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12 NICOLE PIMENTAL, individually and on behalf of
all others similarly situated

13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION

17
18 NICOLE PIMENTAL, individually and on
behalf of all others similarly situated,

19 Plaintiff,

20 v.

21 GOOGLE INC., a Delaware corporation,
22 and SLIDE, INC., a Delaware corporation,

23 Defendants.

Case No. 11-cv-02585-SBA

**JOINT CASE MANAGEMENT
STATEMENT**

1 Pursuant to Civil Local Rule 16-9 and Rule 26(f) of the Federal Rules of Civil Procedure,
2 Plaintiff Nicole Pimental, Defendant Google Inc., and Defendant Slide, Inc. (collectively the
3 “Parties”) jointly submit this Joint Case Management Statement.

4 **1. Jurisdiction & Service:**

5 The First Amended Complaint (“FAC”) asserts that the Court has subject-matter
6 jurisdiction over this case pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2),
7 because at least one member of the putative class is a citizen of a state different from Defendants
8 and the amount in controversy exceeds the sum or value of \$5,000,000. Defendants do not
9 contest the existence of subject matter or personal jurisdiction or the venue of this action. No
10 parties remain to be served.

11 **2. Facts:**

12 Plaintiff’s FAC asserts a single claim for relief, alleging that Defendants transmitted text
13 message advertisements through their group text messaging service known as Disco to the
14 cellular telephones of Plaintiff and the putative class in violation of the Telephone Consumer
15 Protection Act, 47 U.S.C. § 227 (hereafter the “TCPA”). Specifically, Plaintiff alleges that
16 Defendants made and transmitted text message advertisements that promoted the Disco group
17 texting service and the Disco mobile application to Plaintiff without express consent. Plaintiff
18 alleges, on behalf of the putative class, that Defendants never sought nor obtained consent to
19 make and transmit these text messages.

20 Factual issues in this case include, but are not limited to, the following: (a) whether
21 Plaintiff and members of the Class received the text message calls at issue; (b) whether Plaintiff
22 and members of the Class gave prior express consent to receive those text message calls;
23 (c) whether Defendants were responsible for making those text message calls and causing them to
24 be transmitted to Plaintiff and the members of the putative class; and (d) whether Defendants used
25 an “automatic telephone dialing system,” as that term is defined by the TCPA and applicable
26 authorities.

27 Defendants deny liability on Plaintiff’s claim.
28

1 **3. Legal Issues:**

2 The legal issues in this case include, but are not limited to, the following: (a) whether the
3 text message calls allegedly received by Plaintiff and the Class violate the TCPA; (b) whether the
4 putative Class, as defined in the FAC, may be certified under Rule 23; and (c) whether Plaintiff
5 and/or the putative Class members are entitled to treble damages under the TCPA.

6 **4. Motions:**

7 There are no prior or pending motions. Plaintiff anticipates filing a motion for class
8 certification, motion for summary judgment motion and, if necessary, discovery-related motions.
9 As discussed in Section 10, a motion to consolidate cases may also be filed.

10 Defendant anticipates filing a motion to dismiss pursuant to Rule 12, motion for summary
11 judgment motion and, if necessary, discovery-related motions.

12 **5. Amendment of Pleadings:**

13 The initial complaint in this action was filed on May 27, 2011. Plaintiff filed the FAC on
14 June 24, 2011, as of right. (Dkt. 5). Plaintiff does not anticipate the need to file any amendments
15 to the pleadings at this time. Future developments, however, could necessitate the filing of
16 amended pleadings, and the addition of un-named defendants based on information uncovered
17 through discovery. The Parties agree to amend, or file any requests to amend, pleadings on or
18 before February 14, 2012.

19 **6. Evidence Preservation:**

20 The Parties have taken reasonable steps to preserve evidence, including electronically
21 stored information, relevant to the issues reasonably evident in this action. The Parties have
22 agreed to further discuss the following issues: (1) the identification of relevant and discoverable
23 ESI; (2) the scope of discoverable ESI to be preserved and produced by the Parties; (3) the
24 formats for preservation and production of ESI; (4) the potential for conducting discovery in
25 phases or stages as a method for reducing costs and burden; (5) the procedures for handling
26 inadvertent production of privileged information and other privilege waiver issues under Rule 502
27 of the Federal Rules of Evidence; (6) any other relevant ESI issues involved in the case.

1 The Parties have agreed to attempt to craft an appropriate protocol governing the
2 production of ESI and have agreed to negotiate a Stipulated Protective Order.

3 **7. Disclosures:**

4 Defendants believe that discovery, including the exchange of initial disclosures under
5 Rule 26(a)(1), should be temporarily stayed pending resolution of Defendants' forthcoming
6 motion to dismiss, which Defendants believe will be dispositive. Plaintiff disagrees with that
7 position and believes that discovery should not be stayed.

8 In the event that no discovery stay issues, the Parties have agreed to exchange initial
9 disclosures on or before October 14, 2011.

10 **8. Discovery:**

11 As noted above, the Parties disagree as to whether a stay of discovery should issue
12 pending resolution of Defendants' motion to dismiss. The Parties have, however, informally
13 discussed the preliminary exchange of discovery if and when discovery commences. To date, no
14 such information has been formally exchanged. As stated above, if no discovery stay issues, the
15 Parties will exchange Rule 26(a)(1) disclosures by October 14, 2011. Further, if no discovery
16 stay issues, the Parties propose the following schedule for discovery:

- 17 • Discovery shall not be bifurcated and class and merits discovery will take place
18 simultaneously.
- 19 • Fact discovery to commence on October 21, 2011, one week after the service of initial
20 disclosures.
- 21 • Fact discovery to close on July 20, 2012.
- 22 • Expert discovery will be separate from and follow class and merits discovery.
- 23 • Experts to be disclosed by July 6, 2012, and initial expert reports to be disclosed by
24 August 6, 2012; rebuttal experts to be disclosed by August 20, 2012, and rebuttal
25 expert reports to be disclosed by September 19, 2012.
- 26 • Expert discovery to commence on July 23, 2012, and close on October 19, 2012.

- 1 • Although it is premature to anticipate the scope of discovery in this case, the Parties
2 do not foresee the need for a modification of the scope of the discovery rules in the
3 Federal Rules of Civil Procedure, or the standard discovery limitations thereunder.
- 4 • The Parties agree that discovery sought in this case may involve confidential
5 information. Accordingly, as stated above, the Parties anticipate submitting a
6 Stipulated Protective Order to the Court for approval within 60 days.
- 7 • The Parties agree that privilege logs need not be served until 60 days after a Party has
8 completed its production in response to a set of requests for production. The Parties
9 also agree that Rule 502(b) and (d) of the Federal Rules of Evidence shall apply to this
10 case. As such, the inadvertent disclosure of privileged material shall not operate as a
11 waiver of that privilege. The Parties' Stipulated Protective Order to be presented to
12 the Court for approval will contain a clause regarding the inadvertent production of
13 privileged material and the handling of the same.

14 **9. Class Actions:**

15 This action is a putative class action and requires the following additions to the Parties'
16 Joint Case Management Conference Statement pursuant to Civil Local Rule 16-9(b). The FAC
17 asserts this matter is maintainable as a class action under Fed. R. Civ. P. 23(b)(2) and (3) and
18 defines the Class as: "All persons who (1) received a text message directly from the Disco group
19 texting service that was not sent by a Disco group leader or another member of a Disco group;
20 and (2) all persons who opted-out of a Disco texting group within twenty-four hours of receipt of
21 an initiating text message or who was a member of a Disco texting group that was closed within
22 twenty-four hours of its creation." Plaintiff reserves the right to seek leave of Court to revise this
23 definition after sufficient discovery.

24 Plaintiff intends on moving this Court to certify a class under Rule 23(b)(3) of the Federal
25 Rules of Civil Procedure after appropriate discovery, and the Parties have agreed to tentatively set
26 November 26, 2012, as the date for Plaintiff to file a class certification motion. Future
27 developments in the case (e.g., motion practice, joinder of additional parties) may require that the
28 date for filing a class certification motion be delayed.

1 Plaintiff claims she is entitled to maintain this action as a class action under Fed. R. Civ.
2 P. 23(a)-(b) because the following criteria are met.

3 1. **Numerosity.** The Class is estimated to consist of thousands of individuals to whom
4 the allegedly unauthorized text message advertisements were transmitted.

5 2. **Commonality:** There are many questions of law and fact common to the claims of the
6 Plaintiff and other members of the Class which predominate over any questions that may affect
7 individual members of the Class, including: (a) whether the text messages at issue were sent using
8 an automatic telephone dialing system; (b) whether Plaintiff and the Class gave their prior express
9 consent to receive the text messages at issues; and (c) whether the transmission of the text
10 messages at issue was done in willful violation of the TCPA so that statutorily available treble
11 damages are warranted.

12 3. **Typicality:** Plaintiff alleges that Defendants have acted or failed to act on grounds
13 generally applicable to the Plaintiff and other members of the Class by allegedly transmitting *en*
14 *masse* the text messages at issue to Plaintiff and the Class in the same or similar manner requiring
15 the Court's imposition of uniform statutory relief.

16 4. **Adequacy:** Plaintiff will fairly and adequately represent and protect the interests of
17 the other members of the proposed Class. Plaintiff has retained counsel with substantial
18 experience in prosecuting complex litigation and class actions. Plaintiff and her counsel are
19 committed to vigorously prosecuting this action on behalf of the members of the Class, and have
20 the financial resources to do so. Neither Plaintiff nor her counsel has any interest adverse to those
21 of the other members of the Class.

22 5. **Requirements under Rule 23(b)(3):** The questions of law and fact discussed above
23 predominate over any questions affecting only individual members as Defendants' alleged
24 conduct was uniform as to the Plaintiff and the Class. This class action lawsuit is the most fair
25 and efficient way of adjudicating this controversy. The members of the Class would find the cost
26 of litigating their claims to be prohibitive, as each individual plaintiff has suffered relatively small
27 statutory damages compared to the costs of litigation. A class action is also superior to multiple
28

1 individual actions in that it conserves the resources of the courts and the litigants, and promotes
2 consistency and efficiency of adjudication.

3 Defendants dispute that this action is maintainable as a class action under Rule 23.
4 Defendants anticipate opposing any motion to certify a class in this action.

5 **10. Related Cases:**

6 *Franklin v. Google, Inc.* (11-cv-03333-SBA) (N.D. Cal.) was filed on July 7, 2011. The
7 plaintiff in that case filed a Notice of Pendency of Related Case or Proceeding referencing this
8 action. On August 23, 2011, the *Franklin* case was reassigned to this Court after the plaintiff
9 declined to proceed before the Magistrate Judge. However, no order has issued relating the
10 *Franklin* case to the instant action.

11 **11. Relief:**

12 Plaintiff seeks the following relief:

- 13 (a) An order certifying the action as a Class Action and designating Plaintiff and her
14 counsel as representatives of the Class;
- 15 (b) Injunctive relief for the Class on Count I;
- 16 (c) Actual damages, or statutory damages in the amount of \$500 per violation under
17 47 U.S.C. § 227(b)(3)(B), whichever is greater, with a possible trebling under §
18 227(b)(3)(C);
- 19 (d) An award of reasonable attorneys' fees and costs for Plaintiff and her counsel;
- 20 (e) Such other and further relief as the Court may deem just and proper.

21 **12. Settlement & ADR:**

22 The Parties have had informal discussions regarding potential ADR, but have not yet
23 reached agreement on a specific ADR plan for the case, due largely to the early stage of the
24 proceedings. The Parties will file a Notice of Need for ADR Phone Conference prior to the Case
25 Management Conference.

26 **13. Consent to Magistrate Judge for All Purposes:**

27 All Parties do not consent to proceed before a magistrate judge for all purposes.
28

1 **14. Other References:**

2 The Parties do not believe this case is suitable for reference to binding arbitration, a
3 special master, or the Judicial Panel on Multidistrict Litigation.

4 **15. Narrowing of Issues:**

5 The Parties can discuss, through the discovery process and any dispositive motions, the
6 potential narrowing of issues. At this stage, it is too early to have a meaningful discussion
7 regarding the narrowing of issues.

8 **16. Expedited Schedule:**

9 The Parties agree that this case is not suitable for an expedited process or streamlined
10 procedures.

11 **17. Scheduling:**

12 The parties propose the following schedule:

- 13 (a) A trial date of July 1, 2013;
- 14 (b) Dispositive motions due by February 1, 2013;
- 15 (c) Motion for class certification due by November 26, 2012;
- 16 (d) Expert witness disclosures under Fed. R. Civ. P. 26(a)(2) due by July 6, 2012, and
17 initial expert reports due by August 6, 2012; rebuttal experts designated by August
18 20, 2012, and rebuttal expert reports shall be disclosed by September 19, 2012.
19 Expert discovery to be completed by October 19, 2012;
- 20 (e) Class and merits discovery completed by July 20, 2012; and
- 21 (f) Amended pleadings due by February 14, 2012.

22 **18. Trial:**

23 The Parties anticipate a jury trial that would last approximately three to five days.

24 **19. Disclosure of Non-party Interested Entities or Persons:**

25 The Parties have filed their respective Certifications of Interested Entities or Persons.
26
27
28

1 **20. Other Matters:**

2 Other than mediation and the early filing of dispositive motions, Plaintiff does not know
3 of any other matter that may facilitate the just, speedy and inexpensive disposition of this matter.

4 DATED: August 31, 2011

PERKINS COIE LLP

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6 By: /s/ Bobbie J. Wilson
BOBBIE J. WILSON

7 Attorneys for Defendants
8 GOOGLE INC. and SLIDE, INC.

9 DATED: August 31, 2011

EDELSON MCGUIRE, LLP

10
11 By: /s/ Sean P. Reis
SEAN P. REIS

12 Attorneys for Plaintiff NICOLE PIMENTAL,
13 individually and on behalf of all others
14 similarly situated

15 I, Bobbie Wilson, hereby attest, pursuant to N.D. Cal. General Order No. 45, that the
16 concurrence to the filing of this document has been obtained from each signatory hereto.

17 DATED: August 31, 2011

PERKINS COIE LLP

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19 By: /s/ Bobbie J. Wilson
BOBBIE J. WILSON

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21 Attorneys for Defendants
22 GOOGLE INC. and SLIDE, INC.

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