

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 Street, 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.

Case No. 11-cv-02585-YGR

**DEFENDANTS' NOTICE OF MOTION  
 AND MOTION TO STAY LITIGATION  
 BASED ON RECENTLY FILED FCC  
 PETITION; MEMORANDUM OF POINTS  
 AND AUTHORITIES IN SUPPORT  
 THEREOF**

Date: May 1, 2012

Time: 2:00 p.m.

Place: TBD

Judge: Hon. Yvonne Gonzalez Rogers

21  
 22 This Document Relates to All Actions.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**NOTICE OF MOTION**

TO THE COURT, ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on May 1, 2012, at 2:00 p.m., or as soon thereafter as the matter may be heard, in the United States District Courthouse (courtroom to be assigned on the date of hearing), 1301 Clay Street, Oakland, California, 94612, before the Honorable Yvonne Gonzalez Rogers, Defendants Google Inc. and Slide, Inc. will, and hereby do, move the Court for an order staying the instant action on the basis that presently before the Federal Communications Commission is a petition requesting that the agency, pursuant to its Congressionally-vested authority to adopt regulations implementing the requirements of the Telephone Consumer Protection Act, decide two issues central to this action.

This Motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, the accompanying Request for Judicial Notice, any reply memorandum, the pleadings and files in this action, and such other matters as may be presented at or before the hearing.

DATED: March 26, 2012

Respectfully,

**PERKINS COIE LLP**

By: /s/ Joshua A. Reiten  
JOSHUA A. REITEN

Attorneys for Defendants  
GOOGLE INC. and SLIDE, INC.

1 **TABLE OF CONTENTS**

2 **PAGE**

3 INTRODUCTION ..... 1

4 BACKGROUND ..... 1

5 A. The Disco Service. .... 1

6 B. Plaintiffs’ Claim Under the Telephone Consumer Protection Act..... 2

7 C. Defendants’ Position. .... 3

8 D. The GroupMe Action. .... 3

9 ARGUMENT ..... 5

10 I. THE COURT SHOULD STAY THIS ACTION PENDING THE FCC’S

11 RESOLUTION OF THE “PRIOR EXPRESS CONSENT” AND

12 AUTO-DIALER ISSUES. .... 5

13 A. Congress Has Vested The FCC With Comprehensive Regulatory Authority

14 Over The TCPA. .... 6

15 B. The FCC Has Been Recently Petitioned To Directly Consider And Rule On

16 The Prior Express Consent And Auto-Dialer Issues..... 8

17 C. Uniform Administration Of The TCPA Requires A Stay Of This Action

18 Pending Resolution Of The GroupMe Petition..... 10

19 CONCLUSION ..... 12

1 **TABLE OF AUTHORITIES**

**PAGE**

2 **CASES**

3 *Brown v. MCI WorldCom Network Servs., Inc.*,  
4 277 F.3d 1166 (9th Cir. 2002)..... 11

5 *Charvat v. EchoStar Satellite, LLC*,  
6 630 F.3d 459 (6th Cir. 2010)..... 6, 11

7 *Clark v. Time Warner Cable*,  
8 523 F.3d 1110 (9th Cir. 2008)..... 5, 6, 11

9 *Davel Commc’ns, Inc. v. Qwest Corp.*,  
10 460 F.3d 1075 (9th Cir. 2006)..... 5

11 *Glauser v. Twilio, Inc.*,  
12 No. 11-cv-2584-PJH, 2012 WL 259426 (N.D. Cal. Jan. 27, 2012)..... 3, 4, 6

13 *GTE.Net LLC v. Cox Commc’ns, Inc.*,  
14 185 F. Supp. 2d 1141 (S.D. Cal. 2002)..... 6

15 *Syntek Semiconductor Co., Ltd., v. Microchip Tech. Corp.*,  
16 307 F.3d 775 (9th Cir. 2002)..... 5, 11

17 **STATUTES**

18 47 U.S.C. § 227(a)(1)..... 3

19 47 U.S.C. § 227(b)(1)(A)(iii)..... 2, 3

20 47 U.S.C. § 227(b)(2)..... 3

21 **CODES**

22 47 C.F.R. § 64.1200(a)(1) ..... 3

23 47 C.F.R. § 64.1200(f) ..... 7

24 47 C.F.R. § 64.1200(f)(10) ..... 9

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 On March 1, 2012, GroupMe, Inc.—a defendant in a putative class action under the  
4 Telephone Consumer Protection Act (“TCPA”) pending in this District—filed a Petition for  
5 Expedited Declaratory Ruling and Clarification (the “GroupMe Petition”) with the Federal  
6 Communications Commission (“FCC”). This petition asks the FCC to directly address and rule  
7 on two issues that lie at the heart of the present case—(1) the form of “prior express consent” that  
8 a caller must obtain in order to avoid violating the TCPA; and (2) the application of the TCPA’s  
9 definition of “automatic telephone dialing system” (“ATDS” or “auto-dialer”) to modern  
10 technologies—such as group texting services like Disco—that were not anticipated when the  
11 statute was enacted twenty years ago.

12 As explained below, Congress has granted the FCC regulatory authority to implement the  
13 TCPA’s requirements, including the two issues raised in the GroupMe Petition and in the instant  
14 case. And while the FCC has stopped short of addressing these issues in the past, it is poised to  
15 do so now. These issues should be addressed by the FCC in furtherance of a consistent regulatory  
16 TCPA scheme and to avoid inconsistent results. Thus, rather than decide these issues that are  
17 now before the FCC, the Court should await the FCC’s determination of the GroupMe Petition  
18 and stay this case pending resolution of the those issues.<sup>1</sup>

19 **BACKGROUND**

20 **A. The Disco Service.**

21 Plaintiffs’ single claim in this case centers on a “group texting service” known as “Disco.”  
22 According to the allegations, Disco enables users of the service to transmit SMS text messages  
23 simultaneously to all the members of groups that the users themselves create. *See Consolidated*

24  
25  
26 \_\_\_\_\_  
27 <sup>1</sup> Defendants have brought this motion promptly following the March 1, 2012 filing of the  
28 GroupMe Petition and March 8, 2012 meeting between GroupMe and the FCC (see below). In  
the interim, Defendants have continued to be actively engaged in case management and discovery  
discussions with Plaintiffs. *See, e.g.*, Dkt. No. 60 (Further Joint Case Management Statement).

1 Class Action Complaint, Dkt. No. 24 (“Consolidated Complaint” or “CCAC”) ¶11.<sup>2</sup> To create a  
2 Disco group, a user first registers for the service using the Disco website or mobile application.  
3 CCAC ¶14. The group creator then manually enters the mobile phone number of each individual  
4 that the group creator wishes to be part of the group. *Id.* A group creator can add no more than  
5 99 individuals to a Disco group. *Id.* Once the group members receive an SMS message through  
6 Disco, they are then able to send SMS messages directly to everyone else in the group. *Id.* ¶¶13,  
7 17.

8 **B. Plaintiffs’ Claim Under the Telephone Consumer Protection Act.**

9 Plaintiffs allege that, upon the creation of a group by a Disco user, “every member of the  
10 group instantly receives several text messages [sent] directly by Defendants without the consent  
11 of the group leader or the invitee.” *Id.* ¶21. Plaintiffs each claim to have received such messages.  
12 They purport to have first received an SMS message informing them and the other group  
13 members of, among other things, the following: (a) that Disco is group texting service; (b) the  
14 availability of a free Internet application for the Disco service; (c) how to receive help regarding  
15 the service; and (d) how to be removed from a group (*i.e.*, respond to the message by texting  
16 “\*leave”). *Id.* ¶¶22, 25, 30.

17 After receiving that initial SMS message, Plaintiffs allege they each received another SMS  
18 message through the Disco service. *Id.* ¶¶27, 32. This message (a) welcomed Plaintiffs to the  
19 Disco service; (b) explained that they had been added to a Disco group; (c) identified the group  
20 creator; and (d) informed them of how to join the group “chat” and obtain a roster of group  
21 members. *Id.* Plaintiffs allege that Defendants sent them the foregoing messages “using  
22 equipment that, upon information and belief, had the capacity to store or produce telephone  
23 numbers to be called, using a random or sequential number generator.” *Id.* ¶50.

24 Based on these allegations, the Complaint asserts a single cause of action for alleged  
25 violations the TCPA—specifically, 47 U.S.C. § 227(b)(1)(A)(iii). As the Court has recognized,

26 \_\_\_\_\_  
27 <sup>2</sup> As of October 11, 2011, the Disco product has been discontinued by Defendants as part of the  
28 wind-down of the Slide products and services. *See* <http://www.slide.com/byebye/?app=disco>. Thus, even if the Disco text messages at issue did violate the TCPA—which they did not—there is no threat of ongoing or further violations.

1 this claim requires establishing the following elements: that (1) a “call” was made; (2) using an  
2 “automatic telephone dialing system”; (3) the number called was assigned to a cellular telephone  
3 service; and (4) the “call” was not made with the “prior express consent” of the receiving party.  
4 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1).<sup>3</sup> See Dkt. No. 59 (Order denying  
5 Motion to Dismiss at 3:8-12). As discussed in greater detail below, Congress has granted the  
6 FCC the authority to “prescribe regulations to implement” these TCPA requirements, 47 U.S.C.  
7 § 227(b)(2), and these precise issues are now squarely before the FCC as requested in the  
8 GroupMe Petition.

9 **C. Defendants’ Position.**

10 Defendants dispute Plaintiffs’ allegations, and any liability here, on several grounds.  
11 Among other things, Defendants contend that they obtained the required “prior express consent”  
12 of Plaintiffs and other members of the putative class. See, e.g., Answer (Dkt. No. 61) at 7. Those  
13 individuals who received text messages knowingly released their telephone numbers to Disco,  
14 either directly when signing up for the service and agreeing to the Disco terms of use, or  
15 indirectly through the group creators.

16 Likewise, Defendants assert that the technology used to operate the Disco service did not  
17 constitute an “automatic telephone dialing system,” as that term is defined by the TCPA. See  
18 Answer (Dkt. No. 61) at 6. Defendants’ position is that such technology does not have the  
19 “capacity” to store or produce telephone numbers to be called, using a random or sequential  
20 number generator and to dial such numbers. 47 U.S.C. §227(a)(1).

21 **D. The GroupMe Action.**

22 On May 27, 2011—the same day the present action was filed—GroupMe (and another  
23 party, Twilio) was sued in this District in a putative class action under the TCPA. See *Glauser v.*  
24  
25

26  
27 <sup>3</sup> The TCPA defines “automatic telephone dialing system” as “equipment which has the *capacity*”  
28 to both (a) “store or produce telephone numbers to be called, using a random or sequential  
number generator;” and (b) “dial such numbers.” 47 U.S.C. § 227(a)(1) (emphasis added).

1 *Twilio*, N.D. Cal. No. 11-cv-2584-PJH (the “GroupMe Action”). The allegations and legal theory  
2 advanced in the GroupMe Action are nearly identical to those here.<sup>4</sup>

3 As in the present case, the GroupMe Action

- 4 (a) was purportedly brought to “stop [the] practice of making unsolicited text  
5 message calls to cellular telephones” (*see* Request for Judicial Notice in  
6 Support of Defendants’ Motion to Stay Litigation (“RJN”) Ex. 1 (First  
7 Amended Class Action Complaint, *Glauser v. Twilio, Inc., et al.*, 11-cv-  
8 2584-PJH (N.D. Cal. September 15, 2011) (“GroupMe Complaint”) ¶1;  
9 CCAC ¶1);
- 10 (b) centers on a “group texting” product whereby users create texting groups  
11 and can “simultaneously send SMS text messages to large groups of  
12 people en masse, using one common cellular telephone number” (*see*  
13 GroupMe Complaint ¶11; CCAC ¶11);
- 14 (c) includes allegations that GroupMe sent text messages directly to the  
15 plaintiff and class members without their consent and using equipment  
16 that “had the capacity to store or produce telephone numbers to be called,  
17 using a random or sequential number generator” (*see* GroupMe Complaint  
18 ¶55; CCAC ¶50); and
- 19 (d) asserts a single claim for violation of the TCPA based on those allegations  
20 (GroupMe Complaint ¶¶54-59; CCAC ¶¶49-53).

21 On January 27, 2012, the court in the GroupMe Action issued an order staying the case on  
22 the basis that the FCC, at the time, was considering—by way of Comments submitted in  
23 connection with a then-pending Notice of Proposed Rulemaking (“NPRM”) and, separately, a  
24 Petition for declaratory relief—legal issues that “directly overlap[ped] with the legal issues before  
25 court,” and was expected to rule on them. *See Glauser v. Twilio, Inc.*, No. 11-cv-2584-PJH, 2012  
26 WL 259426, \*3 (N.D. Cal. Jan. 27, 2012). Those legal issues included (1) “who qualifies as an  
27 auto-dialer subject to the TCPA”; and (2) the “requirements for obtaining valid prior express  
28 consent under the TCPA.” *Id.* at \*2. According to the court, “allowing the FCC to resolve  
[those] issues . . . in order to obtain the benefit of the FCC’s guidance, [was] appropriate.” *Id.* at  
\*3.

On February 15, 2012, the FCC issued a Report and Order that did not address the two  
identified legal issues, which were not part of the NPRM but had been raised in Comments. *See*

---

<sup>4</sup> In fact, the plaintiff suing GroupMe is represented by the same law firm representing Plaintiffs here.

1 RJN Ex. 2 (Report and Order, *In the Matter of Rules and Regulations Implementing the*  
2 *Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Feb. 15, 2012)) (“2012  
3 Report and Order”).<sup>5</sup> In response, GroupMe filed its own Petition for declaratory ruling with the  
4 FCC. *See* RJN Ex. 3 (GroupMe, Inc.’s Petition for Expedited Declaratory Ruling and  
5 Clarification, *In the Matter of GroupMe, Inc. Petition for Declaratory Ruling*, CG Docket No. 02-  
6 278 (Mar. 1, 2012)) (“GroupMe Petition”). That Petition asks the FCC to directly address and  
7 rule on the following TCPA issues: (1) whether an intermediary, such as a group creator, can  
8 obtain oral consent from a user that allows non-telemarketing, information text messages to be  
9 sent to the user; and (2) what constitutes an “automatic telephone dialing system.” *Id.* at 1.<sup>6</sup> On  
10 March 8, 2012, GroupMe met with the FCC to discuss its Petition. RJN Ex. 4 (Notice of *Ex*  
11 *Parte* Presentation, *In the Matter of Rules & Regulations Implementing The Telephone Consumer*  
12 *Protection Act of 1991*, CG Docket No. 02-278 (Mar. 13, 2012)).<sup>7</sup>

## 13 ARGUMENT

### 14 I. THE COURT SHOULD STAY THIS ACTION PENDING THE FCC’S 15 RESOLUTION OF THE “PRIOR EXPRESS CONSENT” AND AUTO-DIALER 16 ISSUES.

17 The doctrine of primary jurisdiction allows a court to stay a proceeding pending the  
18 resolution “of an issue within the special competence of an administrative agency.” *Clark v. Time*  
19 *Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). “[C]ourts may, under appropriate  
20 circumstances, determine that the initial decision-making responsibility should be performed by  
21 the relevant agency rather than the courts.” *Davel Commc’ns, Inc. v. Qwest Corp.*, 460 F.3d

---

22 <sup>5</sup> Following issuance of the 2012 Report and Order, the plaintiff in the GroupMe Action moved  
23 the court to lift the stay as to GroupMe. On March 16, 2012, the court denied that motion. As a  
24 result, the GroupMe Action remains stayed.

25 <sup>6</sup> Defendants did not initially move to stay this action since the issue of what qualifies as an  
26 ATDS and the requirements for prior express consent were not raised directly by the NPRM, but  
27 only in responsive Comments. Hence, it is arguable whether or not those issues were sufficiently  
28 before the FCC for purposes of requesting a stay of this action. This is further supported by the  
fact that the 2012 Report and Order did not address those issues. However, GroupMe’s Petition  
now squarely puts these issues before the FCC.

<sup>7</sup> According to GroupMe, based on past practices, the FCC will likely publish a notice soliciting  
comments on the GroupMe Petition within 60 days if it intends to consider the petition. *See*  
*Glauzer v. Twilio, Inc.*, No. 11-cv-2584-PJH, Dkt. No. 75 at 2.

1 1075, 1086 (9th Cir. 2006) (citing *Syntek Semiconductor Co., Ltd., v. Microchip Tech. Corp.*, 307  
2 F.3d 775, 780 (9th Cir. 2002)). As recently recognized in this District, applying the doctrine is  
3 “appropriate where conduct is alleged which is ‘at least arguably protected or prohibited by a  
4 regulatory statute,’ and agency resolution of an issue ‘is likely to be a material aid to any judicial  
5 resolution.’” *Glauser*, 2012 WL 259426 at \*1 (citing *GTE.Net LLC v. Cox Commc’ns, Inc.*, 185  
6 F. Supp. 2d 1141, 1144 (S.D. Cal. 2002)).

7 While there is no “fixed formula” for applying the doctrine of primary jurisdiction, the  
8 Ninth Circuit traditionally considers four factors: “(1) the need to resolve an issue that (2) has  
9 been placed by Congress within the jurisdiction of an administrative body having regulatory  
10 authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive  
11 regulatory authority that (4) requires expertise or uniformity in administration.” *Clark*, 523 F.3d  
12 at 1115 (citing *Syntek*, 307 F.3d at 781). As shown below, these factors are satisfied here and  
13 weigh in favor of applying the doctrine.

14 **A. Congress Has Vested The FCC With Comprehensive Regulatory Authority**  
15 **Over The TCPA.**

16 In enacting the TCPA, Congress expressed concern that a multiplicity of inconsistent state  
17 telemarketing regulations would “frustrate the federal objective of creating uniform national  
18 rules.” See RJN Ex. 5 (Report and Order, *In the Matter of Rules and Regulations Implementing*  
19 *the Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14014, 2003 WL 21517853 (June  
20 26, 2003) (“2003 Report and Order”), ¶83). Congress wanted to “promote a uniform regulatory  
21 scheme under which telemarketers would not be subject to multiple, conflicting regulations.” *Id.*

22 Toward these ends, Congress vested the FCC with considerable authority to implement  
23 the TCPA. *Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 466 (6th Cir. 2010). Indeed, the  
24 TCPA “gives the agency power to ‘prescribe regulations to implement’ the legislation . . . to  
25 exempt calls from the . . . requirements of the [TCPA] . . . and to enforce the provisions of the  
26 [TCPA] and its accompanying regulations. In addition to these law-making and law-enforcing  
27 powers, the FCC has interpretive authority over the [TCPA] . . . and its accompanying  
28 regulations.” *Id.* at 466-67 (citations omitted) (referring matter to FCC to consider whether

1 TCPA permits recovery of damages from party that did not place illegal calls but whose  
2 independent contractors did).

3 The FCC has, since 1992, created a complex regulatory TCPA scheme and intermittently  
4 adopted regulations addressing particular aspects of the statute. The FCC has addressed the issue  
5 of “prior express consent” in a variety of contexts but none of them have directly addressed the  
6 type of situation presented by the group texting services. *See, e.g.*, RJN Ex. 6 (Report and Order,  
7 *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of*  
8 *1991*, 7 F.C.C.R. 8752, 1992 WL 690928 (Sept. 17, 1992) (“1992 Report and Order”), ¶31 (citing  
9 Congressional record for support)); RJN Ex. 5 (2003 Report and Order), ¶44; RJN Ex. 2 (2012  
10 Report and Order), ¶21. Specifically, as requested in the GroupMe Petition, the FCC has not  
11 addressed the issue of whether third party consent is sufficient for non-telemarketing or  
12 informational calls or text messages to wireless numbers. RJN Ex. 3 (GroupMe Petition) at 16-  
13 19. Indeed, as recently noted by the FCC, the statute is silent on the issue of the form in which  
14 “prior express consent” must be obtained. RJN Ex. 2 (2012 Report and Order), ¶21.

15 The FCC has also adopted some regulations implementing the TCPA’s prohibition on  
16 auto-dialers. In 1992, the FCC adopted a regulatory definition of auto-dialer that simply copies  
17 the TCPA’s definition and, in 2003, found that “predictive dialers,” which dial numbers at a  
18 particular rate to ensure a sales person is available to speak when a customer answers the call,  
19 meet that definition. 47 C.F.R. § 64.1200(f); *see* RJN Ex. 5 (2003 Report and Order), ¶133. The  
20 FCC has also found that the TCPA prohibits using “auto-dialers” to send text messages to cellular  
21 telephones, but has not revised its 1992 definition of “auto-dialer” and has never defined  
22 “automatic telephone dialing system” for purposes of text messaging. *See id.* ¶165. It is  
23 undisputed that text message technology was not available at the time the TCPA was enacted.  
24 Significantly, it was contemplated that the FCC would need to consider changes in technology  
25 when exercising its rulemaking authority. *See id.* ¶132 (“It is clear from the statutory language  
26 and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking  
27 authority, might need to consider changes in technologies.”). Accordingly, whether the  
28

1 technology used to transmit SMS text messages falls within the scope of the TCPA auto-dialer  
2 provision is an issue ripe for consideration by the FCC.

3 **B. The FCC Has Been Recently Petitioned To Directly Consider And Rule On**  
4 **The Prior Express Consent And Auto-Dialer Issues.**

5 The GroupMe Petition squarely puts before the FCC two of the very same issues involved  
6 in this case and directly requests that the FCC decide them.

7 First, on the auto-dialer issue, the GroupMe Petition asks the FCC to clarify “automatic  
8 telephone dialing system” by issuing a “ruling clarifying and limiting the scope of the term  
9 ‘capacity,’” as that term is used in the TCPA’s definition of ATDS. RJN Ex. 3 (GroupMe  
10 Petition) at 1. The GroupMe Petition notes that “[d]espite a revolution in mobile technology  
11 since Congress enacted the TCPA,” the FCC has, for the most part, “yet to clarify what is meant  
12 by ‘capacity.’” *Id.* at 9. As a result, interpretations of that term have emerged that would expand  
13 “capacity” to sweep in “equipment like GroupMe and many other companies use that is incapable  
14 of autodialing random or sequential numbers but could be programmed to do so if software for  
15 that purpose was written and installed.” *Id.* at 10.<sup>8</sup> Accordingly, the GroupMe Petition asks the  
16 FCC to clarify “capacity” to encompass “only equipment that, at the time of use, could, in fact,  
17 have employed the functionalities described in the TCPA without human intervention and without  
18 first being technologically altered.” *Id.* at 3.

19 Second, regarding “prior express consent,” the GroupMe Petition asks the FCC to “clarify  
20 that third party consent obtained through an intermediary satisfies the [TCPA’s] requirement for  
21 ‘prior express consent’ for certain non-telemarketing, informational calls or text messages to  
22 wireless numbers.” *Id.* at 3. As the Petition explains, “[t]hese informational calls, unlike  
23 telemarketing calls, can be made using an ATDS with the called party’s *oral* prior express  
24

25 <sup>8</sup> The GroupMe Petition notes that this expanded interpretation of “capacity” could reach “tens of millions of smartphones for which applications could be downloaded to program them to autodial  
26 random or sequential numbers.” *Id.* at 10. In fact, the Petition notes that the iDialUDrive  
27 application for the iPhone advertises itself as providing the ability to “Sync your phone lists from  
28 the web over 3G or WiFi! Have someone else maintain your phone lists of important calls to  
make on your way to the airport or to work in the morning. Sync when you get in the car and  
have your calls start dialing without ever touching the phone again.” *Id.* at 10, n.21.

1 consent, but sometimes only an intermediary is able to provide the recipient’s consent to receive a  
2 call or text message.” *Id.* at *i* (Summary) (emphasis in original).<sup>9</sup> As an example, the Petition  
3 cites to Comments filed by United Parcel Service with the FCC, in which UPS stated it relies on  
4 autodialed and prerecorded calls and text messages “to provide various informational messages to  
5 certain customers and package recipients.” *Id.* at 17. “But in many instances, and for a variety of  
6 reasons, UPS sends text messages to the recipient of the package using a wireless number that  
7 was provided by the sender. UPS is unable to obtain the text message recipient’s consent to send  
8 a message that the package has been delivered, for example, because UPS has no contact with the  
9 recipient until the time of delivery.” *Id.*

10 Notably, in the GroupMe Action, even though these issues were only raised via submitted  
11 Comments, the court concluded that the FCC’s consideration of these very issues warranted  
12 application of the primary jurisdiction doctrine and a stay of litigation. The court determined that  
13 those issues, among others, are “within the jurisdiction of the FCC” and that “the FCC’s input  
14 with respect to these issues” was being sought at the time in connection with the FCC’s then-  
15 pending Notice of Proposed Rulemaking. *Glauser*, 2012 WL 259426 at \*2. In other words, “the  
16 FCC [was] in the process of utilizing its recognized expertise to consider issues pending before  
17 the court.” *Id.* at \*3. The court accordingly stayed the case, concluding that “the prerequisites for  
18 application of the primary jurisdiction doctrine are satisfied, and allowing the FCC to resolve the

---

19  
20 <sup>9</sup> Plaintiffs may argue that the FCC already resolved the issue of “prior express consent” for calls  
21 to wireless numbers in the 2012 Report and Order. That is not so. Rather, the 2012 Report and  
22 Order indicated that the TCPA “require[s] prior express *written* consent for autodialed or  
23 prerecorded *telemarketing* calls to wireless numbers.” RJN Ex. 2 (2012 Report and Order) at ¶25  
24 (emphasis added). The FCC defines “telemarketing” calls, however, as “the initiation of a phone  
25 call or message for the purpose of encouraging the purchase or rental of, or investment in,  
26 property, goods, or services.” 47 C.F.R. § 64.1200(f)(10). This rule therefore does not apply in  
27 this case since Plaintiffs do not assert that the text messages allegedly sent by Defendants  
28 encouraged them to buy, rent, or invest in anything. Further, the 2012 Report and Order found  
that non-telemarketing and informational calls or text messages can still be made with the call  
recipient’s *oral* consent. RJN Ex. 2 (2012 Report and Order) ¶¶21, 29 (“We leave it to the caller  
to determine, when making an autodialed or prerecorded *non-telemarketing* call to a wireless  
number, whether to rely on oral or written consent in complying with the statutory consent  
requirement” (emphasis in original)). It did not, though, directly address whether oral consent for  
those text messages can be obtained from the recipient through an intermediary, such as a Disco  
group creator.

Moreover, the 2012 Report and Order did not address the definition of an auto-dialer.

1 foregoing issues prior to adjudicating the issues in the present action, in order to obtain the benefit  
2 of the FCC’s guidance, is appropriate.”<sup>10</sup> *Id.* This analysis is even more compelling here—  
3 where the relevant issues are directly before the FCC in the GroupMe Petition—and supports  
4 granting the instant Motion.

5 **C. Uniform Administration Of The TCPA Requires A Stay Of This Action**  
6 **Pending Resolution Of The GroupMe Petition.**

7 The “prior express consent” and “auto-dialer” issues now directly before the FCC in the  
8 GroupMe Petition are squarely at issue in this case. For example, the Consolidated Complaint  
9 alleges generally that users receive text messages that “they neither consented to nor wanted”  
10 (CCAC ¶18) and “Defendants do not seek to obtain consent of the participants to be part of the  
11 group.” CCAC ¶15. It alleges that Plaintiffs did not consent to receiving text messages from  
12 Defendants. *Id.* ¶¶29, 34. It further alleges that the text messages Plaintiffs purportedly received  
13 “were [sent] *en masse* and without the prior express consent” of Plaintiffs or the other putative  
14 class members “to receive such wireless spam.” *Id.* ¶51 (emphasis in original). With respect to  
15 auto-dialer use, Plaintiffs claim that the text messages were made “using equipment that, upon  
16 information and belief, had the capacity to store or produce telephone numbers to be called, using  
17 a random or sequential number generator.” *Id.* ¶50.

18 Defendants dispute these allegations. It is Defendants’ position that the required “prior  
19 express consent” of the recipient-users is satisfied by the creators’ input of their own mobile  
20 numbers and those of their group members. Those individuals who received text messages  
21

---

22 <sup>10</sup> As noted above, following the issuance of the 2012 Report and Order, the plaintiff in the  
23 GroupMe Action moved the court to lift the stay as to GroupMe (but not co-defendant Twilio).  
24 The court denied that motion on the grounds that it was “not inclined to lift the stay as to one  
25 defendant but not the other” and because “one of the reasons for the stay pertains to the liability  
26 of co-defendant Twilio and the petition on that issue still remains before the FCC.” *See* RJN  
27 Ex. 7 (Order, *Glauser v. Twilio, Inc., et al.*, No. 11-cv-2584 PJH (N.D. Cal. Mar. 15, 2012). The  
28 court stated that its decision to maintain the stay was “not based on GroupMe’s filing of the  
subsequent petition,” but did not otherwise address whether the stay could be based on that  
petition. *Id.* Thus, the order denying the plaintiff’s motion to lift the stay does not affect the  
instant motion, which is based on the GroupMe Petition. However, the district court’s original  
rationale in the GroupMe Action for entering the stay in the first place applies with equal force  
here, for the reasons described herein.

1 knowingly released their telephone numbers to Disco, either directly when signing up for the  
2 service and agreeing to the terms and conditions, or indirectly through the group creators.

3 In addition, similar to the GroupMe position in its Petition, it is also Defendants'  
4 argument that the technology used to operate the Disco service did not constitute an auto-dialer.  
5 That is because such technology does not have the "capacity" to store or produce telephone  
6 numbers to be called, using a random or sequential number generator and to dial such numbers.  
7 Indeed, it is the group creators who provide Disco with telephone numbers, and the transmission  
8 of the Disco informational text messages that Plaintiffs or any other proposed class member  
9 received was prompted by either a group creator or another member of the group.

10 Attempting in this litigation to resolve whether Defendants had "prior express consent" or  
11 whether its technology constitutes an "auto-dialer" will create the potential to cause just the type  
12 of inconsistent applications of the TCPA Congress sought to avoid, with different courts reaching  
13 different determinations over what constitutes sufficient "prior express consent" and which group  
14 texting technologies amount to an "automatic telephone dialing system." The risk for such  
15 inconsistencies is very real given that the parallel GroupMe Action has been stayed pending  
16 decision by the FCC. *Charvat*, 630 F.3d at 466 ("[t]he volume of [pending] lawsuits heightens  
17 the risk that individuals and companies will be subject to decisions pointing in opposite  
18 directions").

19 In sum, the FCC should have the opportunity to consider these issues because of their  
20 technical nature, the FCC's experience addressing new technologies, and Congress' intent to have  
21 the FCC adopt regulations on issues implicated by the TCPA. The FCC presently has the  
22 GroupMe Petition before it, and any judicial determination of these questions could be at odds  
23 with whatever the FCC may decide pursuant to the regulatory structure it has implemented for the  
24 TCPA. *See, e.g., Clark*, 523 F.3d at 1115-16; *Brown v. MCI WorldCom Network Servs., Inc.*, 277  
25 F.3d 1166, 1172-73 (9th Cir. 2002).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CONCLUSION**

For these reasons, the Court should stay this action pending resolution by the FCC of the GroupMe Petition.

DATED: March 26, 2012

Respectfully,

**PERKINS COIE LLP**

By: /s/ Joshua A. Reiten  
JOSHUA A. REITEN

Attorneys for Defendants  
GOOGLE INC. and SLIDE, INC.