SEAN REIS (SBN 184044)
(sreis@edelson.com)
EDELSON MCGUIRE LLP
30021 Tomas Street, Suite 300
Rancho Santa Margarita, California 92688
Telephone: (949) 459-2124
Facsimile: (949) 459-2123

JORDAN L. LURIE (130013)
(jlurie@weisslurie.com)
JOEL E. ELKINS (256020)
(jelkins@weisslurie.com)
WEISS & LURIE
10940 Wilshire Blvd, 23rd Floor
Los Angeles, CA 90024
Telephone: (310) 208-2800
Facsimile: (310) 209-2348

[Additional counsel appearing on signature page]

Attorneys for Plaintiffs and the Putative Class

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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

Plaintiffs,

v.

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

Defendants.

Case No. 11-cv-02585-SBA
Consolidated with:
Case No. 11-cv-3333-SBA

PLAINTIFFS' OPPOSITION TO DEFENDANTS' ADMINISTRATIVE MOTION FOR A TEMPORARY STAY OF DISCOVERY

Courtroom 1, 4th Floor
Hon. Sandra Brown Armstrong

I. INTRODUCTION

Plaintiffs Nicole Pimental and Jessica Franklin (collectively, "Plaintiffs"), respectfully submit their Opposition to Defendants' Administrative Motion for a Temporary Stay of Discovery. (Dkt. 34.) Defendants' motion should be denied because it lacks a sufficient basis to establish that their pending motion to dismiss (Dkt. 29) will dispose of this action in its entirety. Additionally, Defendants have made no showing that they will suffer actual hardship should discovery move forward, and have likewise failed to demonstrate that Plaintiffs will not be prejudiced by delaying the start of discovery by at least five months.

II. DEFENDANTS' ADMINISTRATIVE MOTION IS PROCEDURALLY IMPROPER

As a threshold matter, the Court should deny Defendants' motion because it is procedurally improper. Local Rule 7-11 allows for motions "with respect to miscellaneous administrative matters" such as motions to exceed page limitations or motions to file documents under seal, and is improper for substantive and contested issues. In fact, this Court has ruled multiple times that Local Rule 7-11 is an improper vehicle for entry of a stay. *Dister v. Apple-Bay E., Inc*., (C 07-01377 SBA) 2007 WL 4045429, at *3-4 (N.D. Cal. Nov. 15, 2007) ("the Court finds that the plaintiff's use of Local Rule 7-11 to speed up the litigation in order to save "time and resources" is an improper vehicle to bring a motion to stay in a putative class action suit"); *see also Morgenstein v. AT & T Mobility LLC*, (CV 09-3173 SBA) 2009 WL 3021177, at *1 (N.D. Cal. Sept. 17, 2009) (a motion to stay is not an "'administrative matter' suitable for expedited and summary disposition"). In *Dister*, as here, the "plaintiff offer[ed] no authority to support his use of Local Rule 7-11" as the vehicle to move for a stay. *Dister*, 2007 WL 4045429, at *3. The Court should deny Defendants' motion on this basis alone.

III. STANDARD APPLICABLE TO A MOTION TO STAY

Even if Defendants' motion were not procedurally improper (it is), it should still be denied because Defendants' argument is legally deficient and cannot support a discovery stay. Although Rule 26 gives the Court "authority to stay discovery, this authority must be exercised so as to 'secure the just, speedy and inexpensive determination of every action.'" *Builders Ass'n of Greater Chicago v. City of Chicago*, 170 F.R.D. 435, 437 (N.D. Ill. 1996). The moving party carries "the heavy burden of making a 'strong showing' why discovery should be denied." *Gray v. First Winthrop Corp.,* 133

F.R.D. 39, 40 (N.D. Cal. 1990) (quoting *Blankenship v. Hearst Corp.,* 519 F.2d 418, 429 (9th Cir. 1975)). Additionally, the movant must show a "particular and specific need … as opposed to making stereotyped or conclusory statements." *Id*. (citing Wright & Miller, *Federal Practice and Procedure* § 2035). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Beckman Indus., Inc. v. Int'l Ins. Co.,* 966 F.2d 470, 476 (9th Cir. 1992). Specific to the motion to dismiss context, Courts in this District have observed,

> [h]ad the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. P. 12(b)(6) would stay discovery, the Rules would contain a provision to that effect. In fact, such a notion is directly at odds with the need for expeditious resolution of litigation....

Gray, 133 F.R.D. at 40; *see also Clemons v. Hayes*, (10-CV-01163-KJD) 2011 WL 2112006, at *3 (D. Nev. May 26, 2011) ("An overly lenient standard for granting motions to stay all discovery is likely to result in unnecessary discovery delay in many cases").

In evaluating whether to stay discovery during the pendency of a motion to dismiss, courts in this District consider two primary factors. *Pac. Lumber Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 220 F.R.D. 349, 351 (N.D. Cal. 2003). First, a pending motion must be potentially dispositive of the entire case, or at least dispositive on the issue at which discovery is directed. *Id.* at 352. Second, the court must determine whether the pending dispositive motion can be decided absent additional discovery. *Id.* Discovery should proceed if either prong of the test is not met. *Mlejnecky v. Olympus Imaging Am., Inc*., (10-CV-02630) 2011 WL 489743 (E.D. Cal. Feb. 7, 2011). Under the first prong, the Ninth Circuit has held discovery may be stayed when it "is *convinced* that the plaintiff will be unable to state a claim for relief." *Wenger v. Monroe,* 282 F.3d 1068, 1077 (9th Cir. 2002) (citing *Wood v. McEwen,* 644 F.2d 797, 801 (9th Cir. 1981)). Hence, ruling on the stay requires the district court to review the merits of the underlying motion to dismiss. *Cal. Sportfishing Prot. Alliance v. Chico Scrap Metal, Inc.,* 2011 WL 130228, at *4 (E.D. Cal. 2011).

IV. ARGUMENT

A. Defendants' Constitutional Argument In Support of Dismissal Is Not Dispositive.

Defendants assert that their motion to dismiss is dispositive of the entire case based on the argument that if the Court were to find the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq*.

("TCPA") prohibited the text message calls at issue here, it would be unconstitutional. While Defendants' motion states with great confidence that the Court will agree that the TCPA is unconstitutional as applied to Defendants' service, their argument is pretty far-fetched. As Plaintiffs' forthcoming opposition will show, the lynchpin of Defendants' First Amendment argument is that the text messages at issue are noncommercial messages sent for informational purposes at the behest of individual consumers. But this argument simply ignores the key facts alleged in the Consolidated Complaint (the "Complaint") (Dkt. No. 24) that Defendants, on their own, transmitted text message advertisements (termed "informational messages" by Defendants) directly to consumers that were anything but informational in nature, but rather, promoted their group texting service, Disco. As alleged in the Complaint, Defendants transmit the following text message to all phone numbers added to a Disco group on their own accord, and entirely without the group creator's initiation or knowledge:

> Disco is a group texting service. Standard SMS rates may apply or chat for FREE w/ our app – http://disco.com/d More info? Text *help To quit? Text *leave

(Dkt. 24 ¶¶ 21-25.) This message is clearly commercial in nature because (1) it is an advertisement; (2) it refers to a specific product; and (3) the speaker has an economic motivation. *See Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011). While Defendants attempt to muddy the waters by lumping the personal messages sent between Disco group members in with their promotion of the Disco mobile application (Dkt. 29 at 7-9), Plaintiffs' Complaint seeks redress only for the text message calls made by Defendants (*i.e.*, the Disco Mobile App Text).[1] (Dkt. 24 ¶ 38.) Accordingly, Plaintiffs' Complaint does not attempt to limit personal messages in any manner that would fall under the First Amendment.

Simply put, the Court should be far from "convinced" that Plaintiffs' Complaint is subject to dismissal. *Wood*, 644 F.2d at 801. To justify a stay of discovery, it is not enough that Defendants' motion is *potentially* dispositive on its face, which is a stretch to say the least.

B. Defendants' ATDS Argument In Support of Dismissal Is Not Dispositive.

As is apparent from their decision to ignore it in their request for a discovery stay, Defendants'

[1] Plaintiffs are also seeking redress for text message calls made after they attempted, to no avail, to affirmatively opt out of receiving any further messages by or through the Disco service. (Dkt. 24, ¶ 38.)

secondary argument in support of dismissal—that Plaintiffs failed to sufficiently plead the use of an automatic telephone dialing system ("ATDS") to make the text message calls at issue—is also insufficient to justify a stay. While Plaintiffs could cure any defect in those allegations should the Court grant Defendants' motion, the current allegations more than satisfy federal pleading requirements. Courts in this District and nationwide have found that, taken as a whole, allegations that text messages were transmitted to a large number of consumers without consent, from a phone number operated by Defendants, and containing advertisements written in an impersonal manner, are sufficient to meet Rule 8's pleading requirements. *See*, *e.g.*, *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1171 (N.D. Cal. 2010); *Kazemi v. Payless Shoesource, Inc.,* 2010 WL 963225, at *2 (N.D. Cal. 2010); *Abbas v. Selling Source, LLC,* 2009 WL 4884471, at *3 (N.D. Ill. 2009). Plaintiffs plead ample facts satisfying each of these elements. (Dkt. 24, ¶¶ 19-24, 50-52.) Defendants' secondary argument for dismissal has a very low likelihood of disposing of the case. Consequently, Defendants failed to satisfy the first prong of the test, and thus, granting a stay is neither required nor appropriate.

C. Defendants Provide No Valid Basis to Support the Claim That Discovery Will Be An Unnecessary Burden And That A Stay Will Not Prejudice Plaintiffs.

Defendants argue that moving forward with discovery will be unnecessarily burdensome. The problem for Defendants, however, is that their unadorned assertions do not demonstrate a "particular and specific need" for a stay, but rather, represent "stereotyped or conclusory statements." *Gray,* 133 F.R.D. at 40. Central among their arguments is that "the majority of [Defendant Slide's] witnesses, documents and other evidence [are] located overseas." (Dkt. 34 at 4). Yet, publically available information reveals that Defendants were founded and to this day maintain corporate headquarters in this District. Thus, it is difficult to see how the statement regarding the location of evidence and witnesses overseas—without accounting for their presence in this District—supports a stay. It does not.

Further, by delaying discovery until March 2012, at the earliest, under the current discovery plan, the Parties would have a maximum of three months to complete all discovery, including class and merits, before the June 22, 2012, cut-off. Even if the Court advances the motion to dismiss hearing, the Parties would still be hard pressed to timely conduct comprehensive discovery and resolve any disputes. Plaintiffs and the Class would obviously be prejudiced if that were to occur.

For the reasons stated herein, Plaintiffs request that the Court deny Defendants' motion to stay discovery.

Respectfully submitted,

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

Dated: October 31, 2011

EDELSON MCGUIRE, LLP

By: /s/ Sean P. Reis
Sean P. Reis

Attorneys for Plaintiffs

Sean Reis - SBN 184004
EDELSON MCGUIRE LLP
30021 Tomas Street, Suite 300
Rancho Santa Margarita, California 92688
(949) 459-2124
sreis@edelson.com

Scott D. Owens (Admitted *Pro Hac Vice*)
2000 East Oakland Park Blvd.,
Suite 106
Fort Lauderdale, FL 33306
(954) 306-8104
scott@scottdowens.com

Jordan L. Lurie
Joel E Elkins
WEISS & LURIE
10940 Wilshire Boulevard
23rd Floor
Los Angeles, CA 90024
(310) 208-2800
jlurie@weisslurie.com
jelkins@weisslurie.com

Stefan Coleman (Admitted *Pro Hac Vice*)
STEFAN COLEMAN, ESQ.
1072 Madison Avenue, Suite 1
Lakewood, NJ 08701
(877) 333-9427
law@stefancoleman.com

CERTIFICATE OF SERVICE

I, Sean Reis, an attorney, certify that on October 31, 2011, I served the above and foregoing **Plaintiffs' Opposition to Defendants' Administrative Motion for Temporary Stay of Discovery** by causing true and accurate copies of such paper to be filed and transmitted to the persons registered to receive such notice via the Court's CM/ECF electronic filing system.

/s/ Sean Reis