Exhibit D

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BY EMAIL

Bennet J. Moskowitz
Troutman Sanders LLP
875 Third Avenue
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Re: Doe v. Indyke et al., No. 19-cv-8673 (S.D.N.Y.) (KPF) (DCF)

Dear Bennet:

We write in response to Defendants' May 19, 2020 letter ("May 19 Letter") regarding Plaintiff's and Defendants' First Interrogatories and Requests for Production (respectively, "Plaintiff's Requests" and "Defendants' Requests") and the parties' respective Responses and Objections thereto.

I. Defendants' Responses to Plaintiff's Interrogatories and Requests for Production

A. Defendants' General Obligation to Conduct a Reasonable Inquiry

As stated in our May 12, 2020 Letter ("May 12 Letter"), Plaintiff's position is simply that, in responding to Plaintiff's Requests, Defendants are obligated to provide reasonably obtainable information within the Estate's possession, custody, or control. It was necessary for Plaintiff to assert this uncontroversial principle only because, at the time of our letter, the Co-Executors had failed to meaningfully answer *any* of Plaintiff's Requests, although responsive information—such as, for example, Jeffrey Epstein's email address—was quite obviously within the custody or control of Epstein's Estate. Further, you repeatedly represented to us that Defendants' ability to identify responsive information was limited in light of Epstein's demise, a circumstance which in no way alleviates the Co-Executors' burden to take all reasonable steps to locate and produce responsive information, including by consulting records and individuals who are subject to the Estate's control.

Since our May 12 Letter, Defendants have supplemented their responses, and it appears that, despite Defendants' lengthy argument that the cases Plaintiff cites for this principle are "inapplicable," Defendants agree that they must respond to discovery questions "using all

reasonably obtainable information within their possession, custody or control." (May 19 Letter at 2.) We expect that the Co-Executors will comply with this obligation.

II. Plaintiff's Responses to Defendants' Interrogatories and Requests for Production

A. Defendants' Interrogatories Nos. 10, 11 & 12 and Request Nos. 13 & 14:

Defendants' Requests seek information about Plaintiff's entire medical history, without limitation as to time or content. Plaintiff has agreed to provide information relating to medical conditions, treatments, or services *relevant to the claims and defenses in this action*. Defendants are entitled to nothing more.

Defendants' continued insistence that Plaintiff must produce her entire medical history and related records is flatly incorrect. Well-established precedent in this Circuit makes clear that Defendants do not have an "unfettered right to pursue discovery into [Plaintiff's] entire medical history." *Manessis v. New York City Dep't of Transp.*, No. 02 Civ. 359, 2002 WL 31115032, at *2 (S.D.N.Y. Sept. 24, 2002) (Freeman, M.J.) (holding that, in an emotional distress claim, Defendants are "entitled to discover [Plaintiff's] mental health treatment records," but may "not pursue discovery into treatments [Plaintiff] may have received for *any* physical ailments." (emphasis added)); *see also, e.g., Kunstler v. City of New York,* No. 04 Civ. 1145, 2006 WL 2516625, at *4 (S.D.N.Y. Aug. 29, 2006).

In addition, Defendants' contention that Plaintiff "does not get to be the arbiter of what is 'relevant' to the claims and defenses in this matter, nor what is 'similar' to the conditions she alleges Mr. Epstein caused" is fundamentally incompatible with the principles and functional realities of civil discovery. (May 19 Letter at 4.) A responding party is not obligated to produce documents that are not "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). And of course, it is Plaintiff who, through her counsel, must review her documents and information and determine what is responsive and discoverable and what is not. That does not mean that Defendants are without recourse to interrogate the completeness of Plaintiff's productions. As we explained during the meet and confer conference, Defendants may investigate Plaintiff's physical and mental health history through deposition testimony, her anticipated Rule 35 examination, and other discovery responses. If those or other discovery devices give Defendants' reason to believe that Plaintiff has additional, undisclosed medical problems that are relevant to the claims and defenses in this action, "then Defendants may appropriately seek medical records concerning that underlying medical problem." *Manessis,* 2002 WL 31115032, at *2.

To the extent Defendants continue to insist that Plaintiff's claims entitle them to dig unfettered through her entire medical history and records, despite clear case law to the contrary, we are, unfortunately, at an impasse.

B. Defendants' Requests No. 1 & 3:

Defendants assert that they are "unconvinc[ed]" that communications *solely in the custody of Plaintiff's attorneys and relating to this litigation and to Decedent* will overwhelmingly be protected by the attorney-client privilege and/or the work product doctrine. (May 19 Letter at 4.) This assertion is ludicrous. To the extent these requests call for such communications, it is clear

that the burden of attempting to identify non-privileged material in the entire universe of Plaintiff's counsel's communications concerning this case vastly outweighs the minimal potential benefit to Defendants in terms of discoverable information. For this reason, Plaintiff asked during the May 4, 2020 meet and confer that Defendants identify the specific categories of non-privileged, relevant counsel communications they are seeking. Defendants informed us that they are seeking (i) communications between Plaintiff's counsel and counsel for plaintiffs in similar pending cases against Epstein's Estate and (ii) communications between Plaintiff's counsel and journalists concerning Plaintiff's specific allegations. We address each category, and the related issues raised in the May 19 Letter, in turn.

1. Communications with counsel for other plaintiffs in similar pending cases

As Plaintiff's May 12 Letter made clear, communications between Plaintiff's counsel and counsel to plaintiffs in similar suits against Defendants are protected from discovery by, at a minimum, the work product doctrine and the common interest privilege.[1] (May 12 Letter at 4.)

Defendants' May 19 Letter fails to even address the fact that these communications are subject to the work product protection. As explained, Plaintiff's counsel has communicated with counsel for other plaintiffs about only matters of legal strategy—chiefly, regarding the proposed victim compensation program. Accordingly, those communications, which reflect Plaintiff's counsel's mental impressions, conclusions, opinions or legal theories, are subject to the protection of the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3); *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183–84 (2d Cir. 2007). The fact that these communications involved nonparties to this case does not waive such protection. *Spanierman Gallery, Profit Sharing Plan v. Merritt*, No. 00 Civ. 5712, 2003 WL 22909160, at *2 (S.D.N.Y. Dec. 9, 2003). Work product protection is waived by disclosure to a third party only when that disclosure makes disclosure to an adversary materially more likely. *Favors v. Cuomo*, 285 F.R.D. 187, 200 (E.D.N.Y. 2012). Disclosure of Plaintiff's strategy to counsel for other plaintiffs did not make disclosure to an adversary any more likely, given that all involved are similarly adverse to Defendants. *See Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic*, 945 F. Supp. 2d 431, 437 (S.D.N.Y. 2013) (Freeman, M.J.); *see also Costabile v. Westchester*, *New York*, 254 F.R.D. 160, 166 (S.D.N.Y. 2008) (holding work product protection was not waived in part because "there is very little chance that the report would be disclosed to defendants . . . because plaintiffs and the [third party government agency] were aligned in interest"). Indeed,

With respect to Plaintiff's assertion that these communications are also covered by a common interest privilege, Defendants' May 19 Letter argues that Plaintiff has failed to articulate an interest she shares with other plaintiffs' counsel. (May 19 Letter at 4.) To the contrary, as Plaintiff made clear, all plaintiffs in the pending cases, which have been consolidated for discovery purposes, share a common legal interest because they are bringing substantially similar claims against the same defendants. *See Schultz v. Milhorat*, No. 10 Civ. 103, 2011 WL 13305347, at *3 (E.D.N.Y. Apr. 11, 2011) (finding common interest privilege applicable where the issues

[1] Plaintiff does not hereby waive her right to assert attorney-client privilege where applicable. *See, e.g.*, *HSH Nordbank AG New York Branch* v. *Swerdlow*, 259 F.R.D. 64, 70 & n.6 (S.D.N.Y. 2009) ("Under New York law, the attorney-client privilege protects confidential communications between client and counsel where such communications are made for the purpose of providing or obtaining legal advice.").

overlapped "to such an extent that the parties in each case have agreed to consolidate all of the cases for discovery purposes"); *Costabile*, 254 F.R.D. at 164–65 ("So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts.").[2] Indeed, Judge Freeman has repeatedly expressed the view that the legal issues and the interests of the plaintiffs in these consolidated cases, like those in *Schultz*, are overlapping.[3]

Defendants further suggest that the communications between plaintiffs' counsel did not further any shared legal interest. To the contrary, all communications between plaintiffs' counsel were exchanged "in the course of formulating a common legal strategy." *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York*, 284 F.R.D. 132, 140 (S.D.N.Y. 2012). It is indisputable that, in discussions about the pending claims program, plaintiffs' counsel were "collaborating on a legal effort that is dependent on the disclosure of otherwise privileged information between the parties or their counsel." *AU New Haven, LLC v. YKK Corp.*, No. 15 Civ. 03411, 2016 WL 6820383, at *3 (S.D.N.Y. Nov. 18, 2016). That plaintiffs' counsels' communications are therefore protected is especially clear where, as here, all communications involve only attorneys for the respective plaintiffs. *Id.* (explaining courts often consider in assessing this factor whether an attorney for either party participated in the exchange of privileged information); *Obeid v. Mack*, No. 14 Civ. 6498, 2016 WL 7176653, at *8 (S.D.N.Y. Dec. 9, 2016).

To the extent Defendants continue to take the position that communications between Plaintiff's counsel and counsel for plaintiffs in other similar cases are discoverable, despite the fact that they are protected by the work product doctrine and common interest doctrine, we are, unfortunately, at an impasse.

2. Communications between Plaintiff's counsel and journalists

With respect to Defendants' request for communications between Plaintiff's counsel and journalists concerning this litigation and Decedent, Defendants' May 19 Letter asserts that Plaintiff's May 12 Letter improperly limited the scope of this request to communications relating to Plaintiff's specific allegations. To the extent that this request seeks other communications between counsel and journalists—which might include, for example, requests for comment made by the press, inquiries by the press concerning hearings and case schedules, and statements by counsel in their personal capacities on subjects unrelated to Plaintiff's case—those communications are not related to the claims and defenses of either party to this action and are not discoverable. Indeed, during our meet and confer, Defendants made no effort to argue that such communications are discoverable, instead representing that this request was intended to solicit communications between Plaintiff's counsel and journalists regarding Plaintiff's specific allegations.

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[2] *See also, e.g., Pampered Chef v. Alexanian*, 737 F. Supp. 2d 958, 965 (N.D. Ill. 2010) ("[T]he common interest rule has been extended in a wide range of circumstances, frequently those involving civil co-defendants, companies individually summoned before a grand jury, potential co-parties to prospective litigation, *plaintiffs filing separate actions in different states* and civil defendants who were sued in separate actions." (emphasis added)) (collecting cases).

[3] *See* Nov. 21, 2019 Hr'g Tr. at 8:21-9: 3; 32:4-9; 41:3-6.

With regard to that category of communications, Plaintiff's counsel represented in her May 12 Letter that "to the best of their knowledge," Plaintiff and/or her counsel have not communicated with journalists about her specific allegations. Defendants' May 19 Letter requested an explanation for this qualifying language. Plaintiff clarifies that this language was intended to communicate that this representation was made based on Plaintiff's and counsel's best recollections and not based on an unduly burdensome review of documents or communications. Defendants' May 19 Letter notes that Plaintiff's counsel has been interviewed by the media about Epstein, his estate, and this lawsuit, which Plaintiff's counsel does not dispute. However, Plaintiff's counsel has not discussed *Plaintiff's specific allegations* with the press, and the statements counsel has made, which primarily concern the settlement fund and the probate process, are not relevant to the claims and defenses in this matter.

To the extent that Defendants continue to take the position that they are entitled to any communications between Plaintiff's counsel and journalists regarding Decedent or this litigation, regardless of whether those communications relate to the claims and defenses in this action, we are at an impasse. To the extent that Defendants are seeking communications concerning Plaintiff's specific allegations, we reiterate that, to the best of our knowledge, no such communications exist.

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Please let us know if you would like to confer further about these or any other issues related to discovery. We continue to reserve all rights.

Very truly yours,

Roberta A. Kaplan