

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TERESA HELM,

Plaintiff,

v.

DARREN K. INDYKE and RICHARD D.
KAHN, in their capacities as the executors of
the ESTATE OF JEFFREY EDWARD
EPSTEIN,

Defendants.

Case No. 1:19-cv-10476 (PGG) (DCF)

**DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

TROUTMAN SANDERS LLP
875 Third Avenue
New York, New York 10022
Tel: 212-704-6000
Fax: 212-704-6288

Attorneys for Defendants

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	1
A. Plaintiff has the procedural burden backwards: she fails to meet her burden to allege facts sufficient to invoke an extraordinary exception to the statute of limitations.....	1
1. Plaintiff is unable to invoke CPLR § 215(8)(a) because she fails to present a criminal indictment that arises from Decedent’s alleged conduct towards her	1
2. Plaintiff bears the burden to <i>allege</i> “extraordinary” circumstances; she fails to meet this burden.....	2
B. This motion is proper and timely regardless of its title.	6
C. There is no basis to disregard black letter New York law applying the law of the place of alleged torts to the issue of punitive damages.	7
D. Even if USVI law applies, which it does not, it follows the majority rule prohibiting recovery of punitive damages against a tortfeasor’s estate	9
CONCLUSION.....	10

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abercrombie v. College</i> , 438 F. Supp. 2d 243 (S.D.N.Y. 2006).....	3
<i>Amusement Indus. v. Stern</i> , 693 F. Supp. 2d 301 (S.D.N.Y. 2010).....	7
<i>Blissett v. Eisensmidt</i> , 940 F. Supp. 449 (N.D.N.Y. 1996).....	8
<i>Booth v. Bowen</i> , No. CIV. 2006-217, 2008 WL 220067 (D.V.I. Jan. 10, 2008)	10
<i>Brandy v. Flamboyant Inv. Co., Ltd.</i> , 24 V.I. 249 (V.I. Terr. Ct. 1989).....	10
<i>Brown v. Parkchester S. Condos.</i> , 287 F.3d 58 (2d Cir. 2002).....	5
<i>Burrell v. State Farm & Cas. Co.</i> , 226 F. Supp. 2d 427 (S.D.N.Y. 2002).....	7
<i>Cerveceria Modelo, S.A. de C.V. v. USPA Accessories LLC</i> , No. 07 Civ. 7998 (HB), 2008 U.S. Dist. LEXIS 28999 (S.D.N.Y. Apr. 10, 2008)	7
<i>Christodoulou v. Terdeman</i> , 262 A.D.2d 595 (2d Dept. 1999)	2
<i>Davis v. Christian</i> , 46 V.I. 557 (D.V.I. App. Div. 2005).....	10
<i>Davis v. Jackson</i> , No. 15-cv-5359, 2016 WL 5720811 (S.D.N.Y. Sept. 30, 2016)	6
<i>Deutsch v. Novartis Pharms. Corp.</i> , 723 F. Supp. 2d 521 (E.D.N.Y. 2010)	8
<i>Fairley v. Collins</i> , 09-Civ-6894 (PGG), 2011 U.S. Dist. LEXIS 26536 (Mar. 15, 2011 S.D.N.Y.) (Gardephe, J.).....	3
<i>Funk v. Belneftekhim</i> , No. 14-CV-0376 (BMC), 2019 WL 3035124 (E.D.N.Y. July 11, 2019)	4, 5

<i>Gallina v. Thatcher</i> , No. 2017-52980, 2018 N.Y. Misc. LEXIS 8435 (Sup. Ct. Dutchess Cnty. Oct. 23, 2018)	2
<i>Gen. Stencils, Inc. v. Chiappa</i> , 219 N.E.2d 169 (N.Y. 1966).....	5
<i>Gotlin v. Lederman</i> , No. 05-CV-1899 (ILG), 2006 WL 1154817 (E.D.N.Y. Apr. 28, 2006).....	5
<i>Gov't of Virgin Islands v. Connor</i> , No. S. CT. CIV. 2013-0095, 2014 WL 702639 (V.I. Feb. 24, 2014).....	10
<i>Guidi v. Inter-Continental Hotels Corp.</i> , No. 95-CV-9006, 2003 U.S. Dist. LEXIS 6390 (S.D.N.Y. Apr. 16, 2003).....	8
<i>Guobadia v. Irowa</i> , 103 F. Supp. 3d 325 (E.D.N.Y. 2015)	5
<i>Hamilton v. Dowson Holding Co.</i> , 51 V.I. 619 (D.V.I. 2009).....	10
<i>Hirsch v. Rehs Galleries, Inc.</i> , No. 18-CV-11864 (VSB), 2020 WL 917213 (S.D.N.Y. Feb. 26, 2020)	5
<i>Hunter v. Palisades Acquisition XVI, LLC</i> , 2017 U.S. Dist. LEXIS 189902 (S.D.N.Y. Nov. 16, 2017)	7
<i>Isaac v. Crichlow</i> , 63 V.I. 38, 2015 V.I. LEXIS 15 (V.I. Super. Ct. 2015).....	10
<i>Kashef v. BNP Paribas S.A.</i> , 925 F.3d 53 (2d Cir. 2019).....	3
<i>Kunica v. St. Jean Fin.</i> , 97 Civ. 3804, 1998 U.S. Dist. LEXIS 11867 (S.D.N.Y. July 29, 1998)	6
<i>In re Merrill Lynch Auction Rate Sec. Litig.</i> , 851 F. Supp. 2d 512 (S.D.N.Y. 2012).....	7
<i>Nash v. Coram Healthcare Corp.</i> , No. 96 Civ. 0298 (LMM), 1996 U.S. Dist. LEXIS 9101 (S.D.N.Y. June 27, 1996)	7
<i>Nat'l Jewish Democratic Council v. Adelson</i> , No. 18 Civ. 8787 (JPO), 2019 U.S. Dist. LEXIS 168675 (S.D.N.Y. Sept. 30, 2019)	8, 9

<i>Okyere v. Palisades Collection, LLC</i> , 961 F. Supp. 2d 522 (S.D.N.Y. 2013).....	7
<i>Ortiz v. Cornetta</i> , 867 F.2d 146 (2d Cir. 1989).....	5
<i>Pappas v. Hotel on the Cay Time-Sharing Ass’n</i> , 69 V.I. 3 (U.S.V.I. Super. Ct. 2015)	10
<i>Powell v. Chi-Co’s Distrib.</i> , No. ST-13-TOR-14, 2014 V.I. LEXIS 21 (U.S.V.I. Super. Ct. Apr. 3, 2014)	10
<i>SJB v. N.Y.C. Dep’t of Educ.</i> , No. 03 Civ. 6653, 2004 U.S. Dist. LEXIS 13227 (S.D.N.Y. July 14, 2004)	6
<i>St. Thomas House, Inc. v. Barrows</i> , 15 V.I. 435 (V.I. Terr. Ct. 1979).....	10
<i>Starr Indem. & Liab. Co. v. Am. Claims Mgmt.</i> , No. 14-cv-0463-JMF, 2015 U.S. Dist. LEXIS 60272 (S.D.N.Y. May 7, 2015).....	8
<i>Stenberg v. Carhart</i> , 530 U.S. 914 (2000).....	10
<i>The Cookware Co. (USA), LLC v. Austin</i> , No. 15 Civ. 5796, 2016 U.S. Dist. LEXIS 177691 (S.D.N.Y. Dec. 8, 2016) (Batts, J.)	6
<i>Thomas v. Rijos</i> , 780 F. Supp. 2d 376 (D.V.I. 2011)	10
<i>Zimmerman v. Poly Prep Country Day Sch.</i> , 888 F. Supp. 2d 317 (E.D.N.Y. 2012)	5
Statutes	
EPTL §11-3.2(a)(1).....	7, 8
Other Authorities	
C. Wright & A. Miller, 5C Fed. Prac. & Proc. Civ. § 1380 (3d ed.)	6
CPLR § 215(8)(a)	1, 2, 3
Fed. R. Civ. P. 12(b)(6).....	3
2 Linda L. Schlueter, <i>Punitive Damages</i> § 20.4 (7th ed. 2015).....	10
Restatement (Second) of Torts § 908(2).....	10

The Co-Executors¹ submit this reply memorandum of law in support of their motion to dismiss Plaintiff's Complaint (ECF No. 1).

PRELIMINARY STATEMENT

In her opposition brief, Plaintiff effectively asks the Court to depart from well-established law to resuscitate her claims that expired fifteen years ago. First, Plaintiff asks the Court to disregard basic principles of statutory interpretation and numerous cases applying CPLR § 215(8)(a) by holding that, unless a criminal indictment expressly rules out that it arises from the same event as a civil action, then a plaintiff in the civil action may invoke that rule to revive a time-barred claim. Second, Plaintiff asks the Court to disregard Second Circuit authority holding that it is Plaintiff's burden to allege "extraordinary circumstances" to toll the statutes of limitations. Third, while conceding that courts generally apply the law of the place of a tort to the issue of punitive damages, Plaintiff nonetheless urges this Court to create a new rule whereby, if an alleged tortfeasor's will is being probated in a jurisdiction that has nothing to do with the tort, the law of the probate jurisdiction should apply. Plaintiff's requests are baseless.

ARGUMENT

A. Plaintiff has the procedural burden backwards: she fails to meet her burden to allege facts sufficient to invoke an extraordinary exception to the statute of limitations.

1. Plaintiff is unable to invoke CPLR § 215(8)(a) because she fails to present a criminal indictment that arises from Decedent's alleged conduct towards her.

Plaintiff's central premise in arguing for application of CPLR § 215(8)(a) to this action, notwithstanding the Indictment charges sex-trafficking of minors while Plaintiff alleges she was abused by Decedent as an adult, is that the "pattern described in the Indictment matches

¹ Capitalized terms not defined herein have the meanings ascribed to them in the Co-Executors' moving brief.

[Plaintiff's] experience.” (Op. Br. p. 5.) Even assuming that is correct, it does not render CPLR § 215(8)(a) applicable. Rather, to invoke CPLR § 215(8)(a), Plaintiff is required to establish the Indictment and this action arise from the same “event or occurrence”—i.e., what Decedent allegedly did to her. Plaintiff fails to do this.

The Indictment has nothing to do with Plaintiff, even if it concerns her alleged abuser and describes a “pattern” similar to what she described. There is no legal authority that permits a civil Plaintiff to interpret CPLR § 215(8)(a) in such an open-ended manner. Plaintiff’s assertion that the Indictment “was not restricted to minors” (Op. Br. p. 8) defies a plain reading of it. Plaintiff’s reliance on an FBI press release (*id.*) is unconvincing in light of the language in the Indictment itself: it alleges that Decedent sexually trafficked “minor girls” (Compl., Ex. A at ¶ 1 (emphasis added)), stating throughout that it concerns sex trafficking of “minors” (*Id.*, Ex. A at ¶¶ 2 - 4, 6, 8, 11- 15, 18 - 20, 22).

The cases cited in the Co-Executors’ moving brief confirm that, even where it is undisputed that the subject criminal indictment concerns the civil plaintiff and the same kind of conduct alleged in the plaintiff’s civil complaint, CPLR § 215(8)(a) still does not apply where the indictment and civil action arise from different events or occurrences—*i.e.*, the express limitation set forth in the text of CPLR § 215(8)(a). (See Op. Br. pp. 5-6 (citing *Christodoulou v. Terdeman*, 262 A.D.2d 595, 596 (2d Dept. 1999); *Gallina v. Thatcher*, No. 2017-52980, 2018 N.Y. Misc. LEXIS 8435 (Sup. Ct. Dutchess Cnty. Oct. 23, 2018).

Plaintiff’s attempt to distinguish these cases on the ground that they “focused on events that occurred on specific dates” (Op. Br. p. 8) is based on Plaintiff’s dubious assertion that, because the Indictment at issue here “was not limited to a specific day or discrete event” (Op. Br. p. 8), anyone alleging she suffered the same type of misconduct described in the Indictment is free to

invoke CPLR § 215(8)(a). Such a reading renders the limitation set forth in CPLR § 215(8)(a) meaningless and does not comport with the rationale set forth in the cited decisions.

Plaintiff once again relies on *Kashef v. BNP Paribas S.A.*, 925 F.3d 53 (2d Cir. 2019), notwithstanding that the Co-Executors already showed that *Kashef*, which concerned a conspiracy between BNP and Sudan to violate U.S. sanctions, is factually distinguishable from this action. (Mov. Br. p. 7.) Plaintiff's decision to cite *Kashef* again shows that she has not located any relevant authority to rebut the cases the Co-Executors cited.

2. Plaintiff bears the burden to *allege* "extraordinary" circumstances; she fails to meet this burden.

Plaintiff misstates the burden on this motion by asserting "Defendants have failed to meet their burden of showing that [she] will be unable to invoke equitable estoppel and ... tolling." (Op. Br. p. 2.) As explained in the Co-Executors' moving brief, the burden is on **Plaintiff** to sufficiently allege "extraordinary circumstances" to invoke these doctrines. (Mov. Br. pp. 9-10.)

In her opposition brief, Plaintiff does not even attempt to address many of the cases that the Co-Executors cite on this point, including *Abercrombie v. College*, 438 F. Supp. 2d 243 (S.D.N.Y. 2006) ("without adequate pleading, the issue is not properly raised and therefore cannot defeat a motion to dismiss based on statute of limitations grounds"), and this Court's decision in *Fairley v. Collins*, 09-Civ-6894 (PGG), 2011 U.S. Dist. LEXIS 26536, at *16 (Mar. 15, 2011 S.D.N.Y.) (Gardephe, J.) (finding equitable tolling did not apply and granting defendants' Fed. R. Civ. P. 12(b)(6) motion to dismiss complaint on statute of limitations grounds).

Plaintiff fails to meet her burden. In her opposition brief, Plaintiff attempts to paint a more detailed picture of why she waited 15 years to bring this action than she did in her Complaint. However, the Complaint is controlling. In her Complaint, Plaintiff: does not allege any particularized acts by Decedent that prevented her from exercising her rights; does not allege that

Decedent made a misrepresentation to her and had reason to believe she would rely on it; and does not allege she reasonably relied on any misrepresentation by Decedent to her detriment.

Rather, excluding vague allegations concerning Decedent's alleged misconduct directed at some unidentified set of alleged victims that does not include Plaintiff (*see, e.g.*, Compl. ¶ 26 (“[Decedent] ... continued to manipulate the victims”), Plaintiff merely asserts the following allegations concerning events allegedly occurring in 2002: (Compl. ¶ 50) Epstein told Plaintiff: “Don’t do anything I wouldn’t do”; (Compl. ¶ 51) Plaintiff was a “scared because she recognized that [Decedent] was a very powerful person”; (Compl. ¶ 52) “[Decedent] made very clear to [Plaintiff] that he was incredibly wealthy, powerful, and regularly in contact with world leaders ... he had photographs displayed of significant political figures to ensure that any young female entering the home would know that he had extensive government connections ... [Decedent] was not to be disobeyed and he made clear by his words and actions that there would be consequences if Teresa did not comply with his demands.”; and (Compl. ¶ 53) when Plaintiff returned to California, “she received an e-mail from one of [Decedent’s] co-conspirators thanking her for visiting New York and letting her know that [he] and his co-conspirators would need to decide whether or not they wanted to hire her. She did not respond to the e-mail.”

None of these allegations fills the holes in the required elements of equitable tolling and estoppel described above. Nor does a belief that someone is “wealthy, powerful and regularly in contact with world leaders” come close to constituting an “exceptional” set of circumstances that justify permitted Plaintiff to pursue this action that expired 15 years ago.

Not a single case Plaintiff cites supports a finding that her allegations are “extraordinary” such that they justify her invocation of these doctrines. To the contrary, *Funk v. Belneftekhim*, No. 14-CV-0376 (BMC), 2019 WL 3035124 (E.D.N.Y. July 11, 2019), which Plaintiff cites, confirms

that her allegations fall short. In that matter, the court found the plaintiffs “alleged extraordinary circumstances that could warrant the application of equitable tolling: they were drugged, kidnapped, flown to Belarus, held captive, and tortured for 383 and 483 days, respectively.” *Id.* at *5. There are no such allegations here.

Other cases Plaintiff cites likewise support the conclusion she has not met her burden. *See Zimmerman v. Poly Prep Country Day Sch.*, 888 F. Supp. 2d 317, 340 (E.D.N.Y. 2012) (plaintiffs alleged school engaged in affirmative course of conduct during period of limitations to deceive plaintiffs into believing they had no claim); *Gotlin v. Lederman*, No. 05-CV-1899 (ILG), 2006 WL 1154817, at *30 (E.D.N.Y. Apr. 28, 2006) (plaintiffs in medical malpractice action alleged defendants failed to provide them with, and intentionally and fraudulently attempted to discourage and prevent them from obtaining, their medical records); *Gen. Stencils, Inc. v. Chiappa*, 219 N.E.2d 169, 171 (N.Y. 1966) (plaintiff was allowed to invoke equitable estoppel against a bookkeeper who had used his position to carefully conceal his theft of the plaintiff's money); *Brown v. Parkchester S. Condos.*, 287 F.3d 58, 59 (2d Cir. 2002) (employee argued his medical condition prevented him from timely filing his complaint); *Guobadia v. Irowa*, 103 F. Supp. 3d 325, 341 (E.D.N.Y. 2015) (plaintiff filed her lawsuit less than a year after leaving a home where was allegedly forced to work without pay as a servant). Other cases Plaintiff cites do not even address the issues on this motion.²

Plaintiff's reliance on *Davis v. Jackson*, No. 15-cv-5359, 2016 WL 5720811, at *11 (S.D.N.Y. Sept. 30, 2016) – to support her assertion that reasonable fear of retaliation “may be

² *See Hirsch v. Rehs Galleries, Inc.*, No. 18-CV-11864 (VSB), 2020 WL 917213 (S.D.N.Y. Feb. 26, 2020) (does not address equitable tolling or estoppel); *Ortiz v. Cornetta*, 867 F.2d 146 (2d Cir. 1989) (fact issue was date on which pro se office received plaintiff's complaint);

sufficient” to warrant equitable tolling (Op. Br. p. 16) – is misleading. In that action, the court granted a *pro se* prisoner leave to allege facts sufficient to show he pursued his claims with reasonable diligence. *Id.* at *39. However, the court was very clear that its findings were based on plaintiff’s incarceration and *pro se* status. *See id.* at *35, 39 (“**in the prison context**, reasonable fear of retaliation may be sufficient”; “given Plaintiff’s *pro se* status ... the Court is hesitant to dismiss [his] claims”). Plaintiff is not a prisoner or *pro se*; so *Davis* is inapplicable.

B. This motion is proper and timely regardless of its title.

Plaintiff’s argument that the Co-Executors may only move to strike her punitive damages claim (Op. Br. pp. 2-3) is both wrong and irrelevant. “[T]he technical name given to a motion challenging a pleading is of little importance ... as prejudice to the nonmoving party hardly can result from treating a motion that has been inaccurately denominated a motion to strike as a motion to dismiss the complaint.” *See* C. Wright & A. Miller, 5C Fed. Prac. & Proc. Civ. § 1380 (3d ed.).

Courts in this District regularly grant motions to dismiss punitive damages. *See, e.g., The Cookware Co. (USA), LLC v. Austin*, No. 15 Civ. 5796, 2016 U.S. Dist. LEXIS 177691, at *17 (S.D.N.Y. Dec. 8, 2016) (Batts, J.) (granting motion to dismiss claim for punitive damages without leave to replead because allegations regarding defendant’s bad-faith conduct were conclusory and did not rise to the required level of malice); *SJB v. N.Y.C. Dep’t of Educ.*, No. 03 Civ. 6653, 2004 U.S. Dist. LEXIS 13227, at *25-26 (S.D.N.Y. July 14, 2004) (Buchwald, J.) (granting motion to dismiss punitive damages claims which were not statutorily available); *Kunica v. St. Jean Fin.*, 97 Civ. 3804, 1998 U.S. Dist. LEXIS 11867, at *26 (S.D.N.Y. July 29, 1998) (Sweet, J.) (granting motion to dismiss claim for punitive damages because, even if conduct alleged in complaint was true, it did not rise to the level necessary to award punitive damages).

Courts in the Second Circuit, including in this District, also routinely grant motions to strike punitive damages including at the pleadings stage. *See, e.g., In re Merrill Lynch Auction*

Rate Sec. Litig., 851 F. Supp. 2d 512, 544 (S.D.N.Y. 2012) (granting defendant’s motion to strike sections of first amended complaint asserting punitive damages); *Nash v. Coram Healthcare Corp.*, No. 96 Civ. 0298 (LMM), 1996 U.S. Dist. LEXIS 9101, at *15 (S.D.N.Y. June 27, 1996) (“The motion to strike the punitive damages prayer from the Complaint is Granted.”); *Cerveceria Modelo, S.A. de C.V. v. USPA Accessories LLC*, No. 07 Civ. 7998 (HB), 2008 U.S. Dist. LEXIS 28999, at *21-22 (S.D.N.Y. Apr. 10, 2008) (“Because Defendant has failed to allege that Plaintiff’s conduct was egregious and directed at the public generally, its claim for punitive damages cannot proceed.”). Therefore, whether the Co-Executors’ motion is deemed one to dismiss or strike, the Court should dispose of Plaintiff’s punitive damages claim.³

C. There is no basis to disregard black-letter New York law applying the law of the place of alleged torts to the issue of punitive damages.

Plaintiff’s argument that “New York choice-of-law-rules” dictate the application of USVI law to the issue of punitive damages (Op. Br. p. 3) is wrong for two independent reasons. First, Plaintiff alleges the acts and omissions giving rise to her causes of action occurred entirely in New York. (Compl. ¶¶ 15, 22.) Therefore, New York law applies to the issue of punitive damages. *See 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

³Plaintiff cites *Amusement Indus. v. Stern*, 693 F. Supp. 2d 301 (S.D.N.Y. 2010). However, that court acknowledged a plaintiff’s demand for punitive damages may be stricken where, as here, it is prohibited by law. *Id.* at 318 n.5 (citing *Burrell v. State Farm & Cas. Co.*, 226 F. Supp. 2d 427, 440 (S.D.N.Y. 2002)). Further, neither that case nor the others Plaintiff cites in support of her argument that striking her punitive damages claim would be premature involve a prohibition on such claims such as EPTL §11-3.2(a)(1). *See Hunter v. Palisades Acquisition XVI, LLC*, 2017 U.S. Dist. LEXIS 189902, at *26 (S.D.N.Y. Nov. 16, 2017) (defendant moved to dismiss plaintiff’s claim for punitive damages under her cause of action for conversion); *Okyere v. Palisades Collection, LLC*, 961 F. Supp. 2d 522, 536 (S.D.N.Y. 2013) (defendants alleged punitive damages were not available in the absence of malice and intent).

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)).

Second, Plaintiff may not avail herself of parts of NY EPTL § 11-3.2(a)(1) while disregarding others. Plaintiff effectively asks the Court to apply the first sentence of § 11-3.2(a)(1), permitting her to bring this case, but to disregard the very next sentence precluding punitive damages. At least one New York federal court expressly rejected such an “anomalous situation.” *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 ... action ... because of [§] 11-3.2(a)(1), while at the same time he was allowed to recover ... punitive damages, which clearly is beyond the scope of relief which that statute authorizes.”).

Plaintiff’s premise used to gin up a purported connection to the USVI in this action -- that Decedent “chose to probate his Estate” there and had abused other victims (but not Plaintiff) there (Op. Br. p. 20)-- is specious. Plaintiff sues for damages based on torts that occurred in New York. Further, she chose to sue in New York. Therefore, the Court should reject Plaintiff’s assertion that “[w]hereas the [USVI] has a strong interest in applying its law on punitive damages, New York has no conceivable interest in denying the [USVI] from advancing that interest” (Op. Br. p. 20). The USVI has no interest in applying its punitive damages laws to alleged torts that took place in New York.

The sole connection to the USVI is that the Decedent’s Estate is being probated there, 18 years after the alleged tortious conduct took place -- a connection much weaker than the one deemed “tenuous” in *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), on which Plaintiff relies. Even under the

framework of *Adelson*, New York, not the USVI, has the greater interest in applying its laws and policies concerning Plaintiff's improper claim for punitive damages.

Plaintiff's reliance on *Adelson* is based on a 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 [was] that the suit was filed here." *Id.* at *15. Here, the situation is effectively the opposite, given the strong New York connection.

D. Even if USVI law applies, which it does not, it follows the majority rule prohibiting recovery of punitive damages against a tortfeasor's estate.

As an initial matter, Plaintiff does not dispute that New York law bars her punitive damages claim. Should the Court find New York law applies, which it does, then Plaintiff's punitive damages claim should be dismissed.

Even if the Court finds USVI law applies to Plaintiff's punitive damages claim, which it does not, the result is the same. USVI courts apply a "*Banks* analysis" to determine U.S.V.I. common law, including consideration of three non-dispositive factors: (1) whether USVI courts have previously adopted a particular rule; (2) the position taken by a majority of courts of other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the USVI. *Gov't of Virgin Islands v. Connor*, No. S. CT. CIV. 2013-0095, 2014 WL 702639, at *1 (V.I. Feb. 24, 2014). The *Banks* factors show that USVI courts would adopt the majority rule that punitive

damages are not available against a deceased tortfeasor's estate: (1) previously, USVI courts favorably cited the Restatement section barring punitive damages against estates. *See, e.g., Hamilton v. Dowson Holding Co.*, 51 V.I. 619, 628 (D.V.I. 2009); *Booth v. Bowen*, No. CIV. 2006-217, 2008 WL 220067, at *5 (D.V.I. Jan. 10, 2008) (considering the inverse issue); (2) a majority of U.S. jurisdictions preclude awards of punitive damages based on wrongful acts of decedents, *see* 2 Linda L. Schlueter, *Punitive Damages* § 20.4 (7th ed. 2015) (“[A] majority of jurisdictions will not award punitive damages against a deceased tortfeasor's estate.” (citation omitted); and (3) *Post-Banks*, USVI have found the Restatement § 908 is “the soundest rule.”^{4,5}

CONCLUSION

For the reasons stated above and in the Co-Executors' moving brief, the Co-Executors respectfully request that the Court dismiss Plaintiff's Complaint in its entirety, together with such other and further relief as the Court deems just and proper.

⁴ *Pappas v. Hotel on the Cay Time-Sharing Ass'n*, 69 V.I. 3, 15 n.8 (U.S.V.I. Super. Ct. 2015) (citing *Davis v. Christian*, 46 V.I. 557 (D.V.I. App. Div. 2005), *Isaac v. Crichlow*, 63 V.I. 38, 2015 V.I. LEXIS 15 (V.I. Super. Ct. 2015), *St. Thomas House, Inc. v. Barrows*, 15 V.I. 435 (V.I. Terr. Ct. 1979), *Brandy v. Flamboyant Inv. Co., Ltd.*, 24 V.I. 249 (V.I. Terr. Ct. 1989), and *Thomas v. Rijos*, 780 F. Supp. 2d 376, 380 (D.V.I. 2011)); *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) (“Applying a *Banks* analysis, the Court finds that Restatement (Second) of Torts § 908(2) reflects the common law of this jurisdiction.”).

⁵ Plaintiff argues that the USVI Attorney General's request for punitive damages in a USVI Criminally Influenced and Corrupt Organizations Act lawsuit against Decedent's Estate shows the third *Banks* factor weighs in Plaintiff's favor. However, that the USVI Attorney General asks for something in a lawsuit is not legal authority. 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 (2000).

Dated: New York, New York
March 20, 2020

Respectfully submitted,

TROUTMAN SANDERS LLP
875 Third Avenue
New York, NY 10022
212.704.6000

By: /s/ Bennet J. Moskowitz
Bennet J. Moskowitz

Attorneys for Defendants