Case No. 14-56834

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JORDAN MARKS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff - Appellant,

v.

CRUNCH SAN DIEGO, LLC,

Defendant - Appellee.

On Appeal from Order of the
United States District Court for the Southern District of California
District Court No. 3:14-cv-00348 BAS BLM

APPELLEE'S UNOPPOSED MOTION TO STAY THE ISSUANCE OF THE MANDATE PENDING FILING OF A PETITION FOR A WRIT OF CERTIORARI

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Pursuant to 28 U.S.C. § 2101(f) and Fed. R. App. P. 41(d)(2), Defendant-Appellee Crunch San Diego, LLC ("Crunch") respectfully moves this Court for an order staying issuance of the mandate in this case for ninety (90) days pending the filing of a petition for a writ of certiorari with the United States Supreme Court. Counsel for Plaintiff-Appellant Jordan Marks ("Marks") does not oppose this motion.

On September 20, 2018, this Court issued its initial opinion reversing the district court's grant of Crunch's motion for summary judgment against Marks and remanding for further proceedings. *See* Docket ("Dkt.") No. 112-1. Crunch filed a timely petition for rehearing *en banc* on October 4, 2018. *See* Dkt. No. 113-1. This Court denied the petition on October 30, 2018. *See* Dkt. No. 119. In accordance with Fed. R. App. P. 41(b), the mandate is currently scheduled to issue on November 6, 2018. Crunch's deadline to file a petition for writ of certiorari with the United States Supreme Court is January 28, 2019. *See* S. Ct. R. 13.1, 13.3.

As set forth below, this Court may grant Crunch's motion for a stay of the mandate because (1) Crunch's certiorari petition will present a substantial question of law regarding the Telephone Consumer Protection Act's ("TCPA") definition of an "automatic telephone dialing system" ("ATDS"), 47 U.S.C. § 227(a)(1), about which there is a circuit split, and the petition would not be frivolous or filed merely for purposes of delay, *see* Ninth Cir. R. 41-1; and (2) good cause exists for Crunch's

requested stay, which will conserve judicial and party resources and preserve the status quo pending the Supreme Court's consideration of Crunch's certiorari petition. *See* Fed. R. App. P. 41(d)(2). As such, Crunch respectfully moves this Court for a stay of the issuance of the mandate in this case pending Crunch's filing of a petition for writ of certiorari.

LEGAL STANDARD

Under Fed. R. App. P. 41(d)(2), the mandate may be stayed "pending the filing of a petition for a writ of certiorari in the Supreme Court" when the certiorari petition "present[s] a substantial question and . . . there is good cause for a stay." Fed. R. App. P. 41(d)(2). Motions to stay the mandate pending a certiorari petition are "often" granted. *U.S. v. Pete*, 525 F.3d 844, 851 (9th Cir. 2008) (stating that it is "often the case" that mandates are stayed while seeking a petition for a writ of certiorari from the Supreme Court). A party need not demonstrate "exceptional circumstances" to justify a stay. *See id.* (citing *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528-29 (9th Cir. 1989) ("[A] party seeking a stay of the mandate following this [C]ourt's judgment need not demonstrate that exceptional circumstances justify a stay.")). Rather, a stay is warranted unless "the petition for certiorari would be frivolous or filed merely for delay." Ninth Cir. Rule 41-1.

ARGUMENT

This Court should grant Crunch's motion for a 90-day stay of the mandate pending the filing of its petition for a writ of certiorari because the petition will present substantial questions pertaining to whether the definition of an ATDS under the TCPA can be broadly construed such that any equipment or device that can store phone numbers and automatically dial them constitutes an ATDS, even if it lacks the capacity to generate random or sequential phone numbers, as provided in the statute. The panel's broad reading of the statutory definition of an ATDS creates a circuit split with recent rulings from the Third and D.C. Circuits, which construe the provision more narrowly, and potentially the Eleventh Circuit, which is considering the definition on appeal. *See Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018) ("*Dominguez II*"); *Dominguez v. Yahoo, Inc.*, 629 F. App'x. 368, 372, 373 n.2 (3d Cir. 2015) ("*Dominguez I*"); *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 697 (D.C. Cir. 2018); *Ramos v. Hopele of Fort Lauderdale, LLC*, Appeal No. 18-14456 (11th Cir. Appeal Docketed Oct. 22, 2018).

Given the widespread disagreement among the circuits over the proper definition of an ATDS, coupled with the large number of new TCPA cases filed each year—4,860 in 2016 and 4,392 in 2017[1]—Crunch submits that the Supreme Court

[1]*See* https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/, and https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/ (last visited

is in the best position to resolve the current circuit split and provide guidance on interpretation of the statute. As such, the certiorari petition will not be frivolous or filed merely for purposes of delay. *See* Ninth Cir. R. 41-1.

Appellant Marks does not oppose Crunch's motion and indeed, all parties and the district court would benefit from a stay pending the petition for writ of certiorari to serve the interests of judicial economy and efficiency. If the district court proceedings were to continue, the parties will incur substantial legal expenses engaging in potentially unnecessary merits- and class-based discovery (including discovery against third parties) and motion practice. Accordingly, there is good cause for staying the issuance of the mandate in this case pending Crunch's filing of a certiorari petition.

I. CRUNCH'S CERTIORARI PETITION WILL PRESENT SUBSTANTIAL QUESTIONS REGARDING THE DEFINITION OF AN ATDS WITHIN THE MEANING OF THE TCPA

A. Crunch's Certiorari Petition Attempts to Resolve A Circuit Split Over How To Construe the Definition of an ATDS

The panel's decision presents a substantial question of federal law that has not been, but should be, decided by the Supreme Court because it adopts an interpretation of the TCPA's definition of an ATDS that directly conflicts with those

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Nov. 5, 2018). Indeed, one report observed a recent spike in TCPA suits filed following the panel decision. *See* https://tcpaland.com/happy-halloween-tcpaland-more-ghoulish-tcpa-statistics-to-freak-you-out/ (last visited Nov. 5, 2018).

of the Third and D.C. Circuits. As such, a certiorari petition seeking clarity on the issue would not be frivolous or filed merely for delay.

The TCPA defines an ATDS as

> equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.

47 U.S.C. § 227(a)(1).

The panel decision holds that the statute is ambiguous and should instead be "read" as

> equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers.

Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1052 (9th Cir. 2018). In interpreting the phrase "using a random or sequential number generator" as applying only to the word "produce" but not "store," so that "a piece of equipment qualifies as an ATDS if it has the capacity to store telephone numbers and then dial them" (*id.* at 1050), the panel decision expands liability under the TCPA to potentially include all owners and customary users of smartphones, since all smartphones have the capacity to dial from a list of stored numbers.[2]

[2] For example, smartphone users can call stored numbers by tapping on a party's name in the contacts list, without having to manually dial or press a 10-digit number, or program phones to send scheduled messages or auto-replies.

By contrast, the Third Circuit ruled in two separate opinions that an ATDS must have the capacity to generate random or sequential telephone numbers. *See Dominguez II*, 894 F.3d at 121 (holding that the "key" question under the TCPA is whether the equipment "had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers"); *Dominguez I*, 629 F. App'x. at 372, 373 n.2 (ruling that "an autodialer must be able to store or produce numbers that *themselves* are randomly or sequentially generated"). Indeed, the *Marks* panel itself acknowledged its disagreement with the Third Circuit's interpretation "that a device must be able to generate random or sequential numbers in order to qualify as an ATDS." *Marks*, 904 F.3d at 1052 n.8; *see also Dominguez I*, 629 F. App'x. at 372-73 (clarifying that "the statutory definition is explicit that the autodialing equipment may have the capacity to store *or* produce the randomly or sequentially generated numbers to be dialed," *id.* at 372 n.1); *Dominguez II*, 894 F.3d at 119 ("interpret[ing] the statutory definition of an autodialer" pursuant to its plain text).

The panel's opinion is also inconsistent with the D.C. Circuit's decision in *ACA Int'l*, which held that the ATDS definition could not be construed in a way that would "render every smartphone an ATDS." 885 F.3d at 697 (vacating the FCC's entire "treatment" of ATDS, including its interpretation that a device that dials stored numbers from a list is an ATDS even if it lacks the capacity to generate random or

sequential phone numbers). By construing the ATDS definition to "include[] a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator" (*Marks*, 904 F.3d at 1043), the panel decision adopts what the D.C. Circuit construed as an "impermissibl[y]" overbroad interpretation of the statute because it would classify virtually all smartphones as having the capacity to automatically dial phone numbers from a stored list. *ACA Int'l*, 885 F.3d at 697-98.

This issue of statutory interpretation is also pending in the Eleventh Circuit in a case where the trial court, on a motion for reconsideration, declined to follow the broad definition adopted by *Marks*. *See Ramos v. Hopele of Fort Lauderdale, LLC*, Appeal No. 18-14456 (11th Cir. Appeal Docketed Oct. 22, 2018).

Given the circuit split on the reading of the ATDS definition among the Third, Ninth and D.C. Circuit Courts of Appeals (which will be potentially widened by the Eleventh Circuit in the *Ramos* case), the definition is "an important question of federal law that has not been, but should be, settled by [the United States Supreme] Court." Sup. Ct. R. 10(c). Accordingly, Crunch's anticipated petition would "present a substantial question" appropriate for review by the Supreme Court, Fed. R. App. P. 41(d)(2)(b), and would not be "frivolous" or "made merely for delay," Ninth Cir. R. 41-1.

II. THERE IS GOOD CAUSE FOR A STAY

Good cause exists to stay the mandate pending Crunch's filing of a petition for a writ of certiorari. Absent a stay, the parties and the district court will expend considerable time, financial expense, and resources to conduct discovery and motion practice under the legal framework provided by the panel's decision, which could be modified or abandoned altogether should the Supreme Court grant Crunch's petition for a writ of certiorari. A stay of the issuance of the mandate will therefore conserve judicial and party resources and preserve the status quo pending the Supreme Court's consideration of this case. As such, Crunch respectfully requests its unopposed motion to stay the mandate be granted in the interests of judicial economy and efficiency.

CONCLUSION

For the foregoing reasons, Crunch respectfully requests this Court grant Crunch's motion to stay issuance of the mandate pending its filing of a petition for a writ of certiorari with the United States Supreme Court.

Dated: November 5, 2018 GREENBERG TRAURIG, LLP

By: */s/ Ian C. Ballon*
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CERTIFICATE OF SERVICE

I, Ian C. Ballon certify that on November 5, 2018, Appellee's Unopposed Motion To Stay The Issuance Of The Mandate Pending Filing Of A Petition For A Writ Of Certiorari was filed through the CM/ECF System; registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF system sends an email notification of the filing to the parties and counsel of record who are registered with the Court's CM/ECF system.

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