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April 29, 2020

VIA ECF

The Honorable Katherine Polk Failla
United States District Court
Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: Doe v. Indyke et al., No. 19-cv-8673-KPF (S.D.N.Y.)

Dear Judge Failla:

We represent Plaintiff Jane Doe in the above-captioned action. Pursuant to Rule 2(B) of Your Honor's Individual Rules of Practice in Civil Cases, we write in response to Defendants' letter (Doc. No. 61) regarding Judge Engelmayer's recent opinion in *Mary Doe v. Indyke et al.*, 19 Civ. 10758 (S.D.N.Y. Apr. 28, 2020) (Doc. No. 38) ("*Mary Doe* Op.") submitted by Defendants to the Court yesterday. For the following reasons, Plaintiff respectfully submits that Judge Engelmayer's decision in *Mary Doe* incorrectly concludes that punitive damages are not available against Defendants under United States Virgin Islands ("USVI") law.

First, while correctly acknowledging that the law of the jurisdiction with the greater interest in applying its punitive damages provision should control, the *Mary Doe* Opinion concludes that the plaintiff in that case failed to articulate "any concrete interest" that the USVI has in applying its punitive damages law to Jeffrey Epstein's Estate. (*Mary Doe* Op. at 11.) To the contrary, as Plaintiff in this action has made clear, the USVI has a strong interest in (1) applying its own law to its domiciliaries and (2) ensuring that estate of an individual who chose to probate his estate under USVI law is subject to that law's burdens along with its benefits. (Doc. No. 51 at 9-10.) The *Mary Doe* Opinion does not appear to consider the former interest, a salient oversight given that the domicile of defendants is a central consideration in the choice-of-law analysis. (*Id.* at 9-10 (*citing Nat'l Jewish Democratic Council v. Adelson*, 417 F. Supp. 3d 416, 426 (S.D.N.Y. 2019) (that defendant is a domiciliary of Nevada "points in favor" of applying Nevada punitive damages law).) And the *Mary Doe* Opinion disposes of the latter interest by purporting to require a nexus between the benefits of USVI probate law and the plaintiff, concluding that "[w]hatever benefits Epstein envisioned for his estate by virtue of probating his will in the USVI," Doe has not argued that those benefits have "adverse bearing"

on her personal injury action. (*Mary Doe* Op. at 11.) The *Mary Doe* Opinion cites no case law in support of this nexus requirement, and Plaintiff is not aware of any. The central question is not whether Plaintiff has been disadvantaged by the specific benefits Epstein obtained by probating his estate in the USVI (though she certainly has been disadvantaged), but whether the USVI has an interest in preventing the Epstein Estate of availing itself of the benefits, but not the burdens, of its probate law.[1] There can be no doubt that it does, and that such an interest is entitled to significant weight. (Doc. No. 51 at 10 (citing *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 201 (1985).) Indeed, to the extent there is any doubt on this issue, one need only look to the actions taken by the Attorney General of the USVI, who has filed an action in Virgin Islands Superior Court against the Epstein Estate based on Epstein's use of the Virgin Islands' "land, resources, people, and laws for [his enterprise's] illicit purposes" and his abuse of his "privileges of residency." (Doc. No. 52-1 at ¶¶ 63, 68-69.)

The *Mary Doe* Opinion further reasons that New York has a strong countervailing interest in applying its "conduct-regulating" rules with respect to unlawful behavior within its borders. (*Mary Doe* Op. at 11.) That may be true as a general matter, but it is not dispositive of the particular question presented here. This case does not raise the question whether punitive damages should be available to punish perpetrators of sexual assault of children in New York (they are), but instead whether the estate of a deceased tortfeasor should be obligated to pay such claims. New York has no interest in applying its probate law to an estate that is neither domiciled nor being probated in New York; nor does it have a policy interest in prohibiting the levying of punitive damages against the estate of a tortfeasor who appears to have committed suicide, at least in part to avoid the civil and criminal consequences of his heinous criminal acts. (Doc. No. 51 at 12-13). Balancing New York's interests against those of the USVI makes clear that the most "just[], fair[], and the best practical result" is to apply USVI estates law to determine the availability of punitive damages. *See Simon v. Philip Morris Inc.*, 124 F. Supp. 2d 46, 55 (E.D.N.Y. 2000) (*quoting Babcock v. Jackson*, 12 N.Y.2d 473, 481 (1963)). This Court should therefore follow the reasoning in *Adelson*, which stands for the proposition that, under certain circumstances, the jurisdiction with the greatest interest in applying its punitive damages law will *not* be the jurisdiction where the harm occurred. *Adelson*, 417 F. Supp. 3d at 427.[2]

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[1] These burdens on Plaintiff include, among other things, the need to engage local counsel in the U.S. Virgin Islands to file a claim as an estate creditor there, the difficulty of responding to Epstein's efforts "conceal and shield his assets from potential recovery" through the 1953 Trust and an associated network of related entities, *see* Am. Compl. ¶ 88, *Gov't of the U.S. Virgin Islands v. Indyke, et al.*, No. St-19-PB0000080 (V.I. Sup. Ct. Feb. 11, 2020), and attempting to engage with the Estate's efforts to establish a Victim Compensation Program through the USVI probate court.

[2] *Adelson* is not, as the *Mary Doe* Opinion finds, "inapposite." (*Mary Doe* Op. at 13.) *Mary Doe* distinguishes *Adelson* on the ground that Doe's case, unlike *Adelson*, "does not build on a prior litigation in, or based on the law of, the USVI." (*Mary Doe* Op. at 14.) But, while the facts are certainly different than the ones presented here, *Adelson* does not apply a test under which the presence or absence of "prior litigation" is dispositive: instead, *Adelson* applied Nevada law rather than New York law (1) 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; and (2) because the defendant was a domiciliary of Nevada, which "points in favor of applying Nevada law." *Adelson*, 417 F. Supp. 3d at 426. Here, too, these two factors counsel incontrovertibly in favor of applying Virgin Islands estate law.

Second, the *Mary Doe* Opinion concludes that New York law governs the availability of punitive damages because Mary Doe sued the executor defendants under EPTL § 11-3.2(a)(1) (which authorizes a personal injury suit against an executor), and therefore she may not "disclaim the balance [of that provision], which delimits the recovery available in such a suit." (*Mary Doe* Op. at 12.) As an initial matter, the Complaint in this action does not cite EPTL § 11-3.2(a)(1), and USVI law expressly provides that personal injury claims against a tortfeasor survive his or her death. (Doc. No. 51 at 17 (citing 15 V.I.C. § 601).) But even if the plaintiff's cause of action did arise under EPTL § 11-3.2(a)(1)—as the *Mary Doe* parties apparently assumed—the *Mary Doe* Opinion erred in concluding that the court must therefore apply that provision to the availability of punitive damages.

Specifically, the *Mary Doe* Opinion concluded that applying USVI law to punitive damages would be inconsistent with the doctrine of dépeçage because such a result would "apply two different sets of laws *to a single issue*," where dépeçage permits only the application of different laws to different issues. (*Mary Doe* Op. at 12-13 (emphasis added).) But the case law on dépeçage makes clear that the availability of punitive damages and the availability of a cause of action are *not* a "single issue": "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*." *Fed. Hous. Fin. Agency v. Ally Fin. Inc.*, No. 11 Civ. 7010, 2012 WL 6616061, at *5 (S.D.N.Y. Dec. 19, 2012) (emphasis added). In other words, there is nothing "incongruous" about applying New York law to the question of whether Plaintiff's claim survives the tortfeasor's death and USVI law to the question of whether punitive damages remain available.

Finally, the *Mary Doe* Opinion concluded that "it is likely that USVI common law would not permit an award of punitive damages against an estate." (*Mary Doe* Op. at 14.) The *Mary Doe* Opinion reaches this conclusion, however, by essentially eliminating the third *Banks* factor—*i.e.*, which approach represents the soundest rule for the USVI—from its analysis, although that factor is indisputably the "most important" of the three. *Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 428 (V.I. 2016). The *Mary Doe* Opinion finds that it cannot "assign significant independent weight" to this factor, because it does not credit the evidence cited by the parties in either direction. (*Mary Doe* Op. at 16.) Plaintiff respectfully urges that this Court assess which rule is the "soundest rule for the Virgin Islands" in conducting a *Banks* analysis. (*Id.* at 14.) The USVI Attorney General's view that punitive damages are available against Epstein's Estate should dispose of this question for the Court, and as Plaintiff's Opposition makes clear, any reasonable independent analysis of the interests of the Virgin Islands should lead to the same conclusion. (Doc. No. 51 at 14.) A *Banks* analysis that does not weigh this factor, however, cannot possibly reach the correct conclusion on whether punitive damages are available under USVI law. As Plaintiff's Opposition makes clear, they are.

For the foregoing reasons, Plaintiff respectfully submits that a different decision than the one reflected in *Mary Doe v. Indyke et al.* is appropriate in this case. To the extent that the Court has questions or would like further explanation, we would, of course, be happy to appear (by phone) for oral argument.

Respectfully submitted,

Roberta A. Kaplan

cc: Counsel of Record