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

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

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TABLE OF AUTHORITIES

PLAINTIFF'S STATEMENT OF UNCONTROVERTED MATERIAL FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

1.   Beach Entertainment KC, LLC d/b/a Shark Bar ("Shark Bar") is a bar located in the Power & Light District in downtown Kansas City, Missouri. *See Shark Bar*, Kansas City Power & Light District, https://powerandlightdistrict.com/eat-and-drink/shark-bar.

2.   Shark Bar employed ███████████████████████████████████ ███ ████████████. (Ex. A,[1] Deposition of Mark Musselman at 26:23–30:14; Ex. B, Deposition of Kyle Uhlig ("Uhlig Dep.") at 14:7–14, 17:24–18:10, 18:17–19:2, 22:19–25:3, 27:7–28:23, 49:12–15.) Shark Bar's marketing initiatives ████████████████████████ ██████." (Ex. C, Shark Bar–Hand00025256; Ex. D, Shark Bar–Hand00000443.)

3.   These promotional builders used two text messaging platforms to send messages promoting the bar: SendSmart and TXT Live!. (Ex. E, Shark Bar Supp. Interrog. Resp. No. 4.)

I.   Shark Bar Used the SendSmart Text Messaging Software

4.   The first messaging platform was called SendSmart, which Defendant Entertainment Consulting International ("ECI") ███████████████████████ ███████████████████. (Ex. F, ██████████████████████████.)

5.   SendSmart ███████████████████████████████████████. (Ex. G, Substitute Expert Report of Dr. Michael Shamos ("Shamos Rept.") ¶¶ 87.)

6.   To "campaign" to those numbers (███████████████████████████ ██ ██ (Ex. H,

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Deposition of Kyla Bradley ("Bradley Dep.") at 116:21–117:23; Uhlig Dep. at 25:11–27:7; 74:16–18; Shamos Rept. ¶¶ 88–93.) The employee would ███████████████ ██ ██████████████████████████ (Ex. I, Expert Report of Dr. Michael Mitzenmacher ("Mitzenmacher Rept.") ¶ 35.) The employee would then click "Launch," at which point the SendSmart system would determine which contacts would be texted. *See Sendsmart-launch-create*, Vimeo, https://vimeo.com/165045443 at 2:40 (noting SendSmart "is gonna grab randomly" 100 numbers from a larger list meeting certain criteria); Uhlig Dep. at 25:11–26:5; Shamos Rept. ¶¶ 90–93.) The messages ████████████████████████████ █████████████████████ (Miztenmacher Rept. ¶ 36; Shamos Rept. ¶ 93.)

7.   These campaigns ██████████████████████████████████. (Bradley Dep. at 116:2–117:23; Uhlig Dep. at 25:11–26:5.) Shark Bar employees ███████████ ███████████████████████████████████ (Uhlig Dep. at 74:16–75:18.) As one Shark Bar employee stated, ████████████████████████████████████ ██." (Uhlig Dep. at 16:17–17:19, 25:11–26:5.)

8.   SendSmart was well-equipped for this task because ████████████ █████████████████████████████████. (Uhlig Dep. at 51:7–52:6 (estimating ████████████████████████████). The only ██████████ ██ ██ ██████████████████████████████. (Uhlig Dep. at 48:2–49:3.)

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9.   This meant that SendSmart could send to ███████████████████. As SendSmart's CEO made clear ████████████████████████████

██

(Shamos Rept. at ¶ 83; Uhlig Dep. at 53:1–54:4; Ex. J, Uhlig Dep. Exhibit No. 3 (███████

███████████████████████████████).) Thus, unlike manually dialed telephone

calls to individual phone numbers, ██████████████████████████████████████

███████████████████████████. (*See* Uhlig Dep. at 48:2–4.)

10.   Records produced by SendSmart ("SendSmart SMS Logs") show ████████

██

███████████████████████████. (Kenney Decl. ¶¶ 29–32.) Of those ████████

██.

(Kenney Decl. ¶ 33.) Plaintiff J.T. Hand was among the recipients of texts advertising Shark Bar

sent through the SendSmart System. (Group Ex. K (text Plaintiff received sent through

SendSmart, Excerpts from the SendSmart SMS Logs, and SendSmart MySQL Insert

Commands).)

11.   Around May 19, 2014, Mr. Uhlig—a former District Sales Manager for the

Kansas City Live! Block—started looking into ████████████████████████████

████████████████████████. (Uhlig Dep. at 54:14–19, 57:23–58:8, 58:19–

59:1.) He worked with ██

████████ (Uhlig Dep. at 55:8, 57:23–60:8.)

12.   While ██

██." (Uhlig

Dep. at 59:2–60:8; Ex. L, Uhlig Dep. Exhibit No. 4.) However, Mr. Uhlig testified that he ████

███

███

████████████████████" (Uhlig Dep. at 60:3–8.)

II. Shark Bar Used the TXT Live! Text Messaging Software

13. Ultimately, ███

██

███!. (Ex. M, TXT Live!

████████████████████).)

14. Mr. Uhlig worked with TXT Live!'s ███████████████████████████

███. (Uhlig Dep. at 22:19-

24:11, 61:16–21, 62:25–63:1.) Those that used the SendSmart platform testified ████

███████████████████████████████████████ (*See* Uhlig Dep. 76:20–79:11; Bradley Dep.

115:24–117:23; Ex. N, Deposition of Blake Miller ("Miller Dep.") at 22:20–23:15.)

15. Shark Bar started using TXT Live! in early 2016 to send messages promoting

happy hour events. (Ex. E, Shark Bar Supp. Interrog. Resp. No. 4.)

16. TXT Live! ██ Bradley

Dep. at 110:16–19; Ex. O, Deposition of Benjamin Rodriguez ("Rodriguez Dep.") at 97:4–25.)

There were █████ contacts in the TXT Live! database that were associated with Shark Bar.

(Mitzenmacher Rept. ¶ 102 n.133.)

17. ██ (Bradley

Dep. at 111:14–115:20; Ex. P, Deposition of Dr. Michael Mitzenmacher ("Mitzenmacher Dep.")

at 75:6–17.) In fact, TXT Live! ████████████████████████████." (Mitzenmacher Dep.

at 75:6–17; Shamos Rept. ¶ 36; Mitzenmacher Rept. ¶ 48.)

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18.   To send a campaign, a ████████████████████████████████

██

█████████████████████████████████). (Shamos Rept. ¶¶ 36, 37–43;

Mitzenmacher Rept. ¶ 48; Bradley Dep. at 111:14–112:2; Uhlig Dep. at 62:2–24; Rodriguez

Dep. at 40:12–42:7.) Selecting ████████████████████████████████

██

██

████ (Shamos Rept. ¶ 58; Uhlig Dep. 63:24–64:17; *see also* Ex. Q, Deposition of Steve

Klingbeil at 17:12–18:2.)

19.   The ██

(Shamos Rept. ¶ 45; Uhlig Dep. at 51:16–19.) TXT Live! users ████████████████

████████████████████████, all of the text messages say the same thing. (Uhlig

Dep. 51:16–19; *see also* Ex. R, Deposition of Montana Asher ("Asher Dep.") at 40:3–8.) The

messages ██

██ (Shamos Rept. ¶ 36;

Mitzenmacher Dep. at 116:16–24; Bradley Dep. at 113:21–114:1.)

20.   Next, the TXT Live! ████████████████████████████████

████████████████████. (Bradley Dep. at 112:25–115:20; Miller Dep. at 120:24–122:14;

Shamos Rept. ¶¶ 48, 57; Mitzenmacher Rept. ¶ 52; *see also* Uhlig Dep. at 67:4–19.)

21.   Finally, after setting ████████████████████████████████

████████████(Mitzenmacher Rept. ¶ 53; Shamos Rept. ¶ 67.) At that point, the TXT Live! code

██

████████████████████████████████████ (*See* Shamos Rept. ¶¶ 36, 57–72

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(█████████████████████); Miller Dep. at 89:19–92:5, 121:10–122:14; Uhlig Dep. at 78:23–25; Bradley Dep. at 112:25–115:20.) This process was accomplished █████████

██

████████████████████████████████████. (Rodriguez Dep. at 69:8–70:22;

Shamos Rept. ¶¶ 68–69; Mitzenmacher Rept. ¶ 54; Mitzenmacher Dep. at 128:14–21.)

22.   Thus, TXT Live! ██

████████████████████████████████████ Uhlig Dep. at

75:6–18, 78:23–25; Bradley Dep. at 112:3–115:20 (noting that ███████████████

████████████████████████████); Mitzenmacher Rept. ¶ 71; Shamos Rept.

¶ 57.) TXT Live! users ███

████████████████████████████████████. (Uhlig Dep. at

79:8–11; Asher Dep. at 18:5–17; Shamos Rept. ¶ 44; Mitzenmacher Dep. at 127:18–128:10.)

23.   Once the TXT Live! system ████████████████████████████

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██████████ (Shamos Rept. ¶ 72; Miller Dep. at 34:8–36:15, 123:5–124:10; Rodriguez Dep. at

42:8–43:13, 54:7–56:5; *see also* Mitzenmacher Dep. at 127:11–17.)

24.   One TXT Live! user ████████████████████████████████████

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████████████████████ Uhlig Dep. at 77:5–78:22.) TXT Live! was used to ███████████

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████████████████████ Shamos Rept. ¶¶ 56–57, 77; Uhlig Dep. at 50:4–19; 67:24–68:11;

Ex. T, Uhlig Dep. Exhibit No. 5; Asher Dep. at 16:24–18:25; Miller Dep. at 122:19–123:1.) TXT Live! could send the same text message to 2,082 phone numbers in 420 seconds, which is 4.9 text messages per second for 7 minutes continuously. (Ex. U, Deposition of Dana Biffar at 125:13–127:7.)

25. The ability ██

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██████████████. W, Uhlig Dep. Exhibit No. 6.)

26. Records produced by Think Big show that Shark Bar used TXT Live! to send as many as ████████ outgoing text messages to as many as ████████ unique phone numbers between April 25, 2014 and April 4, 2018. (*See supra* at ¶ 16, *citing* Mitzenmacher Rept. ¶ 102 n.133; Mitzenmacher Rept. ¶ 135.) Of those ██████████████████████████████

██████████████. (Shamos Rept. ¶ 77.)

27. Mr. Hand received texts through the TXT Live! system advertising Shark Bar. (Group Ex. X (Screenshots of TXT Live texts to Hand); Group Ex. K (TXT Live! records showing texts to Hand).)

28. On May 17, 2018, Plaintiff's counsel sent a letter requesting that Shark Bar provide them with a copy of Shark Bar's written policies and procedures to ensure compliance with the TCPA as of April 25, 2014, February 13, 2018, and April 4, 2018; however, Shark Bar never responded to Plaintiff's written request. (Ex. Y, May 2018 Email Thread.) Shark Bar never identified any publicly-available documents setting forth any TCPA policies, and instead claimed to be "exempt from the obligation to download and scrub against the [National Do Not Call Registry] . . ." (Ex. E, Shark Bar Supp. Interrog. Resp. Nos. 14–16.)

29.   The marketing manager overseeing the Power & Light District, (Bradley Dep. at 16:9–25), could not ███████████████████████████████████. (Bradley Dep. at 12:20–16:8.) Shark Bar's Promotional Builder—and former District Sales Manager for the Kansas City Live! Block, (Uhlig Dep. at 22:19–24:11)—who ████████████████████████

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███. (Uhlig Dep. at 79:12–80:6.)

INTRODUCTION

Plaintiff J.T. Hand received multiple text messages imploring him to visit Shark Bar and to bring his friends. After receiving these texts, Mr. Hand filed suit alleging various violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(a)(1). (Dkt. 56.) Mr. Hand now moves for partial summary judgment on the issue of whether the software Shark Bar used to send the text messages—TXT Live! and SendSmart—constitutes an "automatic telephone dialing system" ("ATDS") under the TCPA. The undisputed evidence shows that TXT Live! and SendSmart randomly selected Plaintiff's phone number from Shark Bar's contact list and automatically sent him text messages as part of campaigns that could send thousands of identical messages in a matter of seconds at the click of a button. The undisputed evidence therefore demonstrates that both the TXT Live! and SendSmart messaging platforms qualify as an ATDS, and the motion for partial summary judgment should be granted.[2]

ARGUMENT

"Summary judgment is appropriate when the evidence, viewed in a light most favorable to the nonmoving party, shows no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 999 (8th Cir. 2011); *see Smith v. Basin Park Hotel, Inc.*, 350 F.3d 810, 813 (8th Cir. 2003) (summary judgment should be granted when "the evidence is such that no reasonable jury could return a verdict for the non-moving party"). Here, the undisputed evidence shows that partial summary

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[2]   This Court also has before it a pending motion for class certification. Concurrently pending motions for summary judgment and for class certification present potential one-way intervention problems. *See Barfield v. Sho-Me Power Elec. Co-op.*, No. 2:11-CV-04321-NKL, 2014 WL 1955107, at *2 (W.D. Mo. May 14, 2014). If, as expected, Defendants move for summary judgment prior to a ruling on class certification, Defendants will have waived any one-way intervention objections. *Id.* Nevertheless, to avoid any problems, this Court may wish to defer ruling on summary judgment until it has resolved the motion for class certification.

judgment is warranted on whether Shark Bar's text-messaging equipment satisfies the statutory definition of an ATDS. Fed. R. Civ. P. 56(a) (permitting a party to move for summary judgment on part of a claim).

I. The Messaging Platforms Are Each an "Automatic Telephone Dialing System" Under the TCPA.

The TCPA makes it unlawful for anyone to "make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system" to a cell phone. 47 U.S.C. § 227(b)(1)(A)(iii). The undisputed evidence shows that both the TXT Live! and SendSmart messaging software that Shark Bar used qualify as an ATDS.

An ATDS is "equipment which has the capacity … (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) 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" could seemingly 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.*;

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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* Shamos Rept. ¶ 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,' even if the telephone numbers are produced randomly."). 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 automatically dials numbers from a stored list qualifies as an ATDS.

This is precisely the conclusion that the Ninth Circuit reached in *Marks*. 904 F.3d at 1050–51 (9th Cir. 2019). Notably, it is "[t]he only circuit court to analyze the issue in depth since the D.C. Circuit's ruling in *ACA International*." *Allan v. Pennsylvania Higher Educ. Assistance Agency*, No. 2:14-CV-54, 2019 WL 3890214, at *3 (W.D. Mich. Aug. 19, 2019). After a reasoned analysis, the Ninth Circuit 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." *Marks*, 904 F.3d at 1052 (internal quotations and alterations omitted); *see Duguid v. Facebook*, 926 F.3d 1146, 1150 (9th Cir. 2019) (noting *Marks* "clarif[ied] any ambiguity, [and] rearticulated the definition of an ATDS").

The *Marks* court found support for its holding in "the context and structure of the [TCPA's] statutory scheme." *Marks*, 904 F.3d at 1051. Looking to various other provisions in

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the TCPA, the Ninth Circuit noted that a number of exceptions to liability for autodialed calls suggest that the definition of ATDS is not limited to equipment using a random or sequential number generator, and is broad enough to include equipment that dials from a stored list:

> 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 exception for prior express consent, "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.[3] Thus, the TCPA's prohibition on using an ATDS to dial certain kinds of numbers—such as 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* 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")).

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[3]   While this exemption was recently found to be unconstitutional, *Am. Ass'n of Political Consultants, Inc. v. Fed. Commc'ns Comm'n*, 923 F.3d 159, 170 (4th Cir. 2019), that does not change its relevance to illustrate how equipment could be used to dial—or not dial—curated lists. 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.

Under *Marks*, the TXT Live! and SendSmart systems clearly each qualify as an ATDS because they automatically dial stored numbers from a list. ███████████████ ███████████████████████████████████ (Mitzenmacher Rept. ¶ 102 n.133); Shamos Rept. ¶¶ 85, 87.) After the numbers were uploaded, TXT Live! and SendSmart could ████████████ ██████████████████████████████████████. (*See* Bradley Dep. at 111:14–115:20; Mitzenmacher Dep. at 75:6–17; Shamos Rept. ¶¶ 33, 36–52; 84–93.) Both the TXT Live! and SendSmart platforms could—and did—███████████████████████████████ (Shamos Rept. ¶¶ 55–57, 77, 83; Uhlig Dep. at 50:4–19; 67:24–68:11; Ex. T, Uhlig Dep. Exhibit No. 5.) The SendSmart and TXT Live! platforms would███████████████████████████ ████████████████████████████. (Shamos Rept. ¶¶ 72, 93; Miller Dep. at 34:8–36:15, 123:5–124:10; Rodriguez Dep. at 42:8–43:13, 54:7–56:5; *see also* Mitzenmacher Dep. at 127:11–17.) A TXT Live! user ██████████████████████████████████████ ██ This undisputed evidence establishes that the TXT Live! and SendSmart systems used by Shark Bar is an ATDS. *See Allan*, 2019 WL 3890214, at *3 (granting summary judgment in plaintiffs' favor on ATDS claim where equipment dialed numbers from a stored list).

Shark Bar may try to advance a different definition of what qualifies as an ATDS. In contrast to *Marks*' thorough analysis, a cursory review of the statute by the Third Circuit resulted in a different interpretation of the ATDS definition. *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018). Problematically, the *Dominguez* court did not provide a detailed analysis of the issue. Instead, it simply presented 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) (emphasis in original). Even a district court within the Third Circuit disagreed 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, as neither the Eighth Circuit nor any other court in this district has weighed in on this question. The Court here should follow the well-reasoned, thoughtful decision in *Marks* holding that equipment automatically dialing stored numbers is an ATDS, as many others have. *See, e.g.*, *Allan*, 2019 WL 3890214, at *3; *Gonzalez*, 371 F. Supp. 3d at 34; *Espejo v. Santander Consumer USA, Inc.*, No. 11 C 8987, 2019 WL 2450492, at *8 (N.D. Ill. June 12, 2019); *Getz v. DIRECTV, LLC*, 359 F. Supp. 3d 1222, 1230 (S.D. Fla. 2019).

Nevertheless, 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. When a TXT Live! user sets up a ███████████████████████████████ ██ ██ (Shamos Rept. ¶¶ 36, 37–43, 48, 57; Mitzenmacher Rept. ¶¶ 48, 52; Bradley Dep. at 111:14–115:20; Uhlig Dep. at 62:2–24; Rodriguez Dep. at 40:12–42:7; 73:20–74:22; Miller Dep. at 120:24–122:14.) From there, ████████████████████████████████████ ██

(███

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███.

(Rodriguez Dep. at 69:8–70:22; Shamos Rept. ¶¶ 35, 57–72, 68–69; Mitzenmacher Rept. ¶ 54;

Mitzenmacher Dep. at 128:14–21; Miller Dep. at 89:19–92:5, 120:3–122:14.)[4] Indeed, a

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█████████████ Rodriguez Dep. at 69:8–70:22; Shamos Rept. ¶¶ 68–69; Mitzenmacher Rept.

¶ 54; Mitzenmacher Dep. at 128:14–21.) SendSmart operates ███████████████████

███

██████████████████████████████. (Bradley Dep. 116:21–117:23; Uhlig

Dep. at 25:11–27:7; 74:16–18; Shamos Rept. ¶¶ 88–93); *Sendsmart-launch-create*, Vimeo,

https://vimeo.com/165045443 at 2:40 (demonstration explaining that SendSmart "is gonna grab

randomly" 100 numbers from a larger list meeting certain criteria).

Thus, while the SendSmart and TXT Live! systems ████████████████████

███

████████████████████████████████████ (Uhlig Dep. at

25:23–26:5, 74:16–75:18, 78:23–79:3; Bradley Dep. at 112:25–115:20.)[5] SendSmart and TXT

Live! users ████████████████████████████

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[4]   Both experts agree ██████████████████████████████████████
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███
██████████████████████████ (*Id*. at 145:2–147:6.)

[5]   Dr. Mitzenmacher was ████████████████████████████████
███
███
████████████████ (Ex. Z, Rebuttal Report of Dr. Michael Shamos ¶ 26) (emphasis in
original.)

(Uhlig Dep. at 75:6–18, 79:8–11; Asher Dep. at 18:5–17; Shamos Rept. ¶ 44; Mitzenmacher Dep. at 127:18–128:10.) In fact, the point of the systems was to ███████████████████ ██ (Uhlig Dep. at 16:17–17:19, 25:11–26:5; 75:6–18, 78:23–25; Bradley Dep. at 116:2–117:23, 112:3–115:20.)

In sum, equipment that automatically dials numbers from a stored list—which the TXT Live! and SendSmart systems unquestionably do—fits the statutory definition of an ATDS. But even if random number generation is required, the TXT Live! and SendSmart systems each still qualify as an ATDS because they generate random lists of telephone numbers to be called, and then automatically dial those numbers. Consequently, the Court should grant Plaintiff's motion for partial summary judgment and hold that the Txt Live! and SendSmart systems are each an ATDS.

CONCLUSION

The undisputed evidence establishes that the TXT Live! and SendSmart software that Shark Bar used to text Mr. Hand each qualify as an ATDS. As such, the Court should grant Plaintiff's Motion for Partial Summary Judgment.

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Date: October 25, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 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

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