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June 24, 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 matter. We write in reply to Plaintiff's letter filed June 23, 2020 [ECF 80] in response to the Co-Executors' pre-motion letter [ECF 79].

Plaintiff repeats two false premises throughout her June 23 letter: (i) the Co-Executors failed to articulate reasons why the information they seek is relevant, and (ii) it "goes without saying" that the Co-Executors' Requests are "highly burdensome." These arguments are unsupported and incorrect for at least two key reasons. First, the parties have had numerous conversations in which the Co-Executors have explained the relevance of the material sought, including, for example, to the extent the materials include discussions among various plaintiffs' counsel or with the press regarding an alleged "trafficking scheme" or the relative strengths of claims asserted by numerous individuals against the Estate. Although Plaintiff's counsel may not wish the Co-Executors to see such communications, that is not a valid basis to withhold them. Second, Plaintiff never articulates why a search for the documents at issue is "highly burdensome." Absent a showing of undue burden or a legitimate privilege, Plaintiff is required to produce the materials.

Given the importance of the discovery at issue, the Co-Executors request that the Court either compel Plaintiff to produce the subject documents or permit the parties to more fully brief these issues followed by an opportunity to present oral argument. As an alternative, the Co-Executors request that the Court inspect *in camera* a random sample of the requested documents that Plaintiff contends are subject to a common interest privilege to determine if they are in fact immune from disclosure. See, e.g., *Samad Bros. v. Bokara Rug Co.*, 2010 U.S. Dist. LEXIS 132446, at *8 (S.D.N.Y. Dec. 13, 2010) (after *in camera* inspection, finding "very little in [at issue] correspondence ... that could be characterized as 'mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation,'" as alleged).

June 24, 2020
Page 2



I. Plaintiff's Damages Disclosures are Inadequate and Therefore Prejudice the Co-Executors' Ability to, Among Other Things, Depose Plaintiff Concerning the Propriety of the Amounts She Seeks to Recover from the Estate.

Plaintiff attempts to redefine her obligations under Fed. R. Civ. P. 26 by refusing to provide computations for her claimed categories of damages. There is no justification for her failure to comply. (Before Plaintiff filed her complaint, and while Mr. Epstein was alive, she demanded a specific amount of money from him.) Now that Judge Failla has dismissed Plaintiff's claim for punitive damages [ECF 81], there is no reason Plaintiff cannot quantify the damages she seeks.

Plaintiff justifies her failure to comply with Rule 26 by contending that "calculating damages for emotional harm 'is an inherently imprecise and difficult undertaking.'" (Plf's Ltr. at 3, citing *Johnson v. White*, No. 06 Civ. 2540, 2010 WL 11586681, at *5 (S.D.N.Y. Nov. 18, 2010)). That may well be, but Plaintiff did not—because she cannot—cite **a single** case permitting her to ignore her obligation to provide her best computation of damages under Rule 26.

For example, *Johnson v. White* did not concern Rule 26 disclosures and merely stated that "calculating damages for emotional harm is an inherently imprecise and difficult undertaking." No. 06CIV2540LAPDF, 2010 WL 11586681, at *5 (S.D.N.Y. Nov. 18, 2010). Similarly, *U.S. Bank* expressly held that 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) (emphasis added). Plaintiff's last case, *Kovalchik v. City of New York*, involves the admissibility of expert reports at trial and has nothing to do with Rule 26 damages computations. No. 09 Civ. 4546, 2016 WL 11270091, at *2-3 (S.D.N.Y. Mar. 21, 2016). Plaintiff has no support for her contention that she is excused from her Rule 26 obligations.

Plaintiff further justifies her attempts to circumvent Rule 26 by arguing that the Co-Executors are not prejudiced by her failure to comply because she has "produced documents concerning [her] employment history, financial history, academic history, and medical history." (Plf's Ltr. p. 4.) However, Plaintiff substantially overstates her document production (e.g., her employment history and financial history consists of only a few 1099 tax forms). With respect to her medical history, Plaintiff has not produced documents supporting her myriad of claimed harms, including her alleged PTSD diagnosis and her claim that she has sexual and emotional difficulties with her husband. Accordingly, Plaintiff's assertion that the Co-Executors are not prejudiced by her flouting of Rule 26 rings hollow.

II. Communications with Journalists, Media, and the Press Are Relevant and Not Privileged; They are Therefore Discoverable.

The Co-Executors' Request No. 1 seeks all documents and communications related to Mr. Epstein. Such documents are likely to contain relevant, discoverable information related to the claims **and defenses** in this case. In response, Plaintiff inexplicitly clings to her arbitrary, self-imposed limitation that she need only produce documents relating to her "specific allegations."

June 24, 2020
Page 3



(Plf's Ltr. at 5.) This ambiguous limitation is improper and unsupported by the Federal Rules.¹

Plaintiff's counsel's non-privileged communications about Mr. Epstein—the subject of this litigation—are relevant to the extent they contain information about, *inter alia*, the relative strength of the various plaintiffs' allegations, Plaintiff's alleged emotion abuse and injuries, individuals who were friends with Plaintiff during the time she was allegedly abused, or other potential sources of the injuries Plaintiff alleges, such as sexual abuse by other individuals besides Mr. Epstein.

On the other hand, Plaintiff fails to articulate why collecting such documents would be "extremely burdensome," positing simply that it "goes without saying." (Plf's Ltr. at 5.) Plaintiff even admits the timeframe of such communications is limited to the last year. (*Id.*) In a case where Plaintiff presumably seeks millions of dollars, and has levied extremely harsh accusations, a search of communications for a one-year period is reasonable. For their own part, the Co-Executors have searched over 730,000 documents, spanning well over a decade, to locate potentially relevant documents.

III. Plaintiff's Counsel's Communications with Other Plaintiffs' Counsel Are Relevant and Unprotected.

Plaintiff's broad application of the work product doctrine is baseless. Applying a blanket "work product" doctrine classification to all communications by counsel about the subject of active litigation (without even performing a search or analysis) turns the doctrine on its head. The work-product doctrine is not meant to shield every one of a lawyer's communications to third parties. Yet, that is how Plaintiff asks the Court to apply it here.

Plaintiff's counsel refers to the voluntary claims program as an example of what they have discussed with other counsel and then extrapolates that all of their communications with other counsel must necessarily be deemed irrelevant and protected. However, ***Plaintiff's counsel has not unequivocally represented that the claims program is the exclusive subject of all of their communications with other plaintiffs' counsel.*** Nor does Plaintiff explain why those discussions are necessarily non-responsive to the Co-Executors' document requests in this action or privileged. An *in-camera* inspection of a random selection of Plaintiff's counsel's communications with other plaintiffs' counsel would permit the Court to resolve this dispute.

IV. Plaintiff Has Put her Physical Health at Issue Here.

Plaintiff has placed her physical and psychological health at issue in this case by alleging a wide range of physical and psychological symptoms resulting from Mr. Epstein's alleged conduct. (Compl. ¶¶ 56-58 [ECF 1].) Plaintiff now asserts that only her mental health is at issue here, however, she alleges numerous ***physical*** symptoms, including difficulty sleeping, difficulty falling asleep, rapid heartbeat, panic attacks, and trouble being physically intimate with her husband, all

¹ Plaintiff admits Request No. 1 seeks documents concerning Mr. Epstein but argues that the Co-Executors limited the request to seek only those documents related to "Plaintiff's specific allegations." (Plf's Ltr. at 4-5.) This is not so and Plaintiff cites nothing from the Co-Executors to support this position. The Co-Executors have disabused her of this misguided notion on many occasions and repeat here that they seek documents concerning Mr. Epstein, consistent with their document requests.

June 24, 2020
Page 4



as a direct result of Mr. Epstein's alleged conduct. The Co-Executors' experts are entitled to independently determine the cause of her many symptoms that she attributes to Mr. Epstein.

V. Conclusion

For the foregoing reasons, the Co-Executors request that the Court grant their motion to compel described in their pre-motion letter [ECF No. 79], or enter a briefing schedule for the Motion, or, in the alternative, review *in camera* a sampling of the communications at issue.

Respectfully submitted,

s/Bennet J. Moskowitz
Bennet J. Moskowitz

cc: Counsel of Record (via ECF)