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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.

This Document Relates to All Actions.

Case No. 11-cv-02585-YGR

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO STAY BASED ON RECENTLY FILED FCC PETITION

Date: May 1, 2012
Time: 2:00 p.m.
Place: TBD
Judge: Hon. Yvonne Gonzalez Rogers

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INTRODUCTION

As explained in the opening Motion, with the filing of the GroupMe Petition, the FCC is now poised to consider two issues that are critical to resolution of the merits in this case: (1) the interpretation of the definition of an automatic telephone dialing system ("ATDS" or "auto-dialer") under the Telephone Consumer Protection Act ("TCPA"); and (2) the scope of allowable "prior express consent" for noncommercial calls or text messages. As the FCC is the administrative agency charged by Congress with implementing a regulatory scheme to oversee the TCPA, a stay of this action is appropriate to enable the FCC to decide these issues without risking a judicial interpretation that may be contrary to whatever the FCC eventually decides.

Plaintiffs do not dispute that these issues are integral to this case and that they are squarely raised by the GroupMe Petition. Instead, Plaintiffs' raise a series of specious arguments in opposition to the stay request, which, as shown below, lack merit.

For example, Plaintiffs argue that a stay is not warranted on the ATDS issue because the FCC may not actually act on the GroupMe Petition, and that, in any event, it has already resolved what constitutes an auto-dialer for purposes of the TCPA. That position, though, is firmly belied by recent FCC activity. Although the FCC has not yet acted on the GroupMe Petition, on March 30, 2012, after Defendants originally filed this Motion, the FCC issued a Request for Comments on a Petition for Expedited Declaratory Ruling filed by SoundBite Communications, Inc. *See* Further Request For Judicial Notice In Support Of Motion To Stay ("Reply RJN") Ex. 8 (March 30, 2012 FCC Public Notice).[1] That petition, like the GroupMe Petition, raises the issue of the meaning of the term "capacity" in the definition of an auto-dialer. *See* Reply RJN Ex. 9 (SoundBite Petition for Expedited Declaratory Ruling ("SoundBite Petition")). This recent action by the FCC in issuing the Request for Comments unequivocally demonstrates the FCC's interest in this issue and the significance of a consistent determination of what constitutes an auto-dialer

[1] According to its petition, SoundBite specializes in customer communications, and works with a wide range of other companies, including banks, retailers, utilities, and wireless operators, to send text messages and other messages on their behalf. *See* Reply RJN Ex. 9 at 2.

under the TCPA in the text messaging context.[2] To the extent that the cases cited by Plaintiffs address the ATDS definition, not one of them resolves the pivotal issue in this case (and the GroupMe case)—whether the term "capacity" used in that definition means *theoretical, potential* capacity to auto-dial, or rather *actual, existing* capacity.

Plaintiffs also contend that the other novel issue presented by the GroupMe Petition—whether wireless subscribers can give "prior express consent" to receive non-telemarketing, informational calls through an "intermediary" (*e.g.*, the group creators)—has also been resolved by the FCC. Again, Plaintiffs are mistaken. While the FCC has recently observed that, with respect to noncommercial messages, consent can be either oral or written, the FCC simply has not gone as far as to decide the precise issue on which GroupMe is seeking FCC guidance.

Not only are the legal criteria for a stay satisfied here, but if a stay is not issued, the parties may be prejudiced by inconsistent determinations of this Court and the FCC. Specifically, if the FCC adopts GroupMe's position on the definition of an auto-dialer, after this case has proceeded on the merits, Defendants could be faced with a damages award that could have been significantly different if based on the FCC's conclusion on the scope of the ATDS definition.[3]

Defendants have moved to stay this case to give the FCC an opportunity to consider these issues and to provide guidance to the Court with the goal of avoiding the potential of inconsistent applications of the TCPA. Plaintiffs themselves admit that "the issues involved in this lawsuit undeniably fall within the FCC's field of expertise." *See* Opp. at 9. As explained in the Motion and herein, these issues should be addressed by the FCC in furtherance of a consistent regulatory scheme and to avoid inconsistent results. Accordingly, the Court should stay this case pending the FCC's resolution of those issues.

[2] Since the SoundBite Petition and the GroupMe Petition both raise the issue of the auto-dialer definition, it is possible that the FCC will not act separately on the GroupMe Petition and will determine this issue on the basis of the SoundBite Petition.

[3] Further, since the Disco product and service were discontinued in October 2011, there are no continuing alleged statutory violations or continuing "injury" to Plaintiffs or any putative class members. *See* Mot. at 2, n.2

ARGUMENT

I. UNIFORM ADMINISTRATION OF THE TCPA MANDATES A STAY OF THIS ACTION PENDING THE FCC'S RESOLUTION OF THE "PRIOR EXPRESS CONSENT" AND AUTO-DIALER ISSUES.

As explained in the opening Motion, a court can stay an action under the doctrine of primary jurisdiction after determining that (1) the litigation presents "a particularly complicated issue that Congress has committed to a regulatory agency"; and (2) the regulatory agency, rather than a court, should decide the issue in order to protect the integrity of the applicable regulatory scheme. *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008) (internal quotation and citation omitted); *see* Mot. at 5-6.

The Motion established that the Ninth Circuit's criteria for staying an action based on primary jurisdiction are satisfied here. That is because (a) Congress has vested the FCC with comprehensive regulatory authority over the TCPA (Mot. at 7); (b) the FCC has been petitioned to directly consider and rule on both the "prior express consent" and auto-dialer issues (Mot. at 8-9); and (c) uniform administration of the TCPA favors staying this action pending resolution of these issues. Mot. at 10-11.

A. The FCC Will Address The Definition Of An Auto-Dialer.

In order to determine whether or not a stay is warranted, courts look to whether agency resolution of an issue "is likely to be a material aid to any judicial resolution." *GTE.Net LLC v. Cox Commc'ns, Inc.*, 185 F. Supp. 2d 1141, 1144 (S.D. Cal. 2002) (internal quotation and citation omitted). The Motion shows that precisely such an issue—the scope of the TCPA's definition of an auto-dialer (under 47 U.S.C. § 227(a)(1))—is now squarely before the FCC. As explained, the ATDS issue raised by the GroupMe Petition (and now the SoundBite Request for Comments) addresses a fundamental question of the interpretation and applicability of a 1991 definition to new technology not then contemplated. The question of whether, as a factual matter, equipment with mere potential—but not actual, existing—"capacity" to store or produce numbers using a random or sequential number generator constitutes an auto-dialer under the TCPA, is critical to the resolution of this case (and has far reaching implications for text messaging technology and applications generally). That is because, like GroupMe, Defendants contend that Disco did not

use equipment with such actual, existing "capacity." As noted, Plaintiffs do not dispute that the ATDS issue is a paramount issue here. Nor do they contest that this issue is identical to that raised in the GroupMe case. None of Plaintiffs' arguments in opposition to the stay has merit.

Plaintiffs first contend that the Court should not await the FCC's guidance on the ATDS (and prior express consent) issue because the matter falls within the "conventional experiences of judges." *See* Opp. at 6-9 (identifying "conventional experience of judges" as one of the four relevant factors).[4] In making that argument, however, the Opposition does not apply the Ninth Circuit's traditional four factors for invoking the primary jurisdiction doctrine.[5] Rather, it relies on a dissenting opinion from a Ninth Circuit case where the majority did not even discuss or rule on primary jurisdiction. Opp. at 6 (citing *Maronyan v. Toyota Sales, U.S.A., Inc.*, 658 F.3d 1038, 1048-49 (9th Cir. 2011) (citing Second Circuit cases)).

Plaintiffs also attack the propriety of a stay by focusing—improperly—on the standards articulated in *Landis v. North Am. Co.*, 299 U.S. 248 (1936), rather than a stay based on the doctrine of primary jurisdiction. Opp. at 2. But even applying the *Landis* standards—which include an analysis of the consequences to the parties of the grant or denial of the stay and whether issues may be simplified or complicated by the stay—a stay would be appropriate in this case.[6] Perhaps more importantly, while Plaintiffs cite purported instances of courts addressing

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[4] Notably, Plaintiffs elsewhere in the Opposition concede that these issues "undeniably fall within the FCC's field of expertise." *See, e.g.*, Opp. at 9.

[5] As explained in the Motion, while there is no "fixed formula" for applying the doctrine of primary jurisdiction, the Ninth Circuit traditionally considers four factors: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." Mot. at 6 (citing *Clark*, 523 F.3d at 1115; *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Corp.*, 307 F.3d 775, 781 (9th Cir. 2002)).

[6] A *Landis* stay concerns the district court's discretionary power to stay proceedings in its own court. To evaluate whether a *Landis* stay is warranted, a court weighs "the competing interests which will be affected by the granting or refusal to grant a stay. 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." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (citation omitted). Application of this analysis militates in favor of a stay—particularly where, as here, there is no hardship or possible damage that would inure to Plaintiffs or the putative class if a stay is granted. *See* Part III, below. Additionally, guidance from the

the ATDS (and consent) issue (*see* Opp. at 7-8), in none of those cases did the court do so in the face of pending FCC proceedings directed squarely at the issue.

Plaintiffs next argue that no stay should issue because the auto-dialer issue has already been settled by the FCC. *See* Opp. at 11-13. They claim that the FCC did so in its 2003 Report and Order (*see* Opp. at 11-12) and reaffirmed its position by the *absence* of any discussion of it in the recent 2012 Report and Order. Opp. at 4 (stating that the 2012 Report and Order "left unchanged the widely held understanding of an ATDS promulgated by the Ninth Circuit and confirmed by numerous district courts, including this Court.").[7]

This position, however, is specifically and convincingly disproved by the recent FCC Request for Comments on the SoundBite Petition.[8] Reply RJN Ex. 8. In that Request, the FCC specifically invites comments on the meaning and applicability of the definition of an auto-dialer. Reply RJN Ex. 8 at 2.[9] Hence, by requesting comments on the issues raised in the SoundBite Petition—including what constitutes an ATDS—the FCC has clearly indicated that these issues may not be settled and that they merit further consideration by the Commission. Thus, contrary to Plaintiffs' assertions that the FCC "has already spoken directly and extensively" on the statute's definition of "capacity" (Opp. at 9), open questions remain regarding the interpretation

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FCC would encourage the orderly administration of the TCPA and simplify the issues and questions of law.

[7] Plaintiffs' comment in this regard is disingenuous as the meaning of the auto-dialer definition was not part of the rulemaking proceeding that culminated in the 2012 Report and Order. Thus the "absence" of a mention of an issue that was not even before the Commission is completely irrelevant.

[8] In its Petition, SoundBite asserts that it does not use an ATDS and that its opt out confirmations are targeted only to those numbers who have sent a "STOP" reply. Specifically, SoundBite notes that its system "has absolutely no capacity to store, look-up, or dial in any random or sequential order—there is only a precise, one-time response to an individual subscriber's opt-out text message request that goes only to the specific device through which the opt-out request was made." SoundBite Petition at 6. The Petition further asserts that "the FCC has explained that calling numbers that are 'not generated in a random or sequential fashion' falls outside the TCPA's prohibitions. *The individual confirmation messages sent by SoundBite are not generated in any random or sequential fashion*." SoundBite Petition at 6-7 (emphasis added).

[9] Presumably Plaintiffs' counsel is aware of this Request and the SoundBite Petition as they represent other plaintiffs in a TCPA suit against SoundBite in this District (*see Sager v. Bank of America Corp. and SoundBite Communications*, No. 12-cv-0197-HRL) and the SoundBite Petition was referenced by GroupMe. *See* GroupMe Petition at 14. In the *Sager* matter, the defendants have not filed a responsive pleading yet as the parties have agreed to mediation to be held on April 17, 2012. *See* No. 12-cv-0197-HRL, Dkt. No. 16.

and application of the definition of an ATDS under the TCPA. Given that the FCC is poised to address at least the meaning of "capacity" as raised by SoundBite and as also raised by the GroupMe Petition, this Court should stay this action while the FCC considers this issue.

Plaintiffs also appear to argue that the definition of an auto-dialer has been sufficiently adjudicated in decisional law. But like the FCC, the cases, too, have stopped short of definitively resolving the ATDS "capacity" issue on the merits. For example, in *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009), the Ninth Circuit reviewed the district court's decision granting summary judgment in favor of defendants in part, on the issue of whether an ATDS was used to transmit the text messages. Specifically at issue was whether the equipment used had the "capacity" to store, produce, or call randomly or sequentially generated telephone numbers. The Ninth Circuit found a genuine issue of material fact existed "with regard to whether the equipment has the requisite capacity" and reversed and remanded the case.[10] *Id.* at 951. In *Satterfield*, the plaintiffs' expert opined on how the system worked regarding its automated functions and the president of the company responsible for the transmission of the text messages (mBlox) testified that "the system used was not capable of sending messages to telephone numbers not fed to the system by mBlox nor was it capable of generating random or sequential telephone numbers." *Id.* The Ninth Circuit determined that the "conflicting testimony" and "limited record" demonstrated a genuine issue of material fact such that summary judgment was not appropriate. Thus, while *Satterfield* holds that the TCPA can be violated through use of equipment with the "capacity" to auto-dial, it does not determine whether such capacity may be theoretical or whether, instead, a present existing capability is required.

The other cases cited by Plaintiffs also do not resolve the "meaning" of the term "capacity" because they simply addressed whether, at the pleadings stage, the allegations of the use of an ATDS were sufficient. *See Lozano v. Twentieth Century Fox*, 702 F. Supp 2d 999, 1010-11 (N.D. Ill. 2010) (citing *Satterfield* and holding that Plaintiff had "included allegations in his complaint sufficient to meet the requirements of an automated telephone dialing system"); *In*

[10] The case settled shortly after remand to the District Court. *See Satterfield v. Simon & Schuster, Inc.*, No. 06-cv-2893-CW, Dkt. No. 112.

re Jiffy Lube Int'l Inc. Text Spam Litigation, No. 11-MD-2261-JM-JMA, -- F. Supp. 2d --, 2012 WL 762888, *4 (S.D. Cal. Mar. 9, 2012) (allegations that the message was sent by a machine with the capacity to store or produce random telephone numbers are sufficient at the pleading stage). The reality is that no court has interpreted "capacity" to mean "equipment which could in the future have capacity if software is added to the device or existing software is modified."[11]

Here, Plaintiffs' claim cannot be resolved without a determination of whether an ATDS under the TCPA includes equipment with a "potential" but not "actual" capacity to randomly or sequentially generate and dial numbers. The significance of this issue cannot be overstated. If the term "capacity" is construed as Plaintiffs would have it—to include only *potential* or *theoretical* capacity—then many ordinary consumer devices such as smartphones and laptop computers would fall within the sweep of the statute. That is because they have the theoretical or potential "capacity" to randomly or sequentially generate numbers and dial them—albeit, with the installation of an appropriate application or software.

The scope of the definition of "capacity" directly impacts group texting applications such as GroupMe and Disco because, as explained by GroupMe, its "technology does not randomly or sequentially generate or dial the telephone numbers of group members, and it does not initiate any of the transmissions. In fact, GroupMe's technology has never been capable of performing such functions and, to do so, would need to be reprogrammed to include software modules not even built." GroupMe Petition at 7. Similarly, as alleged in the Complaint in this case, after the group creator created the group and provided the group member's mobile number, the group member

[11] In fact, in one case which dealt with the "capacity" issue as a *factual* matter as opposed to on the pleadings or interpretatively, the court found that a manually dialed call made with equipment that had the capacity to be an ATDS if connected to the server, was not sufficient to establish that calls were made "'using' equipment with the capacity to autodial within the meaning of the TCPA." *Dobbin v. Wells Fargo Auto Finance, Inc.*, 2011 WL 2446566, at *4 (N.D. Ill. June 14, 2011). In *Dobbin*, the desk phones at a call center *could be* connected to a server that uses predictive dialing technology (and frequently were connected to it), but could also be used independently of the predictive dialing technology—that is, while a call center agent is not logged into the server. The court found that the present, existing capability at the time the call was made, was determinative. The *Dobbin* case demonstrates that if any possible capacity—whether it existed at the time the call was made or not—was the requirement, it would lead to absurd results, such as a finding that a manually dialed call violated this section of the TCPA. (47 U.S.C. § 227(a)(1)).

received the Disco explanatory message. CCAC ¶¶25, 30. There are no allegations that Disco obtained the numbers the text messages were sent to by a random or sequential number generator—the messages were sent only after a user, *i.e.*, group creator, provided the numbers. That the technology could possibly be configured to perform functions of randomly or sequentially generating numbers, though not now existing, should not be sufficient to create liability under the TCPA.

B. The FCC Will Likely Address "Consent" For Purposes Of A TCPA Analysis.

The GroupMe Petition asserts that third party consent obtained through an intermediary satisfies the TCPA's prior express consent requirement for certain non-telemarketing, informational calls or text messages to wireless numbers.[12] This is a threshold determination for this litigation, as well. *See* Mot. at 8-9. If third party consent is proper, all other issues, including whether an auto-dialer was used, become irrelevant. This issue has been raised directly by the GroupMe Petition and submitted to the FCC for clarification, and the FCC is likely to provide guidance on this critical threshold question.

Plaintiffs claim that this issue is irrelevant, arguing that the Court has rejected Defendants' argument that the text messages at issue were noncommercial (Opp. at 10, n.6) and that the consent issue has been definitively resolved by the FCC. Both arguments lack merit. First, this Court merely held that, for purposes of a Rule 12(b)(6) motion to dismiss, Plaintiffs had sufficiently *alleged* that the text messages were commercial—it is axiomatic that a ruling on the sufficiency of the allegations is not an adjudication on the merits that the text messages are *in fact* commercial or noncommercial. Indeed, Defendants believe that the facts will show that the messages at issue here were not "telemarketing" messages as that term is defined by the statute and as it has been construed by the courts and the FCC. Hence, the issue raised in the GroupMe

[12] Contrary to Plaintiffs' assertions that Defendants have somehow misrepresented the consent requirement (*see* Opp. at 10, n.5), Defendants had expressly noted that this issue applies to informational calls—not telemarketing calls. *See* Mot. at 9, n.9.

Petition regarding the type of prior consent required for noncommercial calls is clearly relevant to the merits of this case and is an issue of significant import.[13]

Second, this issue was not resolved by the FCC in the recent 2012 Report and Order or in any of its prior proceedings. In fact, in the 2012 Report and Order, the FCC, recognizing the ubiquity of mobile phones and text messaging as a primary means of communication for many subscribers, agreed that requiring prior *written* consent of non-telemarketing calls would "unnecessarily restrict consumer access to information communicated through purely informational calls" and the Commission did not "want to unnecessarily impede" calls such as calls or messages regarding bank account balances, credit card fraud alerts, package deliveries and school closing information. 2012 Report and Order at ¶21. Hence, the FCC specifically determined that consent for such calls could be written or oral and left it to the "caller to determine" what type of consent to rely on for purposes of compliance with the TCPA. *Id.* at ¶29. As noted by GroupMe, in several such instances, it may not be possible to obtain prior express consent directly from the recipient—particularly in the package delivery context as noted by the United Parcel Service. GroupMe Petition at 16-17. As a result, the GroupMe Petition directly requests that:

> the Commission should make clear that for non-telemarketing, informational calls or text messages to wireless numbers, which can permissibly be made using an ATDS under the TCPA with the called party's oral prior express consent, the caller can rely on a representation from an intermediary that they have obtained the requisite consent from the called party.

GroupMe Petition at 18.

Given the protocols followed by both the GroupMe and Disco applications, where informational messages are sent to new members whose numbers were provided by third parties—that is, the group creators—a determination by the FCC on whether such consent

[13] The best example of third party consent is illustrated by the situation involving package delivery companies such as the United Parcel Service which may notify package recipients by text message using a wireless number provided by the sender—since UPS has no contact with the package sender until the time of delivery. GroupMe Petition at 17 (citing United Parcel Services, Inc. Comments filed July 15, 2010).

satisfies the statutory requirement would materially affect the parties' litigation positions. Accordingly, the issue of whether consent for noncommercial, informational and/or administrative text messages can be provided by an intermediary as expressly raised by the GroupMe Petition is directly relevant in this case. A stay should issue to allow the FCC to apply its recognized expertise on this issue.

II. THE CONTINUED STAY IN THE GROUPME CASE FURTHER SUPPORTS A STAY OF THIS ACTION.

Plaintiffs do not dispute that the GroupMe case and this case are closely aligned and involve many of the same legal and factual issues. Hence, the continued stay in the GroupMe case is a relevant factor that should be considered by this Court. As noted in Defendants' opening memorandum, after the issuance of the 2012 Report and Order, Judge Hamilton extended the stay in the GroupMe case pending further resolution by the FCC with regard to certain issues pertaining to GroupMe's co-defendant Twilio.

In an attempt to discount the impact of both of Judge Hamilton's orders staying the GroupMe case, Plaintiffs incorrectly assert that in the March 15 Stay Order, "Judge Hamilton acknowledged that the FCC's 2012 Report and Order had resolved or otherwise disposed of the consent and ATDS issues upon which the original stay as to GroupMe was based." Opp. at 4-5.[14] However, Plaintiffs' characterization of Judge Hamilton's order misleads. The substantive portion of Judge Hamilton's Order in its entirety is as follows:

> For the reasons advanced by GroupMe, the court is not inclined to lift the stay as to one defendant but not the other, and accordingly DENIES the motion. Additionally, because one of the reasons for the stay pertains to the liability of co-defendant Twilio and the petition on that issue still remains before the FCC, the stay remains in effect. If GroupMe's petition for expedited declaratory ruling and clarification is acted on during the period of the stay, the parties shall bring it to the court's attention; however, the instant ruling is

[14] Plaintiffs also incorrectly claim that Defendants somehow asserted that the March 15 Stay Order was based on the GroupMe Petition. Opp. at 1, 5. Defendants expressly and accurately noted the Court's basis for the March 15 Stay Order. *See* Mot. at 10, n. 10. Significantly, however, while basing the stay decision "for now" on the Twilio motion, Judge Hamilton did not specifically address whether or not the stay could have been based on the GroupMe petition—an issue that the Court did not need to reach because of its position on the continued pendency in the FCC of arguments relevant to co-defendant Twilio.

> not based on GroupMe's filing of the subsequent petition. For now, the stay remains based solely on the remaining of its two grounds for its initial imposition.

Glauser v. Twilio et al, No. 11-cv-2584-PJH (Dkt. No. 76).

Nowhere does Judge Hamilton "acknowledge" that the 2012 Report and Order "resolved or otherwise disposed of" the consent or ATDS issue as claimed by Plaintiffs. Rather, the court simply noted that "for now" the stay was based on the fact that the Twilio issues were still pending and specifically ordered the parties to advise the court of any action by the FCC on the GroupMe Petition. The court's continued interest in the status of the GroupMe Petition belies Plaintiffs' assertion that the court considers those issues "resolved" or "disposed of."

Moreover, the fact that Judge Hamilton's March 15 Stay Order continues the stay "for now" based on Twilio's issues simply does not negate the Court's reasoning and conclusion in the initial January 27 Order granting the original stay; to wit: "that the FCC is in the process of utilizing its recognized expertise to consider issues pending before the court . . . and allowing the FCC to resolve the foregoing issues prior to adjudicating the issues in the present action, in order to obtain the benefit of the FCC's guidance, is appropriate." No. 11-cv-2584-PJH, Dkt. No. 73 at 4. These principles are still relevant and applicable in this case—especially given the FCC's recent request for comments on the SoundBite Petition with respect to the ATDS issue—and fully support a determination that a stay is appropriate under these circumstances.

III. IF A STAY IS NOT GRANTED, THE PARTIES MAY BE PREJUDICED BY INCONSISTENT DETERMINATIONS.

Again relying on standards for a *Landis* stay and not a stay based on primary jurisdiction, Plaintiffs baldly claim that a delay in this action will "caus[e] substantial and undue hardship to Plaintiffs and the putative class." Opp. at 16. Not surprisingly, Plaintiffs provide absolutely no facts or even argument as to what the undue hardship would be—because there is none. Nor is this issue relevant for a stay based on the doctrine of primary jurisdiction. However, even were the Court to consider the issue of "hardship," this factor would clearly weigh in favor of a stay. First, as Defendants have previously noted, the Disco product and service were discontinued in October 2011. *See* Mot. at 2, n.2. Thus, there is no danger of ongoing or continuing harm (if

there even was any harm) to any putative class members. Second, there is no danger of Google being unavailable to continue the litigation if necessary, or to ultimately pay a judgment if the case were to proceed on the merits.[15] There are simply no grounds on which Plaintiffs can legitimately assert prejudice or hardship—if that were a relevant consideration for evaluating whether a stay is warranted.

On the flipside, however, the hardship and prejudice to Defendants could be substantial if this case proceeds and this Court were to interpret the ATDS or prior express consent issues in a manner inconsistent with a subsequent FCC ruling on the same issues. In that circumstance, Defendants could be faced with a conflicting ruling on the merits or incur a substantial damages award—an award that might have been significantly different if the Court would have had the FCC guidance. Put simply, Plaintiffs will suffer no prejudice or hardship if this action is stayed, while Defendants could be severely prejudiced if it is not. This consideration thus militates in favor of a stay.

CONCLUSION

For the reasons set forth herein, the Court should stay this action pending resolution by the FCC of the GroupMe Petition and/or the clarification or determination of the ATDS definition.

DATED: April 16, 2012

Respectfully,

PERKINS COIE LLP

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GOOGLE INC. and SLIDE, INC.

[15] It should also be noted that while this Motion has been pending, Defendants have proceeded diligently with discovery including the submission of supplemental responses to interrogatories and document requests as well as the production of documents. Defendants have also issued affirmative discovery requests to Plaintiffs, whose responses should be forthcoming. Hence, written discovery has progressed substantially.