UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE, Plaintiff, v. DARREN K. INDYKE and RICHARD D. KAHN, in their capacities as the executors of the Estate of Jeffrey E. Epstein, Defendants.	:	19 Civ. 8673 (KPF) (DCF)

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES

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The Co-Executors[1] submit this reply memorandum of law in support of their motion to dismiss Plaintiff's claim for punitive damages pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

The parties agree what the legal issue on this motion is: "The pending motion now presents the question of whether [Decedent's] Estate should be liable for a punitive damages verdict that would have clearly been available against him if he were still alive." (Opp. Br. 2.) The parties also agree that New York law prohibits the recovery of punitive damages against a deceased tortfeasor's estate.

Plaintiff nevertheless asks the Court to permit her punitive damages claim to stand. (Opp. Br. 1.) Because no legal authority supports Plaintiff's request, Plaintiff devotes much of her opposition brief to policy arguments better directed to the New York Legislature, a lengthy narrative concerning Decedent's alleged conduct, and speculation (*e.g.*, that Decedent has "no innocent heirs" (Op. Br. 2)). These are not grounds to ignore black-letter New York law on the legal issue presented on this motion.

Permitting Plaintiff's punitive damages claim to remain in this action would delay its inevitable dismissal while simultaneously impeding settlement discussions by enabling Plaintiff to use the (legally baseless) prospect of obtaining punitive damages as (misplaced) leverage.

[1] Capitalized terms used but not defined herein have the meanings ascribed to them in the Co-Executors' moving brief (ECF Doc. 47).

ARGUMENT

A. NEW YORK LAW APPLIES TO THE ISSUE OF PUNITIVE DAMAGES BECAUSE THE TORTS ALLEGEDLY OCCURRED IN NEW YORK

As an initial matter, Plaintiff largely ignores the Co-Executors' showing that she may not have the Court simultaneously apply the first sentence of E.P.T.L. § 11-3.2(a)(1), permitting her to bring this case, but to disregard the very next sentence precluding punitive damages. *See Blissett v. Eisensmidt*, 940 F. Supp. 449, 457 (N.D.N.Y. 1996) ("[I]t would be an anomalous situation indeed if plaintiff were allowed to proceed with this section 1983 action against the estate of Casey because of section 11-3.2(a)(1), while at the same time he was allowed to recover relief in the form of punitive damages, which clearly is beyond the scope of relief which that statute authorizes."). Instead, Plaintiff relegates her discussion of this principle -- which by itself resolves this motion in favor of the Co-Executors -- to a single footnote. (Op. Br. n. 9.) And, while Plaintiff claims without support that "whatever the *Blissett* court meant when it stated that it would be 'incongruous' to allow the plaintiff in *Blissett* to rely on one part of the NY EPTL and not another, it cannot possibly have the meaning Defendants give it," she does not explain why that case does not mean exactly what it says. The quoted language from *Blissett* is unambiguous and makes perfect sense.

To escape the principle set forth in *Blissett*, Plaintiff now argues that she may pursue this action pursuant to a Virgin Islands Estates and Fiduciary Relations statute, 15 V.I.C. § 601. (Op. Br. 17.) This argument fails for four reasons. First, Plaintiff does not cite any legal authority that permits a New York litigant to file a personal injury suit in New York, alleging torts occurring in New York, pursuant to 15 V.I.C. § 601. Second, even if that statute applies (it does not), New York choice-of-law principles would still result in application of New York law to the issue of punitive damages, as explained in the Co-Executors' moving brief and below. Third, Plaintiff

does not set forth any law establishing that she could have brought this lawsuit in the USVI pursuant to 15 V.I.C. § 601 and avail herself of USVI laws on punitive damages while simultaneously maintaining the action is timely pursuant to the New York Child Victims' Act. Fourth, regardless of E.P.T.L. § 11-3.2(a)(1), New York has a "strong policy against the assessment of punitive damages against an estate on account of wrongful conduct of the decedent.'" *Graham v. Henderson*, 224 F.R.D. 59, 63 (N.D.N.Y. 2004) (quoting *Blissett*, 940 F. Supp. at 457).

Plaintiff does not cite any ***legal authority*** justifying a departure from the application of New York law regarding punitive damages to torts that allegedly occurred in New York. The Second Circuit has held that where, as here, alleged misconduct takes place in New York, New York law should apply to damages:

> If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders. *Cooney*, 81 N.Y.2d at 72. In *Licci ex rel. Licci v. Lebanese Can. Bank*, SAL, 739 F.3d 45 (2d Cir. 2014) (per curiam), we observed that, under New York law, when the jurisdictions of the conduct and injury are distinct, "it is the place of the allegedly wrongful conduct that generally has superior 'interests in protecting the reasonable expectations of the parties who relied on the laws of that place to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future.'" *Id.* at 50-51 (quoting *Schultz*, 65 N.Y.2d at 198) (alterations omitted). Here, the allegedly wrongful conduct—the misrepresentations by Citigroup and its officers—took place in New York, where Citigroup had its headquarters. We therefore conclude that New York's rules on fraud damages and negligent misrepresentation apply.

AHW Inv. P'ship, MFS, Inc. v. Citigroup Inc., 661 F. App'x 2, 5 (2d Cir. 2016); *see also Starr Indem. & Liab. Co. v. Am. Claims Mgmt.*, No. 14-cv-0463-JMF, 2015 U.S. Dist. LEXIS 60272, *7 (S.D.N.Y. May 7, 2015) ("Because punitive damages are conduct-regulating, 'the law of the jurisdiction where the tort occurred will generally apply.'") (quoting *Deutsch v. Novartis Pharms.*

Corp., 723 F. Supp. 2d 521, 524 (E.D.N.Y. 2010); *Guidi v. Inter-Continental Hotels Corp.*, No. 95-CV-9006, 2003 U.S. Dist. LEXIS 6390, at *1 (S.D.N.Y. Apr. 16, 2003)).

Plaintiff's heavy reliance on *Nat'l Jewish Democratic Council v. Adelson*, No. 18 Civ. 8787 (JPO), 2019 U.S. Dist. LEXIS 168675, (S.D.N.Y. Sept. 30, 2019), is based on an apparent misinterpretation of that action. In *Adelson*, the National Jewish Democratic Council and its chair sued Sheldon G. Adelson for damages based on Adelson's prior filing of a defamation suit against them in the same court pursuant to Nevada law. *Id.* at *1-2. The court had dismissed Adelson's prior action pursuant to Nevada's anti-SLAPP statute, which has its own punitive damages provision. *Id.* at *1-2, 11. In the action against *Adelson*, the court held that Nevada had a much stronger interest in applying its punitive damages law because Adelson had previously attempted to use Nevada's defamation law to chill First Amendment rights. *Id.* at *14. By contrast, "New York's interest [was] relatively attenuated" in the second action because "[i]ts sole connection to this suit is that the suit was filed here." *Id.* at *15.

Here, the situation is effectively the opposite. New York has the strongest connection (indeed, the only material connection) to this lawsuit because: Plaintiff is suing for damages based on torts that occurred entirely in New York (Compl. ¶ 13); Plaintiff alleges "[a]t all times material to the events alleged herein, Plaintiff resided in New York, New York, and [Decedent] maintained a residence in New York, New York" (*Id.* ¶ 12); Plaintiff alleges she is a New York citizen (*Id.* ¶ 7); Plaintiff alleges she is domiciled in New York (*Id.* ¶ 10); Plaintiff chose to sue in New York (which is only possible pursuant to a New York statute, E.P.T.L. § 11-3.2(a)(1)); and, Plaintiff's causes of action are only timely, according to Plaintiff, by virtue of the *New York* Child Victims Act.

By contrast, the USVI has no interest in applying its laws on punitive damages (which are the same as New York in any event) to the alleged torts that took place in New York. The sole connection to the USVI is that the Decedent's Estate is being probated there approximately fifteen years after the alleged tortious conduct took place—in other words, a connection much weaker than the one deemed "tenuous" in *Adelson*. Even under the framework of *Adelson*, New York, not the USVI, has the sole and thus greater interest in applying its laws and policies concerning Plaintiff's improper claim for punitive damages.

Adelson is also factually distinguishable. *Adelson* did not involve E.P.T.L. § 11-3.2(a)(1) or New York's "strong policy against the assessment of punitive damages against an estate on account of wrongful conduct of the decedent.'" *Graham*, 224 F.R.D. at 63.

The other cases on which Plaintiff relies provide clear support for the Co-Executors' positions on this motion. In *Simon v. Philip Morris*, 124 F. Supp. 2d 46, 73 (E.D.N.Y. 2000), the court reaffirmed that New York has a greater interest in applying its law to punitive damages in matters involving misconduct within its borders, which is exactly the situation here:

> New York's interest appears more significant in this action than that of any single other state. It has a greater interest in determining general compensatory liability issues since, ***like punitive damages***, they may bear directly on the regulation of dangerous conduct within its borders. *Cf.* Russell J. Weintraub, *Methods For Resolving Conflicts of law Problems in Mass Tort Litigation*, 1989 U. Ill. L. Rev. 129 (1989) ("higher compensatory damages may also punish and deter"); *see, e.g.*, American Law Institute: Complex Litigation: Statutory Recommendations and Analysis (choice of Law) § 6.01, comment a ("state where the defendant acted clearly may have a legitimate interest in regulating that conduct and in controlling defendant's potential tort liability"); *see, e.g.*, *Pescatore*, 97 F.3d at 14 ("New York has an obvious interest in regulating the extent to which New York-corporations may be held liable for excessive ***or punitive damages***"). (emphasis added).

While the New York Court of Appeals adopted a "center of gravity" approach *Babcock v. Jackson*, 12 NY2d 473 (N.Y. 1963), it later explained (as Plaintiff fails to explain in her brief):

"This new method of analysis, however, was limited to competing loss-allocation—***not conduct-regulating—rules***." *Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306, 318-19 (N.Y. 2011) (emphasis added). Because punitive damages are conduct-regulating, *Babcock* is inapplicable.

Also, even under the loss-allocation and center of gravity frameworks, which do not apply here, New York law must still apply. Plaintiff does not allege any torts or injuries occurring outside New York, whether in the USVI or elsewhere.

Thomas H. Lee Equity Fund V, L.P. v. Mayer Brown, Rowe & Maw LLP, 612 F. Supp. 2d 267, 284 (S.D.N.Y. 2009), which Plaintiff also relies on, further confirms the site of the tort is what matters here: "When the confliet [*sic*] involves rules that regulate conduct—as here—***the site of the tort***, not the place of the loss, ***governs***." (emphasis added) (citing *Lee v. Bankers Trust Co.*, 166 F.3d 540, 543 (2d Cir. 1999); *Sheldon v. PHH Corp.*, 135 F.3d 848, 853 (2d Cir. 1998)). Here, of course, the site of the loss and the site of the tort are the same: New York.

The other cases cited by Plaintiff are in accord. *See Padula v. Lilarn Props. Corp.*, 84 N.Y.2d 519, 521-22, (N.Y. 1994) ("As we stated in *Schultz* … ***when the conflicting rules involve the appropriate standards of conduct … the law of the place of the tort 'will usually have a predominant, if not exclusive, concern'*** … because the locus jurisdiction's interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future assume critical importance and outweigh any interests of the common-domicile jurisdiction.'" (emphasis added) (citing *Schultz v. Boy Scouts of Am.*, 65 N.Y.2d 189 (N.Y. 1985), which Plaintiff also cites)).

Plaintiff cites an old Ulster County decision, *Stevens v. Shields*, 131 Misc. 2d 145, 499 N.Y.S.2d 351 (Sup. Ct. Ulster Cnty. 1986), to support her flawed assertion that, merely because the Co-Executors are deemed domiciled in the USVI pursuant to 28 U.S.C. § 1332(c)(2), USVI

law should apply to the issue of punitive damages. (See Op. Br. 9 and Compl. ¶ 11). However, the issue and facts in *Stevens* were entirely different than those here. In *Stevens*, the court applied a Florida "post event loss or liability allocating provision" to a Florida resident who was liable under the provision due to her Florida resident son's automobile accident that occurred in New York. *Id*. at 352-53. Here, Plaintiff is asking the Court to apply USVI law to punitive damages, which are conduct regulating, notwithstanding that the alleged torts occurred entirely in New York. New York has the only interest in regulating conduct that occurred within its borders 15 years before Decedent died. Therefore, *Stevens* is irrelevant.

Plaintiff also argues that, "where a tortfeasor commits suicide to avoid imposition of punitive damages, considerations of fairness no longer counsel in favor of protecting his estate." (Op. Br. 12.) However, much like Plaintiff's statement about the supposed lack of "innocent heirs," this is pure speculation. The only legal authority Plaintiff cites to support this argument are two Indiana state law cases—hardly persuasive. Plaintiff cites no New York authority supporting this Indiana concept, which in any event was dicta in a case in which Indiana joined the majority of jurisdictions (including New York) and held "Indiana law does not permit recovery of punitive damages from the estate of a deceased tortfeasor." *Crabtree ex rel. Kemp v. Estate of Crabtree*, 837 N.E.2d 135, 139 (Ind. 2005).

B. USVI LAW IS IN ACCORD WITH THE MAJORITY POSITION PROHIBITING PUNITIVE DAMAGES AGAINST A DECEDENT TORTFEASOR'S ESTATE.

a. Plaintiff's *Banks* analysis ignores what USVI courts have repeatedly held.

As established in the Co-Executors' moving brief, every *Banks* factor favors the Estate: (1) pre-*Banks*, USVI courts expressed approval for the general rule that punitive damages cannot be recovered against the personal representatives of a wrongdoer's estate (*see, e.g., Hamilton v. Dowson Holding Co.*, 51 V.I. 619, 628 (D.V.I. 2009) (considering the inverse issue)); (2) a

majority of courts from other jurisdictions preclude punitive damages against the personal representatives of a wrongdoer's estate (2 Linda L. Schlueter, Punitive Damages § 20.4 (7th ed. 2015)); and (3) post-*Banks*, USVI courts have held Restatement (Second) of Torts § 908 represents the soundest rule for the USVI (*see, e.g., Powell v. Chi-Co's Distrib.*, No. ST-13-TOR-14, 2014 V.I. LEXIS 21, at *5 n.13 (U.S.V.I. Super. Ct. Apr. 3, 2014)).

Plaintiff ignores the first *Banks* factor and admits the second *Banks* factor is not in her favor. (*See* Op. Br. 16 ("While it is true that this is the majority view … .").) Plaintiff's response to the post-*Banks* decisions is to belittle not only those courts' reliance on the Restatement but also the Restatement itself, a tacit admission that USVI courts have repeatedly deferred to Restatement (Second) of Torts § 908 when addressing damages issues.

However, that is precisely what the third *Banks* factor calls for: to determine whether, post-*Banks*, USVI courts have determined that a particular approach represents the soundest rule for the USVI. On the issue of damages, USVI courts have determined that the approach in the Restatement (Second) of Torts § 908 is sound. None of those courts suggests that only part of § 908 is sound. Therefore, even if USVI law applies (which it does not), the result is the same: there can be no punitive damages in this action.[2]

b. <u>The USVI AG's request for punitive damages in a CICO action is irrelevant.</u>

Plaintiff's reliance on the USVI Attorney General's request for punitive damages against Decedent's estate in an action alleging violations of the USVI's Criminally Influenced and Corrupt

[2]Plaintiff asks the Court to certify to the Supreme Court of the USVI the question of whether punitive damages are available against Decedent's Estate. (Op. Br. fn. 8.) As explained in the Co-Executors' moving brief and herein, New York law applies to this issue and, in any event, USVI law is in accord with New York law. There is, therefore, no need to certify that question. Should the Court nevertheless determine to certify this issue, this action should be stayed pending resolution of the certified question.

Organizations Act ("CICO") fails for three reasons. First, per black-letter New York law, USVI law does not apply.

Second, even assuming USVI law does somehow apply, it is in accord with New York law and the majority of U.S. jurisdictions, as reflected in the Restatement (Second) of Torts.

Third, the fact that the USVI Attorney General asks for something in a lawsuit is not legal authority, let alone authority that somehow overrides the numerous USVI court decisions establishing that USVI law conforms to the majority of U.S. jurisdictions in prohibiting recovery of punitive damages from a deceased tortfeasor's estate. Even where an attorney general purports to interpret a law -- and here the USVI AG did no such thing -- the Supreme Court has warned against accepting such interpretation as authoritative. *See Stenberg v. Carhart*, 530 U.S. 914, 940, 120 S. Ct. 2597, 2614 (2000) ("our precedent warns against accepting as 'authoritative' an Attorney General's interpretation of state law when 'the Attorney General does not bind the state courts or local law enforcement authorities'").

CONCLUSION

Based on the foregoing and the Co-Executors' moving brief, the Co-Executors respectfully request that the Court grant their motion to dismiss Plaintiff's claim for punitive damages or, alternatively, to strike that claim, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
February 28, 2020

Respectfully submitted,

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