

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

[REDACTED]

Plaintiff,

v.

Case No. 1:19-cv-10788 (GHW) (DCF)

DARREN K. INDYKE and RICHARD D. KAHN, as
executors of the ESTATE OF JEFFREY E. EPSTEIN,

Defendants.

**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) to the extent it is time-barred and Plaintiff’s claim for punitive damages because it is prohibited as a matter of law.

PRELIMINARY STATEMENT

This action is largely time-barred. Plaintiff alleges that Jeffrey E. Epstein (“Decedent”), now deceased, sexually assaulted her from 2002, when she was 17, to 2004, in Florida, New Mexico, New York, the U.S. Virgin Islands (“USVI”), and France. (Compl. ¶¶ 4, 12, 17, 29, 34, 59-61.) Plaintiff alleges causes of action for battery, assault, and intentional infliction of emotional distress. (*Id.* ¶¶ 71–82.) Plaintiff seeks, among other things, “punitive damages in an amount to be determined.” (*Id.* p. 12.)

Excluding Plaintiff’s alleged torts occurring in New York when she was 17 and thus subject to New York’s Child Victims Act (“CVA”),¹ Plaintiff’s claims expired many years ago. Under New York law, for example, Plaintiff’s claims arising from her alleged sexual abuse as an adult expired in 2007 at the latest. Therefore, all of the Plaintiff’s non-CVA claims must be dismissed.

Plaintiff’s demand for punitive damages must also be dismissed as a matter of law. Each jurisdiction where the alleged torts occurred bars recovery of punitive damages from a decedent tortfeasor’s estate—*i.e.*, exactly what Plaintiff seeks here.

¹The CVA created a one-year window period, commencing in August 2019, in which civil claims alleging damages “suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law *committed against a child less than eighteen years of age*” may be filed, despite the statute of limitations having already run. CPLR § 214-g (emphasis added).

STATEMENT OF ALLEGED FACTS

A. Plaintiff Alleges Torts Occurring Over 15 Years Ago In New York And Other Jurisdictions, Starting When She Was Age Seventeen

Plaintiff, who claims Arizona residency, alleges that in 2002, when she was 17, her sister, who is five years older, introduced Plaintiff to Decedent, describing him as generous and desiring to help Plaintiff attend college. (Compl. ¶¶ 32, 34.) Plaintiff further alleges that, starting in 2002 and ending in 2004, Decedent sexually assaulted her in Florida, New Mexico, New York, the USVI, and France. (*Id.* ¶¶ 4, 12, 17, 29, 34, 59-61.) Although Plaintiff suggests she is only suing on claims based on torts that occurred while she was still a minor (*id.* ¶ 69), she also alleges Decedent abused her “for years” (*id.* ¶ 29). Plaintiff largely fails to articulate which alleged torts happened when and in which jurisdictions.

Plaintiff asserts three causes of action: battery (First Cause of Action); assault (Second Cause of Action); and intentional infliction of emotional distress (Third Cause of Action). (*Id.* ¶¶ 71–82.) As noted above, Plaintiff seeks punitive damages in an unspecified amount. (*Id.* p. 12.)

ARGUMENT

A. Legal Standard: Plaintiff’s Legal Conclusions, Labels And Formulaic Recitations Of The Elements Of Her Causes Of Action Are Insufficient To State A Claim

“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). Nor is the Court

required to reconcile Plaintiff's contradictory allegations concerning whether she is suing only for alleged torts that occurred when she was 17, or for sexual abuse allegedly committed when she was an adult. *See Whitley v. Bowden*, No. 17-CV-3564 (KMK), 2018 WL 2170313, at *11 (S.D.N.Y. May 9, 2018) (“a court is neither obligated to reconcile nor accept the contradictory allegations in the pleadings as true in deciding a motion to dismiss.” (citation omitted)).

B. Most Of Plaintiff's Claims Expired Many Years Ago

CPLR § 202 provides that, when a non-New York resident such as Plaintiff sues on a cause of action accruing outside New York, the complaint must be timely filed under the applicable statutes of limitations of both New York and the jurisdiction where the cause of action accrued. A claim that is untimely under one or both of the two jurisdictions must be dismissed.

Plaintiff turned 18 at some point in 2003. (Compl. ¶ 34.) Plaintiff alleges she was sexually assaulted by Decedent until 2004, *i.e.*, when Plaintiff was an adult. (*Id.* ¶¶ 34, 59-61.) Excluding Plaintiff's alleged torts subject to the CVA (*i.e.*, torts occurring in New York when she was under 18), Plaintiff's causes of action sounding in battery must be commenced within one year of accrual (CPLR § 215(3)); or, if Plaintiff's claims sound in personal injury, within three years (CPLR § 214(5)). Therefore, under New York law, Plaintiff's non-CVA claims arising from her alleged sexual abuse expired in 2007 at the latest.

Plaintiff's claims based on alleged torts occurring outside New York also expired long ago under the laws of those jurisdictions, including non-New York torts that occurred while she was a minor (if any), as follows: (Florida) for torts occurring while she was a minor, the later of within 7 years after she reached the age of majority (*i.e.*, by 2010), within 4 years after she left Decedent's dependency (2008 at the latest),² or within 4 years from the time she discovered both the injury

² Plaintiff alleges Decedent “cast her out” in 2004. (Compl. ¶¶ 59-61.) Therefore, Plaintiff could not have depended on him after that time.

and the causal relationship between that injury and the alleged abuse (Fla. Stat. § 95.11(7));³ and, after Plaintiff reached age of majority, within 4 years (*i.e.*, sometime in 2007) (Fla. Stat. § 95.11 (3)(O)); (New Mexico) for torts occurring while she was a minor, the later of the “first instant” of Plaintiff’s 24th birthday (*i.e.*, sometime in 2009) or 3 years from the date that Plaintiff first disclosed her childhood sexual abuse to a licensed medical or mental health care provider in the context of receiving health care (N.M. Stat. § 37-1-30) (Plaintiff alleges she never made such a disclosure (Compl. ¶ 67)); and, after Plaintiff reached age of majority, 3 years (*i.e.*, in 2006) (N.M. Stat. § 37-1-8); (USVI) when Plaintiff turned 23 (*i.e.*, sometime in 2008) (5 V.I.C. §§ 31(5)(A), 36(a)(1)).

C. Plaintiff’s Claim For Punitive Damages Fails As A Matter Of Law

Plaintiff’s claim for punitive damages fails as a matter of law because it is barred by the law of each potentially applicable jurisdiction. 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); [REDACTED] v.

³ Plaintiff’s allegation that she is only now beginning to “process” her injuries (Compl. ¶¶ 65, 68) is not equivalent to alleging her belated discovery of such injuries. She makes no such allegation.

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 alleges tortious conduct occurring in New York, Florida, New Mexico, the USVI, and France. (Compl. ¶¶ 40, 42.) None of these jurisdictions permits recovery of punitive damages against a deceased tortfeasor’s estate. That is unsurprising given 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). Each of these jurisdictions is addressed below in turn.

New York: 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. [REDACTED]*, 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. Accordingly, Plaintiff may not recover punitive damages against the Co-Executors based on alleged torts that occurred in New York.

Florida: “Florida law prohibits recovery of punitive damages from the estate of a wrongdoer who is deceased.” *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)).

New Mexico: The Supreme Court of New Mexico has unequivocally held that “punishment and deterrence are not accomplished by enabling recovery of punitive damages from the estate of deceased tortfeasors.” *Jaramillo v. Providence Wash. Ins. Co.*, 117 N.M. 337, 346 (N.M. 1994).

France: [REDACTED] law does not recognize punitive damages. See 2 Linda L. Schlueter, *Punitive Damages* § 22.4 (7th ed. 2015) (citing Rouhette, *The Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept*, 74 Def. Coun. J. 320 (2007)).

USVI: In 2011, the Supreme Court of the USVI effectively instructed USVI courts to apply what is now known as a “*Banks* analysis” to determine U.S.V.I. common law. *Banks v. Int’l Rental & Leasing Corp.*, 55 V.I. 967, 979 (V.I. 2011). The *Banks* analysis includes consideration of three non-dispositive factors: (1) whether any 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. [REDACTED]*, No. S. CT. CIV. 2013-0095, 2014 WL 702639, at *1 (V.I. Feb. 24, 2014).

Applying the *Banks* factors here demonstrates that USVI courts would adopt the rule in the Restatement (Second) of Torts—which is also followed in the majority of United States jurisdictions, including New York, Florida and New Mexico—and hold that punitive damages are not available against a deceased tortfeasor’s estate.

1. ***Banks* factor one: previously, USVI courts favorably cited the Restatement section that precludes punitive damages against estates.**

USVI courts have favorably recited the Restatement’s rule precluding punitive damages against a decedent tortfeasor’s estate. *See, e.g.,* [REDACTED] 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). In these cases, the U.S. District Court of the Virgin Islands considered the inverse of the issue here, *i.e.*, whether the personal representatives of an estate may obtain punitive damages in an action arising from the decedent’s wrongful death. In determining that punitive damages were not available under such circumstances, the courts cited the Restatement, which provides that “[p]unitive damages are not awarded against the representatives of a deceased tortfeasor nor, ordinarily, in an action under a death statute.” *Restat. (Second) of Torts* § 908 cmt. a (emphasis added). Accordingly, this *Banks* factor favors the Co-Executors.

2. ***Banks* factor two: a majority of U.S. jurisdictions do not permit an award of punitive damages based on the wrongful acts of a decedent.**

This *Banks* factor overwhelmingly supports the Co-Executors’ position. The majority of U.S. jurisdictions do not permit an award of punitive damages against the personal representatives of an estate based on the actions of the deceased tortfeasor. *See Crabtree v. Estate of Crabtree*, 837 N.E.2d 135, 138 (Ind. 2005) (“The majority view denies punitive damages.”); 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.” (citing Alec A. Beech, *Adding Insult to Death: Why Punitive Damages Should Not Be Imposed Against a Deceased Tortfeasor’s Estate in*

Ohio, 49 Akron L. Rev. 553 (2016)); Timothy R. Robicheaux and Brian H. Bornstein, *Punished, Dead Or Alive: Empirical Perspectives on Awarding Punitive Damages Against Deceased Defendants*, 16 Psych. Pub. Pol. and L. 393, 398 (2010) (“The Restatement (Second) of Torts (1965) is one authority stating that punitive damages should not follow the death of a wrongdoer, and the majority of courts considering the issue have provided rulings consistent with this position.”).

3. ***Banks* factor three: Post-Banks, USVI courts have favorably applied Restatement Section 908 to questions regarding punitive damages.**

The third *Banks* factor weighs strongly in favor of the Co-Executors as well. Post-*Banks*, USVI Courts have already found that Section 908 of the Restatement is “the soundest rule for the Virgin Islands with respect to the imposition of an award of punitive damages.” *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 [REDACTED] 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. [REDACTED] 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 [REDACTED] 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.”).

Therefore, every *Banks* factor favors the Co-Executors: (1) pre-*Banks*, USVI courts expressed approval for the general rule that punitive damages cannot be recovered against a wrongdoer’s estate; (2) the majority of courts from other jurisdictions preclude punitive damages against a wrongdoer’s estate; and (3) post-*Banks*, USVI courts have held that Section 908 of the Restatement of Torts (Second) represents the soundest rule for the USVI with respect to the availability of punitive damages.

In conclusion, even if any of Plaintiff's claims survive, her claim for punitive damages must be dismissed in its entirety.

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court dismiss Plaintiff's Complaint to the extent it is time-barred and Plaintiff's claim for punitive damages, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
February 28, 2020

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