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8/15/2023
STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

11 STATE BAR COURT

12 HEARING DEPARTMENT - LOS ANGELES

14 In the Matter of:) CASE NO. SBC-23-O-30029
15)
16 JOHN CHARLES EASTMAN,) STATE BAR'S SUPPLEMENT TO
17 State Bar No. 193726,) OPPOSITION TO RESPONDENT'S
18) MOTION FOR ABATEMENT
19 An Attorney of the State Bar)
20)
21)
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20 The State Bar hereby provides a supplement to its Opposition to Respondent's
21 Motion for Abatement which the State Bar filed on August 10, 2023 ("Opposition").

22 **A. Fulton County Has Indicted Respondent on Nine Criminal Charges**

23
24 On August 14, 2023, the Fulton County District Attorney filed a 41-count indictment
25 against Former President Trump, respondent, and 17 other co-defendants which alleges that
26 the defendants orchestrated a "criminal enterprise" to reverse the results of the 2020 election
27 in Georgia. Respondent is charged in nine counts: Count One, violation of the Georgia

1 Racketeer Influenced and Corrupt Organizations Act; Count Two, solicitation of violation of
2 oath by public officer; Count Nine, conspiracy to commit impersonating a public officer;
3 Count 11, conspiracy to commit forgery; Count 13, conspiracy to commit false statements
4 and writings; Count 15, conspiracy to commit filing false documents; Count 17, conspiracy
5 to commit forgery in the first degree; Count 19, conspiracy to commit false statements and
6 writings; and Count 27, filing false documents.¹

7 **B. The Keating Factors Still Weigh Against Abatement**

8 The State Bar maintains its opposition to abatement of these proceedings, as most of
9 the grounds set forth in the State Bar's August 10, 2023, Opposition still apply. While it is
10 no longer uncertain whether respondent will be indicted on criminal charges, and many of
11 the allegations in the Fulton County indictment are related to the issues in the State Bar case,
12 the prejudice to the State Bar and the public interest in resolving the State Bar case weigh in
13 favor of completing the trial.

14 The Fulton County criminal case against respondent could take years to resolve,
15 particularly given the number of co-defendants. As the State Bar noted in the Opposition,
16 respondent knew that he faced possible criminal charges related to the conduct alleged in the
17 NDC, including in Fulton County, but he chose to proceed with his State Bar trial without
18 moving for abatement. Now, halfway through the trial, the State Bar would be highly
19 prejudiced by delaying the completion of trial and a decision in this case for what could be
20 several years. Delaying the further presentation of evidence also risks loss of evidence.² (See
21

22 ¹ Respondent's counsel informed the State Bar on August 15, 2023 that respondent is filing a
23 supplemental brief on the Fulton County indictment, and that he plans to attach the indictment to
24 that filing. The State Bar does not object to the court taking judicial notice of the August 14,
2023 Fulton County indictment.

25 ² If the court is inclined to grant respondent's motion for abatement, the State Bar should be
26 allowed to present the rest of its evidence (with the exception of completing its questioning of
27 respondent) before the abatement of respondent's evidence and remainder of his testimony. The
State Bar should present the testimony of Matthew Seligman, Bo Dul, and Jake Rollow, but
would not rest its case until completing respondent's testimony following the end of the
abatement.

1 rule 5.50(B)(5) [court may consider as relevant factor extent to which “evidence may
2 become unavailable because of any delay”].)

3 Furthermore, public protection strongly favors timely completion of the trial. The
4 State Bar has presented extensive evidence to support the NDC’s charges that respondent
5 engaged in acts of dishonesty and moral turpitude in matters concerning the peaceful
6 transition of power in 2020. As set forth in the Opposition, respondent disputes these
7 charges and continues to claim, both in court and in public statements, that the 2020 election
8 was stolen through fraud and that his actions to support efforts to reject the 2020 election
9 results were justified and valid. The public interest weighs strongly in interest of resolving
10 these competing positions as quickly as possible.

11 **C. Respondent Has Waived his Fifth Amendment Rights on Many Topics**
12 **and Therefore the Burden on Respondent in Completing Trial Is Reduced**

13 Respondent has already testified regarding many of the issues in this case without
14 asserting the Fifth Amendment. Because he elected to waive that right by answering
15 questions, he has waived his Fifth Amendment rights regarding those topics and any
16 testimony that might impeach the testimony he previously offered.

17 It is a “well settled rule that a defendant who takes the stand and testifies in his
18 behalf waives his Fifth Amendment privilege and his state constitutional privilege to the
19 extent of the scope of relevant cross-examination.” (*People v. Saddler* (1979) 24 Cal. 3d
20 671, 679 (en banc, citations omitted).) This rule applies not only to persons testifying in
21 civil and criminal suits, but also to respondents in State Bar disciplinary
22 proceedings. (*See In re Utz* (1989) 48 Cal. 3d 468, 479, 769 P.2d 417, 422 [“If the attorney
23 testifies without objection at a State Bar proceeding he has waived the privilege”].)

24 Once the privilege is waived, that waiver cannot be revoked. For example, the
25 waiver cannot be rescinded simply because a prosecutor subsequently begins an
26 investigation, so long as the potentially incriminating nature of testimony was known at the
27 time it was given. (*See Banco Intercontinental, S.A. v. Alvarez Renta*, 2007 WL 9761293, at
28

1 *3 (S.D. Fla. Dec. 10, 2007), *aff'd*, 2008 WL 11502470 (S.D. Fla. Feb. 25, 2008) [“The
2 record reflects that Renta was acutely aware prior to trial, during trial and post trial that
3 his testimony would be potentially incriminating yet he chose to waive his Fifth
4 Amendment rights. Whether a prosecutor is contemplating a prosecution is immaterial to the
5 determination by a person if a response is incriminating. . . . Renta has waived his Fifth
6 Amendment privilege and there is no authority to suggest that his privilege is somehow
7 rehabilitated as a ‘target’ of a criminal investigation.”]; *Core-Mark Int'l, Inc. v. Sparacio*,
8 1994 WL 53763, at *7, n.4 (N.D. Ill. Feb. 18, 1994) [“The fact that between December 29,
9 1992, and January 19, 1993, Sparacio's counsel learned that his client was the subject of a
10 grand jury investigation did not alter the scope of his client's privilege. Either a response is
11 potentially incriminating or it is not. It is assumed that criminal laws will be enforced, and a
12 person will not be compelled to testify if his testimony would link him to a crime.”]; *Acock*,
13 *Schlegel Architects, Inc. v. C. I. R.*, 97 T.C. 352, 360–61 (U.S. Tax Ct. 1991) [“Mr. Thomas
14 argues that because he had not yet been named as a target of the CID's investigation when
15 he executed the affidavit, he did not appreciate the risk of his criminal prosecution and
16 therefore did not voluntarily waive his Fifth Amendment privilege in giving the affidavit.
17 We do not agree. From the record before us, we find that Mr. Thomas was well aware that
18 he was a potential target of the CID investigation when he gave the special agent the
19 affidavit”].)

20 The scope of the waiver depends on the scope of the prior testimony, and
21 encompasses all matters within the scope of proper cross-examination. The latter includes
22 not only questioning about the details of matters previously testified to (*see People v.*
23 *Williams* (2008) 43 Cal.4th 584, 615), but more broadly consists of “any matter (1) to which
24 he has testified *expressly* on direct examination, (2) to which he has testified *impliedly* on
25 direct examination, and (3) that is relevant to impeach the defendant's credibility as a
26 witness.” (*People v. James* (1976) 56 Cal. App. 3d 876, 888 (citing *People v. Thornton*, 11
27 Cal.3d 738 (1974); *People v. Ing*, 65 Cal.2d 603 (1967), and *People v. Wilson* (1967)

1 254 Cal.App.2d 489 (emphasis in original). *See also People v. Barnum* (2003) 29 Cal. 4th
2 1210, 1227 n. 3 [“Clearly, by testifying in his own defense, defendant relinquished his
3 privilege against compelled self-incrimination with respect to cross-examination on matters
4 within the scope of the narrative testimony he provided on direct examination, as well as on
5 matters that impeached his credibility as a witness.”].)

6 In determining what falls within the scope of implied testimony “the guiding
7 principle that is derived from the decisional law is to the effect, that, if the facts testified to
8 by a defendant on direct examination amount, by inference, to a *denial* of the charge, he
9 may then be cross-examined with respect to any matter tending to prove his guilt.” (*People*
10 *v. James, supra*, 56 Cal. App. 3d at 888 (emphasis in original).) “An implied denial of guilt
11 is considered as testimony denying the existence of any evidence relevant on the issue of
12 guilt, which makes cross-examination about the subject of any such evidence properly
13 within the scope of the direct examination.” (*Id.*)

14 In particular, an express or implied general denial of guilt may operate to permit
15 “cross-examination about facts indicating guilt even though evidence of such facts have not
16 first been introduced by the prosecution in its case in chief.” (*Id.*) Such facts may include
17 evidence relating to uncharged conduct not previously testified to, so long as that evidence
18 rebuts testimony previously given. (*See id.* (citing cases); *see also People v. Coffman &*
19 *Marlow*, 34 Cal. 4th 1, 72 (2004), *as modified* (Oct. 27, 2004) [“We conclude that Marlow's
20 direct examination response denying he ever wanted to kill Novis ‘or anybody else’ did
21 ‘open the door’ to questioning regarding the [uncharged] Orange County murder, and the
22 trial court abused its discretion in implicitly ruling to the contrary. A defendant who takes
23 the stand to testify in his own behalf waives the privilege against self-incrimination to the
24 extent of the scope of relevant cross-examination. It matters not that the defendant's answer
25 on cross-examination might tend to establish his guilt of a collateral offense for which he
26 could still be prosecuted.”] (Citation and quotations omitted); *People v. Ing*, 65 Cal. 2d 603,
27 610 (1967) [“[O]n direct examination defendant made a general denial of the rapes charged

1 but did not refer to the other offenses. As we shall see, the other offenses were relevant to
2 show a common scheme or plan and thus would tend to rebut defendant's testimony on
3 direct examination. Cross-examination as to the other offenses would have been proper.”].)

4 Because respondent has already testified on many of the issues in this case, and
5 waived the Fifth Amendment regarding those topics and any testimony that might impeach
6 the testimony he previously offered, the burden on respondent in completing the trial is
7 reduced and weighs against abatement. Courts have denied stays of civil proceedings related
8 to criminal cases based on a finding that the burden on the defendant’s Fifth Amendment
9 privilege was minimal because the defendant had already testified in the civil matter. For
10 example, in *Multiven, Inc. v. Cisco Sys., Inc.* (N.D. Cal. 2010) 725 F. Supp. 2d 887, plaintiff
11 filed a motion to stay counterclaims on the grounds that the claims would jeopardize a
12 party’s Fifth Amendment privileges in parallel criminal proceedings arising out of the same
13 factual circumstances. The court denied the motion because the party had “already
14 voluntarily submitted declarations in support of Multiven's briefs regarding the parties'
15 cross-motions for summary judgment and has been deposed extensively, including fourteen
16 hours of deposition testimony. . .” (*Id.* at 897.) The court found that “continuing the
17 litigation will only minimally implicate [the party’s] Fifth Amendment rights, given the
18 extensive testimony he has already provided in this case.” (*Id.* citing *F.T.C. v. J.K. Publ'ns,*
19 *Inc.*, 99 F.Supp.2d 1176, 1199 (C.D.Cal.2000) [“Where a defendant already has provided
20 deposition testimony on substantive issues of the civil case, any burden on that defendant's
21 Fifth Amendment privilege is ‘negligible.’”].) The court further found that the *Keating*
22 balancing test factors weighed against a stay, noting that the burden on the party of
23 proceeding with the counterclaims did not outweigh the burden on the other party of staying
24 the claims, and “neither the convenience of the Court nor the interests of the public will be
25 served by a stay.” (*Id.* at 898.)

26 In *ESG Cap. Partners LP v. Stratos* (C.D. Cal. 2014) 22 F. Supp. 3d 1042, defendant
27 Stratos was criminal charged with scheming to defraud investors interested in purchasing

1 pre-IPO Facebook shares. In March 2013, an investor filed a civil complaint against
2 Stratos, and in May 2013, the Government filed a superseding indictment against Stratos,
3 adding various fraud counts based on the same scheme. After answering the complaint in
4 August 2013, Stratos filed a motion to stay the proceedings pending resolution of the
5 criminal case. Stratos argued that a stay was warranted because forcing him to engage in
6 discovery in the civil case would jeopardize his Fifth Amendment privilege against self-
7 incrimination. However, the court denied the motion for a stay, on the grounds that Stratos
8 had already participated in the litigation for over eight months, and the stay would severely
9 prejudice the plaintiff. (*Id.* at 1043–44 , 1046.)

10 Here, the burden on respondent in completing the trial is reduced because he has
11 already testified on many of the issues in this case, and waived the Fifth Amendment
12 regarding those topics. The burden on the State Bar of postponing the remainder of the trial
13 for an indefinite period of time, possibly several years, outweighs the burden on respondent
14 in completing the trial.

15 CONCLUSION

16 Balancing of all the relevant factors, abatement is not warranted in light of the
17 substantial prejudice to the State Bar and the minimal burden on respondent in completing
18 the trial. For these reasons, and the reasons set forth in the State Bar’s Opposition, the court
19 should deny the Motion.
20
21

22 Respectfully submitted,

23 THE STATE BAR OF CALIFORNIA
24 OFFICE OF CHIEF TRIAL COUNSEL

25
26 DATED: August 15, 2023

27 By: 

Duncan Carling
Supervising Attorney

DECLARATION OF SERVICE

CASE NUMBER(s): **EASTMAN (SBC-23-O-30029)**

I, the undersigned, am over the age of eighteen (18) years and not a party to the within action, whose business address and place of employment is the State Bar of California, 180 Howard Street, San Francisco, California 94105, dawn.williams@calbar.ca.gov, declare that:

- on the date shown below, I caused to be served a true copy of the within document described as follows:

STATE BAR'S SUPPLEMENT TO OPPOSITION TO RESPONDENT'S MOTION FOR ABATEMENT

☐ By U.S. First-Class Mail: (CCP §§ 1013 and 1013(a)) ☐ By U.S. Certified Mail: (CCP §§ 1013 and 1013(a))
- in accordance with the practice of the State Bar of California for collection and processing of mail, I deposited or placed for collection and mailing in the City and County of San Francisco.

☐ By Overnight Delivery: (CCP §§ 1013(c) and 1013(d))
- I am readily familiar with the State Bar of California's practice for collection and processing of correspondence for overnight delivery by the United Parcel Service ("UPS").

☐ By Fax Transmission: (CCP §§ 1013(e) and 1013(f))
Based on agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed herein below. No error was reported by the fax machine that I used. The original record of the fax transmission is retained on file and available upon request.

☒ By Electronic Service: (CCP § 1010.6)
Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the person(s) at the electronic addresses listed herein below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ (for U.S. First-Class Mail) in a sealed envelope placed for collection and mailing at San Francisco, addressed to: (see below)

☐ (for Certified Mail) in a sealed envelope placed for collection and mailing as certified mail, return receipt requested,
Article No.: _____ at San Francisco, addressed to: (see below)

☐ (for Overnight Delivery) together with a copy of this declaration, in an envelope, or package designated by UPS,
Tracking No.: _____ addressed to: (see below)

Person Served	Business Address	Fax Number	Courtesy Copy via Email to:
Randall Allen Miller Zachary Mayer Jeanette Chu		Electronic Address	Olga Gorbunkova olga@millerlawapc.com Yvette Blandon yvette@millerlawapc.com
		rmiller@millerlawapc.com	
		zachary@millerlawapc.com jeanette@millerlawapc.com	

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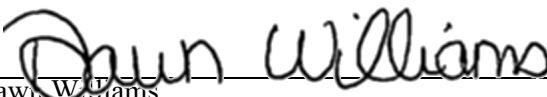
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I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date on the envelope or package is more than one day after date of deposit for mailing contained in the affidavit.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

DATED: August 15, 2023

SIGNED:


Dawn Williams
Declarant