

1 DAVID H. KRAMER, State Bar No. 168452  
2 WILSON SONSINI GOODRICH & ROSATI  
3 Professional Corporation  
4 650 Page Mill Road  
5 Palo Alto, CA 94304-1050  
6 Telephone: (650) 493-9300  
7 Facsimile: (650) 565-5100  
8 Email: dkramer@wsgr.com

9 TONIA OUELLETTE KLAUSNER, *pro hac vice*  
10 BRIAN M. WILLEN, *pro hac vice*  
11 WILSON SONSINI GOODRICH & ROSATI  
12 Professional Corporation  
13 1301 Avenue of the Americas, 40<sup>th</sup> Floor  
14 New York, NY 10019-6022  
15 Telephone: (212) 999-5800  
16 Facsimile: (212) 999-5899  
17 Email: tklausner@wsgr.com  
18 Email: bwillen@wsgr.com

19 *Attorneys for Defendant Twitter, Inc.*

20 UNITED STATES DISTRICT COURT  
21 NORTHERN DISTRICT OF CALIFORNIA  
22 SAN FRANCISCO DIVISION

23 BEVERLY NUNES,  
24 individually and on behalf of a class of similarly  
25 situated individuals,  
26 Plaintiff,  
27 v.  
28 TWITTER, INC.,  
Defendant.

CASE NO.: 3:14-cv-02843-VC  
**DEFENDANT TWITTER, INC.'S  
MOTION FOR CERTIFICATION  
UNDER 28 U.S.C. § 1292(b)**  
Hearing Date: August 18, 2016  
Time: 10 a.m.  
Before: Honorable Vince Chhabria

1 **TABLE OF CONTENTS**

2 **Page**

3 NOTICE OF MOTION & MOTION FOR CERTIFICATION ..... 1

4 STATEMENT OF ISSUE TO BE DECIDED ..... 1

5 MEMORANDUM OF POINTS & AUTHORITIES ..... 1

6 I. INTRODUCTION..... 1

7 II. FACTUAL BACKGROUND ..... 1

8 III. ARGUMENT ..... 4

9 A. Legal Standard..... 4

10 B. The Court’s Ruling Involves a Controlling Question of Law ..... 5

11 C. There Is a Substantial Ground for Difference of Opinion Concerning The  
12 Merits of The Court’s Ruling ..... 6

13 D. An Immediate Appeal of the Court’s Ruling Would Materially Advance  
14 The Ultimate Termination of This Case..... 10

15 E. Interlocutory Review is Especially Appropriate Given The Stay in This  
16 Case and The Pendency of These Issues Before the Ninth Circuit ..... 11

17 IV. CONCLUSION ..... 12

TABLE OF AUTHORITIES

Page(s)

CASES

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

*Ahrenholz v. Bd. of Tr. of the Univ. of Ill.*, 219 F.3d 674 (7th Cir. 2000).....4

*Bassidji v. Goe*, 413 F.3d 928 (9th Cir. 2005) .....6

*Breslow v. Wells Fargo Bank, N.A.*, 755 F.3d 1265 (11th Cir. 2014).....6

*Fortyune v. City of Lomita*, 766 F.3d 1098 (9th Cir. 2014) .....4, 6

*Huricks v. Sophkick, Inc.*, No. C-14-2464 MMC, 2015 U.S. Dist. LEXIS 112596  
(N.D. Cal. Aug. 24, 2015).....3

*IMHOFF Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627 (6th Cir. 2015).....10

*Kauffman v. Callfire, Inc.*, 141 F. Supp. 3d 1044 (S.D. Cal. Oct. 8, 2015) .....3, 6, 9

*Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In  
Amministratore Straordinaria*, 921 F.2d 21 (2d Cir. 1990).....4

*Knipe v. SmithKline Beecham*, 583 F. Supp. 2d 553 (E.D. Pa. 2008).....6

*Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933 (9th Cir. 2006) .....5

*Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110 (11th Cir. 2014) .....5, 10

*McFarlin v. Conseco Servs.*, 381 F.3d 1251 (11th Cir. 2004) .....4

*McKenna v. WhisperText, LLC*, No. 15-16997 (9th Cir.) (appealing No. 5:14-cv-  
00424, 2015 U.S. Dist. LEXIS 120090 (N.D. Cal. Sept. 9, 2015).....3, 6, 11

*Payton v. Kale Realty, LLC*, No. 13 C 8002, 2016 U.S. Dist. LEXIS 21655 (N.D.  
Ill. Feb. 22, 2016) .....3, 6, 8

*Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681 (9th Cir. 2011) .....4, 6

*Sacks v. Office of Foreign Assets Control*, 466 F.3d 764 (9th Cir. 2006).....5

*Selou v. Integrity Sol. Servs. Inc.*, No. 15-10927, 2016 U.S. Dist. LEXIS 18189  
(E.D. Mich. Feb. 16, 2016) .....3

*Somers v. Digital Realty Trust, Inc.*, No. C-14-5180 EMC, 2015 U.S. Dist. LEXIS  
96479 (N.D. Cal. July 22, 2015) .....5, 11

*Steering Comm. v. United States*, 6 F.3d 572 (9th Cir. 1993).....5

*Sterk v. Path, Inc.*, No. 13-CV-2330, 2014 U.S. Dist. LEXIS 183878 (N.D. Ill.  
Aug. 8, 2014).....6

*Thrasher-Lyon v. CCS Commercial LLC*, No. 11 C 04473, 2012 U.S. Dist.  
LEXIS 157230 (N.D. Ill. Nov. 2, 2012).....6

1 *Vereda, LTDA v. United States*, 271 F.3d 1367 (Fed. Cir. 2001) ..... 4

2 *White v. Nix*, 43 F.3d 374 (8th Cir. 1994) ..... 6

3

**STATUTES**

4 28 U.S.C. § 1292(b) ..... *passim*

5 47 U.S.C. § 227(b)(1)(A) ..... 1, 5

6

**RULES**

7 47 C.F.R. § 64.1200(a)(1) ..... 1, 5

8

**MISCELLANEOUS**

9

10 *In the Matter of Rules & Regulations Implementing the TCPA of 1991*, 30 FCC  
Rcd. 796 (July 10 2015) ..... *passim*

11 *In the Matter of Rules & Regulations Implementing the TCPA of 1991*, 64  
Communications Reg (P&F) (Jan. 11, 2016) ..... 8

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **NOTICE OF MOTION & MOTION FOR CERTIFICATION**

2 Please take notice that on August 18, 2016, at 10 a.m., before the Honorable Vince  
3 Chhabria, Defendant Twitter, Inc. (“Twitter”) will and hereby does move the Court to certify its  
4 July 1, 2016 Order (the “July 1 Order”) for interlocutory appeal under 28 U.S.C. § 1292(b).  
5 Twitter’s motion is based on this notice, the accompanying memorandum of points and  
6 authorities, the pleadings on file in these actions, arguments of counsel, and any other matters  
7 that the Court deems appropriate.

8 **STATEMENT OF ISSUE TO BE DECIDED**

9 Should the Court certify its July 1 Order concerning Twitter’s motion for summary  
10 judgment for interlocutory appeal under 28 U.S.C. § 1292(b)?

11 **MEMORANDUM OF POINTS & AUTHORITIES**

12 **I. INTRODUCTION**

13 Twitter respectfully asks the Court to certify its July 1 Order concerning Twitter’s motion  
14 for summary judgment for an immediate appeal under 28 U.S.C. § 1292(b). The Order readily  
15 meets all three conditions required for certification. First, the Court’s ruling on Twitter’s motion  
16 for summary judgment involves a controlling question of law: the proper interpretation of the  
17 FCC’s July 10, 2015 Order and the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A)  
18 (the “TCPA”). Second, the Court’s ruling concerns a matter about which reasonable jurists could  
19 disagree and have disagreed: whether the FCC’s Order shielding intermediary services from  
20 liability under the TCPA adopts a generally applicable test for determining whether modern  
21 calling technologies initiate the text messages they transmit, or whether the question of initiation  
22 for such technologies turns on who receives that message and whether they consented to receive it.  
23 Third, immediate appeal would materially advance the ultimate termination of the presently stayed  
24 case: if the Ninth Circuit agrees with Twitter’s interpretation of the FCC’s Order, Twitter would  
25 be entitled to summary judgment, and this case would be over.

26 **II. FACTUAL BACKGROUND**

27 On June 19, 2014, plaintiff filed a putative class action complaint against Twitter. Docket  
28 No. 1. Plaintiff’s Complaint seeks relief under the TCPA and its implementing regulations, 47

1 C.F.R. § 64.1200(a)(1), alleging that Twitter “made or initiated ... unauthorized text calls to  
2 Plaintiff ... using an automatic telephone dialing system.” Docket No. 1 (Complaint) at 17.  
3 Among the contested issues in Plaintiff’s case are (1) whether Twitter “made or initiated” the  
4 texts at issue; (2) whether the texts were “unauthorized”; and (3) whether the texts were sent  
5 “using an automatic telephone dialing system” (“ATDS”). By Stipulation and Order, the  
6 proceedings related to the latter two issues—consent and ATDS—were stayed pending  
7 proceedings in the Court of Appeals for the District of Columbia Circuit. *See* September 2015  
8 Stipulation and Order Regarding Stay of Proceedings, Docket No. 61 (citing *ACA Int’l v. FCC*,  
9 No. 15-1211 (D.C. Cir.)) (“Stay Stipulation and Order”). The parties agreed to carve out of the  
10 stay (and proceed through discovery and summary judgment briefing on) the question of whether  
11 Twitter “made” or “initiated” the subject text messages, in light of a recent Order from the FCC  
12 on that issue. *See In the Matter of Rules and Regulations Implementing the TCPA of 1991*, 30  
13 FCC Rcd. 796, ¶¶ 25-37 (July 10 2015) (the “FCC Order”).

14 The parties filed a stipulation of undisputed facts (Docket No. 69), and cross-moved for  
15 summary judgment on the issue of whether Twitter initiated the text messages about which  
16 Plaintiff complains in this action. Docket Nos. 73, 85. This Court’s July 1 Order denied Twitter’s  
17 motion and granted plaintiff’s motion. Docket No. 98. The Court rejected Twitter’s argument  
18 that, under the FCC Order, intermediary services do not initiate text messages (and so do not  
19 violate the TCPA) when they respond automatically to directions from their users to transmit text  
20 messages, the content of which the users specify, to phone numbers that the users supply. The  
21 Court instead concluded that the FCC Order does not shield intermediary services where users  
22 direct the transmission of selected messages to numbers they supply, if the users are themselves  
23 the recipients of those messages. July 1 Order at 5-7. Specifically, the Court held that the  
24 recipient of a text message cannot “make” the call (or text) that she herself receives, as such a  
25 construction of the TCPA is “contrary to the ordinary meaning of the word ‘make.’” *Id.* at 5. The  
26 Court next concluded that the factors identified by the FCC as relevant to assessing who initiated  
27 a text message transmitted by an intermediary service—“deciding whether, or when, or to whom  
28 a message is sent, or determining the content of that message”—are not relevant when neither the

1 user who directed the service to send the messages, nor the service itself, supplied the content of  
2 the messages. *Id.* at 6-7. The Court also concluded that adopting Twitter’s interpretation of the  
3 FCC Order on the meaning of the term “initiate” would be inconsistent with a section of that  
4 Order addressing calls made to the holders of reassigned cell phone numbers. *Id.* at 9-10.

5 This case raises important questions about the proper interpretation of the FCC Order  
6 regarding “making” or “initiating” calls or text messages. But it is not the first to do so. Several  
7 courts have already rejected claims against online services similarly situated to Twitter, on the  
8 grounds that a service that transmits user-directed messages does not initiate them within the  
9 meaning of the FCC Order. *See Payton v. Kale Realty, LLC*, No. 13 C 8002, 2016 U.S. Dist.  
10 LEXIS 21655, at \*19-20 (N.D. Ill. Feb. 22, 2016) (web-based text messaging platform did not  
11 initiate text messages where user directed that messages be sent, supplied numbers to which they  
12 were sent, and supplied the content of the messages); *Kauffman v. Callfire, Inc.*, 141 F. Supp. 3d  
13 1044, 1047-48 (S.D. Cal. Oct. 8, 2015) (same); *Huricks v. Sophkick, Inc.*, No. C-14-2464 MMC,  
14 2015 U.S. Dist. LEXIS 112596, at \*9-13 (N.D. Cal. Aug. 24, 2015) (web-based text messaging  
15 platform did not initiate text messages where user directed that messages be sent and supplied  
16 numbers to which they were sent); *Selou v. Integrity Sol. Servs. Inc.*, No. 15-10927, 2016 U.S.  
17 Dist. LEXIS 18189, at \*9-10 (E.D. Mich. Feb. 16, 2016) (calling platform did not initiate calls  
18 made at the direction of debt collection agencies, notwithstanding the fact that platform used an  
19 ATDS). Indeed, the issue is already on appeal to the Ninth Circuit, from one such case in which  
20 the district court dismissed the TCPA claim on the pleadings. *See McKenna v. WhisperText,*  
21 *LLC*, No. 15-16997 (9th Cir.) (appealing No. 5:14-cv-00424, 2015 U.S. Dist. LEXIS 120090, at  
22 \*13-14 (N.D. Cal. Sept. 9, 2015) (Grewal, J.) (dismissing TCPA complaint against online service  
23 for transmitting user-directed text messages; holding FCC Order provides “generally applicable  
24 guidelines” for determining whether an intermediary service is the maker or initiator of text  
25 messages transmitted at users’ direction, and applying factors identified by FCC as relevant to  
26 that inquiry)).

1 **III. ARGUMENT**

2 **A. Legal Standard**

3 Section 1292(b) creates a mechanism for interlocutory appellate review of legal rulings.  
4 As the Ninth Circuit has explained: “A non-final order may be certified for interlocutory appeal  
5 where it ‘involves a controlling question of law as to which there is substantial ground for  
6 difference of opinion’ and where ‘an immediate appeal from the order may materially advance  
7 the ultimate termination of the litigation.’” *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681,  
8 687-88 (9th Cir. 2011) (quoting 28 U.S.C. § 1292(b)). Courts applying this standard consider  
9 each element separately.

10 *First*, a controlling question of law includes “matters the court of appeals ‘can decide  
11 quickly and cleanly without having to study the record.’” *McFarlin v. Conseco Servs.*, 381 F.3d  
12 1251, 1258 (11th Cir. 2004). These include “question[s] of the meaning of a statutory or  
13 constitutional provision, regulation, or common law doctrine rather than ... whether the party  
14 opposing summary judgment had raised a genuine issue of material fact.” *Ahrenholz v. Bd. of Tr.*  
15 *of the Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000). “Although the resolution of an issue need  
16 not necessarily terminate an action in order to be controlling, it is clear that a question of law is  
17 ‘controlling’ if reversal of the district court’s order would terminate the action.” *Klinghoffer v.*  
18 *S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In Amministrazione*  
19 *Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990).

20 *Second*, a “substantial ground for difference of opinion exists where reasonable jurists  
21 might disagree on an issue’s resolution.” *Fortyune v. City of Lomita*, 766 F.3d 1098, 1101 n.2  
22 (9th Cir. 2014). Where two courts have disagreed on the relevant question of law, this criteria is  
23 clearly met, but actual disagreement is not required for certification. “[W]hen novel legal issues  
24 are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue  
25 may be certified for interlocutory appeal without first awaiting development of contradictory  
26 precedent.” *Reese*, 643 F.3d at 688.

27 *Third*, the material advancement requirement is satisfied where an appellate ruling on the  
28 certified question may resolve the case. *See, e.g., Vereda, LTDA v. United States*, 271 F.3d 1367,



1 1374 (Fed. Cir. 2001) (granting 1292(b) petition where “the entire lawsuit [would] be dismissed”  
2 if the Circuit court reversed); *Somers v. Digital Realty Trust, Inc.*, No. C-14-5180 EMC, 2015  
3 U.S. Dist. LEXIS 96479, at \*6 (N.D. Cal. July 22, 2015).

4 Each of these criteria is met in this case.

5 **B. The Court’s Ruling Involves a Controlling Question of Law**

6 The July 1 Order involved “a controlling question of law.” 28 U.S.C. § 1292(b). In  
7 resolving the parties’ cross motions for summary judgment, the Court addressed a significant  
8 legal issue: the proper interpretation of the FCC Order’s ruling on how to determine who  
9 “makes” a call under the TCPA. 47 U.S.C. § 227(b)(1)(A). The FCC’s rule implementing the  
10 TCPA provides that no person or entity may “initiate any telephone call” proscribed by the  
11 statute. 47 C.F.R. § 64.1200(a)(1). And the FCC Order, in turn, explains what is required for a  
12 service to be deemed to have “initiate[d]” a call. FCC Order ¶¶ 25-37. The Court’s ruling on the  
13 meaning and proper interpretation of that Order is a legal determination. *See Steering Comm. v.*  
14 *United States*, 6 F.3d 572, 575 (9th Cir. 1993) (“standard of conduct for pilots under the federal  
15 aviation regulations is a question of law appropriate for interlocutory appeal”); *cf. Sacks v. Office*  
16 *of Foreign Assets Control*, 466 F.3d 764, 770 (9th Cir. 2006) (district court’s interpretation of  
17 federal agency’s enforcement regulation is legal issue reviewed de novo); *Lively v. Wild Oats*  
18 *Mkts., Inc.*, 456 F.3d 933, 938 (9th Cir. 2006) (same as to interpretation of federal statute).

19 In addition to resolving a legal question, the Court’s ruling regarding who “makes” or  
20 “initiates” a text message is unquestionably a *controlling* one in this case. If Twitter’s  
21 interpretation of the FCC Order is correct, it cannot be liable for the messages at issue, and the  
22 case will be over. On the other hand, if the Court’s alternative reading of the FCC Order is correct,  
23 Twitter potentially could be liable and the case will continue. The parties have already agreed this  
24 issue is a controlling one in their Stay Stipulation and Order, which states that “whether Twitter  
25 made the text message calls” is a question that is “potentially dispositive.” Docket No. 61 at 2.  
26 Similar potentially dispositive questions of statutory and regulatory interpretation are routinely  
27 certified for appeal under Section 1292(b). *See, e.g., Mais v. Gulf Coast Collection Bureau, Inc.*,  
28 768 F.3d 1110, 1117 (11th Cir. 2014) (certifying as a controlling question of law the district

1 court’s construction of an FCC Order interpreting the term “prior express consent” under the  
2 TCPA); *Breslow v. Wells Fargo Bank, N.A.*, 755 F.3d 1265, 1267 (11th Cir. 2014) (certifying as a  
3 controlling question of law the district court’s interpretation of “called party” under the TCPA);  
4 *Fortyune*, 766 F.3d at 1100-01 (certifying as a controlling question of law the district court’s  
5 interpretation of the ADA and implementing regulations); *Bassidji v. Goe*, 413 F.3d 928, 935 (9th  
6 Cir. 2005) (certifying as a controlling question of law the district court’s interpretation of an  
7 Executive Order); *Thrasher-Lyon v. CCS Commercial LLC*, No. 11 C 04473, 2012 U.S. Dist.  
8 LEXIS 157230, at \*6-8 (N.D. Ill. Nov. 2, 2012) (certifying as a controlling question of law the  
9 district court’s interpretation of “prior express consent” under the TCPA); *Sterk v. Path, Inc.*, No.  
10 13-CV-2330, 2014 U.S. Dist. LEXIS 183878, at \*3-5 (N.D. Ill. Aug. 8, 2014) (certifying as a  
11 controlling question of law the district court’s interpretation of “automatic telephone dialing  
12 system” under the TCPA).

13 **C. There Is a Substantial Ground for Difference of Opinion Concerning the**  
14 **Merits of The Court’s Ruling**

15 In addressing the second 1292(b) factor, the Ninth Circuit has explained that a  
16 “substantial ground for difference of opinion exists where reasonable jurists might disagree on an  
17 issue’s resolution.” *Fortyune*, 766 F.3d at 1101 n.2. Reasonable disagreement is evident where  
18 two courts have already disagreed on the relevant issue—as is the case here. *See Reese*, 643 F.3d  
19 at 688 (noting that “contradictory precedent” evinces a substantial ground for difference of  
20 opinion); *see also Knipe v. SmithKline Beecham*, 583 F. Supp. 2d 553, 599-600 (E.D. Pa. 2008)  
21 (“Conflicting and contradictory opinions can provide substantial grounds for a difference of  
22 opinion.”) (citing *White v. Nix*, 43 F.3d 374, 378 (8th Cir. 1994)).

23 Before the July 1 Order, other courts interpreting the FCC Order had construed it as  
24 setting forth a general test for determining whether an intermediary service makes or initiates the  
25 text messages it transmits. These courts read the FCC Order as making that determination turn  
26 principally on specific factors identified by the FCC—whether the service or its user determined  
27 whether, when, and to whom the messages would be sent, and who supplied the content. *See*  
28 *Payton*, 2016 U.S. Dist. LEXIS 21655; *Kauffman*, 141 F. Supp. 3d at 1048; *McKenna*, 2015 U.S.

1 Dist. LEXIS 120090, at \*14-15. These courts did not consider the identity of the *recipient* of a  
2 text message relevant to the question of who *initiated* the text message. Nor did these courts  
3 view the FCC Order’s ruling on reassigned numbers as inconsistent with the Commission’s  
4 ruling on “making” or “initiating” calls—even though each of the services at issue undoubtedly  
5 transmits text messages to reassigned numbers. Given these preexisting authorities, Twitter  
6 respectfully submits that fair-minded judges might reach a different conclusion than this Court  
7 did in the July 1 Order.

8 *First*, a reasonable jurist could disagree with this Court’s determination that it “would be  
9 contrary to the plain meaning of the statute” to find that a person can make calls to her own  
10 number. July 1 Order at 5. People call their own cellphone numbers all the time (for various  
11 reasons, such as to leave themselves a reminder message or to find their phone). No one would  
12 doubt that those people are making call to themselves. The FCC Order certainly does not suggest  
13 a contrary result. Indeed, both of the services that the FCC found *not* to be the initiators could  
14 allow users to send messages to themselves. For example, if a TextMe<sup>1</sup> user chooses to send  
15 invitational texts to all of her contacts, and her own phone number was included on her contact  
16 list, TextMe’s system would automatically send that user the requested invitational text. In that  
17 case, under the FCC’s analysis, TextMe would not be deemed the initiator of the text even  
18 though the sender of the message was also the recipient, because TextMe still would not have  
19 controlled whether the message was sent, the number to which the message was sent, or the  
20 timing of the text. FCC Order ¶¶ 36-37.<sup>2</sup> Given these considerations, a reasonable jurist could  
21 conclude that neither the TCPA nor the FCC Order draws any meaningful distinction between  
22 cases where someone directs that a text message be send to his own number rather than someone

---

23  
24 <sup>1</sup> TextMe allows users to send text messages inviting their contacts to join the TextMe  
25 service, which then enables users to send and receive text messages to each other free of charge.  
26 FCC Order ¶ 36.

27 <sup>2</sup> Likewise, if a YouMail user chose to have YouMail transmit auto-reply text messages to all  
28 callers, and the user called his own number from a different cell phone and left himself a  
message, YouMail’s system would automatically send the requested auto-reply text back to the  
user himself. Here too YouMail would not have initiated the text message, regardless of its  
recipient, because YouMail did not direct the message be sent or control the recipient, timing, or  
content of the text. FCC Order ¶ 33.

1 else's. Indeed, a host of web-based platforms allow users to send text messages to themselves.  
2 There is no reason those services should be exposed to TCPA liability simply because they offer  
3 this useful functionality.<sup>3</sup>

4 *Second*, a fair-minded judge could disagree with this Court's conclusion that the factors  
5 the FCC identified as relevant to assessing whether a service or its user initiated text messages  
6 ("deciding whether, or when, or to whom a message is sent, or determining the content of that  
7 message") need not be considered in the context of a service like Twitter's because Twitter's  
8 service differs in certain ways from the TextMe and YouMail services. July 1 Order at 6-7.  
9 Indeed, the FCC has itself confirmed that the standard it adopted in its 2015 Order is the standard  
10 for determining whether a platform provider is the initiator of text messages its users  
11 affirmatively program it to send, even for services that differ in various ways from those  
12 addressed in the 2015 FCC Order. *See In the Matter of Rules & Regulations Implementing the*  
13 *TCPA of 1991*, 64 Communications Reg. (P&F) 19, ¶¶ 7, 8 (Jan. 11, 2016) (explaining that "in  
14 the 2015 TCPA Omnibus Declaratory Ruling and Order, the Commission clarified who is liable  
15 for calls, including text messages, made in violation of the TCPA," and "confirm[ed] that this  
16 Commission precedent is the applicable standard for determining text broadcaster liability for  
17 TCPA violations").

18 Since the FCC Order issued, other courts addressing the question of who initiated text  
19 messages have considered the factors identified by the FCC as relevant, even for services vastly  
20 different from the TextMe and YouMail applications. For example, in *Payton*, 2016 U.S. Dist.  
21 LEXIS 21655, the court interpreted the FCC Order as covering a commercial web-based text  
22 messaging platform. 2016 U.S. Dist. LEXIS 21655, at \*4. Unlike TextMe and YouMail, the  
23 platform did not operate through a smartphone app and it was not used to send invitation text  
24

---

25 <sup>3</sup> For example, parents, teachers, and students can sign up to receive text message  
26 notifications about school closures and similar school-related notifications. *See, e.g.*, South San  
27 Francisco Unified School District, Setup Text Messaging, <http://www.ssfusd.org/tms> (last visited  
28 July 11, 2016); Fremont Union High School District, Naviance, <http://www.fuhisd.org/Naviance>  
(last visited July 11, 2016); Remind, About Us, <https://www.remind.com/about> (last visited July  
11, 2016).

1 messages or auto-reply text messages to individual consumers’ cellphone contacts. Rather, the  
2 platform was entirely web-based, and it was used to send commercial, marketing messages. Yet  
3 *Payton* did not mention these distinctions. Instead, the court interpreted the FCC Order as  
4 requiring consideration of whether the platform, or the platform’s customers, took the affirmative  
5 steps to determine whether, when, and to whom the text messages would be transmitted. *Id.* at  
6 \*17-20; *accord Kauffman*, 141 F. Supp. 3d at 1046-48 (interpreting FCC Order to mean that  
7 when a text messaging service requires its customers to determine the content, timing, and  
8 recipients of the messages it sends, then the service does not initiate the messages; applying  
9 interpretation to purely web-based text messaging platform used by customers to send repeated  
10 marketing messages to lists of uploaded cellphone numbers).

11 Before this Court’s July 1 Order, courts had uniformly read the FCC Order as establishing  
12 a general test for determining whether a service provider “makes” or “initiates” calls or messages  
13 transmitted by its service—asking whether the service provider requires its users/customers to take  
14 affirmative steps to determine whether, when, and to what numbers its system will transmit  
15 messages. *See* FCC Order ¶ 30. Reasonable jurists may thus disagree with this Court’s decision  
16 not to apply those factors in its analysis of who initiates a message.

17 *Third*, a reasonable jurist could disagree with this Court’s conclusion that Twitter’s  
18 interpretation of the FCC Order’s ruling on who “makes” or “initiates” a text message is  
19 inconsistent with the FCC Order’s ruling on reassigned numbers. July 1 Order at 9-10. Another  
20 court could reasonably conclude that whether a message was received by someone holding a  
21 reassigned number has no bearing on the question of who initiated that message. While the FCC  
22 certainly sought to protect holders of reassigned numbers in determining whose *consent* is  
23 required under the TCPA, it never suggested that the question of the recipient’s consent has any  
24 bearing on the inquiry into who initiated the message. To the contrary, the FCC expressly ruled  
25 that the question of initiation and the question of consent were distinct, such that if a service does  
26 not initiate a message, the question of the recipient’s consent never comes into play. FCC Order ¶  
27 50.

1 In Twitter’s view, reading an exception for recycled numbers into the FCC Order regarding  
2 initiation would frustrate the FCC’s objective of shielding intermediary services from TCPA  
3 liability. *See* FCC Order ¶ 29 (explaining that the maker-of-a-call ruling “account[s] for changes in  
4 calling technology that inure to the benefit of consumers”). As Twitter has explained, virtually any  
5 platform that transmits text messages can be used to initiate messages to a number that has been  
6 reassigned. A TextMe user, for example, may choose to initiate invitation messages to all numbers  
7 in her cellphone contacts. *See* FCC Order ¶ 36. If, unbeknownst to the user, one of her friends’  
8 cellphone number had been reassigned, the invitation text meant for the user’s friend would be  
9 sent instead to the new subscriber of the number. The FCC never suggested that TextMe could be  
10 the initiator of that user-directed message. Rather, it found TextMe was not the initiator of any  
11 messages that its users direct the service to send to the users’ contacts.

12 Given these considerations, a reasonable jurist or appellate court could conclude that there  
13 is no tension in interpreting the FCC’s Order regarding who makes or initiates a call or text in a  
14 way that protects intermediaries like Twitter, even in the context of messages sent to reassigned  
15 numbers. *Cf. Mais*, 768 F.3d at 1122-24 (reversing the district court’s interpretation of a 2008  
16 FCC Order as too narrowly limited to the specific contexts discussed in that Order; instead  
17 adopting a broader interpretation of the TCPA term at issue in light of the FCC’s general  
18 explications and interpretative discussion); *IMHOFF Inv., LLC v. Alfocino, Inc.*, 792 F.3d 627,  
19 634-37 (6th Cir. 2015) (reversing the district court’s application of an FCC regulation for failing  
20 to consider the regulation’s distinction between voice calls and fax transmissions).

21 In short, the July 1 Order addresses a significant legal question regarding the FCC Order in  
22 the context of a claim by a reassigned number holder, one on which reasonable jurists could  
23 disagree. As such, it is appropriate for interlocutory certification under Section 1292(b).

24 **D. An Immediate Appeal of the Court’s Ruling Would Materially Advance The**  
25 **Ultimate Termination of This Case.**

26 Finally, immediate appeal of the Court’s Order “may materially advance the ultimate  
27 termination of the litigation.” 28 U.S.C. § 1292(b). If the Ninth Circuit agrees with Twitter’s  
28 interpretation of the FCC Order, that would result in the dismissal of plaintiff’s entire case. That

1 readily satisfies the third prong of the test for interlocutory certification. *See, e.g., Somers*, 2015  
2 U.S. Dist. LEXIS 96479, at \*6 (“If [the district court’s] legal determination ... is reversed on  
3 appeal, [plaintiff’s] ... claim will necessarily be dismissed with prejudice. Thus, both the first and  
4 third 1292(b) factors are satisfied.”).

5 **E. Interlocutory Review is Especially Appropriate Given The Stay in This Case**  
6 **and The Pendency of These Issues Before The Ninth Circuit**

7 Beyond the ordinary considerations counselling in favor of certification, there are two  
8 further considerations that make interlocutory review especially appropriate.

9 *First*, the remaining issues in this case (such as whether the messages at issue were sent  
10 using “an automatic telephone dialing system” and without “prior express consent of the called  
11 party”) are presently stayed pending the appeal of the FCC Order in *ACA Int’l v. FCC*, No. 15-  
12 1211 (D.C. Cir.). That case has yet to be argued, and may not be resolved for some time. Given  
13 the stay, interlocutory review would not disrupt proceedings in the case, or prejudice either side.

14 *Second*, the interpretation of the FCC Order regarding who initiates a text message is  
15 already pending on appeal to the Ninth Circuit in the *WhisperText* case. There, the district court  
16 dismissed the Plaintiff’s claim at the pleading stage, holding that the intermediary service did not  
17 initiate the text messages that its users directed be sent. The developed and undisputed factual  
18 record in this case will help to ensure that the Ninth Circuit considers the meaning of the FCC  
19 Order comprehensively, with a broader appreciation of the scope of the precedent.<sup>4</sup> That is vital  
20 given the ever-growing number of modern communications technologies, and the explosion of  
21 TCPA litigation nationwide.<sup>5</sup> Taking up this case together with *WhisperText* will help increase the  
22 likelihood of clear appellate guidance.

---

23  
24 <sup>4</sup> If the Court grants this Motion, Twitter will seek to consolidate its appeal with the  
*WhisperText* appeal.

25 <sup>5</sup> One FCC Commissioner warned that “the TCPA has become the poster child for lawsuit  
26 abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in  
27 the first nine months of 2014”). FCC Order, Dissenting Statement of Commissioner Ajit Pai; *see*  
28 *also id.* ¶ 6 (noting that TCPA litigation increased by 116 percent between September 2012 and  
September 2013). In the Northern District of California alone, numerous cases have been filed  
against many of the leading intermediary communication services. *See, e.g., Duguid v.*  
*Facebook*, No. 15-cv-00985 (N.D. Cal.); *Pimental v. Google Inc.*, No. C-11-02585 (N.D. Cal.)  
(continued...)

1 **IV. CONCLUSION**

2 For these reasons, Twitter respectfully requests that the Court certify its July 1 Order for  
3 appeal under Section 1292(b).

4 Dated: July 15, 2016

Attorneys for Defendant Twitter, Inc.

5  
6  
7 By: /s/ David H. Kramer  
8 David H. Kramer  
9 Wilson Sonsini Goodrich & Rosati  
10 650 Page Mill Road  
11 Palo Alto, CA 94304-1050  
12 Telephone: (650) 493-9300  
13 Facsimile: (650) 565-5100  
14 Email: dkramer@wsgr.com  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

26 \_\_\_\_\_  
27 (...continued from previous page)  
28 (Gonzalez Rogers, J.); *Reardon v. Uber Techs., Inc.*, No. 14-cv-05678 (N.D. Cal.) (Tigar, J.);  
*Lathrop v. Uber Techs., Inc.*, Case No. 14-cv-05678 (N.D. Cal.) (Tigar, J.); *Derby v. AOL, Inc.*,  
No. 5:15-cv-452 (Whyte, J.).