

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
GroupMe, Inc.'s)	CG Docket No. CG 02-278
)	
Petition for Declaratory Ruling)	

**BRIAN GLAUSER'S COMMENTS ON GROUPME'S PETITION FOR
EXPEDITED DECLARATORY RULING AND CLARIFICATION**

Brian Glauser, through counsel and on behalf of a group of interested consumers, submits these comments in response to the Federal Communications Commission's Public Notice seeking comment on the Petition for Expedited Declaratory Ruling from GroupMe, Inc. ("GroupMe").¹ While the self-serving Petition is transparent in seeking a TCPA liability waiver for GroupMe, the consequences of adopting GroupMe's proposals would reach much further—effectively wiping out two decades of Congressional and regulatory efforts to protect consumers from unwanted and unsolicited telemarketing efforts and opening the door to unlimited opportunities to inundate consumers with wireless spam. Such a result is contrary to the plain language of the TCPA, the Commission's prior orders interpreting the TCPA and its various components, and the clear intent of Congress in passing the statute. Accordingly, the FCC should reject GroupMe's efforts to circumvent the TCPA and refuse to open the floodgates for the waves of wireless spam that would result under GroupMe's "revised" definition of an ATDS and expanded concept of prior express consent.

¹ *GroupMe, Inc.*, Petition for Expedited Declaratory Ruling and Clarification, CG Docket

I. Background

A. GroupMe's Group Texting Service is Intended to Send Commercial Messages and Advertisements

GroupMe is one of several “group messaging” applications that allow users to transmit text message calls to dozens of other users simultaneously within a single texting group. While marketed as a “group texting” tool allowing customers to communicate with large groups of people at once, the GroupMe application is also designed to allow GroupMe to transmit unsolicited text messages to group members and advertise on behalf of itself and third-party advertising partners.

To use the GroupMe service, a group creator signs up by providing basic information through the GroupMe website or mobile application, creating a “group” of up to twenty-four individuals, and providing the full names and cellular telephone numbers of each proposed group member. Notably, GroupMe does not seek the consent of each proposed group member prior to adding them to a texting group. Rather, GroupMe merely requires that the group creator represent that he or she has the consent of the individuals that are added to the texting group—which, in practice, almost never happens. Outside of this bare representation, group creators are not required to provide any evidence of actual consent from group members. As a result, group members do not consent to receive text messages from GroupMe, and are rarely aware that they have been added to a GroupMe texting group until they receive a text message from GroupMe (which, as explained below, sends several text messages directly to users before any individual group member can send a message to any other group member).

In the Petition, GroupMe spends considerable effort mischaracterizing the nature of its services, the content that it pushes to consumers, and what can and cannot be

accomplished using its application. In particular, GroupMe claims that its service is not intended to be used as a marketing tool, “prohibits commercial use,” and that it “does not send advertising or other marketing messages to GroupMe users.”

In reality, GroupMe sends each user who is added to a new GroupMe group at least two unsolicited text messages, which include generic advertisements of GroupMe’s service and mobile application, and even provide a direct link urging consumers to download GroupMe’s mobile application.² Recipients of these text messages are often confused and upset by the messages received, as the vast majority of users have no idea that they have been added to a GroupMe texting group.³ Indeed, even group creators have no idea that the creation of groups will trigger text messages directly from GroupMe, and certainly do not consent on group members’ behalf to receive such messages.

But these promotional text messages are only the beginning of GroupMe’s plans to flood consumers with unwanted text message advertisements. If GroupMe succeeds in gaining immunity from the TCPA through the Petition, there can be little doubt that GroupMe users—the vast majority of which did not choose to become part of a GroupMe

² The second message, sent immediately after the first, reads in full:

GroupMe is a group texting service.
Standard SMS rates may apply.
Get the app at <http://groupme.com/a> to chat for free.
Reply #exit to quit or # help for more.

³ See e.g. “GROUPME HAS IT BACKWARDS,” <http://tumblr.seoulbrother.com/post/4028903949/groupme-has-it-backwards> (“GroupMe assumes it’s perfectly fine to begin sending SMS messages to your phone if you a) haven’t downloaded their app, or b) haven’t configured push notification instead of texts or worse, c) haven’t agreed to join the newly created group . . . I should not have to sign up in order to pre-emptively opt-out of a service that could cost me. **This makes GroupMe spam at this point.**”)

texting group—would be flooded with advertisements from third-parties who pay GroupMe for access to its users.

Indeed, most telling of GroupMe’s plans—made liability-proof by the requests in the Petition—are statements from GroupMe’s founders themselves. In describing their plan to use GroupMe as a revenue-generating advertising platform that pushes ads to consumers based expressly on the content of their “personal” messages, GroupMe founders Jared Hecht and Steve Martocci noted:

“Right now we are sending more than two millions messages a day,” says Hecht, who says the company plans to add revenue-generating advertising to the app in the next couple of months. “In June, that will be more than 100 millions messages a month.” At the end of this year the company will start testing highly targeted, opt-in advertising. “We will mine keywords,” explains Martocci. “So if your group says ‘sushi’ five times, we can send you an ad for a sushi place.”⁴

Given these ambitious plans, it is of little surprise that GroupMe seeks the ruling that it does. GroupMe isn’t designed solely to facilitate “non-commercial,” “user generated” speech. Rather, GroupMe is in the text message advertising business. If GroupMe succeeds in convincing the Commission that its technology is not an ATDS and that it can rely on unsupported, third party “consent,” GroupMe would have free reign to effectively send text spam advertisements to anyone. And as the Commission is well aware, GroupMe is not alone in this business—countless companies would follow, acquiring the same technology as GroupMe (if they don’t already have it) and unleashing spam text messages to consumers with no recourse or concern of the TCPA.

⁴ Eilene Zimmerman, *Jared Hecht and Steve Martocci, Founders of GroupMe*, <http://www.inc.com/30under30/2011/profile-jared-hecht-steve-martocci-founders-groupme.html>.

B. The Technology Employed by GroupMe and its Partners is Predominately Used to Send Spam Text Messages

GroupMe also describes the “technical details” of its service, arguing that its use of web-based application programming interfaces (“API’s”) and “long-codes” to deliver text messages evidences the non-commercial nature of the communications. In reality, the use of such technology demonstrates the polar opposite.

In recent years, scores of companies have emerged that provide text messaging services to advertisers using SMS technology.⁵ These companies are commonly referred to as Value Added Service Providers (“VASPs”), and they specialize in using automated computer equipment to send and receive text messages using SMS technology to and from individual cellular telephone subscribers.⁶ In particular, VASPs have the ability to send large quantities of text messages *en masse* to wireless subscribers—typically, the same exact text message to multiple users—as well as receive individual text messages from those subscribers.⁷

In the early stages of SMS text message advertising, advertisers often transmitted text messages to consumers via unique 5-6 digit SMS “short codes.” VASPs typically obtained one or more short codes from an independent agency, Neustar, Inc., and subsequently requested that these numbers be provisioned (i.e., programmatically stored)

⁵ The following information was provided in an expert declaration submitted by Randall A. Snyder, an independent telecommunications technology consultant with over 25 years of relevant experience, in connection with plaintiff’s motion for class certification in a TCPA class action styled *Lee v. Stonebridge Life Insurance Co.*, No. 3:11-cv-00043 (N.D. Cal.) (Dkt. 69, Attachment 2) (“Snyder Declaration”).

⁶ Snyder Declaration at ¶ 8.

⁷ *Id.*

by wireless carriers so that promotional messages could be easily sent to cellular subscribers using the short code.⁸ In such cases, wireless network operators—such as AT&T or Verizon—always approve any messaging campaign that intends to use a particular short code before it is provisioned in their networks.⁹ Importantly, this process requires that the VASP draft and submit a detailed description of the actual text content of all messages that are to be sent to and received by cellular subscribers, the precise “opt-in” method to be used, the number of subscribers expected to be involved in the communications, when the campaign will start and end, along with many other details.¹⁰

No doubt frustrated with this oversight of their business practices, over the past few years, many VASPs (or individuals who buy or lease such numbers) have begun to send promotional, commercial, and unsolicited text messages to consumers using “long codes.”¹¹ The long code used appears to a cellular subscriber as a typical ten digit number, making the sender of the message appear to the recipient as just another cellular subscriber.¹² Unfortunately, the reason for the rise in the use of long codes is predictable—the system is easily abused by marketers and other companies wishing to anonymously send large amounts of wireless spam to consumers without detection or oversight.¹³ Through the use of a software-based application programming interface

⁸ *Id.* ¶ 13.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* ¶ 14.

¹² *Id.*

¹³ *Id.* ¶ 15.

(“API”)—precisely the technology that GroupMe uses in connection with its business partner Twilio, Inc.—companies can create their own text messaging campaigns, create the content in the body of each text message, and easily schedule the sending of the messages *en masse* over the Internet.¹⁴ Notably, these types of campaigns require no explicit approval from the wireless carriers before they are invoked and implemented. Furthermore, a software application using an API can be created—and often is created—to send out cellular text messages *en masse* to a list of collected cellular telephone numbers, numbers that are randomly generated, or numbers that are generated in sequence.¹⁵

Accordingly, the system used by GroupMe—which would presumably be taken beyond the reach of the TCPA and FCC if GroupMe’s proposed definitions are adopted—is precisely how modern-day “marketing” companies are sending millions of spam text messages to consumers. GroupMe and other marketing companies use long codes to avoid oversight from wireless carriers and other independent agencies, take advantage of API’s to send large amounts of text messages over the Internet at a low cost, and use devices and equipment that is readily and cheaply available to consumers and businesses alike—including the “modern smartphones” repeatedly discussed in the GroupMe Petition.

¹⁴ *Id.*

¹⁵ *Id.*

C. Relevant Background on the TCPA

Congress enacted the TCPA in 1991 amidst an unprecedented increase in the volume of telemarketing calls to consumers in America.¹⁶ In enacting the statute, Congress sought to prevent “intrusive nuisance calls” to consumers’ telephones that it determined were “invasive of privacy.”¹⁷ As new methods of automated telemarketing practices continued to develop and telemarketing efforts became extended to consumers’ cellular telephones, the Commission recognized in 2003 that “telemarketing calls are even more of an invasion of privacy than they were in 1991,” such that “regulations that address this problem serve a substantial government interest.”¹⁸

To that end, the Commission has enacted regulations and interpreted the TCPA consistent with Congress’s goal of protecting consumer privacy and eradicating unwanted commercial telemarketing—even at the cost of the potential overreaching of the statute. The Commission has extended these protections to modern technology, finding in 2003 that text messages are “calls” under the TCPA.¹⁹ State and federal courts have followed suit, regularly applying the TCPA to cases involving text message spam based on the

¹⁶ H.R. 101-633, dkt. 16-17; *see also Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (“[The] TCPA was enacted in response to an increasing number of consumer complaints arising from the increased number of telemarketing calls” and “consumers complained that such calls are a nuisance and an invasion of privacy”).

¹⁷ *Mims v. Arrow Fin. Servs. LLC*, 132 S. Ct. 740, 744 (2012).

¹⁸ *In the Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14014 (July 3, 2003) (“2003 TCPA Order”).

¹⁹ 2003 TCPA Order ¶ 165.

plain language of the statute and prior guidance from Congress, the FCC and other courts.²⁰

Despite this, the Petition attempts to introduce the appearance of ambiguity where none actually exists. GroupMe asserts that class action litigation has proliferated as a result of “confusion” and ambiguities relating to the definition of ATDS and the requirement of prior express consent. GroupMe is wrong. In reality, Congress, the FCC, and numerous state and federal courts have given ample guidance on the scope of the TCPA, as well as the meaning of the terms ATDS and prior express consent specifically. Companies like GroupMe nevertheless choose to engage in text message advertising and other business ventures that they know may run afoul of the TCPA for a simple reason—it is profitable to do so. In the end, the “proliferation” of class action litigation relating to the TCPA has nothing to do with confusion, and everything to do with the fact that companies like GroupMe choose to knowingly engage in practices that violate the statute.

Contrary to GroupMe’s unsupported statements, the FCC has not been silent on the meaning of “capacity” and the definition of an ATDS generally. In 2002, the Commission issued a Notice of Proposed Rulemaking which 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

²⁰ See e.g. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009).

costs.”²¹ In the Final Rule that followed, the FCC concluded from the statutory definition that “the 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 that the FCC . . . might need to consider changes in technology.”²² The FCC went on to note that “the evolution of the teleservices industry has progressed to the point when using lists of numbers is far more cost effective.”²³

Importantly, the FCC went on to note that the “basic function of such equipment . . . has not changed—the capacity to dial numbers without human intervention.”²⁴

Because of this, the Commission concluded that “[w]e believe 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.”²⁵

Accordingly, in 2003, the FCC specifically interpreted ATDS to apply to equipment to which lists of cellular phone numbers can be uploaded to and then dialed without human intervention—precisely the way that text messages are sent automatically to every GroupMe group member whose numbers have been uploaded in connection with a particular group.

²¹ *Notice of Proposed Rule Making in re Regulations Implementing the TCPA*, 17 FCC Red. 17474, ¶ 24, 2002 WL 31084939 (2002).

²² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Final Rule*, 68 FR 44144-01, ¶ 95 (July 25, 2003).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at ¶ 96.

Based on this guidance and the plain language of the statute, courts throughout the country have confirmed that equipment need only have the “*capacity* ‘to store or produce numbers to be called, using a random or sequential number generator,’” which 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.²⁶ Instead, it need only be *capable* of performing such functions.²⁷ Since *Satterfield*, numerous other courts have followed suit.²⁸

Accordingly, there is little “confusion” as to the proper definition of an ATDS, or whether the TCPA reaches devices that have *any* capacity to function as an ATDS—regardless of how that capacity is unlocked. As discussed below, the only “need” for a revised definition of “capacity” or “ATDS” arises from companies whose technology and practices undoubtedly fall within the statute’s scope.

II. The Commission Should Reject GroupMe’s Proposed ATDS Definition

In the Petition, GroupMe proposes a definition of ATDS that is contrary to the plain language of the TCPA, flouts Congressional intent on this precise issue, contradicts prior FCC guidance, and would lead to an unprecedented increase in unwanted text message spam. For at least these reasons, the proposed definition should be rejected.

²⁶ *Satterfield*, 569 F.3d at 951.

²⁷ *Id.*

²⁸ See *Pimental v. Google*, No. 11-cv-02585, 2012 WL 691784, at *2 (N.D. Cal. Mar. 2, 2012) (“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, 1011 (N.D. Ill. 2010); *In re Jiffy Lube*, 2012 WL 762888, at *5-6.

A. GroupMe’s Proposed Definition Reads Out the Words “Capacity” and “Storage” From the Statutory Definition of an ATDS

GroupMe proposes a definition of “capacity” that defies common sense, and effectively reads the word “capacity” out of the statute entirely. In effect, GroupMe asserts that “capacity” should mean only “current capacity,” or more likely, “use.” Such a reading would improperly read “capacity” out of the statute altogether, and thus, is beyond the FCC’s rulemaking power. Equally problematic, GroupMe’s proposal ignores the “storage” aspect of the ATDS definition that appears within the statute. Such a limitation would mean that telemarketers could load large lists of numbers into a software system that automatically dials such numbers without running afoul of the TCPA—a result that directly conflicts with the 2003 TCPA Order.

Foremost, GroupMe does not actually propose a definition of “capacity” at all; instead, it proposes a rewrite of § 227(b)(1)(A) of the TCPA altogether. Specifically, GroupMe urges the Commission to effectively add language to the statute and find that “capacity” actually means “*current* capacity,” encompassing only devices that had autodialer capabilities “at the time of use” and without being “technologically altered.” But the FCC does not have the authority to add words to the TCPA or otherwise rewrite the statute.²⁹ Only Congress can do that. Yet that’s what GroupMe’s Petition asks the Commission to do. But, Congress did not qualify the term “capacity” in any way, nor do the words “technologically altered” or the term “current” capacity appear anywhere in the statute. Moreover, the new terms introduced by GroupMe are themselves ambiguous, particularly the amorphous “technological alteration” requirement. Would downloading a

²⁹ Rather, the TCPA grants the FCC the authority to “prescribe regulations to implement the requirements of [§ 227(b)].” 47 U.S.C. § 227(b)(2).

third-party application amount to alteration? Applying a necessary software update to the device? Or would GroupMe require the user to “root” or “brick” the device prior to use? GroupMe’s proposed definition introduces far more questions than it answers.

Alternatively, GroupMe’s definition may be interpreted to require actual “use” of ATDS functions in order to violate the TCPA. Requiring “use” of a random or sequential number generator, however, would relegate the statutory phrase “which has the capacity” to mere surplusage. It is little surprise then that efforts to require “use” of ATDS functionality have been repeatedly rejected.³⁰

While GroupMe’s definition improperly adds language to the TCPA, it is equally notable for what it fails to include: any reference to the “storage” aspect of an ATDS. As the Commission previously recognized, “[t]he statutory definition [of an ATDS] contemplates autodialing equipment that *either* stores or produces numbers.”³¹ Indeed, modern day marketers, armed with large lists of consumer cell phone numbers, have “progressed to the point where using lists of numbers is far more cost effective.” These lists are uploaded into devices that have the capacity to store them, and are subsequently able to dial (or send text messages to) the numbers “without human intervention”—precisely the system that GroupMe employs. As much as GroupMe would like to limit an ATDS to a device that is capable of arbitrarily generating numbers, storing lists of numbers is equally indicative of the use of an ATDS. This interpretation (and not GroupMe’s) is consistent with the statutory language, modern technology, and the FCC’s prior interpretations.

³⁰ *Satterfield*, 569 F.3d at 951; *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 1165 (N.D. Ill. 2010).

³¹ 2003 Report and Order, FCC 3-153, ¶ 132 (emphasis added).

In the end, GroupMe ignores the plain text of the TCPA and Congressional intent and effectively proposes a self-serving “update” to the statute. But as the Seventh Circuit recently recognized—in rejecting a defendant’s proposal to reevaluate the TCPA’s use of the term “called party” based on the increased use of wireless phones over landlines—absent Congressional intervention, a statute means the same thing today as it did when it was enacted:

Courts do try to avoid imputing nonsense to Congress. This means, however, modest adjustments to texts that do not parse. It does not mean—at least, should not mean—substantive changes designed to make the law “better.” That would give the judiciary entirely too much law-making power. When a text can be applied as written, a court ought not revise it by declaring the legislative decision “absurd.” [Internal citations omitted.] Nor should a court try to keep a statute up to date. Legislation means today what it meant when enacted.³²

While the FCC (unlike Article III courts) has the power to craft regulations necessary to implement the TCPA, it must do so consistent with the statute’s plain language and Congressional guidance. GroupMe asks the Commission to go too far, advocating a rewrite of the TCPA that serves only its own commercial interests.

B. GroupMe’s Proposed Definition is Contrary to Congressional Intent on the Scope of an ATDS

Not only is GroupMe’s proposed definition inconsistent with the plain language of the TCPA, it is contrary to the express intent of Congress on the precise issue of the intended breadth of the definition of an ATDS.

In enacting the TCPA, Congress held extensive hearings on telemarketing, was presented with “significant evidence” regarding “consumer concerns about telephone solicitation in general and about automated calls in particular,” and made extensive

³² *Soppet v. Enhanced Recovery Co. LLC*, 679 F.3d 637, 642 (7th Cir. 2012).

findings.”³³ “[W]hen Congress makes findings on essentially fact issues . . . those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue.”³⁴ Congress, in enacting the TCPA, found that it had “a substantial interest in protecting the privacy of consumers and in prevent[ing] the [] nuisances” of “rampant telemarketing and the consequent costs of money, time, and the invasion of privacy to consumers.”³⁵ In short, the record makes clear that Congress intended for the TCPA to promote the government’s substantial interest in safeguarding consumer privacy and reducing costs to consumers.

Consistent with these goals, Congress explicitly considered the fact that its expansive definition of an ATDS could sweep in a wide variety of devices, some of which were are not actually used in every instance as an automatic telephone dialing system:

It should be noted that the bill’s definition of an “automatic telephone dialing system” is broad, not including equipment which is designed or intended to be used to deliver automatically-dialed prerecorded messages, but also including equipment which has the “capability” to be used in such manner. The Committee is aware of concerns that this broad definition could cover the mere ownership of office computers which are capable, perhaps when used in conjunction with other equipment, of delivering automated messages.³⁶

³³ *Moser v. F.C.C.*, 46 F.3d 970, 974 (9th Cir. 1995).

³⁴ *Id.* at 974.

³⁵ *Abbas v. Selling Source, LLC*, 09 CV 3413, 2009 WL 4884471, at *7 (N.D. Ill. Dec. 14, 2009) (citing S. Rep. 102-178, at 1 & 4, *reprinted in* 1991 U.S.C.C.A.N. at 1969, 1971-72) (noting, *inter alia*, that “unsolicited calls placed to . . . cellular telephone numbers often impose a cost on the called party [as] cellular users must pay for each incoming call).

³⁶ H.R. Rep. No. 633, 101st Cong., 2nd Sess. 1990, 1990 WL 259268.

Congress considered the competing interests of protecting consumer privacy and potential overreaching of the TCPA, and conclusively stated its intent that the statute be interpreted broadly to fully protect the interests of consumers. Simply put, Congress was well aware that the TCPA’s definition of an ATDS would encompass a wide variety of “innocuous” devices—some of which are not actually used to store, generate, or automatically dial telephone numbers—but found that such concerns were outweighed by the statute’s goal of reducing unwanted telemarketing and wireless spam, not to mention Congress’s goal of making the TCPA applicable to emerging telemarketing technologies.

C. GroupMe’s Proposed Definition Would Open the Floodgates to Huge Amounts of Wireless Text Message Spam

As outlined above, the precise technology that GroupMe employs is used by countless modern-day advertisers to transmit large amounts of wireless spam efficiently, at low cost, and often anonymously. If GroupMe’s proposed ATDS definition carries the day, existing telemarketers who use similar systems would have license to spam consumers with impunity. GroupMe would also provide a roadmap to new advertisers—many of whom have previously hesitated to spam consumers given the threat of TCPA liability—to build purpose-built systems that complies with the newly limited ATDS definition (but still allow companies to send millions of text messages each month).

Indeed, even with the existing threat of the TCPA and supposed rise in class action litigation that GroupMe complains of, text message spam is being delivered at unprecedented levels. A recent study by the Pew Research center, published on August 2, 2012, found that 69% of cell phone owners receive unwanted spam or text messages,

with 25% of such users receiving spam text messages on at least a weekly basis.³⁷

Moreover, the total number of spam text messages sent in the U.S. rose to an astonishing 4.5 billion messages in 2011, an increase of over 45% from 2010.³⁸ Given these figures, if the FCC does anything, it should expand its interpretation of an ATDS in order to curb this rampant text message spam, not limit the TCPA's reach to invite more unwanted advertising.

GroupMe would have the FCC consider its request in a vacuum, arguing that the “user-initiated,” “non-commercial” text messages that it sends cannot reasonably be interpreted as violating the TCPA. Setting aside the fact that GroupMe sends messages promoting its own application (and intends to further monetize its service by sending targeted advertisements to users), the Commission must look beyond GroupMe's business to appreciate the unprecedented increase in text message spam that would result. Even without fully understanding the technology that GroupMe employs, it is not difficult to imagine the adverse consequences that would result if GroupMe's proposed definition were adopted. By its own description, the GroupMe service is capable of storing lists of numbers, receiving a message from one of those numbers, and automatically sending that message to the entire list without human intervention. While GroupMe chooses to limit group sizes to 24 individual numbers, there is no indication that the software could not support much larger groups.

³⁷ Accessible at <http://www.pewinternet.org/Reports/2012/Mobile-phone-problems/Main-findings/Mobile-phone-problems.aspx>.

³⁸ “The number of U.S. spam text messages rose 45 percent last year to 4.5 billion messages.” Olga Kharif, *Mobile Spam Texts Hit 4.5 Billion Raising Customer Ire*, <http://www.bloomberg.com/news/2012-04-30/mobile-spam-texts-hit-4-5-billion-raising-consumer-ire.html> (last visited September 4, 2012).

According to GroupMe, a system of this nature would not fall within its newly proposed definition of an ATDS. Thus, not only would the definition give GroupMe the liability waiver that it desperately seeks, it would open the floodgates to an FCC-approved form of text message spamming. For example, a commercial advertiser could contract with a company using the same technology as GroupMe, and that advertiser could create a “group” consisting of a random list of phone numbers as well as a “long code” phone number owned and operated by the advertiser. The advertiser could then send messages to this “group,” which would be routed *en masse* to every phone number within the group using “FCC-approved” technology, all without running afoul of the TCPA. After all, the technology used (at least according to GroupMe) merely “routed the text messages over the Internet to each group member,” such that “group members receive[d] the message simultaneously.” Surely advertisers intent on sending spam text messages, who are highly incentivized to find ways to deliver text messages *en masse* while avoiding TCPA liability, would find further ways to exploit a weakened ATDS definition.

Even more problematic, a marketer could create two companies that in tandem are designed solely to take advantage of the new FCC-approved method of spamming consumers. The first company could utilize equipment that randomly or sequentially generates millions of phone numbers, and then sell those numbers as a whole or in groups to a second company equipped with a system mirroring GroupMe’s. That second company could then upload and store the phone numbers (as it did not itself “generate” the numbers), contract with any number of advertisers more than willing to provide the content of a text message, and transmit text messages *en masse* to millions of

consumers—all without running afoul of the TCPA because the system is not an ATDS. In GroupMe’s own words, “such results are and should be absurd.”

While the consequences of adopting GroupMe’s proposed definition are predictable—even inevitable—GroupMe’s self-serving and far-fetched hypotheticals concerning modern day smartphones and other consumer devices are simply red herrings. GroupMe suggests a world in which ordinary consumers are being sued for violating the TCPA by simply using their personal smartphones in an ordinary manner. In reality, GroupMe cannot point to a single instance of such a case actually occurring—or even explain why a consumer or attorney would have any incentive to engage in litigation against a single consumer. Setting aside GroupMe’s fabricated concern for individual consumers, the remainder of the petition makes clear what GroupMe and its supporters are truly concerned with—class action litigation that, by its very nature, targets only companies who send large amounts of wireless messages to multiple consumers.

The simple truth is that GroupMe and countless other mobile advertising companies want to send millions of text messages to consumers with impunity, and TCPA class actions present a barrier to this business plan. Advances in smartphone and other “consumer” technology have provided opportunistic businesses with an end around to this problem. Such devices can be, and frequently are, easily used to facilitate massive advertising campaigns that transmit millions of unwanted text messages to other cellular phones. But they are more than a sword enabling text message spam: they can act as a shield, allowing advertisers to argue that it is “absurd” that that same “over the counter” device could constitute an ATDS. The FCC should reject this transparent attempt to use

“innocent” consumers as a device to effectively end consumer class action litigation under the TCPA.

The newly proposed definition would present new practical hurdles to TCPA litigation as well. It is difficult to imagine how prospective plaintiffs could ever allege (beyond unsupported information and belief pleading) that a defendant used an ATDS that was or was not “technologically altered” or had the “actual capacity” to function as an ATDS at a particular time. Moreover, a defendant faced with a TCPA class action could quickly and easily alter its technology to eliminate the “auto dialer” features of the device used to transmit text messages. As GroupMe repeatedly asserts, users can easily unlock “dormant” ATDS qualities in modern smartphones by downloading a single application from the Internet. Presumably, companies could just as easily disable such qualities by simply deleting the application, possibly wiping away their TCPA liability in the process.

In sum, GroupMe proposes that the Commission drastically alter the definition of an ATDS to serve its own commercial interests. While FCC approval of the Petition would undoubtedly be great for GroupMe and other advertising companies, it would severely harm consumers and lead to an unprecedented increase in unwanted text message spam. Such a result is contrary to the very purpose of the TCPA and should be rejected.

III. The Commission Should Not Create a Rule Allowing for Blanket Intermediary Consent

In a final effort to insulate itself from liability, GroupMe asks the Commission to drastically alter the concept of obtaining prior express consent as contemplated by the Commission and drafters of the TCPA, and then to apply this approach in a manner that

is entirely overbroad and ambiguous, making it ripe for abuse by marketers all too eager to bombard cell phone users with spam. Once again, GroupMe’s proposal is inconsistent prior FCC guidance and well-accepted judicial precedent interpreting the TCPA.

A. Commercial Advertisers Must Obtain Express Written Consent From Consumers Prior to Sending Them Commercial Text Messages

In the case of commercial text messages—which GroupMe unequivocally sends—there is little question that advertisers must obtain express written consent prior to transmitting messages to a consumer. In its 2012 Report and Order, the Commission made clear that “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 prerecorded telemarketing calls, and will reduce the chance of consumer confusion in responding orally to a telemarketer’s consent request.”³⁹

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.*”⁴⁰ 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,

³⁹ 2012 Report and Order, p. 10.

⁴⁰ *Id.* at p. 11 (emphasis added).

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.”⁴¹ Moreover, 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.⁴²

The FCC’s rulings are consistent with judicial interpretations throughout the country. In the seminal case on the issue of prior express consent—*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.⁴³ The Ninth Circuit determined that that the sender of the text messages had not obtained express consent. 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.⁴⁴ Numerous other courts have similarly adopted a

⁴¹ *Id.*

⁴² 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 considered to have given an invitation or permission” to receive calls); *In the Matter of 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”).

⁴³ *Satterfield*, 569 F.3d at 949.

⁴⁴ *Id.* at 955 (finding that “[e]xpress consent is consent that is clearly and unmistakably stated”).

“common sense” and plain language interpretation of what constitutes “consent,” and have found that it requires the sort of active and unambiguous consent contemplated by the FCC’s writing requirement.⁴⁵

Accordingly, GroupMe needs no “clarification” of the type of consent required for its services. The consent must be written, and it must come directly from the called party. Consent cannot be given by someone other than the called party, nor can consent to receive a specific text message be “transferred” to GroupMe or another advertiser. The FCC need not provide any further clarification on this issue.

B. Intermediary Consent Is Inappropriate for “Informational Calls” as Well

Recognizing that it cannot rely on third-party consent to transmit commercial text messages, GroupMe purports to limit its request to so-called “informational calls.” Specifically, GroupMe proposes that “for non-telemarketing, *informational calls* or text messages to wireless numbers ... the caller can rely on a representation from an

⁴⁵ 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....”); *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....’”).

intermediary that they have obtained the requisite consent from the called party.”⁴⁶ The problem with this approach to obtaining consent is twofold.

First, the terms “informational calls” and “intermediaries” are inapplicable as conceived by GroupMe, in that they are overbroad and ambiguous, and lack any of the structured thought or consumer safeguards that embody the purpose behind the TCPA. In its Petition, GroupMe does not—and cannot—provide any proposed definition for either term, begging the question of what exactly would separate an “informational call” (one that would be exempt from liability) from an advertiser seeking to “inform” consumers about their products, an “informative” fact-of-the-day daily messaging service, or the creator of a text message group seeking to “inform” group members of a product or service.⁴⁷ The same ambiguity surrounds the idea of intermediaries. The concept, as put forth by GroupMe, provides no insight as to who would be considered an intermediary, or what safeguards would ensure that the intermediary obtained and then utilized a consumer’s “consent” in a proper and lawful fashion.⁴⁸

⁴⁶ GroupMe Petition at 18 (emphasis added).

⁴⁷ GroupMe’s repeated assertion that it operates a “free service” has no bearing on the impact of its, or other marketers’, text message solicitations. Though a “group creator” may give actual consent to the receipt of messages from GroupMe in exchange for the use of its “free” text messaging services, the recipients of these messages who incur the costs associated with each message have not. (GroupMe Petition at 18.) Thus, the service is not truly “free” for those consumers who do not consent to the receipt of texts from the group creator, or GroupMe.

⁴⁸ GroupMe itself has repeatedly argued that their messages fall into a purely informational category, but this claim isn’t true, and is representative of the types of ambiguous texting services that would seek shelter under this umbrella. This would introduce even more ambiguity into the TCPA, something that GroupMe claims to be trying to eliminate.

The real potential for ambiguous and uneven application of these terms naturally leads to the second issue raised by GroupMe’s proposed approach to third-party consent: namely, that any person or business acting as an intermediary could obtain broad “consent” from an individual to receive text messages—either genuinely *or* surreptitiously—and then pass along or sell that “consent” to any entity interested in the business of transmitting text messages. Once again, such an approach not only contradicts the consumer protection policies that Congress was deeply concerned with and which led to the passage of the TCPA, but it will also undoubtedly subject consumers nationwide to a never ending bevy of unsolicited text message spam.

By way of illustration, in the case of GroupMe’s own text messaging service, GroupMe plays the role of the caller, and the “group creator” who establishes the list of text message recipients is the “intermediary” who GroupMe relies on to obtain “consent” before transmitting text messages to the group. Even at this level, the flaws in such an approach stand readily apparent. No safeguards exist to prevent a “group creator” from falsely reporting that they have the consent of all their group members to receive texts from not only themselves, but also the “caller,” GroupMe. In fact, this scenario forms the basis for the allegations in the pending class action against GroupMe.

Extending the scenario to its obvious application in the larger market of text message advertising reveals an even more egregious opportunity for marketers to bombard cell phone users with unwanted text spam: A consumer visits a website that, for example, offers help within finding online education opportunities. However, in order to use the website’s services, a consumer must register a “free” account, providing her name, address, and cellular telephone number. At no time during the registration is a

consumer prompted to agree to any Terms and Conditions; yet, at the very bottom of the website there appears a link to the applicable Terms which state that simply by using the website the consumer agrees fully to the Terms & Conditions (commonly known as a “browse-wrap” agreement).

Unbeknownst to the consumer, the Terms and Conditions contain a clause stating that by agreeing to these Terms, the consumer consents to not only receiving text messages from the business itself, but also agrees to allow the business to act as an intermediary who may then “consent” on her behalf to receive any number of future texts from any number of future marketers. Thereafter, often as soon as that same day, the consumer will begin to receive text message advertisements on topics such as used cars, payday loans, and various other subjects entirely unrelated to the initial online education website.

In such an environment, businesses would race to compile enormous lists of consumers who have broadly “consented” to any receipt of text message advertisements, and then sell these lists to third party marketers. In essence, “consent” would then be bought and sold on the open market, with no guarantee or means to confirm that the original intermediary obtained genuine consent from a consumer in the first place

Such a result is absolutely incongruent with the plain language of the TCPA. Citing to the same language GroupMe proffers as being in need of clarification, the 2012 TCPA Order clearly indicates that the Commission “leaves it to the caller to determine, when making an autodialed prerecorded *non-telemarketing* call to a wireless number, whether to rely on oral or written consent in complying with the statutory consent

requirement.”⁴⁹ If nothing else, the responsibility lies with the caller, the originator of any text message solicitation, to obtain oral or express written consent from the called party.⁵⁰ Placing this role in the hands of an ambiguous and unregulated intermediary allows for the actual caller—in this case GroupMe—to escape any liability for its own text message spam by pointing the finger at the intermediary who has essentially transferred consent, if it was even obtained genuinely in the first place, from one text message solicitor to another.⁵¹

Ironically, the use of intermediaries to gain “consent” actually renders an FCC order on the issue unnecessary. Text message advertisers may certainly choose to rely on third-party representations that a particular user has consented to receive text messages from the advertiser. And if those representations are false, the advertiser would presumably have an indemnity action against the third party. This is certainly the case with GroupMe vis-a-vis group creators: GroupMe requires creators to agree to its terms of service, which require the user to “indemnify and hold [GroupMe] harmless” for any

⁴⁹ 2012 TCPA Order ¶ 29.

⁵⁰ GroupMe insists that the Commission identified areas where it did not want to impede text messages such as “bank account balances, credit fraud alert, package delivery, and school closing information.” (Petition at 17, citing *2012 TCPA Order*, at 21.) The difference between these services and GroupMe’s are that consumers can and do provide express consent to their banking institutions and children’s schools up front, consenting in no uncertain terms to the types and frequency of text messages they wish to receive. These messages are sent by the businesses or institutions themselves, relying on consent *they* obtained directly, rather than through an intermediary, from the called party.

⁵¹ GroupMe proffers a single example of a “package delivery” business (in this case UPS) that might suffer if they are unable to send unsolicited text messages to package recipients letting them know their package has arrived. The inconvenience illustrated by GroupMe neglects, and pales in comparison to, the inconvenience that all cellular phone users would experience if they were bombarded by text messages day in and day out as a result of either knowingly—or more likely unknowingly—consenting to the receipt of text messages from one company.

claims arising out of the use of the software.⁵² It would be little trouble for advertisers to enter into similar contracts with consent-providing intermediaries; in such cases, the advertiser is fully protected and does not need an additional liability waiver from the FCC.

In the end, if the Commission were to provide the “fix” to the fabricated problem of third-party consent that GroupMe raises, the only winners would be GroupMe and those text message marketers who stand to profit from the unsolicited transmission of billions of advertisements. Consumers stand to lose under any scenario that makes the transmission of text message spam easier, and makes enforcement under the TCPA substantially more difficult. This is precisely the result that GroupMe and its supporters seek through the Petition and supporting comments, but it is not the result that the TCPA and Congress dictate.

IV. Conclusion

For the reasons outlined herein, and as further illustrated in the numerous comments opposing the Petition, the FCC should decline to accept GroupMe’s proposed ATDS definition and its interpretation of intermediary consent. There is little “confusion” or “ambiguity” surrounding the current interpretation of an ATDS, nor is it necessary or practical for the Commission to clarify issues relating to intermediary consent. While accepting GroupMe’s proposals would be a huge win for the telemarketing industry, the consequences would be dire for consumers and contrary to the very purpose of the TCPA.

⁵² See <https://groupme.com/terms>.

Dated: September 6, 2012

Respectfully Submitted,

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