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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-YGR

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY BASED ON RECENTLY FILED FCC PETITION

Date: May 1, 2012
Time: 2:00 p.m. PST
Judge: Hon. Yvonne Gonzalez Rogers
Action Filed: May 27, 2011

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I. INTRODUCTION

Defendants' Motion to Stay should be denied. Seizing upon a petition for rulemaking recently filed by one of their competitors, GroupMe, Inc. ("GroupMe" and the "GroupMe Petition"), Defendants assert that the Federal Communications Commission ("FCC") is poised to address—for the first time no less—both the form of "consent" Defendants were required to obtain prior to transmitting their mass text message promotions, and whether the equipment they used to transmit those messages is considered an "automatic telephone dialing system" ("ATDS") as contemplated by the Telephone Consumer Protection Act (47 U.S.C. § 227 *et seq*.) ("TCPA"). Defendants are mistaken. In reality, the FCC has spoken directly—as recently as February of this year—on the consent issue and determined that *express written* consent is required before sending the commercial text messages at issue here. Similarly, the FCC has ruled time and again that an ATDS includes any system with the *capacity* to dial telephone numbers without human intervention, like the equipment Defendants are alleged to have used in this case. Given the breadth of well-settled authority on these issues—both from the FCC and courts interpreting and applying the TCPA—it is unlikely the FCC will take any further action in response to the GroupMe Petition. Indeed, it has yet to even open the Petition for comment nor is it required to do so.

Defendants' reliance on the stay of a similar but separate action pending in this District against GroupMe and its business partner that transmitted the text messages—Twilio, Inc. ("Twilio")—is misplaced. *See Glauser v. GroupMe, et al.*, No. 11-cv-2584-PJH (N.D. Cal.) (the "*GroupMe* matter"). Contrary to Defendants' assertions, the continued stay of the *GroupMe* matter is not based upon the GroupMe Petition. In fact, that court expressly stated that the stay *was not* premised on the GroupMe Petition. Rather, the *GroupMe* court correctly found that the FCC has sufficiently addressed the consent and ATDS issues and therefore, it cannot form the basis of a continued stay. Far from awaiting a ruling from the FCC on GroupMe's Petition, the stay in that case remains in place because the Court didn't want the case to proceed as to GroupMe alone while the stay remained in place as to its co-defendant Twilio—which was (and still is) awaiting a ruling

from the FCC on the application of the "common carrier" exemption to text message servicers (like Twilio claims to be).

In the end, Defendants' insistence that there is likely to be a shift in the substantive legal authorities affecting this case is misguided and cannot serve as basis to stay these proceedings. For these reasons and as discussed further herein, the Court should deny Defendants' motion in its entirety and allow this case to proceed.

II. ARGUMENT

The power to stay pending litigation is incidental to the power inherent in every court to control the disposition of the cases on its docket. *Landis v. North Am. Co*., 299 U.S. 248, 254-55 (1936). In exercising that discretion, the Court must weigh "the competing interests which will be affected by the granting or refusal to grant a stay." *Lockyer v. Mirant Corp*., 398 F.3d 1098, 1110 (9th Cir. 2005) (citing *CMAX Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). "Among those competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Id*. "The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997).

In this case, Defendants point to the FCC's receipt of the GroupMe Petition, seeking further "clarification" regarding both GroupMe's duty to obtain express written consent from consumers as well as whether the equipment used for transmission of the text messages at issue falls within the TCPA's definition of auto-dialer. Defendants argue, albeit belatedly, that principles of primary jurisdiction require that this Court defer taking any action until the FCC has considered the GroupMe Petition. As explained further below, Defendants are seriously incorrect. First, and as a preliminary matter, Defendants misunderstand the *GroupMe* matter and the stay that Judge Hamilton has put in place. That case is solely stayed in light of co-Defendant Twilio's pending petition regarding the application of the common carrier exception to its application platform—

issues that Defendants cannot show are present in this litigation. Second, primary jurisdiction doesn't require a stay here in any event. Both the courts and the FCC have consistently ruled that commercial advertisers need to first obtain express consent from consumers and that auto-dialers under the TCPA include any technology that has the capacity to store telephone numbers for dialing without human intervention. Finally, and in stark contrast to Defendants, the Plaintiffs will actually suffer prejudice if a stay were issued in this matter. Accordingly, and as explained further below, this Court should deny the requested stay.

A. As an initial matter, the stay in the GroupMe case is solely due to issues related to co-Defendant Twilio, which awaits a ruling from the FCC regarding the applicability of the common carrier exception to its text-messaging platform—a question indisputably not at issue in this case.

In their motion, Defendants first mischaracterize the bases of the stay of the *GroupMe* matter. Contrary to Defendants' assertions, that stay is neither based upon the GroupMe Petition nor any other issue that would affect these proceedings.

Similar to this case, plaintiff Brian Glauser in the *GroupMe* matter seeks to recover on behalf of a putative class of individuals from GroupMe and its business partner, Twilio, for their transmission of allegedly unauthorized text messages advertising GroupMe's group texting service and specifically, promoting GroupMe's mobile application. On October 6, 2011, GroupMe moved the court to stay the case under the doctrine of primary jurisdiction, referencing the FCC's 2010 Notice of Proposed Rulemaking[1] as pending authority that had the potential to directly affect the substantive legal issues in the case. (*See GroupMe* matter, Dkt. No. 51-1.) By Order entered January 27, 2012, Judge Hamilton stayed the *GroupMe* matter in its entirety pending resolution by the FCC of three issues: (i) the definition of an "auto-dialer" under the TCPA, (ii) the requirements for obtaining express consent under the TCPA, and (iii) as it applied to Twilio only, the applicability of the "common carrier" exemption to a text message service provider under the

[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Notice of Proposed Rulemaking, 25 FCC Rcd 1501 (2010) ("2010 TCPA NPRM").

TCPA. (*Id.*, Dkt. No. 73.)[2] Specifically, with regard to GroupMe, Judge Hamilton stayed the case pending a ruling by the FCC related the 2010 TCPA NPRM, which noted that "the TCPA is silent with respect to the form that 'prior express consent' must take under the TCPA," and sought comment on the issue. (*Id*.) Additionally, the court noted that many of the comments received by the FCC in response to the 2010 TCPA NPRM "requested that the FCC also define auto-dialer under the TCPA to take technological advances in recent years (such as text messaging) into account." (*Id*.)

Shortly following Judge Hamilton's decision, the FCC released its 2012 Report and Order,[3] which addressed the issue of "express consent," and—much to the disappointment of the Defendants—left unchanged the widely held understanding of an ATDS promulgated by the Ninth Circuit and confirmed by numerous district courts, including this Court. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009); *Pimental, et al. v. Google, Inc., et al.*, No. 11-cv-02585-YGR (Dkt. No. 59), 2012 WL 691784, *2 (N.D. Cal. March 2, 2012).

As a result, on February 27, 2012, plaintiff Glauser filed a notice of the FCC's 2012 Report and Order, informing Judge Hamilton that the FCC had decided the issues upon which the stay as to GroupMe had been based. (*GroupMe* matter, Dkt. No. 74.) In response, GroupMe filed a Petition for Expedited Declaratory Ruling and Clarification with the FCC, again seeking to expand the FCC's definition of "express consent" and to significantly narrow the phrase "capacity" as applied to the definition of an ATDS. *See* GroupMe Petition, CG Docket No. CG 02-278. GroupMe also requested that the court continue the stay. (*Id.*, Dkt. No. 75.)

By Order entered March 15, 2012, Judge Hamilton acknowledged that the FCC's 2012 Report and Order had resolved or otherwise disposed of the consent and ATDS issues upon which

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[2] The defendants in the GroupMe matter also referenced Club Texting's Petition for Declaratory Ruling before the FCC as a separate basis upon which to stay the case as to defendant Twilio. In the Club Texting Petition, which has been pending for more than two years, a company responsible for transmitting text messages, allegedly similar to Twilio, has sought a ruling from the FCC on whether the TCPA's "common carrier" exemption is applicable to it.

[3] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, FCC 12-21 (Feb. 15, 2012) ("2012 Report and Order").

the original stay as to GroupMe was based. (*Id.*, Dkt. No. 76.) Nevertheless, the court determined that it would not proceed as to only one defendant and instead would await a separate ruling from the FCC on the common carrier issue with respect to co-defendant Twilio. (*Id.*) Contrary to Defendants' assertions, however, the court made clear that the continued stay "is not based on GroupMe's filing of the subsequent petition. For now, the stay remains based *solely* on the remaining of the two grounds for its initial imposition [as it relates to co-defendant Twilio]." (*Id*.) (emphasis added).

Thus, Defendants' reliance upon the stay in the *GroupMe* matter is misplaced. None of the supposedly "unsettled" substantive issues in that case are present here. Moreover, the only issues raised by Defendants as potentially affecting the outcome of this litigation have been addressed by the FCC. Accordingly, Defendants' motion should be denied.

B. Defendants cannot show the primary jurisdiction doctrine requires a stay of this case pending the FCC's consideration, if any, of the GroupMe Petition.

The primary jurisdiction doctrine "does not require that all claims within an agency's purview be decided by the agency." *Brown v. MCI WorldCom Network Serv., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002). Nor is it intended "to secure expert advice for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit." *Id.* (quoting *U.S. v. General Dynamics Corp.*, 828 F.2d 1356, 1365 (9th Cir. 2002)). Instead, primary jurisdiction is only properly invoked when a case pending in federal court "requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency." *Brown*, 277 F.3d at 1172; *see also General Dynamics*, 828 F.2d at 1362 ("The doctrine applies when protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme."). However, "[p]rimary jurisdiction is not implicated simply because a case presents a question, over which the FCC could have jurisdiction…Rather, primary jurisdiction is properly invoked when a case presents a far-reaching question that 'requires expertise or uniformity in administration.'" *Brown*, 277 F.3d at 1172. Ultimately, the doctrine "applies in a limited set of circumstances," *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th

Cir. 2008), and "is to be invoked sparingly, as it often results in added expense and delay." *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 938 (8th Cir. 2005).

In determining whether to defer to the agency, courts traditionally consider whether: (i) the issue is within the "conventional experiences of judges," (ii) the issue "involves technical or policy considerations within the agency's particular field of expertise," (iii) the issue "is particularly within the agency's discretion," and (iv) "there exists a substantial danger of inconsistent rulings." *Maronyan v. Toyota Motor Sales, U.S.A., Inc.*, 658 F.3d 1038, 1048-49 (9th Cir. 2011).

As explained below, these considerations weigh against waiting for the FCC to do something—if it chooses to do anything at all. The issues raised by Defendants in support of their motion to stay—the form of consent required by and the definition of an ATDS under the TCPA—are well within the conventional experiences of this Court. Courts throughout the country and this Circuit have closely analyzed these issues and applied them to varying factual circumstances. And while the issues involve technologies that are undeniably within the purview of the FCC, the ability to interpret the TCPA is by no means a matter of the agency's exclusive discretion. Further, both the Courts (in this Circuit and elsewhere) and the FCC have interpreted the plain meaning of the TCPA with noteworthy consistency, thereby eliminating any potential for inconsistent decisions. Accordingly, the primary jurisdiction doctrine fails to support a stay in this case.

1. Courts, especially those in this Circuit, are readily familiar with the TCPA and issues of statutory interpretation presented by commercial text messaging services.

Try as they may, Defendants can hardly argue as they do that the issues in this lawsuit—involving matters of statutory interpretation and Congressional intent—fall outside the "conventional experiences of judges." Indeed, courts throughout the country, including the Ninth Circuit Court of Appeals, have squarely addressed the meaning of "prior express consent" under the TCPA. Particularly relevant to this action, in the seminal case on the issue—*Satterfield v. Simon & Schuster*—the Ninth Circuit considered the issue in the context of a consumer providing her cellular phone number to defendant Nextones (an online publisher of multimedia content), who later sold it

to another entity (publisher, Simon & Schuster) for the purpose of transmitting promotional text messages for an upcoming book release. *Satterfield*, 569 F.3d at 949. In reversing the trial court, the Ninth Circuit held that the sender of the text messages had not obtained express consent. *Id.* According to the court, while the plaintiff and other subscribers consented to receive promotions from Nextones, it simply did not follow that that consent extended to Simon & Schuster, with which they had no interaction. *Id.* at 955 (the TCPA only exempts those calls "made with the prior express consent of the called party…[e]xpress consent is consent that is clearly and unmistakably stated."). *Id*.

Following *Satterfield*, courts addressing the issue have similarly adopted a "common sense" and plain language interpretation of what constitutes "consent" and found that it requires the sort of active and unambiguous consent contemplated by the FCC's writing requirement. *See, e.g., Edeh v. Midland Credit. Mgt., Inc*., 748 F. Supp. 2d 1030, 1038 (D. Minn. 2010) (holding that "[e]xpress means 'explicit,' not as [defendant] seems to think, 'implicit.' [Defendant] was not permitted to make an automated call to the [plaintiff's] cell phone unless [plaintiff] had previously said to [defendant] (or at least [defendant's] predecessor in interest) something like this: 'I give you permission to use an [ATDS] to call my cellular phone."); *In re Jiffy Lube Int'l, Inc., Text Spam Litig*., No. 11-MD-2261-JM-JMA, --- F.Supp.2d ----, 2012 WL 762888, *3 fn. 7 (S.D. Cal. Mar. 9, 2012) ("[The court] is not persuaded that a customer's provision of a telephone number on the invoice in question would constitute prior express consent…."); *Leckler v. CashCall, Inc*., 554 F. Supp. 2d 1025, 1030 (N.D. Cal. 2008), *vacated on other grounds*, 2008 WL 5000528 (N.D. Cal. Nov. 21, 2008) ("the FCC, and industry in general understand[] what is required to meet Congress' demand of express consent."); *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1169-70 (N.D. Cal. 2011) (rejecting the defendant's argument that the TCPA is vague as to the meaning of "prior express consent[,]" noting that *Satterfield* "gives valuable guidance about what the TCPA requires, and provides a common sense interpretation of 'express consent….'").

Likewise, numerous courts throughout the country have also interpreted the meaning of the term "capacity" and acted consistently with the FCC's prior rulings. Indeed, in *Satterfield* the Ninth Circuit held that the TCPA's focus "on whether the equipment has the *capacity* 'to store or produce numbers to be called, using a random or sequential number generator'" is a clear indication that "a system need not actually store, produce, or call randomly or sequentially generated telephone numbers" in order to be considered an ATDS. *Satterfield*, 569 F.3d at 951. Instead, it need only be capable of performing such functions. *Id.* Since then, numerous other courts have followed suit. *See Pimental*, 2012 WL 691784, at *2 ("The Ninth Circuit has counseled that the focus must be on the equipment's capacity to do these things, not whether the equipment actually stored, produced, or called randomly or sequentially generated telephone numbers"); *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1010 (N.D. Ill. 2010) (finding plain language to require equipment to "only have *the capacity* to store or produce numbers" and that requiring "use" of a random or sequential number generator would relegate the phrase "which has the capacity" to mere surplusage); *In re Jiffy Lube*, 2012 WL 762888, *5-6 ("The Ninth Circuit has confirmed that the statute creates liability based solely on a machine's capacity rather than on whether the capacity is utilized … But while [defendant] may be correct that preventing the random or sequential generation and dialing of cellular telephone numbers is one goal of the statute, it certainly is not limited to such a purpose. One indication of this is the very phrase that [defendant] thinks is unconstitutional—"has the capacity." If Congress' goal was as narrow as [defendant] posits, the phrase "has the capacity" would have been superfluous. Rather, Plaintiffs and the United States have shown that the government sought to generally protect consumers' privacy and reduce the volume of telephone solicitations").[4]

[4] In *Jiffy Lube*, the United States intervened on behalf of the constitutionality of the TCPA, and in regards to the meaning of "capacity," argued:

> …in defining ATDS in terms of the equipment's "capacity," Congress properly sought to avoid circumvention of the prohibition on unsolicited calls. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Final Rule, 68 Fed. Reg. 44144-01, ¶ 96 (July 25, 2003) (noting that the purpose of the definition of ATDS "is to ensure that the prohibition on autodialed calls not be

Accordingly, the issues presented by this lawsuit surely fall within the conventional experiences of judges such that absolute deference to the FCC—which absent any compulsory mechanism may never consider the GroupMe Petition—is unnecessary. This consideration weighs against granting the requested stay as a result.

2. The issues implicated fall within the FCC's field of expertise, and the FCC has clearly ruled that express written consent is required and that the definition of ATDS is based upon "capacity" and not actual use.

The issues involved in this lawsuit undeniably fall within the FCC's field of expertise. Contrary to the Defendants' assertions, however, the FCC has already spoken directly and extensively regarding both the meaning of "consent" under the TCPA as well as the statute's definition of "capacity" with respect to the use of auto-dialer technologies.

a. The FCC has addressed "consent" under the TCPA.

Indeed, most recently, through its 2012 Report and Order, the FCC made clear that prior express written consent is required prior to transmitting commercial text messages—like the messages Plaintiffs alleged Defendants transmitted—to consumers. According to the FCC, "requiring prior written consent will better protect consumer privacy because such consent requires conspicuous action by the consumer—providing permission in writing—to authorize autodialed or

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> circumvented"). ... As the FCC has observed, technology has advanced to the point where some sophisticated dialing systems do not need to randomly or sequentially generate telephone numbers in order to make auto-dialed calls to large numbers of people. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Final Rule, 68 Fed. Reg. 44144-01, ¶ 95-96 (July 25, 2003). But the technology used to place the auto-dialed calls also likely has the capacity to generate random or sequential numbers, even if that capacity is not used. By regulating the "capacity" to store or produce randomly or sequentially generated numbers, Congress sought to advance its broad interest in reducing unsolicited calls while ensuring that the statute would likely apply to new technologies.

In re Jiffy Lube, United States of America's Memorandum in Support of the Constitutionality of the Telephone Consumer Protection Act (11-MD-02261-JM-JMA) (Dkt. 46.) (S.D. Cal. December 27, 2011)

prerecorded telemarketing calls, and will reduce the chance of consumer confusion in responding orally to a telemarketer's consent request." (2012 Report and Order, p. 10.)[5]

The FCC based its Order, in part, on the need for stronger protections given the recent increase in wireless usage and the heightened potential for privacy intrusions as a result. "Given these factors, [the FCC] believe[d] that it is essential to require prior express written consent for autodialed or prerecorded telemarketing calls to wireless numbers. . . as use of wireless numbers continues to increase, we believe that *increased protection from unwanted telemarketing robocalls is warranted*." (*Id*. at p. 11) (emphasis added). Moreover, "requiring prior written consent will enhance the FCC's enforcement efforts and better protect both consumers and industry from erroneous claims that consent was or was not provided, given that, unlike oral consent, the existence of a paper or electronic record can be more readily verified and may provide unambiguous proof of consent." (*Id*.)[6]

The 2012 Report and Order is consistent with the FCC's history of rulemaking and its continued strengthening of consumer protections related to wireless phone services. *See, e.g., In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 (Sept. 17, 1992) ("1992 Order") (explaining that a consumer provides express consent who "provides his or her telephone number to a business," but "if a caller's number is 'captured' by a Caller ID or an ANI device without notice to [the consumer,] the caller cannot be

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[5] Defendants falsely argue that the 2012 Report and Order did not address, and that the 2010 NPRM did not seek comment on, the issue of express consent. (Dkt. 64, p. 4, 5 fn. 6.) This is not true. In fact, the 2010 NPRM specifically sought comment "on the Commission's authority to adopt a prior written consent requirement similar to the FTC's. Specifically, while the term 'prior express consent' appears in both subsections 227(b)(1)(A) and (b)(1)(B), the statute is silent regarding the precise form of such consent (i.e., oral or written)." (2010 NPRM, p. 9.) Ultimately, the 2012 Report and Order dedicated 7 pages to the topic. In any event, Defendants' arguments regarding the form of consent required are inapposite. Indeed, Plaintiffs expressly allege they gave neither written nor oral consent, or any other conceivable form of consent, to anyone, to be added to a texting group and receive text message solicitations from Defendants. (Dkt. 24, ¶¶ 29, 34.)

[6] Defendants blatantly reargue that the text messages at issue in this case are informational, rather than commercial, and therefore, are exempted from liability under the TCPA. (Dkt. 64, p. 9 fn. 9.) Of course, in denying Defendants' motion to dismiss the Court already rejected that argument, instead holding that Plaintiffs sufficiently alleged that the messages at issue here are the sorts of commercial solicitations prohibited by the TCPA. *See Pimental*, 2012 WL 691784, at *2.

considered to have given an invitation or permission" to receive calls); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 F.C.C.R. 559 (2007) ("We emphasize that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor").[7]

Thus, the issue both falls within the FCC's expertise and the FCC has decided it (albeit in a manner that leave the Defendants dissatisfied). It is highly unlikely that the agency will now do an about-face, mere weeks after its last pronouncement, and relax the TCPA's consent requirements in response to the GroupMe Petition.

b. The FCC has also ruled on the definition of capacity within the context of an ATDS.

Like the issue of consent, the FCC has already spoken to the definition of an ATDS, generally, and the meaning of the term "capacity," specifically, under the TCPA. In the exercise of its TCPA rulemaking authority under 47 U.S.C. § 227(b)(2), the FCC has issued several reports and orders clarifying the TCPA's provisions. In 2002, the FCC issued a Notice of Proposed Rulemaking that recognized "that in the last decade new technologies have emerged to assist telemarketers in dialing the telephone numbers of potential customers. More sophisticated dialing systems, such as predictive dialers and other electronic hardware and software containing databases of telephone numbers, are now widely used by telemarketers to increase productivity and lower costs." *Notice of Proposed Rule Making in re Regulations Implementing the TCPA*, 17 FCC Red. 17474, ¶ 24, 2002 WL 31084939 (2002).

In the Final Rule that followed, the FCC concluded that in order to be considered an ATDS under the TCPA, "equipment need only have the 'capacity to store or produce telephone numbers' . . . [as] it is clear from the statutory language and the legislative history that Congress anticipated

[7] Notably, in the 2012 Report and Order, the FCC sought to "harmonize" its understanding of the consent requirement with that of the FTC: express consent "means that consumers must affirmatively and unambiguously articulate their consent. Silence is not tantamount to consent; nor does an ambiguous response from a consumer equal consent." 16 CFR Part 310, 67 FR at 4620.

that the FCC . . . might need to consider changes in technology." (2003 Order, ¶ 95.)[8] The FCC went on to note that although "telemarketers may have [in the past] used dialing equipment to create and dial 10-digit telephone numbers arbitrarily…the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more effective." *Id.* Notwithstanding, "[t]he basic function of such equipment…has not changed – the capacity to dial numbers without human intervention." *Id.*; *see also In re Jiffy Lube*, 2012 WL 762888 at *6 (citing United States Department of Justice Response to Motion to Dismiss (11-MD-2261-JM-JMA, Dkt. 46) ("As the government argues, 'Congress anticipated that advancements in technology would allow telemarketers to employ new and more sophisticated ways of auto-dialing large lists of numbers.'")). Thus, the FCC "believe[d] that the purpose of the requirement that equipment have the 'capacity to store or produce telephone numbers to be called' is to ensure that the prohibition on autodialed calls not be circumvented." 2003 Order at ¶ 96.[9]

Accordingly, as far back as 2003, the FCC specifically interpreted the term ATDS to apply to equipment to which lists of cellular phone numbers could be uploaded and then dialed without human intervention, and thus, the FCC's 2003 Order has already addressed the capacity argument that GroupMe is now positing. (2003 Order, ¶ 95.) Defendants' process of sending text messages promoting their services and mobile application is nearly identical to the equipment described in the

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[8] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Final Rule, 68 FR 44144-01, ¶ 95 (July 25, 2003) ("2003 Order").

[9] Notably, in a joint letter to members of Congress, all fifty Attorneys General of the United States recently expressed their opposition to proposed legislation affecting the TCPA that set forth a modification to ATDS similar to that sought by GroupMe and Defendants. *See* Mobile Informational Call Act of 2011 (H.R. 3035). In relevant part, the letter stated:

> H.R. 3035 would revise the definition of "automatic telephone dialing system" to include only equipment that uses random or sequential number generators. Most modern automatic dialers, however, already use preprogrammed lists. As a result, H.R. 3035 would effectively allow telemarketers to robo-dial consumers just by avoiding already antiquated technology.

Letter of the National Association of Attorneys General (December 7, 2011) (available at http://law.ga.gov/vgn/images/portal/cit_79369762/179228493Final%20HR3035%20Letter.pdf). In the face of strong opposition, the proposed legislation was later withdrawn.

2003 Order: a phone number is added to a database by a third party group creator, and then, separate and apart from the creation of a group or any conduct by the group creator, Defendants' systems automatically access the databases to transmit their own text messages without human intervention. *Id*. (*See also* Dkt. 24, ¶¶ 19-24.)[10]

Accordingly, there should be no question that the FCC has sufficiently resolved these issues as they affect this case.[11] Granting a stay while the FCC considers the GroupMe Petition would therefore do little more than provide Defendants with a means of prolonging this litigation endlessly, filing new petitions to reconsider with the FCC whenever the agency releases its next guidance, if at all. As discussed below, the FCC's ability to issue regulations and guidance on these matters does not strip this Court of the ability under the primary jurisdiction doctrine to consider the claims alleged in the pleadings. Furthermore, that the FCC has exercised its authority to reach decisions consistent with those reached by the Courts weighs against applying the primary jurisdiction doctrine here.

[10] While both Defendants and GroupMe attempt to place the responsibility for sending their purportedly "administrative" texts on the group creators, in reality, the group creators are unaware of and take no part in sending the actionable text messages. Indeed, as Plaintiffs allege here, the Disco Mobile App Text is sent automatically and without human intervention to all group members at the moment a group is created without the group creator's affirmative action or knowledge. (Dkt. 24, ¶¶ 23-24.)

[11] It is worth noting that the legislative history of the TCPA is also consistent with FCC and judicial interpretations of "capacity" and confirms that the term takes into account the sorts of technological advances Defendants contend require additional consideration. *See* 137 Cong. Rec. S18784 (1991), dkt. 16-21 (statement of Sen. Hollins) ("[T]he FCC is not limited to considering existing technologies. The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies."). Indeed, by making "capacity" the relevant standard, Congress sought to avoid circumvention of the prohibition on unsolicited calls: "the wording of the statute is not limited to 1991 technology . . . and demonstrates Congress anticipated that the TCPA would be applied to advances in automatic telephone dialing technology." *Joffe v. Acacia Mortg. Corp.*, 121 P.3d 831, 839 (Ct. App. 2005); *see also* 2003 Order at ¶ 96 (noting that the purpose of the definition of ATDS "is to ensure that the prohibition on autodialed calls not be circumvented"). As the FCC observed, technology has advanced to the point where some dialing systems need not randomly or sequentially generate telephone numbers in order to call consumers *en masse*, but nevertheless, likely have the capacity to generate random or sequential numbers, even if that capacity is not used. *Id*.

3. While issues of express consent and the scope of technologies covered by the TCPA involve technical considerations within the FCC's field of expertise, the issues are not solely matters of agency discretion.

The third factor in the primary jurisdiction analysis requires that the Court consider whether the issues are solely within the agency's discretion. As a threshold matter, it is important to recall that because the term "capacity" is expressly defined by the TCPA itself, the FCC cannot simply redefine its meaning as Defendants suggest. *See* 47 U.S.C. § 227(a)(1); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984);[12] *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1025-26 (9th Cir. 2007). *See also* 47 C.F.R. § 1.2 (the FCC is empowered to issue rulings for the purpose of "terminating a controversy or removing uncertainty," but is not given the authority to rewrite statutes or contradict Congressional intent). Under *Chevron*, even if the FCC were to overstep its authority and alter the plain meaning assigned by Congress as requested by the GroupMe Petition, this Court would not be required to give such an interpretation deference. *Chevron*, 467 U.S. 842-43. Accordingly, in that Congress did not grant the FCC sole and unlimited authority to interpret the meaning of the TCPA, this factor cannot be used to support the Defendants' request for a stay based upon primary jurisdiction.

4. Given the remarkable consistency between judicial and FCC decisions, Defendants cannot demonstrate that applying the primary jurisdiction doctrine is necessary here to mitigate any risk of inconsistent rulings.

As explained above, both the courts and the FCC have applied the meanings of the terms "consent" and "capacity" consistently and continue to do so. The FCC has known about the *Satterfield* Court's application of the TCPA to spam text messages and, notwithstanding the ability to criticize it, has chosen repeatedly to not do so. Rather, the FCC has taken just the opposite

[12] Under *Chevron*, agency interpretations of federal law are given deference under a two-step test: (1) "if the intent of Congress in clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress;" and (2) "if a statute is silent or ambiguous with respect to the issue at hand, [the court] defer[s] to the agency so long as 'the agency's answer is based on a permissible construction of the statute." *Satterfield*, 569 F.3d at 952 (quoting *Chevron*, 467 U.S. 842-43). As shown, Congress clearly intended to broadly define "capacity" to encompass a wide range of conduct and cover new and emerging technologies.

approach, maintaining its current understanding of the statutory terms.[13]

Accordingly, any claims that Defendants could potentially make regarding the risk of inconsistent determinations are overblown. This factor of primary jurisdiction thus also fails to support granting the requested stay.

C. Plaintiffs would suffer prejudice if the Court were to grant the requested stay.

Finally, courts determining whether to stay a case on grounds of primary jurisdiction must also consider general principles governing stay requests. *See e.g. Nat. Resources Defense Council v. Norton*, No. 64 ERC 1718, 2007 WL 14283, *14 (E.D. Cal. Jan. 3, 2007) (In determining whether to grant a stay based on primary jurisdiction, "a court should take into consideration the possible damage which may result from the granting of a stay, [and] the hardship or inequity which a party may suffer in being required to go forward") (citing *CMAX, Inc.,* 300 F.2d at 268.) In considering traditional requests for stays, the Ninth Circuit has cautioned that "[a party seeking] a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Lockyer*, 398 F.3d at 1109.

Here, Defendants never address whether they will suffer any hardship or inequity if forced to defend this action—they will not. The same cannot be said for Plaintiffs, however. Indeed, the GroupMe Petition was filed approximately one month ago; it could be months before it is made available for public comment, if ever, and more than likely, any type of order based on the petition could be years away. The recent 2012 Report and Order came almost two years after the 2010 NPRM, and the unrelated petition currently underlying the stay in the *GroupMe* matter has likewise been awaiting final action by the FCC for over two years. Moreover, as explained in detail herein, it is highly unlikely that the FCC will even take action that has any impact on this litigation, resulting in months or even years of unnecessary delay that could materially change and prejudice the parties' litigation positions. Accordingly, it is probable that a stay on primary jurisdiction grounds

[13] In fact, the FCC cited favorably to the *Satterfield* ruling in its 2012 Report and Order. (2012 Report and Order, p. 15.)

would serve only to unnecessarily delay this action, causing substantial and undue hardship to Plaintiffs and the putative Class.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion to stay in its entirety and allow this case to proceed.

Respectfully submitted,

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

Dated: April 9, 2012

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CERTIFICATE OF SERVICE

I, Christopher L. Dore, an attorney, hereby certify that on April 9, 2012, I served the above and foregoing ***Plaintiff's Opposition to Defendants' Motion to Stay Based on Recently Filed FCC Petition***, by causing true and accurate copies of such paper to be filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system.

/s/ Christopher L. Dore