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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 STEPHANIE CLIFFORD a.k.a.
12 STORMY DANIELS a.k.a. PEGGY
PETERSON, an individual,

13 Plaintiff,

14 vs.

15 DONALD J. TRUMP a.k.a. DAVID
16 DENNISON, and individual,
ESSENTIAL CONSULTANTS, LLC, a
17 Delaware Limited Liability Company,
MICHAEL COHEN and DOES 1
18 through 10, inclusive,

19 Defendants.
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CASE NO.: 2:18-cv-02217-SJO-FFM

**PLAINTIFF STEPHANIE
CLIFFORD'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
RECONSIDERATION IN PART OF
ORDER IMPOSING STAY**

*[filed concurrently with Notice of Motion
and Declaration of Michael J. Avenatti]*

Hearing Date: June __, 2018
(Pursuant to Court's Order Dkt. __)

Hearing Time: 10:00 am

Location: Courtroom 10C

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1 **I. INTRODUCTION**

2 Based on new facts and evidence, Plaintiff Stephanie Clifford (aka Stormy Daniels)
3 (“Plaintiff”) files this motion seeking reconsideration, *in part*, of the Court’s order dated
4 April 27, 2018 imposing a stay of this action for 90 days. Plaintiff *does not* seek
5 reconsideration of the Court’s order staying discovery as to Defendant Michael Cohen.
6 However, the new facts that emerged beginning on May 2nd do justify a modification of
7 the Court’s order staying the remainder of the case. This is true for at least five reasons:

8 1. New facts call into question whether Mr. Cohen’s Fifth Amendment rights
9 relating to the matters at issue in this case are as compelling as previously argued by
10 Defendants. Statements from Defendant Donald J. Trump himself, along with his attorney
11 Rudy Giuliani speaking on behalf of Mr. Trump, suggest that the criminal proceeding in
12 New York pertain solely to Mr. Cohen’s “businesses” and that the \$130,000 payment to
13 Plaintiff did not result in campaign finance violations.

14 2. The new developments in the case make clear that less drastic measures than
15 a complete stay of all proceedings are available. Mr. Cohen will not be deposed while the
16 existing stay is in place. Plaintiff has agreed to only pursue a deposition of Mr. Trump -
17 who is not reportedly under criminal investigation for any of his dealings relating to the
18 facts of this case. Plaintiff is also agreeable to permit Defendants to rely on Mr. Cohen’s
19 April 2 and 9 declarations during the existing stay. All of this evidence, along with
20 testimony of other witnesses previously identified and the documents that will be
21 available in discovery, is more than adequate to enable Defendants to mount a defense to
22 Plaintiff’s first cause of action.

23 3. Mr. Trump and Mr. Giuliani’s new revelations concerning the Settlement
24 Agreement and \$130,000 payment demonstrate that Defendants Trump and EC are fully
25 equipped to defend Plaintiff’s declaratory judgment claim even without Mr. Cohen.
26 Further, because Plaintiff agrees a stay should be maintained as to Mr. Cohen’s deposition
27 for the remaining 90 days covered by the Court’s prior order, Mr. Cohen will not have to
28 assert the Fifth Amendment privilege on specific questions. Therefore, the second

1 Keating factor—namely, the burden on Defendants—weighs decidedly in favor of
2 denying the stay.

3 4. Because Plaintiff will not be seeking a deposition of Mr. Cohen during the
4 remainder of the 90-day stay period, the third Keating factor regarding convenience of the
5 court in the management of its cases and the efficient use of judicial resources weighs in
6 favor of denying a stay. The Court’s previously stated concerns about inefficiencies
7 associated with compelling Mr. Cohen to be deposed when he would merely assert Fifth
8 Amendment objections, and the attendant discovery and other disputes associated with the
9 deposition no longer apply. Further, because Plaintiff will not object to Defendants’ use
10 of Mr. Cohen’s declarations to support their two existing motions, the Court’s interest in
11 clearing its docket is served by hastening the resolution of these motions.

12 5. Finally, Mr. Trump’s renewed public threat to obtain damages from Plaintiff,
13 and his disparagement of Plaintiff and her story as “false and extortionist” underscore
14 Plaintiff’s strong interest in proceeding expeditiously with this litigation and the prejudice
15 to her of a delay. The first Keating factor, therefore, also now weighs in favor of Plaintiff.

16 **II. SUMMARY OF NEW FACTUAL DEVELOPMENTS BEARING ON THE** 17 **STAY ORDER**

18 Plaintiff’s motion for reconsideration is based on the following new factual
19 developments.

20 On April 26 (after Defendants filed their joint application for a stay and the
21 declaration of Mr. Cohen supporting the stay), Mr. Trump gave a phone interview with the
22 television program *Fox & Friends*. [Avenatti Decl., Ex. 1
23 <http://video.foxnews.com/v/5776719790001/?#sp=show-clips.>] In the interview, when
24 asked about the criminal investigation in New York of Mr. Cohen, Mr. Trump responded
25 that: “they’re looking [in]to something having to do with his [i.e., Mr. Cohen’s] business”
26 and not the legal work he did for Mr. Trump in this case; that Mr. Cohen did “absolutely
27 nothing wrong”; that Mr. Cohen is pleading the Fifth because “he’s got other things—he’s
28 got businesses”; and that no campaign funds were used to pay the \$130,000. [See Avenatti

Decl., Ex. 1 at 14:15-16:00.]¹ These statements contradicted the position taken by Mr. Cohen days earlier in his declaration (and by Defendants in their stay application).

On May 2, new factual revelations directly impacting this case also came to light from Mr. Trump's attorney, Rudy Giuliani. That evening, Sean Hannity of *Fox News* interviewed Mr. Giuliani on his television program, in which the following exchange occurred:

GIULIANI: Having something to do with paying some Stormy Daniels woman \$130,000? I mean, which is going to turn out to be perfectly legal. That money was not campaign money. Sorry, I'm giving you a **fact** now that you don't know. It's not campaign money. No campaign finance violation.

HANNITY: So, they funneled it through the law firm?

GIULIANI: **Funneled it through the law firm, and the president repaid it.**

HANNITY: Oh. I didn't know—he did?

GIULIANI: Yeah.

HANNITY: There's no campaign finance law?

GIULIANI: Zero!

[Avenatti Decl., Ex. 2 <http://video.foxnews.com/v/5779751128001/?#sp=show-clips> at 39:50-40:26 (emphasis added).]

Mr. Hannity's interview of Mr. Giuliani continued:

GIULIANI: Everybody was nervous about this from the very beginning. I wasn't. I knew how much money Donald Trump put into

¹ Plaintiff referenced this evidence in a footnote in her supplemental brief in support of her opposition to Defendants' stay application. [See Dkt No. 52 at 3 n.1.] Because, as noted, the evidence could not have been discovered before April 26—well after Defendants filed their application and Plaintiff filed her opposition—the Court may have disregarded this evidence on the basis that it was not properly before the Court because Defendants would not have had an opportunity to respond. Out of caution, therefore, Plaintiff resubmits this evidence.

1 that campaign, and I said, "\$130,000? He could do a couple of checks
2 for \$130,000.

3 When I heard of Cohen's retainer of 35,000 when he was
4 doing no work for the president. **I said, "Well, that's how he's**
5 **repaying it, with a little profit and a little margin for paying taxes**
6 **for Michael."**

7 HANNITY: But do you know the president didn't know about this? I
8 believe that's what Michael said.

9 GIULIANI: Ah, he didn't know about the specifics of it, as far as I
10 know. **But he did know about the general arrangement**, that
11 Michael would take care of things like this. Like, I take care of things
12 like this for my clients. I don't burden them with every single thing
13 that comes along. These are busy people.

14 [Avenatti Decl., Ex. 2 at 40:30-41:17 (emphasis added).]

15 Later in the interview, Mr. Giuliani continued discussing the Settlement Agreement
16 and payment:

17 GIULIANI: Sure, I was talking about the \$130,000 payment.

18 HANNITY: Right.

19 GIULIANI: The settlement payment which is a very regular thing for
20 lawyers to do. The question there was, the only possible violation there
21 would be wasn't a campaign finance violation, which usually results in
22 a fine, by the way, not this big storm troopers coming in and breaking
23 down his apartment and breaking down his office.

24 That was money that was paid by his lawyer, the way I
25 would do out of his law firm funds or whatever funds, It doesn't
26 matter. **The president reimbursed that over the period of several**
27 **months.**

28 HANNITY: But he had said did it, I remem—I distinctly remember,
that he did it on his own --

GIULIANI: He did.

HANNITY: -- without asking.

GIULIANI: Look, I don't know. I haven't investigated that, no

1 reason to dispute that, no reason to dispute his recollection. I like
2 Michael a lot, you like Michael a lot.

3 HANNITY: A long time.

4 GIULIANI: I feel very bad he's been victimized like this. The
5 President feels even worse. The fact is, just trust me, they are going to
6 come up with no violations there.

7 HANNITY: Alright, you mean the payment --

8 GIULIANI: Yes, the payment was perfectly legal.

9 HANNITY: Let me go back to the main crux of it.

10 GIULIANI: All documented.

11 [Avenatti Decl., Ex. 2 at 44:14-45:20 (emphasis added).]

12 Early the next morning on May 3, consistent with the new revelations disseminated
13 by Mr. Giuliani, Mr. Trump issued three separate tweets discussing Mr. Cohen, Plaintiff,
14 the Settlement Agreement, and the \$130,000 payment:

15 Mr. Cohen, an attorney, received a monthly retainer, not from the
16 campaign and having nothing to do with the campaign, from which he
17 entered into, through reimbursement, a private contract between two
18 parties, known as a non-disclosure agreement, or NDA. These
19 agreements are.....

20 <https://twitter.com/realDonaldTrump/status/991992302267785216>

21 ...very common among celebrities and people of wealth. In this case it
22 is in full force and effect and will be used in Arbitration for damages
23 against Ms. Clifford (Daniels). The agreement was used to stop the
24 false and extortionist accusations made by her about an affair,.....

25 <https://twitter.com/realDonaldTrump/status/991994433750142976>

26 ...despite already having signed a detailed letter admitting that there
27 was no affair. Prior to its violation by Ms. Clifford and her attorney,
28 this was a private agreement. Money from the campaign, or campaign
contributions, played no roll [sic] in this transaction.

<https://twitter.com/realDonaldTrump/status/991995845120753664>

[Avenatti Decl., Ex. 3.]

On the same morning of May 3, Mr. Giuliani went on *Fox & Friends* and continued

1 openly discussing the Settlement Agreement and \$130,000 payment:

2 EARHARDT: . . . Something that did stand out to me. I remember
3 when Michael Cohen was interviewed about it and he, uh—it seemed
4 like he was saying that he was never reimbursed that \$130,000, and
now it sounds like the story is changing.

5 GIULIANI: Well he, I mean he’s uh, he was definitely reimbursed.
6 There’s no doubt about it.

7 <https://www.youtube.com/watch?v=MJSZgwdvNvQ> at 6:00-6:16

8 * * * *

9 DOOCY: So let’s go into that. Why was the \$130,000 payment given
10 to Stephanie Clifford?

11 GIULIANI: That’s what they negotiated.

12 DOOCY: But why did he, the campaign, err...why did the attorney
13 pay her the money? What was she alleging?

14 GIULIANI: Well she was alleging, although there’s the contrary letter
15 that she signed that it never happened, that there was some...a one-
16 time affair...uh and I think when Cohen heard \$130,000, he said “My
17 god, this is cheap.” They come cheap. Let me get the thing signed up
and signed off.

18 <https://www.youtube.com/watch?v=MJSZgwdvNvQ> at 7:00-7:31

19 * * * *

20 DOOCY: So you’re saying, you’re saying that Stephanie Clifford, uh,
21 made these allegations, uh, told Donald Trump’s lawyer—

22 GIULIANI: And denied them.

23 DOOCY: —look I’m about to go public—

24 GIULIANI: And denied them. And then said it wasn’t true.
25 **However, imagine if that came out on October 15, 2016 in the**
26 **middle of the, you know, last debate with Hillary Clinton.**

27 DOOCY: So to make it go away, they, they made this—
28

1 GIULIANI: Cohen didn't even ask, Cohen, Cohen made it go
2 away. He did his job.

3 <https://www.youtube.com/watch?v=MJSZgwdvNvQ> at 8:03-8:29

4 [Avenatti Decl., Ex. 4.]

5 On May 16, Mr. Trump made another factual statement concerning his knowledge
6 about the payment to Plaintiff, this time in a signed disclosure made to the United States
7 Office of Government Ethics entitled "Executive Branch Personnel Public Financial
8 Disclosure Report (OGE Form 278e)." [Avenatti Decl., Ex. 5.] In a footnote in Part 8 of
9 the Report in a section for "Liabilities," Mr. Trump disclosed the following:

10 In the interest of transparency, while not required to be
11 disclosed as 'reportable liabilities' on Part 8, in 2016 expenses
12 were incurred by one of Donald J. Trump's attorneys, Michael
13 Cohen. Mr. Cohen sought reimbursement of those expenses and
14 Mr. Trump fully reimbursed Mr. Cohen in 2017. The category
of value would be \$100,001 - \$250,000 and the interest rate
would be zero.

15 [Avenatti Decl., Ex. 5] According to United States Office of Government Ethics in a
16 letter sent to Deputy Attorney General Rod Rosenstein, "the payment made by Mr. Cohen
17 is required to be reported as a liability." [Id., Ex. 6; see also Avenatti Decl., Ex. 5 at 1
18 ("OGE has concluded that the information related to the payment made by Mr. Cohen is
19 required to be reported and that the information provided meets the disclosure
20 requirement for a reportable liability.")]

21 As of the date of this filing, Plaintiff is not aware of any criminal charges being
22 filed against Mr. Cohen or any indictment having been made public. [Avenatti Decl., ¶8.]

23 **III. LEGAL STANDARD ON MOTION FOR RECONSIDERATION**

24 A district court has the "*inherent power* to reconsider and modify its interlocutory
25 orders prior to the entry of judgment . . ." Smith v. Massachusetts, 543 U.S. 462, 475
26 (2005) (emphasis added; internal quotes omitted). A motion for reconsideration will not
27 be granted unless "the district court (1) *is presented with newly discovered evidence*, (2)
28 committed clear error or the initial decision was manifestly unjust, or (3) if there is an

1 intervening change in controlling law.” School Dist. No. 1J, Multnomah County v.
2 ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993) (emphasis added); see also 389 Orange
3 Street Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999).

4 Additionally, Local Rule 7-18 provides:

5 A motion for reconsideration of the decision on any motion may be
6 made only on the grounds of (a) *a material difference in fact* or law
7 from that presented to the Court before such decision that in the
8 exercise of reasonable diligence could not have been known to the
9 party moving for reconsideration at the time of such decision, or (b)
10 *the emergence of new material facts* or a change of law occurring after
the time of such decision, or (c) a manifest showing of a failure to
consider material facts presented to the Court before such decision.

11 L.R. 7-18 (emphasis added).

12 **III. ARGUMENT**

13 **A. Plaintiff Does Not Seek to Modify the Stay on Discovery From Mr.** 14 **Cohen Previously Imposed By the Court.**

15 As a preliminary matter and for clarity, Plaintiff by this motion does not seek to
16 disturb the portion of the Court’s order staying discovery as to Mr. Cohen for 90 days.
17 Therefore, although Plaintiff respectfully disagrees that such a stay is necessary or
18 justified for all the reasons previously articulated, she does not propose that Mr. Cohen be
19 required to sit for deposition or produce his own documents during the 90 day period of
20 the stay.² See Estate of Limon v. City of Oxnard, No. CV 13-01961 SS, 2013 WL
21 12131359, at *2 (C.D. Cal. Dec. 10, 2013) (partially staying case by granting stay of
22 discovery against individual officers named in suit who were present for shooting of
23 victim, but ruling that “Defendants are not entitled to a complete stay that would, in effect,
24 penalize Plaintiffs for diligently pursuing their claims.”)

25
26
27 ² However, by declining to challenge this portion of the Court’s order in this motion,
28 Plaintiff does not waive any rights on appeal or otherwise.

1 **B. The Court Should Reconsider In Part Its Order Based on the New**
2 **Factual Revelations and Changed Circumstances In the Case.**

3 Although Plaintiff does not seek reconsideration of the Court’s order staying
4 discovery as to Mr. Cohen, the new facts that emerged beginning on May 2 do justify a
5 modification of the Court’s order staying the remainder of the case. This is so for the
6 reasons stated below.

7 **1. The New Facts Revealed Directly From Mr. Trump and His**
8 **Lawyer Mr. Giuliani Cast Doubt on the Strength of Mr. Cohen’s**
9 **Fifth Amendment Rights With Regards to this Case.**

10 “While a district court may stay civil proceedings pending the outcome of parallel
11 criminal proceedings, such action is not required by the Constitution.” Fed. Sav. & Loan
12 Ins. Corp. v. Molinaro, 889 F.2d 899, 902 (9th Cir. 1989). In deciding whether to impose
13 a stay, the first step in the analysis requires the Court to assess “the extent to which the
14 defendant’s fifth amendment rights are implicated.” Keating v. Office of Thrift
15 Supervision, 45 F.3d 322, 324 (9th Cir. 1995). Based on arguments advanced by *all* of the
16 Defendants that Mr. Cohen was being investigated criminally for his role in the \$130,000
17 payment made to Plaintiff, this Court found “that there is a large potential factual overlap
18 between the civil and criminal proceedings that would heavily implicate Mr. Cohen’s
19 Fifth Amendment rights.” [Dkt No. 53 at 4.]

20 However, Defendant Trump’s own statements were not before the Court when the
21 Court reached this conclusion. On April 26, in response to questions on *Fox News*, Mr.
22 Trump spoke confidently the criminal investigation in New York ***had nothing to do with***
23 ***the facts of this case***. Asked to react to Mr. Cohen taking the Fifth Amendment, Mr.
24 Trump responded: “But this doesn’t have to do with me. Michael is a business man.
25 He’s got a business. He also practices law. I would say, probably the big thing is his
26 business. **And they’re looking at something having to do with his business. I have**
27 **nothing to do with his business.**” [Avenatti Decl., Ex. 1 at 14:43.] Mr. Trump
28 continued: “He [Mr. Cohen] represents me, like with this crazy Stormy Daniels deal, he
 represented me. **And, you know, from what I see he did absolutely nothing wrong.**

1 **There were no campaign funds going into this that could have been a problem.”**
2 [Avenatti Decl., Ex. 1 at 15:26.] Asked bluntly, “[t]hen why is he pleading the Fifth,” Mr.
3 Trump responded: **“Because he’s got other things. He’s got businesses. And from**
4 **what I understand, they’re looking at his businesses.”** [Avenatti Decl., Ex. 1 at 15:40.]

5 Subsequent revelations confirmed this was not an off-hand remark. On May 2, Mr.
6 Giuliani told Sean Hannity: “Sorry, I’m going to give you a **fact** now that you don’t
7 know. It’s not campaign money. No campaign finance violation.” [Avenatti Decl., Ex. 2
8 at 40:06.] Mr. Giuliani also verified that Mr. Trump reimbursed Mr. Cohen for the
9 \$130,000 payment: **“They funneled it through a law firm, and the President repaid**
10 **it.”** [Id. at 40:16; see also id. at 44:45 (“the President reimbursed that over the period of
11 several months.”).] Mr. Giuliani explained that Mr. Trump repaid the funds through
12 retainer funds for Mr. Cohen “with a little profit and a little margin for paying taxes for
13 Michael.” [Id. at 40:50.] Mr. Giuliani also confirmed that Mr. Trump “did know about
14 the general arrangement, that Michael would take care of things like this.” [Id. at 41:04.]
15 Mr. Giuliani also stated, very confidently, the \$130,000 payment “is going to turn out to
16 be perfectly legal. That money was not campaign money” and “just trust me. They’re
17 gonna come up with no [campaign] violations there.” [Id. at 40:00 and 45:10.]

18 However, Mr. Trump and Mr. Giuliani did not stop there. The next day on May 3,
19 backing up Mr. Giuliani’s statements, Mr. Trump from his official Twitter account
20 confirmed that he reimbursed Mr. Cohen for the funds used to pay Plaintiff, that the
21 money had “nothing to do with the campaign,” and that the agreement at issue here was
22 “between two parties” that are “very common among celebrities and people of wealth” in
23 order to “stop the false and extortionist accusations made by [Plaintiff] about an affair.”
24 [Avenatti Decl., Ex. 3.] Mr. Giuliani picked up the mantle and continued revealing the
25 same new information about this case hours later to Fox News. [Avenatti Decl., Ex. 4.]

26 These new revelations—emanating directly from Defendant Trump—cast doubt on
27 whether Mr. Cohen’s Fifth Amendment rights are truly implicated by continuing with this
28 proceeding. Among other things, Mr. Trump—along with his authorized agent Mr.

1 Giuliani—for the first time have confirmed Mr. Trump’s personal involvement in the facts
2 that gave rise to this lawsuit, including in the payment and the reasons the agreement were
3 entered into. They both assert that no crime was committed. And Mr. Trump states, with
4 great certainty, that Mr. Cohen is being is being investigated “for something having to do
5 with his business,” not with any matters at issue in this lawsuit.

6 The question then is how is the Court to resolve these contradictory facts from
7 Defendant Cohen and Defendant Trump? Mr. Cohen, on the one hand, claims his
8 testimony about the \$130,000 payment and the Settlement Agreement will be self-
9 incriminating. Defendant Trump on the other hand, asserts based on his own knowledge
10 of the transaction and the investigation, that Mr. Cohen did “absolutely nothing wrong”
11 and that he is being investigated for unrelated matters concerning his “businesses.” See
12 AIG Prop. Cas. Co. v. Cosby, No. CV 15-04842-BRO (RAOx), 2016 WL 6662733, at *8
13 (C.D. Cal. July 15, 2016) (“[C]ontinuing with this declaratory relief action while
14 Defendant faces criminal charges involving a completely different set of facts will likely
15 not implicate Defendant’s Fifth Amendment right against self-crimination.”). It is
16 for precisely this reason—namely that civil defendants may wish to invoke the First
17 Amendment for opportunistic reasons to avoid having to defend a case—that courts
18 conclude that in the absence of an actual indictment to clear up any speculation and self-
19 serving uses of the Fifth Amendment, the case for staying civil proceedings is “**far**
20 **weaker.**” Molinaro, 889 F.2d at 903 (emphasis added); ESG Capital Partners LP v.
21 Stratos, 22 F. Supp. 3d 1042, 1046 (C.D. Cal. 2014) (a defendant “can’t have it both ways,
22 using the Fifth Amendment only when it is convenient for him and his interests.”); cf.
23 Zicarelli v. New Jersey State Comm’n of Investigation, 406 U.S. 472, 478 (1972) (it “is
24 well established that the privilege protects against real dangers, not remote and speculative
25 possibilities.”) (emphasis added).

26 Accordingly, the Court should reconsider its stay order by issuing a new order
27 imposing a partial stay. Specifically, the Court should preserve the stay of discovery on
28 Mr. Cohen for the remaining 90 days of the Court’s prior stay order, but permit all other

1 proceedings to continue. This way, Mr. Cohen’s claimed Fifth Amendment rights remain
2 unencumbered. The genuine doubts placed on the legitimacy of these rights, however,
3 justify the Court lifting the stay in all other respects.

4 **2. The New Developments Demonstrate that Less Drastic Measures**
5 **Are Available in Lieu of a Blanket Stay.**

6 “A stay of an action is not necessary where a defendant’s fifth amendment rights
7 can be protected through less drastic means, such as asserting the privilege on a question-
8 by-question basis and implementing protective orders.” Doe v. City of San Diego, No.
9 12-CV-689-MMA-DHB, 2012 WL 6115663, at *2 (S.D. Cal. Dec. 10, 2012) (citing O.
10 Thronas, Inc. v. Blake, No. CIV.09-00353DAE-LEK, 2010 WL 931924, at *3 (D. Haw.
11 Mar. 10, 2010)). In its stay order, the Court “carefully considered Plaintiff’s request” to
12 impose less drastic measures than a blanket, but ultimately denied Plaintiff’s arguments.
13 It did so because of concerns about protecting Mr. Cohen from a deposition and the
14 futility of proceeding with a deposition in which Mr. Cohen would be asserting his Fifth
15 Amendment privilege in response to nearly every question.

16 Here, no such concerns are implicated under a partial stay as proposed by Plaintiff.
17 In the interim 90 day period, Mr. Cohen would not be required to sit for a deposition,
18 answer any questions, or individually produce any documents that would be incriminating
19 to him. Therefore, Plaintiff’s motion should be granted.

20 The Court also found that Mr. Cohen was “the alleged mastermind behind the
21 Agreement with the most direct knowledge of the facts and circumstances surrounding its
22 formation[.]” [Dkt No. 53 at 7.] However, we now know that Mr. Trump is also capable
23 of testifying authoritatively and with personal knowledge about the Settlement Agreement
24 and payment. [Avenatti Decl., Exs. 1, 3 and 5.] This is also true of Mr. Giuliani. [Id.,
25 Exs. 2 and 4 (cite Hannity and Fox & Friends).] In addition, according to Mr. Giuliani, all
26 of the information concerning the payments is “documented” and presumably in the
27 possession of him and Mr. Trump. [Avenatti Decl., Ex. 2 at 44:14-45:20.]

28 Further, Plaintiff is agreeable to permit Defendants to rely on Mr. Cohen’s April 2

1 and 9 declarations during the existing stay. Indeed, with regards to compelling arbitration
2 and Mr. Cohen’s motion to strike—the only two motions pending before the Court—these
3 two declarations are the only testimony Defendants intended to rely upon in order to
4 support these motions. For this reason, the Court may simply allow the parties to move
5 forward with the existing motions, which were close to being completely briefed at the
6 time Defendants moved for the stay. The issue of whether a complete stay must be
7 reinstated later in the case based on alleged prejudice suffered by not being able to present
8 live testimony of Mr. Cohen at the jury trial Plaintiff has requested pursuant to section 4
9 of the Federal Arbitration Act may be revisited if and when Plaintiff’s request is granted.
10 At this juncture, however, this hypothetical concern need not be resolved.

11 Defendants may utilize all of this evidence—Mr. Cohen’s declarations, Mr.
12 Trump’s testimony, Mr. Giuliani’s testimony, the documents in Mr. Trump’s possession
13 and available in discovery from sources other than Mr. Cohen directly, along with the
14 testimony of all of the other witnesses previously identified (e.g., Keith Davidson, First
15 Republic Bank, Mr. Cohen’s wife and personal assistant, persons identified in the
16 Settlement Agreement, etc.)—to mount a defense to this case.

17 In sum, a partial stay as proposed by Plaintiff is a “less drastic measure” than a
18 blanket stay. Plaintiff’s motion should be granted.

19 **3. The New Developments Demonstrate That Lifting the Blanket**
20 **Stay Would Not Substantially Prejudice Defendants.**

21 Under the second Keating factor, the Court analyzes “the burden which any
22 particular aspect of the proceedings may impose on defendants.” Keating, 45 F.3d at 325.
23 In its stay order, the Court agreed with Defendants that this factor “weighs in favor of a
24 stay.” [Dkt No. 53 at 8.]

25 The concerns articulated by the Court weighing in favor of Defendants, however,
26 no longer apply. The Court found that “compelling Mr. Cohen to sit for a deposition that
27 bears heavily” on his Fifth Amendment rights “would cause undue prejudice.” [Dkt No.
28 53 at 7-8.] The Court also explained that “Mr. Cohen would have to choose between his

1 Fifth Amendment privilege and his ability to defend himself on almost **every major**
2 **aspect** of the requested discovery.” [Dkt No. 53 at 8.] Here, in contrast, Plaintiff does not
3 seek to lift the stay on discovery from Mr. Cohen during the interim 90 day period. This
4 alone establishes that the burden on Mr. Cohen is minimal, or non-existent.

5 Moreover, as shown above, Defendant Trump’s hands would not be tied in
6 defending this action without Mr. Cohen’s testimony. Mr. Trump’s newfound voice on
7 facts concerning this lawsuit demonstrates he will be able to testify in his defense. He will
8 also have Mr. Giuliani available to testify for him in this case. Further, Mr. Trump may
9 also make use of Mr. Cohen’s declarations. And as noted above, if there is a compelling
10 need for Defendants to introduce live testimony from Mr. Cohen at the FAA jury trial—a
11 trial that would not have likely been scheduled within the interim 90 day period in any
12 event—that issue may simply be revisited when and if the jury trial is scheduled by the
13 Court.

14 Therefore, the second Keating factor—namely, the burden on Defendants—weighs
15 decidedly in favor of denying the stay and replacing it with a partial stay as requested by
16 Plaintiff.

17 **4. Reconsideration in Part Would Promote the Efficient Use of** 18 **Judicial Resources.**

19 The third Keating factor permits the court to determine whether a stay will impact
20 “the convenience of the court in the management of its cases, and the efficient use of
21 judicial resources.” Keating, 45 F.3d at 325. The Court found that this factor weighed in
22 favor of Defendants based, in substantial part, on the following reasoning:

23 [I]t is unlikely that compelling testimony from Mr. Cohen on the
24 issues cited by Plaintiff would lead to an efficient outcome. The
25 majority of questions brought forth under Plaintiff’s first cause
26 of action relate to topics on which Mr. Cohen has indicated he is
27 entitled to invoke his Fifth Amendment privilege, and are likely
to cause a number of disputes related to discovery, procedure,
and timing.

28 [Dkt No. 53 at 8.]

1 This rationale no longer applies due to the changed circumstances described in this
2 Motion. Plaintiff will not be seeking a deposition of Mr. Cohen during the remainder of
3 the 90-day period. Therefore, there is no risk of any disputes relating to discovery,
4 procedure, and timing arising out of Mr. Cohen's assertion of the Fifth Amendment
5 privilege. Moreover, Plaintiff's decision to permit Mr. Cohen and the other defendants to
6 utilize the declarations he has already filed in the case from April 2 and 9 to support
7 Defendants' motion to compel arbitration and Mr. Cohen's motion to strike (the only
8 supporting declarations Defendants planned to submit in any event) also promotes
9 efficient use of judicial resources and the court's interest in "clearing its docket" by
10 pushing the case forward toward resolution. Molinaro, 889 F.2d at 903. Therefore, this
11 third Keating factor now weighs in favor of reconsideration.

12 **5. Mr. Trump's Incendiary Tweet Inciting His Followers and**
13 **Renewed Threat to Seek Damages From Plaintiff Causes**
14 **Continued Prejudice to Plaintiff From Maintaining the Stay.**

15 The first Keating factor requires the Court to consider "the interest of the plaintiffs
16 in proceeding expeditiously with this litigation or any particular aspect of it, and the
17 potential prejudice to plaintiffs of a delay." Keating, 45 F.3d at 325. The Court found "it
18 is undeniable that Plaintiff has a valid interest in the prompt resolution of her claims," but
19 decided that Plaintiff's interests did not outweigh the necessity of a stay. [Dkt No. 53 at
20 7.] The Court's conclusion was largely premised on its belief that "Mr. Cohen's Fifth
21 Amendment rights are heavily implicated and the potential impact on the criminal
22 investigation [are] substantial," and on its view that Plaintiff "has not established that she
23 has actually been deterred from speaking, or that a delay would cause undue prejudice."
24 [Dkt No. 53 at 7.]

25 Here, the new developments outlined above further demonstrate the prejudice to
26 Plaintiff of a continued delay in resolving this litigation. First, as shown above, there are
27 valid reasons to question whether Mr. Cohen's Fifth Amendment rights are truly
28 implicated in this case in light of the new revelations from Mr. Trump and Mr. Giuliani.

1 Second, in addition to Defendants’ threat to sue Plaintiff for \$20 million for
2 speaking [Dkt No. 1 at 5:12-16] and Mr. Cohen’s threat to use the money to “take an
3 extended vacation on her dime” [Dkt No. 39-1 at 14], on May 3, Mr. Trump escalated his
4 aggressive and threatening attack on Plaintiff and attempts to intimidate her by writing on
5 Twitter to his **51 million** followers that he will use the Settlement Agreement “**in**
6 **Arbitration for damages against Ms. Clifford (Daniels).**” [Avenatti Decl., Ex. 3
7 (emphasis added).] He also disparaged Plaintiff personally by writing “[t]he agreement
8 was used to stop the **false and extortionist** accusations made by her about an affair.” [*Id.*
9 (emphasis added).] The only way to fully escape the cloud of millions of dollars of
10 alleged damages and liability, would be to allow the lawsuit to proceed and to have the
11 Settlement Agreement declared null and void.

12 These new factual developments reinforce Plaintiff’s strong interest in proceeding
13 expeditiously with this litigation and the prejudice to her from a delay. The first Keating
14 factor, therefore, weighs in favor of Plaintiff.

15 **C. Stays Are Extraordinary Remedies and Extremely Rare.**

16 As noted above, a stay based on the existence of a criminal action is an
17 “extraordinary” remedy. See, e.g., Microfinancial, 385 F.3d at 79; EMA, 767 F.3d at 627;
18 Louis Vuitton, 676 F.3d at 98; ESG Capital Partners, 22 F. Supp. 3d at 1045 (a “stay is an
19 extraordinary remedy that should be granted only when justice so requires.”) (citation and
20 quotation omitted).

21 In fact, it is so rare for a district court to grant a stay of a civil case based on the
22 existence of a criminal proceeding, even aside from the Ninth Circuit, nearly all of the
23 decisions of the circuit courts of appeal outside the Ninth Circuit are opinions affirming a
24 district court’s order *denying* a stay. See EMA, 767 F.3d at 628 (6th Cir. 2014) (finding
25 no abuse of discretion of district court’s denial of stay where “there has yet to be a
26 criminal case or even an indictment filed” and it was thus “unclear which crimes Michael
27 would be charged with”); Guggenheim Capital, LLC v. Birnbaum, 722 F.3d 444, 454 (2d
28 Cir. 2013) (district court was well within its discretion to deny stay); Louis Vuitton, 676

1 F.3d at 98 (2d Cir. 2012) (affirming denial of stay); Creative Consumer Concepts, Inc. v.
2 Kreiser, 563 F.3d 1070, 1081 (10th Cir. 2009) (holding that former employee's Fifth
3 Amendment rights were not compromised by the district court's refusal to stay
4 proceedings pending outcome of criminal trial, and explaining there was no prejudice to
5 the employee because she gave deposition testimony months earlier about the topic at
6 issue in the civil trial and thus "waived her Fifth Amendment privilege with respect to the
7 questions she answered during her deposition."); Microfinancial, 385 F.3d at 78 (1st Cir.
8 2004) (affirming denial of stay and noting that "an unindicted defendant who argues that
9 going forward with a civil proceeding will jeopardize his Fifth Amendment rights usually
10 presents a much less robust case for such extraordinary relief"); United States v. Int'l Bhd.
11 of Teamsters, 247 F.3d 370, 387-88 (2d Cir. 2001) (affirming denial of stay of
12 Independent Review Board proceedings during pendency of criminal proceedings as it did
13 not deny union official of a full and fair hearing); Serafino v. Hasbro, Inc., 82 F.3d 515,
14 519 (1st Cir. 1996) (district court did not abuse discretion in denying the plaintiff's
15 request for a stay and instead dismissing his case where he did not move for a stay and the
16 delay from waiting until criminal limitations period to expire would impose hardship on
17 the defendants); Nosik v. Singe, 40 F.3d 592, 596 (2d Cir. 1994) ("[D]istrict court did not
18 abuse its discretion in denying Nosik's motion for a preliminary injunction" and reasoning
19 that "[a]lthough civil and criminal proceedings covering the same ground may sometimes
20 justify deferring civil proceedings until the criminal proceedings are completed, a court
21 may instead enter an appropriate protective order."); United States v. Lot 5, Fox Grove,
22 Alachua Cty., Fla., 23 F.3d 359, 364 (11th Cir. 1994) (affirming denial of stay of civil
23 forfeiture proceeding against claimant's residence pending resolution of expected criminal
24 prosecution, explaining that "a blanket assertion of the privilege is an inadequate basis for
25 the issuance of a stay" and rejecting the defendant's argument that without her own
26 testimony she could not establish defense to forfeiture "because Claimant provided no
27 explanation as to why she did not use the testimony of other parties to substantiate her
28 defense."); Koester v. American Republic Investments, Inc., 11 F.3d 818, 823 (8th Cir.

1993) (no abuse of discretion in denying defendant’s motion for stay based on pending criminal indictment); United States v. Certain Real Prop., Commonly Known as 6250 Ledge Rd., Egg Harbor, Wis., 943 F.2d 721, 729 (7th Cir. 1991) (even if the defendant’s decision to proceed to trial on stipulated facts was not a waiver of Fifth Amendment rights, affirming denial of stay because the defendant failed to make a sufficient showing to justify a stay because “[a] blanket assertion of the privilege . . . does not provide a sufficient basis for a district court to grant a stay.”); Anglada v. Sprague, 822 F.2d 1035, 1036–37 (11th Cir. 1987) (where the defendants asserted a “blanket” refusal to testify based on the Fifth Amendment, holding that the district court’s denial of stay pending outcome of state criminal proceeding charging them with mortgage fraud and grand theft was not error); Kashi v. Gratsos, 790 F.2d 1050, 1057 (2d Cir. 1986) (rejecting argument that because statute of limitations on criminal charge had not expired, stay of civil suit should have been extended even after prosecutor announced it would decline to prosecute); Mid-Am.’s Process Serv. v. Ellison, 767 F.2d 684, 687 (10th Cir. 1985) (denying writ of mandamus to vacate district court order denying stay, but entering a protective order, and explaining that “[a]lthough postponement might be appropriate in a particular instance, we believe that the law does not require postponement of civil discovery until fear of criminal prosecution is gone”); United States v. Little Al, 712 F.2d 133, 135-36 (5th Cir. 1983) (district court properly denied request for Rule 56(f) continuance based on Fifth Amendment privilege because “[t]he very fact of a parallel criminal proceeding . . . d[oes] not alone undercut [a claimant’s] privilege against self-incrimination, even though the pendency of the criminal action forced [her] to choose between preserving [her] privilege against self-incrimination and losing the civil suit.”); Sec. & Exch. Comm’n v. First Fin. Grp. of Texas, Inc., 659 F.2d 660, 668 (5th Cir. 1981) (affirming denial of stay and noting that “[a] blanket refusal to answer questions at deposition on the ground that they are privileged is an improper invocation of the fifth amendment, irrespective of whether such a claim is made by a plaintiff, defendant, or a witness.”); Sec. & Exch. Comm’n v. Dresser Indus., Inc., 628 F.2d 1368, 1376 (D.C. Cir.

1 1980) (affirming district court order providing that parallel investigation into alleged
2 “questionable foreign payments” conducted by grand jury under guidance of Justice
3 Department did not preclude SEC from enforcing subpoena regarding use by corporation
4 of funds to make such payments); United States v. White, 589 F.2d 1283, 1286-87 (5th
5 Cir. 1979) (affirming denial of stay because there was no indication the defendant having
6 to invoke the Fifth Amendment would have necessarily resulted in an adverse judgment);
7 Ironbridge Corp. v. C.I.R., 528 F. App’x 43, 46–47 (2d Cir. 2013) (rejecting argument that
8 the corporate defendant’s “inability to call its principal James Haber as a trial witness,
9 given his intent to invoke his Fifth Amendment right against self-incrimination in light of
10 pending criminal investigations” justified stay and thus district court did not abuse its
11 discretion); S.E.C. v. Wright, 261 F. App’x 259, 263 (11th Cir. 2008) (no abuse of
12 discretion in denying stay requested based on the assertion the simultaneous civil and
13 criminal cases against the defendant would unfairly jeopardize his Fifth Amendment
14 rights; “a blanket assertion of the privilege against self-incrimination is an inadequate
15 basis for the issuance of a stay.”); Cady v. S. Suburban Coll., 152 F. App’x 531, 533 (7th
16 Cir. 2005) (district court did not err in declining the plaintiff’s request for a stay of civil
17 rights action pending outcome of criminal appeals).

18 Accordingly, courts plainly disfavor granting stays of civil litigation based on the
19 existence of a criminal investigation or action that may implicate a civil defendant’s Fifth
20 Amendment rights. Indeed, among this sea of cases cited above reflecting an
21 unmistakable preference for allowing civil actions to move forward even in the face of
22 parallel criminal proceedings and legitimate assertions of the Fifth Amendment privilege,
23 Plaintiff has located only two cases³—one from 1987 in the Federal Circuit and one from
24 1979 in the Fifth Circuit—where courts have concluded the lower court or administrative
25 body should have ordered a stay. See Afro-Lecon, Inc. v. United States, 820 F.2d 1198,

26 ³ Plaintiff’s counsel conducted exhaustive research and was unable to find additional
27 circuit-level authority resulting in a stay. It is possible that other cases do exist, but
28 Plaintiff’s counsel represents it could not locate any other such cases.

1 1199 (Fed. Cir. 1987) (vacating General Services Administration Board of Contract
2 Appeals decision denying stay of civil action until after completion of related criminal
3 proceedings and remanding); Wehling v. CBS, 608 F.2d 1084 (5th Cir. 1979) (the district
4 court erred by failing to stay a civil libel action pending the outcome of a related criminal
5 investigation and potential prosecution, or the running of the applicable statute of
6 limitations, after the plaintiff had validly claimed his Fifth Amendment privilege in
7 response to the defendant's discovery requests and had sought a protective order staying
8 the civil suit). But in another case from the Fifth Circuit, the Court held that the district
9 court's determination that an administrative hearing concerning a police officer pending
10 resolution of criminal charges should have been postponed was error. See Hoover v.
11 Knight, 678 F.2d 578, 581–82 (5th Cir. 1982). This overwhelming weight of authority
12 rejecting civil stays also weighs in favor of reconsideration.

13 **IV. CONCLUSION**

14 For the reasons stated above, Plaintiff respectfully requests the Court to reconsider,
15 in part, its April 27, 2018 order imposing a 90-day stay of this action.

16 Dated: May 23, 2018

AVENATTI & ASSOCIATES, APC

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