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

10
11 STEPHANIE CLIFFORD a.k.a.
STORMY DANIELS,

12 Plaintiff,

13 vs.
14

15 DONALD J. TRUMP,

16 Defendant.
17
18

CASE NO.: 2:18-cv-06893-SJO-FFM

**PLAINTIFF'S OPPOSITION TO
DEFENDANT DONALD J. TRUMP'S
MOTION FOR ATTORNEYS' FEES
AND MONETARY SANCTIONS**

Assigned to the Hon. S. James Otero

Action Filed: April 30, 2018

Hearing Date: November 26, 2018

Hearing Time: 10:00 a.m.

**Location: 350 West 1st Street
Courtroom 10C
Los Angeles, CA 90012**

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1 **I. INTRODUCTION**

2 Plaintiff Stephanie Clifford (“Plaintiff” or “Ms. Clifford”) opposes Defendant
3 Donald J. Trump’s (“Mr. Trump”) Motion for Attorneys’ Fees. While Mr. Trump is
4 permitted to recover “reasonable” attorneys’ fees, his request is anything but reasonable.
5 On the contrary, Mr. Trump seeks to recover the staggering and grossly inflated sum of
6 **\$341,559.50** in attorneys’ fees accounting for an alleged **509.25** hours of attorney time
7 (over 12.7 weeks of full time work for a single individual) is both “excessive” and
8 “extreme” and is most certainly not “moderate or fair” as is required by Texas law.
9 Sullivan v. Abraham, 488 S.W.3d 294, 299 (Tex. 2016). Accordingly, the vast majority of
10 the fees Mr. Trump requests should be denied.

11 Mr. Trump divides his fee request into four categories: (1) “initial strategy;” (2)
12 motion to transfer; (3) motion to strike; and (4) motion for fees. [Hader Decl. Exh. A.]
13 Mr. Trump also requests sanctions, but fails to request a specific amount of sanctions. Mr.
14 Trump’s request should be denied and dramatically reduced for multiple reasons discussed
15 in more detail herein. However, these reasons may be summarized as follows:

16 *First*, Mr. Trump is only entitled to recover reasonable fees incurred in connection
17 with the latter two categories – namely his motion to strike and his motion for fees.
18 However, even with respect to these categories, the \$203,841.21 in fees Mr. Trump
19 requests which accounts for 319 hours of attorney time (or almost 8 weeks of full time
20 work for a single individual) is not reasonable and is extreme and excessive. See
21 McGibney v. Rauhauser, 549 S.W.3d 816, 821 (Tex. App. 2018), review denied (Sept. 28,
22 2018) (request for over \$300,000 in fees was excessive.). The attorney hourly rates
23 requested by Mr. Trump for his attorneys are similarly unreasonable. Consequently,
24 although Mr. Trump may be entitled to reasonable fees, the amount should be reduced
25 dramatically. See, e.g., La’Tiejira v. Facebook, No. CV H-16-2574, 2017 WL 6949295,
26 at *2 (S.D. Tex. Nov. 15, 2017), report and recommendation adopted, No. 4:16-CV-
27 02574, 2017 WL 6949276 (S.D. Tex. Dec. 4, 2017) (permitting recovery of \$24,150.00 in
28 fees); Klocke v. University of Texas at Arlington, No. 4:17-CV-285-A, 2017 WL

1 6767252, at *1 (N.D. Tex. Oct. 17, 2017) (permitting recovery of \$25,000.).

2 *Second*, with regard to the fees associated with Mr. Trump’s motion to transfer and
3 “initial strategy,” neither of which have anything to do with the motion to strike filed
4 pursuant to the TCPA, Mr. Trump should not recover *any* fees. This is so because Mr.
5 Trump fails to meet his burden to establish that Texas law actually permits recovery of
6 fees for work entirely unrelated to the motion to strike under the TCPA. However, even if
7 the recovery of these fees was in principle statutorily authorized, the request here should
8 be denied entirely because recovery in this instance would not be “moderate or fair.”
9 Sullivan, 488 S.W.3d at 299. To begin with, there was never any reason for Mr. Trump to
10 file the motion to transfer in the first place. Mr. Trump could have had his motion to
11 strike heard by the Southern District of New York. Moreover, the purported basis for the
12 transfer, namely, the risk of inconsistent rulings on the enforceability of the Settlement
13 Agreement has been supposedly negated (if Mr. Trump is to be believed) by Mr. Trump’s
14 own covenant not to “bring any action, proceeding or claim against Plaintiff to enforce
15 any of the terms of the Settlement Agreement.” [Avenatti Decl. Exh. 1 at 1 (emphasis
16 added).] Similarly, Mr. Trump’s request for fees in connection with “initial strategy” is
17 excessive and unrecoverable. Mr. Trump should not recover any fees in connection with
18 these categories. To the extent that he is permitted to recover any of these fees, the
19 amount requested is excessive and should also be reduced dramatically.

20 *Finally*, no sanctions are authorized under the circumstances of this action and Mr.
21 Trump’s request. Mr. Trump fails to request a specific amount of sanctions. Accordingly,
22 Mr. Trump does not afford Plaintiff a meaningful opportunity to be heard and respond to
23 the specific nature of the sanctions sought. Moreover, because there is no need to deter
24 Plaintiff from filing other “similar actions” the only possible sanctions that could be
25 awarded would be nominal sanctions in the amount of \$1. Tatum v. Hersh, No. 05-14-
26 01318-CV, -- S.W.3d --, 2018 WL 1477597, at *5 (Tex. App. Mar. 27, 2018).

27 Accordingly, for these and the other reasons discussed below, the amount of any
28 fees awarded to Mr. Trump should be dramatically reduced to a “moderate or fair” amount

1 as is required by Texas law. Sullivan, 488 S.W.3d at 299.

2 **II. RELEVANT BACKGROUND**

3 The background to the present motion is not complicated. The action was filed on
4 or about April 30, 2018 in the Southern District of New York and asserted a single cause
5 of action for defamation. [Dkt. 1.] On or about July 23, 2018, Mr. Trump filed a motion
6 to transfer venue to this Court. [Dkt. 11.] Mr. Trump did not assert that venue was
7 improper, but instead invoked the court's discretion to transfer venue. [Id.] On August 6,
8 Plaintiff filed an opposition to the motion to transfer. [Dkt. 13.] However, on or about
9 August 8, the parties stipulated to the transfer of the action to this Court. [Dkt. 17.]

10 After the action was transferred to this Court, on August 28, Mr. Trump filed a
11 motion to strike and/or dismiss the complaint pursuant to the Texas Citizens Participation
12 Act ("TCPA"). [Dkt. 28.] Significant to the amount of time Mr. Trump's attorneys spent
13 on their motion, Plaintiff had only *one week* to oppose the motion and filed her opposition
14 on September 3. [Dkt. 30.] Mr. Trump filed a reply (limited to 5 pages) on September 10.
15 [Dkt. 32.] After a hearing on September 24, the Court granted Mr. Trump's motion to
16 strike in an order dated October 15. [Dkt. 36.] Mr. Trump filed the present motion on
17 October 29. [Dkt. 32.] Plaintiff has appealed the Court's order granting the motion to
18 strike. [Avenatti Decl. Exh. 2.]

19 In sum, the action has been pending for roughly six (6) months and has not been the
20 subject of extensive motion practice. Indeed, only two substantive motions were filed and
21 one was resolved via stipulation. No discovery was ever conducted. In spite of this, Mr.
22 Trump's attorneys have somehow managed to spend an astonishing (and wasteful) 509.25
23 hours of attorney time litigating these issues over the span of six months. The
24 unreasonableness of Mr. Trump's request for fees is apparent on the face of the request.
25 Nevertheless, as discussed above and below, there are numerous grounds to deny the
26 request and dramatically reduce the amount of recoverable fees.

27 **III. STANDARD OF REVIEW**

28 Under the TCPA, a party is only entitled to recover "reasonable attorney's fees."

1 Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a)(1). “A ‘reasonable’ attorney’s fee ‘is one
 2 that is not excessive or extreme, but rather moderate or fair.’” Sullivan v. Abraham, 488
 3 S.W.3d 294, 299 (Tex. 2016) (citing Garcia v. Gomez, 319 S.W.3d 638, 642 (Tex. 2010)).
 4 “Whether attorney’s fees are reasonable and necessary is a fact question.” Ruder v.
 5 Jordan, No. 05-16-00742-CV, 2018 WL 672091, at *3 (Tex. App. Feb. 2, 2018). “The
 6 party applying for the award bears the burden of proof.” El Apple I, Ltd. v. Olivas, 370
 7 S.W.3d 757, 762–63 (Tex. 2012). In examining the reasonableness of the request, “a trial
 8 judge is obliged to do more than simply act as a rubber-stamp, accepting carte blanche the
 9 amount appearing on the bill.” McGibney v. Rauhauser, 549 S.W.3d 816, 821 (Tex. App.
 10 2018), review denied (Sept. 28, 2018).

11 **IV. ARGUMENT**

12 **A. The Rates Sought by Mr. Trump are Not Reasonable.**

13 Mr. Trump seeks to recover fees for time spent by five (5) different attorneys with
 14 billing rates ranging from \$307.60/hour to \$841.64/hour. [Harder Decl. Exh. at 18.] Two
 15 of the attorneys in question have billable hour rates in excess of \$750/hour and four of the
 16 five attorneys have rates over \$550/hour. [Id.] These rates are not reasonable under the
 17 circumstances. [Avenatti Decl. ¶11, Exh. 5.] As one court in this District has found, “[i]n
 18 Los Angeles, partners in litigation have an hourly rate ranging from \$340 to \$745.”
 19 Salazar v. Midwest Servicing Grp., Inc., No. CV 17-0137 PSG (KSX), 2018 WL
 20 4802139, at *7 (C.D. Cal. Oct. 2, 2018); see also Luna v. Universal City Studios, LLC,
 21 No. CV 12-9286 PSG (SSX), 2016 WL 10646310, at *8 (C.D. Cal. Sept. 13, 2016).

22 Indeed, according to the *2017 Real Rate Report Snapshot*, “a CEB and TyMetrix
 23 publication that identifies attorney rates by location, experience, firm size, areas of
 24 expertise, and industry, as well as the specific practice areas,” median partner rates for
 25 firms of all sizes and practice areas in the Los Angeles area was \$640.00/hour,
 26 \$452.50/hour for commercial litigation (across all locations), and \$276.20/hour for
 27 litigation partners in firms with 50 or fewer attorneys. [Avenatti Decl. Exh. 5.] Hicks v.
 28 Toys’R’ Us-Delaware, Inc., No. CV13-1302-DSF JCGX, 2014 WL 4670896, at *1 (C.D.

1 Cal. Sept. 2, 2014) (finding Real Rate Report Snapshot to be “persuasive” because “it is
 2 based on actual legal billing, matter information, and paid and processed invoices from
 3 more than 80 companies[.]”). For associates, the median rates were \$478.74/hr,
 4 \$300.00/hr, and \$225.00/hr, respectively. [Avenatti Decl., Exh. 5.]

5 Here, only two of Mr. Trump’s attorneys are partners, but four out of five seek to
 6 recover based on hourly rates that are in the upper end of rates for partners in litigation
 7 within this District. The Court should exercise its discretion to determine more reasonable
 8 rates in line with the prevailing rates in this District by applying one or more of the
 9 median rates identified above. Mr. Trump’s fee request should be reduced accordingly.

10 **B. Mr. Trump’s Request for Attorneys’ Fees in Connection with the Motion**
 11 **to Strike and Motion for Attorneys’ Fees is “Excessive” and “Extreme.”**

12 With regard to his motion to strike under the TCPA and motion for attorneys’ fees
 13 filed in connection therewith, Mr. Trump requests fees in excess of **\$203,874** based on
 14 **319** hours of attorney time. [Harder Decl. Exh. A.] More specifically, with respect to the
 15 TCPA motion, Mr. Trump requests over **\$139,899** in fees based on **230.5** hours of
 16 attorney time and, with respect to the motion for attorneys’ fees, **\$63,975** in fees based on
 17 **88.5** hours of attorney time. [*Id.*] No fewer than five (5) different attorneys spent time
 18 working on these motions. Indeed, Mr. Trump’s attorneys apparently spent *almost 70*
 19 *hours of attorney time drafting a five (5) page reply* in support of the motion to strike.
 20 [*Id.* at 11-13.] Considered collectively, **319** hours of attorney time amounts to almost
 21 *eight (8) weeks of full time work (for a single individual) based on a 40 hour week*. The
 22 motion to strike itself would amount to over 5.75 weeks of work. The motion for
 23 attorneys’ fees equals over **2.20** weeks of work. Mr. Trump’s request is patently
 24 excessive. [Avenatti Decl. ¶8.]

25 Under Texas law, Mr. Trump’s request for fees is both “excessive” and “extreme”
 26 and is anything but “moderate or fair.” Sullivan, 488 S.W.3d at 299. The excessiveness
 27 and unreasonable nature of this request is made plain by decisions discussing an award of
 28 attorneys’ fees under the TCPA as well as under California’s anti-SLAPP statute. For

1 example in McGibney, the Texas Court of Appeal reversed the trial court’s award and
2 held an award of attorneys’ fee in the amount of \$300,838.84 in connection with a motion
3 under the TCPA to be excessive. 549 S.W.3d at 821. The court in McGibney found that
4 the requested fees and substance of the work involved “went well beyond the depth of
5 research and preparation ordinarily expended in the early stages of any lawsuit” and what
6 would be reasonable given the procedural posture of the case and its resolution under the
7 TCPA. Id. at 824. The court in McGibney concluded that the trial court had erred in
8 awarding 100% of the requested fees and remanded the matter for further consideration.
9 Id. at 826.

10 Similarly, in Ruder, the Texas Court of Appeal affirmed the reduction of a request
11 for \$30,380 for attorney time and \$5,464 for costs and expenses to \$9,000 for attorney’s
12 fees and \$600 for costs. 2018 WL 672091, at *3-4. Among other things, the Texas Court
13 of Appeal noted that the trial court took issue with “18.7 hours expended by one attorney
14 to draft an 18–page reply brief ... with additional time expended by another attorney on
15 the same task.” Id. at *4. Here, as noted, Mr. Trump’s attorneys seek to recover 70 hours
16 of attorney time drafting a five (5) page reply. [Harder Decl. Exh. A at 11-13.] The court
17 in Ruder held that the trial court did not abuse its discretion in reducing the requested fees.
18 2018 WL 672091 at *4.

19 In La’Tiejira v. Facebook, the court in the Southern District of Texas reduced a
20 request for attorneys’ fees in connection with the TCPA of over \$68,000 to \$24,150.00.
21 No. CV H-16-2574, 2017 WL 6949295, at *2 (S.D. Tex. Nov. 15, 2017), report and
22 recommendation adopted, No. 4:16-CV-02574, 2017 WL 6949276 (S.D. Tex. Dec. 4,
23 2017). There, the court discussed the fact that “that *four* attorneys worked on this case for
24 Defendants, with their hourly rates ranging from \$348.50 to \$627.00” and “worked,
25 collectively, a total of 138.1 hours.” Id. (emphasis in original). This is of course far less
26 than what Mr. Trump contends his attorneys spent in this action. Nevertheless, the court
27 in La’Tiejira found that “[b]oth the hourly rates and the number of hours expended by
28 counsel in 2017” were unreasonable. Id. The court further found the number of attorneys

1 working on the filings to have been unreasonable. Id. The court also held as unreasonable
2 the fact that “three attorneys collectively worked on Defendants’ Motion for Attorneys’
3 Fees, a relatively short and uncomplicated fourteen page motion which included a
4 summary of those attorneys’ billing records, for a total of 23 hours.” Id. Needless to say,
5 the 230.5 hours of time expended by five (5) different attorneys on the motion to strike
6 and the 88.5 hours (and counting, allegedly) expended on the present motion dwarfs what
7 the court in La’Tiejira determined to be unreasonable.

8 In Klocke v. University of Texas at Arlington, the district court in the Northern
9 District of Texas reduced a request for \$63,822.70 in attorneys’ fees in connection with a
10 motion under the TCPA to \$25,000. No. 4:17-CV-285-A, 2017 WL 6767252, at *1 (N.D.
11 Tex. Oct. 17, 2017). There, counsel sought “to recover for 201.9 hours of attorney time
12 and 8.2 hours of paralegal time” and “[o]f that amount, 36.8 hours [was] attributable to
13 work on the motion for attorney’s fees.” Id. at *2. The court found the number of hours
14 excessive. Id. The court further found, as Mr. Trump’s attorneys do here, that “the bills
15 reflect that counsel charged for matters that should not have been billed, such as becoming
16 familiar with the local rules,” and that “billing judgment was not exercised.” Id.
17 Accordingly, the court held that the amount sought was “excessive” and that a “moderate
18 or fair amount” would be \$25,000. Id. Of particular note, the court came to this
19 conclusion despite determining that the case presented “novel issues” and that “lead
20 counsel is represented to be an authority on cases like this one and to have substantial
21 experience.” Id. Indeed, based on counsel’s expertise, the court concluded that it would
22 have expected the work to be done “expeditiously with little overlap between work done
23 by ... attorneys and paralegals and without need to endlessly research matters not
24 necessary to the disposition of the claim...” Id. Again, the amount of time expended by
25 the attorneys in Klocke, which the court determined to be excessive, was but a small
26 fraction of the amount of time Mr. Trump’s attorneys have spent in this action.

27 Mr. Trump looks to California to establish the reasonableness of his request – in
28 particular as to the reasonableness of the hourly rates requested. However, recourse to

1 California law is not helpful to Mr. Trump. For example, in Maughan v. Google, the
2 California Court of Appeal affirmed the trial court’s reduction of attorneys’ fees in an
3 anti-SLAPP motion from the \$112,288.63 sought to \$23,000. 143 Cal.App.4th 1242,
4 1253 (2006). The trial court’s decision in that action was based in part on “the court’s
5 own experience and expertise in handling complex civil cases” and assessment of what
6 was reasonable. Id. at 1251. The trial court found that the over 200 hours of work
7 claimed by counsel was excessive – particularly since counsel in that action “acknowledge
8 that they are old hats at [anti-]SLAPP motions and experts in defamation.” Id.
9 Consequently, the “motion should not have been such a monumental undertaking.” Id.
10 The court further found that it was “hard to believe that counsel for Google spent
11 approximately four 50-hour work weeks preparing the [anti-]SLAPP motion.” Id. Here,
12 of course, Mr. Trump seeks even more.

13 In Foundation for Taxpayer & Consumer Rights v. Garamendi, the California Court
14 of Appeal in affirmed the trial court’s award of attorneys’ fees which amounted to a
15 reduction in the attorneys’ fees requested from \$135,894.75 to \$70,429.04. 132
16 Cal.App.4th 1375, 1394 (2005). There, the Court of Appeal noted the \$70,429.04 actually
17 awarded was “generous.” Id. Indeed, numerous courts have determined anti-SLAPP
18 litigation to be relatively straight forward and not particularly complex. See, e.g., Lee-Tzu
19 Lin v. Dignity Health-Methodist Hosp. of Sacramento, No. CIV. S-14-0666 KJM, 2014
20 WL 5698448, at *4 (E.D. Cal. Nov. 4, 2014) (“Given the non-complex nature of the anti-
21 SLAPP motion, the 211.25 hours sought by defendants is high.”). The clear weight of
22 authority in California is that anti-SLAPP motions should involve far less attorney time
23 than the over 230 hours requested by Mr. Trump. See AT&T Mobility LLC v. Yeager,
24 No. 2:13-CV-00007 KJM DB, 2018 WL 1567819, at *3 (E.D. Cal. Mar. 30, 2018) (“The
25 total hours expended on the anti-SLAPP motion and instant attorney fee motion, including
26 paralegal time, is thus reduced from 92.3 to 74.8. This total, *while on the high end*, is
27 reasonable in the context of this heavily litigated case.”) (emphasis added); Crowe v.
28 Gogineni, No. 2:11-CV-3438 JAM, 2014 WL 130488, at *5 (E.D. Cal. Jan. 13, 2014),

1 report and recommendation adopted, No. 2:11-CV-3438 JAM DAD, 2014 WL 1513277
2 (E.D. Cal. Apr. 16, 2014) (finding 75 hours of attorney time, rather than the 157.4 hours
3 requested to be reasonable.); Moreau v. Daily Indep., No. 1:12-CV-01862-LJO, 2013 WL
4 796621, at *3 (E.D. Cal. Mar. 4, 2013) (determining reasonable amount of time spent on
5 anti-SLAPP motion to be 40 hours.); Smith v. Payne, No. C 12-01732 DMR, 2013 WL
6 1615850, at *3 (N.D. Cal. Apr. 15, 2013) (concluding that 66.5 hours of attorney time was
7 reasonable.). The authority cited establishes that as a rule of thumb, 75 hours is the upper
8 limit of reasonable time spent prosecuting an anti-SLAPP motion, with considerably less
9 time spent being the norm. Here, however, Mr. Trump seeks over *three times* the high
10 end of reasonableness on the TCPA motion alone.

11 Likewise, with respect to a motion for attorneys' fees, this Court has held that 33.6
12 hours is excessive and permitted recovery of 10 hours of attorney time for such a motion.
13 Barron v. Ashland, Inc., No. CV1001301SJOVBKX, 2012 WL 13001044, at *4 (C.D.
14 Cal. Jan. 9, 2012) (Otero, J.); see also Smith, 2013 WL 1615850, at *3 (awarding 12 hours
15 of work in connection with fee motion on anti-SLAPP motion.). Mr. Trump's attorneys
16 here have already spent over 88 hours of attorney time, and supposedly, are not finished.
17 Indeed, Mr. Trump contends that they will spend additional time drafting a reply brief and
18 attending any hearing on this Motion. This is patently excessive and exceeds even the
19 amount of a high end award in connection with the anti-SLAPP motion itself. See AT&T
20 Mobility, 2018 WL 1567819, at *3 (finding 74.8 hours of attorney and paralegal time to
21 be "on the high end" of reasonable.). Even if the Court were to assume that somehow this
22 particular TCPA motion was exceedingly complex (which it was not) there is no reason to
23 conclude that the motion for attorneys' fees is unusually complicated. There is simply no
24 justification for the "excessive" and "extreme" request made by Mr. Trump. Sullivan, 488
25 S.W.3d at 299.

26 Mr. Trump cites only two cases to support the amount of his request,
27 Charalambopoulos v. Grammer, No. 3:14-CV-2424-D, 2016 WL 915739 (N.D. Tex. Mar.
28 10, 2016) and Stephen Wynn v. James Chanos, Northern District of California, Case No.

1 14-cv-04329 – the latter of which is apparently not even available on Lexis or Westlaw.
2 While these decisions lend some surface support to Mr. Trump’s requests, in light of the
3 foregoing authority, these decisions can only be characterized as outliers. Neither is
4 binding on this Court and neither decision should be viewed as persuasive. Indeed, Mr.
5 Trump’s exorbitant request seems to be premised on the notion that the defamation claim
6 was somehow exceptional. In this regard, Mr. Trump references the media attention paid
7 to Plaintiff and her claim, but this did not of course impact the merits of the defamation
8 claim, the motion to strike, or the law governing these issues. And further, Mr. Trump’s
9 attorneys point to nothing suggesting they had to spend additional time making any media
10 appearances or speaking with members of the media, or that they had to spend more time
11 on their briefs because of the media attention the case garnered. That the litigation
12 captured some public interest does not render the defamation claim itself more complex or
13 exceptional. As such, this provides no basis for the exorbitant fee request made by Mr.
14 Trump.

15 In sum, based on the foregoing authority as well as the circumstances of this action,
16 Mr. Trump should not be permitted to recover anywhere near the \$203,874.21 he requests
17 in connection with the motion to strike under the TCPA and the motion for attorneys’ fees.
18 Instead, Mr. Trump should not recover more than roughly \$25,000 in connection with
19 these motions. See La’Tiejira, 2017 WL 6949295, at *2 (reducing request to
20 \$24,150.00.); Klocke, 2017 WL 6767252, at *1 (reducing request to \$25,000.). In the
21 event that the Court believes additional fees are warranted, the amount should not exceed
22 reimbursement for 50 hours of attorney time at one or more of the median hourly rates
23 identified above. See Maughan, 143 Cal.App.4th at 1249 (finding that “reasonable time
24 spent on the [anti-] *SLAPP* motion and the instant motion [for fees and costs] is, as
25 [Maughan and Brown & Maughan] have suggested, approximately 50 hours...”)
26 (emphasis in original). Even assuming a billing rate on the high end for this district of
27 \$745/hour, this would amount to no more than \$37,250. See Salazar, 2018 WL 4802139,
28 at *7 (discussing rates in the Central District). The remaining balance of Mr. Trump’s

1 request should be denied.

2 **C. Mr. Trump Should Not Be Permitted to Recover Any Fees Unrelated to**
 3 **the TCPA Motion to Strike and Pertaining to the Motion to Transfer or**
 4 **“Initial Strategy.”**

5 Mr. Trump seeks **\$102,977.32** in fees for over **143** hours of attorney time in
 6 connection with his previously filed motion to transfer venue. Mr. Trump further seeks
 7 **\$34,707.97** for **47** hours of attorney time in connection with “initial strategy.” [Harder
 8 Decl. Exh. A.] Neither request bears any apparent connection to the motion to strike filed
 9 under the TCPA as the fees incurred in connection with that motion are enumerated
 10 separately. [*Id.*] Nevertheless, Mr. Trump contends he is entitled to recover attorneys’
 11 fees for these matters that are entirely unrelated to his motion to strike under the TCPA.
 12 Mr. Trump cites no authority under the TCPA requiring such an expansive interpretation
 13 of its provisions. However, even if in principle recovery of these fees is statutorily
 14 authorized, any such recovery here would be unreasonable and excessive. Accordingly,
 15 Mr. Trump should not recover *any* of these requested fees at all.

16 In support of his request, Mr. Trump cites American Heritage Capital, LP v.
 17 Gonzalez, 436 S.W.3d 865, 879 (Tex. App. 2014), disapproved of by Hersh v. Tatum, 526
 18 S.W.3d 462 (Tex. 2017), for the proposition that he is entitled to recover the entirety of his
 19 fees incurred in the action even if completely unrelated to his motion under the TCPA.
 20 Nothing in American Heritage supports this expansive interpretation. Rather, American
 21 Heritage stands only for the limited holding that, within the meaning of the TCPA, “the
 22 term ‘legal action’ is not limited to formal judicial pleadings and proceedings-it also
 23 includes ‘cause[s] of action’” such that the party can recover attorneys’ fees from work
 24 performed prior to formal joinder of a party. *Id.* at 879–80. The actual work at issue in
 25 American Heritage plainly related to the substance of the defamation cause of action at
 26 issue and that was ultimately dismissed under the TCPA. *See id.* at 880 (discussing that
 27 the fees pertained to the “validity of the defamation claims” and settlement negotiations.).

28 Therefore, American Heritage does not amount to authority for the proposition that
 a party can recover fees for work, such as the motion to transfer, which is entirely

1 unrelated to the validity of the claims at issue or the viability of the cause of action under
 2 the TCPA. Indeed, it is noteworthy, given Mr. Trump’s recourse to California law to
 3 attempt to justify his exorbitant fee request, that under California law it is clear that a
 4 party “may recover fees and costs only for the motion to strike, *not the entire litigation.*”
 5 Christian Research Inst. v. Alnor, 165 Cal.App.4th 1315, 1320 (2008) (emphasis added).
 6 California’s anti-SLAPP statute “was ... a primary model or influence on similar laws
 7 subsequently enacted in other states, including, directly or indirectly, the TCPA.”
 8 Serafine v. Blunt, 466 S.W.3d 352, 386 (Tex. App. 2015) (Pemberton, J. *concurring*).¹

9 Accordingly, Mr. Trump cites no authority that permits him to recover attorneys’
 10 fees incurred in connection with the motion to transfer or for “strategy” entirely unrelated
 11 to the merits of the defamation claim or motion under the TCPA or for the motion to
 12 transfer itself which was unrelated to any issue pertaining to the TCPA. [See Harder Decl.
 13 Exh. A at 1-3 (seeking to recover, among other things, fees for research regarding “service
 14 of summons,” “SDNY local rules,” and “potential discovery.”²), *id.* at 4-7 (seeking
 15 recovery of fees pertaining to motion to transfer venue). Mr. Trump thus fails to satisfy
 16 his burden of proof. El Apple I, 370 S.W.3d at 762–63. In fact, Texas law would not
 17 permit recovery of fees for this type of work. For example, the Texas Court of Appeal in
 18 McGibney faulted counsel for a “troublesome pattern of heavy front-end loading of legal
 19 work that might very well have been reasonable, if the case had ever moved beyond the
 20 chapter 27 dismissal stage, but was nevertheless premature and of questionable
 21 reasonableness in the early stages of the lawsuit.” 549 S.W.3d at 824. Similarly, the
 22 Court of Appeal in Ruder affirmed the reduction of a fee request that included matters

23 ¹ Mr. Trump also cites statute Cruz v. Van Sickle, for the proposition that he is permitted
 24 to recover fees in connection with his motion for attorneys’ fees. 452 S.W.3d 503, 526
 25 (Tex. App. 2014). With the caveat that Mr. Trump’s request is not reasonable in amount,
 26 Plaintiff does not dispute entitlement to reasonable fees in connection with the motion for
 27 attorneys’ fees under the TCPA itself. Cruz does not stand for the broader proposition,
 28 however, that Mr. Trump is entitled to recover fees for work entirely unrelated to the
 TCPA.

² “Potential discovery” is of course unrelated to the TCPA because filing a motion under
 the TCPA stays all discovery. Tex. Civ. Prac. & Rem. Code Ann. § 27.003(c).

1 unrelated to the defamation claim at issue under the TCPA. 2018 WL 672091, at *3
2 (faulting counsel for the “absence of segregation between the contract claim and the
3 defamation claim.”).

4 However, even if in principle the recovery of these fees was statutorily authorized,
5 the particular request here is neither “moderate” nor “fair” and is instead “excessive” and
6 “extreme.” Sullivan, 488 S.W.3d at 299. This is so, first and foremost, because filing the
7 motion to transfer was entirely unnecessary. There is absolutely no reason why Mr.
8 Trump could not have filed his motion to strike under the TCPA while the case was
9 pending before the Southern District of New York. In making his motion to transfer, Mr.
10 Trump did not contend that venue in the Southern District of New York was improper.
11 [See Dkt. No. 11-1.] Rather, the motion invoked the court’s discretion under 28 U.S.C. §
12 1404(a). [Id.] Accordingly, by his own account, it would have been possible to file the
13 motion to strike before the Southern District of New York.

14 The motion was further unnecessary because its primary point of emphasis and
15 reason for seeking transfer was, according to Mr. Trump, the argument that the defamation
16 claim “falls squarely within the same arbitration provision in the Settlement Agreement at
17 issue in the First California Action.” [Id. at 3.] Thus, Mr. Trump contended that the court
18 in the Southern District of New York “could be required to rule upon the enforceability of
19 the very arbitration provision in the Settlement Agreement that is the subject of Plaintiff’s
20 declaratory relief claim, and the Arbitration Motion, in the First California Action”
21 thereby, again according to Mr. Trump, creating a “substantial risk of duplicative
22 litigation and inconsistent rulings ... *regarding the enforceability of the Settlement*
23 *Agreement and arbitration provision therein.*” [Id. at 3 (emphasis added).]

24 The frivolity of this argument was laid bare when Mr. Trump, in an attempt to moot
25 Plaintiff’s claims, agreed “that he does not, and *will not, contest Plaintiff’s assertion that*
26 *the Settlement Agreement was never formed*” and covenanted that Mr. Trump “*will not*
27 *bring any action, proceeding or claim against Plaintiff to enforce any of the terms of the*
28 *Settlement Agreement.*” [Avenatti Decl. Exh. 1 at 1 (emphasis added).] Needless to say,

1 if it is now truly Mr. Trump’s position that the Settlement Agreement was never formed
2 and that he supposedly never had any intention to enforce the Settlement Agreement (a
3 claim that is plainly at odds with reality), then there was never any risk of “inconsistent
4 rulings” regarding the enforceability of the Settlement Agreement as Mr. Trump claimed
5 in his motion to transfer. Accordingly, Mr. Trump should not be able to recover over one
6 hundred thousand dollars in attorneys’ fees, specifically **\$102,977.32**, for a motion he
7 never should have filed in the first place. In short, Mr. Trump should not be permitted to
8 recover *any* of the fees associated with the motion to transfer.

9 However, even if recovery of attorneys’ fees in connection with the motion to
10 transfer is not categorically denied, the actual amount requested is “excessive” and
11 “extreme” and should be reduced dramatically. Sullivan, 488 S.W.3d at 299. Attorneys
12 working for Mr. Trump apparently spent over **143** hours working on the motion to
13 transfer. [Harder Decl. Exh. A at 18.] For a single attorney working a 40 hour week, that
14 amounts to approximately 3.57 weeks of non-stop full time work on a motion that is
15 routine in the practice of law. [Avenatti Decl. ¶9.] Revealing how exaggerated and
16 wasteful Mr. Trump’s request for fees is, Mr. Trump’s counsel apparently spent *almost*
17 *three (3) hours of attorney time on a stipulation* to transfer this action to California – a
18 stipulation that was drafted by *Plaintiff’s counsel*. [Harder Decl. Exh. A at 7.] This same
19 inflated approach to billing appears to have been applied across the board to all the fees
20 requested in Mr. Trump’s motion. This is neither moderate nor fair. Sullivan, 488
21 S.W.3d at 299. If any recovery is permitted, it should be for far less than the \$102,977.32
22 requested.

23 The fees requested in connection with “initial strategy” are similarly excessive.
24 Seeking 47 hours of attorney time solely for “initial strategy” is akin to the circumstances
25 in McGibney where the Texas Court of Appeal found that the requested fees and
26 substance of the work involved “went well beyond the depth of research and preparation
27 ordinarily expended in the early stages of any lawsuit” and what would be reasonable
28 given the procedural posture of the case and its resolution under the TCPA. 549 S.W.3d

1 at 824. Here, as in Klocke, Mr. Trump’s attorneys seek to recover “for matters that should
2 not have been billed, such as becoming familiar with the local rules.” 2017 WL 6767252
3 at *1. [See Harder Decl. Exh. A at 1-2 (including roughly 7 hours’ worth of entries
4 regarding matters such as research “regarding SDNY service and filing requirements” as
5 well as “research SDNY local rules.”)] Accordingly, Mr. Trump should not be permitted
6 to recovery any of the time requested in connection with “initial strategy.” But, if some
7 recovery is permitted, it should be for far less than the \$34,707.97 requested.

8 In sum, Mr. Trump should not recover any attorneys’ fees in connection with the
9 motion to transfer and “initial strategy.” However, should some recovery be permitted,
10 for the same reasons discussed above in connection with the fee request for the motion to
11 strike and motion for attorneys’ fees, the amount should be substantially reduced to reflect
12 a reasonable amount of time and a reasonable rate. In view of the circumstances,
13 particularly the lack of any meaningful necessity for the motion to transfer, recovery for
14 these fees should not exceed 10 attorney hours at one or more of the median hourly rates
15 identified above in the *2017 Real Rate Report Snapshot*—if it is permitted at all.

16 **D. Under the Circumstances, Sanctions are Not Authorized.**

17 No sanctions should be imposed at all because Mr. Trump has not requested a
18 specific amount and has therefore deprived Plaintiff of the opportunity to meaningfully
19 respond to the request. Alternately, the Court should award only nominal sanctions of \$1
20 because there is no need for further deterrence.

21 As an initial matter, Mr. Trump does not provide Plaintiff with notice of the amount
22 of sanctions he seeks. It is of course an elementary principle of due process that, prior to
23 the imposition of a sanction, a party must have notice and an opportunity to be heard. See,
24 e.g., Tom Growney Equip., Inc. v. Shelley Irr. Dev., Inc., 834 F.2d 833, 835 (9th Cir.
25 1987) (“In the absence of extraordinary circumstances, procedural due process requires
26 notice and an opportunity to be heard *before* any governmental deprivation of a property
27 interest.”). Here, Mr. Trump’s failure to request a specific amount of sanctions deprives
28 Plaintiff of a meaningful opportunity to both notice and an opportunity to be heard

1 because Plaintiff has no prior notice of the amount of sanctions requested. Under the
2 TCPA, the evidentiary record must support the specific amount of sanctions awarded. See
3 McGibney, 549 S.W.3d at 836 (“We agree that based on the meager evidence before us,
4 the \$150,000 sanction award was excessive.”). In the absence of a request for a specific
5 amount of sanctions, Plaintiff has no ability to present evidence against, or meaningfully
6 rebut, any purported evidentiary basis for the amount of sanctions that may be imposed.
7 For this reason, Mr. Trump’s request for sanctions should be denied entirely.

8 However, should the Court reach the substantive question, under the TCPA,
9 sanctions shall be awarded sufficient “to deter the party who brought the legal action from
10 bringing similar actions described in this chapter.” Tex. Civ. Prac. & Rem. Code Ann. §
11 27.009(a)(2). Courts interpret this requirement according to its plain language with the
12 purpose of a sanctions award being deterrence “from bringing similar actions in the
13 future.” Rich v. Range Res. Corp., 535 S.W.3d 610, 613 (Tex. App. 2017), review denied
14 (June 1, 2018). Sanctions under the TCPA “*are not aimed to punish but rather only to*
15 *deter.*” McGibney, 549 S.W.3d at 836 (emphasis added). Should “the trial court
16 determine[] that the plaintiff does not need deterring from filing similar actions, the court
17 may award a nominal sanction such as \$1.00.” Tatum v. Hersh, No. 05-14-01318-CV, --
18 S.W.3d --, 2018 WL 1477597, at *5 (Tex. App. Mar. 27, 2018). Indeed, while the award
19 of sanctions is mandatory, because a court has discretion to award nominal sanctions, the
20 failure to award nominal sanctions and a denial of sanctions entirely where no deterrence
21 is necessary amounts to harmless error. Tatum, 2018 WL 1477597, at *6; Rich, 535
22 S.W.3d at 614.

23 The relevant consideration for the purposes of deterrence is whether the Plaintiff
24 may file “similar actions” – i.e., those running afoul of the TCPA. There is no reason to
25 believe that Plaintiff may do so. Tex. Civ. Prac. & Rem. Code § 27.009(a)(2). Indeed,
26 Mr. Trump has subsequently tweeted additional false and insulting statements about
27 Plaintiff – going so far as to call her “horseface” and threatening her with additional
28 litigation even in the face of a purported covenant not to sue Plaintiff. [Avenatti Decl.

1 Exh. 3.] Plaintiff has not taken any additional legal action against Mr. Trump. Moreover,
2 as to the defamation claim against Mr. Cohen presently pending, Plaintiff wishes to amend
3 the complaint in that action to omit the defamation claim. [Avenatti Decl. Exh. 4.]
4 Accordingly, there is no basis to impose sanctions in order to deter Plaintiff from filing
5 other similar actions.

6 In short, no sanctions are authorized given Mr. Trump's failure to provide notice of
7 the amount of sanctions he seeks. However, if any sanctions are imposed at all, the Court
8 should only impose the nominal sanction of \$1. Rich, 535 S.W.3d at 614.

9 **E. The TCPA Does Not Apply in Federal Court.**

10 Lastly, for the purpose of preserving the record on appeal, Plaintiff reiterates her
11 objection that the TCPA does not apply in federal court. See, e.g., Cuba v. Pylant, 814
12 F.3d 701, 719 (5th Cir. 2016) (“Applying an *Erie* analysis, I conclude that the TCPA is
13 procedural and must be ignored.”) (Graves, J. *dissenting*); Mathiew v. Subsea 7 (US)
14 LLC, No. 4:17-CV-3140, 2018 WL 1515264, at *7 (S.D. Tex. Mar. 9, 2018), report and
15 recommendation adopted, No. 4:17-CV-3140, 2018 WL 1513673 (S.D. Tex. Mar. 26,
16 2018) (the “TCPA directly conflicts with the ‘integrated program’ Rules 12 and 56 create
17 for determining whether to grant pre-trial judgment in cases in federal court because it
18 changes the burdens of proof applicable to both parties” and as a result “the procedural
19 mechanisms of the TCPA must yield to the Federal Rules of Civil Procedure.”); Rudkin v.
20 Roger Beasley Imports, No. A-17-CV-849-LY, 2017 WL 6622561, at *3 (W.D. Tex. Dec.
21 28, 2017), report and recommendation approved, No. A-17-CV-849-LY, 2018 WL
22 2122896 (W.D. Tex. Jan. 31, 2018) (“Even if the [TCPA] is viewed to be somehow
23 substantive, it still cannot be applied in federal court, as its provisions conflict with Rules
24 12 and 56, rules well within Congress’s rulemaking authority. Accordingly, the motion to
25 dismiss under the TCPA should be denied.”). Indeed, Plaintiff has already filed a notice
26 of appeal regarding the Court’s ruling on the merits of the motion to strike. [Avenatti
27 Decl. Exh. 2.] The Court should therefore refrain from ruling on this request for fees prior
28 to resolution of this issue by the Ninth Circuit.

1 **V. CONCLUSION**

2 For the foregoing reasons, Plaintiff requests that the Court deny Mr. Trump's
3 Motion as to the vast majority of the fees requested by Mr. Trump. Mr. Trump's fee
4 request must be reduced dramatically as argued herein.

5 Dated: November 5, 2018

AVENATTI & ASSOCIATES, APC

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