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June 22, 2020

VIA ELECTRONIC COURT FILING

Hon. Debra C. Freeman
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: Jane Doe, 1:19-cv-8673 (KPF) (DCF)

Dear Judge Freeman:

We represent Defendants Darren K. Indyke and Richard D. Kahn, Co-Executors of the Estate of Jeffrey E. Epstein (together, the "Co-Executors"), in the above-referenced action. We write pursuant to Your Honor's Individual Rule 2(A) and Local Rule 37.2 to request a conference in anticipation of filing a motion to compel Plaintiff to produce the following documents and information:

1. in accordance with Fed. R. Civ. P. 26(a)(1)(A)(iii) and the Co-Executors' interrogatories, a computation of the damages she seeks to recover in this action supported by documents, including an analysis supplying the underlying calculations or formulas used in arriving at the damages claimed. *See, e.g., Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006) (quoting Rule 26);
2. communications concerning Jeffrey Epstein ("Decedent" or "Mr. Epstein") which are to, from, or copy members of the press, media, or publishing industry;
3. documents concerning Mr. Epstein which are to, from, or copy other plaintiffs (or their attorneys) who have asserted claims against Mr. Epstein, his Estate, or the Co-Executors;
4. documents concerning all medical procedures and consultations Plaintiff received during the relevant time period, and not just those which Plaintiff deems relevant to her claims; and
5. documents concerning specific medical procedures and conditions, regardless of timeframe, and not just those which Plaintiff deems relevant to her claims.

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We have corresponded with Plaintiff's counsel multiple times via email, letter and telephonic conference. Regrettably, the parties remain at an impasse on these issues such that the Court's assistance is necessary.

I. Relevant background

In September 2019, Plaintiff filed a four-count complaint alleging Mr. Epstein sexually abused her starting in or around 2002, when Plaintiff was "approximately" fourteen years old, until she turned seventeen years old. (Compl. ¶ 23 (ECF No. 1).) Plaintiff alleges she became financially dependent on Mr. Epstein and dropped out of high school as a result. (*Id.* ¶ 41.) She also claims she suffers from "extreme anxiety and depression, which cause her to experience difficulty falling asleep, difficulty staying asleep (because she often wakes up with nightmares), difficulty eating, rapid heartbeat, and panic attacks." (*Id.* ¶ 56.) According to Plaintiff, "[h]er physical and emotional injuries impact her daily functioning." (*Id.*) Plaintiff also alleges that she was diagnosed with post-traumatic stress disorder in connection with the alleged abuse and that she "regularly experiences the symptoms of PTSD, including flashbacks to [Mr. Epstein's] house." (*Id.* ¶ 57.) She further alleges that she "struggles to be physically and emotionally intimate with her husband." (*Id.* ¶ 58.) Her complaint requests actual, compensatory, statutory, consequential, and punitive damages, plus pre-judgment and post-judgment interest. (*Id.* at 16.)

A. Plaintiff's initial disclosures

On February 5, 2020, Plaintiff served her Rule 26(a)(1) initial disclosures. However, Plaintiff's disclosure concerning her damages calculations was deficient: she did not provide a computation of each category of damages she seeks, nor did she identify any documents on which she bases her computations. Instead, she stated simply that she was "entitled to recover damages in the form of, *inter alia*, actual damages, compensatory damages, statutory damages, consequential damages, punitive damages, attorneys' fees, costs, and interest."¹ By way of justification for her inadequate disclosure, Plaintiff stated that she "anticipate[d] that damages calculations will depend upon expert analyses and testimony to be developed and disclosed according to the schedule set by the Federal Rules of Civil Procedure and the Court."

B. Plaintiff's written discovery responses

On March 10, 2020, the Co-Executors served their First Request for Production of Documents ("Requests") and First Set of Interrogatories ("Interrogatories") to Plaintiff.² Relevant here are the following Requests:

- **Request No. 1:** All documents and communications with or otherwise concerning Decedent. This includes, without limitation, all communications concerning Decedent which are to, from, or which copy: (i) members of the press, media or publishing industry; (ii) law enforcement personnel; (iii) government agents, including, without limitation, prosecutors and government attorneys; and communications which are to, from, or which

¹ A copy of Plaintiff's initial disclosures is attached hereto as **Exhibit A**.

² A copy of these discovery requests is attached hereto as **Exhibit B**.

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copy you or your attorneys, on the one hand, and other persons who have filed lawsuits or made claims against Decedent or his estate, or such other persons' attorneys, on the other hand.

- **Request No. 2:** To the extent not otherwise produced in response to the foregoing, all documents and communications concerning any other legal proceeding or investigation that concerns Decedent.
- **Request No. 13:** All documents and communications concerning all medical procedures and consultations you received during the relevant time period.³
- **Request No. 14:** Regardless of date and the relation (or lack thereof) to Decedent's acts and omissions alleged in the Complaint or otherwise, all documents and communications concerning all medical procedures and consultations you received evidencing or otherwise concerning the following conditions: (a) an eating disorder, (b) emotional distress, (c) psychological or psychiatric trauma, (d) mental anguish, (e) humiliation, (f) confusion, (g) embarrassment, (h) loss of self-esteem, (i) loss of dignity, (j) loss of enjoyment of life, (k) pain, (l) suffering, or (m) any condition that would require surgery to correct.

Also of relevance here are the following Interrogatories:

- **Interrogatory No. 2:** Identify and describe the computation of each category of damages for which you seek recovery in this litigation.
- **Interrogatory No. 10:** Identify all medical procedures and consultations you received, including the dates of each procedure and consultation, the locations of each procedure and consultation, and the identities of all medical providers who conducted or otherwise participated in each procedure and consultation. The relevant time period for this interrogatory is the date on which you first learned of Decedent through the date of your responses to these interrogatories.
- **Interrogatory No. 11:** Regardless of date and the relation (or lack thereof) to Decedent's acts and omissions alleged in the Complaint or otherwise, identify all medical procedures and consultations you received evidencing or otherwise concerning the following conditions: (a) an eating disorder, (b) emotional distress, (c) psychological or psychiatric trauma, (d) mental anguish, (e) humiliation, (f) confusion, (g) embarrassment, (h) loss of self-esteem, (i) loss of dignity, (j) loss of enjoyment of life, (k) pain, (l) suffering, or (m) any condition that would require surgery to correct.

On April 16, 2020, Plaintiff served her responses to these Requests and Interrogatories.⁴ Since that time, the parties have exchanged several deficiency letters and emails, and engaged

³ The relevant time period is defined as: "the date on which [Plaintiff] first learned of Decedent through the date of [her] responses to these requests."

⁴ A true and correct copy of Plaintiff's responses to the Requests and Interrogatories is attached hereto as **Exhibit C.**

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in multiple telephonic meet-and-confer discussions. Despite these attempts to resolve the parties' differences, Plaintiff refuses to provide:

- communications concerning Mr. Epstein sent to, from, or copying the press, media and publishing industry, in response to **Request Nos. 1 and 2**;
- documents and communications concerning Mr. Epstein sent to, from, or copying other persons (or their attorneys) who have filed lawsuits or asserted other claims against Mr. Epstein or his Estate, in response to **Request Nos. 1 and 2**;
- a list of all medical procedures and consultations Plaintiff received during the relevant time period and all documents and communications concerning these procedures and consultations, in response to **Interrogatory No. 10** and **Request No. 13**;
- a list of all medical procedures and consultations Plaintiff received concerning specific medical procedures and consultations relating to emotional trauma and anxiety and all documents and communications concerning these procedures and consultations, in response to **Interrogatory No. 11** and **Request No. 14**; and
- a computation of each category of damages for which she seeks recovery in this litigation in response to **Interrogatory No. 2** (and as required under Fed. R. Civ. P. 26).

Plaintiff's failure to provide such information and documents is improper, as explained below.

II. Argument

A. Plaintiff's damages disclosure leaves the Co-Executors in the dark.

Plaintiff's 26(a)(1)(A)(iii) initial disclosure regarding her computation of damages, and her response to Interrogatory No. 2, which essentially requests the same information, are inadequate. Instead of providing the required computation of each category of damages and the documents on which she bases each computation, Plaintiff simply rattled off a laundry list of generic categories of damages, which, according to her, is not even exhaustive. In essence, the "disclosure" was anything but, as it disclosed nothing meaningful, which is contrary to the purpose of Rule 26.

Plaintiff must amend her initial disclosures, and to the extent applicable, her response to Interrogatory No. 2, to provide "a 'computation,' supported by documents," including an analysis supplying the underlying calculations or formulas used in arriving at the damages claimed. See *Design Strategy, Inc.*, 469 F.3d at 295 (quoting Rule 26); *Max Impact, LLC v. Sherwood Grp., Inc.*, 2014 WL 902649, at *6 (S.D.N.Y. Mar. 7, 2014) ("initial disclosures were wholly inadequate because they merely provided [the other party] with total dollar figures for each category of damages and were unaccompanied by any analysis whatsoever" and "failed to provide a calculation or formula through which the figures were derived"); *Ritchie Risk-Linked Strategies Trading (Ir.), Ltd. v. Coventry First LLC*, 280 F.R.D. 147, 159 (S.D.N.Y. 2012) (Rule 26 "does not merely require a plaintiff to describe its damages in general terms, such as 'compensatory,' but

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— as best as the party is able at an early stage in the case — to provide a ‘computation’ of each category of damages, and to produce the documents on which that computation is based.”).

Plaintiff claims that, because she has apparently hired an expert on this topic, she is relieved from having to provide to the Co-Executors a computation of damages or documents on which those calculations are based. Plaintiff is wrong. There is no “exception to Rule 26(a)(1) in cases in which damages will be proved by experts: the disclosing party still has the responsibility to provide each category of required disclosures based on the information it has at the time, and to supplement those disclosures as more information is gained.” *U.S. Bank Nat. Ass’n v. PHL Variable Ins. Co.*, No. 12 CIV. 6811 CM JCF, 2013 WL 5495542, at *3 (S.D.N.Y. Oct. 3, 2013) (citing *Stemrich v. Zabiya*, No. 1:12-CV-1409, 2013 WL 4080310, at *3 (M.D. Pa. Aug. 13, 2013) (stating that Rule 26 “explicitly contemplates a procedure” by which initial damages information is supplemented following an expert’s review); *Allstate Ins. Co. v. Nassiri*, No. 2:08-cv-369, 2010 WL 5248111, at *4 (D. Nev. Dec. 16, 2010) (“While the precise method of calculation need not be disclosed if it is properly the subject of future expert testimony, this does not relieve the plaintiff from providing reasonably available information concerning its damages computation.”); *Hesco Parts, LLC v. Ford Motor Co.*, No. 3:02-CV-736-S, 2007 WL 2407255, at *2 (W.D. Ky. Aug. 20, 2007) (“[A]lthough the defendants are not entitled to early disclosure of the plaintiff’s expert report, the plaintiff’s initial disclosures should provide its executives’ assessment of damages in light of the information available to them in sufficient detail so as to inform the defendants of the contours of their potential exposure.”)).

Thus, regardless of whether Plaintiff plans to seek expert analysis in forming a final damages calculation, she must still provide “an estimate of damages and ‘some analysis’” “based on the information [Plaintiff] has at the time.” *Id.* at 3, 5. Given Plaintiff’s recent refusal to consent to a short extension of discovery deadlines, it is inconceivable that she does not have this information already.

B. Plaintiff’s responses to Request Nos. 1, 2, 13 and 14 and Interrogatory Nos. 2, 10 and 11 are inadequate and must be amended.

i. Communications with the press, media and publishing industry about Mr. Epstein exist and are highly relevant; there is no basis for Plaintiff’s refusal to produce them.

The Co-Executors’ Request Nos. 1 and 2 seek communications concerning Mr. Epstein between Plaintiff or her counsel on the one hand and members of the press, media or publishing industry on the other hand. Plaintiff refuses to produce such documents based solely on her “best recollections”⁵ that no such documents exist. When the Co-Executors reminded Plaintiff that her lead counsel, Roberta Kaplan, was recently interviewed by Arielle Levy and appeared on a September 5, 2019 episode of a podcast called *Broken*, in which Ms. Kaplan discussed Plaintiff, Mr. Epstein and his Estate, the Co-Executors, Plaintiff’s alleged injuries and damages, and Plaintiff’s intention to file a civil suit against the Estate, Plaintiff responded that those topics are

⁵ See the June 5, 2020 letter from Ms. Kaplan attached hereto as **Exhibit D**.

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not relevant because they are not about “**Plaintiff’s specific allegations.**”⁶ (Emphasis in original). Plaintiff’s position is both nonsensical and inappropriate.

First, Request Nos. 1 and 2 are not limited to documents concerning only Plaintiff’s “specific allegations.” These Requests seek documents concerning Mr. Epstein, which are wholly proper, as they are relevant to the claims **and defenses** in this case. Plaintiff is not permitted to withhold documents unless they (as she determines) relate to the “specific allegations” in this case. Additionally, Plaintiff’s notions about what relates to her “specific allegations” is tremendously narrow. An interview in which Plaintiff’s counsel discusses, among other things, Plaintiff’s injuries and damages and Mr. Epstein’s Estate cannot legitimately be characterized as not relating to Plaintiff’s “specific allegations.” Plaintiff’s semantics are no justification for denying the Co-Executors their fundamental right to obtain fulsome discovery, especially given Plaintiff’s request for various significant damages (which she has yet to properly disclose).

Second, Plaintiff is not entitled to rest on her counsel’s “best recollections” to determine whether responsive documents exist. This is especially so when Plaintiff’s counsel was interviewed just a few months ago about Mr. Epstein.

In summary, Plaintiff must search and review documents her possession, custody or control, including in her counsel’s possession, in accordance with her obligations under the Federal Rules of Civil Procedure. Plaintiff must amend her responses to Request Nos. 1 and 2 and produce all non-privileged documents in response thereto.

ii. Communications with counsel and other plaintiffs with claims against the Co-Executors are discoverable and highly relevant.

In Request Nos. 1 and 2, the Co-Executors requested documents and communications concerning Mr. Epstein between Plaintiff or her counsel, on the one hand, and other persons who have filed lawsuits or made claims against Mr. Epstein or his Estate, or such other persons’ attorneys, on the other hand. Plaintiff claims all such documents or communications are protected by the work product doctrine and common interest privilege. Plaintiff is wrong.

As an initial matter, Plaintiff bears the burden of proof to establish these claimed privileges. See *Campinas Found. v. Simoni*, 2004 U.S. Dist. LEXIS 23580, at *8 (S.D.N.Y. Nov. 18, 2004) (“[T]he burden is upon the plaintiff, as the party invoking the protection of the common interest privilege, to establish the facts upon which the claimed privilege is based.”). Plaintiff cannot meet her burden.

“The ‘common interest’ rule is a limited exception to the general rule that the attorney-client privilege is waived when a protected communication is disclosed to a third party outside the attorney-client relationship.” *Shamis v. Ambassador Factors Corp.*, 34 F. Supp. 2d 879, 893 (S.D.N.Y. 1999). “The ‘common interest’ doctrine typically applies where multiple persons are represented by the same party — ‘join representation’ — and accordingly both clients are working together with a single attorney toward a common goal.” *Id.* (citing *Int’l Ins. Co. v. Newmont Mining*

⁶ *Id.*

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Corp., 800 F. Supp. 1195, 1196 (S.D.N.Y. 1992)). “[T]he key consideration is that the nature of the interest be **identical**, not similar, and be legal, not solely commercial.” *Campinas Found.*, 2004 U.S. Dist. LEXIS 23580, at *6 (emphasis added) (citing *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995)). Notably, “[s]haring a desire to succeed in an action does not create a ‘common interest.’” *Id.* (citing *Shamis*, 34 F. Supp. 2d at 893). “What is important is not whether the parties theoretically share similar interests but rather whether they demonstrate actual cooperation toward a common legal goal.” *Id.*

Shamis is instructive here. In that action, the Southern District of New York held the doctrine did not apply, explaining:

Although *Shamis* and BankBoston would both benefit from a judgment in favor of the plaintiff, they do not share identical legal interests. ... *Shamis* has not produced any agreement between plaintiff and his counsel and BankBoston establishing a joint prosecution of plaintiff's claims. There is no evidence of a coordinated legal strategy between *Shamis* and BankBoston. BankBoston is not, and has never been a party to this action. BankBoston has not exercised control over the conduct of this action, nor has it contributed to *Shamis*' legal expenses. See *North River Ins. Co.*, 1995 WL 5792 at *5 (“common interest” doctrine did not apply because the parties were not represented by same counsel; one party did not contribute to the other's legal expenses, nor exercise control over the conduct of the legal proceedings; and no evidence was presented of a coordinated legal strategy). Accordingly, the BankBoston documents are not privileged, and must be produced.

34 F. Supp. 2d 879, 893.

Similarly, in *Campinas*, which is also instructive here, plaintiff claimed the common interest doctrine protected communications between his counsel and counsel for other plaintiffs with claims against the same defendant that all arose from the same set of facts and circumstances, *i.e.*, the repurchase of certain shares, which allegedly harmed the various plaintiffs. 2004 U.S. Dist. LEXIS 23580, at *5-6. In that action, the court held that the common interest doctrine did not apply, finding that “the interest common to all the pending actions is the desire by diverse litigants to succeed in recovering a sum of money from [defendant].” *Id.* The court found:

the fact that the litigants share a desire to succeed in various civil actions does not mean that an identical legal interest is common to the various actions to which they are parties. Moreover, merely sharing a desire to succeed in various civil actions does not support the invocation of the common interest privilege to shield from disclosure statements that traditionally would not come within the ambit of the attorney-client privilege.

2004 U.S. Dist. LEXIS 23580, at *7 (citing *Shamis*, 34 F. Supp. 2d 879, 893).

Here, too, while it is theoretically possible (though unlikely given all plaintiffs are seeking recovery from the same limited pot of funds) that Plaintiff may desire for the other plaintiffs with

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claims against the Co-Executors to succeed in their lawsuits, they do not share identical legal interests for common interest purposes. Put another way, if a plaintiff in another case against the Co-Executors is unsuccessful, it has absolutely no bearing on whether Plaintiff is successful here, and vice-versa. That is because their legal interests are not remotely **identical**.

Nor do the various plaintiffs' claims arise out of the same sets of facts and occurrences. The alleged conduct forming the basis of Plaintiff's claims in this action allegedly occurred in different years and in different states/countries as various other plaintiffs. Nor does Plaintiff allege, for example, that other plaintiffs were present during her alleged abuse.

Further, (i) Plaintiff has not produced any agreement between her counsel and other plaintiffs' counsel establishing a joint prosecution of any claims; (ii) there is no evidence of a coordinated legal strategy between Plaintiff and other plaintiffs; (iii) the other plaintiffs have never been party to this action; and (iv) there is no contention that the other plaintiffs have exercised control over the conduct of this action, nor have they contributed to Plaintiff's legal expenses. See *Shamis*, 34 F. Supp. 2d 879, 893. Simply put, the plaintiffs alleging claims against the Co-Executors in other cases have no legal interest in this case, and vice-versa. The other plaintiffs' various legal rights are not dependent on the outcome of this case. (Further, Plaintiff's counsel previously asked the Southern District to assign this and other actions against the Co-Conspirators to a single judge and marked as "related." (ECF No. 16.) Plaintiff made no mention of her legal interests being identical to the other plaintiffs in that request. (*Id.*) That request was denied. (ECF No. 23.) Likewise, this Court's January 14, 2020 Order (ECF No. 44), stated, "[t]he above referenced cases ... have neither been consolidated for any purpose, nor designated as 'related' by the Court.") Accordingly, the common interest doctrine is inapplicable here.

Plaintiff also claims communications with other plaintiffs' counsel are protected by the work product doctrine because they reflect Plaintiff's counsel's mental impressions, conclusions, opinions or legal theories. However, it is not credible that all such communications fall into those categories. Nor has Plaintiff met her burden to show her counsel acted consistent with the work product doctrine in attempting to keep communications with other counsel confidential. See *Spanierman Gallery, Profit Sharing Plan v. Merritt*, No. 00CIV5712LTSTHK, 2003 WL 22909160, at *2, 5 (S.D.N.Y. Dec. 9, 2003) (finding work product doctrine did not apply where the production "was not made under circumstances which would ensure the confidentiality of the material"; the documents provided "were not identified as 'privileged'"; and "no agreement was reached with the [receiving party] to treat the information as privileged.").

Accordingly, Plaintiff must produce these communications. Alternatively, and at minimum, given the critical importance of these communications to the Co-Executors' fundamental right to defend against Plaintiff's claims, it would be appropriate for the Court to review a random sample of such communications *in camera*, to determine whether any privilege applies. See, e.g., *Makhoul v. Watt, Tieder, Hoffar & Fitzgerald, LLP*, No. 11-CV-05108 (PKC) (VMS), 2014 U.S. Dist. LEXIS 32239, at *26-27 (E.D.N.Y. Mar. 12, 2014) (supporting Magistrate Judge Go's decision to review certain documents *in camera* to determine if they were privileged because, "despite Defendants' assertion of privilege, the Court determined that an *in camera* review of the documents was the best way to satisfy Plaintiff and the Court that Defendants did not invoke privilege in order to hide evidence....").

iii. Plaintiff's medical history is critical to the Co-Executors' defenses.

Request Nos. 13 and 14 and Interrogatory Nos. 10 and 11 seek documents and information related to Plaintiff's medical history. Plaintiff's responses to these requests seek to limit her production to only those documents and information that she determines "relate to the allegations of the Complaint." This is improper.

Plaintiff put her physical and mental health squarely at issue in this action by broadly alleging numerous afflictions, lasting over a decade, that she claims are the result of Mr. Epstein's alleged conduct. Specifically, Plaintiff alleges that she suffers from "severe mental anguish" and "anxiety and depression"; "difficulty falling asleep"; "difficulty staying asleep"; nightmares; "difficulty eating, rapid heartbeat, and panic attacks"; has been diagnosed with PTSD, making it "difficult for her to take care of herself and her family"; and "struggles to be physically and emotionally intimate with her husband." (Compl. ¶¶ 56-58.) Information relating to Plaintiff's medical history is therefore critical to the Co-Executors' defense. Whether Plaintiff suffered any medical conditions—particularly the same or similar conditions she now alleges resulted from her interaction with Mr. Epstein—prior to her interactions with him is relevant to the Co-Executors' defenses, including that such conditions directly caused or contributed to Plaintiff's alleged damages for which she now seeks recovery. Moreover, given the breadth of the medical conditions Plaintiff alleges are relevant to her claimed damages, the Co-Executors are entitled to information concerning the entirety of the medical procedures and consultations Plaintiff received after she met Mr. Epstein.

Plaintiff has no right to cherry-pick the medical records she wishes to disclose. "The disclosure provisions in the Federal Rules of Civil Procedure do not permit a party to trim his duty of disclosure to suit [her] own view of what might be relevant to [her] adversary." *Arthur v. Atkinson Freight Lines Corp.*, 164 F.R.D. 19, 20–21 (S.D.N.Y. 1995) (issuing sanctions against plaintiff for failing to produce certain medical records and holding meritless plaintiff's contention that he was "under no duty to turn over some of the undisclosed medical reports and records to his adversary on the ground that he did not view such material to be relevant to the plaintiff's case."); *see also Rodriguez v. Folksamerica Reinsurance Co.*, No. CIV-305-CV-01687-CFDTPS, 2006 WL 1359119, at *3 (D. Conn. May 15, 2006) (ordering plaintiff's counsel to submit statement in writing under oath that the plaintiff never received treatment for emotional distress—"whether the stress was due to the actions alleged in this lawsuit or otherwise.") (emphasis added). Here, the Co-Executors are entitled to Plaintiff's medical history and to have their experts determine which conditions, if any, caused or contributed to Plaintiff's alleged damages, which she attributes to Mr. Epstein's abuse, regardless of which ones Plaintiff connects to him. Accordingly, Plaintiff must provide all documents and information responsive to these Requests and Interrogatories.

III. Conclusion

For the foregoing reasons, the Co-Executors request that the Court enter a briefing schedule for the Motion to Compel described herein, where the Co-Executors have two weeks to submit their motion, Plaintiff has two weeks therefrom to respond, and the Co-Executors have one week therefrom to reply.

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Respectfully submitted,

s/Bennet J. Moskowitz
Bennet J. Moskowitz

cc: Counsel of Record (via ECF)