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a.k.a. Stormy Daniels a.k.a. Peggy Peterson
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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, an individual, ESSENTIAL
17 CONSULTANTS, LLC, a Delaware
Limited Liability Company, MICHAEL
18 COHEN and DOES 1 through 10,
inclusive,

19 Defendants.
20

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

**PLAINTIFF STEPHANIE
CLIFFORD’S RESPONSE TO
DECLARATION OF MICHAEL D.
COHEN FILED IN SUPPORT OF
DEFENDANTS’ JOINT *EX PARTE*
APPLICATION FOR STAY**

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1 **I. INTRODUCTION**

2 Despite having been provided an opportunity to cure their deficient application for a
3 stay, Defendants continue to fail to meet their burden. That burden requires Defendants to
4 provide the Court with sufficient information from which it can make an intelligent
5 evaluation of the claim of Fifth Amendment privilege. Instead, Defendants offer a
6 skeletal declaration from Michael Cohen asserting an across-the-board, *blanket* refusal to
7 answer any questions. But such blanket claims of Fifth Amendment privilege are
8 expressly prohibited by law. United States v. Pierce, 561 F.2d 735, 741 (9th Cir. 1977).
9 Moreover, Mr. Cohen continues to fail to offer the essential details required to support his
10 declaration and the stay motion. Rather, Defendants mistakenly believe that the mere
11 *possibility* one defendant may be able to raise Fifth Amendment concerns grants them an
12 affirmative right to a stay. That is simply not the law. Keating v. Office of Thrift
13 Supervision, 45 F.3d 322, 326 (9th Cir. 1995) (“A defendant has no absolute right not to
14 be forced to choose between testifying in a civil matter and asserting his Fifth Amendment
15 privilege.”).

16 But perhaps the most glaring omission from Mr. Cohen’s declaration is the absence
17 of any explanation as to why his Fifth Amendment rights prevent any of the defendants
18 from adequately defending this case. As the Court knows, Mr. Cohen is not the only
19 witness in this case. Thus, even if he takes the Fifth on a question by question basis, the
20 case may proceed with document discovery from defendant Essential Consultants, LLC
21 (“EC”) and others, and with witness testimony from many other witnesses in the case.
22 Defendants offer no meaningful response to this contention. Accordingly, less drastic
23 measures in lieu of a stay are available and should be utilized.

24 **II. MR. COHEN’S BLANKET ASSERTION OF THE FIFTH AMENDMENT**
25 **PRIVILEGE DOES NOT SALVAGE DEFENDANTS’ STAY MOTION**

26 Mr. Cohen’s declaration fails to cure Defendants’ deficient stay application. It is
27 well settled that in invoking the Fifth Amendment, a “*blanket refusal to answer any*
28 *question is unacceptable.*” United States v. Pierce, 561 F.2d 735, 741 (9th Cir. 1977)

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1 (emphasis added). This is so because the Court has a “duty to scrutinize a witness’
2 invocation of the Fifth Amendment.” United States v. Vavages, 151 F.3d 1185, 1192 (9th
3 Cir. 1998). In order to permit the Court to carry out this duty, the “proper application” of
4 the Fifth Amendment privilege “requires that the Fifth Amendment claim *be raised in*
5 *response to specific questions.*” Pierce, 561 F.2d at 741 (emphasis added). Otherwise, the
6 Court has no ability “to determine whether a responsive answer might lead to injurious
7 disclosures.” Id. When faced with a blanket invocation, the Court “need proceed no
8 further in determining the extent” of any claimed Fifth Amendment rights. Id. at 741-42.

9 Here, the declaration is a textbook example of that which the law expressly
10 prohibits—namely, a blanket assertion of the Fifth Amendment privilege. He states: “I
11 will assert my 5th amendment rights in connection with *all* proceedings in this case due to
12 the ongoing criminal investigation by the FBI and U.S. Attorney for the Southern District
13 of New York.” [Cohen Decl., ¶3 (emphasis added).] This is no different from a “blanket
14 refusal to answer any question[.]” Pierce, 561 F.2d at 741. Mr. Cohen has thus failed to
15 provide the Court with a sufficient basis to evaluate his claimed Fifth Amendment rights.

16 Indeed, Mr. Cohen’s declaration does very little to respond to the concerns raised
17 by the Court at the prior hearing. He still makes no attempt to show why his testimony
18 would be self-incriminating. He fails to demonstrate the government is investigating, or is
19 even interested in pursuing, criminal charges relating to the Settlement Agreement, the
20 \$130,000 payment, or any other issue in this case. There is still no evidence of an actual
21 indictment or that criminal charges relating to anything Mr. Cohen would be testifying
22 about in this case (as opposed to other non-legal, business activities of Mr. Cohen)¹ are

23
24 ¹ In fact, Defendant Trump this morning repeatedly emphasized that in the investigation,
25 “they’re looking [in]to something having to do with his [i.e., Mr. Cohen’s] *business*” and
26 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
<<http://video.foxnews.com/v/5776719790001/?#sp=show-clips>> at 14:15-16:00.] These
statements—which contradict the position taken by Mr. Cohen in this declaration (and by
Defendants in their stay application)—further underscore why the absence of any
meaningful detail in Mr. Cohen’s declaration to enable the Court to make an intelligent
assessment of his Fifth Amendment claim is fatal to Defendants’ position.

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1 imminent. At best, Mr. Cohen’s declaration merely establishes that documents were
2 seized from his office “which contain information relating to the \$130,000 payment to
3 Plaintiff Stephanie Clifford at the center of this case...” [Dkt. No. 50 at ¶2.] It does not,
4 however, establish that Mr. Cohen’s testimony *as to any and all topics* in this action
5 “would ‘support a conviction under a federal criminal statute’” or “furnish a link in the
6 chain of evidence needed to prosecute the claimant for a federal crime.” Earp v. Cullen,
7 623 F.3d 1065, 1070 (9th Cir. 2010). In short, the declaration fails to amount to “a good
8 faith effort to provide ... sufficient information from which [the Court] can make an
9 intelligent evaluation of the claim.” Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir.
10 1981).

11 Defendants’ Request for Judicial Notice, filed without leave of the Court, also does
12 not cure this deficiency. Even if considered substantively, which it should not be,² the
13 cited portions of the transcripts do not offer the missing details regarding the nature of the
14 investigation and its claimed relationship to the \$130,000 payment, and do not establish a
15 likely causal link between Mr. Cohen’s testimony in this action and possible criminal
16 consequences. [See Dkt. No. 51.]

17 **IV. THE DECLARATION DOES NOT CHANGE THE WAIVER ANALYSIS**

18 Mr. Cohen’s declaration also does not alter the conclusion that he waived any Fifth
19 Amendment rights he may have had by filing a declaration discussing this case after the
20 FBI raids. Mr. Cohen attempts to address his waiver problem with one conclusory
21 sentence: “On April 10, 2018 I first realized my Fifth Amendment rights would be
22 implicated in this case, after I considered the events of April 9, 2018, described in the
23 above paragraph 2.” [Cohen Decl., ¶4.] This self-serving statement is insufficient. Mr.
24 Cohen, *a practicing lawyer*, admits he was aware that the FBI conducted raids of his
25 residence, office, and hotel room. He also admits he was aware the FBI seized materials
26 “relating to the \$130,000 payment[.]” [Cohen Decl., ¶2.] It follows, therefore, that if

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28 ² AS this Court previously noted, judicial notice cannot be taken over the truth of the facts asserted in the transcript. Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001).

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1 there are any Fifth Amendment concerns to begin with, Mr. Cohen must have *immediately*
2 identified and recognized those concerns *while the raids were occurring* on the morning
3 of April 9 (Eastern Time).³ Indeed, Mr. Cohen provides no detail as to what, if anything,
4 changed between the time of the raids on April 9 and the next day on April 10.⁴

5 Ultimately, however, the declaration does not change the waiver analysis. Mr.
6 Cohen voluntarily testified in *this proceeding*.⁵ He did so even after the FBI raids. And
7 he did so voluntarily, without any compulsion, for his own benefit to support his motion to
8 strike. In fact, Mr. Cohen was not even under a time constraint to file the declaration as
9 there was no deadline to file the motion on April 9. Accordingly, Brown v. United States,
10 356 U.S. 148 (1958), along with all of the other case law cited on pages 12 through 15 of
11 the Opposition (none of which Defendants addressed in their Reply), is controlling.

12 **V. LESS DRASTIC MEASURES ARE AVAILABLE**

13 Among all of the fatal omissions in Mr. Cohen’s declaration, perhaps none is as
14 damaging as the following: Mr. Cohen fails to assert that he and the other defendants
15 would be unable to adequately defend themselves in this litigation without Mr. Cohen.
16 Nor has Mr. Trump offered any testimony or other evidence demonstrating why he would
17 be unable to adequately defend himself in this case without Mr. Cohen.

18 For this reason, any legitimate “Fifth Amendment rights can be protected through
19

20 ³ There is also very good reason to question the genuineness of Mr. Cohen’s claim that he
21 supposedly first realized on April 10 that his Fifth Amendment rights would be
22 implicated. *On that same day*, Mr. Cohen addressed the allegations directly when he told
23 Don Lemon of *CNN* in a phone interview that “everything he did in regards to paying
24 Stormy Daniels was perfectly legal.” [Avenatti Decl., Ex. 6.]

25 ⁴ Mr. Cohen’s self-professed and subjective state of mind is ultimately irrelevant. That is
26 because, as set forth in Minnesota v. Murphy, “an individual may lose the benefit of the
27 privilege [against self-incrimination] without making a knowing and intelligent waiver.”
28 465 U.S. 420, 428 (1984) (quoting Garner v. United States, 424 U.S. 648, 654 n. 9
(1976)). Defendants rely on cases citing Fifth Amendment waiver rules that apply
specifically to custodial interrogations. Here, in contrast, as the Court in Murphy
recognized, “this extraordinary safeguard ‘does not apply outside the context of the
inherently coercive custodial interrogations for which it was designed.’” *Id.* at 429-30
(quoting Roberts v. United States, 445 U.S. 552, 560 (1980)).

Plaintiff’s argument is thus consistent with the portion of the Ninth Circuit opinion
Defendants cite in their reply. See U.S. v. Licavoli, 604 F.2d 613, 623 (9th Cir. 1979) (“It
is settled that a waiver of the Fifth Amendment privilege is limited to the *particular*
proceeding in which the waiver occurs.”) (emphasis added).

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1 less drastic means [than a stay], such as asserting the privilege on a question by question
 2 basis and implementing protective orders.” O. Thronas, Inc. v. Blake, No. CIV.09-
 3 00353DAE-LEK, 2010 WL 931924, at *3 (D. Haw. Mar. 10, 2010).

4 Here, Mr. Cohen can testify and assert Fifth Amendment rights he deems
 5 appropriate on a question by question basis. As an initial matter, the mere possibility that
 6 an adverse inference may be drawn from Mr. Cohen’s invocation of the Fifth Amendment
 7 does not justify a stay. Keating v. Office of Thrift Supervision, 45 F.3d 322, 326 (9th Cir.
 8 1995); Estate of Morad v. City of Long Beach, No. CV 16-06785 MWF (AJWx), 2017
 9 WL 5187826, at *9 (C.D. Cal. Apr. 28, 2017) (“Simply being forced to invoke the Fifth
 10 Amendment, and accordingly incurring an adverse inference, is not by itself the sort of
 11 prejudice that categorically favors a stay.”). Moreover, there is no prejudice to Mr. Cohen
 12 or any of the other defendants because Mr. Cohen is not the only witness in this case.
 13 Indeed, as Plaintiff pointed out at the hearing, many other witnesses—witnesses with no
 14 apparent need at this time to assert Fifth Amendment rights—will have to testify in this
 15 case. This includes, among others, Mr. Trump, witnesses from First Republic Bank (the
 16 bank from which the \$130,000 payment was made), Keith Davidson (Plaintiff’s prior
 17 counsel involved in the Settlement Agreement), Mr. Cohen’s assistant or other associates
 18 who assisted him with the Settlement Agreement and payment, possibly the four
 19 individuals named in paragraph 4.2 of the Settlement Agreement, and Mr. Cohen’s wife.
 20 Moreover, as previously noted, because EC does not have any Fifth Amendment rights,
 21 Braswell v. United States, 487 U.S. 99, 102 (1988), its records are available to the parties
 22 in this case.

23 VI. CONCLUSION

24 For the reasons stated above, Plaintiff respectfully requests the Court DENY
 25 Defendants’ *ex parte* application for a stay of this action in its entirety.

26 Dated: April 26, 2018

AVENATTI & ASSOCIATES, APC

27 By: /s/ Michael J. Avenatti

28 Michael J. Avenatti
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