

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

JANE DOE 1000,

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. 1:19-cv-10577-LJL-DCF

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

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Defendants Darren K. Indyke and Richard D. Kahn, as Co-Executors of the Estate of Jeffrey E. Epstein (the “Co-Executors”), submit this memorandum of law in support of their motion pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiff’s Complaint (ECF No. 1) because it is time-barred, and Plaintiff’s claim for punitive damages because it is prohibited by a New York statute and well-established Florida law.

PRELIMINARY STATEMENT

This action is time-barred. Plaintiff alleges that, in or about 1999, when she was an adult, Jefferey E. Epstein (“Decedent”), now deceased, committed sexual offenses against her in New York and Florida. (Compl. ¶¶ 16, 38, 40, 42, 50, 55.) Plaintiff asserts two causes of action—battery and intentional infliction of emotional distress—and demands punitive damages. (*Id.* ¶¶ 49-59, p. 13.) Plaintiff’s causes of action expired many years ago per New York’s one- and three-year statutes of limitations (CPLR §§ 214(5), 215(3)) and Florida’s four-year statute of limitations (Fla. Stat. § 95.11 (3)(O)).

In apparent recognition that her claims are time-barred, Plaintiff erroneously alleges that (i) a New York statute of limitations enacted last year revives her claims, notwithstanding the enacting law expressly and unequivocally provides it does **not** apply retroactively to claims that are already time-barred, (ii) her claims are timely pursuant to CPLR § 215(8)(a),¹ (iii) her claims were equitably tolled, and (iv) the Co-Executors are equitably estopped from asserting a statute of limitations defense. (Compl. ¶¶ 12-14.) Each of these arguments fails as a matter of law.

The 2019 New York law enacting a new, longer statute of limitations is very clear: it does not apply retroactively except “where the applicable statute of limitations in effect on the date of

¹ CPLR § 215(8)(a) provides: “Whenever it is shown that a criminal action against the same defendant has been commenced ***with respect to the event or occurrence from which a claim governed by this section arises***, the plaintiff shall have at least one year from the termination of the criminal action ... to commence the civil action.” (Emphasis added.)

such act or omission has not yet expired.” 2019 N.Y. Ch. 315, 2019 N.Y. SB 6574, §4. Plaintiff’s causes of action expired many years before the new law went into effect.

Moreover, CPLR § 215(8)(a) does not apply here because Decedent’s criminal indictment (the “Indictment”), which concerns alleged *sexual trafficking of minors*, has nothing to do with Plaintiff, who alleges sexual assault when she was an adult. Plaintiff also fails to meet her burden to allege extraordinary circumstances sufficient to justify tolling or equitable estoppel.

Plaintiff’s demands for punitive damages must also be dismissed as a matter of law. Both New York and Florida law bar recovery of punitive damages from a decedent tortfeasor’s estate—*i.e.*, exactly what Plaintiff is seeking here.

STATEMENT OF ALLEGED FACTS

A. Plaintiff Alleges Decedent Sexually Assaulted Her In And Around 1999, When She Was An Adult

Plaintiff alleges she met Decedent in “late 1999” at his New York residence. (Compl. ¶ 38.) Plaintiff does not allege that she was a minor at this time. According to Plaintiff, she went to Decedent’s residence to discuss modeling opportunities. (*Id.* ¶¶ 38-39.) Plaintiff alleges that, at some point thereafter, she moved into an apartment owned by Decedent on 66th Street in Manhattan. (*Id.* 40.)

Plaintiff further alleges that Decedent had “recruiters” who would call her to visit Decedent at his residence to give him a massage. (*Id.*) Decedent allegedly sexually assaulted Plaintiff during these massages. (*Id.*) Plaintiff also alleges, with no further details, that Decedent flew her to Florida, where he sexually assaulted her again. (*Id.* ¶ 42.) Plaintiff also claims Decedent promised her modeling opportunities “for years, up until the last time [she] saw Epstein,” but does not provide even an approximate date identifying when that was or when the alleged abuse ended. (*Id.* ¶ 45.)

Apparently recognizing that her claims are time-barred under applicable statutes of limitations, Plaintiff alleges a few generic legal conclusions that also appear in other time-barred complaints against the Co-Executors that Plaintiff's counsel filed in this District on behalf of other individuals. Thus, Plaintiff alleges in conclusory fashion:

- This action has been timely filed pursuant to N.Y. C.P.L.R. § 215(8)(a), which provides that a plaintiff shall have at least one year from the termination of a criminal action against the same defendant to commence an action with respect to the event or occurrence from which the criminal action arose. A criminal action against [Decedent] with respect to the same sex trafficking enterprise from which Plaintiff's claims arise was terminated on August 29, 2019. (*Id.* ¶ 12.)
- This action has also been timely filed pursuant to N.Y. C.P.L.R. § 213-c, which provides that a plaintiff shall have 20 years to file civil claims “for physical, psychological or other injury or condition suffered by such person as a result of conduct which would constitute” certain sex crimes under New York Penal Law Article 130. [Decedent] and Ghislaine Maxwell sexually assaulted Plaintiff by forcible compulsion within 20 years of filing this Complaint, and that sexual assault constitutes one or more sex crimes described in N.Y. C.P.L.R. § 213-C. (*Id.* ¶ 13.)
- Any statute of limitations applicable to Plaintiff's claims is tolled due to the continuous and active deception, duress, threats of retaliation, and other forms of misconduct that [Decedent] and his co-conspirators used to silence his many victims, including Plaintiff. [Decedent]'s actions deprived Plaintiff of the opportunity to commence this lawsuit before his death. Until his death, Plaintiff feared that [Decedent] and his co-conspirators would harm her or her family, or ruin her life, if she came forward. (*Id.* ¶ 14.)
- Defendants are equitably estopped from asserting a statute of limitations defense. Allowing Defendants to do so would be unjust. [Decedent] and his co-conspirators intimidated each of his victims into silence by threatening their lives and their livelihoods. They therefore prevented Plaintiff from commencing this lawsuit before his death. By using threats, along with his wealth and power, Epstein was able to escape punishment for his crimes against countless young women and underage girls for the duration of his life. (*Id.* ¶15.)

These rote, non-specific allegations cannot rescue Plaintiff's time-barred claims.

ARGUMENT

A. Legal Standard: Plaintiff's Legal Conclusions, Labels, And Formulaic Recitations Of The Elements Of Her Causes Of Action Are Insufficient To Revive Her Time-Deserved Claims

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While a Court must normally accept as true all well-pleaded factual allegations in a complaint and draw all inferences in a plaintiff's favor, those principles are “inapplicable to legal conclusions.” *Id.* at 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 556 (2007)). Thus, a pleading that offers only “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (2007).

B. Plaintiff's Claims Expired Many Years Ago And Must Be Dismissed

Plaintiff asserts causes of action for battery and intentional infliction of emotional distress arising out of events starting in late 1999 and occurring in New York and Florida, all when Plaintiff was an adult. Each cause of action is time-barred and must be dismissed.

Under New York law, causes of action sounding in battery must be commenced within one year of accrual (CPLR § 215(3)); and claims sounding in personal injury, within three years (CPLR § 214(5)). Under Florida law, the statute of limitations for Plaintiff's claims is four years. *See Fla. Stat. § 95.11(3)(O)*.

Plaintiff does not allege that she endured the alleged sexual assaults for a period of time that would permit her to avoid these statutes of limitations. (*See* Compl. ¶¶ 2, 45.) Plaintiff's failure to allege when Decedent's alleged sexual assaults ended is either a tacit admission that this action is time-barred or a fatal pleading failure. In either event, this action must be dismissed.

In Plaintiff's response to the Co-Executors' pre-motion letter (ECF Doc. 25, § I), Plaintiff erroneously claims the current 20-year statute of limitations in CPLR § 213-c applies to her claims.

However, CPLR § 213-c is not a revival statute. CPLR § 213-c, which became effective as of September 18, 2019, does not apply retroactively except “where the applicable statute of limitations in effect on the date of such act or omission has not yet expired.” 2019 N.Y. Laws 315, 2019 N.Y. SB 6574, § 4.

Plaintiff does not allege—and did not argue in her pre-motion letter—that any of her claims were timely as of September 18, 2019. Therefore, CPLR § 213-c does not apply.

Instead, Plaintiff argued in her pre-motion letter that, because the 2019 law rewriting CPLR § 213-c did not set forth the prohibition on retroactive application in the text of CPLR § 213-c itself, Plaintiff should be able to invoke it. (ECF Doc. 25, § I.) That is wrong.

C. Plaintiff’s Attempts To Invoke Extraordinary Statute Of Limitations Exceptions Fail

- i. CPLR § 215(8)(a) is inapplicable because the Indictment concerned sex trafficking of minors, not adults such as Plaintiff

Nor does CPLR § 215(8)(a) apply here. CPLR § 215(8)(a) provides: “Whenever it is shown that a criminal action against the same defendant has been commenced *with respect to the event or occurrence from which a claim governed by this section arises*, the plaintiff shall have at least one year from the termination of the criminal action ... to commence the civil action.” (emphasis added.)

Decedent’s Indictment, which Plaintiff attaches to her Complaint, was not commenced with respect to Plaintiff. Rather, the Indictment charges Decedent sexually abused “minor girls” from 2002 to 2005 (Compl., Ex. A at ¶¶ 1, 20), stating throughout that it concerns sex trafficking of minors. (*Id.* ¶¶ 2-4, 6, 8, 11-15, 18-20, 22.) Plaintiff does not allege she was a minor when Decedent sexually assaulted her in or around 1999. Therefore, this action and the Indictment arise from different occurrences.

New York courts apply CPLR § 215(8)(a) narrowly. *See Christodoulou v. Terdeman*, 262 A.D.2d 595, 596 (2d Dept. 1999) (CPLR § 215(8)(a) applied only to claims based on events of February 26, 1993 and December 28, 1993, because it was only in connection with events of those two days that a criminal prosecution was commenced against defendant); *Gallina v. Thatcher*, No. 2017-52980, 2018 N.Y. Misc. LEXIS 8435 (Sup. Ct. Dutchess Cnty. Oct. 23, 2018) (CPLR § 215(8)(a) inapplicable where incidents charged in criminal action and those alleged in civil action occurred on different dates); *McElligott v. City of N.Y.*, No. 15-cv-7107 (LGS), 2017 U.S. Dist. LEXIS 201829, at *13 (S.D.N.Y. Dec. 7, 2017) (CPLR § 215(8)(a) inapplicable to claims against civil defendants not charged as co-defendants in criminal action, notwithstanding same events gave rise to both actions).

Gallina is especially instructive. In that case, an individual sued an attorney for battery and other claims based on the core allegation that, over the course of two years, the attorney committed various sexual misconduct against the plaintiff, including sexual assault. 2018 N.Y. Misc. LEXIS 8435, at *1. Defendant had also been criminally charged with forceable touching for incidents that occurred with the plaintiff in 2017. *Id.* at *3. The court dismissed as time-barred plaintiff's battery counts based on incidents alleged to have occurred in 2016. *Id.* at *2-3.

In doing so, the court rejected plaintiff's argument that CPLR § 215(8)(a) applied to the 2016 incidents, finding:

Plaintiff argues that the July and October 2016 incidents are part of the same ongoing course of events as the February, March and May 2017 incidents and should therefore be deemed timely commenced ... the case law does not support Plaintiff's interpretation of ... CPLR §215(8)(a). The criminal instruments ... demonstrate that Defendant was charged for incidents occurring on three (3) specific dates ... Pursuant to CPLR §215(8)(a), tolling would apply only to claims based on these dates, "because it was only in connection with the events of these [three] days that a criminal prosecution was commenced against the defendant." *Christodoulou v. Terdeman*, 262 AD2d 595, 596 [2d Dept. 1999]. As criminal charges were

not commenced with respect to the July 2016 and October 2016 events, the tolling provisions of CPLR §215(8) do not apply.

Id. at *3-4.

Here, Plaintiff asserts a more tenuous connection between this action and the Indictment than the one unsuccessfully asserted by the plaintiff in *Gallina* (and the other cited cases). The Court should therefore reject Plaintiff's argument for the application of CPLR § 215(8)(a).

In Plaintiff's response to the Co-Executors' pre-motion letter (ECF No. 25, § I), Plaintiff asserts two erroneous arguments for application of CPLR § 215(8)(a). First, Plaintiff argues that CPLR § 215(8)(a) does not require the Indictment to expressly identify Plaintiff as one of Decedent's victims. This is a strawman argument: no one argues otherwise.

However, Plaintiff is required to show—but cannot show under the circumstances here—that this action and the Indictment arise from the same event. They do not. Not only does the Indictment not refer to Plaintiff, it also does not refer to misconduct of the type that Plaintiff alleges here. The Indictment could not be clearer: it concerns *sex trafficking of minors*. Plaintiff does not allege she was a minor when Decedent sexually assaulted her. Nor does she allege anything establishing she was a sex trafficking victim.

Second, Plaintiff urges a broad construction of CPLR § 215(8)(a) that effectively rewrites it by rendering the limitation therein—“*with respect to the event or occurrence from which a claim governed by this section arises*”—meaningless. Plaintiff effectively argues that, unless the Indictment expressly rules out that it arises from the same event as this action, then Plaintiff is entitled to invoke CPLR § 215(8)(a). That argument is contrary to basic principles of statutory interpretation prohibiting a reading of a statute that would render its words meaningless (*see* 97 NY Jur Statutes § 185), the case law cited above, a plain reading of the Indictment and common sense.

Plaintiff cites a single case in support of this erroneous argument, *Kashef v. BNP Paribas S.A.*, 925 F.3d 53 (2d Cir. 2019). However, *Kashef* is distinguishable on its face, since the civil and criminal actions in that case both arose out of the same conspiracy between BNP and Sudan to violate U.S. sanctions. *Kashef*, 925 F.3d at 63.

Here, by contrast, Plaintiff's allegations—that she was an adult whom Decedent sexually assaulted—do not comport with the alleged scheme to *traffic minors* set forth repeatedly in the Indictment. Nor does Plaintiff sufficiently set forth allegations establishing she was a trafficking victim in any respect. Therefore, while Plaintiff may claim she, too, is a victim of Decedent, she is *not* a victim by reason of the events giving rise to the Indictment.

Plaintiff also cites a Third Department case, *Crucible Materials Corp. v. N.Y. Power Auth.*, 50 A.D.3d 1353 (Third Dept. 2008), to support her separate assertion that the Court must permit her to invoke CPLR § 215(8)(a) based on statutory interpretation principles. Yet *Crucible* does not concern CPLR § 215(8)(a). Further, in that case, the Third Department reaffirmed the principle that, when interpreting a statute, courts “giv[e] clear effect to the plain meaning of the words employed.” *Crucible Materials Corp.*, 50 A.D.3d at 1355-56. This is exactly what the Co-Executors urge here and what Plaintiff argues against—namely, a proper interpretation of CPLR § 215(8)(a) that gives meaning to the words “with respect to the event or occurrence from which a claim governed by this section arises.” The Court should reject Plaintiff's attempt to rewrite the statute.

ii. Plaintiff fails to meet her burden to allege “extraordinary” circumstances sufficient to justify tolling or equitable estoppel

Plaintiff fails to meet her burden to allege extraordinary circumstances sufficient to justify tolling or equitable estoppel. “Second Circuit cases discussing equitable tolling set a stringent standard for its application.” *Fairley v. Collins*, No. 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). Equitable tolling only applies where a plaintiff is “prevented in some *extraordinary way* from exercising h[er] rights.” *Viti v. Guardian Life Ins. Co. of Am.*, No. 10-cv-2908 (ALC) (MHD), 2012 U.S. Dist. LEXIS 189633, at *30 (S.D.N.Y. Oct. 5, 2012), *adopted by*, 2013 U.S. Dist. LEXIS 174145 (S.D.N.Y. Dec. 11, 2013) (emphasis added) (citing *Smith v. N.Y.C. Dep’t of Corr.*, No. 09-civ-7639, 2010 U.S. Dist. LEXIS 137152, at *2 (S.D.N.Y. 2010); *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996)).

Under this doctrine, a court may, “under *compelling circumstances*, make *narrow exceptions* to the statute of limitations ... ‘to prevent inequity.’” *Id.* (emphasis added) (citing *Yesh Diamonds, Inc. v. Yashaya*, No. 09-CV-2016 (DLI) (RER), 2010 U.S. Dist. LEXIS 101744, at *2 (E.D.N.Y. 2010); *In re U.S. Lines, Inc.*, 318 F.3d 432, 436 (2d Cir. 2003)). “That the doctrine is to be employed only sparingly—in ‘*extraordinary*’ and ‘*compelling*’ circumstances—is reflected in the fact that the *plaintiff bears the burden of persuasion to show that tolling is justified.*” *Id.* (emphasis added) (citing *Boos v. Runyon*, 201 F.3d 178, 185 (2d Cir. 2000)). A late-filing party seeking equitable tolling must also demonstrate she acted with “reasonable diligence” in pursuing her claims during the period she seeks to toll. *Id.* at *32 (citation omitted).

Equitable estoppel only applies where a plaintiff knows her cause of action exists, but the defendant’s conduct causes her to delay bringing suit. *See Yesh*, 2010 U.S. Dist. LEXIS 101744, at *5 (citing *Cerbone v. Int’l Ladies’ Garment Workers’ Union*, 768 F.2d 45, 50 (2d Cir. 1985)). “The rationale behind this equitable doctrine is to protect the person who brings their action after it would normally be barred because she was ‘lulled’ into believing that she should delay pursuing her cause of action.” *Id.* (quoting *In re Higgins*, 270 B.R. 147, 158 (Bankr. S.D.N.Y. 2001)).

Equitable estoppel requires a plaintiff to show: “(i) the defendant made a definite misrepresentation of fact, and had reason to believe that the plaintiff would rely on it; and (ii) the plaintiff reasonably relied on that misrepresentation to h[er] detriment.” *Id.* (citation omitted). Tolling is inappropriate where, as here, a plaintiff fails to articulate any acts by a defendant that prevented the plaintiff from timely commencing suit. *See id.* at *6.

Plaintiff does not allege **any** particularized acts by Decedent that prevented her from exercising her rights. Nor has Plaintiff alleged that (i) Decedent made a misrepresentation to her and had reason to believe she would rely on it, or (ii) Plaintiff reasonably relied on it to her detriment. Nor does Plaintiff allege any facts showing she acted with “reasonable diligence” in pursuing her claims during the period she seeks to toll. Therefore, there is no “extraordinary” basis alleged sufficient to toll the statute of limitations or estop the Co-Executors from asserting a statute of limitations defense.

Plaintiff erroneously asserts in her pre-motion letter that her allegations in paragraphs 27, 40 and 43 of her Complaint constitute “extraordinary circumstances” sufficient to invoke these doctrines. (ECF No. 13, § II.) However, Paragraph 27 does not even relate to Plaintiff. Rather, it concerns general allegations of misconduct by Decedent related to other, unidentified alleged victims. There is nothing alleged about why such misconduct prevented **Plaintiff** from filing this action a long time ago.

Plaintiff’s reliance on paragraphs 40 and 43 is also misplaced. The allegations in those paragraphs are that, **during** the period of the alleged assaults of Plaintiff, Decedent threatened her and on a single occasion forced her to meet with an attorney who asked her “personal questions.” However, Plaintiff does not allege that Decedent did anything **after** the alleged assaults ended to prevent her from commencing this lawsuit.

There are numerous court decisions in which stronger, clearer allegations are deemed insufficient to justify equitable estoppel or tolling. *See, e.g., Conklin v. Maidenbaum*, No. 12-cv-3606, 2013 U.S. Dist. LEXIS 113975, at *27 (S.D.N.Y. Aug. 13, 2013) (Ramos, J.) (finding equitable tolling inapplicable and dismissing complaint notwithstanding that plaintiffs alleged they reasonably relied on defendants' representations over a period spanning more than ten months and dozens of telephone calls).

Plaintiff alternatively argues in her pre-motion letter that her entitlement to equitable estoppel and tolling are fact issues not subject to rulings by the Court on a motion to dismiss. (ECF No. 25, § II.) Plaintiff misses the point. Where, as here, a plaintiff fails to ***allege facts*** that support invocation of an exception to the statute of limitations, there is no issue of fact sufficient to defeat a motion to dismiss on statute of limitations grounds:

If properly pled, allegations of equitable estoppel normally create questions of fact which cannot be determined at a motion to dismiss.... However, without adequate pleading, the issue is not properly raised and therefore cannot defeat a motion to dismiss based on statute of limitations grounds. See Dep't of Econ. Dev. v. Arthur Andersen & Co., 747 F. Supp. 922, 943 (S.D.N.Y. 1990) (dismissing cause of action because plaintiff made no allegation in complaint that "its failure to timely institute its third-party action was due to its justified reliance upon a misrepresentation" by opposing party); Moll v. U.S. Life Title Ins. Co. of N.Y., 700 F. Supp. 1284, 1293 (S.D.N.Y. 1988) ("Plaintiffs have not alleged that defendant caused them to delay in bringing suit on a known cause of action. On the contrary, plaintiffs repeatedly emphasize that they did not discover the alleged ... violations until long after the limitations period had expired. Equitable estoppel is therefore not appropriate in this case.").

Abercrombie v. College, 438 F. Supp. 2d 243 (S.D.N.Y. 2006) (emphasis added).

Here, as in *Abercrombie*, "Plaintiff has failed to allege any facts that would support invocation of the equitable estoppel doctrine. First, Plaintiff does not identify the misrepresentations or other facts demonstrating fraudulent concealment that could serve as the basis for the claimed equitable estoppel. More particularly, Plaintiff has utterly failed to identify

in the Complaint which statements led her to believe that she could delay bringing her lawsuit.” *Id.* at 266. Nor does Plaintiff *allege facts* that would support invocation of equitable tolling.

D. Plaintiff’s Claim For Punitive Damages Must Be Dismissed Because They Are Precluded By New York Law

Plaintiff’s claim for punitive damages fails as a matter of law because it is barred by statute and well-established law. Courts in this District regularly grant motions to dismiss legally deficient claims for 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 because punitive damages were not statutorily available); *Kunica v. St. Jean Fin.*, No. 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); *Purdy v. Consumers Distrib. Co.*, 648 F. Supp. 980, 981, 984 (S.D.N.Y. 1986) (Cedarbaum, J.) (granting motion to dismiss claim for punitive damages).

When determining what law applies, the court looks to the choice of law rules of the forum state. *Simons v. Marriott Corp.*, No. 92 Civ. 3762 (SWK), 1993 U.S. Dist. LEXIS 14365, at *15 (S.D.N.Y. Oct. 12, 1993). Under New York law, the law of the state where a tort occurs generally applies to 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 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 (LAP), 2003 U.S. Dist. LEXIS 6390, at *1 (S.D.N.Y. Apr. 16, 2003)).

Here, Plaintiff has alleged tortious conduct occurring in New York and Florida. (Compl. ¶¶ 40, 42.) New York Estates, Powers and Trusts Law provides: “No cause of action for injury to person or property is lost because of the death of the person liable for the injury. For any injury, an action may be brought or continued against the personal representative of the decedent, **but punitive damages shall not be awarded nor penalties adjudged in any such action brought to recover damages for personal injury.**” NY EPTL § 11-3.2 (a)(1) (emphasis added). “Also, ‘there is a strong policy against the assessment of punitive damages against an estate on account of wrongful conduct of the decedent.’” *Graham v. Henderson*, 224 F.R.D. 59, 63 (N.D.N.Y. 2004) (quoting *Blissett v. Eisensmidt*, 940 F. Supp. 449, 457 (N.D.N.Y. 1996)).

New York General Construction Law § 37-a defines “personal injury” as including “an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff, or of another.” Here, Plaintiff seeks to recover damages for personal injuries, *i.e.*, “battery” and “intentional infliction of emotional distress,” which are actionable injuries to Plaintiff’s person. Accordingly, Plaintiff may not recover against the Co-Executors for punitive damages based on alleged torts that occurred in New York.

Nor are punitive damages available to Plaintiff under Florida law. *Poindexter v. Zacharzewski*, No. 18-14155, 2018 U.S. Dist. LEXIS 189861, at *6 (Nov. 5, 2018 S.D. Fla.) (citing *Lohr v. Byrd*, 522 So. 2d 845 (Fla. 1988)). “Florida law prohibits recovery of punitive damages from the estate of a wrongdoer who is deceased.” *Id.* That is the law in most jurisdictions, as reflected in the Restatement. *See* Restat. (Second) Of Torts § 908 cmt. a (punitive damages not

available against representatives of deceased tortfeasor). Even if Plaintiff's claims somehow survive, her claims for punitive damages must therefore be dismissed.

In her pre-motion letter, Plaintiff does not dispute that this prohibition on punitive damages in personal injury actions against a decedent tortfeasor's estate is black-letter New York and Florida law. Rather, Plaintiff asks the Court to simply delay ruling on the issue of punitive damages until after discovery. (ECF No. 25, § II.) However, as there are no facts alleged that would render Plaintiff's punitive damages claim proper, there is no reason to allow it to stand.

Plaintiff seeks to delay the inevitable so she may use the prospect of punitive damages—expressly prohibited as they may be—as (misplaced) leverage over the Co-Executors. This would serve no legitimate purpose. It would also impede productive settlement discussions. Plaintiff's punitive damages claim, like the punitive damages claims in the cases cited above, should be dismissed.

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court dismiss Plaintiff's Complaint, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
February 28, 2020

By: /s/ Bennet J. Moskowitz
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