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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 JANE DOE,

4 Plaintiff,

New York, N.Y.

5 v.

19 CV 8673 (KPF)

6 DARREN K. INDYKE, et al.,

7 Defendants.

8 -----x

Conference

9 December 11, 2019
10 11:30 a.m.

11 Before:

12 HON. KATHERINE POLK FAILLA,

13 District Judge

14 APPEARANCES

15
16 KAPLAN HECKER & FINK LLP
17 Attorneys for Plaintiff
18 BY: ROBERTA KAPLAN
19 ALEXANDRA CONLON
KATE L. DONIGER
LOUIS FISHER

20 TROUTMAN SANDERS LLP
21 Attorneys for Defendants
22 BY: BENNET J. MOSKOWITZ
23 CHARLES GLOVER
24
25

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1 THE DEPUTY CLERK: In the matter of Doe v. Indyke.
2 Counsel, please state your name for the record beginning with
3 plaintiff.

4 MS. KAPLAN: Good morning. Roberta Kaplan for
5 plaintiff from Kaplan Hecker & Fink. I am here with my
6 colleagues Kate Doniger, Alex Conlon, and Louis Fisher.

7 THE COURT: Good morning.

8 MR. MOSKOWITZ: Good morning. Bennet Moskowitz,
9 Troutman Sanders LLP, counsel for the co-executors of the
10 Estate of Jeffrey D. Epstein.

11 MR. GLOVER: And Charles Glover of the same firm.

12 THE COURT: First of all, I thank you very much for
13 your indulgence. As you could see, we did not know until we
14 knew that plaintiff in our prior case did not speak English.
15 He was comfortable with the dates of a conference and not more
16 than that. So I appreciate your patience.

17 Let me begin by noting that I'm surprised we are
18 having this conference, even though I am the one who convened
19 it. And that is because what I thought made sense from an
20 efficiency perspective was to have the discovery assigned to a
21 single magistrate judge, and which is what was done. The
22 reason that I'm having this conference, and Judge Freeman is
23 not, is it does not appear that the discussion of motions to
24 strike or motion practice is occurring in all of the cases.
25 And so for those in which it is happening, those judges have

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1 decided to talk about it.

2 I'm asking in the first instance to speak with
3 Mr. Moskowitz, unless he wants to pass the mic over to
4 Mr. Glover.

5 Mr. Moskowitz, I had understood, from a very sort of
6 peripheral perspective, that the focus of your clients was on
7 setting up a fund to perhaps fund the settlement of these
8 claims. Am I correct?

9 MR. MOSKOWITZ: That's absolutely correct.

10 THE COURT: I'll ask you to stand only because there
11 is a monitor in front of you.

12 MR. MOSKOWITZ: I prefer it. Thank you. That's
13 absolutely correct. That is still a major focus of my clients.
14 In fact, it's full steam ahead. I understand that, as has been
15 described when we were before Judge Freeman and before then, I
16 understand that the administrators-to-be, Ken Feinberg, Jordana
17 Feldman, Camille Biyos, all leading people in the field of
18 claims administration, has been in touch with or have reached
19 out to various plaintiffs' counsel. And the administrators are
20 working on the protocol, which is basically the nuts and bolts
21 of that program.

22 It's our hope and expectation that all plaintiffs will
23 give it a shot. It doesn't require anything in terms of
24 waiving any rights. They can go through the whole claims
25 process, get an independent determination -- the estate doesn't

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1 control the program administrators or designers -- and if given
2 plaintiff doesn't like that determination, they can say, you
3 know what, I don't like this, I am going back to concentrate on
4 my litigation.

5 I too, although, you know, I'm hoping people come
6 around, and I'm disappointed as of now no one has come to us
7 and said I am going to give it a shot, let's stay the
8 litigation in the meantime. But it's not required. The
9 administrators aren't requiring that.

10 THE COURT: This is the fork in the road where you and
11 I diverge. I would have thought given your focus was on
12 setting up a fund for claims administration you would not be
13 focusing on motions to strike, which to me seemed to be a --
14 not a distraction, but a detour in the path to resolution of
15 the case.

16 MR. MOSKOWITZ: I see. If I can, I gather, but I'll
17 ask the question, your Honor is wondering that based on your
18 Honor's understanding of what the law is, on whether what we
19 are talking about here is, as Ms. Kaplan asserted in her letter
20 a motion to strike, or as I'll gladly briefly go over is
21 actually, no, a motion to dismiss.

22 And the reason we made the motion is because I would
23 have loved to push the time out more. But plaintiff's counsel
24 wasn't willing to do that. We have preserved our rights. A
25 critical threshold issue for us, I have six points to briefly

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1 touch upon, I'll be very quick, that will address that.

2 But, it's very important to us that we be able to move
3 to dismiss, which is what it is, the punitive damages claims.

4 THE COURT: Okay. But, that wouldn't get rid of all
5 of the claims.

6 MR. MOSKOWITZ: No.

7 THE COURT: I am trying to figure out why expend -- I
8 am not using the term waste -- why expend the resources when,
9 at some point, perhaps, we can have a discussion about whether
10 or not Virgin Islands permits law permits punitive damages or
11 not.

12 I am just trying to understand, because things were
13 going so well, I thought. You've had your initial conference
14 before Judge Freeman, there are discussions that I imagine were
15 going on. There was, I presume, the establishment of protocols
16 for discovery. And this, again, just seems like something that
17 is inconsistent with everything that's been going on before
18 her.

19 So perhaps I need to hear some or all of your six
20 points and I will listen to you.

21 MR. MOSKOWITZ: Sure. Well, plaintiff's counsel
22 generally, not all of them, but plaintiff's counsel here today
23 included has made it clear to us that they are not yet sold,
24 that's my wording, on the program. And unless and until they
25 tell us otherwise, they are moving full steam ahead with their

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1 litigation. So we are basically having to react to that.

2 In terms of making motions, your Honor is correct,
3 we've again, if we had it our way, we wouldn't have to engage
4 in this practice on either side. We would stay everything.
5 But we're here, and the reason moving to dismiss punitive
6 damages in this case is so important to us and worth the time
7 and energy now we are already halfway there to briefing and
8 having this issue decided is two fold.

9 Number one, the scope of discovery, ever since the
10 2015 amendments, now expressly as I think it did previous to
11 that contemplates that the amount in controversy is directly
12 relevant to the scope of discovery. This is a very different
13 case, from our perspective, because no punitive damages are
14 available than plaintiff, if they do, we think incorrectly
15 believe punitive damages are available.

16 People, as I'm sure your Honor is aware, make very
17 large claims for punitive damages. That's out of the case and
18 should be as a threshold.

19 The second is going to the claims program, or any
20 other settlement because, you know, Judge Freeman asked me
21 this, well, can someone talk to you about settlement separate
22 from the claims program. Absolutely. They all have my phone
23 number. Nothing is off the table. We hope everyone will give
24 that claims program a shot. Why wouldn't you. I don't see
25 why. In the meantime, if someone wants to talk about

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1 settlement, fine.

2 How can the parties in this case see eye to eye if
3 plaintiffs, again, I think clearly and incorrectly say and we
4 are entitled to X millions punitive versus we are saying we are
5 talking about compensatory damages. Let's have a discussion
6 about that.

7 THE COURT: Let's be clear. Assuming, as you'd like me
8 to do, the exclusion of punitive damages, the claim's not going
9 to be for ten dollars. It is going to be for millions upon
10 millions of dollars. And do you really think the scope of
11 discovery is going to change, given the nature of the damages
12 sought and the nature of the claims raised?

13 MR. MOSKOWITZ: Well, I do -- part of the clarity that
14 I don't have, which I welcome to get, not trying to make my own
15 questions, don't have clarity on how much is plaintiff claiming
16 is owed to her in terms of punitive versus compensatory
17 damages. It's not clear to me from the complaint. I haven't
18 heard that yet, so it's hard for me to answer that question.
19 But, I'm happy to answer questions in the order that your Honor
20 desires.

21 There is one other, I mentioned I had these six
22 points. It is often the case we don't come in and do things
23 how I want. I want to raise another critical threshold issue
24 that came up entirely because of what was in the contents of
25 plaintiff's counsel's response to my letter, and that is if

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1 they are correct that USVI law applies, this action is time
2 barred. Every cause of action that is asserted in their
3 complaint says it is timely because of the New York Child
4 Victims Act. Well, it stands to reason that if U.S. Virgin
5 Islands law applies in this case, then the plaintiff cannot
6 avail herself of the New York Child Victims Act. That is
7 certainly something that I also now need to brief, and would,
8 like I said, that's a key threshold issue even more so than
9 punitive damages. There can be no case if there is no New York
10 Child Victims Act applying. It's time barred.

11 THE COURT: Not to put words in your mouth, but what
12 I'm understanding is that you believe your premotion letter is
13 not inconsistent with your desire to have a claims resolution
14 process. It is, rather, something you feel is thrust upon you
15 by the fact that today, not all of the plaintiffs' counsel are
16 interested in participating in the program that you're setting
17 up.

18 MR. MOSKOWITZ: Yes. Let me clarify that, too.
19 That's correct, but various plaintiffs' lawyers have indicated
20 to me that they are interested. In fact, and a big issue
21 before Judge Freeman was various plaintiffs' lawyers reached
22 out to me and others that represent the executors before these
23 actions got filed in the case, certainly before they began in
24 earnest, to say they wanted a kind of claims program. It was
25 something we were already thinking about on our end. This was

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1 not something that was just thrust out here.

2 I don't want to rehash during Judge Freeman's hearing
3 there was a disagreement about the way it's unfolded, etc., and
4 that's not why we're here.

5 Your Honor is correct, having the final motion to
6 dismiss now, I wish we could put it off for three months and
7 see if the claims program works and save the dockets, but here
8 we are. And again, we think that punitive damages and now
9 again USVI law applies as being time barred. These are key
10 issues we can't avoid. These are straightforward legal issues.
11 These will not be 50-page briefs. The motions I filed in other
12 cases have all been on the concise side I'll call it, which I'm
13 sure is something your Honor would appreciate. This can be
14 done on a relatively short time frame.

15 These are threshold issues. Certainly the time bar
16 aspect, and I still argue the punitives and subject to I'd love
17 to know what is plaintiff asking for in terms of punitive
18 damages.

19 Based on a collective, not in this case, what I've
20 heard from the plaintiffs' side is, for example, there is one
21 case out there where two plaintiffs, not this firm, claim \$100
22 million. They don't say what part is which, they don't even
23 allege they were underage at the time of the alleged harms to
24 them, but we have the complaint at the time. We request \$100
25 million or another amount to be determined. That tells me we

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1 need to set clarity where we can on the front end to make
2 things more efficient going forward.

3 THE COURT: Thank you.

4 Ms. Kaplan, I'll hear from you in response.

5 MS. KAPLAN: Yes, your Honor. So, I think I heard
6 Mr. Moskowitz say that various plaintiffs' lawyers are not yet
7 sold on the proposed settlement process.

8 THE COURT: That's the word that was used, yes.

9 MS. KAPLAN: That might be the understatement of the
10 day, your Honor. First of all, there is no fund. In response
11 to questions from the plaintiffs, Mr. Moskowitz responded by
12 saying that no amount of money is actually being set aside by
13 the estate to settle these claims. That is something that is
14 very, very concerning to the plaintiffs. It's one thing to
15 agree to participate in a fund when you know that, say, 300 or
16 400 million of the 577 million in the estate is being set
17 aside. But they have said that no amount is being set aside.
18 They just want to settle claims, presumably, so they can settle
19 as low as possible and have the rest for the estate. That's a
20 huge problem. It is going to be a huge problem for the
21 plaintiffs' lawyers.

22 Number two, as Judge Freeman admonished Mr. Moskowitz
23 when we met, settlement is a two-way street. There has to be
24 consultation. The settlement -- the discussions that
25 Mr. Moskowitz referred to, I was part of those, and I said to

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1 the estate that the plaintiffs needed to be involved. That
2 these women who, many of whom, like my client, were horribly
3 abused as young children, have to have agency. And they have
4 to help pick the administrator, be involved in who the
5 administrator is. None of that has happened.

6 Mr. Moskowitz and the estate picked Ken Feinberg on
7 their own. There was no consultation with us. We have now
8 asked them to put on an administrator on a panel that the
9 plaintiffs select. We've gotten no answer to that.

10 With all respect, your Honor, I'm someone who has
11 settled cases for decades in this district. This does not look
12 to me like a case that's going to settle.

13 If your Honor would like, I can move on to the merits
14 issues.

15 THE COURT: Please.

16 MS. KAPLAN: With respect to this motion, whether it's
17 styled as a motion to dismiss under 12(b)(6) or a motion to
18 strike under 12(f), I've made those motions, I've always made
19 them as 12(f) motions. I've never won one, but I've made them.
20 However it's styled, your Honor said the fundamental important
21 point here, which is not that it doesn't dismiss one claim, it
22 dismisses no claims. We have compensatory damage sought in
23 connection with all four of our claims. They have no motions
24 to dismiss compensatory damage. They have no motion to dismiss
25 any of the four underlying tort claims.

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1 For that reason, your Honor, there is really no reason
2 not to get started. We are happy to have a conference with
3 Judge Freeman, but the problem is the cases are in all
4 different kind of configurations. There are many cases that
5 don't require even responses until late January. There are
6 cases with different defendants. There are cases with federal
7 trafficking statutory claims. This is a simple diversity
8 claim, common law claim. We are ready to get started. We
9 don't think we should be delayed.

10 With all respect to the Southern District, the way
11 this has been set up where there is one magistrate but I think
12 at least nine, maybe a dozen different judges now, give the
13 plaintiffs all the disadvantages of consolidation and none of
14 the advantages of consolidation. Because various issues are
15 being decided by various district court judges, most of the
16 judges are deciding pseudonymity. Your Honor has deferred that
17 to Judge Freeman. It's kind of a big mess.

18 We understand that Judge Freeman has jurisdiction over
19 discovery. We would just like to start, and maybe if we could
20 set a trial date today that would help get that underway.

21 THE COURT: I'm not setting a trial date today.

22 MS. KAPLAN: Let me talk about the scope of discovery.
23 I will hereby make representation there is nothing about the
24 damages claim that will affect the scope of discovery.

25 We expect this case will have at most four witnesses.

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1 Maybe five. Our plaintiff, the two women who booked
2 meetings -- that's not a right term. But massages with
3 Mr. Epstein. I expect both of those women to take the Fifth,
4 so that won't take very long, and maybe two experts.

5 In terms of the documents that we are seeking, your
6 Honor, again, it will be very limited. We don't know if they
7 have written evidence about our client. We understand that
8 these transactions were done in cash. I don't know if they
9 kept records of who he met with when. Obviously, if he has
10 that record, we'd like it. We don't expect a lot of documents
11 from the plaintiff.

12 And I should also add that we have opened a
13 conversation with the U.S. attorney's office for the Southern
14 District who may have one or two documents that corroborate our
15 client's claims. They are thinking about how they can get
16 those to us subject to grand jury requirements. And obviously
17 the minute we get them, we will share them with the estate.

18 The final issue, your Honor, has to do with choice of
19 law and time bar. The issues are distinct. So whether Virgin
20 Islands law applies to issues relating to what you can get from
21 the estate, whether that's an estate choice of law issue, is
22 entirely different from the question of what state substantive
23 law applies to the underlying torts.

24 I think there can be no question that given this
25 happened on the streets of New York City, in his mansion, that

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1 the law, the substantive law of tort applies New York law, and
2 we clearly get the benefit of the New York statute on that.

3 With respect to the estate and whether or not he
4 purposefully availed himself two days before his death of the
5 benefits Virgin Islands law, which he presumably thought was
6 going to be an advantage to Mr. Epstein, and in fact it has
7 been. It is incredibly difficult for us to deal with the
8 Virgin Islands court, to get Virgin Island lawyers to file
9 papers. There are 100 advantages to the estate being in the
10 Virgin Islands.

11 Having sought those advantages, they don't get to pick
12 and choose and say for purposes of the punitive damages, we
13 want New York law to apply. We're happy to brief that issue.
14 Courts in the Southern District in civil cases apply different
15 laws to different issues of cases in a single case all the
16 time. There is nothing out of the ordinary about that, and
17 there is no rule that requires that one state's law applies to
18 all issues in the case, particularly when you have a
19 particularized issue about estate law like this.

20 I am happy to address anything else your Honor would
21 want to address.

22 Couple more points. Again, we don't think that
23 discovery in this case should take very long, given the limited
24 number of documents and witnesses. We would be willing to
25 waive a jury trial, your Honor, to help expedite things. And

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1 again, we are very much eager to get things to happen here as
2 quickly as possible. Our client has lived with this for many,
3 many years, she's really desirous of putting this behind her,
4 and I'm sure your Honor can appreciate that.

5 THE COURT: Just before you sit down. I am
6 understanding, as you began this discussion, the problems that
7 you see and that your client sees in the process that's been
8 identified by defense. I am assuming you've had the
9 discussions with them, because you've told me that you have,
10 regarding increased plaintiff involvement in the administration
11 process.

12 If they agreed, might you change your mind about the
13 futility or not of the claims administration process?

14 MS. KAPLAN: I think if they were willing to have a
15 panel of administrators, at least one of whom, maybe there
16 would be two, Mr. Feinberg is the one chosen by the plaintiffs
17 and a third neutral, I certainly would be open to
18 participating. But I am not open in participating in something
19 that's been done entirely by them, completely in secret, by
20 someone they chose, and without denominated amounts that they
21 are setting aside.

22 THE COURT: There's two stumbling blocks. One is the
23 composition of the panel and the other is the need for some
24 defined amount.

25 MS. KAPLAN: It is very hard for the plaintiffs to

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1 figure out what they can expect without understanding what the
2 denominator is, if you will.

3 THE COURT: Understood. Thank you. Mr. Moskowitz.

4 MR. MOSKOWITZ: Thank you. Your Honor, it's
5 interesting. First, as to the motion, we think we have a
6 fundamental right to make and intend to make. Plaintiff's
7 counsel does not dispute that under New York law, punitive
8 damages are not available. USVI law appears to me to be in
9 accord with that. By the way --

10 THE COURT: No. Let me understand why you think it's
11 in accord. I found it, I found it an interesting issue. I
12 didn't see much in the way of cases in the Virgin Islands that
13 dealt with the issue. I thought I understood that the Virgin
14 Islands law tends to be accepting of common law and the law of
15 other jurisdictions that doesn't seem to conflict.

16 MR. MOSKOWITZ: What you'll find is many Virgin
17 Islands cases, and I will tell you I'm not -- I can brief it,
18 but I cannot tell you now the current state of Virgin Islands
19 law with respect to restatement. You will find cases,
20 including from as recent as 2009, that refer to the restatement
21 on the issue of punitive damage against an estate, and the
22 restatement as well as the majority of U.S. jurisdictions,
23 because we looked into this, are in accord.

24 THE COURT: So this will be Section 908 and Section
25 926?

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1 SPEAKER: I believe that's correct. I don't have it
2 in front of me. I'm happy to pull that if I can after I finish
3 speaking. But, there is Hamilton v. Dowson Holding, 51 VI 619,
4 628 (DVI 2009); there is Booth v. Bowen, 2008 WL 220067, at *5
5 (DVI Jan. 10, 2008).

6 Candidly not Supreme Court USVI cases, but they are
7 the authority that you will find on this issue in the USVI, and
8 they are supportive of that restatement position. Which is not
9 surprising. When someone's dead, you are not trying to punish
10 them. Others would argue what about deterrence. The few cases
11 I found work in our favor saying deterrence doesn't work like
12 that. When someone is alive thinking if they die perhaps their
13 estate will be impacted by this. This is not some obscure
14 position. This is statutory law in a lot of places, including
15 New York.

16 In terms of the time issue, plaintiff's counsel also
17 doesn't deny that if U.S. -- if New York law doesn't apply to
18 that issue, this action is time barred. I'm surprised and I
19 agree with Ms. Kaplan, this should be briefed. It should be
20 briefed now. I am surprised to hear that it's routine that you
21 get to pick and choose from one part of the case that X law
22 applies --

23 THE COURT: I think that's an overstatement of what
24 her argument was. I didn't hear the word "routine" mentioned
25 at all. I have had cases, I'm sure you have as well, even

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1 basic contract cases where there are certain provisions that
2 are subject to one jurisdiction of law and other claims that
3 could be made on the same contract that would be under a
4 different jurisdiction of law.

5 MR. MOSKOWITZ: What I've seen, your Honor, is splits
6 between procedural law and substantive law. We are talking
7 about two very substantive issues here. Availability of a kind
8 of damages and a right to revive a claim under New York
9 statutory law that's part of a new trend but is,
10 notwithstanding that, it relates to a reviving statute of
11 limitations, gives it new vested substantive right to people to
12 bring a claim that was otherwise previously time barred.

13 THE COURT: To be clear, when you call it new trend,
14 I'm sure you mean the law that actually provides for it. It's
15 not like someone just woke up and decided let's do this.

16 MR. MOSKOWITZ: Correct.

17 THE COURT: Do you really think the tort issues in
18 this case would be decided by Virgin Islands law?

19 MR. MOSKOWITZ: No. That's why we were surprised to
20 hear that in the response to our letter, which is why we came
21 here, point number one was going to be that surprised us. But
22 because of that suggestion, we number one need to brief it,
23 because, as I said, and as has been denied, if USVI law applies
24 wholesale or even to the two issues we are talking about, the
25 action is time barred. Certainly that's a threshold issue that

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1 needs to be decided now.

2 THE COURT: I understand. I wouldn't be -- I wouldn't
3 be so sure that it is time barred.

4 I guess my question is, if you are hellbent on
5 bringing this motion -- that's the legal term -- and it appears
6 that you are, is it your belief that I should not have
7 discovery while the motion is pending because, at most, well,
8 you think possibly that instead of hitting the single of
9 getting rid of punitive damages, you would hit the home run of
10 getting rid of the case in its entirety?

11 MR. MOSKOWITZ: Certainly something we would brief.
12 Having heard it for the first time, in the response to our
13 letter, and not wanting to do something which I don't like when
14 other people do, which is seek leave to submit an unauthorized
15 reply to your Honor, it's something we think needs to be dealt
16 with now. But we think both issues need to be dealt with now.

17 THE COURT: Let's step back. While your motion is
18 being briefed, which, by the way, I haven't allowed just yet,
19 what is the status of discovery?

20 MR. MOSKOWITZ: So, number one --

21 THE COURT: What do you think it should be?

22 MR. MOSKOWITZ: Oh sure. If it is limited, all the
23 more reason not to get going with it now. Nothing is going to
24 change in six weeks that's going to impact the plaintiff's
25 rights. Look, I get it --

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1 THE COURT: What is the six weeks that you are
2 thinking?

3 MR. MOSKOWITZ: Sorry. That was a ballpark
4 guesstimation, if we're briefing, I don't know how long it will
5 take to brief --

6 THE COURT: You haven't figured out my schedule yet,
7 which is not six weeks, but okay, nice try.

8 MR. MOSKOWITZ: Noted. And some judges look at me the
9 other way if you say three weeks versus nine. Good to know.

10 But in terms of discovery, Magistrate Freeman, number
11 one, has ordered the parties to report back to her on
12 January 10 including about the claims program and discovery.
13 So that issue's to be determined. I am hoping we can come to
14 some agreement. I know Judge Freeman threw out some ideas on
15 the transcript, I don't have that transcript in front of me.
16 She was in good control of that issue.

17 If I can, I'd like to take a brief moment to set some
18 things clear about the claims program. It's the opposite of
19 what plaintiff's counsel has asserted. That's correct, we
20 haven't said only X million is devoted. What we have said in
21 writing numerous times there is no aggregate cap on the amount
22 that the independent administrator can deem appropriate to pay
23 to people. If you say 10 million is in it, then it's 10
24 million spread across however many joined. We are saying, no,
25 we want people to join this program. Everything we are doing

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1 is we want people to join.

2 Choosing Ken Feinberg. Ms. Kaplan did express extreme
3 interest in having one person and one person only who was not
4 Ken Feinberg. We vetted and interviewed many people, including
5 that person. We made our own decision, that's true. Ken
6 Feinberg has impeccable credentials. And this notion of
7 appointing someone to a panel, this is not arbitration or
8 mediation. This is an independent claims program.

9 The estate -- we have no control at the end of the day
10 over when Ms. Feldman, who is the designer and administrator of
11 the fund, when she makes a determination that I think this
12 person should get X, we can't veto that. We can't impact that.
13 All we can do is, when we hear about a claim, is say here's
14 what we know about this claim that we think you should know
15 about, and Ms. Feldman, just like she gets whatever evidence
16 claimants make, can do what she wants with it. She can find
17 what we say not important. And she makes a determination.

18 So I am hearing this notion like we put two people,
19 two or three people up there, first of all, it's one. And she
20 is independent. I mean, these people have, that we've
21 selected, and we were so careful about it. I am just shocked,
22 and this is perhaps the only case where I've heard repeated
23 objections to Ken Feinberg being --

24 THE COURT: I know who he is.

25 MR. MOSKOWITZ: Right. So candidly, I hear words get

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1 thrown out. I'm honestly mystified by that. Who else better
2 to ensure a successful claims program. It is not like we went
3 out and hired our cousin. These are the leading people.
4 Jordana Feldman, not as well known, worked on the 9/11 Fund for
5 many, many years, just left the fund to do this program. She's
6 very compassionate. She cares. They want this program to work
7 and so do we. Various plaintiffs have told me they are
8 interested too.

9 THE COURT: To be clear, you don't have to sell me on
10 it because I'm not participating one way or the other.
11 Whatever PR work you are doing has failed, because here we are.
12 And we are at motions practice and we are going with litigation
13 because the efforts to sell folks on the claims resolution
14 proceeding have not worked.

15 MR. MOSKOWITZ: I don't think that's correct, your
16 Honor. The time to sign up hasn't opened yet.

17 THE COURT: All right. Why are you bringing this --
18 is it because there is otherwise a response due that you are
19 not waiting to hear whether the folks at the front table are
20 joining in the process or not?

21 MR. MOSKOWITZ: I'm sorry. I don't think I understood
22 the question.

23 THE COURT: You just said to me now that people do not
24 have to elect to participate or not participate today, they
25 have a period of time. Correct?

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1 MR. MOSKOWITZ: Correct.

2 THE COURT: Is that period of time the 10th of January
3 or some date sooner than that?

4 MR. MOSKOWITZ: I'm not certain. I know the protocol
5 comes out very soon. Like in days or a week or so. And then
6 shortly thereafter, it is a matter of months, so I don't have
7 the exact date. But it's soon, it's very soon, it's not months
8 from now.

9 THE COURT: My understanding is that, first of all,
10 you'd like more plaintiffs and their counsel to participate in
11 the program. But, in the absence of that, you need to do
12 something, and if it's to proceed with the litigation, you will
13 proceed with the litigation.

14 I was trying to understand, and I was trying to
15 understand when I began this conference, why it was that you
16 were bringing the motion now, if you are in the process of
17 trying to persuade, encourage, entice people to participate in
18 the claims resolution process. And I am assuming it is because
19 otherwise you are going to be in default, and you have to do
20 something.

21 MR. MOSKOWITZ: That's right. I would have loved
22 again to put off the date. But this to us, and I have cases,
23 Judge Batts, Judge Buchwald, Judge Sweet, it is a motion to
24 dismiss. We had to move. We had to respond to the complaint,
25 and this is an important motion for us to make.

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1 Yes, in fact, the last time we adjourned the date, it
2 was without consent. We've been saying since the start, hey,
3 let's save resources on both sides. Let's get the claims
4 program going.

5 Again, I do want to be clear, it's not been -- I know
6 your Honor said maybe it was a PR failure. I don't think
7 that's the accurate way to look at it. Again, we've heard
8 various plaintiffs express that they are very interested. Time
9 to actually make that public -- or sorry, not public. Make
10 that official hasn't happened yet.

11 THE COURT: Okay. Ms. Kaplan, are you not going to
12 join in? I just want to know.

13 MS. KAPLAN: I think it's very unlikely, your Honor.
14 They keep referring to them as independent. I don't know how
15 they properly use that adjective to describe Mr. Feinberg and
16 his colleague Ms. Feldman here. They were chosen by the
17 estate, they are being paid for by the estate, there was no --
18 not only was there no participation by us, but any opportunity
19 for us to weigh in on that was declined. And they have a
20 fiduciary duty not to our clients, but to the estate. That's
21 not independent under any definition of the word.

22 And what I am hearing from him frankly causes me
23 greater concern. This protocol, this is what we've heard all
24 along. I don't know, maybe a week. Maybe two weeks. Maybe
25 three weeks. We were supposed to participate in the protocol.

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1 What's he talking about?

2 So we have very, very low confidence in the process,
3 in the integrity of the process, in the ability of these women
4 to have agency in their fates, and I think my client is very
5 likely to go forward with litigation.

6 THE COURT: All right.

7 MS. KAPLAN: Highly likely.

8 THE COURT: I didn't want to set a motion schedule.
9 If we are going forward with the litigation, the folks at the
10 back table have to respond.

11 MS. KAPLAN: Understood. But nothing about their
12 response is relevant to the motion about punitive damages.
13 Again, it does not dismiss a single claim in the case. It
14 doesn't relate to a single one of the one through 86 paragraphs
15 of factual allegations in the complaint. All it relates to are
16 three words in the prayer for relief at the end of the
17 complaint, and we all acknowledge sitting here today that our
18 client is entitled to compensatory damage. So I'm completely
19 willing to brief the issue, your Honor. And I can talk about
20 how the choice of law analysis would work here. But it
21 shouldn't delay anything, frankly, your Honor. Because it
22 won't change anything in terms of moving forward with
23 discovery, and trial in the case.

24 THE COURT: All right. I don't know I need to hear
25 anything else. Mr. Moskowitz, last words?

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1 MR. MOSKOWITZ: Yes. If I can just give three cites
2 where judges in this district, again, I think I referred to
3 them earlier, Batts, Buchwald, and Sweet did dismiss on
4 12(b)(6) motions claims for punitive damages. Happy to do so.
5 If you want us to save it for the brief.

6 THE COURT: That's fine. Well, I haven't yet
7 scheduled the brief, and I want to think about the degree to
8 which discovery runs concurrent with the brief. It is only for
9 the punitive damages; is that not correct?

10 MR. MOSKOWITZ: And the time bar issue which since --

11 THE COURT: We are back to that again.

12 MR. MOSKOWITZ: It was a surprise to us.

13 THE COURT: Of course. I make no final decisions but
14 you're observing the skepticism with which I heard the time bar
15 issue. Because I'm incapable of not expressing my emotions.
16 So I understand that. But I don't think that's going to be
17 carrying the day any time soon.

18 I think I have what I need to go back and think about
19 the issue and set a schedule. But I don't want to deprive
20 either side the opportunity to say final words to me.
21 Ms. Kaplan, anything else you wish me to know?

22 MS. KAPLAN: Just briefly. I've become a student of
23 the law of punitive damages and Mr. Moskowitz is right that the
24 majority rule is to bar it, as we do in New York. But the
25 jurisdictions that do that, at least in the United States, are

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1 all based on statute. New York has a statute that prohibits
2 punitive damages against an estate. Virgin Islands has no such
3 statute. We are not aware of any case, we researched the issue
4 too in Virgin Islands, saying one way or the other whether that
5 is the law. Although of course in other contexts, the courts
6 in Virgin Islands refer to the restatement.

7 The factors that courts would look to in deciding this
8 issue is kind of the traditional factors. So the purpose of
9 punitive damages in a case is deterrence of future wrongdoing.
10 It's really honestly hard to imagine a case in which deterrence
11 of future wrongdoing is not a stronger interest, particularly
12 given the fact that Mr. Epstein can no longer be prosecuted
13 criminally. There is nothing more important than deterring
14 criminal sexual acts against young children.

15 The countervailing perspective is whether it's unfair
16 to punish the estate for the acts of the decedent. Typically,
17 your Honor, as you can imagine, that comes up in the context of
18 children. There is that famous line from Exodus in the Bible
19 about punishing the children for the sins of the fathers. And
20 since the Enlightenment in our country and in our world, we
21 believe that you shouldn't punish children for the sins of the
22 father.

23 There is no children at issue in this estate. They
24 have identified the sole beneficiary as Mr. Epstein's brother.
25 At least since Mr. Epstein was prosecuted in Florida, his

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1 brother was fully aware of what Mr. Epstein did, and in fact,
2 we have reason to believe his brother lives in a building owned
3 partly owned by him, partly owned by Mr. Epstein, in which the
4 the two women who did the booking of massages for these girls
5 also lived. So, the idea that Mr. Epstein's brother is somehow
6 innocent here, or should have the full benefits of the estate,
7 based on those policy reasons, makes very, very little sense.

8 And obviously, deterrence is really a huge factor
9 here. This should never happen to any young girl ever again,
10 certainly anywhere in New York or anywhere in this country.

11 THE COURT: Thank you. Mr. Moskowitz, final thoughts?

12 MR. MOSKOWITZ: Yes. I have various law in front of
13 me that I'm happy to brief that, number one, show there are
14 plenty of jurisdictions that not based on statute bar punitive
15 damages against an estate. I have cases such as Lohr v. Byrd,
16 522 So 2d 845, 846 (Fla. 1988), which is a Florida case that
17 refutes any notion that deterrence is served by punishing a
18 tortfeasor. And I am happy to brief all of those.

19 THE COURT: All right. I will get back to the parties
20 as soon as I can. I'm imagining one side or the other will be
21 getting a transcript of this. If you do so, I'll receive it
22 automatically. So I'll just imagine one of you will do that.

23 Thank you very much.

24 (Adjourned)