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6 **UNITED STATES DISTRICT COURT**
7 **EASTERN DISTRICT OF CALIFORNIA**
8

9 DEBRA BERRY,

10 Plaintiff,

11 v.

12 YOSEMITE COMMUNITY COLLEGE
13 DISTRICT, *et al.*,

14 Defendants.
15

Case No. 1:16-cv-00411-LJO-EPG

**ORDER DIRECTING FURTHER
DISCOVERY**

16 Debra Berry (“Plaintiff”), proceeding *pro se* and *in forma pauperis*, commenced this civil
17 rights action pursuant to 42 U.S.C. §§ 1983 and 2000d on March 25, 2016. (ECF No. 1.)

18 On January 4, 2019, Defendants filed a motion to compel additional deposition testimony
19 and for sanctions. (ECF No. 48.) The Court heard arguments on the motion on January 25, 2019.
20 (ECF No. 59.) On January 30, 2019, the Court issued an order granting in part and denying in
21 part the motion. (ECF No. 60.) The order provided:

22 Plaintiff is ordered within thirty (30) days from the date of this order
23 to provide defendants the following in writing and under oath:

- 24
- 25 1. A list of all cases Plaintiff was involved in within the last 10
26 years, including, the case name, case number, and a brief
description of the subject matter;
 - 27 2. A written statement as to whether Plaintiff claims emotional
distress damages, and if so the specific basis of that claim; and
 - 28 3. A statement stating whether Plaintiff has any documents that she

1 looked at during her deposition, which have not already been
2 provided to defendants. If so, describe the documents.

3 Defendants have leave to file a supplement to their motion to compel
4 requesting further information within 14 days after receipt of
5 Plaintiff's submission.

6 *Id.* (footnote omitted).

7 On February 15, 2019, Plaintiff filed a response as directed by the January 30, 2019 order.
8 (ECF No. 62.) Plaintiff lists three cases she filed within the last ten years: *Berry v. Yosemite*
9 *Community College*, No. 0:18-cv-16765; *Berry v. Yosemite Community College*, No. 1:18-cv-
10 00172; and *Berry v. Yosemite Community College*, No. 1:16-cv-00411. Plaintiff also claims
11 damages for emotional distress and states that she provided Defendants with all the documents
12 she brought to the deposition—a copy of the complaint, a diary, and a one-page document with
13 personal notes. *Id.*

14 On March 1, 2019, Defendants filed a supplement to their motion to compel. (ECF No.
15 63.) Defendants argue that Plaintiff has provided an incomplete and inconsistent list of the cases
16 she has filed in the last ten years by omitting at least one case, *Debra Berry v. Modesto Area*
17 *Express Regional Transit, et al.*, No. 1:18-cv-00022, a case filed on January 4, 2018, and
18 dismissed for failure to state a claim on August 13, 2018. *Id.* Defendants also argue that Plaintiff
19 failed to identify in her response all the documents that she relied upon during her deposition. *Id.*
20 Defendants further assert that they are entitled to the following information related to Plaintiff's
21 claim for emotional distress:

- 22 1. The name, address, and telephone number of every mental
23 health provider (psychologist, psychiatrist, counselor, or
24 otherwise) from whom she has sought treatment at any time;
- 25 2. The dates of the treatment sought;
- 26 3. The type of treatment sought;
- 27 4. The conditions for which she sought such treatment;
- 28 5. The length of treatment;
6. Identification of any mental health condition that she has
been diagnosed with at any time;

- 1 7. Details regarding the specific emotional distress that
2 Plaintiff has suffered or is suffering from, including the
3 duration and frequency of the complaints;
- 4 8. Details regarding how the alleged emotional distress has
5 affected her;
- 6 9. Information regarding her self-administered “spiritual
7 treatment” that allegedly resulted from her emotional
8 distress;
- 9 10. The name, address, and telephone number of each person
10 Plaintiff has lived with in the last ten years, and to provide
11 the name, address, and telephone number of her husband and
12 children; and,
- 13 11. Any other information that reveals the extent and/or severity
14 of Plaintiff’s emotional distress.

15 *Id.* at 5.

16 Given Plaintiff’s assertion that she is claiming substantial damages from emotional
17 distress, the Court finds that Plaintiff has waived the psychotherapist-patient privilege.
18 “[C]onfidential communications between a licensed psychotherapist and her patients in the
19 course of diagnosis or treatment are protected from compelled disclosure.” *Jaffee v. Redmond*,
20 518 U.S. 1, 15 (1996). “Like other testimonial privileges,” however, “the patient may of course
21 waive the protection.” *Id.* at n. 14. Three approaches have emerged to determined when a
22 plaintiff has waived the psychotherapist-patient privilege when the plaintiff brings forth claims
23 based on emotional distress: the broad approach, the narrow approach, and the middle-ground
24 approach. *See Engert v. Stanislaus Cty.*, No. 1:13-CV-0126 LJO-BAM, 2014 WL 5217301, at
25 *2 (E.D. Cal. Oct. 14, 2014); *E.E.O.C. v. California Psychiatric Transitions*, 258 F.R.D. 391,
26 399 (E.D. Cal. 2009). “Under the broad approach, the psychotherapist-patient privilege is
27 waived whenever the patient places his mental condition at issue” *California Psychiatric*
28 *Transitions*, 258 F.R.D. at 399. “Under the narrow approach, the psychotherapist-patient
privilege is waived only if the patient places the contents of the communication itself at issue . .
. . .” *Id.*

This Court will follow the middle-ground approach here. “Under the middle ground
approach, courts have generally found a waiver when the plaintiff has done more than allege

1 ‘garden-variety’ emotional distress.’ *Engert*, 2014 WL 5217301, at *2; *see also Curry v.*
2 *United States*, No. 2:16-CV-2898-JAM-CMK, 2018 WL 347661, at *1 (E.D. Cal. Jan. 9, 2018)
3 (“‘Garden variety’ emotional distress has been described in a number of ways, such as ‘the
4 distress that any healthy, well-adjusted person would likely feel as a result of being so
5 victimized;’ ‘the generalized insult, hurt feelings and lingering resentment which anyone could
6 be expected to feel’ given the defendant’s conduct;’ and general pain and suffering that is not
7 serious enough to require psychological treatment or to disrupt or affect the claimant’s life
8 activities.” (quoting *Flowers v. Owens*, 274 F.R.D. [218, 225-226 (N.D. Ill. 2011))). A plaintiff
9 alleges more than “garden-variety” emotional distress where she: (1) claims intentional or
10 negligent infliction of emotional distress; (2) alleges a specific mental or psychiatric injury or
11 disorder; (3) alleges unusually severe emotional distress; (4) offers expert testimony to support
12 a claim of emotional distress; and/or (5) concedes that her mental condition is in controversy
13 within the meaning of Rule 35(a). *Langenfeld v. Armstrong World Indus., Inc.*, 299 F.R.D. 547,
14 552 (S.D. Ohio 2014); *see also Horn v. Hornbeak*, No. 1:08CV1622 LJO DLB, 2010 WL
15 1027508, at *1 (E.D. Cal. Mar. 18, 2010).

16 Here, Plaintiff claims unusually severe emotional distress, and has therefore waived the
17 psychotherapist-patient privilege. Plaintiff states that she has suffered “a significant amount of
18 emotional distress,” and seeks “uncapped emotional distress damages” and punitive damages.
19 (ECF No. 62 at 3.) Plaintiff also cites and relies on several cases with “substantial
20 compensatory” damages awards ranging from \$176,156.00 to \$839,470.00 for claims of race or
21 sex discrimination. *Id.*

22 Thus, Defendants may obtain discovery pertaining to Plaintiff’s mental health.
23 Nevertheless, the Court will limit any such discovery to the treatments Plaintiff sought and the
24 conditions for which Plaintiff sought treatments within the last 5 years only.

25 In order to obtain additional information regarding such damages, the Court will permit
26 Defendants to depose Plaintiff for no more than two hours on the record. The deposition shall
27 take place in Modesto, California. The deposition shall be limited to the following topics:
28 Plaintiff’s claim for emotional distress (with the limitation described above regarding past

