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By ECF
Hon. Debra Freeman
U.S. District Court for the Southern District of New York
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Re: *Davies v. Indyke et al.*, 19-cv-10788 (GHW)(DCF)

Your Honor:

We represent Plaintiff Teala Davies. We write regarding Defendants' pending motion to dismiss (ECF 26) to ask the Court to disregard a new legal argument that Defendants have improperly raised for the first time in their reply brief (ECF 34).

In their motion, Defendants contend, *inter alia*, that Plaintiff's claims arising from sexual assaults inflicted on her by Jeffrey Epstein in New Mexico when she was seventeen years old are time-barred under New Mexico law. Defs.' MOL in Support of Motion (ECF 27) at 4. In their moving brief, Defendants correctly identified the applicable New Mexico law governing statutes of limitations in childhood sexual abuse cases such as this one:

> Plaintiff's claims based on alleged torts occurring outside New York also expired long ago under the laws of those jurisdictions, including non-New York torts that occurred while she was a minor (if any), as follows: . . . (New Mexico) for torts occurring while she was a minor, the later of the "first instant" of Plaintiff's 24th birthday (i.e., sometime in 2009) or *3 years from the date that Plaintiff first disclosed her childhood sexual abuse to a licensed medical or mental health care provider in the context of receiving health care (N.M. Stat. § 37-1-30)* (Plaintiff alleges she never made such a disclosure (Compl. ¶ 67)); and, after Plaintiff reached age of majority, 3 years (i.e., in 2006) (N.M. Stat. § 37-1-8) . . . .

Id. at 3-4 (emphasis added). Plaintiff agrees that this is the governing legal standard under New Mexico law, and that her claim is timely if brought within

three years from the date that she "first disclose[s] the person's childhood sexual abuse to a licensed medical or mental health provider in the context of receiving health care from the provider." Plaintiff's MOL in Opposition (ECF 32) at 6 (quoting N.M. Stat. § 37-1-30(A)(2)).

Notwithstanding the parties' agreement on the applicable legal standard governing the timeliness of Plaintiff's New Mexico claims, Defendants' reply brief attempts for the first time to suggest that a different legal standard applies. Even though Defendants cited New Mexico Statutes § 37-1-30 in their opening brief and correctly stated that under that the statute the limitations period does not begin to run until "Plaintiff first disclosed her childhood sexual abuse to a licensed medical or mental health care provider in the context of receiving health care," Defendants now contend for the first time on reply that "Plaintiff is not entitled to avail herself" of that standard, and that the Court must apply an older version of that statute. Defs.' Reply MOL (ECF 34) at 9.

It is well established that "arguments raised for the first time in a reply brief are waived." *Cottam v. Global Emerging Capital Group, LLC*, No. 16 Civ. 4584 (LGS), 2020 WL 1528526, at *14 (S.D.N.Y. Mar. 30, 2020); *RL 900 Park LLC v. Ender*, No. 18 Civ. 12121 (AT), 2020 WL 70920, at *4 (S.D.N.Y. Jan. 3, 2020); *Gonzalez v. United States*, No. 17 Civ. 1093 (WHP), 2019 WL 3408886, at *2 n.2 (S.D.N.Y. July 29, 2019); *Centeno v. City of New York*, No. 16 Civ. 2393 (VSB), 2019 WL 1382093, at *6 n.13 (S.D.N.Y. Mar. 27, 2019); *Coscarelli v. ESquared Hosp. LLC*, 364 F. Supp. 3d 207, 219 n.10 (S.D.N.Y. 2019). Accordingly, the Court must ignore Defendants' belated attempt to argue that a different legal standard applies.

Even if Defendants had not plainly waived this new argument, and even if the pre-2017 version of New Mexico Statutes § 37-1-30 applied to Plaintiff's claims, Defendants' motion would still fail. Under the version of that statute that was in effect between 1995 and 2017, a claim is timely if brought before the latter of the plaintiff's twenty-fourth birthday or "three years from the date of the time that a person knew or had reason to know of the childhood sexual abuse and that the childhood sexual abuse resulted in an injury to the person, as established by competent medical or psychological testimony." *Kevin J. v. Sager*, 999 P.2d 1026, 1028 (N.M. App. 1999). In *Kevin J.*, for example, after discovery had been completed, the Court considered testimony from the plaintiff's expert that, "even though Plaintiff had some cognitive understanding and realization of the abuse and its effect upon him prior to February 5, 1994, Plaintiff did not finally pull it all together and realize the impact that the abuse had on his life until after February 5, 1994," and that "it's a process that unfolds for people." *Id.* at 1029; *see also id.* at 1027 ("Plaintiff does not claim that he repressed any memory of the alleged abuse."). The court denied summary judgment was improper, holding that "[t]he question of when Plaintiff knew or had reason to know of the alleged abuse and its impact is a question for the jury to decide." *Id.* at 1030. Here, Plaintiff has alleged that that she "is still in the nascent stages of understanding the deep and lasting

injuries that Epstein's pattern of abuse has caused her," and that she "is still just beginning to process and understand the full extent of the injuries that Epstein's abuse had caused her and the connection between Epstein's abuse and the emotional and psychological injuries she had experienced." Complaint (ECF 1) ¶¶ 65, 68. Accordingly, even if the pre-2017 version of the New Mexico statute applied, Plaintiff has pleaded sufficient facts to allege that her claims are timely, and Defendants' cannot meet their burden of proving that Plaintiff's New Mexico claims are time-barred, particularly at this phase before fact and expert discovery have been conducted.

The Court should ignore Defendants' new argument both because it was raised for the first time in reply and because it is in any event meritless.

Respectfully submitted,

/s/ Daniel Mullkoff

Daniel Mullkoff

cc: Bennet J. Moskowitz, Counsel for Defendants (by ECF)