

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

In the Matter of)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	
)	
Petition of YouMail, Inc.)	CG Docket No. 02-278
For Expedited Declaratory Ruling That)	
YouMail’s Service Does Not Violate the TCPA)	
)	

GROUPME, INC.’S COMMENTS

GroupMe, Inc. (“GroupMe”), by its undersigned counsel, submits these comments in support of YouMail, Inc.’s (“YouMail”) Petition for Expedited Declaratory Ruling pursuant to the Public Notice released June 25, 2013, by the Federal Communication Commission (“Commission” or “FCC”) in the above-referenced proceeding.¹ YouMail seeks clarification concerning several issues related to the Telephone Consumer Protection Act (“TCPA”). Of particular relevance to GroupMe is YouMail’s request that the Commission clarify what constitutes “prior express consent” under the statute. GroupMe, along with other parties,² seeks clarification regarding “prior express consent” issues as well.³

The GroupMe Petition requests FCC clarification that consent obtained and provided by an intermediary constitutes “prior express consent” in connection with GroupMe’s non-

¹ *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from YouMail, Inc.*, DA 13-1433 (rel. June 25, 2013) (“YouMail Petition”).

² *See, e.g.,* Cargo Airlines Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 1 (filed Aug. 17, 2012) (“CAA Petition”).

³ *See GroupMe, Inc.*, Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Mar. 1, 2012) (“GroupMe Petition”). Note that the GroupMe Petition also seeks clarification with respect to the definition of an automatic telephone dialing system (“ATDS”) under the TCPA but limits its comments in this proceeding to the issue of what constitutes “prior express consent” under the TCPA.

commercial, social media tool. The record developed in response to GroupMe’s Petition demonstrates that many parties support clarifying that consent obtained and provided by an intermediary is appropriate for certain kinds of non-commercial, informational or administrative communications that consenting recipients expect to receive.⁴ The YouMail Petition underscores the continuing confusion caused by the TCPA and the stifling impact it has on innovative service offerings. In evaluating all of the petitions pending before it seeking clarification of the meaning of “prior express consent,” the FCC must consider the totality of the circumstances, users’ expectations, and the underlying purpose of the TCPA.

Understanding the context and nature of the relationship between the sender and recipient of communications is essential in interpreting the TCPA. When considering and enacting the statute, Congress recognized that people are requesting contact when they make their telephone number available to others.⁵ The FCC followed suit concluding that the release of a telephone number is tantamount to inviting communications through the use of that number.⁶

⁴ See CAA Comments, CG Docket No. 02-278, at 1-3 (filed Aug. 30, 2012) (“CAA Comments”); Twilio, Inc. Comments, CG Docket No. 02-278, at 15-16 (filed Aug. 30, 2012) (“Twilio Comments”); U.S. Chamber of Commerce Comments, CG Docket No. 02-278, at 11-13 (filed Aug. 30, 2012) (“U.S. Chamber Comments”); American Bankers Association and Consumer Bankers Association Reply Comments, CG Docket No. 02-278 at 2 (Sept. 10, 2012); Nicor Energy Services Company Reply Comments, CG Docket No. 02-278, at 6-10 (filed Sept. 10, 2012) (“Nicor Replies”). See also GroupMe Comments, CG Docket No. 02-278, at 3-5 (filed Nov. 15, 2012).

⁵ See YouMail Petition, at 13 (*citing* House Report 102-317, 1st Sess., 102nd Cong. (1991) at p.13).

⁶ See *id.* (*citing Rules and Regulations Implementing the [TCPA] of 1991*, Report and Order, 7 FCC Rcd 8752, 8769 (1992) (“1992 TCPA Order”); *Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rcd 559, 564-65 (2008) (“ACA Declaratory Ruling”)).

Courts, too, have employed analyses focused on the totality of the circumstances, users' expectations, and the reasons that led to enacting the TCPA when evaluating liability under the statute. A representative recent case is *Emanuel v. Los Angeles Lakers, Inc.*⁷ where the plaintiff sent a text message to defendant so as to have the message appear on the scoreboard during a Lakers basketball game. Defendant replied with an informational text message informing the plaintiff that not all text messages would be displayed, how to opt-out of receiving future text messages, and how to obtain additional information.⁸ Relying on a "'common sense' [sic] reading of the TCPA[,]"⁹ the court found that defendant's text message was not actionable. Instead, "by sending his original message, Plaintiff expressly consented to receiving a confirmatory text from the Lakers."¹⁰ Note that the confirmatory text sent by the defendant was not an opt-out confirmatory text message but instead an informational message, initiated by the plaintiff's conduct in sending his original text message, educating the recipient about the service and how to use it -- similar to the GroupMe text messages triggered when a group creator establishes a group and sends a message. The court's analysis makes clear that actionable claims under the TCPA require that the communication is the nuisance, intrusive, telemarketing communications "that Congress sought to prohibit in enacting the TCPA."¹¹

⁷ *Emanuel v. Los Angeles Lakers, Inc.*, 2013 WL 1719035 (C.D. Cal. Apr. 18, 2013).

⁸ *See id.* at *1.

⁹ *Id.* at *3.

¹⁰ *Id.* at *3.

¹¹ *Id.* (internal citations removed).

Similarly, in *Pinkard v. Wal-Mart Stores, Inc.*,¹² the plaintiff alleged violation of the TCPA when Wal-Mart sent text messages to her after obtaining her cell phone number in connection with filling a prescription. Plaintiff claimed that she had not provided “prior express consent” to receive such messages. Relying on *1992 TCPA Order*, the court granted defendant’s motion to dismiss finding that the TCPA’s requirement of obtaining “prior express consent” is satisfied as it “encompasses a situation where an individual voluntarily divulges her telephone number.”¹³ The court reasoned that “[t]o hold otherwise would contradict the overwhelming weight of social practice: that is, distributing one’s telephone number is an invitation to be called.”¹⁴

GroupMe’s users, comprised largely of family members, friends, and other groups sharing tight-knit social ties, populate their groups with telephone numbers of those that want and consent to receive and engage in group communications. Consistent with common social practice, GroupMe allows group creators to include phone numbers of those with whom group creators represent and warrant would like to be part of a group conversation¹⁵ but only if the

¹² *Pinkard v. Wal-Mart Stores, Inc.*, 2012 WL 5511039 (N.D. Ala. Nov. 9, 2012).

¹³ *Id.* at *5.

¹⁴ *Id.* at *3. *see also, Gutierrez v. Barclays Group*, 2011 WL 579238, at *2-3 (S.D. Cal. Feb. 9, 2011) (holding that the requirement of “prior express consent” is satisfied when plaintiff provided cell phone numbers in completing an online application form); *Starkey v. Firstsource Advantage, LLC*, 2010 WL 2541756, at *6 (W.D. N.Y. Mar. 11, 2010) (relying on the *ACA Declaratory* as a basis for finding that plaintiff furnished “prior express consent” when plaintiff admitted to providing her cell phone number to a cable television provider even though defendant was not the party to whom the telephone number was supplied).

¹⁵ *See* GroupMe, Inc., Terms of Service, *available at*: <https://groupme.com/terms> (noting that by signing up for the service, the user agrees to receive text messages from GroupMe, and represents and warrants that “each person you add to a group has consented to receive text messages from GroupMe.”).

communications will be non-commercial.¹⁶ By requiring group creators to obtain from and provide such intermediary consent on behalf of group members, GroupMe obtains written representations from the group creators (based on group creators' agreeing to the Terms of Service) that group members have consented to receive text messages from GroupMe.¹⁷ The GroupMe Terms of Service formalize and document the underlying social convention where users expect and desire to receive the communications that the GroupMe service enables. Indeed, the reason for the power and popularity of the tool is that it leverages existing social conventions and norms.

The FCC should clarify the meaning of "prior express consent" as separately requested by the CAA, GroupMe, and YouMail, by engaging in similar fact finding, and employing similar reasoning that many courts have used when interpreting the TCPA. Other examples of judicial analysis that could serve as a model for the agency include decisions where courts were grappling with how to address TCPA liability based on plaintiffs' receipt of a confirmatory opt-out text message before the release of the *SoundBite Order*.¹⁸ Courts looked to the specific facts governing the communications between the parties, users' expectations, and the underlying purpose of the TCPA. For example, in *Ibey v. Taco Bell*,¹⁹ the court found that a single, confirmatory text-message communication "does not appear to demonstrate an invasion of privacy

¹⁶ See *id.* (noting that it is the user's responsibility to "ensure that the content is not spam, is not machine- or randomly-generated, and does not contain commercial content.").

¹⁷ See Ex Parte Letter from Ronald W. Del Sesto, Jr., Counsel for GroupMe, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at Attachment p. 9 (filed June 24, 2013).

¹⁸ See *SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, Declaratory Ruling, CG Docket No. 02-278 (rel. Nov. 29, 2012).

¹⁹ See *Ibey v. Taco Bell Corp.*, 2012 WL 2401982, (S.D. Cal. 2012).

contemplated by Congress in enacting the TCPA.”²⁰ To find otherwise “would contravene public policy and the spirit of the statute– prevention of unsolicited telemarketing in bulk format.”²¹

Likewise, in *Ryabyshchuck v. Citibank*,²² another case predating the *SoundBite Order*, the court found that a single, confirmatory text message did not violate the TCPA. Starting from the premise that “context is indisputably relevant to determining whether a particular call is actionable under the TCPA[,]”²³ the court examined the totality of the circumstances. The court found that the communication was not actionable under the TCPA as such communications “can hardly be termed an invasion of privacy under the TCPA.”²⁴ The court further held that “[a] finding to the contrary would ‘stretch an inflexible interpretation beyond the realm of reason[,]’ would ‘constitute an impermissibly ‘absurd and unforeseen result[,]’”and “when interpreting the scope of a statute, ‘the Court must ... refuse to be compelled into an absurd and unforeseen result.’”²⁵

The reasoning employed by the courts in *Ibey* and *Ryabyshchuck* is equally applicable to the clarifications of “prior express consent” sought by CAA, GroupMe, and YouMail. With respect to the CAA, senders are representing that the recipients want to receive the informational, non-commercial communication. The public interest is served because such communications can prevent theft and allows the recipient to re-route the delivery if needed, promoting efficiency

²⁰ *Id.* at *3.

²¹ *Id.*

²² *See Ryabyshchuck v. Citibank*, 2012 WL 5379143 (S.D. Cal. 2012).

²³ *Id.* at *3 (internal citations removed).

²⁴ *Id.* (internal citations removed).

²⁵ *Id.* at *3-*4(internal citations removed).

in the package delivery process. Clearly, the TCPA was not meant to prohibit such communications.

Similarly, GroupMe offers a service that allows users to manage non-commercial group communications efficiently. Its Terms of Service prohibit use of the offering for commercial purposes. Instead, GroupMe enhances group discourse of a personal nature, the antithesis of the communications prohibited by the TCPA. Like the facts underlying the CAA Petition, these communications run far outside the zone of harms that Congress addressed in passing the TCPA.

Finally, YouMail's service simply enables users to customize their communications in a manner that allows parties calling them to receive information and other details from the called party. It is not one-way, commercial discourse done on a massive scale, but instead targeted communications allowing the user to realize and leverage the power of new technologies. While there are factual differences presented in the petitions of CAA, GroupMe and YouMail, one of the basic premises is the same: the TCPA was not enacted to address certain types of communications.

The FCC should look to the reasoning used by a variety of courts for guidance when considering the multiple requests for clarification and rest assured that it can provide the clarifications of "prior express consent" sought by the CAA, GroupMe and YouMail, respectively. Courts have provided the FCC with a roadmap as to how to clarify the statute. Taken together, these decisions make clear that the context of the communications is critical to understanding the meaning of the statute. Social conventions serve as a foundation for determining users' and consumers' expectations which are also essential to TCPA analysis. Finally, the FCC should adopt a commonsense approach and embrace consideration of the policies informing the TCPA so as to avoid inflexible and absurd results when clarifying the meaning of the statute. The FCC

should seize the opportunity presented by all of these petitions and provide much needed clarification as to the meaning of “prior express consent.”

Respectfully submitted,

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By: /electronically signed/

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