UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE 1000,

Plaintiff,

CASE NO: 19-cv-10577-LJL

v.

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

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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Plaintiff Jane Doe 1000, by and through her undersigned attorneys, respectfully submits this Memorandum of Law in Opposition to the Defendants' Motion to Dismiss Plaintiff's Complaint.[1]

PRELIMINARY STATEMENT

For decades, Jeffrey Epstein and his co-conspirators recruited countless young women to his homes in New York, Florida, and elsewhere, and forced them to give him massages that escalated into sexual assault. Plaintiff Jane Doe 1000 was just one of many victims that Epstein and his co-conspirators recruited to be a part of their sex-trafficking operation when she was a young woman. Epstein continuously offered to help Jane Doe with her career, but instead sexually abused her for years.

Defendants contend that Jane Doe's claims are untimely, but wholly ignore the burden that they bear and which they have failed to meet. *First*, Jane Doe's claims are timely under N.Y. C.P.L.R. § 215(8)(a), which provides that when a criminal action is commenced with respect to the same event or occurrence that gives rise to a plaintiff's civil claims, the plaintiff has at least one year from the termination of the criminal action to file a civil action. *Second*, Jane Doe's claims are timely under N.Y. C.P.L.R. § 213-c, which provides victims of rape or other delineated criminal sexual acts with 20 years to bring a civil action against the perpetrator. *Third*, Defendants have failed to meet their burden of showing that Jane Doe will be unable to invoke equitable estoppel and equitable tolling. Finally, Defendants' motion to "dismiss" Jane Doe's demand for punitive damages is not only procedurally improper, but incorrect—punitive damages are available under U.S. Virgin Islands law. The Court should deny Defendants' motion to dismiss in full.

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[1] Plaintiff respectfully requests oral argument pursuant to Individual Rule 2.K.

STATEMENT OF FACTS

Plaintiff Jane Doe 1000's story echoes the stories of many other victims of Jeffrey Epstein. Jane Doe grew up in extreme poverty and her mother had been homeless at various times throughout her childhood. Compl. ¶ 37. Jane Doe did modeling work as a young woman, and after seeing her picture, a man contacted her to ask if she would like to meet someone with connections to various modeling opportunities—Jeffrey Epstein. *Id.* ¶ 38. Because Jane Doe was struggling financially and aspired to be a successful model, Jane Doe agreed to meet Epstein at his New York mansion. *Id.* When they met, Epstein bragged about his friendship with Leslie Wexner, the chief executive of Victoria's Secret, and offered Jane Doe a modeling job with the lingerie retailer. *Id.* ¶ 39. After identifying Jane Doe's vulnerabilities, Epstein moved her into his apartment building on 66th Street, where he provided housing to other victims. *Id.* ¶ 40.

Epstein soon began sexually abusing Jane Doe. Ghislaine Maxwell, Epstein's head recruiter, and other recruiters would call Jane Doe several times a week and direct her to give Epstein massages at his New York mansion. *Id.* ¶ 40. Consistent with Epstein's pattern of abuse of countless other victims, Epstein forced Jane Doe to engage in sex acts during the massages, including by making her use sex toys. *Id.* ¶¶ 40–41. Epstein also flew Jane Doe to his mansion in Palm Beach, Florida, for additional sexual massages. *Id.* ¶ 42.

Jane Doe's final encounter with Epstein was particularly harrowing. On that day, Epstein called Jane Doe to his New York mansion, and when she arrived, Maxwell led her upstairs to Epstein's master bedroom. *Id.* ¶ 46. Sex toys had been laid out on the bed prior to Jane Doe's arrival. *Id.* Epstein and Maxwell then simultaneously sexually assaulted Jane Doe by force, and Maxwell penetrated Jane Doe with a sex toy. *Id.* The encounter left Jane Doe distraught and terrified. She moved out of the 66th Street apartment building and, having nowhere else to go, moved into a Salvation Army housing facility. *Id.*

Epstein and his co-conspirators used displays of wealth and power to manipulate, scare, and control their victims. *Id.* ¶¶ 3, 27, 44. For example, after recruiting victims, Epstein and his co-conspirators made sure that victims saw photographs of Epstein with powerful political and social figures and noticed the opulence of his homes. *Id.* ¶ 27. These tactics were meant to ensure that victims knew that there would be consequences if they did not comply with Epstein's demands or if they reported their abuse to the authorities or the media. *Id.*

Unsurprisingly, Epstein and his co-conspirators used these tactics on Jane Doe. Knowing that Jane Doe had struggled financially, Epstein provided her with housing to ensure that she remained loyal to and dependent on him. *Id.* ¶ 40. He also constantly touted his relationship with Wexner and Victoria's Secret because he knew about her aspirations, and he promised her modeling opportunities every time he abused her. *Id.* ¶¶ 39, 45. Epstein made it so that without him, Jane Doe was homeless, jobless, and without any career prospects. On one occasion, Epstein forced Jane Doe to meet with a prominent lawyer and law professor, who gathered personal information about her that Epstein later used against her to intimidate her and to keep her quiet. *Id.* ¶ 43.

After decades of escaping appropriate punishment for his extraordinarily far-reaching and disturbing crimes, Epstein was indicted in July 2019 on one count of sex-trafficking conspiracy and one count of sex trafficking. Compl., Ex. A (the "Indictment"). The Indictment focused on Epstein's recruitment of victims to his New York and Palm Beach homes to provide him with massages that became sexual in nature. Indictment ¶ 7. The Indictment specifically described how Epstein recruited victims who "were, for various reasons, often particularly vulnerable to exploitation" to come to his New York and Florida mansions to give him massages. *Id.* ¶¶ 3, 9, 15. During the massage, Epstein "would escalate the nature and scope of physical contact with his

victims to include, among other things, sex acts such as groping and direct and indirect contact with the victim's genitals" with his hands or sex toys. *Id.* ¶¶ 9, 15. Afterwards, Epstein and his associates would continue to contact victims to schedule appointments for additional sexual encounters so that he could continue to abuse them. *Id.* ¶ 11, 17. This pattern described in the Indictment matches Jane Doe's experience and the experiences of countless other victims.

On August 8, 2019, shortly after Epstein's Indictment, Epstein executed his last will and testament, naming Defendants the executors of his Estate. Compl. ¶ 30. Two days later, Epstein was found dead in his jail cell. *Id.* ¶ 31. His last will and testament was filed in the U.S. Virgin Islands on August 15, 2019. *Id.* ¶ 32. The U.S. Attorney's Office submitted a proposed *nolle prosequi* order and Judge Richard M. Berman dismissed the indictment on August 29, 2019. *Id.* ¶ 36. Plaintiff filed her Complaint shortly thereafter, on November 14, 2019.

ARGUMENT

Defendants' motion to dismiss Plaintiff's claims and Plaintiff's request for punitive damages should be denied. "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. . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). The Court must "accept[] all factual allegations in the complaint as true and draw[] all reasonable inferences in the plaintiff's favor." *Kashef v. BNP Paribas S.A.*, 925 F.3d 53, 58 (2d Cir. 2019).

Drawing all reasonable inferences in Plaintiff's favor, Defendants have failed to meet their burden of proving that Plaintiff's claims for battery and intentional infliction of emotional distress are untimely. Further, Defendants' argument that the Court should dismiss punitive damages from the Complaint is both procedurally improper and substantively incorrect.

I. Defendants Have Not Met Their Burden of Proving that Plaintiff's Claims Are Untimely.

Because the statute of limitations is an affirmative defense, Defendants bear the burden of proving that Plaintiff's claims are untimely. *Childers v. New York & Presbyterian Hosp.*, 36 F. Supp. 3d 292, 301 (S.D.N.Y. 2014). A motion to dismiss based on timeliness "should not be granted unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Ortiz v. Cornetta*, 867 F.2d 146, 148 (2d Cir. 1989) (internal quotation marks and citation omitted). Accordingly, "dismissal is appropriate only if a complaint clearly shows the claim is out of time." *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999). In this case, Plaintiff's factual allegations demonstrate that (A) her claims are timely under N.Y. C.P.L.R. § 215(8)(a), (B) her claims are timely under C.P.L.R. § 213-c, (C) Defendants are equitably estopped from asserting a statute of limitations defense, and (D) the limitations period for bringing her claims was equitably tolled.

A. Plaintiff's Claims Are Timely Under N.Y. C.P.L.R. § 215(8)(a).

Plaintiff's claims fall squarely within N.Y. C.P.L.R. § 215(8)(a), which allowed Plaintiff to file her complaint within a year of the Indictment's dismissal. That provision provides that:

> 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 . . . arises, the plaintiff shall have at least one year from the termination of the criminal action . . . in which to commence the civil action . . . .

Id. Section 215(8)(a)'s one-year limitations period has three requirements: "(1) a criminal action has been commenced, (2) against the same defendants, and (3) concerning the same event or transaction from which the civil action arose." *Clemens v. Nealon*, 202 A.D.2d 747, 749 (3d Dep't 1994). Because Plaintiff filed the Complaint within one year of the termination of the Indictment, her claims are timely.

Defendants' only argument to the contrary is that the Indictment did not concern the same event or transaction from which Plaintiff's civil action arose because the Indictment targeted, according to Defendants, some separate sex trafficking operation that only involved underage girls. Defs.' Mem. at 5 ("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."). But Defendants mischaracterize § 215(8)(a), the applicable case law, Plaintiff's Complaint, and, most egregiously, the vast sex-trafficking operation that the Indictment targeted.

1. The Indictment Was Not Restricted to Minors.

As an initial matter, the Indictment covered the crimes Defendants committed against Plaintiff, notwithstanding the fact that she did not allege that she was a child when they occurred. Defendants seek to minimize the scope of the abuse alleged in the Indictment by focusing on its reference to "minors." Defs.' Mem. at 5. But clinging to the use of the word "minors" does not change the nature of the vast and sophisticated operation alleged in the Indictment. Epstein's pattern and practice was to recruit and traffic young females with vulnerabilities that he knew he could exploit, and the Indictment spells out that pattern in detail. Age is not the deciding factor as to whether a female was a victim of the sex-trafficking operation or experienced the precise patterns of recruitment and abuse described in the Indictment. And the fact that many of the victims were minors does not mean that non-minors were not victimized by Epstein's sophisticated sex-trafficking operation. Indeed, the Indictment states that "many" but not "all" of Epstein's victims were minors, demonstrating that prosecutors were investigating Epstein's crimes against young women over the age of 18 as well. Indictment ¶ 11 ("[Epstein] knew that many of his New York victims were underage."); *id.* ¶ 17 ("JEFFREY EPSTEIN, the defendant, knew that certain of his victims were underage . . . ."). The FBI confirmed this understanding of the Indictment's scope in a press release issued two days after Epstein's arrest, stating to Epstein's victims: "We

want to hear from you, regardless of the age you are now, or *whatever age you were then*, no matter where the incident took place." https://www.justice.gov/usao-sdny/pr/jeffrey-epstein-charged-manhattan-federal-court-sex-trafficking-minors (last visited March 30, 2020) (emphasis added).

The mere fact that Plaintiff did not allege that she was a minor at the time that she was recruited into Epstein's sex-trafficking scheme does not negate the fact that Plaintiff's civil claims arise from the acts described in the Indictment. Plaintiff therefore had one year from August 29, 2019, the date on which Judge Berman formally dismissed the Indictment, to file the Complaint. Having filed suit on November 14, 2019, her claims fall well within that limitations period.[2]

2. Plaintiff's Claims Concern the Same Sex-Trafficking Operation that the Indictment Concerned.

Even if the Indictment for some reason was limited to Epstein's trafficking of minors (to the exclusion of other victims), Plaintiff's claims would nonetheless arise from the same "event or occurrence" for the purposes of § 215(8)(a). *See, e.g.*, *Kashef*, 925 F.3d at 62 (noting that "a New York appellate court explicitly rejected the theory that the tolling provisions of CPLR 215(8) are exclusively for the benefit of the victims of the crime charged in the criminal proceeding" (internal quotation marks omitted)). Contrary to Defendants' suggestion, the Court should not construe the Indictment "narrowly," Defs.' Mem. at 6, where the Indictment itself describes a pattern of abuse against numerous victims spanning a number of years. Epstein repeated the same patterns of recruitment and abuse time and time again on countless young females, including Plaintiff. *See*, *e.g.*, Indictment ¶ 7 (explaining that Epstein "perpetuated [the] abuse in similar ways" against

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[2] To the extent Defendants suggest that Epstein's crimes against Jane Doe are not part of the same "event or occurrence" as those described in the Indictment because they began in 1999 (as opposed to 2002), this argument similarly fails. *See* Defs.' Mem. at 5. The Indictment itself notes that Epstein's sex-trafficking conspiracy lasted "*from at least* in or about 2002," and it is now apparent that the conspiracy began years earlier. Indictment ¶ 2 (emphasis added).

victims). The Indictment was therefore not limited to neatly categorized events that happened on specified dates—it covered a sprawling sex-trafficking operation that occurred "over the course of many years" and affected an unspecified number of victims. *Id*. ¶ 1.

Defendants' contention that the Indictment "does not refer to misconduct of the type that Plaintiff alleges here" is incorrect. Defs.' Mem. at 7. The sex-trafficking operation that the Indictment described is precisely the same sex-trafficking operation that Plaintiff was lured into—the Complaint's allegations as to the perpetrator, the locations, and the repeated sexual assaults all match the pattern described in the Indictment. Just as the Indictment alleged that Epstein enticed and recruited "particularly vulnerable" females to engage in sex acts with him in New York and Palm Beach, Indictment ¶¶ 3, 6, Epstein enticed and recruited Plaintiff, a particularly vulnerable young woman, to engage in sex acts with him in New York and Palm Beach. Compl. ¶¶ 37, 40–42. Just as the Indictment alleges that the abuse would start out with the victim performing a massage on Epstein, Indictment ¶¶ 9, 15, recruiters initially called Plaintiff to Epstein's home to give him a massage. Compl. ¶ 40. The Indictment alleges that Epstein would escalate the nature and scope of physical contact during the massages to include sex acts, Indictment ¶¶ 9, 15, and Epstein escalated the nature and scope of Plaintiff's massages to include sex acts. Compl. ¶¶ 40, 41. The Indictment alleges that Epstein used sex toys on victims during massages, Indictment ¶¶ 9, 15, and Epstein repeatedly used sex toys on Plaintiff during massages. Compl. ¶ 41. And, finally, just as Epstein's associates would call victims by phone to arrange for them to return for additional sexual encounters, Indictment ¶ 11, Epstein's associates called Plaintiff frequently to schedule more sexual massages. Compl. ¶¶ 40, 46. The conduct alleged in the Indictment is precisely the conduct alleged in the Complaint.

Defendants have the audacity to make a stunning contention that Plaintiff does not sufficiently allege that she was a sex-trafficking victim. Defs.' Mem. at 7. Defendants may be unfamiliar with the definition of sex trafficking: "the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act." 22 U.S.C. § 7102. Epstein and his co-conspirators recruited Plaintiff and housed her in his apartment building for the *sole purpose* of sexually abusing her, without ever helping her find a modeling job as he had promised. Compl. ¶¶ 40, 45, 46. She is therefore unquestionably a victim of sex trafficking. Defendants' desperate attempt at severing Plaintiff's experience from the vast, sophisticated sex-trafficking operation alleged in the Indictment fails.

3. Defendants' Attempts to Narrow the Scope of C.P.L.R. § 215(8)(a) Fail.

Defendants seek to advance a strained interpretation of § 215(8)(a)'s "event or occurrence" requirement, asserting that this Court must "apply C.P.L.R. § 215(8)(a) narrowly" to limit its availability to the specific crimes committed against the specific victims identified in the Indictment. Defs.' Mem. at 6. But the cases that Defendants cite for that proposition are inapposite. In *Christodoulou v. Terdeman*, the Second Department held that § 215(8)(a) "applies only to those claims which are based on events of February 26, 1993 and December 28, 1993, because it was only in connection with events of these two days that criminal prosecution was commenced against defendant." 262 A.D.2d 595, 595 (2d Dep't 1999). Similarly, in *Gallina v. Thatcher*, the court held that the plaintiff could not rely on § 215(8)(a) to file a civil suit for assault and battery that occurred over the course of two years because the indictment "charged [the defendant] for incidents occurring on three (3) specific dates." No. 2017-52980, 2018 N.Y. Misc. LEXIS 8435, at *3–4 (Sup. Ct. Oct. 23, 2018).

Christodoulou and *Gallina* are both readily distinguishable from Plaintiff's case. The criminal actions in *Christodoulou* and *Gallina* focused on events that occurred on specified dates

(two dates in *Christodoulou* and three dates in *Gallina*), and both *Christodoulou* and *Gallina* explicitly recognized that the relevant criminal prosecutions were commenced "only in connection with the events of these [specific] days." *See Christodoulou*, 262 A.D.2d at 596; *Gallina*, 2018 N.Y. Misc. LEXIS 8435, at *3–4. By contrast, the Indictment in this case was not limited to a specific day or discrete event. Rather, the Indictment covered sexual abuse that occurred "over the course of many years." Indictment ¶¶ 1–2, 8, 20, 24. Further, the Indictment charged Epstein with conspiracy and a broad sex-trafficking scheme, while the criminal actions in *Christodoulou* and *Gallina* charged the defendants with crimes stemming from isolated incidents.[3]

In contrast, the Second Circuit's opinion in *Kashef* controls and demonstrates why Plaintiff's claims fall within § 215(8)(a) here. In *Kashef*, BNP Paribas ("BNPP") entered a guilty plea conceding "knowledge of the atrocities being committed in Sudan and of the consequences of providing Sudan access to U.S. financial markets." *Kashef*, 925 F.3d at 56. The plaintiffs, Sudanese victims of mass rape, torture, deliberate infection with HIV, and other atrocities, filed a complaint against BNPP within a year of the judgment of conviction, contending that their claims were timely under C.P.L.R. § 215(8)(a). *Id*. at 57, 62–63. BNPP attempted to argue—similar to Defendants' argument here—that § 215(8)(a) did not apply because the plaintiffs "played no role in the proceedings surrounding BNP Paribas's plea agreement," the criminal action "required no investigation of or briefing on any injuries sustained by Plaintiffs," and the facts in the criminal case and the civil case were not "identical." Brief of Defendants-Appellees at 51–52, *Kashef v. BNP Paribas S.A.*, No. 18-1304 (2d Cir. Aug. 9, 2018), Dkt. 92.

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[3] Defendants also cite *McElligott v. City of New York*, No. 15 CIV. 7107 (LGS), 2017 WL 6210840, at *5 (S.D.N.Y. Dec. 7, 2017), but that case is inapplicable because it hinged on whether the defendant in the civil action was the same defendant charged in the criminal action.

The Second Circuit rejected BNPP's argument, and instead found that the "event or occurrence" for § 215(8) purposes was more generally "BNPP's conspiracy with Sudan to violate U.S. sanctions" for humanitarian violations. 925 F.3d at 62–63. The Court therefore held that the victims of those humanitarian violations could bring timely claims under § 215(8)(a). *Id.* That conspiracy, like the one here, was a broad scheme spanning many years, rather than a single event (such as an assault on a specified date). Just as BNPP's conspiracy to violate sanctions was the relevant event or occurrence in *Kashef,* Epstein's widespread sex-trafficking scheme is the event or occurrence at issue in Plaintiff's case for the purposes of applying § 215(8)(a). Defendants attempt to distinguish *Kashef* by pointing out that "the civil and criminal actions in that case both arose out of the same conspiracy between BNP and Sudan to violate U.S. sanctions," Defs.' Mem. at 8, but that fact only highlights *Kashef*'s applicability to this case, which also involves a civil and criminal action arising from the same conspiracy. Defendants have failed to meet their burden of proving that Plaintiff's claims do not arise from the same event or occurrence as the Indictment, and therefore that § 215(8)(a) does not apply to her claims.[4]

B. Plaintiff's Claims are Timely Pursuant to N.Y. C.P.L.R. § 213-c

Plaintiff's claims are also timely under N.Y. C.P.L.R. § 213-c. That provision provides victims of rape or criminal sexual acts (and other delineated sexual offenses) 20 years to bring a civil action for resulting injuries:

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[4] Defendants argue that a narrow reading of § 215(8)(a) "gives meaning to the statute's language 'with respect to the event or occurrence from which a claim governed by this section arises.'" Defs.' Mem. at 8. But Plaintiff is not asking, for example, for the Court to hold that any person with a tangential connection to Epstein's sex-trafficking operation may avail of § 215(8)(a). Rather, the Court should hold that Plaintiff's claims in *this matter* arise from the same "event or occurrence" as the Indictment because the perpetrator is the same, the location is the same, and, most importantly, the pattern of misconduct is the same.

> Notwithstanding any other limitation set forth in this article, . . . all civil claims or causes of action brought by any person for physical, psychological or other injury or condition suffered by such person as a result of conduct which would constitute rape in the first degree as defined in section 130.35 of the penal law, . . . or criminal sexual act in the first degree as defined in section 130.50 of the penal law, . . . may be brought . . . within twenty years.

N.Y. C.P.L.R. § 213-c.[5] Plaintiff alleges that Epstein sexually assaulted her by forcible compulsion at some point after late 1999, within 20 years of the filing of this lawsuit, and that the assault constituted one or more sex crimes listed in § 213-c. Compl. ¶¶ 13, 38, 46, 51. Her claims are therefore timely under § 213-c.

Without citing any case supporting their argument, Defendants contend that the 20-year statute of limitations of § 213-c does not apply to Plaintiff's claims because it became effective through an amendment on September 18, 2019, and the amendment does not apply retroactively. Defs.' Mem. at 5. But New York courts have not adopted any such rigid rule prohibiting the retroactivity of statutory amendments to limitations periods. Instead, "[c]ourts have employed customary tools of construction to find the requisite intent to give retroactive effect to new laws affecting periods of limitation." *McGuirk v. City Sch. Dist. of Albany*, 116 A.D.2d 363, 365 (3d Dep't 1986). Using those tools, New York courts have held that certain amendments to limitations periods apply retroactively. *See, e.g.*, *Meegan S. v. Donald T.*, 475 N.E.2d 449, 450 (N.Y. 1984) ("[T]he enlargement of the Statute of Limitations for paternity suits is to be applied retroactively.").

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[5] "A person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person . . . [b]y forcible compulsion" and "is guilty of criminal sexual act in the first degree when he or she engages in oral sexual conduct or anal sexual conduct with another person . . . [b]y forcible compulsion." N.Y. Penal Law §§ 130.35, 130.50.

The text and legislative history of § 213-c demonstrate the New York Legislature's intent for the 20-year limitations period to apply retroactively. First, the text of the provision itself says that it applies "notwithstanding *any other limitation* set forth in this article." N.Y. C.P.L.R. § 213-c (emphasis added). "[T]his article" refers to Article 2 of Chapter 8 of the C.P.L.R., which contains New York's statutes of limitation for civil actions, *see* N.Y. C.P.L.R. § 201, suggesting that the Legislature intended for no other statute of limitations to apply.

Further, the bill's legislative history highlights the "ticking clock" that the former statute of limitations imposed on victims of sexual abuse: "For crimes of sexual violence in particular, the clock ticks against the trauma and culture of silence that prevents victims from speaking out. Over the last year, victims who have suffered in silence for decades have bravely spoken about their abuse . . . ." N.Y. Comm. Rep., 2019 N.Y. S.B. No. 6574, 242nd Legis. Sess. (June 17, 2019). The Legislature's explicit reference to "victims who have suffered in silence for decades," like Plaintiff, and victims that have been prevented "from speaking out," also like Plaintiff, evince an intent for the provision to apply retroactively to victims like Plaintiff. Governor Cuomo echoed the sentiment behind the provision while signing the bill, explaining that "[f]ive years is an insult to these survivors and today *we're providing them more time* to come to terms with the trauma they experienced and to seek justice." https://www.governor.ny.gov/news/governor-cuomo-joined-leaders-times-movement-signs-legislation-extending-rape-statute (last visited March 30, 2020) (emphasis added). In light of the legislative goals behind the amendment to § 213-c, the Court should hold that it applies retroactively to Plaintiff's claims.

Moreover, "remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose." *In re Gleason (Michael Vee, Ltd.)*, 749 N.E.2d 724, 726 (N.Y. 2001). Legislative history establishes that the amendment to § 213-c was remedial in nature—it extended

the statute of limitations for certain sexual offenses in order to correct the injustice that the shorter limitations period imposed on victims. *See Coffman v. Coffman*, 60 A.D.2d 181, 188 (2d Dep't 1977) ("Remedial statutes are those designed to correct imperfections in prior law, by generally giving relief to the aggrieved party." (internal quotation marks omitted)); *see also Meegan S.*, 475 N.E.2d at 450 (finding that amendment extending statute of limitations in paternity suits was remedial legislation); https://www.governor.ny.gov/news/governor-cuomo-joined-leaders-times-movement-signs-legislation-extending-rape-statute (last visited March 30, 2020) ("This new law recognizes the injustice that has gone on for far too long . . . ."). "[I]nsofar as remedial statutes are concerned, the court should consider the mischief sought to be remedied and should favor the construction which will suppress the evil and advance the remedy." *Burrows v. Bd. of Assessors for Town of Chatham*, 98 A.D.2d 250, 253 (3d Dep't 1983) (internal quotation marks and citations omitted), *aff'd*, 473 N.E.2d 748 (N.Y. 1984). The remedial purpose of the amendment to § 213-c, to correct the injustice of providing victims of rape and other criminal sexual acts who were prevented from speaking out by their abusers (like Plaintiff) with only five years to bring actions, would be undermined if the amendment were only applied prospectively. Plaintiff's claims are therefore timely under § 213-c's 20-year limitations period.

C. Defendants Have Not Met Their Burden of Proving that Plaintiff Cannot Invoke Equitable Estoppel.

Even if the Court were to hold that C.P.L.R. § 215(8)(a) and § 213-c do not apply to Plaintiff's claims, it should hold that they are still timely under the doctrine of equitable estoppel. The Complaint alleges in detail the methods of intimidation and control that Jeffrey Epstein and his co-conspirators used to deter their victims from seeking justice. Epstein went to great lengths to threaten and manipulate not only countless victims, but journalists, officials at the highest levels of our government, and others charged with preventing and punishing sex trafficking. Plaintiff

had every reason to believe that filing this suit during Epstein's lifetime would have had severely negative (even life-threatening) consequences for her. She therefore did not take action until after she knew that Epstein was dead, and timely filed her claim approximately three months later.

Defendants' contend that the doctrine of equitable estoppel applies only to situations in which the defendant makes a misrepresentation of fact. Defs.' Mem. at 10–11. But "courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing—a carefully concealed crime here—which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding." *Gen. Stencils, Inc. v. Chiappa*, 219 N.E.2d 169, 171 (N.Y. 1966). A defendant is therefore equitably estopped from asserting a statute of limitations defense if the defendant "wrongfully induced the plaintiff to refrain from timely commencing an action by deception, concealment, threats *or other misconduct*." *Funk v. Belneftekhim*, No. 14-CV-0376 (BMC), 2019 WL 3035124, at *2 (E.D.N.Y. July 11, 2019) (citation omitted) (emphasis added).

Assuming the truth of the allegations in Plaintiff's Complaint and drawing all inferences in her favor, Plaintiff has sufficiently pleaded misconduct that should equitably estop Defendants from asserting a statute of limitations defense. Plaintiff was terrified of Epstein and his co-conspirators.[6] For example, Epstein constantly bragged to Plaintiff about his connections to powerful people like Leslie Wexner and made countless representations about his wealth, power, and connections. Compl. ¶¶ 39, 40, 44. Epstein also forced Plaintiff to meet with a powerful lawyer so that the lawyer could gather personal information about Plaintiff. *Id.* ¶ 43. Defendants

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[6] In fact, Plaintiff is still terrified of Epstein's powerful co-conspirators, which caused her to file this lawsuit under pseudonym. *See* Memorandum of Law in Support of Plaintiff's Motion for Leave to Proceed Anonymously at 4–5, Dkt. 7 (Nov. 20, 2019).

discount this allegation because it happened during the time period when Epstein was abusing Plaintiff. Defs.' Mem. at 10. But Defendants conveniently leave out Plaintiff's allegation that "Epstein later used the information that the lawyer had obtained through his meeting with Jane Doe to intimidate her and to keep her compliant in his sex-trafficking scheme." Compl. ¶ 43. That allegation therefore directly supports Plaintiffs' equitable estoppel argument. Epstein also ensured that Plaintiff, who struggled financially for her entire life, became dependent on him so that she would remain compliant and keep quiet about the abuse. He provided her with things she desperately needed, like housing and the prospect of future employment opportunities. Compl. ¶¶ 37, 39, 40, 45. This manipulation contributed to Plaintiff's silence until Epstein's death.

Plaintiff's allegations are more than sufficient to allow her claims to proceed under an equitable estoppel theory at this early stage of the litigation. "[A] complaint does not need to anticipate potential affirmative defenses, such as the statute of limitations, and to affirmatively plead facts in avoidance of such defenses." *Childers*, 36 F. Supp. 3d at 315 (internal quotation marks and citation omitted). Further, "[w]hether equitable estoppel applies in a given case is ultimately a question of fact." *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 725 (2d Cir. 2001). Courts applying New York law have therefore reserved the highly factual issue of equitable estoppel for summary judgment after discovery or for a jury. *See, e.g.*, *Gotlin v. Lederman*, No. 05-CV-1899 (ILG), 2006 WL 1154817, at *13 (E.D.N.Y. Apr. 28, 2006) ("A vast majority of the cases on equitable estoppel permit plaintiffs to defeat a motion to dismiss on the pleadings, deferring the question until some discovery can be had.").[7] Defendants have failed

[7] In another victim's action against the Estate, the court recognized that the doctrines of equitable estoppel and equitable tolling are "very fact specific" and accordingly asked Defendants to refrain from filing a motion to dismiss prior to discovery. Transcript of Pre-Motion Conference

to meet their burden of proving that Plaintiff can prove no set of facts demonstrating her entitlement to equitably estopping Defendants from asserting a statute of limitations defense.

D. Defendants Have Not Met Their Burden of Proving that Plaintiff Cannot Invoke Equitable Tolling.

Plaintiff's claims are also timely under the doctrine of equitable tolling. While equitable estoppel focuses on a defendant's affirmative misconduct, equitable tolling focuses on the plaintiff and applies as a matter of fairness where the plaintiff has been "prevented in some extraordinary way from exercising [her] rights." *Flight Sci., Inc. v. Cathay Pac. Airways Ltd.*, 647 F. Supp. 2d 285, 289 (S.D.N.Y. 2009) (internal quotation marks and citations omitted). In this case, Plaintiff's fear of retaliation prevented her from filing her claims prior to Epstein's death.

Defendants' contention that Plaintiff has not alleged any facts supporting equitable tolling is incorrect. Defs.' Mem. at 9. A "reasonable fear of retaliation may be sufficient to constitute extraordinary circumstances warranting equitable tolling, particularly if the person threatening retaliation is a defendant." *Davis v. Jackson*, No. 15-cv-5359, 2016 WL 5720811, at *11 (S.D.N.Y. Sept. 30, 2016). The *Davis* court's reasoning also applies in this context. The court reasoned that fear of retaliation could support equitable tolling in the prison context because "sustained control tends to result in adverse psychological effects that invariably have behavioral consequences" such as, among other things, "interpersonal distrust and suspicion of threat or personal risk; . . . diminished sense of self-worth and personal value; and posttraumatic stress

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at 3:4-8, *Farmer v. Indyke, et al.*, No. 19-cv-10475 (LGS) (S.D.N.Y. Mar. 5, 2020), Dkt. 39 ("[T]he doctrines of equitable estoppel and equitable tolling could, nevertheless, save the claims and make them timely and that is very fact specific, or early in the case I presumed there will be factual issues around those questions . . . .").

reactions to the pains of imprisonment. Retaliation and fear of retaliation are natural consequences of this unique psychological environment." *Id.* at *10 (internal quotation marks omitted).

Epstein's pattern of controlling, manipulating, and intimidating his victims caused similar psychological effects in his countless victims, which in turn caused severe fear of retaliation. And Plaintiff alleges that Epstein's abuse and psychological manipulation had such effects on her. Compl. ¶¶ 40, 44, 46–48. The court should therefore extend equitable tolling to reach fear of retaliation in the context of Epstein's abuse of and control over his victims, including Plaintiff.

In any event, as with equitable estoppel, "when plaintiffs raise an equitable tolling argument, a court must deny a motion to dismiss based on the statute of limitations unless all assertions of the complaint, as read with required liberality, would not permit the plaintiffs to prove that this statute was tolled." *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 287 (S.D.N.Y. 2009). Plaintiff's allegations are sufficient to defeat a motion to dismiss and to proceed to discovery on the issue of equitable tolling. *See, e.g.*, *Brown v. Parkchester S. Condos.*, 287 F.3d 58, 60–61 (2d Cir. 2002) (evidentiary hearing appropriate to determine whether limitations period was equitably tolled); *Guobadia v. Irowa*, 103 F. Supp. 3d 325, 341 (E.D.N.Y. 2015) (equitable tolling "is a question appropriately reserved for a jury" due to "genuine issues of material fact"); *Childers*, 36 F. Supp. 3d at 315 (holding that plaintiff did not need to plead facts establishing right to equitable tolling). Defendants have failed to meet their burden of proving that Plaintiff can prove no set of facts demonstrating entitlement to equitable tolling in this case.

II. The Court Should Deny the Defendants' Motion to Dismiss Punitive Damages.

Defendants' argument that Plaintiff's claim for punitive damages fails as a matter of law is incorrect. Not only are such damages available, they are warranted in this case. Beyond the procedural impropriety of Defendants' purported motion to dismiss punitive damages—that on its

own warrants its denial—under New York choice-of-law principles the law of the Virgin Islands applies to the issue of punitive damages. Under Virgin Islands law, a court may allow for punitive damages against the estate of a deceased tortfeasor, especially when that tortfeasor went to great lengths during his life to avoid punishment for causing immeasurable harm to countless victims.

A. Defendants' Motion to Dismiss Punitive Damages is Procedurally Improper.

As an initial matter, the Court should not decide whether punitive damages are available at this early stage. A motion to dismiss is not the proper vehicle for determining the availability of punitive damages. Rule 12(b)(6) allows a defendant to file a motion to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Accordingly, "[a] motion to dismiss is addressed to a 'claim'—not to a form of damages." *Amusement Indus., Inc. v. Stern*, 693 F. Supp. 2d 301, 318 n.5 (S.D.N.Y. 2010). Defendants' request for the Court to dismiss Plaintiff's request for punitive damages does not relate to either of Plaintiff's claims (for battery and intentional infliction of emotional distress) and does not relate to the sufficiency of the allegations in the Complaint. The issue of what types of damages Plaintiff is entitled to should therefore be dealt with at a later stage. *See, e.g.*, *Hunter v. Palisades Acquisition XVI*, No. 16 Civ. 8779 (ER), 2017 WL 5513636, at *9 (S.D.N.Y. Nov. 16, 2017) ("Because punitive damages are a form of damages, not an independent cause of action, a motion to dismiss a prayer for relief in the form of punitive damages is procedurally premature." (internal quotation marks and citation omitted)); *Okyere v. Palisades Collection, LLC*, 961 F. Supp. 2d 522, 536 (S.D.N.Y. 2013) (same).

B. Plaintiff May Recover Punitive Damages in this Case.

Even if a motion to dismiss punitive damages was an adequate way to address this issue, Defendants' motion still fails. Plaintiff may recover punitive damages because the Virgin Islands

has the strongest interest in whether punitive damages are available in this case.[8] And, under Virgin Islands law, Plaintiff can recover punitive damages.

1. The Law of the Virgin Islands for Punitive Damages Governs Under New York's Choice-of-Law Principles.

Federal courts look to the choice-of-law rules of the forum state in deciding choice-of-law disputes. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). "In the context of tort law, New York utilizes interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation. The greater interest is determined by an evaluation of the facts or contacts which relate to the purpose of the particular law in conflict." *Padula v. Lilarn Prop. Corp.*, 644 N.E.2d 1001, 1002 (N.Y. 1994) (internal quotation marks and alterations omitted). New York courts seek "[j]ustice, fairness and the best practical result." *Babcock v. Jackson*, 191 N.E.2d 279, 283 (N.Y. 1963).

"Punitive damages are conduct regulating," and "[u]nder the doctrine of depecage, then, the choice-of law analysis for punitive damages is distinct from the analysis for compensatory damages." *Nat'l Jewish Democratic Council v. Adelson*, No. 18 Civ. 8787 (JPO), 2019 WL 4805719, at *6 (S.D.N.Y. Sept. 30, 2019). While the law of the place of the tort *generally* applies to conduct regulating law, "under New York law—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 quotation marks and alterations omitted). "Punitive damages are designed

[8] As explained below, under the doctrine of depecage New York law still governs as to the underlying claims and as to compensatory damages.

to punish the defendant, not to compensate the plaintiff, and so the choice-of-law inquiry for punitive damages provisions is necessarily 'defendant-focused.'" *Id.*

Although Defendants correctly note that the law of the jurisdiction of where the tort occurred *generally* applies, Defs.' Mem. at 12, in this case the Virgin Islands has a stronger interest in the resolution of whether punitive damages can be awarded in this case than New York or Florida. This being a "defendant-focused" analysis, *Adelson*, 2019 WL 4805719, at *6, the Virgin Islands' interest in applying its law on punitive damages is greater than New York's. Epstein was domiciled in the Virgin Islands, not New York or Florida. Compl. ¶ 19; *see also Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 201 (1985) (holding that, although New York was the place of the wrong, New Jersey law applied because it "would further [New Jersey's] interest in enforcing the decision of its domiciliaries to accept the burdens as well as the benefits of" New Jersey law). Epstein also had a private island in the Virgins Islands, where he abused countless young females. Compl. ¶ 24. Defendants then chose to probate his Estate in and under the laws of the Virgin Islands. *Id.* ¶ 32. Having availed themselves of all the benefits and protections that Virgin Islands probate and estate law have to offer, Defendants cannot also seek to escape its drawbacks. Whereas the Virgin Islands has a strong interest in applying its law on punitive damages, New York and Florida have no conceivable interest in denying the Virgin Islands from advancing that interest. As such, New York's choice-of-law rules dictate the application of Virgin Islands law to the issue of punitive damages.[9]

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[9] As an indication of the Virgin Islands' interest in matters concerning Epstein's Estate, the Attorney General of the United States Virgin Islands filed suit against the Estate on January 15, 2020, seeking, among other things, punitive damages. Complaint, *GVI v. Estate of Jeffrey E. Epstein*, No. ST-20-CV-014 (V.I. Sup. Ct. Jan. 15, 2020), Dkt. No. 1.

2. Virgin Islands Law Would Allow for Punitive Damages against Defendants in this Case.

Virgin Islands law would allow for an award of punitive damages in this case. When determining how best to apply common law, courts in the Virgin Islands apply what is known as the *Banks* analysis. *See Gov't of the V.I. v. Connor*, 60 V.I. 597, 600, 602 (2016); *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 979 (2011). As part of the *Banks* analysis, the Virgin Islands Supreme Court has "instructed that, instead of mechanistically following the Restatements, courts should consider three non-dispositive factors to determine Virgin Islands common law: (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) most importantly, which approach represents the soundest rule for the Virgin Islands." *Connor*, 60 V.I. at 600 (internal quotation marks omitted). Under the *Banks* analysis, given the extraordinary nature of this case, Plaintiff can pursue punitive damages against Defendants.

a. *Banks* Factor One: Whether Any Virgin Islands Courts Have Adopted a Rule

Virgin Islands courts have not adopted a rule as to whether a plaintiff can pursue punitive damages against the estate of a deceased tortfeasor who went to great lengths to avoid punishment for his crimes, including by taking his own life. Although Defendants cite to the Second Restatement of Torts' position that punitive damages are not awarded against the representatives of a deceased tortfeasor, Defs.' Mem. at 13–14, that position is included only in commentary and is not binding on Virgin Islands courts. *See Connor*, 60 V.I. at 600 (instructing not to "mechanistically" follow the Restatements). And although some Virgin Islands trial courts have cited to the Restatement, those courts were not faced with the question at issue in this case: whether punitive damages are available against an estate. *See, e.g., Pappas v. Hotel on the Cay Time-Sharing Ass'n, Inc.*, 69 V.I. 3, 6 & n.8 (V.I. Super. 2015) (citing the Restatement in a case

that did not involve an estate); *Hamilton v. Dowson Holding Co.*, 51 V.I. 619, 628 (Super. Ct. 2009) ("[P]unitive damages are not available in wrongful death actions in the Virgin Islands."). Defendants have not cited a single Virgin Islands case adopting the Restatement's commentary's position on that specific issue. Given the lack of any established rule in the Virgins Islands governing this case, this *Banks* factor is neutral.

b. *Banks* Factor Two: The Position Taken by a Majority of Courts from Other Jurisdictions

As to the second *Banks* factor, numerous courts have held that plaintiffs may recover punitive damages against the estate of a deceased tortfeasor. *See, e.g., Haralson v. Fisher Surveying, Inc.*, 31 P.3d 114, 117 (Ariz. 2001) (concluding that "there are situations in which it would be appropriate, and perhaps even necessary, to express society's disapproval of outrageous conduct by rendering such an award against the estate of a deceased tortfeasor" (internal quotation marks omitted)); *Tillett v. Lippert*, 909 P.2d 1158, 1162 (Mont. 1996) (rejecting "the reasoning of those courts which have disallowed punitive damages against the estates of deceased tortfeasors"); *Perry v. Melton*, 299 S.E.2d 8, 12 (W. Va. 1982) ("Punitive damages in this state serve other equally important functions and are supported by public policy interests going beyond simple punishment of the wrongdoer."). Those courts have reasoned that punitive damages do not only serve to punish wrongdoers, but also to "motivate others not to engage in similar action in the future." *Kaopuiki v. Kealoha*, 87 P.3d 910, 928 (Haw. Ct. App. 2003).[10] In this case, general

[10] *See also, e.g., Ellis v. Zuck*, 546 F.2d 643, 644–45 (5th Cir. 1977) (punitive damages allowed against estate because they provide "deterrents to others similarly situated from taking steps of the character condemned"); *Estate of Farrell ex rel. Bennett v. Gordon*, 770 A.2d 517, 521–22 (Del. 2001) (punitive damages available against estate because they "serve a dual purpose—to punish wrongdoers and deter others from similar conduct" (internal quotation marks omitted)); *Hofer v. Lavender*, 679 S.W.2d 470, 474 (Tex. 1984) (exemplary damages available against estate because they "serve as an example to others").

deterrence is of the utmost importance—Epstein spent decades abusing countless young women and girls, intimidating them into silence, and gaming the justice system with his wealth and power to avoid punishment. No person should be able to commit such acts while at the same time considering themselves to be above the law.

Even courts that generally do not allow for punitive damages against a deceased tortfeasor's estate have expressly acknowledged that punitive damages might be available where, as here, the deceased tortfeasor takes his own life "as an escape from punitive damages." *Crabtree ex. Rel. Kemp v. Estate of Crabtree*, 837 N.E.2d 135, 139 (Ind. 2005) ("If we ever encounter a case where a tortfeasor seems to have considered his own death as an escape from punitive damages incident to some intentional tort, we can address that issue at that time."). Here, it is undisputed that punitive damages would have been available against Epstein if he were still alive. But Epstein spent his life using his power, wealth, and intimidation to avoid proportionate punishment for his countless crimes. *See* Compl. ¶¶ 8, 14. And once he was finally imprisoned pending trial for his sex-trafficking operation, he signed his will and then almost immediately caused his own demise. *See id.* ¶¶ 30, 31. Given the unique facts surrounding Epstein's crimes and death, and the need to deter others from committing such heinous crimes against vulnerable victims and then using power to avoid the consequences, the second *Banks* factor weighs heavily in favor of allowing for punitive damages under these facts.

c. *Banks* Factor Three: The Soundest Rule for the Virgin Islands

Although none of the three *Banks* factors is dispositive, the third factor—"which approach represents the soundest rule for the Virgin Islands"—is the most important. *See Connor*, 60 V.I. at 600. The soundest rule for the Virgin Islands is to allow for punitive damages against an estate in circumstances as extraordinary as those in this case. Here, the deceased tortfeasor spent his life avoiding punishment, used wealth, power, intimidation, and threats to prevent his victims from

seeking justice, and then caused his own demise once he was about to face real punishment for his countless crimes. Allowing for punitive damages in this case would be in line with the general deterrence principle behind punitive damages because it would deter others from manipulating the justice system and silencing victims of sexual abuse to avoid punishment. *See, e.g., Guardian Ins. Co. v. Gumbs*, No. ST-15-CV-195, 2016 WL 9525609, at *10 (V.I. Super. Aug. 22, 2016) ("[A] primary purpose behind punitive damages [is] . . . to further deter [the tortfeasor] and others like him from similar conduct in the future."). The rule would also be consistent with the cases suggesting that punitive damages against the estate of a deceased tortfeasor may be available if the tortfeasor committed suicide to avoid punishment. The absence of any Virgin Islands case adopting the Restatement's commentary about punitive damages against estates, coupled with the extraordinary nature of Epstein's transcontinental sex-trafficking enterprise, counsel in favor of such a rule.[11] The Court should therefore deny Defendants' motion to dismiss punitive damages.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss Plaintiff's Complaint. Because Defendants seek to dismiss Plaintiff's Complaint in full, Plaintiff requests oral argument on Defendants' motion.

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[11] To the extent necessary, United States courts may certify questions to the Supreme Court of the Virgin Islands if there is "a question of law which may be determinative" and if "it appears there is no controlling precedent in the decisions of the Supreme Court." *Banks*, 55 V.I. at 972 (internal citations omitted). Because the issue would be a matter of first impression in the Virgin Islands, and given the split in common law authorities concerning the availability of punitive damages against a deceased tortfeasor's estate, the Court should certify the question to the Supreme Court of the Virgin Islands if it deems it necessary to resolve the issue at this stage of the case. *See CIT Bank N.A. v. Schiffman*, 948 F.3d 529, 537 (2d Cir. 2020), *certified question accepted*, No. 36, 2020 WL 729773 (N.Y. Feb. 13, 2020) (certifying questions where no precedent from state's highest court is available, and the state court was better situated to make "value judgments and important public policy choices").

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Respectfully Submitted,

/s/ Joshua I. Schiller

David Boies
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

Sigrid McCawley
(Pro Hac Vice)
BOIES SCHILLER FLEXNER LLP
401 E. Las Olas Blvd., Suite 1200
Ft. Lauderdale, FL 33301
(954) 356-0011

Joshua I. Schiller
Andrew Villacastin
Sabina Mariella
BOIES SCHILLER FLEXNER LLP
55 Hudson Yards
New York, NY 10001
(212) 446-2300

Counsel for Plaintiff Jane Doe 1000