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*.	Case No. 19 Civ. 8673 (KPF) (DCF)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Roberta A. Kaplan, Esq.
Kate L. Doniger, Esq.
Alexandra K. Conlon, Esq.
Louis W. Fisher, Esq.

KAPLAN HECKER & FINK LLP
350 Fifth Avenue, Suite 7110
New York, New York 10118
Telephone: (212) 763-0883
Facsimile: (212) 564-0883

Attorneys for Plaintiff

PRELIMINARY STATEMENT

For decades, Jeffrey Epstein used his vast wealth to sustain a massive enterprise for the sexual abuse of young girls and to evade justice for his heinous crimes. But even the richest and most powerful men cannot treat the law as a restaurant menu, picking and choosing among its provisions to suit their interests. Although he owned properties all over the world, Jeffrey Epstein chose the United States Virgin Islands as his domicile, establishing an island retreat there where he could sexually abuse children in secret. He secured his enormous wealth in a byzantine network of corporations, limited liability companies, trusts, and other entities established under Virgin Islands law. And, in August 2019, two days before he committed suicide in a federal jail, Epstein executed a Will that expressly provides for his estate to be probated in the Virgin Islands. Despite Epstein's decision to subject his Estate to *Virgin Islands* probate law, the Executors now ask this Court to give them the benefit of a provision of *New York* probate law that would exempt them from paying punitive damages for Epstein's heinous crimes. But that is not how it works.

This Court should deny Defendants' motion to dismiss Plaintiff's claim for punitive damages.[1] *First*, under New York choice-of-law rules, the Court must endeavor to achieve "justice, fairness, and the best practical result" by giving controlling effect to the law of the jurisdiction with the "greatest concern with the specific issue raised in the litigation." *Simon v. Philip Morris Inc.*, 124 F. Supp. 2d 46, 55 (E.D.N.Y. 2000). The circumstances of this case are as shocking as they are unique: Jeffrey Epstein, who chose to organize his estate under the laws

[1] Defendants' motion is properly denominated a motion to strike under Federal Rule of Civil Procedure 12(f). (Dkt. 36.) Defendants' motion does not seek dismissal of any of Plaintiff's four causes of action. Instead, it merely seeks to excise Plaintiff's demand for punitive damages. Such a motion is better characterized as a Rule 12(f) motion to strike. S*ee, e.g.*, *Rapay v. Chernov*, No. 16 Civ. 4910, 2017 WL 892372, at *1, 8 (S.D.N.Y. Mar. 6, 2017)*; Com- Tech Assocs. v. Comput. Assocs. Int'l, Inc.*, 753 F. Supp. 1078, 1093 (E.D.N.Y. 1990) (denying Rule 12(f) motion to strike punitive damages).

of the Virgin Islands, committed suicide just as he became aware of the full scope of civil and criminal claims against him. *See infra at 5-6.* The pending motion now presents the question of whether his Estate should be liable for a punitive damages verdict that would have clearly been available against him if he were still alive. The Virgin Islands has a strong interest in applying its own law to its domiciliaries and in ensuring that an individual who chose to probate his estate under Virgin Islands law is subject to that law's burdens along with its benefits. New York, on the other hand, has no conceivable interest in applying its ban on punitive damages—which reflects a policy decision to protect innocent heirs from suffering for the wrongs of the decedent—to a non-domiciled estate in a case where there are no "innocent heirs" and where the decedent purposefully evaded liability of all kinds for his heinous acts by taking his own life. The most just, fair, and practical result is to apply Virgin Islands estates law to this question.

Second, contrary to Defendants' arguments (Dkt. 4-6), Virgin Islands common law *does* permit punitive damages against Epstein's Estate. This is made especially clear by the fact that the Government of the Virgin Islands is currently seeking punitive damages against Epstein's Estate in a pending lawsuit. *See infra* at 7. Any reasonable analysis of the factors that this Court must consider in assessing questions of Virgin Islands common law leads to the same conclusion. Permitting punitive damages against Epstein's Estate clearly represents the "soundest rule" for the Virgin Islands, where punitive damages are viewed as a mechanism to punish wrongdoers *and* deter others from engaging in similar misconduct, and where the Attorney General of the Virgin Islands herself likewise seeks punitive damages against the Estate. *See id.* Indeed, given these facts and circumstances, it is impossible to conceive of a case where the need for deterrence is greater.

STATEMENT OF FACTS

Decedent Jeffrey Epstein was a prolific and notorious pedophile who subjected dozens, if not hundreds, of young girls to sexual and psychological abuse. Compl. ¶ 1. He was also one of the wealthiest individuals in the United States. *Id.* ¶ 17. While the total scope of his assets remains unknown, his estate has a current estimated value of at least $600 million, Ex. 1 ¶¶ 10-11,[2] and he is believed to have owned, among other properties, a private island in the U.S. Virgin Islands; the largest private home in Manhattan; a 7,500 acre ranch in New Mexico; a mansion in Palm Beach, Florida; and an apartment in Paris. *Id.* ¶ 17. Epstein leveraged this prodigious wealth to create a vast enterprise for the sexual exploitation and abuse of children, whether on his private island in the U.S. Virgin Islands, or at his homes in New York City or Palm Beach. *Id.* ¶ 18. For decades, he perpetrated these heinous acts without legal consequence, which he accomplished by targeting the most vulnerable victims he could find: young girls from impoverished backgrounds who would silently suffer his abuse in exchange for money they desperately needed. *Id.* ¶¶ 1, 22. Plaintiff Jane Doe in this case was one of these girls.

A. Epstein's Abuse of Doe

Doe met Epstein when she was fourteen years old, in or around 2002. *Id.* ¶ 3. For the next three years, Epstein repeatedly abused and exploited her. *Id.* He regularly forced Doe to give him massages while she was completely naked, and during these massages, he touched Doe's breasts with his hands, lips and tongue. *Id.* ¶ 35. Over time, the abuse worsened. He touched Doe's vagina with his fingers and forcefully and painfully penetrated her. *Id.* ¶ 38. He made Doe watch while he masturbated and forced her to help him masturbate. *Id.* ¶ 33, 39. He even recruited other adults to abuse Doe: on one occasion, Epstein and an adult woman sexually

[2] In support of this memorandum, Plaintiffs submit the Declaration of Roberta A. Kaplan ("Kaplan Declaration"), which collects other supporting exhibits referred to herein as "Ex._".

abused Doe together. *Id.* ¶ 40. Epstein gave Doe cash at each of these encounters, money that she desperately needed to support her sister, who suffered from a serious medical condition, and her mother, who was unable to financially sustain their family. *Id.* ¶ 22-24. Epstein's relentless abuse persisted until Doe was seventeen years old, when she finally managed to slip his grasp. *Id.* ¶ 54.

Doe suffered serious and foreseeable consequences as a result of Epstein's sexual abuse during her formative years. She dropped out of high school and, as a result, has been forced to take on dangerous and degrading work to make ends meet. *Id.* ¶¶ 41, 55. More than fifteen years after Epstein's abuse ended, Doe still suffers from extreme anxiety and depression. *Id.* ¶ 56. She has been diagnosed with Post-Traumatic Stress Disorder, which causes her to endure disruptive flashbacks to Epstein's abuse, forcing her to live through some of the worst moments of her life over and over again. *Id.* ¶ 57. She suffers from debilitating panic attacks and has difficulty sleeping and eating. *Id.* ¶¶ 56-57. The continuing effects of Epstein's sexual abuse make the basic and essential tasks of Doe's daily life—going to work, parenting her young daughter, and caring for her ailing mother—nearly impossible. *Id.* ¶¶ 57-60.

But while Doe suffered and struggled to survive, Epstein flourished. Before his death, Epstein was believed to be one of the wealthiest people in the United States, and he owned vast estates around the world. *Id.* ¶ 17. He used this incredible wealth to facilitate his sexual abuse of young girls. *Id.* ¶ 17. He employed people to find children for him to abuse. He used that staff to schedule appointments for girls to visit him in his many homes, so that he could abuse them. He used that staff to maintain contact with girls he liked, so that he could summon them for more abuse at his whim. And he used that money to pay the children he abused, buying their silence along with their young bodies. *Id.* ¶ 32, 47.

B. The 2008 Non-Prosecution Agreement

Despite the size and reach of his pedophilic enterprise, Epstein avoided criminal and civil consequences for his heinous conduct for most of his life. In 2008, his flagrantly illegal activities caught the attention of law enforcement, and he was investigated for sexually abusing minors. *Id*. ¶ 20. But, somehow, Epstein still managed to avoid facing any meaningful consequences: for his years-long scheme of sexually abusing and exploiting children, Epstein was allowed to plead guilty to two counts of solicitation of prostitution under Florida state law and entered into a non-prosecution agreement with the United States Attorney's Office for the Southern District of Florida. *Id*. ¶ 20. He was "incarcerated" for a year in a local jail, during which time he was afforded extraordinary privileges, including being allowed to leave the jail twelve hours per day, six days per week. *Id.*

C. Epstein's Will, Suicide, and Evasion of Liability

In 2019, Epstein finally seemed poised to face real consequences for sexually abusing Doe and countless other girls. In July 2019, he was indicted by the United States Attorney's Office for the Southern District of New York on serious sex trafficking charges. *Id*. ¶ 62. For Doe in particular, who was identified as "Minor Victim-1" in the indictment, it was extremely significant that Epstein would, at last, be criminally prosecuted for what he did to her. But on August 10, 2019, before he could be tried for his crimes, Jeffrey Epstein committed suicide in a federal jail in Manhattan. *Id.* ¶ 63

Two days before he took his own life, on August 8, 2019, Epstein amended his estate plan, executing a Will while in federal custody that identifies him as a domiciliary of the Virgin Islands and that names Defendants, Darren Indyke and Richard Kahn, as the executors of his estate. *Id.* ¶ 65; Ex. 2. The Will identified Mark Epstein, his brother, as his heir, but directed the

executors to give all of his property, after paying his debts, to the then-acting Trustees of his "1953 Trust," thereby effectively transferring all of his property and money to "The 1953 Trust." *Id.* ¶ 66; *see also* Ex. 2. Defendants Indyke and Kahn are also the Trustees of the 1953 Trust. *Compl.* ¶ 67. On August 15, 2019, Defendants filed Epstein's Will with the Probate Division of the Superior Court of the Virgin Islands. *Id.* ¶ 64.

Epstein's suicide took place as he faced significant potential civil liability in addition to the pending criminal charges against him. Indeed, before Epstein's suicide, one of his victims filed an application for pre-action discovery in New York state court.. *See Araoz v. Epstein et al.,* No. 156728/2019 (Sup. Ct., New York Cty., Doc No. 1). Further, six months earlier, on February 14, 2019, New York passed the Child Victim's Act, N.Y. C.P.L.R. § 214-g, which provided that starting on August 14, 2019 (just days after Epstein's suicide), the civil claims of child sexual abuse victims would be revived for a one-year period, regardless of any previously applicable statutes of limitations. Consequently, before Epstein's suicide, it would have been obvious to him—given the scope of his crimes and number of his victims—that he would likely soon face a flood of civil litigation and considerable liability.

D. The Present Action against the Estate

On September 18, 2019, Doe filed this diversity action against the Epstein Estate for sexual assault, sexual battery, intentional infliction of emotional distress, and negligent infliction of emotional distress. She seeks actual, compensatory, statutory, consequential, and punitive damages for her substantial injuries. *Id.* ¶ 88.

On January 15, 2020, Defendants filed the instant motion to dismiss Plaintiff's claim for punitive damages, arguing that they should be exempt from paying punitive damages by virtue of a provision of the New York State Estates, Powers, and Trust Law ("NY EPTL"). Defendants

argue that New York State law should apply to the question of whether Plaintiff may pursue punitive damages against an estate, and that, in the alternative, Virgin Islands law, even if it were to be applied, does not provide for punitive damages against an estate. (Dkt. 46.) On the same day Defendants filed their motion, the Attorney General of the United States Virgin Islands filed an action in Virgin Islands Superior Court against the Epstein Estate (the "Virgin Islands Action") alleging myriad violations of the Virgin Islands' Criminally Influenced and Corrupt Organizations Act ("CICO") and other Virgin Islands laws. *See* Ex. 1. Of most relevance here, the Virgin Islands Action seeks punitive damages against Epstein's Estate under Virgin Islands law because "economic damages are simply not sufficient" given Epstein's "egregious, persistent, and injurious" conduct and "money, assets, and power." *Id.* at ¶ 276.

ARGUMENT

Defendants' argument is as simple as it is incorrect. They ask this Court to find that because the acts giving rise to Plaintiff's cause of action occurred entirely in New York, "New York law . . . applies to the issue of punitive damages." (Dkt. 47 at 3.) But Defendants ignore that New York courts long ago eschewed this mechanical application of the "place of the injury" rule in favor of the "more just, fair, and practical result that may best be achieved by giving controlling effect to the law of the jurisdiction which has the greatest concern with, or interest in, the specific issue raised in the litigation." *Neumeier v. Kuehner*, 31 N.Y.2d 121, 127 (1972).

This motion raises one specific issue: whether Plaintiff, a victim of child sexual abuse by Jeffrey Epstein, may seek punitive damages against his Estate. Just as Epstein once used his vast wealth to evade responsibility for his horrific crimes, the Executors of his Estate now seek to use his death—and a New York estate law proscribing punitive damages against a dead tortfeasor's estate—as a tool to protect that wealth from the valid civil claims of Plaintiff and Epstein's many

other victims. But only two days before his death, Epstein chose to make himself a domiciliary of the Virgin Islands, and he chose to avail himself of the benefits of its estate law by probating his estate there, giving the Virgin Islands a significant interest in applying its estate law to this question. On the other hand, no interest of the State of New York is furthered by applying its punitive damages exemption for estates to the non-domiciled estate of a tortfeasor who committed suicide *with knowledge of the scope of the potential civil claims pending against him*. Accordingly, the Virgin Islands has the greatest concern with the specific issue raised in this litigation, and its estate law, which permits punitive damages against an Estate, must govern.

I. PLAINTIFF IS AUTHORIZED TO SEEK PUNITIVE DAMAGES AGAINST THE ESTATE UNDER U.S. VIRGIN ISLANDS LAW

A. USVI Law Governs Whether Punitive Damages Are Available in This Action

It is well settled that a federal court must look to the choice-of-law rules of the forum state in resolving conflicts of law. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Int'l Bus. Machs. Corp. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 143 (2d Cir. 2004). When a choice-of-law issue arises in a tort action, New York courts apply a flexible "interest analysis," which "eschew[s] mechanical rules in favor of a practical analysis of the interests of the various states involved." *Simon*, 124 F. Supp. 2d at 54. New York's interest analysis aims to achieve "[j]ustice, fairness, and the best practical result . . . by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." *Id.* at 55 (quoting *Babcock v. Jackson*, 12 N.Y.2d 473, 481 (1963)); *Thomas H. Lee Equity Fund V, L.P. v. Mayer Brown, Rowe & Maw LLP*, 612 F. Supp. 2d 267, 283-84 (S.D.N.Y. 2009).

Typically, to determine which jurisdiction has the prevailing interest in a conflict-of-law question arising in a tort action, New York courts consider whether the purpose of the rule in

question is to regulate conduct or to allocate loss. *Padula v. Lilarn Props. Corp.*, 84 N.Y.2d 519, 521-22 (1994). Here, Defendants argue in conclusory fashion that because punitive damages are "conduct-regulating," the law of the place of the tort controls. (Dkt. 47 at 3.) This argument vastly oversimplifies the analysis called for under New York law. It is settled that punitive damages rules are conduct-regulating: however, that means only that "*as a general matter* . . . the law of the place of the tort governs *unless there is good reason not to apply the rule of* lex loci delecti." *Nat'l Jewish Democratic Council* v. *Adelson*, No. 18 Civ. 8787 (JPO), 2019 WL 4805719 at *6 (S.D.N.Y. Sept. 30, 2019) (emphasis added). In other words, the fact that punitive damages are conduct-regulating does not end the inquiry: "for punitive damages in particular . . . a court must consider the object or purpose of the wrongdoing to be punished and give controlling weight to the law of the jurisdiction with the strongest interest in the resolution of the particular issue presented." *Id.* (internal quotations and citations omitted).

The unique circumstances presented here clearly give this Court "good reason" not to apply New York estate law. This case raises the question not of whether punitive damages should be available to punish perpetrators of sexual assault in New York (they are), but of whether the estate of a deceased tortfeasor should be obligated to pay such claims. The Virgin Islands clearly has the strongest interest in applying its law to resolve this issue. *First,* Defendants are domiciliaries of the Virgin Islands, which counsels in favor of applying Virgin Islands estate law. *Id.* at *5-6 (that defendant is a domiciliary of Nevada "points in favor" of applying Nevada punitive damages law); *see also, e.g.*, *Stevens v. Shields*, 499 N.Y.S.2d 351, 353 (Sup. Ct., Ulster Cty. 1986) (applying Florida law to a New York accident because

defendant's "liability as a parent of a negligent minor driver is cast upon her by virtue of her choice to be a domiciliary of Florida" regardless of where the minor drove.)[3]

Second, the Virgin Islands has an overwhelming interest in preventing Epstein and his Estate from availing themselves of the benefits, but not the burdens, of Virgin Islands estate law. Epstein, who owned residences and property all over the world, chose to identify the U.S. Virgins Islands as his domicile and to probate his Estate in that jurisdiction. This was a deliberate choice to avail himself of the benefits of Virgin Islands probate law, which he presumably viewed as advantageous to his estate. Compl. ¶¶ 11, 65; *see also* Ex. 1 ¶ 89 ("Two days before his death, Epstein amended the Trust and his Last Will and Testament. Upon information and belief, he did so as part of a pattern and ongoing effort to conceal and shield his assets from potential recovery by claimants.").[4] As a result, the Virgin Islands has a significant interest in applying all the provisions of its probate law to questions regarding Epstein's estate. *Adelson*, 2019 WL 4805719, at *6; *see also, e.g.*, *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 201 (1985) (deferring to state's interest in forcing litigant to accept "the burdens as well as the benefits" of that state's tort rules). Neither Epstein nor his Estate could have reasonably expected a different result. *See Stevens*, 499 N.Y.S.2d at 353; *see also King v. Car Rentals, Inc.*, 29 A.D.3d 205, 212 (2d Dep't 2006) (noting the relevance in choice-of-law analysis of the "parties' expectations" about what law would govern).

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[3] The Virgin Islands' interest in applying its estate law to Jeffrey Epstein's estate is only enhanced by the profoundly detrimental impact on the U.S. Virgin Islands of the decedent's connection with that jurisdiction. *See* Ex. 1 ¶¶ 15, 68-69 (Epstein formed a "deliberately complex web of Virgin Islands corporations, limited liability companies, foundations, and other entities . . . through which he carried out and concealed his criminal conduct," "used the Virgin Islands' land, resources, people, and laws for [his enterprise's] illicit purposes," and "subjected the Virgin Islands to public portrayals as a hiding place for human trafficking and sex crimes.")

[4] The Court may take judicial notice of this pleading, even at the motion to dismiss stage, as it is in the public record. *See 2002 Lawrence R. Buchalter Alaska Tr. v. Philadelphia Fin. Life Assur. Co.*, 96 F. Supp. 3d 182, 206 (S.D.N.Y. 2015).

Together, these two factors counsel incontrovertibly in favor of applying Virgin Islands estate law. Indeed, when courts in this State and in this District have declined to apply the rule of *lex loci delecti* to the availability of punitive damages, they have done so in deference to precisely these interests. In *Adelson*, for example, the defendant filed a defamation suit under Nevada law in the Southern District of New York, and plaintiffs sought punitive damages for a violation of Nevada's anti-SLAPP statute. The district court concluded that Nevada law, rather than New York law, should determine the availability of punitive damages for two reasons: first, because the defendant was a domiciliary of Nevada, which "points in favor of applying Nevada law," and second, because the defendant had attempted to avail himself of the benefits of Nevada defamation law, giving Nevada "a corresponding interest" in ensuring the application of its defamation law's punitive damages provision. *Adelson*, 2019 WL 4805719, at *6; *see also Beasock v. Dioguardi Enters., Inc.*, 100 A.D.2d 50, 52-54 (4th Dep't 1984) (concluding that the law of two of defendants' respective domiciles should govern whether punitive damages were available in a survivorship action).

In contrast to the Virgin Islands' strong interest in applying its estate law to this question, New York's interest in applying its own estate law is extremely attenuated. The Epstein Estate is not domiciled in New York and it is not being probated here. Moreover, even if New York has a policy interest in prohibiting the levying of punitive damages against an estate, that interest is clearly not furthered in the unique circumstances presented here.

Generally, the prohibition on punitive damages against an estate exists because a dead tortfeasor cannot be punished by the judicial system and so courts or legislatures have made a policy decision to protect the decedent's "innocent heirs" from being punished for the wrongs they did not personally commit. *See, e.g.*, *Flaum v. Birnbaum,* 177 A.D.2d 170 177 (4th Dep't

1992*); Lohr v. Byrd*, 522 So. 2d 845, 846-47 (Fla. 1988). There can be no question that this policy interest is irrelevant where, as here, Epstein had no "innocent" heirs who will be unjustly punished by the levying of punitive damages against his Estate. Epstein reportedly had no children, and his Will identifies only his brother, Mark Epstein, who is widely reported to have considerable financial resources of his own, as his heir. Ex. 2 at 3.[5] Importantly, Mark Epstein has been on notice of his brother's heinous crimes for—at a minimum—more than a decade, since Jeffrey Epstein's guilty plea in Florida in 2008. Compl. ¶ 20. What Jeffrey Epstein does leave behind is countless women whose lives have been deeply impacted by the sexual, emotional, and psychological abuse he wrought on them. Prohibiting punitive damages in this case would not protect innocent heirs; it would punish traumatized victims deserving of adequate compensation.

More importantly, where a tortfeasor commits suicide to avoid imposition of punitive damages, considerations of fairness no longer counsel in favor of protecting his estate. Here, Jeffrey Epstein committed suicide while he was awaiting trial on serious federal sex trafficking charges. A high-profile civil case had already been initiated against him, *see supra* at 7, and, since Epstein was well aware of the full scope of his own misconduct, he was equally aware of the potential scope of his civil liability. His suicide appears designed, at least in part, to avoid the civil and criminal consequences of his heinous acts. In this unique situation, New York has no conceivable policy interest in permitting Epstein's continued efforts to evade justice. Indeed, some courts have commented that they would decline to apply a bar on punitive damages against an estate should they ever encounter the extreme and unusual circumstances presented here. *See*

[5] Jeffrey Epstein's Will, which is attached as Exhibit 1 to the Kaplan Declaration, is both incorporated by reference and integral to the Complaint in this action. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002).

Crabtree ex rel. Kemp v. Estate of Crabtree, 837 N.E.2d 135, 139 (Ind. 2005) (Indiana Supreme Court may decline to apply its normal bar on punitive damages "where a tortfeasor seems to have considered his own death as an escape from punitive damages incident to some intentional tort" by committing suicide); *see also Estate of Mayer v. Lax, Inc.*, 998 N.E.2d 238, 259 (Ind. Ct. App. 2013) (noting a "possible exception" to the rule proscribing punitive damages against an estate "if the tortfeasor committed suicide to attempt to escape such damages").

B. Virgin Islands Law Permits Recovery of Punitive Damages against an Estate

Defendants argue that even if Virgin Islands law applies to the question here, this Court should conclude that Virgin Islands law does not permit the recovery of punitive damages against an estate. That is plainly incorrect. In deciding how to apply Virgin Islands' common law, courts must consider what are known as the *Banks* factors: "(1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) which approach represents the soundest rule for the Virgin Islands." *Gov't of the V.I. v. Connor,* 60 V.I. 597, 600 (V.I. 2014)). An accurate assessment of these three factors makes clear that punitive damages are available in this case.

The third factor—which approach represents the soundest rule for the Virgin Islands—is the "most important" of the three. *Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 428 (V.I. 2016). Here, the "soundest rule" for the Virgin Islands is to permit punitive damages against Jeffrey Epstein's Estate. But this Court need not decide this question in a vacuum: the Virgin Islands Attorney General has articulated this very position on behalf of the Virgin Islands in her pending lawsuit against the Estate. The Attorney General states that, under Virgin Islands common law, the purpose of punitive damages is "to punish the defendant for outrageous conduct that is reckless or intentional and to deter others from engaging in such conduct in the future," and she

further notes that "[p]unitive damages are especially important in the case of persons or companies that have money, assets, and power that mere fines, penalties, and economic damages are simply not sufficient." Ex. 1 ¶¶ 274, 276. The Attorney General states that Epstein engaged in "intentional conduct so egregious, persistent, and injurious that it shocks the conscience and offends a civilized society" and that therefore, the Government of the U.S. Virgin Islands seeks punitive damages against the Estate. *Id.* ¶¶ 275, 277.

The Attorney General's view that punitive damages are available against Epstein's Estate should dispose of the question for this Court, but any reasonable independent analysis of the interests of the Virgin Islands leads to the same conclusion. Punitive damages in the Virgin Islands are designed to both punish wrongdoers and to deter others from engaging in similar conduct. *See, e.g.*, *Guardian Ins. Co. v. Gumbs*, No. ST-15-CV-195, 2016 WL 9525609, at *10 (V.I. Super. Aug. 22, 2016). It is hard to imagine a case where the need to deter others from engaging in similar misconduct is more significant than here. This is particularly true in the Virgin Islands, where Epstein not only abused countless girls and young women, but also "abused [the] privileges of residency," specifically choosing the Virgin Islands as the location for his heinous crimes because of its seclusion and isolation, and thereby contributing to a public perception that the Virgin Islands is "a hiding place for human trafficking and sex crimes." Ex. 1 ¶¶ 63, 69. The fact that Epstein would have been subject to punitive damages claims if he had not taken his own life—and that he committed suicide *knowing* he was subject to such claims—further militates in favor of permitting punitive damages against his Estate: as discussed above, even in a jurisdiction where punitive damages against a deceased tortfeasor's estate are normally barred, courts have acknowledged that such egregious conduct by a tortfeasor may warrant a departure from that rule. *See Crabtree*, 837 N.E.2d at 139; *Estate of Mayer,*998 N.E.2d at 259.

Defendants fail to offer any countervailing reason why their rule would be sounder for the Virgin Islands—or, indeed, any reason at all. Instead, they assert only that Virgin Islands courts "have favorably applied Restatement Section 908 to questions regarding punitive damages." (Dkt. 47 at 6.) But none of the seven cases cited by Defendants address the question of whether punitive damages are available *against an estate*, nor do they even consider the Restatement's position on that question. That courts have favorably cited portions of the Restatement in considering *other* questions regarding punitive damages does not suffice to show that the Restatement's position on punitive damages against an estate is the rule in the Virgin Islands. Regardless, the Restatement is nothing more than non-binding secondary authority. *See, e.g.*, *Gov't of Virgin Islands v. Connor*, No. Sup. Ct. Civ. No. 2013-0095, 2014 WL 702639, at *1 (V.I. Feb. 24, 2014) (noting that the Supreme Court of the Virgin Islands has instructed that courts should not "mechanistically follow[] the Restatements" in determining common law); *see also Thorn v. Stephens*, 646 N.Y.S.2d 597, 599 n.2 (Sup. Ct., Westchester Cty. 1995) ("The Restatement of Law is not binding."); *Bellino v. JPMorgan Chase Bank, N.A.*, No. 14-CV-3139 (NSR), 2015 WL 4006242, at *5 (S.D.N.Y. June 29, 2015) ("[T]he Restatement is not binding on the Court."); *Alain Ellis Living Tr. v. Harvey D. Ellis Living Tr.*, 308 Kan. 1040, 1055–58 (2018) (noting the Restatement's view on whether punitive damages are available against an Estate and declining to follow it).

Nor do the other *Banks* factors provide any reason to adopt Defendants' view that punitive damages should not be permitted against Epstein's Estate. Regarding factor one, which asks whether Virgin Islands courts have previously adopted a particular rule, Plaintiff is not aware of any Virgin Islands decision on the question of whether to permit punitive damages against an estate, nor have Defendants cited any such case. The fact that, as Defendants point

out, a Virgin Islands court has recited the Restatement rule on punitive damages against an estate *while deciding a different question of law* does not come close to showing that a court has considered and decided the precise question at issue here.[6] (Dkt. 47 at 5.) And Defendants exaggerate the degree to which *Banks* factor two—which weighs the position taken by the majority of other jurisdictions—favors prohibiting punitive damages against an estate. While it is true that this is the majority view, a considerable minority has reached the opposite conclusion: ten[7] of the approximately 35 jurisdictions to address the question have decided that punitive damages should be allowed against an Estate, including for reasons that are especially salient here: adequate compensation for victims, punishment of wrongdoers, deterrence of other future wrongdoers, and social condemnation of uniquely abhorrent behavior. *Haralson v. Fisher Surveying, Inc.*, 201 Ariz. 1, 3-4 (2001) (en banc); s*ee also generally* Zitter, 30 A.L.R.4th 707; Barry A. Lindahl, 2 Modern Tort Law: Liability and Litigation § 20:24 (2d ed., June 2019 Update). And notably, most of the jurisdictions adopting the majority rule have—unlike the Virgin Islands—passed a statute codifying a prohibition on punitive damages against an estate. *See Alain Ellis Living Tr.*, 308 Kan. at 1046 ("[A]t least 14 of the cases adopting the position that an injured party cannot recover punitive damages from the estate of a tortfeasor—the majority rule—reached that conclusion because their respective state legislatures had passed a statute stating that position.").

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[6] The cases Defendants cite do not address the question at issue here—namely, whether punitive damages are available against an Estate. Instead, both cases address the separate question of whether punitive damages are available in survival actions for wrongful death. *See Hamilton v. Dowson Holding Co.*, No. CIV. 2008-2, 2009 WL 723134, at *5-6 (D.V.I. Mar. 17, 2009), and *Booth v. Bowen*, No. CIV. 2006-217, 2008 WL 220067, at *5 (D.V.I. Jan. 10, 2008). Defendants themselves point out this distinction, conceding that these cases address the "the inverse of the issue here" (Dkt. 47 at 5), rather than the actual question before the Court.

[7] Arizona, Delaware, Indiana, Ohio, Pennsylvania, South Carolina, Alabama, Montana, New Hampshire, and West Virginia all permit punitive damages against a decedent's Estate. *See* Jay M. Zitter, *Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged*, 30 A.L.R.4th 707 (1984 ed., 2019 Suppl.).

Thus, the most important *Banks* factor weighs strongly in favor of allowing punitive damages, and the other two factors are indeterminate. The *Banks* analysis therefore clearly counsels in favor of adopting the same position taken by the USVI Attorney General: that under USVI law, punitive damages are available against Jeffrey Epstein's Estate.[8]

II. PLAINTIFF HAS A STATUTORY RIGHT TO SUE THE ESTATE UNDER EITHER U.S. VIRGIN ISLANDS OR NEW YORK LAW.

Defendants' argument that Plaintiff is "only permitted to bring her causes of action against the Estate" under NY EPTL § 11-3.2(a)(1), and therefore is subject to that statute's prohibition on punitive damages, is a red herring. (Dkt. No. 47 at 3.) First, the Complaint does not identify NY EPLT Section 11-3.2(a)(1), which provides that a cause of action for personal injury survives the death of the person liable, as the source of law enabling Plaintiff to bring her causes of action against the Estate. Virgin Islands law *also* expressly provides that personal injury claims against a tortfeasor survive his or her death. 15 V.I.C. § 601. Thus, whether Virgin Islands law or New York law applies to the Plaintiff's ability to sue the Estate of her deceased abuser, it is indisputable that Plaintiff is authorized to bring this action under the law of either jurisdiction. 15 V.I.C. § 601; N.Y. EPTL § 11–3.2(a)(1).

Second, even if NY EPTL were the authorizing source of law, Defendants' argument that Plaintiff's punitive damages claim must therefore also be governed by the NY EPTL is

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[8] In the alternative, Plaintiff respectfully requests that the Court certify the question whether punitive damages are available against Epstein's Estate in the U.S. Virgin Islands to the Supreme Court of the Virgin Islands. Rule 38 of the Virgin Islands Rules of Appellate Procedure provides that the Supreme "Court may answer a question certified by a court of the United States 'if there is involved in any proceeding before the certifying court a question of law which may be determinative of the cause then pending in the certifying court.'" *Hall v. Hall*, S. Ct. Civ. No. 2018-0036, 2018 WL 1888496, at *1 (V.I. Apr. 18, 2018) (emphasis in original) (quoting V.I. R. APP. P. 38(a)).

In the Second Circuit, questions about the availability of punitive damages are appropriate for certification to a jurisdiction's highest court, assuming that jurisdiction provides for such a procedure. *See, e.g.*, *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 56-57 (2d Cir. 1992) (certifying to New York Court of Appeals question of whether provision of state insurance law preempts common law right to punitive damages standard), *certified question withdrawn after settlement,* 984 F.2d 69, 70 (2d Cir. 1993)). The U.S. Virgin Islands' certification procedure thus provides an alternative means by which the Court could, in its discretion, resolve this question of Virgin Islands' law.

incompatible with New York's established choice-of-law rules, as the Court recognized at its last conference in this case on December 11, 2019 (Tr. at 17:23-18:4; 26:13-17). It is well-settled that "in a single action[,] different states may have different degrees of interests with respect to different operative facts and elements of a claim or defense." *2002 Lawrence R. Buchalter Alaska Tr.*, 96 F. Supp. 3d at 200. This doctrine, known as dépeçage, expressly permits different jurisdictions' laws to govern the availability of punitive damages and the availability of a cause of action. *Adelson*, 2019 WL 4805719, at *6 ("Although it is clear that the measure of compensatory damages is determined by the same law under which the cause of action arises, this is not necessarily true with regard to [punitive] damages."); *Fed. Hous. Fin. Agency v. Ally Fin. Inc.*, No. 11 Civ. 7010 (DLC), 2012 WL 6616061, at *5 (S.D.N.Y. Dec. 19, 2012) ("The New York Court of Appeals has recognized that the doctrine [of dépeçage] may sometimes require that a plaintiff's demand for punitive damages be analyzed under the law of a state other than the one under whose law the cause of action arises."); *In re Air Crash Near Clarence Ctr., New York*, 798 F. Supp. 2d 481, 488 n.6 (W.D.N.Y. 2011) ("[T]he possibility that one state's law could apply to punitive damages and another's to compensatory damages is permitted under the doctrine of *depecage*.").[9]

In short, it is indisputable that Plaintiff is authorized to bring this action under Virgin Islands law or New York law, regardless of which jurisdiction's law authorizes Plaintiff to sue the Estate of her deceased abuser. 15 V.I.C. § 601; N.Y. EPTL § 11–3.2(a)(1). And even if New

[9] Defendants ask this Court to interpret a single line of *dicta* from *Blissett v. Eisensmidt*, 940 F. Supp. 449, 457 (N.D.N.Y. 1996) as supporting a position that would be entirely inconsistent with this well-settled principle of law. *Blissett* has no bearing on this case—there, the claims arose under Section 1983, and different principles of law govern choice of law questions in federal civil rights cases. *Id.* In any event, 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. As the foregoing case law on dépeçage demonstrates, it is indisputable that a cause of action and a claim for punitive damages can be governed by two different bodies of law.

York law is the source authorizing Plaintiff's cause of action, well-established choice-of-law principles make clear that a different jurisdiction's law may apply to the question of punitive damages.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss Plaintiff's claim for punitive damages.

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By: 

Roberta A. Kaplan
Kate L. Doniger
Alexandra Conlon
Louis W. Fisher
KAPLAN HECKER & FINK LLP
350 Fifth Avenue, Suite 7110
New York, New York 10118
Tel: (212) 763-0883
Fax: (212) 564-0883
rkaplan@kaplanhecker.com

Counsel for Plaintiff Jane Doe