No. 17-35094

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID MOSHE RAHMANY and YEHUDA RAHMANY,
individually and on behalf of all others similarly situated

Plaintiffs-Appellants,

v.

T-MOBILE USA, INC.

Defendant,

SUBWAY SANDWICH SHOPS, INC.

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 2:16-cv-01416-JCC

APPELLEE SUBWAY SANDWICH SHOPS, INC.'S MOTION TO STAY ISSUANCE OF MANDATE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Subway Sandwich Shops, Inc. states it is owned 50% by the Terminating Trust UA III of the Frederick A. DeLuca Revocable Trust and 50% by Peter Buck. No publicly traded company holds more than 10% of Subway Sandwich Shops, Inc.'s stock.

Dated: April 25, 2018

s/ Kristine McAlister Brown
Kristine McAlister Brown

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On April 5, 2018, this Court entered a Memorandum reversing the District Court's Order compelling arbitration and remanding to the District Court. ECF 31. Pursuant to Federal Rule of Appellate Procedure 41(d)(2), Defendant-Appellee Subway Sandwich Shops, Inc. ("Subway")[1] respectfully moves this Court for an Order staying issuance of the Court's mandate until July 4, 2018 (90 days after the April 5, 2018 entry of this Court's Memorandum) to allow Subway time to prepare and file a petition for a writ of certiorari in the United States Supreme Court.[2]

Subway's Motion for a stay of the mandate pending its filing of a petition for a writ of certiorari is appropriate and justified because Subway's petition will "present a substantial question and . . . there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). Subway's petition for Supreme Court review will not be frivolous and will not be lodged for purposes of delay. *See* Ninth Circuit Rule 41-1. The Ninth Circuit has recognized that its mandate is "often" stayed for a party to petition

[1] Plaintiffs' Complaint improperly names Subway Sandwich Shops, Inc. as the defendant. Subway Franchisee Advertising Trust, Ltd. is the proper party for the claims Plaintiffs attempt to assert in this case.

[2] Rule 41(d)(2)(B) provides that a stay shall not exceed 90 days, unless the party who obtained the stay files the petition for a writ of certiorari and so notifies the circuit clerk in writing within the period of the stay. Consistent with Rule 41(d)(2)(B), Subway will notify the circuit clerk in writing upon filing of the petition. At that time, Subway will seek to extend any stay pending the Supreme Court's final resolution of its petition.

the Supreme Court for certiorari. *United States v. Pete*, 525 F.3d 844, 850 (9th Cir. 2008). For the reasons set forth below, Subway submits that a stay is proper here.

Subway has conferred with Counsel for Plaintiffs-Appellants regarding this Motion. Counsel has stated that Plaintiffs-Appellants will oppose this motion.

ARGUMENT

A. Statement of the Case

Plaintiffs David Moshe Rahmany and Yehuda Rahmany filed this case against Subway and T-Mobile USA, Inc. on September 6, 2016, asserting violations of the Telephone Consumer Protection Act ("TCPA"). Plaintiffs premise their TCPA claims on a single text message that T-Mobile sent to each of them on their T-Mobile cellular telephones. The message offered Plaintiffs a free Subway sandwich as a thank you gift for their T-Mobile service. Two days after filing the Complaint, Plaintiffs dismissed T-Mobile from the case despite Plaintiffs' allegation that T-Mobile, not Subway, sent the text message at issue. Plaintiffs undoubtedly dismissed T-Mobile in an effort to avoid their binding arbitration agreement with T-Mobile.

Subway moved to compel arbitration on October 31, 2016, arguing that Plaintiffs should be equitably estopped from avoiding the arbitration provision in their agreement with T-Mobile. The District Court granted Subway's motion on January 5, 2017. In doing so, the District Court held that Plaintiffs' claims fall within

the scope of Plaintiffs' arbitration agreement and that Subway (a non-signatory) was entitled to enforce the arbitration agreement between Plaintiffs and T-Mobile because Subway satisfied both prongs of California's equitable estoppel doctrine.

Plaintiffs appealed to this Court. Subway filed its Brief of Appellee on August 11, 2017, arguing that the District Court did not abuse its discretion in finding that Subway satisfied the requirements of equitable estoppel under California law. Subway also argued that the federal equitable estoppel doctrine applied and provided an alternate basis for affirmance. On April 5, 2018, the Panel reversed the District Court's decision, holding that Subway had not satisfied the requirements of California's equitable estoppel law. The Panel did not consider Subway's argument that the federal equitable estoppel doctrine provides an alternative basis for compelling arbitration.

B. The Petition for a Writ of Certiorari Will Present A Substantial Question

It is beyond dispute that if the federal equitable estoppel doctrine applies, the District Court's decision compelling arbitration was the correct one. Nevertheless, the Panel limited its analysis to California law without addressing Subway's federal equitable estoppel arguments. Subway's petition for a writ of certiorari will present a question of substantial importance – the continued viability of the equitable estoppel doctrine after *Arthur Andersen v. Carlisle LLP*, 556 U.S. 624 (2009).

As the Supreme Court has recognized, "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements. . . . The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The federal equitable estoppel doctrine is a critical aspect of that body of law, supplanting state equitable estoppel law and providing an alternative grounds for third-party enforcement of arbitration agreements. *See, e.g.*, *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355 (4th Cir. 2012); *Lomax v. Weinstock, Friedman & Friedman, P.A.*, 583 F. App'x 100 (4th Cir. 2014); *Ragone v. Atlantic Video at Manhattan Ctr.*, 595 F.3d 115 (2d Cir. 2010).

In *Arthur Andersen*, the Supreme Court held that there are some circumstances in which the FAA requires a stay of litigation when a non-signatory to an arbitration agreement moves to compel its enforcement. *Arthur Andersen*, 556 U.S. at 630-31. The Supreme Court explained that one of the circumstances in which a non-signatory can compel arbitration is where "traditional principles of state law allow a contract to be enforced by or against nonparties," including "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Id.* at 631 (internal quotation marks omitted). Although this Court has interpreted *Arthur Andersen* as abrogating the

long line of federal equitable estoppel cases by making state law the exclusive basis for allowing non-signatories to enforce arbitration agreements, the Supreme Court in *Arthur Andersen* did not go that far.

In *Arthur Andersen*, the Supreme Court carefully limited the scope of its holding, explaining that the strong federal policy in favor of arbitration "cannot possibly require the disregard of state law *permitting* arbitration by or against nonparties to the written arbitration agreement." *Arthur Andersen*, 556 U.S. at 630 n.5 (emphasis in original). It did not preclude the application of federal law when state law would not permit a non-signatory to compel arbitration. Consistent with that reading, other circuits have correctly continued to apply the federal equitable estoppel doctrine after *Arthur Andersen*. *See, e.g.*, *Lomax*, 583 F. App'x 100; *Aggarao*, 675 F.3d 355; *Ragone*, 595 F.3d 115. Indeed, one circuit, although deciding the case on other grounds, recognized that *Arthur Andersen* "leaves unclear, however, whether the Court intended to disturb the uniform body of precedent in the courts of appeals" permitting non-party enforcement of arbitration agreements. *Grand Wireless, Inc. v. Verizon Wireless, Inc.*, 748 F.3d 1, 12 (1st Cir. 2014). The scope of *Arthur Andersen* – and the fate of the equitable estoppel doctrine – at best, remains uncertain. This uncertainty should be resolved by the Supreme Court itself.

This confusion, coupled with the strong federal policy in favor of arbitration, presents precisely the sort of substantial question contemplated by Rule 41(d). In fact, the Supreme Court regularly grants certiorari to review questions regarding the FAA and arbitration. *See e.g.*, *Kindred Nursing Centers Ltd. v. Clark*, 137 S. Ct. 1421 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013). And this Court routinely grants motions to stay where there is disagreement regarding the interpretation of Supreme Court precedent. *See e.g.*, *United States ex rel. Campie v. Gilead Sci. Inc.*, No. 15-16380, ECF 100 (9th Cir. Oct. 4, 2017); *Dang v. Samsung Elec. Co.*, No. 15-16768, ECF 35 (9th Cir. Mar. 31, 2017); *Van Dusen v. Swift Transp. Co.*, No. 11-17916, ECF 37 (9th Cir. Nov. 21, 2013); *Fiore v. Walden*, No. 08-17558, ECF 47 (9th Cir. Aug. 10, 2012). Accordingly, the Court should stay the mandate in this case to give Subway time to prepare and file its petition for writ of certiorari to review this substantial question.

C. Good Cause Exists to Stay the Mandate

Good cause exists to stay the mandate for several reasons. ***First***, the stay spares Subway the hardship and inequity that would occur if the Supreme Court ultimately concludes that Subway is entitled to compel arbitration of this dispute. This point cannot be overstated. If Subway is required to engage in discovery in this

putative class action – not to mention the expense associated with dispositive motions and class certification briefing – the benefits of arbitration will have been irreparably lost even though the arbitrability of this dispute will remain in doubt pending Subway's petition for writ of certiorari.

Second, a stay will significantly enhance judicial economy. If the Supreme Court grants Subway's petition for certiorari and concludes that Subway has the right to compel arbitration, any steps in the District Court toward litigating this matter will be rendered moot. Forcing the parties and the District Court to proceed through discovery, summary judgment, and class certification before the Supreme Court determines whether to review the Ninth Circuit's decision and potentially concludes that the parties are required to arbitrate will waste scarce judicial resources and the resources of the parties.

A stay of the mandate will avoid these problems and will cause no prejudice to Plaintiffs-Appellants. To the contrary, a stay will conserve both parties' resources and prevent them from litigating in two courts simultaneously.

CONCLUSION

For these reasons, the Court should grant Defendant-Appellee's Motion to Stay Issuance of Mandate pending the filing of Subway's petition for a writ of certiorari in the United States Supreme Court. Consistent with Federal Rule of Appellate Procedure 41(d)(2)(B), Subway will notify the Court upon filing its

petition for a writ of certiorari and move to stay the mandate pending final disposition of the case.

Dated: April 25, 2018

s/ Kristine McAlister Brown

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s/ *Kristine McAlister Brown* _____

Attorney for Subway Sandwich Shops, Inc.

Dated: April 25, 2018

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 25, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 25, 2018

s/ Kristine McAlister Brown
Kristine McAlister Brown