met certain requirements, such as customers with upcoming birthdays, as this

information was reflected for Mr. Hand. (Uhlig Decl. ¶ 16.)

RESPONSE: Denied. The [redacted]

Plaintiff further denies the message recipients were all Shark Bar "customers." [redacted]

[redacted] In addition, [redacted]

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

RESPONSE: Admitted that Plaintiff did not respond specifically to Mr. Uhlig's messages as reflected in Exhibits C and D to the Uhlig Declaration. Plaintiff [redacted])

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

RESPONSE: Admitted that [redacted]

62. There is no record of any request by Plaintiff to stop receiving text messages and Plaintiff could not identify any other evidence related to his alleged request. (Smith Decl. Ex. H

(Pl. Tr. 84:12-85:7).)

RESPONSE: Denied that no evidence exists that Plaintiff requested not to be texted; Plaintiff [redacted]

Plaintiff Patronized Shark Bar After Receiving Text Messages from Shark Bar

63. After Plaintiff received the text messages in March 2015 and February 2016. (Uhlig Decl. Ex. C.) Plaintiff visited Shark Bar on May 7, 2016, with friends and purchased drinks. (Smith Decl. Ex. H (Pl. Tr. 98:5-11, 102:19-106:6); *id*. Ex. I (Pl. Resp. to Interrog. No. 2); Uhlig Decl. Exs. A, B.)

RESPONSE: Admitted.

64. Plaintiff again visited Shark Bar on May 13, 2016, with friends and enjoyed drinks. (Smith Decl. Ex. H (Pl. Tr. 98:21-99:16, 106:24-109:18); *id*. Ex. I (Pl. Resp. to Interrog. No. 2).) In addition to Shark Bar, Plaintiff also visited another venue within KCPL on May 13, 2016. (Smith Decl. Ex. H (Pl. Tr. 107:2-22).)

RESPONSE: Admitted that Plaintiff visited Shark Bar on May 13, 2016. Whether Plaintiff "enjoyed drinks" is vague and irrelevant. To the extent "enjoyed" means "purchased," denied. Plaintiff testified [redacted] 16, (*see* Hand Dep. at 100:17–29) and the financial records only [redacted]

Plaintiff's Claims

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

RESPONSE: Admitted.

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

RESPONSE: Admitted that Plaintiff alleges Defendants failed to obtain the required prior express written consent to send advertising messages using an ATDS. Denied that Plaintiff alleges this "on information on belief." (SAC ¶ 50.)

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

RESPONSE: Admitted.

68. In Count I, Plaintiff alleges that Defendants violated Section 227(b)(1)(A)(iii) of the TCPA (SAC ¶¶ 83-90), which prohibits making a non-emergency call, or a call without the prior express consent of the called party, using an ATDS to a cellular telephone number (the "ATDS Claim"). 47 U.S.C. § 227(b)(1)(A)(iii).

RESPONSE: Admitted that Count I alleges Defendants' violated 227(b)(1)(A)(iii) of the TCPA . The remainder of Paragraph 68 is a legal conclusion to which no response is required. To the extent a response is required, admitted.

69. In Count II, Plaintiff alleges that Defendants violated the regulations set out in 47 C.F.R. § 64.1200(d) (SAC ¶¶ 91-101), which requires a company to institute certain procedures before calling a residential telephone subscriber on a landline for a telemarketing purpose (the "Procedural Claim"). 47 C.F.R. §64.1200(d).

RESPONSE: Admitted that Count II of Plaintiff's Second Amended Complaint ("SAC") alleges violations of 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(d). The remainder of Paragraph 69 is a legal conclusion to which no response is required. Nevertheless, admitted that 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(d) require telemarketers to establish and implement written policies and procedures that are available to the public on demand, and train their employees on such policies and procedures. *See* 47 C.F.R. § 64.1200(d). Denied that the Do-Not-Call ("DNC") rules only apply to telemarketing calls to a "landline"; 47 C.F.R. § 64.1200(e) explicitly provides that "[t]he rules set forth in paragraph (c) and (d) of this section [64.1200] are applicable to any person or entity making telephone solicitations or telemarketing calls *to wireless numbers* to the extend described in the [Federal Communication] Commission's Report and Order, CG Docket No. 02–278, FCC 03–153, 'Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991.'" 47 C.F.R. § 64.1200(e).

70. In Count III, Plaintiff alleges that Defendants violated Section 227(c) of the TCPA and the regulation set out in 47 C.F.R. § 64.1200(c)(2) (SAC ¶¶ 102-12), which prohibits

telephone solicitations, as defined by the TCPA, to residential telephone subscribers who registered their numbers on the National Do Not Call Registry ("NDNCR") (the "DNC Claim"). 47 U.S.C. §227(c); 47 C.F.R. §64.1200(c).

RESPONSE: Admitted that Count III of Plaintiff's SAC alleges violations of 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(c)(2). The remainder of Paragraph 70 is a legal conclusion to which no response is required. To the extent required, further admitted that 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(c)(2) prohibit telemarketers from placing telephone solicitations to phone numbers on the NDNCR. 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2).

71. In Count IV, Plaintiff alleges that Defendants sent Plaintiff two or more telemarketing text messages within any twelve-month period, after Plaintiff requested Defendants to stop (the "Revocation Claim") (SAC ¶¶ 113-22). 47 C.F.R. 1600(d)(3).

RESPONSE: Admitted that Count IV of Plaintiff's SAC alleges Defendants violated 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(d)(3), which require telemarketers to record opt-out requests at the time the requests are made, and to honor such requests for a period of five years.[5] (SAC ¶¶ 113-22); 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(d)(3).

Plaintiff's Motion for Class Certification

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

RESPONSE: Admitted.

[5] It appears that the reference to "47 C.F.R. 1600(d)(3)" is a typo.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

PLAINTIFF'S STATEMENT OF ADDITIONAL MATERIAL FACTS

1. The code underlying [redacted])

2. Plaintiff's proffered expert, Dr. Michael Shamos, [redacted]

3. Defendants' [redacted]

[redacted]

4. When a [redacted]

5. Users [redacted]

6. Dr. Mitzenmacher [redacted] (Mitzenmacher Dep. at 147:13–148:1.)

7. Cordish and ECI [redacted]

8. [redacted].) The data cards that were produced as Shark Bar – Hand00000001-2 do not disclose that Defendants will use an ATDS, and do not state that providing information is not a condition of purchase. (Ex. AU, Shark Bar – Hand00000001-2)

9. [redacted]

10. Shark Bar did [redacted]

11. Txt Live! [redacted]

INTRODUCTION

Defendants Beach Entertainment KC, LLC d/b/a Shark Bar ("Shark Bar"); The Cordish Companies, Inc. ("Cordish"); and Entertainment Consulting International, LLC, ("ECI") have moved on various grounds for summary judgment on all four counts of Plaintiff J.T. Hand's Second Amended Complaint. All of Defendants' arguments are without merit, and their motion should be denied.

First, Defendants seek summary judgment on Count I, which alleges that Defendants sent text messages to Mr. Hand's cell phone with an automatic telephone dialing system ("ATDS") in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(A)(iii). Defendants argue that neither of the autodialers they used to send the text messages qualify as an ATDS because they do not produce numbers to be called using a random or sequential number generator. But producing numbers to be called using a random or sequential number generator is not the *sine qua non* of an ATDS; an autodialer falls within the statutory definition of an ATDS if it stores lists of numbers and automatically dials numbers from those lists. The autodialers here do exactly that. And in any case, even if an autodialer must use a random or sequential number generator in order to be considered an ATDS, the autodialers here did that as well. When Shark Bar employees wanted to engage in a text message campaign, the autodialers would (in some cases subject to certain user-chosen criteria) randomly select numbers from Shark Bar's database to text. Either way, the undisputed evidence establishes that each autodialer is an ATDS, rendering summary judgment in Defendants' favor on that ground inappropriate. To the contrary, summary judgment on that issue should be entered in *Plaintiff*'s favor, and Mr. Hand has moved accordingly. (Dkt. 140.)

Second, Defendants seek summary judgment on Counts II, III, and IV, which allege

violations of various do-not-call regulations, because those regulations protect only "residential telephone subscriber[s]." 47 C.F.R. § 64.1200(c)(2), (d). While Defendants argue that a "residential telephone subscriber" does not include cell phone users like Mr. Hand, Defendants are mistaken. The relevant regulations on their face apply to "telephone solicitations or telemarketing calls to wireless telephone numbers." 47 C.F.R. § 64.1200(e). Summary judgment on this ground should be denied.

Third, Defendants argue that the TCPA creates no private cause of action under which Mr. Hand can bring Counts II and IV. While the TCPA subsection establishing a private cause of action for regulatory violations applies only to "regulations prescribed under this subsection," 47 U.S.C. § 227(c)(5), Defendants assert that the regulations forming the basis of Counts II and IV were not prescribed under that subsection. Again, however, Defendants are mistaken. The regulations in Counts II and IV, which relate to maintaining and complying with company-specific internal do-not-call procedures, were prescribed under subsection (c) of the TCPA, and the TCPA thus establishes a private cause of action for their violation.

Fourth, Defendants pepper their brief with a few other miscellaneous arguments: that there is no evidence that Mr. Hand made a do-not-call request to Shark Bar, that he had an existing business relationship with Shark Bar such that some of the text messages he received should not be considered, and that Count IV should be stricken as duplicative of Count II. Each of the arguments is baseless, and do not warrant summary judgment.

Finally, Defendants argue that summary judgment should be granted in favor of Cordish and ECI on the ground that they cannot be liable for text messages sent by Shark Bar. Defendants' contention that non-callers cannot be held liable for TCPA violations is wrong as a matter of law, however, and whether Cordish and/or ECI are ultimately liable for the texts as a

matter of fact rests on disputed issues inappropriate for resolution on summary judgment.

Defendants' motion for summary judgment should be denied in its entirety.

ARGUMENT

I. DEFENDANTS USED "AUTOMATIC TELEPHONE DIALING SYSTEMS" TO TEXT MR. HAND.

Defendants first argue that they are entitled to summary judgment on Count I because neither the SendSmart nor Txt Live! messaging platforms used by Shark Bar is an ATDS. (Dkt. 138 (the "Mot.") at 5–10.) Specifically, they argue that neither platform produces telephone numbers to be called using a random or sequential number generator, which, according to Defendants, is necessary to be considered an ATDS. (*Id*. at 5–8.) That argument fails for two reasons.[6] First, a text messaging system need not use a random or sequential number generator in order to qualify as an ATDS; automatically dialing numbers from a stored list is sufficient. Second, even if random or sequential number generation were required, the systems here randomly produce lists of numbers to be called using random number generators and then automatically dial those numbers.[7]

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)

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[6] As noted above, Mr. Hand has moved for partial summary judgment on the issue of whether the SendSmart and Txt Live! platforms fall within the statutory definition of an ATDS. His response to Defendants' argument on the ATDS issue here is largely repetitive of the argument he made in support of his own motion for partial summary judgment. (*See* Dkt. 144.)

[7] While there are two text messaging platforms at [redacted].

to dial such numbers." 47 U.S.C. § 227(a)(1). Courts have struggled with this definition, particularly with whether the phrase "using a random or sequential number generator" modifies both "store" and "produce," or just "produce." On the one hand, given the placement of the comma in part (A), "using a random or sequential number generator" would seem to modify both "store" and "produce." *See Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1050–51 (9th Cir. 2019). In that case, the definition could be read as "equipment which has the capacity (A) to store [telephone numbers produced using a random or sequential number generator]; or [to] produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *Id*. (alterations in original). Under that reading, a dialing system must use a random or sequential number generator in order to be considered an ATDS.

On the other hand, 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. *See id*; *Gonzalez v. HOSOPO Corp*., 371 F. Supp. 3d 26, 34 (D. Mass. 2019) ("[I]t is unclear how an ATDS—or indeed anything—could 'store' numbers 'using' a number generator."); (*see also* PSAMF ¶ 2 (referencing Shamos Rep. ¶ 25) ("While this may be a grammatical possibility, it makes no technical sense because storing is never done 'using a random or sequential number generator.'").) To avoid this incongruity, 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." *Marks*, 904 F.3d at 1050 (alterations in original). Under that reading, use of a random or sequential number generator is not necessarily required, because equipment that dials numbers from a stored list is an ATDS.

Because the text can reasonably support two conflicting interpretations—that the phrase

"using a random or sequential number generator" modifies both "store" and "produce" or that it modifies only "produce"—the D.C. and the Ninth Circuits have found the definition facially ambiguous. *ACA Int'l v. FCC*, 885 F.3d 687, 702–03 (D.C. Cir. 2018) ("So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? … It might be permissible for the [FCC] to adopt either interpretation."); *Marks*, 904 F.3d at 1051 ("After struggling with the statutory language ourselves, we conclude that it is not susceptible to a straightforward interpretation based on the plain language alone. Rather, the statutory text is ambiguous on its face."). Other courts agree. *See, e.g., Espejo v. Santander Consumer USA, Inc.*, No. 11 C 8987, 2019 WL 2450492, at *7 (N.D. Ill. June 12, 2019) ("Based solely on the statutory text, either of these interpretations are reasonable. Therefore, the Court joins the Ninth and D.C. Circuits in finding the ATDS definition to be facially ambiguous."); *Gonzalez*, 371 F. Supp. 3d at 34 ("[T]he TCPA is an unusually confusing statute.").

In light of the ATDS definition's facial ambiguity, the Ninth Circuit looked to "the context and structure of the statutory scheme" to try to interpret it. *Marks*, 904 F.3d at 1051. Looking to various other provisions in the TCPA, the Ninth Circuit noted a number of exceptions suggesting that the definition of ATDS is not limited to equipment using a random or sequential number generator:

> For instance, the TCPA permit[s] use of autodialers for a call "made with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A) (1991). To take advantage of this permitted use, an autodialer would have to dial from a list of phone numbers of persons who had consented to such calls, rather than merely dialing a block of random or sequential numbers.

Id. Similarly, the TCPA exempts using an ATDS to make calls "solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). Like the prior express consent

exception, "this debt collection exception demonstrates that equipment that dials from a list of individuals who owe a debt to the United States is still an ATDS but is exempted from the TCPA's strictures." *Marks*, 904 F.3d at 1052.[8] Likewise, the TCPA's prohibition on using an ATDS to dial certain kinds of numbers—such as numbers on the national do-not-call registry, emergency telephone lines, patient rooms in hospitals, and numbers assigned to paging services and cell phones—supports an interpretation of ATDS that does not require a random or sequential number generator:

> In order to comply with such restrictions, an ATDS could either dial a list of permitted numbers … or block prohibited numbers when calling a sequence of random or sequential numbers. In either case, these provisions indicate Congress's understanding that an ATDS was not limited to dialing wholly random or sequential blocks of numbers, but could be configured to dial a curated list.

Marks, 904 F.3d at 1051 n.7; (*see* PSAMF ¶ 3 (citing Mitzenmacher Dep. at 149:2–150:1 (recognizing that there "would have to be some sort of lookup process to determine if – once you generated a random number, if there was consent or not").)

Reading the definition of ATDS "in its context and with a view to its place in the overall statutory scheme," the Ninth Circuit ultimately concluded that "the statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a random or sequential number generator, but also includes devices with the capacity to dial stored numbers automatically." *Id*. at 1052 (internal quotations and alterations omitted).

Neither the Eighth Circuit nor any other court in this district has weighed in on this question. And while Defendants cite to the Third Circuit's decision in *Dominguez v. Yahoo, Inc*.,

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[8] Though some courts have recently held that the debt collection exception is an unconstitutional content-based restriction on speech and severed it from the TCPA, *Duguid v. Facebook, Inc*., 926 F.3d 1146, 1156-57 (9th Cir. 2019); *Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 171 (4th Cir. 2019), the fact that the exception was enacted in the first place illustrates Congressional understanding that a device that dials from a stored list of numbers is an ATDS, even where those numbers were not produced using a random or sequential number generator.

894 F.3d 116 (3d Cir. 2018), that decision does not provide a thorough analysis of the issue. Instead, it simply presents the "unreasoned assumption" offered "without explanation" that a device must be able to generate random or sequential numbers in order to qualify as an ATDS. *Marks*, 904 F.3d at 1052 n.8. Indeed, "the Third Circuit failed to resolve the linguistic problem it identified in an unpublished opinion in the same case, where it acknowledged that it is unclear how a number can be *stored* (as opposed to *produced*) using a random or sequential number generator." *Id*. (internal quotations omitted). Even a district court within the Third Circuit disagrees with *Dominguez*, ultimately following it only because it was binding on that court. *Richardson v. Verde Energy USA, Inc*., 354 F. Supp. 3d 639, 649-50 (E.D. Pa. 2018) ("If the Court were writing on a blank slate, it would likely follow the course chartered by the Ninth Circuit in *Marks*.") Unlike that district court, this Court *is* writing on a blank state, and should follow the well-reasoned, thoughtful decision in *Marks* holding that equipment dialing stored numbers automatically is an ATDS.[9]

Under *Marks*, the TXT Live! and SendSmart systems clearly each qualify as an ATDS because th[redacted]

[9] Along with *Dominguez*, Defendants also cite the Sixth Circuit's unpublished decision in *Gary v. TrueBlue, Inc*., No. 18-2281, 2019 WL 5251261 (6th Cir. Sept. 5, 2019) to support their contention that "for a system to qualify as an ATDS, it must produce numbers to be called 'using a random or sequential number generator' rather than merely dialing a stored list of numbers." (Mot. at 5.) But *Gary* provides even less analysis than *Dominguez*; indeed, it doesn't address the issue of dialing numbers from a stored list at all.

[redacted]

Furthermore, even if this Court were to adopt the Third Circuit's view from *Dominguez* that a random or sequential number generator is a required element of an ATDS, the TXT Live! and SendSmart systems *still* each qualify as an ATDS because they randomly select which numbers to call. [redacted] .) From there, the TXT Live! s[redacted]

[redacted]

Thus, [redacted]

Defendants additionally argue that regardless of how this Court comes out on the random

[10] [redacted]

or sequential number generator issue, they are entitled to summary judgment because Mr. Hand cannot establish that Send Smart and Txt Live! automatically send text messages without human intervention. (Mot. at 8–10.) [redacted] (Mot. at 10.) In Defendants' view apparently, a machine is an ATDS only if it is sentient, choosing on its own to start sending text messages and deciding what numbers to dial and what to say in those texts without any human intervention at all.[11] That incredible proposition is the stuff of science fiction novels, not what the drafters of the TCPA intended.

"By referring to the relevant device as an '*automatic* telephone *dialing* system,' Congress made clear that it was targeting equipment that could engage in automatic *dialing*, rather than equipment that operated without any human oversight or control." *Marks*, 904 F.3d at 1052. *See also Espejo*, 2019 WL 2450492 at *8 ("[T]he statutory language reveals what Congress anticipated would be automatic—the dialing."). "Common sense indicates that human intervention of some sort is required before an autodialer can begin making calls, whether turning on the machine or initiating its functions." *Marks*, 904 F.3d at 1052-53. The question is whether Defendants' text messaging platforms automatically *dial* numbers. T[redacted]

In sum, autodialing equipment need not include a random or sequential number generator

[11] [redacted]

in order to fall within the statutory definition of an ATDS. Automatically dialing numbers from a stored list—which Defendants' systems undisputedly do—is sufficient. But even if random number generation is required, both Txt Live! and SendSmart qualify as an ATDS because they generate random lists of numbers to be called using random algorithms, and then automatically dial those numbers. Consequently, Defendants' motion for summary judgment should not be granted on the ground that Shark Bar didn't use an ATDS, and—to the contrary—this Court should instead grant Mr. Hand's motion for partial summary judgment on the ATDS issue.

II. "RESIDENTIAL TELEPHONE SUBSCRIBER" INCLUDES CELL PHONE USERS.

Defendants next argue that they are entitled to summary judgment on Counts II, III, and IV—which allege violations of various FCC do-not-call regulations—because cell phone users like Mr. Hand are not "residential telephone subscribers" under those regulations. (Mot. at 11–13; 16.) Defendants are wrong. Cell phone users are residential telephone subscribers entitled to bring claims under the do-not-call regulations.

Counts II, III, and IV of the Second Amended Complaint are each brought under 47 U.S.C. § 227(c)(5), which creates a private cause of action for calls received "in violation of the regulations prescribed under this subsection." While each count alleges violations of a different do-not-call regulation, each of the regulations applies only to calls made to "a residential telephone subscriber." 47 C.F.R. § 64.1200(d)(1)-(6) (prohibiting telemarketing calls to residential telephone subscribers unless the caller has implemented certain company-specific internal do-not-call procedures); *id*. § 64.1200(c)(2) (prohibiting telephone solicitations to residential telephone subscribers who have placed their numbers on the national do-not-call registry); *id*. § 64.1200(d)(3) (requiring callers to honor residential telephone subscribers' caller-specific do-not-call requests). Defendants assert that the "residential telephone subscriber"

language of 47 C.F.R. § 64.1200(c) and (d)—the subsections forming the basis of Counts II, III, and IV—does not apply cell phone users, but in so arguing, "Defendant[s] overlook[] 47 C.F.R. § 64.1200(e), which extends the protections afforded by subsections (c) and (d) to solicitations 'to wireless telephone numbers.'" *Izor v. Abacus Data Sys., Inc*. No. 19-cv-01057, 2019 WL 3555110, at *2 (N.D. Cal. Aug. 5, 2019).

Specifically, subsection (e) states 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 to the extent described in [a 2003 FCC Report and Order]." 47 C.F.R. § 64.1200(e). That FCC Report and Order makes clear that the do-not-call regulations apply to cell phones. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14014, ¶ 36 (July 3, 2003) (the "2003 Report and Order") ("[W]e conclude that wireless subscribers may participate in the national do-not-call list."); *id*. ¶ 166 n. 612 ("Wireless subscribers … can easily make a company-specific do-not-call request."). Indeed, in the 2003 Report and Order, the FCC expressly rejected the argument that Defendants make here. *Id*. ¶¶ 34-36 (rejecting argument that the phrase "residential telephone subscribers" in the do-not-call regulations is limited to "telephone service used primarily for communication in the subscriber's residence").

None of the three cases cited by Defendants discuss or even mention subsection (e) of the regulations. *See Cunningham v. Sunshine Consulting Grp., LLC*, No. 16-2921, 2018 WL 3496538 (M.D. Tenn. July 20, 2018); *Cunningham v. Politi*, No. 18-cv-00362, 2019 WL 2519702 (E.D. Tex. Apr. 26, 2019); *Shelton v. Fast Advance Funding, LLC*, 378 F. Supp. 3d 356 (E.D. Penn. 2019). In contrast, courts that have not overlooked subsection (e) uniformly recognize that the do-not-call regulations apply to cell phone users. *See, e.g., Izor*, 2019 WL

3555110 at *2; *Sasin v. Enter. Fin. Grp., Inc.*, No. CV 17-4022, 2017 WL 10574367, at *5 (C.D. Cal. Nov. 21, 2017); *Hodgin v. Parker Waichman LLP*, No. 14-cv-733, 2015 WL 13022289, at *3 (W.D. Ky. Sept. 30, 2015); *Sieleman v. Freedom Mortg. Corp.*, No. CV 17-13110, 2018 WL 3656159, at *2 n.3 (D.N.J. Aug. 2, 2018); *Drew v. Lexington Consumer Advocacy, LLC*, No. 16-cv-00200, 2016 WL 1559717, at *6 (N.D. Cal. Apr. 18, 2016); *United States v. Dish Network LLC*, 75 F. Supp. 3d 916, 926 (C.D. Ill. 2014); *Buja v. Novation Capital, LLC*, No. 15-81002-CIV, 2017 WL 10398957, at *4 (S.D. Fla. Mar. 31, 2017); *Wagner v. CLC Resorts & Developments, Inc.*, 32 F. Supp. 3d 1193, 1198 n.3 (M.D. Fla. 2014).

III. THE TCPA CREATES A PRIVATE CAUSE OF ACTION FOR VIOLATIONS OF THE COMPANY-SPECIFIC INTERNAL DO-NOT-CALL REGULATIONS.

Defendants next argue that they are entitled to summary judgment on Counts II and IV because there's no private cause of action for violations of 47 C.F.R. § 64.1200(d). (Mot. at 14-16.) Defendants are wrong.

As noted above, subsection (c) of the TCPA creates a private cause of action for violations of regulations "prescribed under this subsection." 47 U.S.C. § 227(c)(5). And as explained below, § 64.1200(d) of the regulations was indeed prescribed under subsection (c) of the TCPA.

TCPA subsection (c) required the FCC to "initiate a rulemaking proceeding concerning the need to protect residential subscribers' privacy rights to avoid receiving telephone solicitations to which they object." 47 U.S.C. § (c)(1). In particular, Congress ordered the FCC to evaluate various alternatives for achieving this goal, including "company-specific 'do not call' systems." *Id.* § (c)(1)(A). The regulation forming the basis of Counts II and IV—47 C.F.R. § 64.1200(d)—enacts the company-specific internal do-not-call system envisioned by subsection (c) of the TCPA. Specifically, that regulation prohibits a company from initiating telemarketing

calls unless that company has "instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of" it. 47 C.F.R. § 64.1200(d). Among other things, the regulation requires companies to maintain an internal do-not-call list, honor consumer requests to be placed on the list, and train their telemarketing personnel on the existence and use of the list. *Id*. Because this regulation enacts the company-specific internal do-not-call option that Congress told the FCC to evaluate in subsection (c)(1)(A) of the TCPA, it is no surprise that courts throughout the country have determined that 47 C.F.R. § 64.1200(d) was promulgated under TCPA subsection (c), and that consumers thus have a private cause of action for its violation. *See, e.g., Charvat v. NMP, LLC*, 656 F.3d 440, 443-44, 448-50 (6th Cir. 2011); *Seileman*, 2018 WL 3656159, at *2 n.3; *Drew*, 2016 WL 1559717, at *6; *Heidorn v. BDD Mktg. & Mgt. Co., LLC*, No. C-13-00229, 2013 WL 6571629, at *10 (N.D. Cal. Aug. 19, 2013); *Kazemi v. Payless Shoesource Inc.*, No. 09-5142, 2010 WL 963225, at *3 (N.D. Cal. Mar. 16, 2010); *Benzion v. Vivant, Inc.*, No. 12-61826, 2014 WL 11531368, at *5 (S.D. Fla. Jan. 17 2014); *Valdes v. Century 21 Real Estate, LLC*, No. 19-05411, 2019 WL 5388162, at *3 (D.N.J. Oct. 22, 2019); *Izor*, 2019 WL 3555110, at *1; *Buja*, 2017 WL 10398957, at *4.[12]

Despite the clear connection between 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(d), Defendants argue that the regulation was not prescribed under that subsection of the statute. But Defendants' reasoning—and the reasoning of the cases on which they rely—is flawed. Citing cases like *Burdge v. Association Health Care Management, Inc.*, No. 10-cv-00100, 2011 WL 379159 (S.D. Ohio Feb. 2, 2011), Defendants argue that § 64.1200(d) of the regulations was

[12] Defendants criticize one of these cases, *Charvat*, as stating its conclusion "without analysis." (Mot. at 16.) Little analysis is needed, however, to draw the line between Congress's mandate in 47 U.S.C. § 227(c)(1)(A) that the FCC evaluate "company-specific 'do not call' systems" and the FCC's enactment in 47 C.F.R. § 64.1200(d) of regulations requiring that companies "maintain[] a list of persons who request not to receive telemarketing calls" from that company.

promulgated under subsection (d), not (c), of the TCPA. TCPA subsection (d) orders the FCC to "prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone." 47 U.S.C. § 227(d)(3). But while Defendants assert that § 64.1200(d) of the regulations "delineates internal 'procedures' and 'standards' for maintaining an internal do-not-call list" (Mot. at 15), procedures and standard relating to internal do-not-call lists are not what subsection (d) of the TCPA is talking about. The procedures and standards referenced in TCPA subsection (d)—requiring artificial or prerecorded voice messages to include certain information about the caller—are found in § 64.1200(b), not (d), of the regulations. *Compare* 47 U.S.C. § 227(d)(3) *with* 47 C.F.R. § 64.1200(b). *See also Meyer v. Capital All. Grp.*, No. 15-cv-2405, 2017 WL 5138316, at *15 (S.D. Cal. Nov. 6, 2017) ("[T]he regulations in section 64.1200(b) flow directly from the directives in Section 227(d)(3).") (internal quotations omitted).

Defendants' apparent confusion may arise out of the fact that 47 C.F.R. § 64.1200 was amended and reorganized in 2003. Originally, the FCC decided to implement subsection (c) of the TCPA by requiring only company-specific internal do-not-call lists, not a national do-not-call registry. *See Mainstream Mktg. Servs., Inc. v. F.T.C.*, 358 F.3d 1228, 1235 (10th Cir. 2004).[13] The company-specific internal do-not-call regulations were originally set out in 47 C.F.R. § 64.1200(e)(2). *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C.R. 8752, Appx. B (Oct. 16, 1992) (the "1992 Report and Order"). In 2003, however, the FCC decided to supplement the company-specific internal

[13] Subsection (c) of the TCPA ordered the FCC to establish regulations to protect consumers from unwanted telemarketing calls, but left the details up to the FCC. Two alternatives proposed (but not mandated) by Congress were "company-specific 'do not call' systems," 47 U.S.C. § 227(c)(1)(A), and "a single national database," *id.* § 227(c)(3). Defendants' motion seems to be premised on the mistaken belief that subsection (c) of the TCPA authorizes *only* a national do-not-call registry. (*See, e.g,* Mot. at 15.)

do-not-call regulations with a national do-not-call registry. *See Mainstream Mktg*., 358 F.3d at 1235. The national do-not-call registry regulations were set out in what is now 47 C.F.R. § 64.1200(c)(2). *See* 2003 Report and Order, 18 F.C.C.R. 14014, Appendix A. The existing company-specific internal do-not-call regulations were moved to 47 C.F.R. § 64.1200(d), and what was originally § 64.1200(d) of the 1991 regulations—the rules enacted pursuant to subsection (d) of the TCPA requiring artificial or prerecorded voice messages to include certain information about the caller—was moved to § 64.1200(b) of the regulations. *Id*.

Burdge, the primary case on which Defendants rely for the argument that the company-specific internal do-not-call regulations currently set out in 47 C.F.R. § 64.1200(d) were promulgated under TCPA subsection (d), not (c), confuses the 1992 and 2003 versions of the regulations. Specifically, the court in *Burdge* quoted the 1992 Report and Order for the proposition that § 64.1200(d) was promulgated under subsection (d) of the TCPA. 2011 WL 379159, at *4. But when the 1992 Report and Order refers to "64.1200(d)," it's referring to the 1992 version of the regulations. Thus, it was the 1992-era § 64.1200(d) (which, as noted above, is now § 64.1200(b)) that was promulgated under TCPA subsection (d). To draw the conclusion from the 1992 Report and Order's statement about *then*-64.1200(d) that what is *now* 64.1200(d) was promulgated under TCPA subsection (d)—as the court did in *Burdge*—is mistaken. To the contrary, the 1992 Report and Order makes clear that what is now 47 C.F.R. § 64.1200(d)—the company-specific internal do-not-call regulations (formerly 47 C.F.R. § 64.1200(e)(2))—was promulgated under TCPA subsection (c) and thus could serve as the basis for a private cause of action under TCPA subsection (c)(5). *See* 7 F.C.C.R. 8752, ¶ 24 (contemplating private causes of action under 47 U.S.C. § 227(c)(5) for violations of the company-specific internal do-not-call regulations).

All of this is a lengthy way to say that 47 C.F.R. § 64.1200(d)—the regulation on which Counts II and IV are based—was prescribed under subsection (c) of the TCPA, and Mr. Hand thus has a private cause of action for violations of that regulation. Defendants' motion for summary judgment on the ground that he lacks such a cause of action should be denied.

IV. DEFENDANTS' OTHER ARGUMENTS ARE WITHOUT MERIT.

Defendants make three other arguments that can be quickly disposed of.

First, Defendants argue that they are entitled to summary judgment on Count IV, the company-specific internal do-not-call claim, because there is no evidence that Mr. Hand made a do-not-call request to Shark Bar. (Mot. at 16-17.) That assertion is patently false. Mr. Hand testified under oath at his deposition and submitted an interrogatory answer under penalty of perjury that he responded "STOP" after first receiving text messages from Shark Bar, and that he continued to receive text messages thereafter. (RDSMF ¶ 62 (citing Hand Dep. at 84:20–24; 86:7–88:9; 89:17–91:2;115:14–20; 118:11–20; Ex. AD (Pl.'s Resp. to Defs.' Interrog. No. 6).) While Defendants argue that his testimony is "undercut" by the lack of a do-not-call request in Shark Bar's records (Mot. at 17), that simply illustrates that a factual dispute exists, precluding summary judgment on this issue. *See, e.g., Henderson v. Munn*, 439 F.3d 497, 503 (8th Cir. 2006) ("We need look no further than both parties' sharply conflicting accounts of the circumstances … to find a material factual dispute."); *Harry Stephens Farms, Inc. v. Wormald Americas, Inc.*, 571 F.3d 820, 821 (8th Cir. 2009) ("[Plaintiff] provided conflicting deposition testimony. Thus, we conclude that there remains a genuine issue of material fact, which cannot be resolved without making credibility determinations, weighing evidence, and drawing

inferences against the non-moving party.").[14]

Second, Defendants argue that two of the four texts sent to Mr. Hand cannot support Count III, his national do-not-call registry claim. (Mot. at 13-14.) As an initial matter, the argument is irrelevant, because only two texts are required to support his claim, 47 U.S.C. § 227(c)(5), and Defendants take no issue with the first two texts he received. Regardless, Defendants are wrong that the undisputed evidence shows that an "established business relationship" existed between Mr. Hand and Defendants rendering consideration of the second two texts inappropriate.

FCC regulations prohibit companies from making a "telephone solicitation" to someone on the national do-not-call registry. 47 C.F.R. § 64.1200(c)(2). As Defendants correctly note, however, "telephone solicitation" does not include a call to a consumer with whom the caller has "an established business relationship." 47 C.F.R. § 64.1200(f)(14)(ii). An "established business relationship" is "formed by a two-way communication between a person or entity and a residential subscriber … on the basis of the subscriber's purchase or transaction with the entity." 47 C.F.R. § 64.1200(f)(5). But while Defendants point to evidence showing that Mr. Hand paid for some drinks at Shark Bar (Mot. at 13), they fail to point to any particular "two-way communication" between Mr. Hand and Shark Bar that would create an established business relationship. And in any case, a consumer's "seller-specific do-not-call request … terminates an established business relationship … even if the [consumer] continues to do business with the

[14] Defendants also suggest that Mr. Hand's testimony was "vague and uncertain." (Mot. at 17.) But while Mr. Hand could not recall exactly when he asked that Shark Bar stop texting him, he was unequivocal that he made such a request, and that after he made it, he received additional text messages. (RDSMF ¶ 62.) Defendants' citation to two unpublished decisions from other circuits involving equivocal testimony are thus not helpful here. *Cf. Keating v. Pittston City*, 643 F. App'x 219, 224-25 (3d Cir. 2016) (plaintiff's answers to questions at deposition were "qualified with equivocations such as 'I don't recall' or 'I don't believe so.'"); *Chambers v. Troy-Bilt, L.L.C.*, 687 F. App'x 401, 403 (5th Cir. 2017) (relevant deposition testimony about exactly how long a lawnmower was running "was equivocal").

seller." 47 C.F.R. § 64.1200(f)(5)(i). As noted above, Mr. Hand testified that he made such a request. Here, both the existence of a two-way communication required to create an established business relationship and whether Mr. Hand terminated any such relationship through a seller-specific do-not-call request are—at best—disputed issues to be resolved by the ultimate trier of fact. (*See* RDSMF ¶¶ 60–62.) It is certainly not the case that undisputed evidence shows an established business relationship existed between Mr. Hand and Shark Bar such that two of the four texts he received can be discounted.

Third, Defendants argue that Count IV should be stricken under Rule 12(f) as duplicative of Count II. (Mot. at 17-18.) "[M]otions to strike under Fed. R. Civ. P. 12(f) are viewed with disfavor and are infrequently granted." *Stansbury Law Firm v. I.R.S.*, 221 F.3d 1059, 1063 (8th Cir. 2000) (internal quotations omitted). As an initial matter, Defendants' request is beyond untimely. Rule 12(f)(2) states that a court can strike redundant material from a pleading "on motion made by a party … before responding to the pleading." Defendants made no such motion before responding to the pleadings here. If Defendants truly believed that Count IV presented "a burdensome distraction and source of confusion" (Mot. at 18), they should have moved to strike it when Shark Bar removed the case to this Court in August 2018 (dkt. 1-1), when Shark Bar filed its initial answer to the complaint that same month (dkt. 8), or when Mr. Hand filed his Second Amended Complaint adding Cordish and ECI as defendants in March 2019 (dkt. 56).

And while Rule 12(f) does allow this Court to strike things from pleadings "on its own," there is no reason to do so here. Contrary to Defendants' assertion, Count IV is not redundant of Count II. Count II alleges that Defendants texted him without having certain required procedures in place (dkt. 56 ¶ 93), while Count IV alleges that Defendants texted him after he asked them to stop (*id.* ¶ 115). Those are two different alleged violations, and it is possible to commit one

violation without committing the other. If, for example, Mr. Hand establishes at trial that Defendants failed to have the required procedures in place when they texted him but is unable to convince a jury that he requested that they stop texting him (a disputed issue as noted above), then he can prevail on Count II but not Count IV. Conversely, if a trial shows that Defendants did have the required procedures in place but nevertheless texted Mr. Hand after he requested that they not do so, he can prevail on Count IV but not necessarily Count II. Count IV is thus not duplicative of Count II and there is no reason to strike it. *Cf. Schupp v. CLP Healthcare Servs., Inc.*, No. 12-cv-04262, 2013 WL 150291, at *1 (W.D. Mo. Jan. 14, 2013) ("[Plaintiff] has not claimed that she could recover for [claim sought to be stricken] even if she could not recover under either of the [other] claims asserted in her Complaint.").

V. CORDISH AND ECI'S LIABILITY FOR TEXT MESSAGES SENT BY SHARK BAR DEPENDS ON DISPUTED QUESTIONS OF FACT.

Finally, Defendants ask that summary judgment be granted in favor of ECI and Cordish "on the ground that they cannot be liable for any conduct alleged against Shark Bar." (Mot. at 19.) Citing the Eighth Circuit's opinion in *Golan v. FreeEats.com, Inc.*, Defendants argue that "TCPA liability does not extend to sellers who do not personally make the phone calls at issue." (Mot. at 19.) But *FreeEats* holds no such thing. While *FreeEats* held that a party who does not initiate a call may not be held *directly* liable under the TCPA, the Eighth Circuit made clear that a party may be held *vicariously* liable where the caller is the party's agent. 930 F.3d 950, 960-61 (8th Cir. 2019) ("Under an agency theory of liability, a party may be held liable even if he or she does not 'initiate' the violating call, but the direct violator acts as the party's agent."). The FCC has also made clear that vicarious liability applies to TCPA claims like Mr. Hand's. *See In re Joint Petition Filed by Dish Network, LLC*, 28 F.C.C.R. 6574, ¶ 29 (2013) ("[W]e find that section 227(c)(5) contemplates, at a minimum, the application of [common law agency]

principles of vicarious seller liability for do-not-call violations."); *id*. ¶ 33 ("We find that vicarious seller liability under federal common law agency principles is also available for violations of section 227(b)."). *See also Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 674 (2016).[15]

Given that the TCPA encompasses vicarious liability principles, Defendants then argue that there is no evidence that Shark Bar was acting as an agent of ECI or Cordish and that ECI and Cordish had no control over the bar. That too is wrong. Cordish and ECI [redacted] (*see also* dkt. 148 at 18) ("Plaintiff provides emails between ECI, Shark Bar, individuals with @cordish.com email addresses, [and others] communicating detailed use policies and engaging in regular oversight of venues' use of the Send Smart and Txt Live! systems over the course of the four-year class period."). [redacted]

[15] To be clear, Mr. Hand does not concede that ECI and Cordish cannot be held *directly* liable for the text messages he received. A non-caller can be held directly liable for calls that violate the TCPA when the non-caller "is so involved in placing the calls as to be deemed to have initiated them." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 F.C.C.R. 7961, ¶ 30 (July 10, 2015), *set aside in part on other grounds by ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). That inquiry "look[s] to the totality of facts and circumstances surrounding the placing of" the calls. *Id*. There is evidence here from which a jury could determine that ECI and Cordish were so involved with Shark Bar's text messaging campaigns as to be deemed to have initiated them. [redacted]

[redacted]

The only evidence to which Defendants point to support their contention that Shark Bar is not an agent of ECI or Cordish is [redacted] ut with respect to the former, as this Court held in denying Cordish's motion to dismiss for lack of personal jurisdiction, "Defendants' contention that 'Cordish has no employees and therefore no individual could possibly be engaged in sending text messages' … is countered to some degree by Plaintiff's showing that Cordish does have individuals working on its behalf in some capacity." (Dkt. 148 at 15.) Defendants' contention is also countered by the evidence discussed above regarding Cordish's involvement in Shark Bar's text messaging campaigns. (*See* RDSMF ¶¶ 3, 6, 9, 12, 13, 15; PSMF ¶¶ 7–9.) And with respect to the Consulting Agreement between ECI and Shark Bar, parties' characterization of their own relationship is not dispositive of an agency question. *See, e.g., Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1343 n.7 (8th Cir. 1976) ("The dealership contract in this case characterized Jacobson as an independent contractor. This characterization is not controlling on the agency question."); *Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068, 1073 (9th Cir. 2019) ("Whether an agency relationship exists is … based on an assessment of the facts of the relationship and not based on how the parties define their relationship.").

At best, the evidence Defendants point to shows that whether an agency relationship

exists between Shark Bar on the one hand and Cordish and/or ECI on the other is a disputed issue of fact. And as the Eighth Circuit has held, "when 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). *See also McGraw-Edison*, 542 at 1343 ("Since this determination [whether an agency relationship exists] requires the finding and weighing of numerous facts, the ultimate resolution is appropriately left to the province of the jury in most instances."); *Waterhout v. Associated Dry Goods, Inc.*, 835 F.2d 718, 720 (8th Cir. 1987) ("Normally the existence or nonexistence of a principal-agent relationship is a fact question left to the trier of fact.").

Defendants' motion for summary judgment in favor of Cordish and ECI on the ground that they cannot be held liable for text messages sent by Shark Bar should be denied.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment should be denied in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 2, 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