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 DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

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INTRODUCTION

For years, Defendants Beach Entertainment KC, LLC d/b/a Shark Bar ("Shark Bar"); Entertainment Consulting International, LLC ("ECI"); and The Cordish Companies, Inc. ("Cordish") have worked together to harvest consumers' data in order to bombard them with text messages advertising Shark Bar's services, sending the messages through their own proprietary text-messaging software platform. Plaintiff Hand is one such consumer who received text messages from Defendants without ever having provided his signed consent. He contends that these messages violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, which prohibits sending text messages with dialing equipment that qualifies as an "automatic telephone dialing system" without first obtaining recipients' prior express written consent.

Defendants ECI and Cordish seek to distance themselves from their myriad ties to both Missouri and the text messages at issue, and argue the Court lacks jurisdiction over them. But, as explained below, ECI and Cordish are inextricably intertwined with the claims in this action, and are appropriately brought before this Court. Next, all Defendants seek to dodge liability by asking this Court to invalidate the entirety of the TCPA because an exemption to liability under a single provision may be constitutionally improper. The Court need not go so far; should the Court find that the challenged provision is unconstitutional, it may appropriately sever it and otherwise leave intact the TCPA's ban on autodialers—as two appellate courts have done thus far. Defendants' other conclusory challenges to the TCPA's validity are also easily dispatched. Defendants' Motion to Dismiss should be denied in its entirety.

BACKGROUND

Cordish owns and manages the Kansas City Power & Light District, a large entertainment complex in downtown Kansas City, of which Shark Bar is a part. (SAC ¶¶ 2, 11, 13.) Despite

creating subsidiary holding companies, Cordish itself implements and possesses the final say over any day-to-day operating decisions, including those regarding advertising and text messaging campaigns, acting through its own "Entertainment Management Division"—ECI. (*Id.* ¶¶ 11, 14, 40, 41, 43.) To enact these policies and carry out these messaging campaigns, Shark Bar used Cordish and ECI's Txt Live! platform—accessible through the "ECI Connect App." (*Id.* ¶ 43, 47–48.) The platform stores thousands of phone numbers, an can send promotional text messages to randomly-selected numbers at the push of a button. (*Id.* ¶¶ 44-45, 48, 51–53.)

Through Cordish and ECI's platform and in accordance with their instructions, Plaintiff Hand received several unwanted text messages from Shark Bar advertising the bar's services, despite the fact that he was registered on the national do-not-call registry and had never provided his written consent to receive texts from Defendants. (*Id.* ¶¶ 63–64, 67–68, 70–71.) In addition, Hand texted the number that sent him the promotional texts, "STOP," but the texts continued. (*Id.* ¶ 69.)[1] Plaintiff contends that these promotional text messages violate the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii), which prohibits companies from "mak[ing] any call … using an automatic telephone dialing system" to a cell phone.

Plaintiff also claims that these promotional text messages implicate 47 U.S.C. § 227(c), which authorizes the FCC to "develop proposed regulations" "concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." Two sets of rules are implicated here. First, in 1992, the FCC began requiring companies engaged in telemarketing to develop internal policies to establish and maintain company-specific do-not-call lists. *See In the Matter of Rules & Regulations*

[1] An uncited footnote in Defendants' background section suggests striking Hand's claim that they violated the TCPA by failing to honor his request not to be texted. (Mot. at 5.) This request is meritless.

Implementing the Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. 8752, 8763-67 (1992); 47 C.F.R. § 64.1200(d). Hand alleges that Defendants have failed to develop the requisite internal policies. (SAC ¶¶ 57–60.) Second, in 2003, the FCC established guidelines for compliance with the National Do-Not-Call Registry. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14033-49 (2003); 47 C.F.R. § 64.1200(c). Hand took advantage of the opportunity to register his number on the Do-Not-Call Registry in 2012, yet he still received multiple text messages from Defendants. (SAC ¶¶ 70–71.) As Defendants violated these regulations, and Hand received multiple texts in a 12-month period, he further alleges claims under § 64.1200(d) and § 64.1200(c). (FAC Counts 2–4.)

ARGUMENT

I. The Court Has Specific Personal Jurisdiction Over Defendants Cordish and ECI.

First, ECI and Cordish contest this Court's ability to exercise personal jurisdiction over them. To survive a 12(b)(2) challenge, "a plaintiff must make a prima facie showing that personal jurisdiction exists, which is accomplished by pleading sufficient facts to support a reasonable inference that the defendant can be subjected to jurisdiction within the state." *K-V Pharm. Co. v. J. Uriach & CIA, S.A.*, 648 F.3d 588, 591–92 (8th Cir. 2011) (internal quotations omitted). A court considering the jurisdictional challenge "must view the evidence in the light most favorable to the plaintiff and resolve all factual conflicts in its favor in deciding whether the plaintiff made the requisite showing," which is "minimal" at the prima facia stage. *Id.* Defendants need only have "minimum contacts" with Missouri such that exercising jurisdiction will not "offend traditional notions of fair play and substantial justice." *Aly v. Hanzada for Imp. & Exp. Co., LTD*, 864 F.3d 844, 849 (8th Cir. 2017).[2] Specific personal jurisdiction, asserted

[2] Missouri's long-arm statute permits the exercise of personal jurisdiction to the greatest extent

here, exists where the defendant "has sufficient contacts with the forum State and the plaintiff's claims arises from or relates to those contacts." *Curne v. TraxNYC Corp.*, No. 4:19-CV-00184-SRB, 2019 WL 1980705, at *2 (W.D. Mo. May 3, 2019).

Courts in the Eighth Circuit consider multiple factors when evaluating these contacts: "'(1) the nature and quality of the contacts with the forum state; (2) the quantity of those contacts; (3) the relationship of those contacts with the cause of action; (4) Missouri's interest in providing a forum for its residents; and (5) the convenience or inconvenience to the parties.'" *See Aly*, 864 F.3d at 849 (quoting *Eagle Tech. v. Expander Americas, Inc.*, 783 F.3d 1131, 1136 (8th Cir. 2015)). In the case of intentional torts, as here, courts consider jurisdiction appropriate "over non-resident defendants whose acts are performed for the very purpose of having their consequences felt in the forum state." *Johnson v. Arden*, 614 F.3d 785, 796 (8th Cir. 2010) (internal quotations omitted). At bottom, these factors seek to answer to a single question: whether defendants "purposefully availed" themselves of the "privilege of conducting activities within [Missouri]," such that each invoked the "benefits and protections of [Missouri] law." *Mid-Am. Pool Renovations, Inc. v. Perry*, No. 12-1491-CV-W-SOW, 2013 WL 12324719, at *2 (W.D. Mo. Apr. 24, 2013) (citing *Steinbuch v. Cutler*, 518 F.3d 580, 586 (8th Cir. 2008)). The answer here is inescapable: yes. Hand more than makes the minimal showing required at this stage for the Court to appropriately exercise jurisdiction over ECI and Cordish.

A. Cordish and ECI's Many Significant Contacts with Missouri are Intertwined with Hand's Claims.

The number of contacts with the forum state, their significance, their relation to the claims at issue, and whether Defendants intended their conduct to be felt in Missouri are

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allowable under the United States Constitution. *See Aly*, 864 F.3d at 849. Thus, if jurisdiction comports with Due Process requirements—as here—then it is also proper under Missouri's long-arm statute.

naturally related. Here, Cordish and ECI's directives to Shark Bar were not "random, fortuitous, or attenuated," but rather, expose repeated "intentional conduct" targeting Missouri. *See Walden v. Fiore*, 571 U.S. 277, 286 (2014); *see also Stocks v. Cordish Companies, Inc.,* 118 F. Supp. 3d 81, 88 (D.D.C. 2015) (denying Cordish's 12(b)(2) motion because Cordish advertised in forum for its Live! establishment); *K-V Pharm.*, 648 F.3d at 594–95 (sufficient contacts because, *inter alia*, officials conducted relevant business while present in Missouri and "exchange[d] many letters, emails and telephone calls" with a Missouri company); *Creative Calling Sols., Inc. v. LF Beauty Ltd.*, 799 F.3d 975, 980 (8th Cir. 2015) (that "sixteen [defendant] employees corresponded with [forum company] in [forum] via e-mail… support[ed] the conclusion that [defendant] purposefully established numerous contacts within the forum state"); *Catipovic v. Turley*, No. C 11-3074-MWB, 2012 WL 2089552, at *11 (N.D. Iowa June 8, 2012) (jurisdiction when defendant "entered into a continuing relationship with [the forum], to the extent of continuing to communicate with [forum citizens]"). Cordish and ECI were well aware that by directing Shark Bar's data collection and text message campaigns—the backbone of Hand's claims—through regular and consistent communications, they would affect Missouri consumers and invoke Missouri's laws. *Johnson v. Arden*, No. 08-CV-06103-DW, 2009 WL 10672018, at *3 (W.D. Mo. June 8, 2009), *aff'd*, 614 F.3d 785 (8th Cir. 2010) (citation omitted) (noting the "principle issue is whether the non-resident Defendants have fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign").

First, it is indisputable that Cordish and ECI each have numerous significant ties to Missouri. ECI is registered to do business with the Missouri Secretary of State. (*See* Ex. A to Declaration of William Kenney ("Kenney Decl.").)[3] Reed Cordish, a Cordish principal and

[3] Unless otherwise noted, all cites to exhibits reference those attached to the Kenney Decl.

President of ECI, signed the application. (*Id.*); *see* Reed Cordish, *Our Team, The Cordish Companies*, https://cordish.com/about/team; Reed Cordish, *LinkedIn*, https://www.linkedin.com/in/reed-cordish. ECI has employees that live and work in Kansas City. (Exs. B–D.) This includes Elliot Duckworth, who was both Shark Bar's general manager, (Ex. E), and an ECI employee, Elliot Duckworth, *LinkedIn*, https://www.linkedin.com/in/elliot-duckworth-2a732817. Shark Bar and ECI "negotiated, executed, delivered, and [] intended to [] perform[]" an operating agreement in the Western District of Missouri, which Jacob Miller—both a member of Shark Bar and an employee of ECI, *Combs, et al. v. Lounge KC, LLC et al.*, No. 4:14-cv00227, Dkt. 350-2, at 4:20–21; 6:12–17; 54:12–55:15 (W.D. Mo. Mar. 16, 2018) (attached as Ex. F) (alterations in original)—signed on Shark Bar's behalf, (Ex. G). Cordish executives also reside and work in Kansas City. Ex. H; Nick Benjamin, *Our Team, The Cordish Companies*, https://cordish.com/about/team; Nick Benjamin, *LinkedIn*, https://www.linkedin.com/in/nick-benjamin-b29b9032. 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. Kyla Bradley, who acted as an intermediary between Shark Bar and ECI and Cordish, testified that she [redacted] (Ex. I, Deposition of Kyla Bradley ("Bradley Dep."), at 21:12–24:16; 56:3–14.) Kyle Uhlig worked with Allyson Curran and Ashley Miller of ECI—all of whom reported to Jake Miller—to [redacted] (Ex. J, Deposition of Kyle Uhlig, ("Uhlig Dep."), at 55:14-56:8.)

More importantly, these connections are directly tied to Hand's claims that ECI and Cordish played an integral role in the alleged violation of the TCPA by overseeing the development and use of the ATDS at issue, and instituting Shark Bar's data collection methods

and insufficient consent policy.[4] In particular, Cordish and ECI were the [redacted] [5] Later, ECI developed the Txt Live! platform its venues—including Shark Bar—used to text Kansas City Live! patrons. (*See* Ex. L.) In fact, the development of Txt Live! took place in Kansas City. (*Id* § L.4.).

The data collection methods used to populate the database with phone numbers—including Plaintiff's—feeding the Txt Live! platform were dictated by Cordish and ECI. Reed Cordish, who is affiliated with both Cordish and ECI, [redacted] (*See* Ex. C ([redacted]) Kansas City-based ECI employees, including an ECI Operations Executive, [redacted] (*See* Ex. M.) In a separate email, ECI's District Manager wrote to Shark Bar and other Missouri bar managers to: [redacted] (Ex. D.) In yet another email, Musselman wrote to Shark Bar's General Manager, Elliot Duckworth, with a [redacted] (Ex. N.) Even the cards used to collect data were [redacted] (Bradley Dep., at 66:22–67:20.)[6]

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[4] Notably, neither Cordish nor ECI move to dismiss Hand's complaint for any failure to state a claim. Courts recognize entities having such a high degree of control—like ECI and Cordish—over the creation and sending of a text message and the platform that is used are appropriately held directly liable for TCPA violations. *See, e.g.*, *Bauman v. Saxe*, No. 214CV01125RFBPAL, 2019 WL 591439, at *3 (D. Nev. Feb. 13, 2019); *2015 TCPA Declaratory Ruling*, 30 FCC Rcd. at 7980-84, ¶¶ 30-37 (setting out factors to consider to determine an entity's involvement in the placing of a call).

[5] Mr. Uhlig expressed concerns that the texting platform was [redacted] (Uhlig Dep., at 59:2-15, 60:9-17.)

[6] Despite acknowledging that the nine venues in Live! district [redacted] (Bradley Dep., at 32:23–35:16;

Finally, the platform's use was also controlled by Cordish and ECI. Notably, [redacted] (Ex G § 4.2.) Kansas City-based ECI employees provided support and guidance regarding [redacted], (Ex. O), and [redacted], (Ex. P.) ECI [redacted]. (Ex. Q ([redacted]); (Ex. R ([redacted]); (Ex. S. ([redacted]).) Unsurprisingly, Reed Cordish had [redacted]. (Ex. T [redacted]).) ECI similarly had [redacted]. (Ex. W; Bradley Dep., at 95:22–100:9.)

Another TCPA case, *Keim v. ADF MidAtlantic, LLC*, is particularly instructive here. 199 F. Supp. 3d 1362, 1370 (S.D. Fla. 2016). In *Keim*, the court held that jurisdiction was appropriate over out-of-state defendants that had hired marketing companies to send text messages promoting their franchises to a number of states, including the forum state. The court held that even though the defendants hadn't sent the text messages themselves, what mattered was that text messages were sent at their behest, and that it was "reasonable to anticipate the harm from a

45:15–47:8.) In fact, ECI [redacted]. (*See id*., at 49:1–52:8.)

TCPA violation arising from a…text message to a [forum] phone number." *Id.*; *see also Tickling Keys, Inc. v. Transamerica Fin. Advisors, Inc.*, 305 F. Supp. 3d 1342, 1349 (M.D. Fla. 2018) (finding jurisdiction over out-of-state parent company alleged to have participated in sending fax). The facts are analogous here. While Cordish and ECI may not have sent the text messages themselves, tens of thousands of text messages were sent to Missouri residents at their direction, through their platform, and for their particular benefit.

And, contrary to the stated "policy and practice" in the Hudolin Declaration that ECI "did not send Text Messages," (dkt. 66-3 ¶ 7), ECI itself in fact used a platform called [redacted] (Ex. X.) to send [redacted] text messages to [redacted] unique phone numbers, including sending [redacted] text messages to unique phone numbers with area codes specific to Missouri from [redacted] through [redacted] alone, including [redacted] text messages to [redacted] with Missouri phone numbers. (Kenney Decl. ¶¶ 27-28); *also Seefeldt v. Entm't Consulting Int'l, LLC*, No. 4:19-cv-00188-SNLJ, dkt. 52 ¶ 6 (W.D. Mo. June 6, 2019) (withdrawing jurisdictional argument and reliance on Hudolin Declaration, admitting "ECI employees" sent text messages to Missouri residents offering coupons to bars). Thus, it is simply not true that "no ECI employee has been engaged in sending text messages to Shark Bar customers." (Mot. at 8.)

Defendants reliance on *Velez v. Portfolio Recovery Assocs., Inc.*, 881 F. Supp. 2d 1075 (E.D. Mo. 2012) and *Goans Acquisition, Inc. v. Merch. Sols., LLC,* No. 12-00539-CV-S-JTM, 2012 WL 4957628 (W.D. Mo. Oct. 16, 2012) is misplaced. In *Velez*, the would-be defendant company did not conduct any business in Missouri whatsoever. *Velez*, 881 F. Supp. 2d at 1079. In *Goans*, "neither [defendant] had any specific knowledge that the subject fax was being transmitted to the State of Missouri…neither [defendant] approved the sending of the fax; and neither [defendant] had knowledge of the contents of the subject fax." 2012 WL 4957628, at *2.

The facts are far different here: Cordish and ECI had knowledge of and were integrally involved in the data collection and text campaigns—down to the [redacted]—taking place in Missouri that injured Hand and the putative class, to the point that ECI even had employees *in Missouri* to manage Shark Bar and help effectuate the policies. *See, e.g.*, Exs. C, U.[7]

B. Missouri Has an Interest in Providing a Forum for Its Residents, and Is Otherwise a Convenient Forum.

Txt Live!'s database reflects that Cordish and ECI directed the sending of [redacted] text messages to [redacted] unique phone numbers beginning with 816—Kansas City's area code—alone, and [redacted] text messages to another [redacted] unique phone numbers with area codes specific to Missouri. (Kenney Decl. ¶ 29.) "The State of Missouri has an interest in providing a forum for [these] residents," including Plaintiff Hand. *Johnson*, 2009 WL 10672018, at *5; *see also DeSirey v. Unique Vacations, Inc.*, No. 4:13 CV 881 RWS, 2014 WL 272369, at *5 (E.D. Mo. Jan. 24, 2014) (finding Missouri's interests "substantial" when, among other factors, defendants aimed advertisements at Missouri residents). In addition, the forum is convenient for the parties; Shark Bar is located here, evidence is here, witnesses reside here, the bulk of the putative class resides here, and ECI employees are based here. (*See generally* Uhlig Dep.; Bradley Dep.) In short, "there is no other forum that would be significantly more convenient to the parties." *Eaton Veterinary Pharm., Inc v. Wedgewood Vill. Pharmacy, Inc.*, No. 4:15-CV-687-SRB, 2015 WL 7871055, at *6 (W.D. Mo. Dec. 3, 2015).

C. Jurisdiction is Equally Proper Based on an Alter Ego or Agency Theory.

While each individual claim-related contact to the forum warrants jurisdiction, it is

[7] Hand's evidence goes go far beyond the "vague allegations" that led to dismissal in *Nexgen HBM, Inc. v. Listreports, Inc.*, No. 16-cv-3143-SRN/FLN, 2017 WL 4040808, at *10 (D. Minn. Sept. 12, 2017) and *Hanline v. Sinclair Global Brokerage Corp.*, 652 F. Supp. 1457, 1458 (W.D. Mo. 1987).

additionally proper for Shark Bar's forum-related contacts to be imputed to ECI and Cordish. First, the overlapping web of the persons in control of Shark Bar, Cordish, and ECI's operations shows that they are the "alter-egos" of one another.[8] This is appropriate if "the record indicates that the parent dictates every facet of the subsidiary's business—from broad policy decisions to routine matters of day-to-day operation." *Velez*, 881 F. Supp. 2d at 1079. Second, and relatedly, Shark Bar's actions to carry out ECI and Cordish's marketing campaign on their behalf, under their direction, and for their benefit demonstrate the scope and existence of an agency relationship. *St. Louis Motorsports, LLC v. Gay*, No. 4:17-CV-2694 PLC, 2018 WL 926563, at *4 (E.D. Mo. Feb. 16, 2018) (recognizing that a court may exercise personal jurisdiction based on the acts of its agent).

Here, the degree of control that ECI exercised over Shark Bar is apparent—in addition to the materials cited above—based on the [redacted] (Ex. G.) This agreement specifically sets out the minutia of the day-to-day control ECI

[8] The statement that "Cordish, ECI, and Shark Bar do not have any parent-subsidiary relationship whatsoever," (Mot. at 9), is false. When Shark Bar most recently changed its agent for service, Cordish specifically identified Beach Entertainment KC, LLC as its subsidiary. (Ex. V). Jacob Miller of ECI was installed as Shark Bar's president, likely a decision that Reed Cordish participated in, so that Miller could have additional control over the venues, as had been done before. (*See* Ex. F, at 21:18–21; 23:11–13; 54:13–56:19.)

has over Shark Bar, far different than the general ownership interest in *General, LLC v. Ryder System, Inc.*, No. 4:18-cv-00442-JAR, 2018 WL 4961497, at *2-5 (E.D. Mo. Oct. 15, 2018).

For these same reasons, allegations of an agency relationship are supported; ECI and Cordish's involvement in Shark Bar's day-to-day operations goes far beyond merely "articulating general policies and procedures." *See Velez*, 881 F. Supp. 2d at 1084. ECI was empowered to issue specific directives—including with respect to Shark Bar's marketing—that Shark Bar carried out, and which resulted in a direct benefit to ECI. *See* (Ex. G). ECI and Cordish set the policies, and Shark Bar was expected to "follow through" and carry them out. (Ex. M); *Levine Hat Co. v. Innate Intelligence, LLC*, No. 4:16-CV-1132 (CEJ), 2017 WL 3021526, at *1, 5 (E.D. Mo. July 17, 2017) (finding personal jurisdiction may exist in TCPA case based on agent's sending of fax at principal's direction).

II. Defendants' Challenges to the TCPA's Constitutionality Fail.

A. The debt exemption is severable from the ATDS restrictions.

Defendants claim that the TCPA's government-backed debt exemption is a content-based restriction that does not survive strict scrutiny,[9] and that therefore the whole of the TCPA must be invalidated. But as two appellate courts have found, to the extent the exemption itself is unconstitutional, it is appropriately severed from the broader statute. *See Duguid v. Facebook, Inc.*, No. 17-15320, 2019 WL 2454853, at *8 (9th Cir. June 13, 2019) ("Though incompatible with the First Amendment, the debt-collection exception is severable from the TCPA."); *Am.*

[9] Defendants also suggest that exemptions aimed at tax-exempt non-profits do not survive strict scrutiny. (Mot. at 12.) However, those exemptions only apply to calls that are "telephone solicitation[s]." 47 U.S.C. § 227(a)(4). Telephone solicitations—that is, speech inviting commercial transactions or with an economic motive—are canonically commercial speech, and subject to the standard of scrutiny set forth in *Central Hudson Gas & Electric Corp. v. Public Services Commission of New York*, 447 U.S. 557 (1980), not strict scrutiny. Nowhere in their motion do Defendants mention *Central Hudson*, much less make the argument that any non-profit exemptions must be invalidated under its test. (*See generally* Mot.)

Ass'n of Political Consultants, Inc. v. Fed. Commc'ns Comm'n, 923 F.3d 159, 171 (4th Cir. 2019) ("AAPC") ("[T]he explicit directives of the Supreme Court and Congress strongly support a severance of the debt-collection exemption from the automated call ban.") As it has for decades, the background prohibition on the use of a particular dialing technology—a clearly content-neutral restriction on the "manner" of speech—remains in full effect.

The Fourth and Ninth Circuits' severance analyses are sound, and warrant the same outcome here. Congress specifically included "unambiguous language endorsing severability" in the TCPA, which "creates a presumption of severability absent 'strong evidence that Congress intended otherwise.'" *Duguid*, 2019 WL 2454853, at *8; *AAPC*, 923 F.3d at 171 ("[I]f Congress wants the balance of a statute to stand when one aspect is constitutionally flawed, a reviewing court 'must leave the rest of the [statute] intact.'"); *see* 47 U.S.C. § 608. In addition, the removal of the government-backed debt exemption will in no way undermine the TCPA's overall structure or "fundamental purpose." *Duguid*, 2019 WL 2454853, at *8. "For twenty-four years, from 1991 until 2015, the automated call ban was 'fully operative.'" *AAPC*, 923 F.3d at 171; *Duguid*, 2019 WL 2454853, at *8 ("TCPA has been 'fully operative' for more than two decades."). Thus, after taking away the exemption, what is left is "the same content-neutral TCPA" that courts have repeatedly upheld as valid. *Id*.

Contravening the express statutory language endorsing severability and fact that the same ATDS ban previously existed for decades is a tall order. Tellingly, Defendants make no argument whatsoever regarding severability or the Fourth Circuit's decision on the matter. (Mot. at 13 n.7) The motion merely makes the conclusory assertion in a footnote that the court "wrongly concluded that severance was [] appropriate." (*Id*.) This failure to make any reasoned argument on this point in their opening motion waives their ability to do so on reply. *See Peters*

v. Fin. Recovery Servs., Inc., 46 F. Supp. 3d 915, 917 (W.D. Mo. 2014) ("'[I]t is well settled that we do not consider arguments raised for the first time in a reply brief.'") (quoting *Bearden v. Lemon*, 475 F.3d 926, 930 (8th Cir. 2007)). The government-backed debt exemption is appropriately severed from the TCPA.[10] The Court should appropriately follow the "general rule" "'that partial . . . invalidation [of a statute] is the required course.'" *AAPC*, 923 F.3d at 171.

B. The definition of an "automatic telephone dialing system" is not vague.

Defendants next assert that the FCC's most recent interpretation of the phrase "automatic telephone dialing system" has resulted in "uncertainty [that] has not been cured" and is therefore void for vagueness" under the Fifth Amendment (Mot. at 15.) "Uncertainty" is, of course, not the test. A statute is void for vagueness only when it fails to provide "fair warning" of prohibited conduct to persons of ordinary intelligence or invites "arbitrary and discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). As the Supreme Court has made clear, this is not an exacting standard. "We can never expect mathematical certainty from our language." *Id.* at 110. "Perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *United States v. Williams*, 553 U.S. 285, 304 (2008).

Vagueness challenges like those asserted here are rare and unsuccessful. *See Abbas v. Selling Source, LLC*, No. 09 CV 3413, 2009 WL 4884471, at *9 (N.D. Ill. Dec. 14, 2009) (rejecting challenge to "capacity" portion of ATDS definition, reasoning that the statute was "straightforward"). Here, the statute provides "fair warning" of the type of dialing equipment it

[10] Defendants state in a conclusory fashion that for the same reasons the TCPA is unconstitutional under the First Amendment, it runs afoul of the Equal Protection clause. But as an economic regulation that does not discriminate on the basis of any suspect classification, the TCPA is subject to rational basis review—not strict scrutiny—in an Equal Protection analysis. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). The FCC recognized that "non- commercial calls" do not "represent as serious a concern for telephone subscribers as unsolicited commercial calls," 1992 Order, 7 FCC Rcd. at 8774, justifying any differential treatment. *See Williamson v. Lee Optical of Okla, Inc.*, 348 U.S. 483, 489 (1955). In any event, this doesn't change the severability analysis.

regulates. As the Ninth Circuit recently held, the text makes clear that an ATDS is dialing equipment with the capacity to call either (1) lists of stored numbers, or (2) lists of randomly or sequentially generated numbers. *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018). That definition is consistent with several years of FCC interpretation. *See* 2003 Order, ¶ 132 ("The statutory definition contemplates autodialing equipment that either stores or produces numbers.").[11] Defendants had fair warning of what equipment is regulated.

The system described in the Complaint dials numbers from a stored list—precisely what is prohibited by statute and something years of case law and regulation should have put Defendants on notice of. *See, e.g.*, 2003 Order, 18 FCC Rcd. at 14091-92; *Moore v. DISH Network LLC*, 57 F. Supp. 3d 639, 654-55 (N.D.W. Va. 2014). Defendants complain that they could not have been on notice that a web-based platform that requires human intervention would fall under the ATDS definition. This ignores that "[e]very ATDS requires some initial act of human agency—be it turning on the machine or pressing 'Go.' It does not follow, however, that every subsequent call the machine dials—or message it sends—is a product of that human intervention." *Espejo v. Santander Consumer USA, Inc.*, No. 11 C 8987, 2019 WL 2450492, at *8 (N.D. Ill. June 12, 2019) (internal quotation omitted). The "automatic" element of an ATDS is focused on the dialing of the numbers, which Hand alleges occurs here. (*See* SAC ¶¶ 27.)

CONCLUSION

Defendants' Motion should be denied in its entirety.

[11] The now invalidated, "future-capacity" interpretation struck down in *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 697 (D.C. Cir. 2018). provides no basis to declare all of § 227(b) void. *Hill v. Colorado*, 530 U.S. 703, 733 (2000) ("[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications.") (internal quotations omitted).

Dated: June 25, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 25, 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