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 SUPPORT OF MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

The key issues in this case are straightforward, and they can be effectively and efficiently resolved on a class basis. Defendant Beach Entertainment KC, LLC, d/b/a Shark Bar ("Shark Bar") sent tens of thousands of promotional text messages to tens of thousands of consumers using two automatic text messaging systems—SendSmart and TXT Live!—that functioned nearly identically. Not only does Shark Bar lack signed, written agreements from the recipients authorizing these text messages (as it must), many of the recipients had registered their phone numbers on the National Do-Not Call Registry.

Plaintiff J.T. Hand, a recipient of multiple of these unwanted text messages, brought suit under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"), against Shark Bar and two related entities inextricably involved in the text message campaigns, The Cordish Companies, Inc. ("Cordish") and Entertainment Consulting International, LLC ("ECI"). Mr. Hand's complaint alleges, among other things, that Shark Bar used an "automatic telephone dialing system" (an "ATDS") to send the text messages in violation of the TCPA (the "Autodialer Claims"), and impermissibly sent text messages to numbers listed on the National Do-Not-Call Registry (the "Do-Not-Call Claims").[1]

Courts routinely find these types of claims warrant class treatment because of their ability to be resolved *en masse* using common evidence. For example, the gravamen of the Autodialer Claims—whether one or both of Defendants' text messaging systems constitutes an ATDS—can be uniformly resolved for all recipients in one proceeding based on those systems' functionalities. Likewise, the Do-Not-Call Claims, which require determination of whether the

[1] The Second Amended Complaint asserts two other claims: Count II, alleging violations of regulations requiring telemarketers to maintain various policies and procedures, and Count IV, alleging violations of regulations regarding internal do-not-call lists. (Dkt. 56.) Mr. Hand does not seek to certify classes with respect to those counts, but will continue to pursue them on an individual basis.

text messages urging recipients to patronize Shark Bar constitute "telephone solicitation," are equally resolvable for all individuals on the Do-Not-Call Registry that received them. Even Defendants' potential affirmative defense—that Shark Bar obtained the recipients' consent to send them text messages—can be addressed uniformly.

Thus, with respect to the Autodialer Claims and the Do-Not-Call Claims, Mr. Hand seeks to certify the following three classes:[2]

> **SendSmart Class**: All individuals who received one or more text messages from Shark Bar sent using the SendSmart text messaging system, as reflected in the SendSmart Class List.
>
> **TXT Live! Class**: All individuals who received one or more text messages from Shark Bar sent using the TXT Live! text messaging system, as reflected in the TXT Live! Class List.
>
> **Do-Not-Call Class**: All individuals on either the SendSmart or TXT Live! Class Lists who received more than one text message from Shark Bar in any twelve-month period to a number included on the National Do-Not-Call Registry.

As explained below, all three proposed classes satisfy the requirements of Rule 23 and should be certified. Members of the SendSmart Class and the TXT Live! Class have identical Autodialer Claims as all other members of their respective classes, and all members of the Do-Not-Call Class share the same Do-Not-Call Claims. The evidence necessary to establish liability on each of the claims is likewise identical across the members of each class. Resolving the Autodialer and Do-Not-Call Claims of Mr. Hand, who is a member of every class, will resolve all class members' claims in one stroke. "Class certification is normal in litigation under [the

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[2] The classes are defined by reference to a "SendSmart Class List" and a "TXT Live! Class List." How those lists were generated is fully explained in the declaration of Shawn Davis, which is attached as Ex. A to the Declaration of William Kenney ("Kenney Decl"). (Unless otherwise noted, all referenced exhibits are attached to the Kenney Decl.) Basically, a universe of text messages was created by comparing a contact list produced by Shark Bar to text logs obtained in discovery. From that universe, certain phone numbers were removed, including (1) duplicate phone numbers; (2) foreign, toll free, or emergency numbers; (3) phone numbers of recipients who responded positively to a Shark Bar text; and (4) phone numbers that Shark Bar records show were provided by customers electronically. Owing to file size and format, a copy of the complete SendSmart and TXT Live! Class Lists will be produced to the Defendants and hand-delivered via USB drive to the Clerk's Office and Court.

TCPA]," *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 998 (8th Cir. 2016) (quoting *Holtzman v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013)), and this case is no exception.

BACKGROUND

Shark Bar is a "retro" beach-themed nightclub and bar in Kansas City's Power & Light District. In order to drive up business, Shark Bar engaged in repeated text message advertising campaigns that ultimately sent over [redacted] text messages to more than [redacted] unique phone numbers between April 25, 2014 and April 4, 2018. (Kenney Decl. ¶¶ 3-11). These myriad campaigns were sent using two pieces of software: SendSmart and ECI's own proprietary TXT Live! messaging system. (*See* Ex. B (Supp. Interrog. Resp. 4); Ex. C (contract for TXT Live!'s development).) Both functioned to send mass messaging blasts in largely the same way with just a few clicks. (*See* Ex. D, Deposition of Kyla Bradley ("Bradley Dep.") at 115:24–117:23); Ex. E, Deposition of Kyle Uhlig ("Uhlig Dep.") at 76:20-79:11).) Shark Bar employees would [redacted] (*See* Uhlig Dep. 25:19-26:5; 74:16-75:18; 77:5-79:11; Bradley Dep. 111:14-116:4.) [redacted] (Ex. F (reflecting [redacted]); (Ex. G, Substitute Expert Report of Dr. Michael Shamos ("Shamos Rept.") ¶¶ 55–56 ([redacted]).)

These initial texts were "generic" campaign messages.[3] Indeed, one of the four texts that Mr. Hand received included language identical to that appearing in at least [redacted] other text

[3] Based on the "Txt Live! Data Analysis" performed by Lauren Bust, [redacted] (*See* Ex. H, Deposition of Lauren Bust ("Bust Dep.") at 59:2-60:11, 65:6-68:22; Ex. I Excerpts from Txt Live! Data Analysis.)

messages, [redacted].[4] (Shamos Rept. ¶ 77.) The purpose of these messages was clear: [redacted] (Uhlig Dep. at 27:21-28:4; Ex. J (describing development of ECI's "Text Marketing Platform"); Ex. K, (describing TXT Live!'s goal [redacted]); Ex. L ("Sales Building 101" guide).)

The Defendants purport to have built their contact list in part by collecting numbers through various methods, including paper cards, sign-in sheets, and digital forms, and then uploading that information to the texting platforms. (Ex. B, Supp. Interrog. Resp. 12, 16; Uhlig Dep. at 25:13-18; Bradley Dep. at 87:14-20.)[5] With the exception of the digital forms, however, Defendants failed to maintain any records of how or when any individual provided their number, or whether they provided express written consent to receive text messages. Instead, Defendants' standard practice was to [redacted] (Bradley Dep. at 77:4-10, 79:24-80:1, 91:17-20; Uhlig Dep. at 97:12-98:6.)

Mr. Hand received multiple unsolicited promotional text messages from Defendants, (Ex. N (reflecting texts sent to Hand).) This is despite the fact that he never provided them his phone number, nor had he ever even been to Shark Bar when he first began receiving messages. (Ex. O,

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[4] The messages all claim to be from "Kyle from Shark Bar KC. You entered to win a free party with us and we picked your name[,]" including one of the messages sent to Plaintiff. (*See* Ex. N (screenshot of texts received by Plaintiff).) Notably, after additional SendSmart records were produced, it was discovered that the exact phrase was used in nearly [redacted] additional messages sent through the SendSmart system. (Kenney Decl. ¶¶ 12–13.)

[5] [redacted] (Bradley Dep. at 59:5-12; Uhlig Dep. at 84:4-86:13.) In addition, Lauren Bust, the former director of digital strategy involved in analyzing TXT Live!'s usage—testified that [redacted] (Bust Dep. at 75:9-76:1.)

Deposition of J.T. Hand ("Hand Dep.") at 90:13-24; 91:10-20.) What's more, he received the texts even though his phone number had been registered on the National Do-Not-Call Registry since 2012. (Ex. P (confirming registration on National Do-Not-Call List as of June 7, 2012).) And when Mr. Hand told Shark Bar to stop contacting him, in fact, the messages increased.[6] (Hand Dep. at 115:14-20; 119:8-16.) As a result, Mr. Hand filed this lawsuit.

ARGUMENT

A party seeking class certification must show that the proposed class satisfies Rule 23(a)'s threshold requirements of numerosity, commonality, typicality, and adequacy, and that the proposed class fits within one of the three subsections of Rule 23(b). *Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371, 374 (8th Cir. 2018). Each class should be certified.

I. The Proposed Classes Satisfy Rule 23(a)'s Requirements.

A. The proposed classes are sufficiently numerous.

Fed. R. Civ. P. 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." Here, numerosity cannot be seriously disputed. There are 37,175 people in the SendSmart Class, and 40,218 people in the TXT Live! Class. (Davis Decl. ¶¶ 9, 13) The Do-Not-Call Class contains at least 4,860 people. (Davis Decl. ¶ 16.) These figures are more than sufficient to establish numerosity. *See, e.g., Cope v. Let's Eat Out, Inc.*, 319 F.R.D. 544, 554–55 (W.D. Mo. 2017) (certifying class of "at least 99" members, and noting that the Eighth Circuit has found classes as small as twenty to satisfy numerosity).

B. The proposed classes present common questions.

Fed. R. Civ. P. 23(a)(2) requires that "there are questions of law or fact common to the

[6] Failure to honor requests to stop texting were common. (*See* Group Ex. Q (TXT Live! screenshots showing [redacted].)

class." "[A] common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *In re State Farm Fire & Cas. Co.*, 872 F.3d 567, 572 (8th Cir. 2017) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016)). Though "even a single common question will do," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (internal quotations omitted), here, such questions abound.

With respect to the Autodialer Claims asserted on behalf of the SendSmart and TXT Live! Classes, the primary question for summary judgment or trial will be whether the text messages were sent using an ATDS. *See* 47 U.S.C. § 227(b)(1)(A)(iii) ("It shall be unlawful for any person … to make any call … using an automatic telephone dialing system … to any telephone number assigned to a … cellular telephone service[.]"). But because every member of the SendSmart Class was called using the SendSmart system, and every member of the TXT Live! Class was called using the TXT Live! system, determination of whether each of those systems constitutes an ATDS under the statute "will resolve an issue that is central to the validity" of the Autodialer Claims of each member of the respective classes "in one stroke." *Wal-Mart*, 564 U.S. at 350. Courts routinely find that factual and legal questions regarding whether a particular calling system constitutes an ATDS are common to people called by that system and certify such classes. *See*, *e.g.*, *Toney v. Quality Res., Inc.*, 323 F.R.D. 567, 584 (N.D. Ill. 2018) (finding that whether defendant "call[ed] cell phone numbers using an ATDS" was a common question because "Toney has … demonstrated that these calls were made using the same type of device"); *Agne v. Papa John's Int'l, Inc.*, 286 F.R.D. 559, 567 (W.D. Wash. 2012) (common question presented when defendant sent texts "using the same automatic dialing technology").

Likewise, with respect to the Do-Not-Call Claims, the primary question for summary

judgment or trial will be whether the text messages constitute "telephone solicitation." *See* 47 C.F.R. § 64.1200(c)(2) ("No person or entity shall initiate any telephone solicitation to … [a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry[.]"). Here, whether the Shark Bar texts—stock messages sent thousands at a time aimed at getting customers to come to Shark Bar—were telephone solicitations is a question that can be answered for the Do-Not-Call Class in one stroke. According to the testimony of one of Shark Bar's most prolific texters, the texts were all sent for the [redacted] (Uhlig Dep. at 27:21-28:4.) Thus, the question of whether the texts constitute "telephone solicitation" is common to all members of the Do-Not-Call Class. *See Golan v. Veritas Entm't, LLC*, No. 4:14CV00069 ERW, 2017 WL 193560, at *5 (E.D. Mo. Jan. 18, 2017), *leave to appeal denied*, No. 17-8006, 2017 WL 3273862 (8th Cir. Feb. 22, 2017) (holding that determination of whether calls constituted telephone solicitation presented common question and certifying class in TCPA case).

Finally, whether Cordish and ECI can be held liable for text messages sent by Shark Bar is also a common question shared by all members of the proposed classes. *See Moser v. Health Ins. Innovations, Inc.*, No. 17-cv-1127, 2019 WL 3719889, at *7 (S.D. Cal. Aug. 7, 2019) *appeal filed*, No. 19-80111 (9th Cir. Aug. 22, 2019), (collecting cases finding that vicarious liability for TCPA violations was a common question).

"Commonality is easily satisfied in most cases," *M.B. by Eggemeyer v. Corsi*, 327 F.R.D. 271, 278 (W.D. Mo. 2018), and is easily satisfied here.

C. Mr. Hand's claims are typical of absent class members' claims.

Fed. R. Civ. P. 23(a)(3) requires that "the claims … of the representative parties are typical of the claims … of the class." "Typicality under Rule 23(a)(3) means that there are other

members of the class who have the same or similar grievances as the plaintiff." *Alpern v. UtiliCorp. United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996) (internal quotations omitted). "The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995). Mr. Hand easily meets that burden here. He is a member of each of the proposed classes, having received text messages sent from both the SendSmart and TXT Live! systems, (Ex's. M, N, Q (reflecting texts sent to Hand), and having received more than one text message in a twelve-month period after placing his number on the National Do-Not-Call Registry, (*see* Ex. P). His Autodialer Claims and Do-Not-Call Claims are identical to every other member of the respective classes: they "arise[] from the same … course of conduct as the class claims, and give[] rise to the same legal or remedial theory." *Alpern*, 84 F.3d at 1540. *See also Cope*, 319 F.R.D. at 555 (holding that, to be typical "the class representative must generally possess the same interest and suffer the same injury as the unnamed class members") (internal quotation omitted). His claims are typical.

D. Mr. Hand is an adequate representative.

Finally, Fed. R. Civ. P. 23(a)(4) requires that the named plaintiff "will fairly and adequately protect the interests of the class." "The adequacy requirement is met where: (1) the representatives and their attorneys are able and willing to prosecute the action competently and vigorously, and (2) each representative's interests are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge." *Postawko v. Mo. Dep't of Corr.*, No. 16-cv-04219-NKL, 2017 WL 3185155, at *12 (W.D. Mo. July 26, 2017) (internal quotations omitted), *aff'd*, 910 F.3d 1030 (8th Cir. 2018). Taking the latter point first, Mr. Hand's interests in this litigation are identical to those of the proposed classes "because … [his] claims arise out

of the same common course of conduct and are based upon the same legal theories as the class members' claims." *Id*. It is in his interest to prove that the SendSmart and TXT Live! systems each qualify as an ATDS under the statute, that the texts were "telephone solicitations" under the do-not-call regulations, and that all three defendants are liable for the texts.

With respect to the competent and vigorous prosecution of this action, Mr. Hand has already demonstrated his ability and willingness to do so by, among other things, actively participating in this litigation and sitting for a deposition. *See, e.g*., *Nobles v. State Farm Mut. Auto. Ins. Co*., No. 10-04175-CV-C-NKL, 2013 WL 12153517, at *6 (W.D. Mo. June 5, 2013) (finding plaintiffs had "demonstrated that they will adequately serve the interests of the class by participating in the extensive discovery that has taken place so far in this case"). His counsel, too, is more than qualified to competently and vigorously prosecute this action. In appointing class counsel under Fed. R. Civ. P. 23(g), courts "must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g). All of these factors weigh in favor of the adequacy of Mr. Hand's counsel and their appointment as class counsel.

Edelson PC has been at the forefront of TCPA litigation for nearly a decade. (*See* Edelson PC Firm Resume, Ex. A to the Declaration of Benjamin H. Richman ("Richman Decl.").) The firm won a groundbreaking ruling in the Ninth Circuit applying the TCPA to text messages, *Satterfield v. Simon & Schuster, Inc*., 569 F.3d 946 (9th Cir. 2009), and has been lead or co-lead counsel in TCPA cases securing hundreds of millions of dollars in relief for consumers. Edelson PC obtained—on the eve of trial—the largest TCPA settlement to date, $76 million in monetary

relief. *Aranda v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2017 WL 818854 (N.D. Ill. Mar. 2, 2017), *aff'd sub nom. Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 923 (2019). The firm recently won a jury verdict in a TCPA case with minimum statutory damages amounting to over $925 million. *Wakefield v. ViSalus, Inc.*, No. 3:15-CV-1857-SI, 2019 WL 2578082, at *1 (D. Or. June 24, 2019).

Likewise, Bill Kenney, of his eponymous law firm, has been responsible for conducting the initial investigation, bringing the claims at issue, steering early discovery and litigation efforts, and engaging Edelson PC as co-counsel. Given his deep familiarity with the facts of this case, Mr. Kenney is eminently qualified to represent the proposed classes. Moreover, he has an established history of representing individuals in complex litigation in western Missouri and elsewhere, and has litigated before the Eight Circuit and the Missouri Supreme Court. (*See* Ex. S, Bill Kenney Law Firm Resume.) He has been involved in numerous jury trials, and has a long history of litigating individual and class action consumer claims, including under the TCPA. *See, e.g.*, *Williams v. zZounds Music, L.L.C.*, No. 4:16-cv-940 (W.D. Mo. Feb. 28, 2017).

Plaintiff's counsel has dedicated significant resources to prosecuting the claims, taking and defending depositions, issuing and reviewing discovery productions, and are committed to devoting the resources necessary to seeing the case through to judgment. (Richman Decl. ¶ 3; Kenney Decl. ¶ 33.) And Mr. Hand is a more-than-adequate representative of the proposed classes, who, along with his counsel, will competently and vigorously prosecute this action.

II. The Proposed Classes Meet Rule 23(b)(3)'s Requirements.

In addition to satisfying all elements of Rule 23(a), the proposed classes satisfy the requirements of Rule 23(b)(3)—predominance and superiority—as well.

A. Common questions predominate.

To certify a class under Fed. R. Civ. P. 23(b)(3), this Court must find that "the questions of law or fact common to class members predominate over any questions affecting only individual members." "The predominance requirement tests whether proposed class members are sufficiently cohesive to warrant adjudication by representation." *Nobles*, 2013 WL 12153517, at *6 (internal quotations omitted). "The requirement is met where a prima facie case can be established through common evidence." *Id*. (internal quotations omitted). *See also Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) ("The predominance inquiry requires an analysis of whether a prima facie showing of liability can be proved by common evidence."). Here, a prima facie showing of liability can be made with common evidence.

Liability on the Autodialer Claims can be established simply by showing that the SendSmart and TXT Live! systems meet the statutory definition of an ATDS. The evidence needed to prove that they do relates solely to how the two systems function—evidence that is common to all class members. *See* 47 U.S.C. § 227(a)(1) ("The term 'automatic telephone dialing system' means equipment which has the capacity … to store or produce telephone numbers to be called, using a random or sequential number generator; and … to dial such numbers."). Ultimately, "the question, then, is whether that device qualifies as an ATDS under the TCPA—either it does or does not, [which] is a question common to all proposed class members." *Toney*, 323 F.R.D. at 592 (Rule 23(b)(3)'s predominance requirement satisfied in TCPA case where "Defendants used the same automated dialer for its telemarketing campaign"). Indeed, any analyses by the Parties' experts of Defendants' texting platforms will be equally applicable to all members of the proposed TXT Live! and SendSmart Classes. (*See* Dkts. 80, 97.)

Likewise, liability on the Do-Not-Call Claims can be established by showing that the text

messages sent to members of the Do-Not-Call Class meet the regulatory definition of "telephone solicitation," which depends on the purpose of the text messages. *See* 47 C.F.R. § 64.1200(f)(14) ("The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services[.]"). Here, all the initial campaign texts at issue were sent for the same reason—promoting the bar—and a prima facie case of violating the do-not-call regulations can thus be established through common evidence. (*See, e.g.*, Uhlig Dep. at 27:21-28:4 (testifying that the text messages were sent for the [redacted]); Ex. K, (describing TXT Live! as [redacted])); *see also Golan*, 2017 WL 193560, at *5 (whether calls were telephone solicitations was a predominating common question).

Defendants may assert that whether class members consented to receive the text messages is an individual question that destroys predominance. There are two problems with this argument. First, lack of consent is not an element of a prima facia claim under the TCPA; consent is an affirmative defense. *In re the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 7990 (July 10, 2015) ("[T]he burden is on the caller to prove that it obtained the necessary prior express consent."); *In re the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, 1844 (Feb. 15, 2012) ("should any question about the consent arise, the seller will bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained."); *Backer Law Firm, LLC v. Costco Wholesale Corp.*, No. 4:15-cv-00327-SRB, 2017 WL 6388974, at *6 (W.D. Mo. Nov. 28, 2017); *Krakauer v. Dish Network L.L.C.*, 311 F.R.D. 384, 397 (M.D.N.C. 2015), *aff'd*, 925 F.3d 643 (4th Cir. 2019)

(demonstrating consent an affirmative defense to do-not-call violations). Where, as here, common issues otherwise predominate, courts generally certify classes under Rule 23(b)(3) despite potential individualized issues in affirmative defenses that Defendants might raise. *Cromeans v. Morgan Keegan & Co.*, 303 F.R.D. 543, 561 (W.D. Mo. 2014).

Second, evidence of consent is sorely lacking here, and what little evidence exists is common to all class members. The relevant regulations require signed, written agreements to establish consent. *See* 47 C.F.R. § 64.1200(a)(2), (f)(8) (consent required for autodialed telemarketing calls "means an agreement, in writing, bearing the signature of the person called"); *id.* § 64.1200(c)(2)(ii) (consent required to call a number on the do-not-call registry "must be evidenced by a signed, written agreement"). But Shark Bar [redacted] (Bradley Dep. at 77:1-10, 79:24-80:1, 91:17-20; Uhlig Dep. at 97:14-98:6.) Thus, in order to establish that members of the proposed classes consented to receive text messages, Shark Bar will have to rely on circumstantial evidence, namely testimony that it [redacted]. (*See* Bradley Dep. at 79:11-23.) This circumstantial evidence of Shark Bar's general practice—along with evidence to the contrary, *see supra* note 5—is common to all proposed class members, and resolving whether it is sufficient to establish consent as to Mr. Hand will resolve that issue for all other class members. *See Physicians Healthsource, Inc. v. A-S Medication Solutions, LLC*, 318 F.R.D. 712, 722–23 (N.D. Ill. 2016), *appeal filed* (7th Cir. Mar. 13, 2019) (holding that TCPA consent could be determined on a class-wide basis because defendant argued that a number was only in its database if the number had been voluntarily provided along with permission to receive faxes); *Dr. Robert L. Meinders D.C., Ltd. v. Emery Wilson Corp.*, No. 14-cv-596-SMY-SCW, 2016 WL 3402621, at *6–*7 (S.D. Ill. June 21, 2016)

(certifying class of people in defendant's database who had received faxes where evidence of consent consisted primarily of testimony that it was employees' practice to obtain consent; "[defendant] may not rely on its own failure to … retain records of who consented to receiving fax advertisements in order to defeat class certification").

B. Class treatment is superior.

The Rule 23(b)(3) superiority element "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Lafollette v. Libery Mut. Fire Ins. Co.*, No. 14-cv-04147-NKL, 2016 WL 4083478, at *16 (W.D. Mo. Aug. 1, 2016) (internal quotations omitted). Here, no such practical problems exist and a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In determining whether superiority is met, courts look to four factors: (A) class members' interest in individually controlling separate actions; (B) the extent and nature of litigation concerning the claims already involving class members; (C) the desirability of concentrating the litigation before the court; and (D) any difficulties in managing a class action. *Id*. Each of these factors support finding superiority here.

With respect to the first two factors, Mr. Hand is the only class member to have come forward seeking to act as lead plaintiff in this action on behalf of other recipients of telemarketing text messages from Shark Bar, and there is no evidence of any other case concerning the claims at issue here. *See Lafollette*, 2016 WL 4083478 at *16; *Vogt v. State Farm Life Ins. Co.*, No. 16-cv-04170-NKL, 2018 WL 1955425, at *7 (W.D. Mo. Apr. 24, 2018). The third factor also weighs in favor of superiority, as the factual locus of this case, Shark Bar, is located in this district. *See Cromeans*, 303 F.R.D. at 560. With respect to the fourth factor, no particular manageability difficulties exist. *See id*. (finding fourth superiority factor met where

"Plaintiffs' counsel, who has substantial experience in class action litigation, does not anticipate any significant or unusual difficulties in the management of this action as a class action").

Furthermore, "[c]lass actions are superior vehicles for addressing wrongs when members' damages are too small to make individual litigation worthwhile." *Padberg v. Dish Network LLC*, No. 11-04035-CV-C-NKL, 2013 WL 12344881, at *9 (W.D. Mo. July 11, 2013). *See also Vogt*, 2018 WL 1955425, at *7 (finding superiority where "the costs of prosecuting each class member's claims individually would likely exceed each member's damages"). A TCPA action is generally a "negative value suit—where the value of claims is so insubstantial that individual lawsuits would be unlikely or unfeasible." *Backer*, 321 F.R.D. at 350. "Given that statutory damages under the TCPA are only $500 per violation (which may be trebled under [47 U.S.C.] § 227(b)(3)(C) if Defendant's actions were willful or knowing) and there is no statutory provision for the recovery of attorneys' fees, class members would spend more money to litigate their suits than what they can individually gain." *Id*. at 350–51. This is particularly apparent here, where a time- and resource-intensive analysis of the at-issue texting platforms' capabilities would have to be undertaken for any given class member, and repeated for each individual case. Ultimately, the alternative to class certification here—tens of thousands of negative value individual suits—"would be more burdensome and less efficient" than a class action, rendering class treatment superior. *Vogt*, 2018 WL 1955425, at *7.

CONCLUSION

The proposed classes satisfy all the requirements of Rule 23(a) and (b)(3). This Court should grant the motion for class certification, appoint Mr. Hand to represent the classes, and appoint his lawyers as class counsel.

Date: October 14, 2019

Respectfully submitted,

/s/ Bill Kenney

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CERTIFICATE OF SERVICE

I hereby certify that, on October 14, 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