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June 22, 2020

VIA ECF

Hon. Judge Freeman
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007

Re: *Doe v. Indyke et al.,* No. 19-cv-8673-KPF (S.D.N.Y.)

Dear Judge Freeman:

On behalf of Plaintiff Jane Doe in the above-referenced action, we write in response to Defendants' letter dated June 18, 2020 (Doc No. 74 (the "June 18 Letter")) requesting a conference concerning Defendants' anticipated motion to compel.

* * * * *

As an initial matter, Defendants' purported request for a conference is, in reality, a ten-page brief which advances in great detail their legal arguments on each issue in their anticipated motion to compel. Accordingly, Plaintiff sees no reason that the Court should order an extended five-week briefing schedule, which would only serve to cause further delay. Plaintiff provides her opposition to Defendants' anticipated motion below. These papers, together with this week's telephonic conference, should provide a more than adequate opportunity for the parties to make their arguments.

To date, Defendants' approach to discovery in this case has been transparently calculated to impose unreasonable burdens on Plaintiff and to delay adjudication on the merits. (*See, e.g.*, Doc No. 71.) Defendants' discovery requests are no different. As their June 18 Letter lays bare, Defendants' discovery requests are strikingly unreasonable: they include, for example, a demand for all communications *in the custody of Plaintiff's counsel* concerning Jeffrey Epstein and this litigation, even though such communications are obviously overwhelmingly privileged or irrelevant, as well as a demand for records and information about every medical procedure and condition that Plaintiff has ever had, despite clear precedents prohibiting such an invasive and unnecessary request. (Ex. C to June 18 Letter, at 6-7, 11-12.) These patently overbroad requests necessitated lengthy negotiations between the parties, at the conclusion of which Defendants

continue to demand three categories of documents that are either privileged, not relevant to the claims and defenses in this litigation, or both: (1) communications between Plaintiff's counsel and members of the press, media, and the publishing industry; (2) communications between Plaintiff's counsel and counsel for the other plaintiffs with pending cases against Mr. Epstein; and (3) documents and information related to Plaintiff's entire *physical* medical history. (June 18 Letter.)

Notably, throughout the parties' negotiations, as in their June 18 Letter to this Court, Defendants have failed to articulate the relevance of the documents or information they demand, relying on nothing more than conclusory assertions that such documents are "critical" or "highly relevant." (June 18 Letter at 5, 6, 9.) But Defendants are not permitted to go on a "fishing expedition with expansive, potentially burdensome requests" when they have not met their initial burden of demonstrating relevance. *Maxon Hyundai Mazda v. Carfax, Inc.*, No. 13 Civ. 2680, 2015 WL 4510416, at *3 (S.D.N.Y. July 24, 2015); *see also Indovino v. Tassinari*, No. 05 Civ. 4167, 2010 WL 11629191, at *1, 4 (E.D.N.Y. Mar. 29, 2010) (holding it is "incumbent upon the [moving party] to provide the necessary linkage between the discovery sought and the claims brought and/or other defenses asserted in the case" and finding "conclusory statements" insufficient to support relevance). And Defendants have failed to rebut Plaintiff's clear showing that at least one category of communications sought by Defendants—communications between her counsel and counsel for other plaintiffs—are privileged in their entirety. Accordingly, Plaintiff respectfully requests that this Court deny Defendants' motion to compel at this time.[1]

A. Plaintiff's Rule 26 Damages Disclosure Is Appropriate.

Defendants' assertion that Plaintiff has refused to provide anything more than a "laundry list of generic categories of damages" (June 18 Letter at 4) mischaracterizes Plaintiff's disclosures to date, as well as her position on her ongoing disclosure obligations. In fact, Plaintiff has disclosed all information reasonably available to her, and has informed Defendants—repeatedly—that she will supplement her disclosures as additional information, including crucial expert testimony and analysis, becomes available. The Federal Rules of Civil Procedure require nothing more.

Specifically, pursuant to Rule 26, Plaintiff is obligated to disclose a computation of each category of damages suffered *based on the information reasonably available to her*, and to supplement those disclosures as additional information is acquired. Fed. R. Civ. P. 26(a)(1)(A), (E); Fed. R. Civ. P. 26(e)(1)(A); *see also, e.g.*, *U.S. Bank Nat. Ass'n* v. *PHL Variable Ins. Co*, No. 12 Civ. 6811, 2013 WL 5495542, at *2 (S.D.N.Y. Oct. 3, 2013). That is precisely what Plaintiff has done here. Plaintiff's Complaint alleges, in great detail, the nature of the harm Plaintiff suffered as a result of Mr. Epstein's conduct. (Doc. No. 1, ¶¶ 54-60.) In February of this year, Plaintiff informed Defendants that she will seek damages in the form of, *inter alia*, actual damages, compensatory damages, statutory damages, consequential damages, punitive damages, attorneys' fees, costs, and interest. (*See* Ex. A to June 18 Letter) On March 6, 2020 and again on April 27, she informed Defendants that her damages will be comprised of medical expenses, lost

[1] Defendants' request that Plaintiff be forced to supplement her damages disclosure fares no better: Plaintiff has fully complied with her obligations under the Federal Rules of Civil Procedure, and the information she has provided—which is all the information that she has—is more than sufficient to enable Defendants to adequately prepare their defense. Plaintiff has stated repeatedly that she will supplement her disclosures as more information becomes available to her and an order on this issue would be premature, particularly as Defendants cannot show that they have suffered any prejudice at this stage.

wages, and compensation for pain and suffering (including both mental and emotional harm), as well as any other categories of damages that may be identified in the course of discovery. *See* Ex. 1 at 1[2]. And, as Defendants are well-aware, Plaintiff has been producing to them all of the underlying medical, financial, and employment records that may be relevant to her damages calculation on a rolling basis.

Plaintiff has also explained to Defendants that a more specific computation of damages in this case depends on detailed expert analyses of the harm that Epstein caused Plaintiff and its impact on her physical and mental health, employment prospects, and other areas of her life. For example, as Plaintiff informed Defendants in February, she has retained an experienced clinical and forensic psychologist (Ex. A to June 18 Letter, at 2), who is evaluating the psychological impact of Epstein's abuse on Plaintiff and the way that harm manifests in her personal and professional life. The results of this expert analysis are essential to Plaintiff's ability to provide a specific estimate of her damages; without such an assessment, Plaintiff cannot possibly accurately estimate, for example, the cost of her future medical treatment or the extent to which the trauma she has suffered will continue to impact her mental health. Indeed, for this reason, courts have widely recognized that "calculating damages for emotional harm 'is an inherently imprecise and difficult undertaking,'" *Johnson v. White*, No. 06 Civ. 2540, 2010 WL 11586681, at *5 (S.D.N.Y. Nov. 18, 2010), and it is routine for plaintiffs to seek to calculate and prove damages in sexual assault cases through "psychological evaluations" prepared by experts. *See, e.g.*, *Kovalchik v. City of New York,* No. 09 Civ. 4546, 2016 WL 11270091, at *2-3 (S.D.N.Y. Mar. 21, 2016), *report and recommendation adopted*, 2017 WL 3105873 (S.D.N.Y. July 21, 2017).

Not surprisingly, the cases cited by Defendants in their June 18 letter do not suggest otherwise. As an initial matter, all of Defendants' cases arose in the context of motions to preclude, not motions to compel. *See e.g. Max Impact, LLC v. Sherwood Grp., Inc.*, No. 09 Civ. 902, 2014 WL 902649, at *1 (S.D.N.Y. Mar. 7, 2014); *Ritchie Risk-Linked Strategies Trading (Ireland), Ltd. v. Coventry First LLC*, 280 F.R.D. 147, 151 (S.D.N.Y. 2012). Moreover, many of Defendants' cases involve claims with straightforward economic damages calculation, unlike the claims in this case. *See Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006) (excluding lost profits damages, where such damages were not mentioned in initial disclosures); *Max Impact, LLC*, 2014 WL 902649, at *1 (lost sales, lost future sales and lost profits); *Ritchie Risk-Linked Strategies Trading (Ireland), Ltd.*, 280 F.R.D. at 150 (calculation of attorney's fees and costs). And in the few cases cited by Defendants in which expert analysis is actually required to calculate damages, every one explicitly recognizes that the plaintiff is obligated to provide "the best information then available to it . . . , however limited and potentially changing it may be," and that "a precise and ultimate computation of damages is more properly to be produced as part of the plaintiff's expert disclosures." *Hesco Parts, LLC v. Ford Motor Co.*, No. 02 Civ. 736, 2007 WL 2407255, at *2 (W.D. Ky. Aug. 20, 2007); *see also Allstate Ins. Co. v. Nassiri*, No. 08 Civ. 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," plaintiff must "provid[e] reasonably available information concerning its damages computation."); *U.S. Bank Nat. Ass'n*, 2013 WL 5495542, at *3. That is precisely what Plaintiff has done in this case.

[2] Citations to "Ex.__" refer to Exhibits to this letter. Citations to Exhibits to Defendants' June 18 Letter take the following form: "June 18 Letter, Ex.__."

Indeed, other than their assertion (made in the caption to the relevant argument section) that they are left "in the dark," Defendants have not even attempted to argue that they are in any way prejudiced by the damages disclosure Plaintiff has made thus far. *See, e.g.*, *Supreme Showroom, Inc. v. Branded Apparel Grp. LLC*, No. 16 Civ. 5211, 2018 WL 3148357, at *14 (S.D.N.Y. June 27, 2018) ("[T]his is not a case in which the defendant waited until the eve of trial to disclose an entirely new category of damages."). Defendants have requested, and Plaintiff has produced, documents concerning Plaintiff's employment history, financial history, academic history, and medical history (Ex. C to June 18 Letter, at 9-12). Defendants have proposed a deposition schedule that includes depositions of Plaintiff's medical providers, including ones who treated Plaintiff on only one occasion. And expert discovery in this case is scheduled to commence on July 10, 2020. (Doc. No. 60.) As a result, Defendants cannot plausibly argue that receiving a specific numerical estimate of damages would change their approach to discovery. Indeed, Defendants' motion to dismiss Plaintiff's claim for punitive damages (Doc. No. 46.), which would drastically affect any calculation of damages, has not yet been decided, so the question of the precise scope of their potential liability is currently unanswerable.

B. Communications of Plaintiff's Counsel

Defendants' motion to compel targets two categories of documents that are in the sole possession of Plaintiff's counsel: (1) Plaintiff's counsel's communications with the press, and (2) Plaintiff's counsel's communications with other plaintiffs and their counsel. But as this Court is no doubt aware, "[c]ourts have been especially concerned about the burdens imposed on the adversary process when lawyers themselves have been the subject of discovery requests, and have resisted the idea that lawyers should routinely be subject to broad discovery." *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 70 (2d Cir. 2003). Here, as explained below, Defendants have not identified a single good reason why they believe that these requests are reasonably calculated to lead to the discovery of relevant and non-privileged information such that their production would outweigh the substantial burden on Plaintiff.

1. Plaintiff's Counsel's Communications with the Press

Request No. 1 of Defendants' First Set of Requests for Production calls for "[a]ll 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 . . . and communications which are to, from, or which 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." (Ex. C to June 18 Letter, at 6.) Plaintiff agreed to produce all communications she has had concerning Jeffrey Epstein, including with members of the press, but no such communications exist, since Plaintiff is proceeding pseudonymously and has not spoken to the press. (Ex. D to June 18 Letter, at 5.)

With respect to counsel's communications, at a meet and confer on May 4, 2020, Plaintiff informed Defendants that this Request is overly broad and seeks plainly irrelevant communications, such as media requests for comment on any topic related to Jeffrey Epstein or logistical inquiries regarding scheduled hearings or filings. Plaintiff therefore asked Defendants whether there were any specific categories of non-privileged and arguably relevant counsel communications they sought. At that time, Defendants indicated that they were seeking counsel's

communications with journalists *concerning Plaintiff's specific allegations*. (Ex. D to June 18 Letter, at 4-5.) Plaintiff's counsel then informed Defendants that, to the best of their knowledge, they have not had communications with journalists or members of the media about Plaintiff's specific allegations, which makes sense since Plaintiff is proceeding pseudonymously. (*Id.* at 5.)

It is unclear to us whether Defendants dispute this recollection, or have simply changed their minds. In any event, Defendants have since taken the position that they are seeking all of counsel's communications with the press relating to Jeffrey Epstein and this litigation. (Ex. 2 at 5). But Defendants have not, and cannot, explain why all statements made by counsel to the media regarding Epstein or this litigation are discoverable. The fact that a document concerns *the subject matter* of a litigation is insufficient: Following the 2000 and 2015 amendments to Rule 26, parties are entitled only to discovery that is *relevant to the claims and defenses in the litigation. See O'Garra v. Northwell Health*, No. 16 Civ. 2191, 2018 WL 502656, at *1–2 (E.D.N.Y. Jan. 22, 2018). In light of Plaintiff's representations that Plaintiff's counsel have not spoken to the press about Plaintiff's specific allegations, it is impossible to imagine what communications Defendants believe exist that satisfy this standard.

In the May 19 Letter, Defendants point to Plaintiff's counsel's six-minute appearance on Arielle Levy's *Broken* podcast as an example of statements by counsel that are responsive. But that podcast provides a clear example of the absurdity of Defendants' position. As an initial matter, Plaintiff is not obligated to provide Defendants with publicly available documents and communications. *See Alexander Interactive, Inc.* v. *Adorama, Inc.,* No. 12 Civ. 6608, 2013 WL 6283511, at *6 (S.D.N.Y. Dec. 4, 2013) (declining to order litigant to produce documents that are "publicly available on the internet"). But more importantly, statements of counsel's personal opinion about, for example, the complexity of Virgin Islands probate court ("the Virgin Islands is obviously a small jurisdiction, I'm quite sure they've never really handled something like this before") and the process of compensating victims of sexual assault through litigation ("obviously these women were terribly damaged, my client was terribly damaged, our judicial system has ways of putting a dollar figure on that and it should") are not relevant to the claims and defenses *in this action*: they in no way make it "more or less probable" that any fact "of consequence in determining the action" is true. *See Vaigasi v. Solow Mgmt. Corp*., No. 11 Civ. 5088, 2016 WL 616386, at *11 (S.D.N.Y. Feb. 16, 2016).

It goes without saying that identifying responsive communications and documents in the custody of counsel would be extremely burdensome and that high burden is not justified where there is a correspondingly low probability of discovering relevant material. Requiring the numerous attorneys who have worked on this case to review all of their communications over the span of more than a year is plainly not justified given the marginal utility of the communications sought. *See Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 322-23 (S.D.N.Y. 2003) (explaining that cost-shifting is appropriate where discovery requests "impose an undue burden or expense," balancing how important the sought-after evidence [is] in comparison to the cost of production"). Defendants' motion to compel Plaintiff's review and production of these communications should be denied.

2. Plaintiff's Counsel's Communications with Counsel for Other Plaintiffs

Defendants next seek all communications between Plaintiff's counsel and counsel for plaintiffs with similar claims against Defendants concerning Jeffrey Epstein and this litigation.

(Defendants' RFPs 1 and 2.) These demands are equally overbroad and unduly burdensome on their face, especially since the material they seek is protected by the work product doctrine and the common interest doctrine.

As an initial matter, Defendants again fail to articulate the relevance of these communications to the claims and defenses *in this case*. Plaintiff has explained to Defendants that her counsel's communications with counsel for other plaintiffs relate to the development and implementation of the voluntary claims resolution program. *See* Letter from R. Kaplan to B. Moskowitz (May 12, 2020), at 4. By the very design of that program, Defendants and Defendants' counsel in the case will have essentially nothing to do with it.[3] It is therefore difficult to imagine why Defendants believe discussions among counsel about the program would bear on the claims and defenses in this action. Nor do Defendants have any reason to believe that counsel in this case have had communications with other counsel on any other topics. *See Chembulk Mgmt. PTE Ltd. v. Vedanta Ltd.*, No. 16 Civ. 9799, 2018 WL 3410013, at *5 (S.D.N.Y. July 13, 2018) (further discovery denied where no record basis existed beyond party's "mere hunch"). But even if Defendants could establish that these communications are somehow relevant to the claims and defenses—which they cannot—they are nonetheless barred from attempting to discover communications that are subject to the protections of the work product and common interest doctrines.

Indeed, Defendants' June 18 Letter mischaracterizes the nature of the protection that Plaintiff asserts here. Plaintiffs do not assert a free-standing protection arising out of the common interest doctrine. Instead, Plaintiff asserts, correctly, that her counsel's communications with other plaintiffs' counsel are protected by the work product doctrine, and the common interest doctrine operates to confirm that counsel did not waive the benefits of that protection by disclosing their opinion work product to counsel for other plaintiffs. *See, e.g.*, *City of Almaty, Kazakhstan v. Ablyazov*, No. 15 Civ. 5345, 2019 WL 2865102, at *7 (S.D.N.Y. July 3, 2019).

There can be little doubt that the communications Defendants seek reflect the "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation" and are therefore protected against disclosure under the work product doctrine. Fed. R. Civ P. 26(b)(3)(B); *Hickman* v. *Taylor*, 329 U.S. 495, 510–11 (1947). There is no question that counsel's emails were prepared "*because of* anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation," as the work product doctrine requires. *Bloomingburg Jewish Educ. Ctr.* v. *Vill.*, 171 F. Supp. 3d 136, 142 (S.D.N.Y. 2016) (quoting *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, No. 02 Civ. 7955, 2003 WL 21998674, at *4 (S.D.N.Y. Aug. 25, 2003) (emphasis added).[4] Indeed, the communications in question are core "opinion work product," as they contain counsel's opinions and impressions about strategy, in particular vis-à-vis the victim's compensation program; as such, they enjoy "virtually absolute protection." *Favors v. Cuomo*, 285 F.R.D. 187, 200 (E.D.N.Y. 2012).

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[3] *See, e.g.*, Nov. 21, 2019 Hr'g Tr. at 10:23-11:1 (Defendants' counsel "encourage[ing] anyone who has questions on the plaintiff's side to reach out to the program administrators and designers for whom I don't speak because they're fully independent.").

[4] Of course, documents relating to legal strategy "in connection with *ongoing* litigation" are also protected by the work product doctrine. *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 640 (E.D.N.Y. 1997); *see* also *In re Initial Pub. Offering Sec. Litig.*, 220 F.R.D. 30, 34 (S.D.N.Y. 2003).

Defendants do not and cannot meaningfully dispute that work product protection applies to these communications; instead, they claim, without elaboration, that it is "not credible that *all* such communications" are work product. June 18 Letter at 8 (emphasis added). But Defendants fail to explain why they believe Plaintiff's counsel have communicated with other plaintiffs' attorneys about topics somehow relevant to this litigation but that do not involve counsel's "mental impressions, conclusions, opinions or legal theories." Defendants' mere "hunch" that unprotected, relevant communications between counsel exist is not sufficient to justify further discovery. *See Chembulk Mgmt..,* 2018 WL 3410013, at *5.

Unable to challenge the application of the work product doctrine, Defendants instead attempt to argue that work product protection was waived because counsel shared their opinions and strategy with nonparties. Defendants' waiver argument is meritless.

"Unlike waiver of the attorney-client privilege, work product is not automatically waived once produced to a third party." *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 may be shown to others, "'simply because there was some good reason to show it' without waiving the privilege." *Id.* (quoting *United States v. Adlman,* 134 F.3d 1194, 1200 n. 4 (2d Cir.1998)); *see also Costabile v. Westchester County, New York*, 254 F.R.D. 160, 164 (S.D.N.Y. 2008) ("Work product immunity is not automatically waived by production to a third party; it is waived when its production to another is inconsistent with the protection.").

Spanierman—the only work product case Defendants cite, June 18 Letter at 8—is not to the contrary. 2003 WL 22909160, at *4 ("[D]isclosure of work product to a third party does not necessarily waive work product protection if it was not disclosed to an adversary or one who stands in a potentially adversarial position to the client, or if did not substantially increase the likelihood of it being revealed to an adversary."). In *Spanierman*, work product protection was waived by defendant's voluntary production *to the FBI*, where the FBI had an "obligation to perform an objective investigation of [defendant's] allegations," and where the voluntary disclosure "substantially increased the likelihood that privileged information would be secured by [the party's] adversaries." *Id.* at 5. In short, "[defendant] and her attorneys consciously disregarded the possibility that an adversary might obtain the protected materials" via her disclosure to the FBI. *Id.* No comparable facts exist here.

Furthermore, the common interest doctrine provides an alternative, independently sufficient basis to conclude that Plaintiff has not waived work product protection. The common interest doctrine "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York*, 284 F.R.D. 132, 139 (S.D.N.Y. 2012). "Obtaining the protections of the common interest doctrine requires a two-part showing": (1) a common legal interest, and (2) cooperation in formulating a common legal strategy. *Id.* Both elements are satisfied here.

First, Plaintiff and the other plaintiff-victims share "a common legal, rather than commercial, interest." *Id.* Contrary to Defendants' argument, June 18 Letter at 7, which cites outdated caselaw for the proposition that there must be "identical legal interests" among the parties asserting the common interest, "more recent cases have held that the parties need not have 'total

identity of interest' as long as 'a limited common purpose necessitates disclosure to certain parties.'" *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 434 (S.D.N.Y. 2013). A common legal interest exists where "parties . . . have come to an agreement, though not necessarily in writing, embodying a cooperative and common enterprise towards an identical legal strategy," as demonstrated by any evidence of "the existence of coordinated legal efforts." *Fireman's Fund*, 284 F.R.D. at 139–40 (alteration omitted).[5] Here, the various plaintiffs with cases pending against the Estate, all of 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 in consolidated cases 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 165 ("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."); *see also 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). Indeed, as this Court has recognized,[6] the legal issues and the interests of the plaintiffs in these consolidated cases, like those in *Schultz*, are overlapping. This substantial overlap in issues is sufficient to give rise to a common legal interest among plaintiffs in these consolidated cases.

Defendants do not even address the second prong of the common interest exception, namely, whether the exchange of privileged information "was made in the course of formulating a common legal strategy, and [] the parties understood that the communication would be in furtherance of the shared legal interest." *Fireman's Fund*, 284 F.R.D. at 140 (alterations omitted). Here, "[t]he key question is whether the parties are 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).

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[5] Relying on *Shamis*, Defendants argue that the various plaintiffs lack a common legal interest because "(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." June 18 Letter at 8. But *Shamis* is inapplicable. As an initial matter, *Shamis* appears to deal with waiver of *attorney-client privilege*, *see Shamis v. Ambassador Factors Corp.*, 34 F. Supp. 2d 879, 892 (S.D.N.Y 1999), which is more easily waived by third-party disclosure than the work product protection Plaintiff asserts here. *See Spanierman*, WL 22909160, at *2. The same is true of Defendants' reliance on *Campinas Foundation v. Simoni*, No. 02 Civ. 3965, 2004 WL 2709850, at *2 (S.D.N.Y. Nov. 23, 2004) ("The common interest privilege, sometimes referred to as the joint defense privilege, is an extension of the attorney-client privilege." (internal quotation marks omitted)).

Furthermore, the list of factors Defendants derive from *Shamis* are neither exhaustive nor mandatory. *See Fireman's Fund*, 284 F.R.D. at 139–40 (no agreement in writing is necessary; any evidence of common legal strategy is acceptable); *see also Homeward Residential, Inc. v. Sand Canyon Corp.*, No. 12 Civ. 5067, 2017 WL 4676806, at *6 (S.D.N.Y. Oct. 17, 2017) ("[p]arties may share a 'common legal interest' even if they are not parties in ongoing litigation."). Moreover, for the reasons explained above, Plaintiff has clearly established "evidence of a coordinated legal strategy" with other plaintiffs vis-à-vis the proposed victims' compensation program, reaffirming the existence of a common legal interest. *Shamis*, 34 F. Supp. 2d at 893.

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

There can be no doubt that this is true of communications between Plaintiff's counsel and counsel for other plaintiffs in similar actions. To give one example, on November 22, 2019, following a conference before this Court in which Your Honor urged the parties to work collaboratively towards settlement,[7] counsel for plaintiffs sent counsel for Defendants a letter posing three questions concerning the size of Mr. Epstein's Estate and of the funds to be made available through the claims program. (Ex. 3.) Naturally, drafting that joint letter required communications between counsel for the plaintiffs whose cases are before this Court[8]; such communications clearly related to a collaborative legal effort and would reflect counsel's otherwise privileged individual opinions on strategic issues—as such, they are classic examples of communications subject to common interest protection. *See, e.g., Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995); *see also Fireman's Fund*, 284 F.R.D. at 140 (collecting cases noting the significance of attorney participation to the determination of whether communications qualify for common interest protection).

Given that Plaintiff's counsel's communications with other plaintiff's counsel are extremely likely to be subject to the work product protection, the enormous burden of searching through all of counsel's correspondence with other plaintiffs' counsel is clearly unjustified by the corresponding potential benefit to Defendants, which they have yet to articulate. *See Am. Broad. Companies, Inc. v. Aereo, Inc.*, No. 12 Civ. 1540, 2013 WL 139560, at *1 (S.D.N.Y. Jan. 11, 2013) ("[A] court must limit the extent of discovery if the burden of discovery outweighs its likely benefit."). Accordingly, Defendants' motion to compel these documents and communications should also be denied.

C. Plaintiff is Not Obligated to Produce Unrelated Medical Information and Records

Finally, Defendants argue that because Plaintiff alleges Epstein's sexual abuse caused her emotional and psychological harm, they are entitled to discover her *entire* medical history. But again, well-established precedent prohibits Defendants from conducting an overbroad fishing expedition into Plaintiff's private medical records, unconstrained by time period or type of treatment or condition.

Plaintiff's *mental health* is what is at issue in this action. The Complaint alleges that Plaintiff has suffered from psychiatric conditions, including anxiety, depression, panic attacks, as well as continuing emotional distress, caused by Epstein's sexual abuse during her childhood. *See* June 18 Letter at 9. Appropriately, therefore, in response to Defendants' Request for Production Nos. 13 and 14 and Interrogatory Nos. 10 and 11, Plaintiff has agreed to produce all records and information "relating to any condition, treatment, or, service that concerns the same or similar conditions as those she alleges" in the Complaint. (*See* Ex. 4 at 3.) Plaintiff has already begun producing such records (Doc. No. 71 at 2), and expects to complete her production of those records by June 24, 2020.

Defendants are entitled to nothing more. As this Court has explained in analogous circumstances, Plaintiff's "emotional distress claim does not . . . give Defendants an unfettered right to pursue discovery into [Plaintiff's] entire medical history." *Manessis v. New York City*

[7] *See* Nov. 21, 2019 Hr'g Tr. at 8:21-9:3; 43:13-44:3; 49:21-24.
[8] Counsel for a plaintiff suing the Executors in New York County Supreme Court also signed the letter.

Dep't of Transp., No. 02 Civ. 359, 2002 WL 31115032, at *2 (S.D.N.Y. Sept. 24, 2002); *see also Evanko v. Elec. Sys. Assocs., Inc.*, No. 91 Civ. 2851, 1993 WL 14458, at *2 (S.D.N.Y. Jan. 8, 1993) (emotional distress allegations do not give "defendants a license to rummage through all aspects of the plaintiff's life in search of a possible source of stress or distress.") Instead, Defendants are entitled to discovery only of "[Plaintiff's] mental health treatment records, whether they are the records of psychiatrists, psychologists, mental health therapists or counselors, or other medical practitioners." *Manessis*, 2002 WL 31115032, at *2. Defendants, however, insist on receiving records of "*any* medical conditions" that "Plaintiff may have suffered . . . prior to her interactions with [Epstein]," and "information concerning *the entirety* of the medical procedures and consultations Plaintiff received *after* she met Mr. Epstein. June 18 Letter at 9 (emphasis added).

With respect to records from before Plaintiff met Epstein, to the extent Defendants are "seeking records of *all medical care* rendered to the plaintiff[] starting . . . years before [her injuries] and irrespective of what maladies the plaintiffs were being treated for, the request is self-evidently overbroad." *Kunstler v. City of New York*, No. 04 Civ. 1145, 2006 WL 2516625, at *4 (S.D.N.Y. Aug. 29, 2006) (emphasis added). Defendants hypothesize, without any factual basis, that some prior underlying condition might have "directly caused or contributed to Plaintiff's alleged damages." June 18 Letter at 9. But precedent forecloses Defendants from relying on the generalized and speculative notion "that any physical malady *might* cause emotional distress" to justify their overbroad discovery expedition into Plaintiff's past conditions during her *childhood*. *Evanko*, 1993 WL 14458, at *2 (emphasis added). Where, as here, a plaintiff claims only emotional distress damages, "Defendants . . . are not entitled to pursue discovery into treatments [Plaintiff] may have received for any physical ailments, unless [Plaintiff] has first indicated through deposition testimony or other discovery responses that a particular physical ailment or ailments caused [her] emotional distress during the relevant period." *Manessis*, 2002 WL 31115032, at *2.

For the same reasons, Defendants' claimed entitlement to "the *entirety* of the medical procedures and consultations Plaintiff received after she met Mr. Epstein" fares no better. June 18 Letter at 9 (emphasis added). Beyond gesturing at "the breadth of the medical conditions Plaintiff alleges,"—all of which relate to her mental health—Defendants make no effort to explain how treatment for any physical ailment after Epstein's abuse would be relevant to any claim or defense in this action. *See Evanko*, 1993 WL 14458, at *2. Given that Plaintiff alleges no physical harm from her abuse by Epstein, Defendants cannot seriously contend that records relating to her physical health over the last twenty years—such as, for example, records from treatment for a sinus infection or the results of her most recent pap smear—are relevant and discoverable. *Manessis*, 2002 WL 31115032, at *2.

Not surprisingly given the above, both of the cases cited by Defendants concern disputes over precisely the sorts of documents *Plaintiff has already agreed to produce*. In *Arthur v. Atkinson Freight Lines Corporation*, a personal injury plaintiff failed to turn over medical records from the physician who treated plaintiff *for the accident underlying the suit* and failed to supplement his responses as further medical records, including "progress notes," were generated during litigation. 164 F.R.D. 19, 20 (S.D.N.Y. 1995). Such records were indisputably relevant, and Plaintiff has already agreed to provide their precise analogue here by producing records of "any condition, treatment, or, service that concerns the same or similar conditions as those she alleges." (Ex. 4 at 3.) Similarly, in *Rodriguez v. Folksamerica Reinsurance Corporation*, the defendant sought

"records from the plaintiffs' medical care providers concerning any treatment they have ever received for *emotional distress*, whether the stress was due to the actions alleged in this lawsuit or otherwise." No. 305 Civ. 01687, 2006 WL 1359119, at *3 (D. Conn. May 15, 2006) (emphasis added). Again, Plaintiff has already agreed to provide all such records here. *Rodriguez* only reaffirms that Plaintiff has fully satisfied her discovery obligations in this regard.

In sum, Defendants' effort to rummage through Plaintiff's entire medical history is nothing more than an abusive tactic designed to exact the maximum amount of embarrassment and harm on Plaintiff for having brought this claim in the first place. Such tactics find no support in the case law and should not be permitted here.

D. Conclusion

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' request for a five-week briefing schedule and decide these discovery disputes based on the comprehensive letters already submitted by the parties, as well as the telephonic conference that the Court already scheduled. Plaintiff further requests that the Court deny Defendants' motion to compel.

Respectfully submitted,

Roberta A. Kaplan

cc: Counsel of Record