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10  
11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 STEPHANIE CLIFFORD a.k.a.  
14 STORMY DANIELS a.k.a. PEGGY  
15 PETERSON, an individual,

16 Plaintiff,

17 v.

18 DONALD J. TRUMP a.k.a. DAVID  
19 DENNISON, an individual,  
20 ESSENTIAL CONSULTANTS, LLC, a  
21 Delaware Limited Liability Company,  
22 and DOES 1 through 10, inclusive,

23 Defendants.

Case No. 2:18-CV-02217-SJO-FFM

**DEFENDANT ESSENTIAL  
CONSULTANT, LLC'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO COMPEL  
ARBITRATION**

Assigned for All Purposes to the  
Hon. S. James Otero

**Date: April 30, 2018**  
**Time: 10:00 a.m.**  
**Location: 350 West 1<sup>st</sup> Street**  
**Courtroom 10C, 10<sup>th</sup> Floor**  
**Los Angeles, CA 90012**

Action Filed: March 6, 2018

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1 **I. INTRODUCTION**

2 Defendant and moving party Essential Consultants, LLC (“EC”) and Plaintiff  
3 Stephanie Clifford aka “Stormy Daniels” aka “Peggy Peterson” aka “PP” (herein,  
4 “Clifford”) are signatories to a written *Confidential Settlement Agreement and*  
5 *Mutual Release* dated October 28, 2016 (the “Settlement Agreement”). Declaration  
6 of Michael D. Cohen (“Cohen Decl.”), Ex. A, Settlement Agreement.

7 This motion seeks to enforce the arbitration provision in the Settlement  
8 Agreement, which was negotiated at arms’ length by the parties’ respective counsel,  
9 and pursuant to which Clifford accepted \$130,000 as consideration. The strong  
10 policy favoring arbitration set forth by Congress in the Federal Arbitration Act  
11 (“FAA”) dictates that this motion be granted, and that Clifford be compelled to  
12 arbitration, as she knowingly and voluntarily agreed to do.

13 Paragraph 5.2 of the Settlement Agreement contains an arbitration provision  
14 that requires Clifford to arbitrate any and all claims that may arise between Peggy  
15 Peterson (“PP”) and David Dennison (“DD”), stating in pertinent part:

16 Dispute Resolution. In recognition of the mutual benefits to  
17 DD and PP of a voluntary system of alternative dispute  
18 resolution which involves binding confidential arbitration of  
19 all disputes which may arise between them, it is their  
20 intention and agreement that any and all claims or  
21 controversies arising between DD on the one hand, and PP  
22 on the other hand, shall be resolved by binding confidential  
23 Arbitration to the greatest extent permitted by law.

24 According to Clifford’s allegations, Peggy Peterson (“PP”) is a pseudonym for  
25 Clifford, and David Dennison (“DD”) is a pseudonym for Defendant Donald J.  
26 Trump (“Mr. Trump”). Declaration of Brent H. Blakely (“Blakely Decl.”), Ex. B,  
27 Complaint, ¶ 18 and Ex. C, First Amended Complaint (“FAC”), ¶ 19.

28 The first cause of action in the FAC is for Declaratory Relief against Mr.

1 Trump (and EC). This claim undeniably falls within the arbitration provision: a  
2 claim or controversy between PP and DD.

3 Clifford asserts in the FAC that the Settlement Agreement was never formed  
4 because it was not signed by Mr. Trump, and thus the arbitration provision contained  
5 therein is unenforceable. This argument is without merit.

6 The first paragraph of the Settlement Agreement defines the parties to the  
7 agreement as EC, LLC “**and/or**” DAVID DENNISON (DD), “**on the one part,**” and  
8 PEGGY PETERSON (PP), “**on the other part.**” Ex. A, p. 0 (emphasis added). This  
9 provision demonstrates the parties’ intent for the Settlement Agreement to be binding  
10 once signed by EC and Clifford, and regardless of whether it was also signed by DD.

11 In conformance with this intent, and according to her own admissions, Clifford  
12 and EC signed the Settlement Agreement, and Clifford accepted \$130,000 in  
13 consideration from EC, despite not receiving a signature from Mr. Trump. Ex. B, ¶¶  
14 16, 22-23; Ex. C, ¶¶ 17, 23-24. Then, over the course of the next sixteen (16)  
15 months, Clifford did not at any time: reject the Settlement Agreement; offer to return  
16 or return the \$130,000; or assert that the Settlement Agreement is unenforceable  
17 because it was not signed by Mr. Trump, or for any other reason. Cohen Decl., ¶ 3.

18 In fact, Clifford did not assert any claim challenging the validity of the  
19 Settlement Agreement until she filed this action on March 6, 2018. To this day,  
20 Clifford has not returned the \$130,000 she received from EC. Thus, there is no  
21 question that a valid agreement to arbitrate Clifford’s claims against DD (and EC)  
22 was formed. *See infra* Section III.b.

23 On March 26, 2018, Clifford filed the FAC, which added several new  
24 challenges purportedly directed to the enforceability of the arbitration provision  
25 itself, as opposed to the enforceability of the Settlement Agreement as a whole.  
26 These allegations are a sham and were added in a transparent attempt to circumvent  
27 the holding in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006),  
28 which requires that Clifford’s challenges to the Settlement Agreement be decided by

1 the arbitrator. Blakely Decl., ¶¶ 7-8.<sup>1</sup>

2 Under the Ninth Circuit’s “crux of the complaint” test, Clifford’s challenges to  
3 the enforceability of the arbitration clause are effectively the same as her challenges  
4 to the Settlement Agreement as a whole. *See Bridge Fund Capital Corp. v.*  
5 *Fastbucks Franchise Corp.*, 622 F.3d 996, 1001 (9th Cir. 2010). Thus, the Court  
6 need not decide those issues for purposes of the instant motion. However, to the  
7 extent the Court does consider Clifford’s challenges to the arbitration provision, they  
8 should be rejected. For example, Clifford’s argument that the arbitration provision is  
9 unconscionable fails for several reasons. *See infra*, Section III.d.3.

10 Pursuant to well-established U.S. Supreme Court jurisprudence, the Court  
11 simply needs to determine that Clifford agreed to arbitrate any claim or controversy  
12 between her and DD arising under the Settlement Agreement. Clifford’s admissions  
13 in her Complaint and FAC confirm that she agreed to do just that.

14 Accordingly, EC respectfully requests that the Court issue an order compelling  
15 Clifford to arbitrate her dispute with DD (and EC).

16 **II. FACTUAL BACKGROUND**

17 Clifford is an adult-film actress and exotic dancer. In October 2016, according  
18 to an exclusive news report, Clifford unsuccessfully attempted to sell a story about an  
19 alleged one-night-stand with Mr. Trump to tabloid magazines and related outlets for  
20 \$200,000. Blakely Decl., Ex. D, 3/29/18 *Daily Mail* Article.

21 Instead, on or about October 28, 2016, Clifford (who was represented by legal  
22 counsel) entered into the Settlement Agreement with EC. Ex. A, p. 14; Ex. B, ¶ 22;  
23 Ex. C, ¶ 23; Cohen Decl., ¶¶ 2-3. In the Settlement Agreement, Clifford agreed to

24 \_\_\_\_\_

25 <sup>1</sup> Clifford also added a second cause of action against a newly named  
26 defendant, Michael Cohen, for defamation. This claim should be dismissed pursuant  
27 to California’s anti-SLAPP statute. Blakely Decl., Ex. I. However, as set forth in  
28 Section III.e. below, arbitration between EC and Clifford should proceed, regardless  
of whether Clifford’s claim against Mr. Cohen is also subject to arbitration.



1 accept \$130,000 from EC in exchange for, among other things, her promise not to  
2 disclose any Confidential Information (as defined in the Settlement Agreement),  
3 including any of DD’s “alleged sexual partners, alleged sexual actions or alleged  
4 sexual conduct.” Ex. A, pp. 4-5; Ex. B, ¶¶ 16, 22-23; Ex. C, ¶¶ 17, 23-24. In the  
5 Settlement Agreement, Clifford also promised to arbitrate any dispute that might later  
6 arise between her and DD. Ex. A, pp. 10.

7 EC paid Clifford the sum of \$130,000, as required under the Settlement  
8 Agreement. Ex. B, ¶ 23; Ex. C, ¶ 24; Cohen Decl., ¶ 3. For the next sixteen months,  
9 Clifford did not: reject the Settlement Agreement; assert that the Settlement  
10 Agreement was unenforceable because it was not signed by Mr. Trump; or make any  
11 attempt to return the \$130,000 that she was paid by EC. Cohen Decl., ¶ 3.

12 During that time, Clifford performed all of her obligations under the  
13 Settlement Agreement, and made no public statements disclosing Confidential  
14 Information. Cohen Decl., ¶ 4. Prior to February 2018, Clifford’s only complaint  
15 relating to the Settlement Agreement was in October 2016, when she complained that  
16 she was not receiving the \$130,000 due to her under the Settlement Agreement  
17 quickly enough. *Id.*

18 In February 2018, Clifford threatened to breach the Settlement Agreement by  
19 publicizing allegations that constitute Confidential Information. On or about  
20 February 22, 2018, EC filed an arbitration proceeding with ADR Services, Inc.  
21 (“ADRS”) in Los Angeles (the “Arbitration”), pursuant to the arbitration provision in  
22 the Settlement Agreement. Cohen Decl., ¶ 5. Upon EC’s emergency application for  
23 a Temporary Restraining Order (“TRO”), the arbitrator (a retired California Superior  
24 Court judge) issued an order prohibiting Clifford from violating the Settlement  
25 Agreement by, among other things, disclosing any Confidential Information to the  
26 media or in court filings (the “TRO”). *Id.* at ¶¶ 6-7, Ex. E, TRO.

27 Clifford has violated the Settlement Agreement and the TRO by, among other  
28 things, filing the Complaint and FAC in this action, and also by disclosing

1 Confidential Information to the news media, including in a nationally televised  
2 interview with Anderson Cooper on *60 Minutes*, which reportedly was watched by  
3 twenty-two million viewers. Clifford further breached the Settlement Agreement by  
4 sending her attorney of record in this action, Michael Avenatti, to participate in  
5 dozens of interviews on national television programs, wherein he has repeatedly  
6 disclosed Confidential Information.<sup>2</sup>

7 Within days of filing this action, and the massive news coverage that it  
8 generated, Clifford made appearances at various adult entertainment clubs, claiming  
9 publicly that her pay has quadrupled from the publicity of this lawsuit. Blakely  
10 Decl., Ex. F, 3/11/18 CNN article and Ex. G, 3/9/18 *Rolling Stone* article.

11 On March 21, 2018, counsel for the parties participated in the Local Rule 7-3  
12 conference of counsel. Blakely Decl., ¶ 7. During the conference, EC's counsel  
13 specifically informed counsel for Clifford that, pursuant to *Buckeye Check Cashing,*  
14 *Inc. v. Cardegna, supra*, Clifford's defenses to the enforcement of the Settlement  
15 Agreement as a whole must be decided by the arbitrator, not the Court. *Id.* Five days  
16 later, Clifford filed the FAC, which includes several new challenges to the arbitration  
17 provision, and a second cause of action against Mr. Cohen.

18 **III. CLIFFORD'S FIRST CAUSE OF ACTION FOR DECLARATORY**  
19 **RELIEF SHOULD BE COMPELLED TO ARBITRATION**

20 Where the making of an agreement to arbitrate is not "in issue," as is the case  
21 here, the District Court should order the parties to proceed with arbitration upon  
22 petition of the aggrieved party. 9 U.S.C. § 4. Section 4 states, in pertinent part:

23 A party aggrieved by the alleged failure, neglect, or refusal  
24 of another to arbitrate under a written agreement for  
25 arbitration may petition any United States district court

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26  
27 <sup>2</sup> Section 4.3.4 of the Settlement Agreement provides that any disclosure of  
28 Confidential Information by Clifford's counsel is deemed to be a disclosure by her.

1 which, save for such agreement, would have jurisdiction  
2 under title 28...for an order directing that such arbitration  
3 proceed in the manner provided for in such agreement....  
4 The court shall hear the parties, and **upon being satisfied**  
5 **that the making of the agreement for arbitration or the**  
6 **failure to comply therewith is not in issue**, the court shall  
7 make an order directing the parties to proceed to arbitration  
8 in accordance with the terms of the agreement.

9 *Id.* (emphasis added.)

10 Here, the Settlement Agreement contains an agreement by EC and Clifford to  
11 arbitrate any dispute between PP and DD. The Complaint and FAC were filed by  
12 Clifford against DD and EC, assert a claim arising under the Settlement Agreement,  
13 and thus undeniably fall within the scope of the arbitration provision.

14 Contrary to Clifford's assertion, a valid agreement to arbitrate was formed. By  
15 Clifford's own admission, she signed the Settlement Agreement, accepted the  
16 consideration required of EC thereunder and did not raise any objection to its  
17 enforceability until approximately sixteen months thereafter. Thus, Clifford  
18 knowingly and voluntarily agreed to arbitrate this dispute. The Court need not go  
19 any further to grant this motion and compel this matter to arbitration. Thereafter,  
20 Clifford's claims of invalidity or unenforceability of the Settlement Agreement  
21 should be determined by the arbitrator. *See infra*, Sections III.c. and III.d.

22 a. **The Federal Arbitration Act Establishes A Liberal Policy Favoring**  
23 **The Enforcement Of Arbitration Agreements**

24 “[T]he Federal Arbitration Act (FAA or Act), 9 U.S.C. § 1 *et seq.* (2000 ed.  
25 and Supp. V), establishes a national policy favoring arbitration when the parties  
26 contract for that mode of dispute resolution.” *Preston v. Ferrer*, 552 U.S. 346, 349  
27 (2008); *see also Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1,  
28 24 (1983) (“Section 2 is a congressional declaration of a liberal federal policy

1 favoring arbitration agreements.”); *Mortensen v. Bresnan Comm., LLC*, 722 F.3d  
2 1151, 1160 (9th Cir. 2013) (“the FAA’s purpose is to give preference (instead of  
3 mere equality) to arbitration provisions.”). “The Act, which rests on Congress’  
4 authority under the Commerce Clause, supplies not simply a procedural framework  
5 applicable in federal courts; it also calls for the application, in state as well as federal  
6 courts, of federal substantive law regarding arbitration.” *Id.*

7 The FAA “mandates that district courts *shall* direct the parties to proceed to  
8 arbitration on issues as to which an arbitration agreement **has been signed.**” *Dean*  
9 *Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (bold added); *Republic of*  
10 *Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 475 n.8 (9th Cir. 1991) (the FAA  
11 “reflects the strong Congressional policy favoring arbitration by making such clauses  
12 ‘valid, irrevocable, and enforceable.’”). The FAA “is phrased in mandatory terms,”  
13 thus a District Court “has little discretion to deny an arbitration motion.” *Republic of*  
14 *Nicaragua, supra*, 937 F.2d at 475. “If a contract contains an arbitration clause,  
15 claims brought under or against that contract are presumed arbitrable.” *Guadagno v.*  
16 *E\*Trade Bank*, 592 F.Supp.2d 1263, 1272 (C.D. Cal. 2008).

17 In *Guadagno v. E\*Trade Bank*, the plaintiff filled out an online application for  
18 an E\*Trade account, and clicked a box acknowledging that she had reviewed  
19 E\*Trade’s account agreement, which contained an arbitration clause. 592 F.Supp.2d  
20 at 1267. This Court rejected plaintiff’s argument that she did not assent to the  
21 arbitration agreement, and granted defendant’s motion to compel arbitration. *Id.* at  
22 1273. In doing so, this Court held that any “[d]oubts should be resolved in favor of  
23 arbitrability.” *Id.* at 1272; *see also Moses H. Cone Memorial Hosp. v. Mercury*  
24 *Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (“[A]ny doubts concerning the scope of  
25 arbitrable issues should be resolved in favor of arbitration.”).

26 **b. Clifford Entered Into A Valid Arbitration Agreement**

27 The Ninth Circuit uses “general state-law principles of contract interpretation  
28 to decide whether a contractual obligation to arbitrate exists.” *Goldman, Sachs & Co.*

1 *v. City of Reno, supra*, 747 F.3d at 743 (9th Cir. 2014). Under those principles, there  
2 should be no question that an enforceable arbitration agreement was reached.

3 Clifford admits that she (and EC) signed the Settlement Agreement, that she  
4 was represented by counsel in connection therewith, and that EC paid her \$130,000  
5 pursuant to the Settlement Agreement. Ex. B, ¶¶ 16, 22-23. By doing so, Clifford  
6 accepted the terms of Settlement Agreement, including her obligation to arbitrate  
7 contained therein. *See* Cal. Civ. Code § 1589 (“A **voluntary acceptance of the**  
8 **benefit of a transaction** is equivalent to a consent to all the obligations arising from  
9 it, so far as the facts are known, or ought to be known, to the person accepting.”)  
10 (emphasis added); Cal. Civ. Code § 1584 (“Performance of the conditions of a  
11 proposal, or the **acceptance of the consideration offered with a proposal**, is an  
12 acceptance of the proposal.”) (emphasis added.)

13 1. Clifford’s Agreement To Arbitrate Is Enforceable Regardless Of  
14 Whether DD Also Signed The Agreement

15 Clifford is bound by the terms of the Settlement Agreement, including the  
16 arbitration provision, even though it was not signed by DD. First, the Settlement  
17 Agreement contemplated a binding agreement between Clifford and EC, regardless  
18 of whether DD also signed. Second, California law does not require all parties to  
19 sign a contract for it to be binding on those who did sign it. “It is not the rule that a  
20 contract, which on its face purports to be between the parties named in the  
21 instrument, must invariably be executed by all whose names appear in the instrument  
22 before it will be binding on any.” *Kaneko v. Okuda*, 195 Cal.App.2d 217, 225  
23 (1961). “In the absence of a showing that a contract is not to be deemed complete  
24 unless signed by all parties, **the parties signing may be bound though others have**  
25 **not signed.**” *Id.* (emphasis added); *see also Angell v. Rowlands*, 85 Cal.App.3d 536,  
26 540 (1978).

27 Here, the first paragraph of the Settlement Agreement demonstrates that the  
28 parties intended for the Settlement Agreement to be binding regardless of whether it

1 was signed by DD. It expressly defines the parties to the agreement as EC, LLC  
2 “**and/or**” DAVID DENNISON (DD), “**on the one part**,” and PEGGY PETERSON  
3 (PP), “**on the other part**.” Ex. A, p. 0 (emphasis added).

4 If this language is not clear enough, it is well-settled under California law that  
5 the Court need look no further than Clifford’s subsequent conduct to determine that  
6 she intended for the Settlement Agreement to be binding without DD’s signature.  
7 “Where any doubt exists as to the purport of the parties’ dealings as expressed in the  
8 wording of their contract, the court may look to...subsequent acts or declarations of  
9 the parties ‘shedding light upon the question of their mutual intention at the time of  
10 contracting.’ (citation).” *Barham v. Barham*, 33 Cal.2d 416, 423 (1949). “[I]t is said  
11 that ‘a construction given the contract by the acts and conduct of the parties with  
12 knowledge of its terms, before any controversy has arisen as to its meaning, is  
13 entitled to great weight and will, when reasonable, be adopted and enforced by the  
14 court.’ (citation).” *Id.*

15 In *Crestview Cemetery Ass'n v. Dieden*, 54 Cal.2d 744, 757 (1960), the  
16 California Supreme Court held that the subsequent actions of the parties to a contract  
17 demonstrated their belief that the “contract had been fully performed.” The Court  
18 stated: “The practical construction placed on the contract by the parties is far more  
19 convincing than the construction arrived at in an attempt to escape a liability already  
20 accrued.” *Id.* at 755.<sup>3</sup>

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21  
22  
23 <sup>3</sup> In doing so, the California Supreme Court quoted the following passage from its  
24 opinion in *Mitau v. Roddan*, 149 Cal. 1, 14 (1906):

25 It is to be assumed that parties to a contract best know what was  
26 meant by its terms, and are the least liable to be mistaken as to its  
27 intention; that each party is alert to his own interests, and to  
28 insistence on his rights, and that whatever is done by the parties  
contemporaneously with the execution of the contract is done  
under its terms as they understood and intended it should be.  
Parties are far less liable to have been mistaken as to the intention  
(footnote continued)

1 Clifford signed the Settlement Agreement, accepted the \$130,000 that EC was  
2 obligated to pay her, and, despite not receiving any signature from Mr. Trump,  
3 Clifford did not reject the Settlement Agreement, did not deem it null and void  
4 because it was supposedly missing a signature, and did not return, or offer to return,  
5 the \$130,000 she was paid, prior to filing this lawsuit approximately sixteen months  
6 thereafter. Ex. B, ¶¶ 16, 22-23; Ex. C, ¶¶ 17, 23-24; Cohen Decl., ¶ 3. Further,  
7 Clifford performed all of her obligations under the Settlement Agreement during  
8 those sixteen months and made no public statements that EC is aware of disclosing  
9 Confidential Information. Cohen Decl., ¶ 4. Prior to February 2018, Clifford’s only  
10 complaint relating to the Settlement Agreement was that she was not receiving the  
11 payment quickly enough. *Id.* This is powerful evidence that Clifford intended for the  
12 Settlement Agreement to be binding absent DD’s signature.

13 2. Clifford Received Adequate Consideration Under The Settlement  
14 Agreement

15 Under California Civil Code § 1550, “sufficient cause or consideration” is  
16 necessary for an enforceable contract. However, “[a]dequacy of consideration need  
17 not be proved where the defendant has already accepted the consideration.” *Abers v.*  
18 *Rounsavell*, 189 Cal.App.4th 348, 362 (2010), citing *Beab, Inc. v. First Western Bank*  
19 *& Tr. Co.*, 204 Cal.App.2d 680, 685 (1962). Because Clifford accepted EC’s  
20 consideration under the Settlement Agreement (\$130,000), and made no attempt to

21 \_\_\_\_\_  
22 of their contract during the period while harmonious and practical  
23 construction reflects that intention, than they are when subsequent  
24 differences have impelled them to resort to law, and one of them  
25 then seeks a construction at variance with the practical  
26 construction they have placed upon it.  
27 *Crestview Cemetery Ass'n v. Dieden*, 54 Cal.2d at 753; see also *City of Hope Nat.*  
28 *Med. Ctr. v. Genentech, Inc.*, 43 Cal.4th 375, 393 (2008) (“A party’s conduct  
occurring between execution of the contract and a dispute about the meaning of the  
contract’s terms may reveal what the parties understood and intended those terms to  
mean.”)

1 reject such consideration for nearly sixteen months, there should be no question that  
2 such consideration was adequate.

3       Regardless, “[a] consideration of one dollar is ordinarily sufficient to support a  
4 contract at law.” *Abers v. Rounsavell, supra*, 189 Cal.App.4th at 362. “‘A written  
5 instrument is presumptive evidence of a consideration’ (Civ.Code, § 1614), and in  
6 any event all the law requires for sufficient consideration is the proverbial  
7 ‘peppercorn.’” *San Diego City Firefighters, Local 145, AFL-CIO v. Bd. of Admin. of*  
8 *San Diego City Employees' Ret. Sys.*, 206 Cal.App.4th 594, 619 (2012).

9       Moreover, the consideration that Clifford received from EC (\$130,000) was  
10 sufficient to support all of her obligations under the Settlement Agreement, including  
11 to arbitrate, independent of whether the Settlement Agreement also provided for non-  
12 monetary consideration from DD. “[W]here there is consideration for any of the  
13 agreements specified in a contract[,] the contract as a whole cannot be said to lack  
14 mutuality or consideration, nor can any particular promise or agreement contained  
15 therein be singled out and deemed inoperative because no special or particular  
16 consideration appears to have been given or promised for it.” *Brawley v. Crosby*  
17 *Research Found.*, 73 Cal.App.2d 103, 118 (1946), quoting *Tennant v. Wilde*, 98  
18 Cal.App. 437, 442 (1929). “In other words, “[w]hile consideration is a necessary  
19 element of every contract, it is not necessary that each separate promise or covenant  
20 should have a distinct consideration.” *Daily Transit Mix, LLC v. Daily Transit Mix*  
21 *Corp.*, 2011 WL 5416188, at \*10 (Cal. Ct. App. Nov. 9, 2011), citing *Brawley v.*  
22 *Crosby Research Found., supra*, 73 Cal.App.2d at 118. Thus, Clifford should be  
23 required to arbitrate this dispute, regardless of whether she received separate  
24 consideration from DD under the Settlement Agreement.

25       **c. Clifford’s Challenges To The Contract As A Whole Should Be**  
26       **Decided By The Arbitrator, Not The Court**

27       The U.S. Supreme Court has held that “a challenge to the validity of the  
28 contract as a whole, and not specifically to the arbitration clause, must go to the



1 arbitrator.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. at 444. In *Buckeye*  
2 *Check Cashing*, the Court held that a claim that the subject contract was illegal and  
3 void *ab initio* must be decided by the arbitrator, not the court. *Id*; see also *Preston v.*  
4 *Ferrer, supra*, 552 U.S. at 349. The holding in *Buckeye Check Cashing* followed the  
5 decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404  
6 (1967), wherein the Supreme Court held that the FAA “does not permit the federal  
7 court to consider claims of fraud in the inducement of the contract generally,” as  
8 opposed to a claim of “fraud in the inducement of the arbitration clause itself.” See  
9 also *Mentor Capital, Inc. v. Bhang Chocolate Co.*, No. 3:14-CV-3630 LB, 2014 WL  
10 6485666, at \*4-6 (N.D. Cal. Nov. 19, 2014) (held that claim for rescission of entire  
11 agreement for failure of consideration must be decided by arbitrator), citing *Buckeye*  
12 *Check Cashing v. Cardegna, supra*, 546 U.S. at 444-446.

13 “[A]s a matter of substantive federal arbitration law, an arbitration provision is  
14 severable from the remainder of the contract.” *Buckeye Check Cashing, Inc. v.*  
15 *Cardegna, supra*, 546 U.S. at 445-446. “[U]nless the challenge is to the arbitration  
16 clause itself, the issue of the contract’s validity is considered by the arbitrator in the  
17 first instance.” *Id*; *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71 (the Supreme  
18 Court requires “the basis of challenge to be directed specifically to the agreement to  
19 arbitrate before the court will intervene.”). In *Guadagno v. E\*Trade Bank, supra*,  
20 592 F.Supp.2d at 1270, this Court held: “If a party challenges the validity of an  
21 arbitration clause itself, rather than the entire contract containing the clause, the  
22 arbitration clause’s validity is for the court, rather than an arbitrator, to decide.”  
23 (citing *Buckeye Check Cashing, Inc. v. Cardegna, supra*, 546 U.S. at 445-446.)

24 **d. The “Crux Of The Complaint” Is A Challenge To The Settlement**  
25 **Agreement As A Whole, Not The Arbitration Provision**

26 Clifford’s newly added, sham challenges to the validity of the arbitration  
27 provision should be viewed as nothing more than challenges to the Settlement  
28 Agreement as a whole, and thus are to be decided by the arbitrator. Following the

1 U.S. Supreme Court’s holding in *Buckeye Check Cashing*, the Ninth Circuit Court of  
2 Appeals has “applied the ‘crux of the complaint’ rule as a method for differentiating  
3 between challenges to the arbitration provision alone and challenges to the entire  
4 contract.” *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996,  
5 1001 (9th Cir. 2010). “The ‘crux of the complaint’ matters when the complaint itself  
6 makes clear that the challenge to the arbitration clause is the same challenge that is  
7 being made to the entire contract.” *Id.*

8 In *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1263-1264 (9th Cir. 2006),  
9 the Ninth Circuit held that “when the crux of the complaint challenges the validity or  
10 enforceability of the agreement containing the arbitration provision, then the question  
11 of whether the agreement, as a whole, is unconscionable must be referred to the  
12 arbitrator.” Prior to Clifford’s thinly veiled attempt to circumvent the holding of  
13 *Buckeye Check Cashing, Inc.* by filing the FAC, the Complaint demonstrated that  
14 Clifford’s challenges to arbitration clause are the same as her challenges to the  
15 Settlement Agreement as a whole:

- 16 • Paragraph 38 alleges, in pertinent part, that the Settlement Agreement was  
17 “never formed” because “Mr. Trump never signed” it; and “as a ... result,  
18 there is no agreement to arbitrate between the parties.”
- 19 • Paragraph 39 alleges, in pertinent part, that the Settlement Agreement is  
20 “invalid, unenforceable, and/or void under the doctrine of  
21 unconscionability”; and “as a ... result, there is no agreement to arbitrate  
22 between the parties.”
- 23 • Paragraph 40 alleges, in pertinent part, that the Settlement Agreement is  
24 “invalid, unenforceable, and/or void because [it] is illegal and/or violate[s]  
25 public policy”; and “as a ... result, there is no agreement to arbitrate  
26 between the parties.”

27 Ex. B, pp. 6-7. Clifford’s newly asserted defenses to the enforceability of the  
28 arbitration provision in the FAC are also the same as her defenses to the validity of

1 the Settlement Agreement as a whole:

- 2 • Paragraph 41 alleges, in pertinent part, that “no agreement was ever formed  
3 or existed” and “as a ... result, there is no agreement to arbitrate between  
4 the parties.”
- 5 • Paragraphs 42 and 43 allege that the Settlement Agreement as a whole is  
6 unconscionable, while paragraph 58 also alleges that the arbitration  
7 provision is unconscionable.
- 8 • Paragraphs 44 through 55 allege that the Settlement Agreement as a whole  
9 is void *ab initio* because it is illegal and violates public policy, while  
10 paragraphs 59 through 61 allege that the arbitration provision is void *ab*  
11 *initio* because it is illegal and violates public policy.

12 Ex. C, pp. 8-15.

13 Thus, the “crux of the complaint” is a challenge to the Settlement Agreement  
14 as a whole, not the arbitration provision contained therein.

15 1. The Authorities Relied Upon By Clifford To Argue That The Court  
16 Should Decide “Formation” Are Highly Distinguishable

17 Clifford contends that her challenge to the formation of the Settlement  
18 Agreement should be decided by the Court, not the arbitrator. However, the  
19 authorities Clifford relied upon during the parties’ Local Rule 7-3 conference of  
20 counsel are highly distinguishable. Blakely Decl., ¶ 7.

21 In *Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 964 (9th Cir. 2007), the  
22 plaintiff alleged that she never received, much less signed, the membership  
23 agreement containing the arbitration clause, and that she did not even know about  
24 the membership until approximately 13 months after she was supposedly sent the  
25 agreement. *Id.* at 958-959. Under those facts, the Ninth Circuit held that the District  
26 Court should determine whether an enforceable arbitration agreement was formed.  
27 This case is very different: here, Clifford acknowledges that she signed and received  
28 the agreement, along with the consideration required of EC thereunder.

1           In *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1144  
2 (9th Cir. 1991), the cities of Lawndale, San Marino, and Palmdale, and the Palmdale  
3 Redevelopment Agency, claimed that the person who signed the subject agreements  
4 on their behalf, an individual “who worked in various financial capacities for those  
5 entities,” did not have authority to bind them to those agreements, which opened  
6 investments accounts with defendant (in which the plaintiffs lost \$8 million). *Id.* at  
7 1140–1141. Under those facts, the Ninth Circuit held that the District Court should  
8 determine whether the signatory to the agreements containing the arbitration clauses  
9 had authority to bind the plaintiffs to those agreements. *Id.* By contrast, Clifford has  
10 not, nor can she, make any argument that she lacked the authority to enter into the  
11 Settlement Agreement.

12           In *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 741, 747 (9th Cir.  
13 2014), the Ninth Circuit held that the forum selection clauses in Goldman, Sachs &  
14 Co.’s Broker-Dealer Agreements with the City of Reno, which stated that “all actions  
15 and proceedings ... shall be brought in the ... District of Nevada,” superseded  
16 Goldman’s default obligation to arbitrate under FINRA’s general rules. Here,  
17 Clifford makes no such argument.

18           In *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 303-304 (2010),  
19 the Court held that the District Court should determine arbitrability of a dispute over  
20 **when** the contract was formed, because this issue governed whether the arbitration  
21 agreement was in existence and enforceable during the relevant time period. Here,  
22 there is no dispute that the Settlement Agreement was executed by Clifford and EC  
23 more than a year before this dispute arose.

24           Moreover, the cases cited in Clifford’s Motion for Expedited Jury Trial for the  
25 proposition that the court should decide her challenges to the formation of the  
26 Settlement Agreement also are highly distinguishable. Dkt. No. 16, pp., 11-12.

27           In *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1287 (9th Cir.  
28 2009), the Ninth Circuit held that an arbitrator did not have the authority to issue an

1 injunction against non-parties, “such as cousins of former spouses” of signatories,  
2 and a “a non-party grandmother” of a signatory, to an arbitration agreement. The  
3 Court held that “these collateral relatives are not in privity with the...signatories.”  
4 *Id.* Here, there is no dispute that EC is seeking to enforce the arbitration provision  
5 against a signatory to the Settlement Agreement (Clifford).

6 In *Doherty v. Barclays Bank Delaware*, No. 16-CV-01131-AJB-NLS, 2017  
7 WL 588446, at \*4 (S.D. Cal. Feb. 14, 2017), the defendant, one of the top ten issuers  
8 of credit cards in the United States, alleged that plaintiff was bound by the arbitration  
9 provision contained in defendant’s “Cardmember Agreement” because plaintiff was  
10 an authorized user of his father’s credit card account. However, the plaintiff claimed  
11 that he did not know he was an authorized user on the account, and that he was added  
12 as an authorized user without his knowledge. *Id.* at \*1, 4. Under those facts, the  
13 District Court denied the defendant’s motion to compel arbitration. *Id.* at \*4. Here,  
14 there is no dispute that Clifford signed the Settlement Agreement.

15 In *Switch, LLC v. Ixmation, Inc.*, No. 15-CV-01637-MEJ, 2015 WL 4463672,  
16 at \*3 (N.D. Cal. July 21, 2015), the plaintiff argued that “it did not sign or otherwise  
17 agree to” the defendant’s “Proposal,” which contained the subject arbitration  
18 provision. Under those facts, the District Court denied the defendant’s motion to  
19 compel arbitration. *Id.* at \*5. Again, there is no similar dispute here.

20 In contrast to the authorities relied upon by Clifford, in *Teledyne, Inc. v. Kone*  
21 *Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1989), the Ninth Circuit held that the arbitrator,  
22 not the District Court, must decide whether an agreement signed by both parties, but  
23 that defendant claimed was an unenforceable “DRAFT”, was formed. In doing so,  
24 the Court held that cases must “be submitted to arbitration unless there is a challenge  
25 to the arbitration provision which is *separate* and *distinct* from any challenge to the  
26 underlying contract.” *Id.* (emphasis in original), citing *Prima Paint Corp. v. Flood &*  
27 *Conklin Mfg. Co.*, *supra*, 388 U.S. at 402-404.

28

1           2.     The Arbitration Provision Is Not Unconscionable

2           Clifford argues that the arbitration provision in the Settlement Agreement is  
3 unconscionable based on various theories. To the extent the Court even decides this  
4 issue, it should find that none of these arguments have merit.

5           **First**, under the FAA, there are strict limits on the types of unconscionability  
6 arguments that may be raised against an arbitration agreement. 9 U.S.C. § 2 limits the  
7 grounds for denying enforcement of arbitration agreements to “such grounds as exist  
8 at law or in equity for the revocation of any contract.” The U.S. Supreme Court has  
9 interpreted this rule to prohibit unconscionability arguments directed to the  
10 substantive effect of the arbitration clause itself. Thus, in *AT&T Mobility LLC v.*  
11 *Concepcion*, 563 U.S. 333, 340-341 (2011), the Court held that a California doctrine  
12 holding that contractual waivers of class action arbitration were unconscionable was  
13 preempted by the FAA, even though it was an application of a state law rule. Thus, to  
14 the extent that Clifford seeks to use unconscionability doctrine to impose substantive  
15 limits on the arbitration clause, these arguments must fail.

16           **Second** and independently, the arbitration clause is not unconscionable under  
17 California law. “Under California law, unconscionability has both a procedural and a  
18 substantive element, the former focusing on oppression or surprise due to unequal  
19 bargaining power, the latter on overly harsh or one-sided results.” *Mohamed v. Uber*  
20 *Technologies, Inc.*, 848 F.3d 1201, 1210 (9th Cir. 2016) (broad delegation of  
21 arbitrability issues to arbitrator is not unconscionable) (internal quotations omitted).  
22 **“Both substantive and procedural unconscionability must be present in order for**  
23 **a court to find a contract unconscionable**, but they need not be present in the same  
24 degree... Recently, the California Supreme Court has emphasized that  
25 unconscionability requires a substantial degree of unfairness beyond a simple old-  
26 fashioned bad bargain... Rather, unconscionable contracts are those that are so one-  
27 sided as to shock the conscience.” *Id.* (emphasis added; internal quotations omitted).  
28

1 “Procedural unconscionability focuses on two factors in contract formation:  
2 oppression and surprise.... Oppression arises when there is inequality in bargaining  
3 power between the parties to a contract, resulting in no real opportunity to negotiate  
4 the terms of the contract and the absence of meaningful choice. Surprise involves the  
5 extent to which the supposedly agreed terms were hidden from the party seeking to  
6 avoid enforcement of the agreement.” *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087,  
7 1093-94 (9th Cir. 2009) (arbitration clause in readable type in cellular service  
8 agreement was not procedurally unconscionable).

9 Here, there is no procedural unconscionability. There is no evidence that  
10 Clifford was forced to enter into the Settlement Agreement, had no meaningful choice  
11 to do so, or had no choice but to accede to the terms of the arbitration clause as  
12 drafted. The Settlement Agreement was the antithesis of standard form adhesion  
13 contracts imposed by large corporations that the procedural unconscionability  
14 doctrine addresses. Clifford had the power to walk away, the power to negotiate the  
15 terms of the agreement, and only entered into the agreement after she unsuccessfully  
16 attempted to sell her story for \$200,000. Ex. D. Because there is no procedural  
17 unconscionability, all of Clifford’s unconscionability defenses fail.

18 In any event, Clifford also has not shown substantive unconscionability. Her  
19 contention is exactly what *Mohamed* states cannot constitute substantive  
20 unconscionability, namely, that she made an old fashioned bargain that she now  
21 regrets, not that any terms of the Settlement Agreement shock the conscience.  
22 Clifford has shown no unfairness in the arbitration process (an argument that is barred  
23 under *Concepcion* anyway), and no unfairness in the terms of the arbitration clause.  
24 For instance, Clifford has not shown how she is prejudiced by being required to go to  
25 the arbitrator to get an injunction to enforce the Settlement Agreement, or that the  
26 choice of law rule in the Settlement Agreement has harmed her in any way. Nor has  
27 she shown that the other terms of the agreement—a straightforward promise to pay  
28 \$130,000 in exchange for various confidentiality obligations—were so one-sided as to

1 shock the conscience. If this agreement is unconscionable, then any confidentiality  
2 agreement is unconscionable, and that is not the law. *Borgarding v. JP Morgan*  
3 *Chase Bank*, 2016 WL 8904413 at \*9 (C.D. Cal. Oct. 31, 2016) (“A confidentiality  
4 clause, however, does not, render the entire arbitration agreement substantively  
5 unconscionable.”).

6 Finally, even if there is a provision (such as the choice of law provision) of the  
7 arbitration agreement that is found to step too far under unconscionability doctrine,  
8 any such provision is severable from the rest of the arbitration agreement. The core  
9 agreement is to arbitrate all disputes arising under the Settlement Agreement;  
10 restrictions on injunctive relief and special choice of law rules are not central to the  
11 bargain and can be excised if the Court determines that they are unconscionable.  
12 *Mohamed v. Uber Technologies, Inc, supra*, 848 F.3d at 1213-14 (holding that waiver  
13 of private attorney general suits, which was unenforceable, was severable from  
14 remainder of arbitration clause).

15 **e. The Newly Added Second Cause Of Action Against Michael Cohen**  
16 **Does Not Prevent Arbitration Of The First Cause Of Action**

17 Clifford cannot avoid arbitration of her first cause of action against DD and EC  
18 on the basis that her second cause of action asserts a non-arbitrable claim against Mr.  
19 Cohen. “[W]hen a complaint contains both arbitrable and nonarbitrable claims, the  
20 [Federal Arbitration] Act requires courts to ‘compel arbitration of pendent arbitrable  
21 claims when one of the parties files a motion to compel, even where the result would  
22 be the possibly inefficient maintenance of separate proceedings in different forums.’”  
23 *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011), citing *Dean Witter Reynolds Inc. v.*  
24 *Byrd*, 470 U.S. 213, 217 (1985). “The Act has been interpreted to require that if a  
25 dispute presents multiple claims, some arbitrable and some not, the former must be  
26 sent to arbitration even if this will lead to piecemeal litigation.” *Id.* at 19.

27 “Moreover, a plaintiff cannot avoid arbitration merely by claiming that one or  
28 more of its claims for relief is against a defendant who is not a signatory to the



1 agreement.” *Encore Prods., Inc. v. Promise Keepers*, 53 F.Supp.2d 1101, 1113 (D.  
2 Colo. 1999), citing *Hilti, Inc. v. Oldach*, 392 F.2d 368, 369 n. 2 (1st Cir. 1968)  
3 (“arbitration should not be foreclosed simply by adding persons to a civil action who  
4 are not parties to the arbitration agreement because such an inclusion would thwart  
5 the federal policy in favor of arbitration”); *Steinberg & Lyman v. Takacs*, 774  
6 F.Supp. 885, 888 (S.D.N.Y.1991) (“while [plaintiff] asserts that notions of judicial  
7 economy favor having this Court try the entire action at one time, rather than sending  
8 only two of the defendants to arbitration, such an argument does not withstand the  
9 mandate of the [FAA].”)

10 **IV. THE COURT SHOULD STAY THIS ACTION PENDING THE**  
11 **OUTCOME OF THE ARBITRATION**

12 The Court should stay all proceedings with respect to the first cause of action,  
13 pending the completion of the arbitration. 9 U.S.C. § 3. Section 3 provides, in  
14 pertinent part:

15 If any suit or proceeding be brought in any of the courts of  
16 the United States upon any issue referable to arbitration  
17 under an agreement in writing for such arbitration, the court  
18 in which such suit is pending, upon being satisfied that the  
19 issue involved in such suit or proceeding is referable to  
20 arbitration under such an agreement, shall on application of  
21 one of the parties stay the trial of the action until such  
22 arbitration has been had...

23 **V. CONCLUSION**

24 For the foregoing reasons, the instant Motion to Compel Arbitration should be  
25 granted; Clifford should be ordered to arbitration in the currently pending arbitration  
26 between the parties with ADRS, consistent with the parties’ agreement; and the first  
27 cause of action in the FAC should be stayed pending the outcome of the arbitration.  
28

1 Dated: April 2, 2018

BLAKELY LAW GROUP

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By: /s/ Brent H. Blakely

BRENT H. BLAKELY

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