UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
		Docket #1:20-cv-02365-LJL-DCF
DOE, JANE,	:	
Plaintiff,	:	
- against -	:	
INDYKE, DARREN K. et al,	:	New York, New York August 26, 2021
Defendants.	:	
		TELEPHONE CONFERENCE
----------	:	

PROCEEDINGS BEFORE
THE HONORABLE JUDGE DEBRA C. FREEMAN,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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None				

E X H I B I T S

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HONORABLE DEBRA C. FREEMAN (THE COURT): This is Judge Freeman. This should be Jane Doe versus Indyke et al. It is 20-civ-2365, a case before Judge Liman and myself.

Could I have your appearances, please, for the record, starting on plaintiff's side?

MR. DANIEL J. KAISER: Daniel Kaiser of Kaiser Saurborn & Mair, your Honor, representing Jane Doe.

THE COURT: Okay. And on defendants' side?

MR. BENNET MOSKOWITZ: Good morning, your Honor. Bennet Moskowitz, Troutman Pepper, representing the co-executors. And I just discovered there was a kind of a clerical error with the Proposed Scheduling Order filed last week. So I just wanted to put a note down that, when your Honor pleases, I'd like to just note that for the record so we can correct it.

THE COURT: That's fine. Is there anyone else currently on this call? Do I have my clerk on? Donna, are you there?

THE CLERK: I'm here, Judge.

THE COURT: Okay. Is there anyone else on the line?

THE DEPUTY CLERK: It's Aisha. I'm on, too.

THE COURT: Oh, my deputy's on, as well.

MR. JAMES HILL: Good morning, your Honor. This is James Hill; I'm the reporter with ABC News, in listen-only mode.

THE COURT: Okay. Anyone else on the line?

MALE: A reporter from the New York Post.

THE COURT: I'm sorry, say it again, please?

MALE: A reporter from the New York Post on listen-only mode.

THE COURT: Okay. All right. I have a few things in front of me. First of all, I have the need to set a Scheduling Order. I also have a motion for plaintiff for leave to proceed anonymously. I also have a pro hac vice application. That pro hac application I have granted; it just probably has not hit the docket yet. But that one is resolved. I've also granted the motion to seal some papers that were submitted in connection with the motion to proceed anonymously. So that's also newly hitting the docket, my granting of that application.

With respect to a Scheduling Order, I'm wondering, rather than to have a Scheduling Order that has everything just based on a certain number of days after there is an answer, waiting to see if there is an answer or if there is a motion, if there is an answer, then I would propose to set a schedule that has actual firm dates in it for things

so that we don't have this wait with the date that is 100 days after this or 120 days after that or whatever. If there is as motion, I think we ought to have a discussion about whether discovery should proceed in light of the motion and if so, to what extent. There is not automatic stay of discovery when a motion to dismiss is filed. But there can at times -- it can at times make sense to stay discovery in whole or in part. The default is that discovery would go forward, but I think it would be worth taking a look at any schedule in light of any motion that's pending, to see what the basis of the motion is and to see what sort of discovery would make sense.

So I'm thinking of potentially -- well, actually, I think what I'd like to do is find out from defendants, do you intend to file a motion?

MR. MOSKOWITZ: We do, your Honor. Essentially, there are statute of limitations issues, number one; and, number two, there's a request for punitive damages, which your Honor likely recalls that that's an issue that's been ruled on in several cases already. So those are at least the two grounds that I'm currently aware of that we plan to move on.

THE COURT: Have the rulings on the punitive damages point been consistent?

MR. MOSKOWITZ: They have, your Honor. And to put a finer point on it, it's somewhat different here due to the fact that the plaintiff, as far as I'm aware, is couching the claim solely as Trafficking Victim Protection Act claims. However, there was a ruling in at least one prior case on that. But punitive damages generally, yes, have been repeatedly dismissed on motions to dismiss insofar as they've been asserted against the Epstein estate.

THE COURT: And assuming you file this motion, would you be looking for any stay of discovery in whole or in part?

MR. MOSKOWITZ: Well, your Honor, our position is not that we would necessarily file a formal motion to stay; but consistent with prior positions, what I would say is this, which is that it would be a shame for discovery to go forward at full speed and potentially spin out of control if -- and I don't know this yet and this is something that is up to plaintiff to tell us whenever they please -- or not -- but if there's any prospect of discussing exploration of a resolution outside of litigation -- and I guess what I'd say to that, your Honor, since we haven't spoken a bit of a while for -- based on our track record, is, you know, as a general matter, the estate is in favor

of alternative dispute resolutions and settlements. And, of course, that's why we had the very successful Epstein Victims' Compensation Program. And as the Court may be aware, the program's independent administrator recently actually announced that the program has essentially finished the front-end stage and is proceeding to wind down. It's awarded nearly 125 million to approximately 150 eligible claimants. And that was roughly one year after it launched. You may recall that was back in June of 2020. Ninety-two percent of eligible claimants accepted their offers, and at the time of the announcement the program had already paid out over 121 million to those claimants.

I can't go into on the estate side who or why certain resolutions did not happen via the program; however, again we are open as a general principle to exploring with any claimants who wish to do so whether there's a potential for resolution outside of litigation. And that's true in this case as with any of the others that remain.

MR. KAISER: If I may, your Honor?

THE COURT: Sure. Who's this, please?

MR. KAISER: Dan Kaiser. Just on those points -- I don't want to get into a lot of detail -- but the victims' compensation fund was not successful, which

[indiscernible] like, you know, it's not necessarily relevant, although I had explicit discussions with the administrator, and she was very explicit with me on the phone how politics, you know, restrained her and entered into what she did or didn't do with my client. So -- and I don't want to get into the details about that, but she was very, very openly acknowledged of that. And we're very happy to have settlement discussions. We've never disguised that. We've been open to it. If the other side wants to, for example, engage a mediator to see whether it can be resolved, then we're happy to explore that. And if they're saying that the continuance at this point of discovery would interfere with that process, I'm happy to preliminarily have discussions about resolution to see if it could happen without the need for discovery. I won't get into the statute of limitations issues -- I'm not sure what the merits of that are, but we'll deal with them at another time. But, again, your Honor, I'm happy to have those discussions; and if they're going to be had, particularly in this case and the context and posture of it, it should happen sooner rather than later.

THE COURT: Sure. Just a quick question about the statute of limitations issues, if that defense is successful, would it resolve the entire case or only part

of the case?

MR. KAISER: Well, I don't --

MR. MOSKOWITZ: I believe --

THE COURT: Mr. Moskowitz?

MR. KAISER: Go ahead. I'm sorry. Go ahead.

MR. MOSKOWITZ: No apologies. I didn't know if that question was more for me, your Honor --

THE COURT: This is Mr. Moskowitz?

MR. MOSKOWITZ: Yeah. I believe it's partial. I don't believe it's a total dismissal.

THE COURT: All right. So based on what I have heard, my view is that, assuming the motion is made -- and I accept that it likely will be -- that discovery should still go forward, but it should go forward in part because the case would not be fully resolved, anyway, even if the motion were granted. And so there's no reason to let discovery be stalled. But because of the parties' expressed interest on both sides in pursuing settlement and possibly because of the motion, discovery should be scheduled with an eye toward what is practical. So perhaps there should be some time built in on the front end where you can talk settlement; or perhaps it should be structured so that certain things are done first that you know you would likely have to do anyway but are not the most

burdensome things and some other things that you might have to do down the road that perhaps are more burdensome, we have it on a schedule, you know when you're going to do it if you have to, but perhaps you kick it a little bit further down so that you don't spend unnecessary time, money and effort on discovery that may not be needed.

With respect to settlement, you have a number of options. One option is that you talk between you without the aid of a third-party mediator or other dispute-resolution professional. You just talk between counsel as counsel and you see what you can do to try to negotiate a resolution. I have great confidence in lawyers' skills in advancing the ball in settlement. Here there were some unusual circumstances where this program was set up and obviously a lot of claims were put there instead of put before counsel to try to work something out. But at this stage of the game it seems to me the first thing you should do is have good-faith conversations between you and see where you are.

If that is not successful, you have a number of options with respect to mediation. You could go to the court's mediation program -- and I'm happy to send you there. You can come before me, and I'm happy to host you. Or you could retain a private mediator of your choice

through whatever organizational or whatever individual you're both comfortable with. And I'm happy to have you do that, as well, if that's something you should talk about. But I do think that, if you're going to talk, the time to talk is in fact sooner rather than later because I don't want to see discovery stalled longer than necessary if the case is not going to be resolved. So if you build in some time at the front end of the discovery schedule to talk settlement, that means you should be talking settlement.

So I'm going to send you back to talk between counsel about how you want to proceed with this. I will tell you that, if I have a conference before me on settlement, I will require counsel to tell me that they've tried as hard as they can on their own and they really do need help, you know, that you're at impasse, you can't think of anything else to do, you know, all the skills that you have in settlement have been exhausted and you just have no other idea how to proceed other than to ask for outside help. And then I am happy to try to help you break through whatever log jam you've got. I think even if that's not a requirement for the mediation program or for an outside mediator, it doesn't hurt to try on your own first and get as far as you can and see whether you really need the help or if so, to figure out exactly what the gap

between the parties' positions is and just how much work has to be done to get there.

So what I'm thinking is this. Let me send you back to the well. Propose a discovery plan that, A, has in mind that a motion is coming and that the parties are interested in talking settlement; and, B, has firm dates in it instead of 30 days after this and 20 days after that and so on. I will tell you what I would generally put in a scheduling order, and you can modify it as you think would be appropriate. And if I think it's reasonable, I'll approve it. I would want a date for initial disclosures. Usually that comes pretty quickly. Usually it's within a couple of weeks after I issue my Scheduling Order.

Then once you get the information on the initial disclosures, assuming there's information that still hasn't already been informally exchanged, I'd want a date for service of initial document requests and interrogatories, just to make sure that ball is rolling. I will let you go outside Local Rule 33.3A, go straight to B with respect to the kinds of interrogatories you serve, to save some time because A is a lot like the initial disclosures under 26A, and it seems to me that it doesn't make sense to object just because interrogatories go outside that rule when you can just serve a second set and be there anyway. I'm not

talking about contention interrogatories. Save those for further down the pike. I'm not talking about interrogatories that are abusive or call for long, narrative responses. Use your judgment, please.

With respect to motions to amend or for joinder, as soon as you reasonably have the idea as to whether you've got the right claims and the right parties, let's get that closed down so that something doesn't happen late in the case that throws a monkey wrench into everything. I'm looking for a deadline, a proposed deadline for motions to amend or joinder. If there's not going to be an objection by your adversary, I'm not going to require the motion. So you've got to back up whatever deadline it is in your head, think about drafting a proposed amended pleading, sending it to your adversary saying would you oppose this if I were to move to amend. It doesn't have to be consent; it just has to be I wouldn't object to it, I wouldn't oppose it. If there's not going to be an opposition, let me know, and I'll just accept the amended pleading for filing. If there is going to be an objection, I want a deadline in the Scheduling Order for motions to amend or for joinder. If you miss that deadline that's in the Order, be aware it is an important deadline because if you miss it, you're going to be in Rule 16 land with having

to show good cause why you couldn't meet a date in a Scheduling Order, and that liberal amendment standard of Rule 15 can go out the window if you can't show good cause for missing the deadline. So give me a deadline for motions to amend or joinder. If you think there might really be an amendment and you're worried about the deadline, put your hand in the air and ask to have it extended before that date comes. Don't find yourself with a problem under Rule 16. Obviously, if something comes up late in the game that was honestly something that couldn't have been anticipated, you'll have good cause for a late motion to amend; but, you know, don't risk it if you can possibly avoid that.

And then a deadline for the close of fact discovery, I'm going to try not to micromanage you other than getting that ball rolling on document requests and interrogatories. I'm not going to require you to set firm dates for depositions or the like unless you start running into problems and there's no other way to do it than to have court-ordered dates. I don't anticipate that.

With respect to any experts, generally what I would do is I would say if you've got the affirmative burden of proof on an issue, get your expert reports out within 30 days of the close of fact discovery, rebuttal

reports 30 days after that, and then you'll have a small window for expert depositions. If there's something unusual going on here, if you think that schedule does not work, talk about it. But that's what I would ordinarily do.

And that's all I've got on that. Does that sound reasonable for you to go back and talk and see what you can come up with?

MR. MOSKOWITZ: Bennet Moskowitz. Yes, your Honor. And if I could, before we close as far as discussion, I did want to address that clerical issue because, notwithstanding that we're not going to -- the Court's not going to enter the proposal that was already submitted, I do want to correct it for the docket.

THE COURT: Sure. I have it in front of me. What was it?

MR. MOSKOWITZ: Yes. It has the wrong signature page. It looks like a signature page from another action against the estate.

THE COURT: Oh, dear.

MR. MOSKOWITZ: Apologies if that was on our end. I'm not even certain yet. We certainly filed the --

THE COURT: That's what happens when there are too many cases. All right, no problem.

MR. MOSKOWITZ: We tried to reduce the number. So I would like to -- I don't know if the Court can remove that from the docket or -- I just don't want to have it hanging there. You know, obviously, the other attorney from the other case shouldn't be reflected on this docket.

THE COURT: We can figure out something. If you want to just send a -- put a letter on the docket saying that it's withdrawn. I mean, it won't disappear from the docket. I mean, it's not something that would ordinarily get sealed. But you can write a letter and just indicate that there's an error if you want to have the docket reflect that.

MR. MOSKOWITZ: Sure.

THE COURT: Right? I mean, for anyone on the call who's listening in on mute who's a member of the press, there's as document on the docket that has the wrong signature page. So please ignore it.

Anyway, just put some letter on the docket about it, and I'll deal with it when I get that letter from you.

MR. MOSKOWITZ: Understood. Thank you, your Honor.

THE COURT: Okay. That --

MR. KAISER: Your Honor --

THE COURT: Yes.

MR. KAISER: I'm sorry, your Honor. It's Dan Kaiser. Just one point of clarification. To the motion to proceed anonymously still needs to be ruled upon, correct?

THE COURT: Yes. Yes. I was just going to turn to that.

MR. KAISER: Okay. Yes. Okay.

THE COURT: Anything else about scheduling?

By the way, you have some other things in the Proposed Scheduling Order like a date to provide HIPAA releases. That's fine. If you want to add some things in there that you think are worth having in there that you want to have, you know, the power of the court behind to make sure things happen by a certain date, you can. Those things that I outlined for you are the things that I require to be in a Scheduling Order, initial disclosures, date to serve initial document requests and interrogatories, deadline for amendment of pleadings and joinder, deadline for fact discovery, and then the schedule for expert discovery. If there's something else in there that you think would be helpful, you know, you can add it in there by agreement.

And also, you can stipulate to modify an interim dates in my Scheduling Order that you want if it all wraps up at the same point in time. I want to see it end the

same way. If you agree that fact discovery can slide into the period for expert discovery and you're in agreement it can get done, it's okay. If you agree that you can move some other date in there because you're talking settlement but you're still looking at the same end date, you don't need leave of Court to do that; you can just stipulate to that. If it's the amendment deadline, let me know that you're stipulating so that we don't have any confusion there about what rule you're under if there's a motion that comes in late. Okay?

All right --

MR. KAISER: Yes, your Honor.

THE COURT: -- with respect to the motion to proceed anonymously, I've looked at the motion, I've looked at what was put on the docket for the Court's view in unredacted form, I've looked at the reply. My inclination at this point is to grant the motion to proceed anonymously. It may be revisited at a later date, but I think at this juncture that is the better course, and so I'm going to allow this case, like the other cases in the court, to proceed with plaintiff as Jane Doe. So I'm going to grant that.

Is there anything else?

You know what, let me give you one other thing to

do, which is after -- I'm sorry, which is to put in the Proposed Scheduling Order a date by which you'll send me a joint status report on how things are going, both with respect to the status of discovery and the status of your settlement talks. Just figure out what would be a logical point in time to report back to me, and put in the date so that I don't lose track of the case.

With respect to a status report on the settlement, this is going to be a publicly filed document, so I really don't want you to put your confidential settlement discussions in the letter -- that's not the purpose of it, and I don't really think that belongs on the public docket. So what I mean by a status letter on settlement is the following. I've taken to saying this a lot in cases these days when I ask for status reports on settlement. From best to worst, the best kind of status letter you can put on the docket to the worst kind of status letter you can put on the docket, the best is, "We have a resolution in principle, Judge." That's obviously great. Next best is, "We are talking seriously. Because of that -- and we think we're optimistic -- we'd like a little bit more time to get back to you. We think maybe we need a little bit of discovery; but, you know, we think this is going well." And then propose how you want to proceed from there. "We'd

like some further extensions on deadlines in light of this," or, "We'd like another status report letter date," or something. Next is, "We've been talking seriously, and we're having difficulty. We really would like to try the assistance of a mediator, you or the mediation program or outside mediator," or whatever it is you want to propose; you let me know. Next is, "We've been talking seriously. We're not getting anywhere. We don't think we're going to get anywhere. We think this case has to be litigated. We think there's absolutely no hope." If I see a letter like that, I'll probably have another call with you and say, "Are you sure there's nothing that can help you, because I know both sides are interested." And I'm usually more optimistic than the parties when I get a letter like that. The worst letter you can put on the docket is, "Even though I know you're interested in settlement, we've done nothing on this front. We haven't been talking. We haven't advanced the ball at all since the last time we had a conference two months ago. It's been completely stagnant on that front." If you're interested in settlement, pursue it; try to make progress and give me an actual progress report. Okay?

MR. KAISER: Yes, your Honor.

MR. MOSKOWITZ: Understood.

THE COURT: Anything else for today?

MR. MOSKOWITZ: Thank you, your Honor.

MR. KAISER: Nothing for plaintiffs. Nothing from plaintiffs, your Honor.

THE COURT: So get me a modified proposed schedule. I'll let you get the motion filed and take a look at that motion. It's supposed to come in, what, September 7 -- was that the day? What was the date I gave you for a motion? I don't remember. Sixth, I think it was --

MR. KAISER: Correct, September 6.

THE COURT: September 6. So how about you get me a Proposed Scheduling Order in light of that motion by September 10?

MR. MOSKOWITZ: Sure.

MR. KAISER: That works, your Honor.

THE COURT: Okay. All right, I'll look for something on the docket by then.

Thank you, all.

(Whereupon, the matter is recessed.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Doe v. Indyke et al, Docket # 20-cv-02365-LJL-DCF, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: September 3, 2021