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March 4, 2014

Via Electronic Filing

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: Notice of Ex Parte Communication - GroupMe, Inc.’s Petition for Declaratory Ruling and Clarification in CG Docket No. 02-278

Dear Ms. Dortch:

By this letter, GroupMe, Inc. (“GroupMe”), respectfully requests that **prior to March 27, 2014**, the Commission issue a declaratory ruling consistent with the clarification it seeks concerning intermediary consent in its pending petition.¹ Specifically, GroupMe requests that the Commission limit its clarification to finding that “for non-telemarketing, informational calls or text messages to wireless numbers, which can be permissibly made using an ATDS under the TCPA with the called party’s oral prior express consent, the caller can rely on an intermediary obtaining consent from the called party.”² For the reasons detailed herein, clarifying that intermediaries may obtain and provide valid consent will provide the company and the industry much needed relief.

GroupMe sought clarification on two issues in the *GroupMe Petition*: (1) the meaning of an “automatic telephone dialing system” (“ATDS”) as defined in Section 227(a)(1) of the Telephone Consumer Protection Act (“TCPA”); and (2) that wireless subscribers may consent to receive non-telemarketing, informational calls or text messages through an intermediary.³ Since the filing of the *GroupMe Petition*, numerous other parties have filed petitions seeking similar clarification of the definition of an ATDS under the TCPA.⁴ But, the issue of intermediary consent is unique to the *GroupMe*

¹ See *GroupMe, Inc., Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278 (filed Mar. 1, 2012) (“*GroupMe Petition*”).

² *Id.* at 19.

³ See *id.* at 1.

⁴ See, e.g., *Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (filed Jan. 31, 2014); *Petition of Glide Talk, Ltd. for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Oct. 28, 2013) (“*Glide Talk Petition*”); *Professional Association for*

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*Petition and Glide Talk Petition.*⁵ Given that many parties seek clarification regarding the question of what constitutes an ATDS under the TCPA, coupled with the unique issues that face GroupMe and other providers of social media services, GroupMe requests that the Commission clarify the intermediary consent issue as presented in the *GroupMe Petition*.

GroupMe is a social media tool empowering user-initiated, non-commercial speech.⁶ It is a free service fostering personal communications among a group of individuals and it is not a service derivative to commercial transactions.⁷ The company prohibits commercial use of the service and group creators have a “personal relationship” with members of the group.⁸ As such, the service raises important First Amendment considerations. Without Commission clarification, the TCPA’s ATDS provision is at risk of running afoul of the First Amendment if some courts continue interpreting it in a manner that eliminates the text messaging platform as a channel of communication even when it enables non-telemarketing, informational speech by those with a “personal relationship” with recipients.⁹

By clarifying the intermediary consent issue in the manner proposed by GroupMe, the Commission will provide significant relief to GroupMe and other

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Customer Engagement’s Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking, CG Docket No. 02-278 (filed Oct. 18, 2013); *YouMail, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed April 19, 2013); *Communications Innovators Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed June 7, 2012).

⁵ The Cargo Airlines Association (“CAA”) Petition seeks related relief with respect to the intermediary consent issue. See *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Aug. 17, 2012). But the CAA has since revised its request and instead seeks a service-specific exemption from the TCPA. See Ex Parte Letter from Mark W. Brennan, Counsel to the CAA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed Nov. 18, 2013). The service-specific relief that the CAA now seeks is unrelated to the clarification that GroupMe seeks regarding the intermediary consent issue as detailed in the *GroupMe Petition*. But should the Commission clarify the intermediary consent issue as proposed by GroupMe, the CAA would also benefit.

⁶ See *GroupMe Petition*, at 4-8.

⁷ See *GroupMe, Inc.’s Comments*, CG Docket No. 02-278 (filed Dec. 17, 2013), at 3-5.

⁸ See *id.* at 7-8; *GroupMe Reply Comments*, CG Docket No. 02-278, at 19-20 (filed Sept. 10, 2012).

⁹ See *GroupMe, Inc.’s Comments*, CG Docket No. 02-278 (filed Aug. 30, 2012), at 11-14.

similarly-situated entities facing abusive class action lawsuits. The TCPA provides some class action lawyers with an irresistible incentive due to the availability of large statutory damages.¹⁰ Far too often companies of all sizes fall victim to baseless lawsuits under the TCPA where the ultimate objective is a quick, class-wide settlement benefiting only the attorneys who file such suits,¹¹ and the growth of these lawsuits is accelerating at an alarming pace.¹² Courts have acknowledged increased use of the TCPA “as a device for the solicitation of litigation,” and have observed that plaintiffs’ class action lawyers often stand to benefit substantially, with little benefit to class members.¹³ The Commission has

¹⁰ See 47 U.S.C. § 227(b)(3)(providing for \$500 damages for each violation, and a trebling of such damages if found by a court to have willfully or knowingly violated the TCPA or the regulations prescribed thereunder).

¹¹ See *Newman v. Americredit Financial Services Inc.*, No. 3:11-cv-3041, Order at 6 (S.D. Cal. Feb. 3, 2014) (rejecting a modified class action settlement in TCPA class action case because the motion seeking court approval did not adequately address whether Plaintiff “is typical of the entire class, and whether, in light of the consent issue, the proposed class meets ... commonality and predominance requirements.”); *Marek v. Lane*, 187 L. Ed. 392, 2013 U.S. LEXIS 7772 (Nov. 4, 2013) (denying writ of certiorari concerning a class action settlement because granting review would not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of *cy pres* remedies in such litigation); *Newman v. Americredit Financial Services Inc.*, No. 3:11-cv-3041, Order (S.D. Cal. Apr. 15, 2013) (rejecting TCPA class settlement because it was not fair, reasonable, and adequate, and because the parties did not adequately address the *cy pres* award in the settlement).

¹² See, e.g., Ex Parte Letter of William L. Kovacs, U.S. Chamber of Commerce, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 3 (filed Dec. 19, 2013) (highlighting that there have been 1,332 TCPA lawsuits in the first nine months of 2013 compared to 824 for all of 2011, an increase of 62%); *Comments of the U.S. Chamber of Commerce*, CG Docket No. 02-278, at 5 (filed Nov. 15, 2012) (noting that between 2008 and 2011, federal lawsuits brought under the TCPA increased by more than 500 percent, and the number of federal class-action TCPA lawsuits – which seek millions of dollars in aggregate damages – has increased six-fold since 2008); *Communications Innovators Petition for Declaratory Ruling*, CG Docket No. 02-278, at 15 (filed June 7, 2012) (noting that TCPA litigation involving ATDS has increased 592% over the last few years, while litigation involving predictive dialers has increased 800%).

¹³ See, e.g., *West Concord 5-10-1.00 Store, Inc. v. Interstate Mat Corp.*, No. 2010-00356, 31 Mass. L. Rep. 58 (Mass. Super. Ct. Mar. 5, 2013) (denying class certification and rejecting use of TCPA “as a device for the solicitation of litigation” and “as a device to generate legal fees in cases in which the attorneys have a far greater interest and stake in certification of a class than the putative class members”); *Saunders v. NCO Fin. Sys., Inc.*, 910 F. Supp. 2d 464, 465 (E.D.N.Y. 2012) (granting summary judgment in TCPA

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the opportunity to return the statute to its original purpose of protecting individuals' privacy rights. Of course, individuals or groups of individuals whose privacy rights were actually violated would still have recourse by demonstrating that they did not provide the requisite "prior express consent."

As detailed above, GroupMe is involved in litigation where clarity from the Commission is acutely needed. The court in that case has stayed the litigation, pending clarification from the Commission on the *GroupMe Petition*. The parties' **next status conference in that litigation is scheduled for March 27, 2014**. The court has stated, however, absent clarification on this issue from the FCC, or an indication such clarification is coming soon, the court will lift the stay and the Commission may lose its opportunity to provide guidance to courts on the issue of intermediary consent, and thus cede its position as the primary agency charged with interpretation of the TCPA. Therefore, GroupMe respectfully requests that the Commission limit its clarification to a finding that "for non-telemarketing, informational calls or text messages to wireless numbers, which can be permissibly made using an ATDS under the TCPA with the called party's oral prior express consent, the caller can rely on an intermediary obtaining consent from the called party" **prior to March 27, 2014**.

Respectfully Submitted,

/electronically signed/

Ronald W. Del Sesto, Jr.

cc: John B. Adams
Claude Aiken
Christianna Barnhart
Amy Bender
Nicholas Degani
Lynn Follansbee
Aaron Garza
Diane Griffin Holland
Maria Kirby

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case and ordering plaintiff to show cause why sanctions should not be imposed, noting that "remedial laws can themselves be abused and perverted into money-making vehicles for individuals and lawyers").

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Marcus Maher
Kurt Schroeder
Mark Stone
Suzanne Tetreault
Staci Pies (Skype/GroupMe)