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Defendant in Marks v. Crunch San Diego, LLC Abandons Appeal

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As we previously reported here, last fall the court in *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018) purported to expand the definition of an automatic telephone dialing system ("ATDS") by holding that an ATDS is any "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 automatically (even if the system must be turned on or triggered by a person)." (emphasis added).

Given the impact of that interpretation (which appears to sweep smartphones into the definition of an ATDS) we expected the ruling to be appealed. And indeed it was: the defendant sought a rehearing *en banc*, and, when that request was denied, obtained a stay of the Ninth Circuit's mandate pending the filing of a petition of certiorari, which it filed on January 28. In that petition, the defendant argued that review was warranted because (i) the decision in *Marks*conflicted with Third Circuit's decision in *Dominguez v. Yahoo, Inc.* 894 F.3d 116 (3d Cir. 2018) (discussed here) and the D.C. Circuit's decision in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018); (ii) the decision in *Marks* expanded the definition of an ATDS beyond the limitations set forth in the statute itself by ignoring "[b]asic rules of grammar and punctuation"; and (iii) the sweep of the statute, the volume of filings, and the dollars at issue make the issue one worthy of Supreme Court attention.

Two weeks later, plaintiff Marks sought and was granted an extension of time to respond to the defendant's petition. But a week later, counsel for the defendant and counsel for the plaintiff filed with the Supreme Court an Agreement to Dismiss [insert hyperlink over "Agreement to Dismiss"] the petition "in light of a settlement between the parties." Counsel for parties also filed similar stipulations with the Ninth Circuit and with the District Court explaining that case had settled on an individual basis.

The settlement leaves in place the Ninth Circuit's expansive definition of an ATDS: that a device is an ATDS so long as it has the capacity to store numbers to be called. In the Ninth Circuit, at least in the short term, that definition will likely complicate the defense of existing TCPA lawsuits and open the door to significantly more TCPA lawsuits—possibilities that were certainly in the minds of the parties and their counsel when they negotiated their settlement. The long-term impact of *Marks*, however, depends on several other variables: the FCC's anticipated ruling addressing the definition of an ATDS (discussed here); the Supreme Court's ruling in *PDR Network, LLC v. Carlton & Harris*

Chiropractic, Inc. regarding the precedential value of the FCC's interpretation of the TCPA; whether a defendant in another Circuit, faced with a decision following *Marks*, chooses to press the issue on appeal; and whether the Supreme Court eventually resolves the Circuit split created by *Marks*.

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