

1 **PERKINS COIE LLP**
 BOBBIE J. WILSON (Bar No. 148317)
 2 JOSHUA A. REITEN (Bar No. 238985)
 Four Embarcadero Center, Suite 2400
 3 San Francisco, CA 94111-4131
 Telephone: (415) 344-7000
 4 Facsimile: (415) 344-7050
 E-mail: bwilson@perkinscoie.com

5
 6 DEBRA R. BERNARD (*Pro hac vice*)
 131 S. Dearborn St., Suite 1700
 Chicago, Il 60603
 7 Telephone: (312) 324-8559
 Facsimile: (312) 324-9559
 8 E-mail: dbernard@perkinscoie.com

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

10
 11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 OAKLAND DIVISION

14
 15 NICOLE PIMENTAL and JESSICA
 FRANKLIN, individually and on behalf of
 16 all others similarly situated,
 17 Plaintiffs,
 18 v.
 19 GOOGLE INC., a Delaware corporation,
 and SLIDE, INC., a Delaware corporation,
 20 Defendants.
 21

Case No. 11-cv-02585-SBA

**DEFENDANTS' ADMINISTRATIVE
 MOTION FOR A TEMPORARY STAY OF
 DISCOVERY**

Place: Courtroom 1, 4th Floor
 Judge: Hon. Sandra Brown Armstrong

22 This Document Relates to All Actions.

1 **INTRODUCTION**

2 Currently pending before the Court is Defendants’ motion to dismiss Plaintiffs’
3 Consolidated Class Action Complaint (the “Complaint”). That motion may dispose of this
4 putative class action in its entirety: it attacks not only the sufficiency of Plaintiffs’ allegations, but
5 also demonstrates that the Telephone Consumer Protection Act (“TCPA”)—under which
6 Plaintiffs bring their single claim—cannot be constitutionally interpreted to prohibit the
7 noncommercial text messages at issue here. This motion turns on questions of law and may be
8 decided without any discovery. As a result, Plaintiffs have no need for discovery at this time—in
9 fact, they have not asked for any in order to respond to the motion.

10 These circumstances justify the issuance of a temporary stay of discovery in this case
11 pending resolution of the motion to dismiss. Indeed, as the Ninth Circuit has recognized, “[t]he
12 purpose of [Rule] 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints
13 without subjecting themselves to discovery.” *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d
14 729, 738 (9th Cir. 1987) (citations omitted). “[I]f the allegations of the complaint fail to establish
15 the requisite elements of the cause of action, our requiring costly and time consuming discovery
16 and trial work would represent an abdication of our judicial responsibility. It is sounder practice
17 to determine whether there is any reasonable likelihood that plaintiffs can construct a claim
18 before forcing the parties to undergo the expense of discovery.” *Id.* (citations and quotation
19 marks omitted).

20 If and when the appropriate time comes, Defendants will comply with their discovery
21 obligations, to the full extent that the law requires. In the meantime, however, Defendants should
22 not have to bear the burden and expense of responding to discovery given the potentially
23 dispositive motion to dismiss that is pending. Defendants therefore respectfully request that this
24 Court temporarily postpone discovery until Plaintiffs have satisfied the Court that they can state a
25 valid claim.

1 **RELEVANT BACKGROUND**

2 **A. This Action.**

3 This case centers on Defendants’ Disco service, which provides a platform for its users to
4 send group text messages to their friends and invite potential new users to the service. Text
5 messaging groups within Disco are created by the users themselves—not Defendants. These
6 groups are created when users provide the mobile phone numbers of the individuals they would
7 like to be group members. According to the Complaint, upon creation of a Disco group
8 Defendants send several unsolicited text messages to group members about how to use Disco,
9 including how to quit the service.

10 Plaintiffs claim that they each received multiple such messages, even though they never
11 consented to receive any text messages through Disco or from Defendants. Plaintiffs contend that
12 Defendants’ transmission of these text messages violates the TCPA.

13 On October 14, 2011, Defendants filed a motion to dismiss Plaintiffs’ action, on two
14 grounds. First, Plaintiffs failed to plead facts establishing that Defendants used an “automatic
15 telephone dialing system” to send the subject text messages, which is an essential element under
16 the TCPA. Second, the TCPA cannot be interpreted to reach the text messages at issue here
17 without violating the First Amendment. If granted, this motion would dispose of this action in its
18 entirety.

19 **B. Meet And Confer Efforts.**

20 On August 26, 2011, Defendants’ counsel and counsel for Plaintiff Pimental met and
21 conferred on case management topics, including how discovery should proceed in this case.
22 Defendants explained their position that discovery should not proceed at all unless/until the
23 pleadings are settled. Plaintiff Pimental preferred instead that discovery proceed without delay.
24 Those positions were set forth in the initial joint case management statement (Dkt. 15), and
25 reiterated in the further joint case management statement (Dkt. 27).¹

26
27
28 ¹ In the further joint case management statement, the parties agreed to exchange initial disclosures on
November 1, 2011, in the event no stay of discovery issues.

1 On October 20, 2011, Defendants’ counsel and counsel for Plaintiffs Pimental and
2 Franklin met and conferred again regarding a discovery stay. Defendants sought Plaintiffs’
3 agreement that no discovery would proceed until the pleadings are settled. Plaintiffs declined to
4 agree. Although Plaintiffs have not yet served any discovery requests on Defendants, counsel for
5 Plaintiffs have indicated an intent to do so. Unable to secure an agreement to temporarily
6 postpone discovery, Defendants make this motion.

7 8 ARGUMENT

9 **I. THE COURT SHOULD TEMPORARILY STAY DISCOVERY PENDING 10 RESOLUTION OF DEFENDANTS’ DISPOSITIVE MOTION TO DISMISS.**

11 District courts have “broad discretion to stay discovery in a case while a dispositive
12 motion is pending.” *Orchid Biosciences, Inc. v. St. Louis Univ.*, 198 F.R.D. 670, 672
13 (S.D.Cal.2001) (citing *Data Disc, Inc. v. Sys. Tech. Associates, Inc.*, 557 F.2d 1280 (9th
14 Cir.1977)); *see also Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988) (“The [D]istrict
15 [C]ourt has wide discretion in controlling discovery. Such rulings will not be overturned unless
16 there is a clear abuse of discretion.”) (citation omitted).

17 In deciding whether to stay discovery while dispositive pending motions are resolved,
18 courts consider two factors: “First, a pending motion must be potentially dispositive of the entire
19 case, or at least dispositive on the issue at which discovery is directed. Second, the court must
20 determine whether the pending dispositive motion can be decided absent additional discovery.”
21 *Hanni v. American Airlines, Inc.*, No. 08-cv-00732-CW, 2009 WL 1505286, at *7 (N.D. Cal.
22 May 27, 2009) (granting motion to stay discovery pending disposition of motion to dismiss class
23 action) (quoting *Pac. Lumber Co. v. Nat’l Union Fire Ins. Co.*, 220 F.R.D. 349, 351-52 (N.D.
24 Cal. 2003)); *see also Qwest Commc’ns Corp. v. Herakles, LLC*, No. 7-cv-00393, 2007 WL
25 2288299, at *2 (E.D. Cal. 2007). Here, both factors are readily satisfied.

26 First, Defendants’ pending motion to dismiss aims to dispose of this action entirely: it
27 asserts that the TCPA should be interpreted to permit the noncommercial, informational text
28 messages alleged here because any other interpretation would unconstitutionally restrict
noncommercial speech initiated by users of Defendants’ text messaging platform. As explained

1 in the motion to dismiss, the defects in the Complaint cannot be cured by amendment. For
2 example, if the Court agrees with Defendants that the noncommercial, informational text
3 messages at issue here cannot be proscribed by the TCPA without violating the First Amendment,
4 then further allegations from Plaintiffs will not likely save their claim.

5 Second, this motion may be decided without any discovery; indeed, Plaintiffs have not
6 requested any discovery on the motion. Given the broad scope of the motion and its lack of need
7 for any discovery, this case readily satisfies the “two part” test often used by federal courts in
8 California when deciding whether to stay discovery pending a motion to dismiss. *Hanni*, 2009
9 WL 1505286, at *7 (N.D. Cal. May 27, 2009).

10 **II. TEMPORARILY STAYING DISCOVERY WILL AVOID UNNECESSARY**
11 **BURDEN AND EXPENSE AND WILL NOT PREJUDICE PLAINTIFFS.**

12 Discovery in this putative class action, like so many others, threatens to be time
13 consuming and expensive. Indeed, Plaintiffs seek to certify at least one nationwide class and one
14 nationwide subclass; and they seek relief against two defendants, one of which—Defendant
15 Slide—has the majority of its witnesses, documents, and other evidence located overseas. But
16 requiring the parties to incur the substantial and expensive burden necessarily associated with
17 discovery—including multiple depositions abroad; propounding and responding to discovery
18 requests; document collection, analysis, and review; meet and confer efforts; and discovery
19 motions—is not warranted given that there is a pending motion to dismiss, the resolution of
20 which may end this case.

21 Furthermore, a temporary stay of discovery will not prejudice Plaintiffs. If Plaintiffs can
22 convince this Court in the future that they can state a valid claim as a matter of law, they may
23 then proceed to obtain all documents and other discovery to which they are entitled. *See Orchid*
24 *Biosciences*, 198 F.R.D. at 675 (“Should Defendant prevail on its motion to dismiss, any effort
25 expended in responding to merits-related discovery would prove to be a waste of both parties’
26 time and resources. Should Defendant’s motion be denied, however, Plaintiff will still have
27 ample time and opportunity to conduct discovery on the merits.”).

1 This is not a case in which there is any concern that evidence will disappear or that
2 witnesses will die, flee the country, or otherwise abscond with key evidence, or that any other
3 legally cognizable prejudice may befall Plaintiffs if discovery does not occur immediately. If
4 Plaintiffs are convinced that they can state a valid claim, they should have little concern that they
5 will eventually obtain the discovery to which they are entitled. But, if Defendants are correct that
6 Plaintiffs cannot, this Court can save the parties (and itself) the considerable time and expense of
7 the burdensome discovery process.²

8 CONCLUSION

9 For all the foregoing reasons, Defendants respectfully request that the Court issue an order
10 staying all discovery and mandatory disclosures pending resolution of the pleadings in this case.
11

12 DATED: October 26, 2011

PERKINS COIE LLP

13
14 By: /s/ Bobbie J. Wilson
BOBBIE J. WILSON

15 Attorneys for Defendants
16 GOOGLE INC. and SLIDE, INC.
17
18
19
20
21
22
23
24
25

26 _____
27 ² To the extent Plaintiffs argue that issuing a stay would unnecessarily delay this action, Defendants are
28 willing to stipulate to advance the hearing date on the motion to dismiss, if the Court's calendar permits.
The hearing on the motion is currently scheduled for February 28, 2012 (which was the earliest available
hearing date). Defendants have no interest in prolonging resolution of that motion.