UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRINITY SUNAZ,

Plaintiff,

-against-

DESPONT STUDIOS LLC, et al.,

Defendants.

17-CV-1979 (GBD) (BCM)

**ORDER**

**BARBARA MOSES, United States Magistrate Judge.**

By Order dated November 14, 2017 (Dkt. No. 59), the Court directed defendants to produce documents concerning past complaints of harassment or discrimination by employees of defendant Despont Studios LLC, d/b/a the Office of Thiery W. Despont, LTD (OTD), and defendants' response to such complaints, from December 2012 through January 2017, except for documents concerning former OTD employee Dominique Moore, who settled her pregnancy discrimination claims against OTD in 2017 pursuant to a confidential settlement agreement. As to Ms. Moore, the Court requested, *id.* ¶ 2, and the parties filed, supplemental letter-briefs setting forth their positions as to (a) whether plaintiff is entitled to documents concerning her complaint and defendants' response; and (b) whether plaintiff's counsel, having previously represented Ms. Moore, may pursue and/or utilize such documents on behalf of their current client. Having reviewed the parties' submissions, docketed as letter-motions (Dkt. Nos. 63, 64), the Court concludes that the answer to both questions is yes.

**BACKGROUND**

Plaintiff Sunaz worked for OTD as a housekeeper from December 2014 to January 2017. She alleges that she was subjected to (a) a steady stream of insults and name-calling from a fellow housekeeper, Salome Santos, based on her Filipino ethnicity; and (b) sexual harassment,

both verbal and physical, from defendant James Smith, an accountant at OTD who "directly supervised" plaintiff. *See* Am. Compl. (Dkt. No. 31) ¶¶ 1-2, 11, 14-18. Plaintiff alleges that in October 2015 she complained about Ms. Santos to (among others) the OTD Office Administrator, Elaine Vivar Camin, who "told Ms. Santos to stop harassing Ms. Sunaz." *Id.* ¶ 19. However, Ms. Santos continued her offensive conduct. Plaintiff complained again in October 2016. *Id.* ¶ 21. At that point OTD assigned plaintiff and Ms. Santos to work on different floors, but Ms. Santos continued to mistreat Ms. Sunaz when the two housekeepers saw each other. *Id.* ¶¶ 22-23. Plaintiff complained again in November 2016, but "no further even attempted remedial measures were taken." *Id.* ¶¶ 24-25.

Meanwhile, plaintiff alleges, Mr. Smith was making frequent "inappropriate remarks" about her breasts and her sex life. Am. Compl. ¶ 26. In addition, he falsely claimed to coworkers that plaintiff had offered to perform a sex act on him at an office holiday party, and asked her via text to "send naked pictures." *Id.* By the fall of 2016 Mr. Smith's conduct "escalated from offensive and harassing remarks and comments to unwanted physical touchings," including grabbing and squeezing plaintiff's breasts and slapping her behind, despite her physical and verbal efforts to prevent such contact. *Id.* ¶¶ 29-34. "On January 20, 2017, Ms. Sunaz reported Mr. Smith's harassing conduct to Ms. Camin, and never returned to work as she had been constructively discharged." *Id.* ¶ 35. Plaintiff acknowledges that she did not complain to Ms. Camin or others at OTD about Mr. Smith's conduct until that day. According to the Amended Complaint, she felt that OTD "did not have any legitimate mechanism to address employee complaints and remedy the unlawful terms and conditions of her employment, and felt she had no choice but to completely remove herself from that environment." *Id.* ¶ 40.

Plaintiff asserts harassment and discrimination claims against OTD pursuant to 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e–2(a); the New York State Human Rights Law (NYSHRL), N.Y. Exec. Law §§ 296, *et seq.*, and; the New York City Human Rights Law (NYCHRL), N.Y.C. Admin. Code §§ 8-101, *et seq.*, as well as claims against Smith pursuant to the NYSHRL, the NYCHRL and common law. In its answer, OTD avers, among other things, that it "took reasonable steps to prevent and promptly correct" sexual harassment and discrimination, and in particular that it "took appropriate remedial measures" when plaintiff complained about Ms. Santos, but that she "unreasonably failed to take advantage" of OTD's preventive and/or corrective measures and "failed to report [her] sexual harassment allegations in a timely and/or prompt manner." OTD Ans. to Am. Compl. (Dkt. No. 41) ¶¶ 92-95. *See also* Smith Ans. to Am. Compl. (Dkt. No. 42) ¶ 90 ("Plaintiff failed to report [her] sexual harassment allegations in a timely and/or prompt manner.").[1]

Plaintiff Sunaz is represented in this action by Wigdor LLP (Wigdor), which previously represented Ms. Moore in her pregnancy discrimination case against OTD. *Moore v. Despont Studios LLC*, No. 16-CV-00619 (S.D.N.Y.), was dismissed pursuant to a settlement agreement executed on March 2, 2017 (fifteen days before the *Sunaz* action was filed on March 17, 2017), in which Ms. Moore agreed that she would:

> treat the existence and terms of [this] Agreement and the negotiation leading to this Agreement and any information she has about the treatment of herself and other OTD employees by OTD or its employees ("Confidential Information") as confidential and will not discuss the Confidential Information or the Agreement

[1] Mr. Smith admits to an "ongoing friendly relationship" with Ms. Sunaz "that involved much flirtatious innuendo" and "included touching each other," Smith Ans. to Am. Compl. ¶¶ 26-29, but avers that the comments attributed to him in her complaint were made "in a joking context," *id.* ¶ 26, and that all touching was "consensual, reciprocal, and welcomed by Plaintiff." *Id.* ¶ 39. Smith also admits telling others that Ms. Sunaz offered to perform a sex act on him following the office Christmas party in 2015, but avers that his statements were truthful. *Id.* ¶ 26.

> with anyone other than: (i) her immediate family; (ii) her counsel or tax advisor as necessary to secure their professional advice; or (iii) as may be required by law.

Def. Ltr. dated Nov. 17, 2017 (Dkt. No. 64), Ex. A (the Agreement), ¶ 5.[2] There is no reciprocal provision requiring OTD to keep its settlement with Ms. Moore, or any of the underlying facts, confidential. However, the contract also contains a mutual non-disparagement clause which generally prohibits the parties from "making any unfavorable comments" about one another, unless compelled by subpoena or other compulsory legal process. *Id.* ¶ 6. The pleadings in *Moore* were not sealed and remain available to the public.

## ANALYSIS

### A. Whether the Moore Documents are Discoverable

Ms. Sunaz alleges that she was harassed by two different OTD employees: Ms. Santos, who was a co-worker, and Mr. Smith, who "directly supervised Ms. Sunaz from, in and around, December 2014 until her constructive discharge on or about January 20, 2017." Am. Compl. ¶ 11. Under Title VII, an employer's liability for harassment "may depend on the status of the harasser." *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013).

> If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a "supervisor," however, different rules apply. If the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.

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[2] Defendants first filed an unredacted copy of the Agreement in this action on May 24, 2017, in support of their motion to strike portions of Ms. Sunaz's original Complaint (which contained numerous allegations concerning the *Moore* case) or, in the alternative, to disqualify Wigdor from representing Ms. Sunaz. *See* Aff. of Matthew Maddalene, filed May 24, 2017 (Dkt. No. 21), Ex. F. On June 16, 2017, the parties agreed, and the District Judge so-ordered (Dkt. No. 33), that defendants' motion was mooted by the filing of plaintiff's Amended Complaint, which does not contain any express references to Ms. Moore.

*Id.* (citing *Faragher v. Boca Raton,* 524 U.S. 775 (1998), and *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998)). *See also Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 50 (2d Cir. 2012) (quoting *Faragher*, 524 U.S. at 807 and *Ellerth*, 524 U.S. at 765) (where employer has asserted the *Faragher/Ellerth* defense, it is that employer's burden to establish that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise"); *Little v. Nat. Broad. Co.*, 210 F. Supp. 2d 330, 392 (S.D.N.Y. 2002) (the *Faragher/Ellerth* defense "allows an employer to escape liability for the conduct of the supervisor if the employer demonstrates that: (1) it took reasonable steps to prevent harassment and to remedy such conduct promptly once it was brought to the employer's attention; and (2) the harassed employee unreasonably failed to avail himself or herself of any corrective or preventive opportunities made available by the employer").

Defendant OTD has clearly asserted the *Faragher/Ellerth* defense. *See* OTD Ans. to Am. Compl. ¶¶ 92-95. Plaintiff is therefore entitled to discovery concerning the existence and effectiveness of the "preventive or corrective opportunities" that OTD provided. In light of OTD's relatively small size and apparent informality,[3] the Court has already held that the permissible discovery includes documents concerning past complaints of harassment and discrimination, and OTD's response to such complaints, from December 2012 through January 2017. Order dated Nov. 14, 2017, ¶ 2. *See Berrie v. Bd. of Educ. of Port Chester-Rye Union Free Sch. Dist.*, 2017 WL 2374363, at *13 (S.D.N.Y. May 31, 2017) (if an employer's anti-

[3] OTD has approximately 50 employees. *See* Tr. of Nov. 13, 2017 Hrg. (Dkt. No. 60) at 23:2-4, 30:9. As of November 17, 2017, defendants had not produced any written complaint procedure in discovery. *See* Pl. Ltr. dated Nov. 17, 2017, at 1 n.1.

harassment policy "is ineffective – for example, if an employer fails to adequately or promptly investigate a complaint, or the policy is generally ignored – the employer may not avail itself of the *Faragher/Ellerth* defense"); *Little*, 210 F. Supp. 2d at 393 (even where employer maintained a formal "anti-harassment policy with complaint procedures," a plaintiff "may rebut this evidence with proof that the policy was ineffective," including evidence that supervisors "routinely dismissed or mocked" employees' informal complaints, or "took no action in response"); *see generally Chen-Oster v. Goldman, Sachs & Co.*, 293 F.R.D. 557, 562 (S.D.N.Y. 2013) ("courts typically apply more liberal civil discovery rules in employment discrimination cases, giving plaintiffs broad access to employers' records in an effort to document their claims.") (internal quotation marks and citations omitted).[4]

To the extent documents concerning Ms. Moore fall within the scope of my November 14, 2017 Order, they are not rendered immune from discovery by Ms. Sunaz merely because OTD obtained a confidentiality promise from Ms. Moore when it settled her lawsuit. Ms. Sunaz has not asked Ms. Moore to produce any documents. She seeks discovery from OTD itself, which is not burdened by any contractual confidentiality obligation. OTD does not seriously dispute this point. Instead, it argues: (1) that Ms. Sunaz does not "need" evidence concerning the "supposed mishandling of other complaints to prove her claim, since she can draw upon her own

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[4] Although *Berrie* and *Little* discuss the first prong of the *Faragher/Ellerth* defense, discovery concerning complaints by other employees may also be relevant to the second prong. *See, e.g.*, *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001) (an employee who claims that she did not avail herself of the employer's internal complaint procedures due to fear of retaliation may not rely solely on her own "subjective belief" but must produce evidence "to the effect that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints"); *Cruz v. Liberatore*, 582 F. Supp. 2d 508, 527 (S.D.N.Y. 2008) (plaintiff Cruz cannot "circumvent the second prong of the *Faragher/Ellerth* defense" without any "*ex ante* evidence that [defendants] ignored or resisted similar complaints or took adverse employment actions against employees who made such complaints").

experience when she complained about Ms. Santos"; (2) that complaints by other employees are irrelevant unless Ms. Sunaz knew about those complaints, and how they were handled, "at the time"; and (3) that introducing Ms. Moore's claims into this case would "invite a prolonged mini-trial" on their merits, rendering "any" discovery concerning Ms. Moore "completely disproportionate to the needs of the case." Def. Ltr. dated Nov. 17, 2017, at 2-3.

The Court is not persuaded. Discovery is bounded by Fed. R. Civ. P. 26(b), not by what a defendant believes a plaintiff "needs." In this case, the Court has already determined that certain documents concerning complaints by other employees are within the scope of Rule 26(b)(1).[5] As noted above, those documents are potentially relevant to both prongs of the *Faragher/Ellerth* defense. While the second prong focuses on the reasonableness of the *employee's* conduct, the first prong asks whether the *employer* "exercised reasonable care to prevent and correct any harassing behavior." *Vance*, 133 S. Ct. at 2439. The answer to that question does not vary depending on what a particular employee knew or did not know about the employer's policies or practices. Finally, defendants' concerns about a "prolonged mini-trial" are premature. "[T]he scope of relevance under Rule 26 is broader than under the Rules of Evidence.'" *In re Terrorist Attacks on Sept. 11, 2001*, 293 F.R.D. 539, 546 (S.D.N.Y. 2013) (quoting *Malinowski v. Wall Street Source, Inc.*, 2011 WL 1226283, at *1 (S.D.N.Y. Mar. 18, 2011)). *See also* Fed. R. Civ. P. 26(b)(1) ("Information within [the] scope of discovery need not be admissible in evidence to be discoverable."). The Federal Rules of Evidence, including Rules 401, 403 and 408, will provide

[5] To be clear: the discoverable documents are those constituting or concerning the employees' *internal* complaints and the employer's response thereto. The *Faragher/Ellerth* defense asks whether the employer "exercised reasonable care to prevent and correct any harassing behavior," *Vance*, 133 S. Ct. at 2439, not how it later responded to litigation accusing it of failing to do so. Defendants' fear that Ms. Sunaz could "gain unfettered access to the nearly 60,000 pages OTD produced in the *Moore* case," Def. Ltr. dated Nov. 17, 2017, at 4, thus seems unrealistic.

the Court with ample tools to prevent the trial of this action from devolving into a trial of the now-settled *Moore* action.

**B. Whether the Moore Documents are Discoverable by Wigdor**

Although only the parties signed the Agreement in *Moore*, defendants argue that the one-way confidentiality clause contained in ¶ 5 also binds Wigdor – and prohibits Wigdor from seeking discovery concerning Ms. Moore's internal complaints and OTD's response – by virtue of ¶ 10, which makes the Agreement "binding on Employer and Employee and upon their respective heirs, representatives, successors, and assigns." *See* Def. Ltr. dated Nov. 17, 2017, at 1 ("The terms of the Agreement are binding on Ms. Moore's representatives, *i.e.*, her lawyers."). Thus, defendants argue, since Ms. Moore cannot discuss "the treatment of herself and other OTD employees by OTD or its employees," *Moore* Ag. ¶ 5, her former counsel (now counsel for Ms. Sunaz) cannot take discovery into any subjects within the scope of that prohibition.

Defendants' argument proves too much. If the generic term "representatives" in ¶ 10 were meant to bind litigation counsel to every substantive provision in the *Moore* Agreement, absurd results would follow. For example, if OTD's counsel were bound by the payment provision in ¶ 1, it could be liable to pay Ms. Moore the agreed-upon settlement amount. More to the point, if the parties' lawyers were bound by the mutual non-disparagement clause in ¶ 6 (prohibiting any "unfavorable comments" about the opposing party), Wigdor could never take another case against OTD, regardless of the nature of the dispute or the identity of its new client.[6] Yet OTD has never argued – and does not now argue – that Wigdor is prohibited from

[6] Although the parties' letter-briefs do not discuss this point, it appears that OTD itself, which *is* bound by the *Moore* Agreement, is now in breach of ¶ 6. *See, e.g.*, Def. Mem. of Law in Supp. of Mtn. to Strike, filed May 24, 2017 (Dkt. No. 22), at 15 (Ms. Moore "was fired for hacking into highly confidential emails of senior OTD personnel"); Def. Ltr. dated Nov. 17, 2017, at 3 ("If required, OTD will vigorously argue and prove" that Ms. Moore was fired "because she hacked

representing any and all plaintiffs in litigation against it.[7] These facts suggest that the parties did *not* intend the term "representatives" to mean their litigation counsel, at least not when acting on behalf of a different client. *See Earnings Performance Grp., Inc. v. Quigley*, 124 F. App'x 350, 353-54 (6th Cir. 2005) (lawyer who did not sign settlement agreement in which his former clients agreed not to cooperate in future litigation adverse to EPC "obviously" was not bound by that agreement, despite language making it binding on the parties' "representatives").

Even if the language of the Agreement were more susceptible of the interpretation OTD now champions, this Court would hesitate to construe it as restricting Wigdor from representing other clients against OTD, because any such contract would violate Rule 5.6(a)(2) of the New York Rules of Professional Conduct (RPC). RPC 5.6(a)(2) states that a lawyer "shall not participate in offering or making . . . an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy." It is well-settled that this rule prohibits a lawyer from entering into an agreement that prevents her from representing future clients against the same opposing party. *See, e.g.*, N.Y. State Bar Ass'n, Ethics Op. 730 (2000) (Op. 730), *available at* https://www.nysba.org/CustomTemplates/Content.aspx?id=5514 (last visited Nov. 28, 2017) (in connection with the settlement of an employment discrimination action, "DR 2-108 [the predecessor to RPC 5.6] would prohibit an agreement by the employee's lawyer not to

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into the emails of various OTD employees, and stole the company's confidential information."). If ¶ 6 were also binding on the parties' counsel, these statements would put OTD's counsel (the same firm that represented OTD in *Moore*) at risk of independent liability to Ms. Moore for breach of contract.

[7] Although OTD previously argued that Wigdor should be disqualified from representing Ms. Sunaz, it sought that relief only in the alternative, if the Court failed to strike certain allegations in the original *Sunaz* Complaint expressly referencing the *Moore* case. *See* Def. Mem. of Law filed May 24, 2017, at 2, 15. Moreover, OTD withdrew the motion after Ms. Sunaz filed her Amended Complaint, which did not expressly mention Ms. Moore. *See* Jnt. Ltr. dated June 16, 2017 (Dkt. No. 32), at 1.

represent other employees in claims of discrimination against the defendant employer"); Am. Bar Ass'n Formal Ethics Op. 00-417 (2000) (Op. 00-417) ("a lawyer may not, as part of settlement of a controversy on behalf of a client, agree to a limitation on the lawyer's right to represent other clients against the same opposing party"); *In re World Trade Ctr. Disaster Site Litig.*, 83 F. Supp. 3d 519, 524 (S.D.N.Y. 2015) ("it is unprofessional for a law firm to accept a payment conditioned upon its refusal to represent future clients who seek its expertise").

The federal courts generally refuse to enforce contractual provisions that violate Rule 5.6. *See, e.g.*, *Earnings Performance Grp., Inc.*, 124 F. App'x at 353 ("Even if [counsel] had signed the contract and had expressly promised . . . not to appear in any future litigation [against EPG], it is doubtful that such a promise could be enforced."); *In re World Trade Ctr.*, 83 F. Supp. 3d at 524 (refusing to award attorney fees pursuant to a settlement provision that "incentivizes lawyers to refuse new clients" with similar claims).[8] Similarly, given a choice, the federal courts generally decline to construe settlement agreements in a manner that brings them into tension

[8] OTD points to *Blue Cross & Blue Shield of New Jersey v. Philip Morris, Inc.*, 53 F. Supp. 2d 338, 341 (E.D.N.Y. 1999), in which the court upheld an express written agreement by Winston & Strawn (W&S) not to "file an appearance or otherwise appear" on behalf of Philip Morris in that particular case. As Judge Weinstein pointed out, however, W&S did not make that promise as part of the settlement of any client's case, nor did it run to the benefit of its client's opposing party. Rather, W&S made the promise directly *to* its own client, Blue Cross & Blue Shield (BCBS) – which it represented, at the time, in unrelated matters – to avoid a potential disqualification battle when it first sought to defend Philip Morris against BCBS's claims based on the high medical costs of tobacco-related illnesses. *Id.* at 340. The agreement permitted W&S to represent Philip Morris in similar cases in Chicago and Seattle, in return for a promise that the firm "would not appear in the New York action." *Id.* A few months later, after BCBS terminated its relationship with W&S, the law firm reneged on its promise and entered its appearance for Philip Morris. In disqualifying the firm, Judge Weinstein noted that the contract he upheld was express, unambiguous, and did not "implicate the concerns which animate" Rule 5.6, in that it posed "no threat to the public's unfettered right to counsel or any danger that the rights of potential future claimants are being bargained away." *Id.* at 344. The *Moore* Agreement, by way of contrast, was not even signed by Wigdor. Moreover, the obligation that OTD seeks to imply into that Agreement would implicate both of the concerns that underlie RPC 5.6(a)(2).

with Rule 5.6. *See, e.g.*, *Tradewinds Airlines, Inc. v. Soros*, 2009 WL 1321695, at *9 (S.D.N.Y. May 12, 2009) (declining to interpret settlement agreement in prior action "as an implied restriction on counsel's ability to represent other clients, especially as such a restrictive covenant would itself violate ethical rules"); *Hu-Friedy Mfg. Co. v. Gen. Elec. Co.*, 1999 WL 528545, at *3 (N.D. Ill. July 19, 1999) (rejecting GE's "interpretation" of protective order and cooperation agreement executed in prior lawsuit as "contrary to the policy" of Rule 5.6). For this reason as well, I will not interpret the *Moore* Agreement to prohibit Wigdor from making the "unfavorable comments" about OTD that are inevitable in any litigation against it.

Nor can OTD rely on the *Moore* Agreement to protect it from otherwise-permissible discovery. On its face, the confidentiality language to which the parties agreed restricts only what Ms. Moore may voluntarily disclose, including "any information *she* has about the treatment of herself and other OTD employees by OTD or its employees." *Moore* Ag. ¶ 5 (emphasis added). Wigdor does not seek permission to reveal to its current client any information that it learned from Ms. Moore (and does not concede that it has done so). Rather, it seeks leave to conduct discovery of OTD – just as any other lawyer would do on Ms. Sunaz's behalf – which will likely lead to some of the same information. Even assuming, *arguendo*, that the *Moore* Agreement (including ¶ 5) is binding on Wigdor, it would not prohibit the "re-discovery" of such information in the instant action. *Tradewinds*, 2009 WL 1321695, at *7 (protective order in prior action, executed by the parties and their counsel, "[did] not restrict its signatories from engaging in future litigation that would involve overlapping discovery," nor did confidentiality provisions of prior settlement agreement).

Here too, RPC 5.6(a)(2) militates against any interpretation that would imply into ¶ 5 a broader obligation, on counsel's part, not to pursue such "re-discovery." A settlement agreement

that "bars a lawyer in future representations from subpoenaing certain records or fact witnesses" is an improper "restriction upon the lawyer's right to practice," because it creates a conflict between the interests of his current client, on whose behalf he is attempting to negotiate a favorable settlement, and the interests of his future clients, who would be disadvantaged by the restriction. Op. 00-417. By the same token, it would violate RPC 5.6 for a lawyer to agree to keep confidential "information about 'the business or operations of the defendant corporation' that is public information *or that can be learned in future representations without relying on confidences or secrets of the current client*." Op. 730, at 2 (emphasis added).

Any competent attorney representing Ms. Sunaz would become aware of the *Moore* case.[9] Moreover, once OTD put its handling of prior employee complaints in issue by pleading the *Faragher/Ellerth* defense, most competent attorneys would seek discovery concerning those prior complaints, including Ms. Moore's. There is nothing unfair about permitting Wigdor to do the same.[10] As Judge Koeltl explained in *Tradewinds*, 2009 WL 1321695, at *8, "An attorney's

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[9] The *Moore* pleadings were and are publicly available on this Court's electronic docket, and the case was covered by local newspapers. *See* Victoria Bekiempis, "Ex-architect at Despont Studios accuses firm execs of harassing her while she was pregnant, calling her 'arrogant' for taking maternity leave in suit," New York Daily News, Jan. 29, 2016, *available at* http://www.nydailynews.com/new-york/architect-accuses-firm-execs-harassing-pregnancy-article-1.2513732 (last visited Nov. 27, 2017); Lia Eustachewich, "I got pregnant and had a baby, so my architect firm fired me: suit," New York Post, Jan. 29, 2016, *available at* https://nypost.com/2016/01/29/i-got-pregnant-and-had-a-baby-so-my-architect-firm-fired-me-suit/ (last visited Nov. 27, 2017).

[10] Nor is there anything inherently unfair about the prospect that "defendants will be precluded from taking discovery into plaintiff's communications with Wigdor about the *Moore* case, because [Ms. Sunaz] will likely assert the attorney-client privilege." Def. Ltr. dated Nov. 17, 2017, at 4. Defendants' concern is that they will be unable to establish, from Ms. Sunaz's lips, that she did not know about the *Moore* case until Wigdor told her about it, and thus that it was not the reason she failed to report Mr. Smith's harassment to OTD. As noted above, however, any competent attorney would have uncovered the *Moore* case, could have told Ms. Sunaz about it, and would be entitled to invoke the attorney-client privilege as to those conversations. Wigdor enjoys no special advantage in this regard.

prior access to relevant but *non-discoverable* information gives her an unfair advantage in litigation *against a former client*. By contrast, any attorney representing plaintiff in this case would have access to the information at issue through discovery." (Emphasis added.) Similarly, in *Hu-Friedy Mfg. Co.*, 1999 WL 528545, at *3, where a protective order in a prior action barred any "use" of confidential discovery material except for purposes of that case, the court refused to prevent plaintiff's counsel, HH&J, from seeking the same material on behalf of a different client in a second action, noting that "any reasonably competent attorney would routinely obtain it in discovery" and that GE's proffered construction would be "contrary to the policy of Rule 5.6."[11]

**CONCLUSION**

For the foregoing reasons, plaintiff's letter-motion (Dkt. No. 63) is GRANTED and defendants' letter-motion (Dkt. No. 64) is DENIED to the extent that Ms. Sunaz may, through her current counsel, seek discovery of documents concerning Ms. Moore's internal complaints of discrimination and/or harassment, and OTD's responses, to the same extent she may seek documents concerning complaints by other OTD employees.

Dated: New York, New York
November 28, 2017

**SO ORDERED.**

**BARBARA MOSES**
**United States Magistrate Judge**

[11] GE argued that it would be "unfair" to permit the same law firm to conduct discovery in the second case, because that firm would have a "head start" by virtue of having obtained and examined the same discovery in the prior action. The court made short work of this point: "The unstated premise of the argument seems to be that it is unfair for Hu–Friedy not to have to pay other counsel to duplicate the work that HH&J did in [the prior action]. The argument is unimpressive, but any merit it might have is far outweighed by the policy of avoiding unnecessary and unworkable restrictions on the practice of law." 1999 WL 528545, at *3.