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

18 NICOLE PIMENTAL and JESSICA
 FRANKLIN, individually and on behalf of
 19 all others similarly situated,

20 Plaintiffs,

21 v.

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

23 Defendants.
 24

Case No. 11-cv-02585-SBA

**FURTHER JOINT CASE MANAGEMENT
 STATEMENT**

Hearing: October 12, 2011
 Time: 2:30 p.m.

25 This Document Relates to All Actions.
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1 Pursuant to this Court’s September 8, 2011 minute entry (Dkt. No. 21), Plaintiffs Nicole
2 Pimental and Jessica Franklin, along with Defendant Google Inc., and Defendant Slide, Inc.
3 (collectively the “Parties”), jointly submit this Further Joint Case Management Statement. As
4 further described below, Plaintiffs Pimental and Franklin consolidated their separate class action
5 complaints through a Consolidated Complaint (“CC”) filed on September 14, 2011. (Dkt. No.
6 24.) The CC additionally modifies the proposed class definition and adds a separate proposed
7 subclass.

8 **1. Jurisdiction & Service:**

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

14 **2. Facts:**

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

23 Factual issues in this case include, but are not limited to, the following: (a) whether
24 Plaintiffs and members of the proposed class and subclass received the text message calls at issue;
25 (b) whether Plaintiffs and members of the proposed class gave prior express consent to receive
26 those text message calls; (c) whether Defendants were responsible for making those text message
27 calls and causing them to be transmitted to Plaintiffs and the members of the proposed class and
28 subclass; (d) whether Defendants continued to make text message calls to Plaintiffs and the

1 members of the subclass after they requested that all Disco text messages cease; and (e) whether
2 Defendants used an “automatic telephone dialing system,” as that term is defined by the TCPA
3 and applicable authorities.

4 Defendants deny liability on Plaintiffs’ claims.

5 **3. Legal Issues:**

6 The legal issues in this case include, but are not limited to, the following: (a) whether the
7 text message calls allegedly received by Plaintiffs and members of the proposed class and
8 subclass violate the TCPA; (b) whether the putative class and subclass, as defined in the CC, may
9 be certified under Rule 23; and (c) whether Plaintiffs and/or the putative class and subclass
10 members are entitled to treble damages under the TCPA.

11 **4. Motions:**

12 On September 12, 2011, the Parties filed a stipulation to consolidate the related case:
13 *Franklin v. Google, Inc.* (11-cv-3333-SBA), which was at the time pending before this Court.
14 (Dkt. No. 23.) The Court entered an order consolidating the two cases on September 22, 2011.
15 (Dkt. No. 25.) There are no prior or pending motions. Plaintiffs anticipate filing a motion for
16 class certification, motion for summary judgment motion and, if necessary, discovery-related
17 motions.

18 Defendants anticipate filing a motion to dismiss pursuant to Rule 12, motion for summary
19 judgment motion and, if necessary, discovery-related motions.

20 **5. Amendment of Pleadings:**

21 The initial complaint in this action was filed on May 27, 2011. Plaintiff Pimental filed the
22 FAC on June 24, 2011, as of right. (Dkt. 5.) Plaintiffs filed a Consolidated Complaint on
23 September 14, 2011. (Dkt. No. 24.) Plaintiffs do not anticipate the need to file any further
24 amendments to the pleadings at this time. Future developments, however, could necessitate the
25 filing of amended pleadings, and the addition of un-named defendants based on information
26 uncovered through discovery. The Parties agree to amend, or file any requests to amend,
27 pleadings on or before February 14, 2012.

1 **6. Evidence Preservation:**

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

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

12 **7. Disclosures:**

13 Defendants believe that discovery, including the exchange of initial disclosures under
14 Rule 26(a)(1), should be temporarily stayed pending resolution of Defendants' forthcoming
15 motion to dismiss, which Defendants believe will be dispositive. Plaintiffs disagree with that
16 position and believes that discovery should not be stayed.

17 In the event that no discovery stay issues, the Parties have agreed to exchange initial
18 disclosures on or before November 1, 2011.

19 **8. Discovery:**

20 As noted above, the Parties disagree as to whether a stay of discovery should issue
21 pending resolution of Defendants' motion to dismiss. Plaintiff contends that as no stay is
22 currently in place, discovery may commence immediately. Defendants disagree and may file the
23 appropriate motion. As stated above, if no discovery stay issues, the Parties will exchange Rule
24 26(a)(1) disclosures by November 1, 2011. Further, if no discovery stay issues, the Parties
25 propose the following schedule for discovery:

- 26 • Discovery shall not be bifurcated and class and merits discovery will take place
- 27 simultaneously.
- 28 • Fact discovery to close on June 22, 2012.

- 1 • Experts to be disclosed by May 16, 2012, and initial expert reports to be disclosed by
2 June 15, 2012; rebuttal experts to be disclosed by June 29, 2012, and rebuttal expert
3 reports to be disclosed by July 27, 2012.
- 4 • Expert discovery to commence on May 16, 2012, and close on August 17, 2012.
- 5 • Although it is premature to anticipate the scope of discovery in this case, the Parties
6 do not foresee the need for a modification of the scope of the discovery rules in the
7 Federal Rules of Civil Procedure, or the standard discovery limitations thereunder.
- 8 • The Parties agree that discovery sought in this case may involve confidential
9 information. Accordingly, as stated above, the Parties anticipate submitting a
10 Stipulated Protective Order to the Court for approval within 60 days.
- 11 • The Parties agree that privilege logs need not be served until 60 days after a Party has
12 completed its production in response to a set of requests for production. The Parties
13 also agree that Rule 502(b) and (d) of the Federal Rules of Evidence shall apply to this
14 case. As such, the inadvertent disclosure of privileged material shall not operate as a
15 waiver of that privilege. The Parties' Stipulated Protective Order to be presented to
16 the Court for approval will contain a clause regarding the inadvertent production of
17 privileged material and the handling of the same.

18 **9. Class Actions:**

19 This action is a putative class action and requires the following additions to the Parties'
20 Joint Case Management Conference Statement pursuant to Civil Local Rule 16-9(b). The CC
21 asserts this matter is maintainable as a class action under Fed. R. Civ. P. 23(b)(2) and (3) and
22 defines the Disco Mobile App Class as: "All persons who received the Disco Mobile App Text, or
23 a substantially similar text from Defendants, that advertised Disco's mobile application." The
24 CC further defines the Leave SubClass as: "All persons who received any text message calls
25 through the Disco group texting service after texting "leave" to a Disco texting group." Plaintiffs
26 reserve the right to seek leave of Court to revise this definition after sufficient discovery.

27 Plaintiffs intend on moving this Court to certify a class under Rule 23(b)(3) of the Federal
28 Rules of Civil Procedure after appropriate discovery, and the Parties have agreed to tentatively set

1 September 14, 2012, as the date for Plaintiffs to file a class certification motion. Future
2 developments in the case (e.g., motion practice, joinder of additional parties) may require that the
3 date for filing a class certification motion be delayed.

4 Plaintiffs claim they are entitled to maintain this action as a class action under Fed. R. Civ.
5 P. 23(a)-(b) because the following criteria are met.

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

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

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

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

25 5. **Requirements under Rule 23(b)(3):** The questions of law and fact discussed above
26 predominate over any questions affecting only individual members as Defendants' alleged
27 conduct was uniform as to the Plaintiffs and the Class. This class action lawsuit is the most fair
28 and efficient way of adjudicating this controversy. The members of the Class would find the cost

1 of litigating their claims to be prohibitive, as each individual plaintiff has suffered relatively small
2 statutory damages compared to the costs of litigation. A class action is also superior to multiple
3 individual actions in that it conserves the resources of the courts and the litigants, and promotes
4 consistency and efficiency of adjudication.

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

7 **10. Related Cases:**

8 As set forth above, the related case, *Franklin v. Google, Inc.* (11-cv-03333-SBA), has
9 been consolidated with the case before the Court.

10 **11. Relief:**

11 Plaintiffs seek the following relief:

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

20 **12. Settlement & ADR:**

21 The Parties have had informal discussions regarding potential ADR, but have not yet
22 reached agreement on a specific ADR plan for the case, due largely to the early stage of the
23 proceedings. The Parties filed a notice of need for ADR phone conference on September 8, 2011,
24 and an ADR call is scheduled for October 6, 2011. (Dkt. Nos. 19, 26).

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

26 All Parties do not consent to proceed before a magistrate judge for all purposes.
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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 June 1, 2013;
- 14 (b) Dispositive motions due by January 11, 2013;
- 15 (c) Motion for class certification due by September 14, 2012;
- 16 (d) Expert witness disclosures under Fed. R. Civ. P. 26(a)(2) due by May 16, 2012,
17 and initial expert reports due by June 15, 2012; rebuttal experts designated by June
18 29, 2012, and rebuttal expert reports shall be disclosed by July 27, 2012. Expert
19 discovery to be completed by August 17, 2012;
- 20 (e) Class and merits discovery completed by June 22, 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.
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1 **20. Other Matters:**

2 Other than mediation and the early filing of dispositive motions, Plaintiffs do not know of
3 any other matter that may facilitate the just, speedy and inexpensive disposition of this matter.
4

5 DATED: October 5, 2011

PERKINS COIE LLP

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

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

10 DATED: October 5, 2011

EDELSON MCGUIRE, LLP

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12 By: /s/ Sean P. Reis
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13 Attorneys for Plaintiffs NICOLE PIMENTAL
14 and JESSICA FRANKLIN, individually and
on behalf of all others similarly situated

15 DATED: October 5, 2011

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CERTIFICATE OF SERVICE

The undersigned certifies that, on October 5, 2011, he caused this document to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of filing to counsel of record for each party.

Dated: October 5, 2011

EDELSON MCGUIRE LLC

By: /s/ Christopher L. Dore
Christopher L. Dore

Attorneys for Plaintiff