IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

CIVIL CASE NO.: ST-2020-CV-00155

GHISLAINE MAXWELL,

Plaintiff,

vs.

ESTATE OF JEFFREY E. EPSTEIN, DARREN K. INDYKE, in his capacity as EXECUTOR OF THE ESTATE OF JEFFREY E. EPSTEIN, RICHARD D. KAHN, in his capacity as EXECUTOR OF THE ESTATE OF JEFFREY E. EPSTEIN, and NES, LLC, a New York Limited Liability Company,

Defendants.

PLAINTIFF'S BRIEF IN RESPONSE TO COURT ORDER

Plaintiff, GHISLAINE MAXWELL (hereinafter, "Plaintiff"), pursuant to this Court's oral directive at the status conference held on March 9, 2022, hereby files her brief as to whether Virgin Islands public policy bars one or more of her claims in this action.

INTRODUCTION

This is an action for indemnification for the attorneys' fees, security costs, costs to find safe accommodation, and all other expenses Plaintiff has incurred by reason of her prior employment relationship with Jeffrey E. Epstein ("Epstein") and his businesses. From approximately 1999 through at least 2006, Maxwell was employed by Epstein and several of his businesses, including NES LLC. In this capacity, Plaintiff was responsible for managing Epstein's properties in the U.S. Virgin Islands and elsewhere. In the wake of Epstein's 2008 guilty plea in Florida to a felony charge of soliciting prostitution from a minor, Plaintiff has

incurred legal fees and expenses in connection with various legal proceedings relating to Epstein, his businesses, and his alleged victims.

Plaintiff seeks indemnity under three distinct theories: (1) Epstein promised Plaintiff that he would indemnify her for any expenses incurred by reason of her employment relationship with him and his businesses, and Plaintiff relied on that promise; (2) Plaintiff is entitled to indemnification under a common law theory due to her employment relationship with Epstein and his businesses; and (3) NES, LLC (and other possible companies) must indemnify Plaintiff for legal fees, personal security costs, and other expenses incurred by reason of her agency relationship to NES, LLC.

In the briefing on Co-Executors Darren K. Indyke and Richard D. Kahn's (the "Co-Executors") Motion to Dismiss Plaintiff's Complaint, the Co-Executors suggest that Plaintiff "cannot be indemnified for intentional wrongdoing, including criminal conduct." *See* Co-Executors' Reply Brief in Support of Motion to Dismiss dated September 28, 2020 (the "Reply"), at pp. 3-4, n. 2. As shown below, Virgin Islands public policy does not bar Plaintiff's indemnity claims in this action.

ARGUMENT

I. Plaintiffs' Claims May Not Be Barred as a Matter of Public Policy at This Preliminary Stage of the Proceedings.

A. Virgin Islands public policy does not necessarily bar Plaintiff's contractual indemnity claims.[1]

In support of its original argument that Plaintiff "cannot be indemnified for intentional

[1] As an initial matter, the Co-Executors' public policy defense arises in the contract law context. Therefore, it would not operate to bar Plaintiff's claims to the extent that they arise under common law or general corporation law theories.

wrongdoing, including criminal conduct," the Co-Executors cite a single Virgin Islands case, *Berne Corp. v. Government of the Virgin Islands*, 46 V.I. 106, 115 (V.I. Super. Ct. 2004) for the general proposition that "[t]he Court has a duty to refuse to enforce a contract that is contrary to public policy and tends to injure the public good." *See* Reply, at pp. 3-4, n. 2. The Co-Executors posit that "[c]ourts across the country—including in New York, where the underlying actions against Maxwell are pending—hold that indemnification for intentional wrongdoing is against public policy because it would promote illegality and allow a wrongdoer to cause intentional injury with impunity," but cite no Virgin Islands case for this proposition. Finally, the Co-Executors cite a Virgin Islands case, *Willie v. Amerada Hess Corp*., 66 V.I. 23, 34 (V.I. Super. Ct. 2017), for the notion that the Virgin Islands recognizes common law indemnification "when an *innocent party* is held vicariously liable for the actions of the *true tortfeasor*." *See* Reply, at p. 4, n. 2 (emphasis in original). The Co-Executors cite no other Virgin Islands case, statute, rule, or regulation that defines relevant Virgin Islands public policy or what may be "contrary to [its] public policy."

To determine the public policy of this forum, Virgin Islands case law, statutes, rules, and regulations must be examined. *In re Catalyst Third-Party Litig*., 2020 WL 1862216, *26 (V.I. Super. April 13, 2020) (*citing Twin City Pipe Line Co. v. Harding Glass Co*., 283 U.S. 353, 357 (1931) ("In determining whether the contract here in question contravenes the public policy of Arkansas, the constitution, laws and judicial decisions of that State and as well the applicable principles of the common law are to be considered. Primarily it is for the lawmakers to determine the public policy of the State."); *Bloch v. Bloch*, 9 V.I. 554, 558 (3d Cir. 1973) ("'I find nothing in the statutory or decisional law in the Virgin Islands to indicate that a common law marriage,

even if prohibited, is against the public policy of this forum.'" (citation omitted)). In *Catalyst*, this Court declined to follow longstanding Third Circuit precedent – at the risk of "disrupting the state of the law" that "Virgin Islands companies and companies doing business in the Virgin Islands ha[d] come to rely on – because the Third Circuit did not consider Virgin Islands cases or statutes, "relied almost exclusively on federal precedent, even though the question at issue in each case involved … Virgin Islands public policy," and "did not attempt to identify the best approach for the Virgin Islands." *Id*.

In light of the following Virgin Islands public policy, which is derived from Virgin Islands case law, statutes, and rules, the Co-Executors are incorrect in their assertion that Plaintiff "cannot be indemnified for intentional wrongdoing, including criminal conduct," and their reliance on the public policy of *other* jurisdictions is misplaced:

i. *Freedom of contract in indemnification context*

"[T]he underlying purpose of contract law ... is to hold parties to their agreements so that they receive the benefit of their bargains." *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 621 (V.I. 2017) (citations omitted). The *Catalyst* Court found that:

> Virgin Islands businesses and residents, and companies doing business in the Virgin Islands, have assumed that Virgin Islands common law will let them agree among themselves how to allocate responsibility for loss, liability, injury, and damages and further, that Virgin Islands courts would enforce such agreements and provide a remedy if breached. The law of contracts is designed to effectuate exchanges and to protect the expectancy interest of parties to private bargained-for agreements.

Catalyst, 2020 WL 1862216, at *13 (*citing Phillip*, 66 V.I. at 621) (internal quotation marks omitted). While "the Virgin Islands Legislature has not weighed in on indemnification agreements, including agreements whereby one party agrees to indemnify another party for that

party's own negligence," the Virgin Islands Supreme Court promulgated a rule that potentially requires a lawyer to indemnify the financial institution servicing client trust accounts even if the institution is negligent. *Id*. (*citing* V.I. S. Ct. R. 211.1.15-3(j) ("Every lawyer or law firm maintaining a trust account in the Virgin Islands shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements by financial institutions mandated by Rule 211.1.15-5 and shall indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement.")).

ii. *Indemnification among joint tortfeasors*

Virgin Islands courts have recognized the right to common law indemnity between joint tortfeasors. That is, under Virgin Island law, a party seeking indemnification is not required prove that it was not at fault in causing a plaintiff's injuries. *See, e.g., Dublin v. Virgin Islands Tel. Corp*., 15 V.I. 214, 227 (Terr. V.I. June 9, 1978) (holding "that a right to contribution or indemnity against a joint tortfeasor exists in the Virgin Islands.")(*citing*, *inter alia*, *Silverlight v. Huggins*, 10 V.I. 638 (3d Cir 1973); Restatement (Second) of Torts § 886B (Indemnity Between Tortfeasors). *Cf*. 5 V.I.C. § 1451 (Virgin Islands comparative negligence statute silent on issue of a right to indemnity among joint tortfeasors). Indeed, Virgin Islands courts have long recognized that "[t]here is no public policy which prevents judicial enforcement of an agreement to shift liability for the consequences of one's own negligence." *Hess Oil Virgin Islands Corp. v. Firemen's Ins. Co*., 626 F. Supp. 882, 884, 22 V.I. 139, 143 (D.V.I. 1986) (*citing Eastern Airlines, Inc. v. INA*, 758 F.2d 132 (3d Cir.1985); *United States v. Seckinger*, 397 U.S. 203, 211, 90 S.Ct. 880, 885, 25 L.Ed.2d 224 (1970)); *Dominic v. Hess Oil Virgin Islands Corp*., 624 F. Supp. 117, 119 (D.V.I. 1985) ("CS&M's contention that the agreement in question, which

indemnifies HOVIC against its own negligence, is void against public policy, would come as a surprise to the Third Circuit. This appellate court has resolved so many disputes involving these agreements, that the public policy issue has long been put to rest. … Repeatedly the circuit court has held that there is no public policy which prevents judicial enforcement of an agreement to shift liability for the consequences of one's own negligence.")[2] *See also, Catalyst*, 2020 WL 1862216. *26 ("[T]he Court agrees that the soundest rule for the Virgin Islands is to recognize a cause of action for breach of an indemnification agreement. And, whether an indemnification agreement covers A's negligence, B's negligence, or A through Z's negligence is for the contracting parties to decide.")

The foregoing is consistent with the Restatement, which provided the rules of decision in this jurisdiction from 1921 to 2011 (where there was no contrary local law).[3] The Restatement on indemnity does not make a distinction between negligent and intentional tortfeasors. *See* Restatement (Second) of Torts § 886B; Restatement (Third) of Torts: Apportionment of Liability § 22 (1999 & Supp.2006) ("When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement ..., the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, if … the indemnitor has agreed by contract to indemnify the indemnitee...."). *See also Brooks v. Dana Nance & Co.*, 113 Haw. 406, 417, 153 P.3d 1091, 1102 (Haw. 2007) ("Restatement (Second) § 886B does not distinguish between intentional and other

[2] While the *Catalyst* Court criticized the reasoning employed in *Hess* and *Dominic*, they have been approvingly cited over the years and remain good law.

[3] 1 V.I.C. § 4; *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011).

forms of tort. Accordingly, the Restatement (Second) does not foreclose a right of indemnity for intentional torts in the present matter.")

In any event, there is no public policy, case, statute, or other provision of Virgin Islands law barring a contracting party from indemnification for an intentional or willful act.

iii. *Indemnification for criminal acts under General Corporation Law*

Under certain circumstances, Virgin Islands law provides that indemnification may be appropriate even if the indemnitee has been convicted of a criminal charge. Specifically, the General Corporation Law codified at Title 13 of the Virgin Islands Code provides in pertinent part that:

> (a) A corporation shall have power to indemnify **any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative** (other than an action by or in the right of the corporation) by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if:
>
> (1) he acted:
>
> (A) in good faith; and
>
> (B) in a manner he reasonably believed to be in or not opposed to the best interests of the corporation; and
>
> (2) with respect to any criminal action or proceeding, he had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the

> corporation, and with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

13 V.I.C. § 67a (emphasis added).

Clearly, the Virgin Islands' General Corporation Law statute *reflects* Virgin Islands public policy and is not *in violation of* Virgin Islands public policy. Plaintiff here was entitled to rely on Epstein's promise of indemnification because it was entirely consistent with this Virgin Islands indemnification statute.

B. There is no basis to bar Plaintiff's claims as a matter of public policy at the Rule 12 stage.

i. Plaintiff has no notice to date of any extra-pleading materials the Co-Executors want this Court to consider in connection with their Motion to Dismiss.

The Co-Executors' Motion to Dismiss is made pursuant to V.I. R. Civ. P. 12(b)(6). "The basic purpose of a motion to dismiss is to test the legal sufficiency of the complaint to state an actionable claim, not to test the truth of the fact alleged in the complaint." *Arno v. Hess Corp*., 71 V.I. 463, 495, (V.I. Super. October 17, 2019) (citation omitted). Courts have the discretion to exclude extra-pleading materials attached to a motion to dismiss for failure to state a claim for relief, or else convert the motion to dismiss into a motion for summary judgment to be able to address it. *Stanley v. Virgin Islands Bureau of Corr*., 2020 WL 1639902, *4 (V.I. Super. April 1, 2020). If the Court ultimately chooses to convert the motion to dismiss into a motion for summary judgment, it must notify the parties so they can "present all the material that is pertinent...." V.I. R. Civ. P. 12(d). *See also United Corp. v. Named*, 64 V.I. 297, 307 (V.I. 2016). Courts addressing the issue "have found that failure to give adequate notice to the parties before conversion constitutes reversible error." *Stanley*, 2020 WL 1639902, *5 (quotation and citation

omitted).

Here, in advancing their public policy argument, the Co-Executors are not challenging whether Plaintiff states a claim for relief. Instead, the Co-Executors seek judgment on the merits on the theory that Plaintiff "cannot be indemnified for intentional wrongdoing, including criminal conduct." The Co-Executors have not yet asked this Court to consider any specific extra-pleading materials that purport to establish such "intentional wrongdoing, including criminal conduct," despite having the burden to do so. *See, e.g.*, *Maduro v. Am. Airlines, Inc.*, 2008 WL 901525, *3 (V.I.2008) (under Virgin Islands law, the burden of proving an affirmative defense in a civil case is on the defendant); *Bryan v. Fawkes*, 2014 WL 5409110, *26 (V.I.2014) (citing 5 V.I.C. § 740(5)) (the party against whom the affirmative defense is asserted is "not required to prove a negative").

Plaintiff objects to the Court's consideration of any matters outside the pleadings that the Estate may submit with its Brief since the briefing on the motion is closed and Plaintiff will have been deprived of an opportunity to respond.

ii. The SDNY judgment of conviction, to the extent considered, does not conclusively decide any issues presented in this action.

In considering a motion to dismiss, a court may consider only the complaint, matters of public record, and indisputably authentic documents that the complaint relies upon. Courts have defined "public records" narrowly for the purpose of a motion to dismiss, which includes "criminal case dispositions such as convictions or mistrials, letter decisions of government agencies, and published reports of administrative bodies." *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1197 (3d Cir. 1993) (internal citations omitted); *see also Schmidt v. Skolas*, 770 F.3d 241, 249 (3d. Cir. 2014) (applying the *Pension* definition of public

records narrowly and refusing to consider press releases not attached to a complaint); *Bostic v. AT & T of Virgin Islands*, 166 F. Supp. 2d 350, 354 (D.V.I. 2001). A court may then only consider a criminal case conviction to establish *the fact* of the criminal case and conviction but may not consider it for the truth of any matters asserted therein. *Kramer v. Time Warner Inc*., 937 F.2d 767, 774 (2d Cir.1991) ("Courts routinely take judicial notice of documents filed in other courts ... not for the truth of the matters asserted in other litigation, but rather to establish the fact of such litigation and related filings."); *Crews v. Cnty. of Nassau*, 2007 WL 316568, at *2 (E.D.N.Y. Jan. 30, 2007) ("The Court takes judicial notice of certain documents and proceedings in the underlying criminal action only to establish the fact of such litigation, including (1) the notice of alibi dated September 27, 2005, and (2) the transcript of Crews' September 22, 2005 arraignment in Nassau County Court.")

In *Collins v. Kendall Cnty., Ill*., 807 F.2d 95, 99 (7th Cir. 1986), cited by the *Pension* Court, the Seventh Circuit reviewed the district court's dismissal of plaintiffs' bad faith prosecution claims, where the district court considered case "dispositions" of underlying cases referenced in, but not actually filed with, the complaint. After considering these case "dispositions," the district court found that the "defendants have successfully prosecuted the plaintiffs on three obscenity charges," and thus found that the plaintiffs failed to set forth facts supporting an inference of bad faith prosecution. *Id*. at 101. The *Collins* Court held that the "district court did not err in considering these undisputed matters appearing on the public record." *Id*. 99, n.6.

Here, assuming that the Co-Executors will offer Plaintiff's judgment of conviction in the U.S. District Court for the Southern District of New York ("SDNY") in support of their public

policy argument, the Court may only consider this record to establish the existence and disposition of the SDNY proceeding. The SDNY judgment entered on June 29, 2022 here reflects that only Plaintiff was adjudicated guilty of offenses under 18 U.S.C. § 371, 18 U.S.C. § 2423, and 18 U.S.C. § 1591. *See*, Judgment entered June 29, 2022 in SDNY Case No. 1:20-cr-00330-AJN, Document 696. While the Court might take judicial notice that Plaintiff was adjudicated guilty of these three offenses, the Court may not make any other findings based on the SDNY judgment or draw any inferences from the SDNY judgment favorable to Defendants at this stage. *See, Collins, supra*, at 99. *See also*, *Benjamin v. AIG Ins. Co. of Puerto Rico*, 56 V.I. 558, 566 (V.I. 2012) (on Rule 12(b)(6) motion, Court "view[s] the facts alleged in the pleadings and the inferences to be drawn from those facts in the light most favorable to the plaintiff.") Because the relevance of the SDNY disposition to *this* action is not apparent on its face, it provides no actual support for the suggestion that public policy bars the claims in this action.

Further, for a judgment to have preclusive effect and bar relitigation of an issue under the doctrine of collateral estoppel, an asserting party must satisfy the following elements:

> (1) **the issue to be barred is identical to an issue actually and necessarily decided in the prior action**; (2) the prior action was adjudicated in a decision that was final, valid, and on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party to the prior action; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior action.

Stewart v. Virgin Islands Bd. of Land Use Appeals, 66 V.I. 522, 549–50 (V.I. 2017) (emphasis added).

Here, the Co-Executors' have not yet identified what specific issues they contend have

already been decided by the SDNY that are identical in this case. In fact, the narrow issues tried before the SDNY do not necessarily overlap with Plaintiffs' claims here, which include indemnification for expenses incurred in connection with a civil lawsuit filed by Jennifer Araoz (who did not testify in the SDNY proceeding), investigations relating to Epstein, and security services incurred in 2019 in the wake of intense media scrutiny following Epstein's arrest. To the extent that Plaintiff's claims relate to expenses that Plaintiff incurred exclusively because of Epstein's actions, such claims would clearly not be subject to any public policy bar. Simply put, the SDNY judgment of conviction does not conclusively establish any issue presented here and is not dispositive of this action.

Finally, Plaintiff has appealed the SDNY conviction to the U.S. Court of Appeals for the Second Circuit. While Virgin Islands courts have not spoken on the issue, many courts have found that a trial court judgment of conviction is not final for purposes of res judicata or collateral estoppel when it is on appeal. *See, e.g.*, *People ex rel. Gow v. Mitchell Bros.' Santa Ana Theater*, 161 Cal.Rptr. 562, 568 (Cal.Ct.App.1980); *Greene v. Transp. Ins. Co.*, 169 Ga.App. 504, 313 S.E.2d 761, 763 (Ga.Ct.App.1984); *Dupre v. Floyd*, 825 So.2d 1238, 1240–41 (La.Ct.App.2002) (*per curium*), *writ denied*, 840 So.2d 546 (La.2003); *Petition of Donovan*, 137 N.H. 78, 623 A.2d 1322, 1324 (N.H.1993); *Benham v. Plotner*, 795 P.2d 510, 512 (Okla.1990); *McBurney v. Aldrich*, 816 S.W.2d 30, 34 (Tenn.Ct.App.1991); *Faison v. Hudson*, 243 Va. 413, 417 S.E.2d 302, 305 (1992); *Jordache Enters., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 204 W.Va. 465, 513 S.E.2d 692, 703 (W.Va. 1998).

II. Plaintiff's Common Law Indemnity Claims Not Barred.

The Co-Executors' public policy defense does not apply to Plaintiff's common law indemnity claims since the defense allows a party to avoid enforcement of *a contract*. *See*, *Berne*, *supra*, 46 V.I. at 115 (public policy is a defense to the enforceability of a contract); *Brouillard v. DLJ Mortg. Cap., Inc*., 63 V.I. 788, 794 (V.I. 2015) (same). In fact, as a matter of common law, the Virgin Islands courts recognize the right to indemnity between joint tortfeasors. *See infra*, Section I(A)(ii). *See also* 41 Am. Jur. 2d Indemnity § 21 ("Generally, indemnity will be granted where the indemnitee has incurred tort liability by performing an act not manifestly wrong at the direction or for the benefit of, and in reliance upon, the indemnitor.") (*citing Horrabin v. City of Des Moines*, 198 Iowa 549, 199 N.W. 988, 38 A.L.R. 554 (1924); *Jacobs v. General Acc. Fire & Life Assur. Corp*., 14 Wis. 2d 1, 109 N.W.2d 462, 88 A.L.R.2d 1347 (1961)). As such, Virgin Islands public policy does not impact Plaintiff's common law indemnity claims.

III. Plaintiff's Corporate Indemnity Claims Not Barred.

Nor does Virgin Islands public policy bar Plaintiff's indemnity claims that may arise under Virgin Islands General Corporation Law. As noted above, this law provides that a corporation may indemnify any person who "was or is" a party to a civil or criminal proceeding by reason of the person's relationship with the corporation "against expenses (including attorneys' fees)," incurred in connection with the proceeding if the person "in good faith" and "in a manner he reasonably believed to be in or not opposed to the best interests of the corporation." 13 V.I.C. § 67a(a). In the case of a "criminal proceeding," the person must have had "no reasonable cause to believe his conduct was unlawful." *Id*.

> The termination of any action, suit or proceeding by … conviction… **shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation, and with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful**.

Id. (emphasis added). At this stage, the facts of Plaintiff's conduct as an agent of NES, LLC and belief that she was acting in the company's interest have never been litigated. As such, Plaintiff's corporate indemnity claims may not be barred or adjudicated at this stage because they would involve issues not actually and necessarily decided in any prior action. *Stewart*, 66 V.I. at 549–50.

IV. The Co-Executors' Public Policy Defense Has Been Waived.

Any objection by the Co-Executors to indemnification on grounds of public policy should be found to have been waived by Epstein's past actions here.

Waiver is defined as "the voluntary relinquishment of a known right." *Rivera v. Sharp*, No. CV 2008-0020, 2021 WL 2228492, at *11 (D.V.I. June 1, 2021), aff'd, No. 21-2254, 2022 WL 2712869 (3d Cir. July 13, 2022); *accord Ringo v. Southland Gaming of U.S. Virgin Islands, Inc.*, No. ST-10-CV-116, 2010 WL 7746074, at *3 (V.I. Super. Ct. Sept. 22, 2010); *Abramsen v. Bedminster*, 45 V.I. 3, 10 (Terr.Ct.2002). "Waiver requires 'a clear, unequivocal, and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part.'" *Great Lakes Reinsurance (UK) PLC*, 2013 WL 68731, at *4 (*quoting Carter v. Exxon Co. USA*, 177 F.3d 197, 204 (3d Cir.1999)); *accord Ringo*, 2010 WL 7746074, at *3. *See also Dewerd v. Bushfield*, 993 F. Supp. 365, 369 (D.V.I. 1998) ("Waiver ... may be shown by express declarations, or by acts and declarations manifesting an intent and purpose not to claim the

supposed advantage, or it may be shown by a course of acts and conduct, and in some cases will be implied therefrom.")

While courts in this jurisdiction have not addressed the specific issue presented here, courts in other jurisdictions have found that a party can waive a defense of contract illegality through voluntary conduct (*e.g.*, performance of the contract) that is inconsistent with the defense. *See, e.g.*, *C.R. Klewin Ne., LLC v. City of Bridgeport*, 282 Conn. 54, 919 A.2d 1002 (Conn. 2007) (City, by participating for 20 days in arbitration proceeding which took place over a year after indictment of public official that set forth operative facts forming basis for claim that municipal public works contract was illegal, waived defense that contract, which included arbitration provision, was illegal.). *See also*, *AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 139 F.3d 980, 981 (2d Cir. 1998) (by disavowing any illegality claim "until an adverse award was rendered," petitioner "waived its right to assert the public policy exception"); *Jones v. Faulkner*, 114 S.E.2d 542, 543 (Ga. App. 1960) ("If a contract be illegal as against public policy, its invalidity will be a defence while it remains unexecuted. If the illegal contract be in part performed and money has been paid in pursuance of it, no action will lie to recover the money back.").

Here, Plaintiff alleges in the Complaint as follows:

> 17. Since the time of Epstein's Florida state proceeding to the present, Maxwell has incurred legal fees and expenses in connection with various suits, proceedings, and investigations relating to Epstein, his affiliated businesses, and his alleged victims.
>
> 18. Consistent with his repeated promises, Epstein indemnified Maxwell and advanced legal fees and settlement costs when they were incurred in connection with a lawsuit filed by Sarah Ransome against Epstein in 2017 (Jane Doe 43 v. Epstein, et al., 17-cv-00616-JGK).

19. Consistent with his repeated promises, Epstein also paid Maxwell's legal bills incurred in connection with a civil suit filed by Virginia Roberts against Epstein in 2009.

See Complaint, ¶¶ 17-19. At this preliminary, Rule 12(b)(6) stage, the Court "must accept [these] factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Lockhart v. Treasure Bay Virgin Islands Corp*., 63 V.I. 357, 360 (V.I. Super. Ct. August 31, 2015); *Benjamin*, *supra*, 56 V.I. at 566.

By advancing legal fees and expenses in connection with past legal proceedings, which were for the benefit of Plaintiff, Epstein made it clear that he believed Plaintiff had committed no wrong and/or was entitled to indemnification. Any objection to the contrary should found to be waived.

V. The Co-Executors May Not Raise Any Objection to Indemnification on Public Policy Grounds Due to Unclean Hands.

Finally, the Co-Executors should be estopped from raising any objection to indemnification on public policy grounds due to unclean hands. The "'unclean hands' doctrine is based on the principle that a party who has committed wrongdoing should not be allowed to come into court and request a remedy for its own personal benefit." *In re Prosser*, 2012 WL 6737781, at *17 (Bankr. D.V.I. Dec. 20, 2012) (*citing In re New Valley Corp*., 181 F.3d 517, 525 (3d Cir.1999); *Sunshine Shopping Ctr., Inc. v. KMart Corp*., 42 V.I. 397, 407, 85 F. Supp. 2d 537, 544 (D.V.I. Jan. 27, 2000) ("It is an ancient and established maxim of equity jurisprudence that he who comes into equity must come with clean hands. If a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing.") (*quoting Bishop*

v. Bishop, 257 F.2d 495, 500 (3d Cir.1958)). In *Sunshine Shopping*, the court held that the defendant could be precluded from raising an equitable defense to a forfeiture clause in a lease due to its own "unclean hands." *Id*.

Here, having engaged in the wrongful conduct that caused Plaintiff to incur legal and other expenses in the first place, Epstein (and by association, the Estate) should not be permitted to prevail in this action by relying upon a salutary public policy.

CONCLUSION

WHEREFORE, Plaintiff respectfully asks this Court to find that Virgin Islands public policy does not bar her indemnity claims in this action.

Dated: August 1, 2022

Respectfully submitted,

QUINTAIROS, PRIETO, WOOD & BOYER, P.A.
Attorneys for Plaintiff
9300 S. Dadeland Blvd., 4th Floor
Miami, FL 33156
T: (340) 693-0230
F: (340) 693-0300

By: */s/ Kyle R. Waldner*
Kyle R. Waldner, Esq.
kwaldner@qpwblaw.com
V.I. Bar No.: 1038

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 1, 2022, I filed the foregoing, which complies with the page or word limitation set forth in Rule 6-1(e), with the Clerk of the Court using the Court's electronic filing system, which will send a notice of such filing to the following:

Christopher Allen Kroblin, Esq.
KELLERHALS FERGUSON KROBLIN PLLC
Royal Palms Professional Building
9053 Estate Thomas, Suite 101
St. Thomas, V.I. 00802
ckroblin@kellfer.com

Ariel M. Smith, Esq. (AAG)
VIRGIN ISLANDS DEPARTMENT OF JUSTICE
Office of the Attorney General
34-38 Kronprindsens Gade
St. Thomas, U.S. Virgin Islands 00802
ariel.smith@doj.vi.gov

Gordon C. Rhea, Esq.
GORDON C. RHEA, PC
1533 Appling Dr.
Mt. Pleasant, SC 29464
grhea@rpwb.com

/s/ Kyle R. Waldner
Kyle R. Waldner, Esq.