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

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GHISLAINE MAXWELL, **Plaintiff,** **v.** **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. ESTEIN, and NES, LLC, a New York Limited Liability Company,** **Defendants.**	**CIVIL NO: ST-20-CV-155** **COMPLEX**

CO-EXECUTORS' REPLY IN SUPPORT OF SUPPLEMENTAL MOTION TO DISMISS, OR ALTERNATIVELY, COMPEL PLAINTIFF TO APPEAR *PRO SE*

DARREN K. INDYKE and RICHARD D. KAHN, by and through their undersigned counsel, in their capacity as Co-Executors of the Estate of Jeffrey E. Epstein (the "Estate"), and on behalf of the Estate and NES, LLC ("NES"), an entity administered in probate by the Co-Executors as part of the Estate (collectively, "Defendants"), respectfully submit this reply in support of their supplemental motion to dismiss for failure to prosecute, or alternatively, to compel Plaintiff Ghislaine Maxwell ("Maxwell") to appear *pro se*.

BACKGROUND AND PROCEDURAL HISTORY

Almost four years ago, Maxwell initiated this action, seeking contractual and common law indemnification of attorneys' fees and other costs incurred in connection with her criminal prosecution in the Southern District of New York. Subsequently, Defendants moved to dismiss

pursuant to Virgin Islands Rule of Procedure 12(b)(6) (hereinafter, the "Rule 12(b)(6) Motion"). In their Rule 12(b)(6) Motion, Defendants argued that (1) NES's operating agreement bars Maxwell's claims; (2) the lawsuits for which Maxwell seeks indemnification are not related to her performance of legitimate, employment-related duties on behalf of Epstein or his affiliated entities; and (3) Maxwell's criminal conviction precludes her indemnification claims as a matter of public policy. That Motion has been fully briefed and pending before this Court since August 2022.

In September 2022, the Court stayed these proceedings to allow Maxwell to secure new representation after her attorney withdrew. Six months later, in March 2023, Maxwell still had not engaged new counsel and the Court granted her an additional 60 days to do so. Again, Maxwell did not engage new counsel.

Having received no indication from Maxwell that she had retained new counsel or intended to proceed *pro se*, on September 19, 2023, Defendants moved to dismiss under Rule 41(b) for failure to prosecute, or alternatively, to compel Maxwell to appear *pro se* (hereinafter, the "Rule 41(b) Motion"). But on October 3, 2023, the Court docketed a filing from Maxwell—apparently dated May 16, 2023—in response to the Court's March 2023 order.[1] In that filing, Maxwell sought an additional 180 days to secure new counsel and requested yet another stay during the pendency of the appeal of her criminal conviction. Defendants opposed a stay on October 31, 2023.

On December 22, 2023, the Court received Maxwell's opposition to Defendants' Rule 41(b) Motion.[2] In her opposition, Maxwell indicated that she still has not secured counsel and

[1] While the Court docketed Maxwell's filing on October 3, 2023, Maxwell did not serve Defendants with a copy. Defendants did not receive a copy until October 17, 2023, when the Court alerted Defendants of the filing.

[2] Again, Maxwell failed to serve Defendants with a copy of her opposition brief.

repeated her request to continue the stay while she seeks counsel. Additionally, she presented several substantive arguments in relation to Defendants' Rule 12(b)(6) Motion.

Maxwell's stalling must end. As with her May 16, 2023 filing, Maxwell's opposition sets forth no new grounds or good cause for continuing the stay in this matter. Further, Maxwell's arguments as to the merits of Defendants' Rule 12(b)(6) Motion should be rejected—indeed, each of Maxwell's substantive arguments here merely parrot her prior briefing on the long-pending Rule 12(b)(6) Motion and are no more convincing today than they were more than a year ago. Accordingly, Defendants respectfully submit that the Court should lift the stay and address Defendants' Rule 12(b)(6) Motion.

ARGUMENT

Maxwell's most recent filing is yet another attempt to delay these proceedings—an attempt the Court should decline to entertain. While Defendants' Rule 41(b) Motion was premised in part on Maxwell's perceived disregard of the Court's March 2023 Order—which Maxwell apparently did respond to in May 2023, but just failed to serve Defendants—the fact remains that this case has lain dormant for well over a year and Maxwell is no closer to finding new counsel. Under the circumstances, Defendants respectfully request that the Court lift the stay and address Defendants' pending Rule 12(b)(6) Motion at its earliest convenience.

Moreover, Maxwell's arguments opposing Defendants' Rule 12(b)(6) motion have already been briefed by her then-counsel and presented to the Court, further militating in favor of lifting the stay and ruling on the Rule 12(b)(6) motion. Indeed, Maxwell repeats the arguments made in her prior briefing, specifically that (1) Virgin Islands' public policy does not bar her indemnification claims; (2) Defendants' supposed unclean hands bar them from asserting a public policy defense; (3) Epstein intended to indemnify her for her criminal conduct; and (4) her criminal

conviction is not dispositive of her claims. Opp'n Br. at 3–7. Each of these arguments lacks merit, as outlined in Defendants' prior briefing. First, Virgin Islands' public policy prohibits indemnification for those who have engaged in intentional criminal conduct. Second, the doctrine of unclean hands has no application to Defendants' public policy defense. Third, the language of NES's Operating Agreement plainly demonstrates that there was no intent to indemnify Maxwell for her intentional criminal conduct. Finally, Maxwell's criminal conviction is one of several reasons to dismiss her claims. There is no continuing reason to stay this action; respectfully, the Court should now consider and grant Defendants' pending Rule 12(b)(6) Motion.

I. The Stay Should Be Lifted.

There is no reasonable basis to further delay this matter. Though Maxwell once again requests more time to secure new counsel, she fails to offer any new grounds or good cause to support such a request. The Court has granted Maxwell ample time to find new counsel, but she has been unable to do so. The Court should decline to entertain additional requests from Maxwell. And though Maxwell is unrepresented, this does not excuse her from diligently prosecuting her claims in accordance with the Virgin Islands Rules of Civil Procedure. *Simon v. Herbert*, 69 V.I. 963, 697 (V.I. 2018) ("Although we have traditionally given *pro se* litigants greater leeway where they have not followed the technical rules of pleading and procedure, self-representation is not a license excusing compliance with relevant rules of procedural and substantive law.") (cleaned up). Indeed, as detailed in Defendants' Rule 41(b) Motion, Maxwell's failure to abide by the rules of procedure—specifically, Rule 41(b)—is prejudicial to Defendants. As each day passes, evidence could be lost, memories will fade, and witnesses may become unavailable, making it all the more difficult for Defendants to refute Maxwell's claims. Further, though other matters remain open, the Estate cannot complete its probate proceedings and bring the Estate to a close while this indemnification matter remains pending. Thus, any further requests for a stay should be denied.

Moreover, as Maxwell indicates in her opposition, she will "continue to appear" in this matter *pro se*. Maxwell has now indicated her willingness to proceed *pro se* twice—in her May 16 filing and the most recent opposition—and that status does not justify any further delay of the Court's consideration of Defendants' Rule 12(b)(6) Motion. That Motion was briefed by all parties *when Maxwell was still represented by counsel*. Whether Maxwell is able to obtain counsel or not should have no effect on the Court's consideration of the Rule 12(b)(6) Motion. Accordingly, Defendants respectfully submit that the Court should lift the stay.

II. Maxwell's Substantive Arguments Are Meritless.

In her most recent opposition, Maxwell offers several substantive arguments in opposition to Defendants' Rule 12(b)(6) Motion—all of which have been addressed previously and lack merit.

First, Maxwell falsely contends that public policy does not bar her contractual and common law indemnity claims. She notes that Virgin Islands common law recognizes a right of indemnity as between two tortfeasors, and that Virgin Islands statutes permit indemnification for corporate officers and employees who engage in criminal conduct on behalf of the corporation. *See* Opp'n Br. at 3. But common law indemnity is an equitable remedy, and such a remedy is barred where the claimant has been convicted of intentional criminal conduct as is the case here. *See, e.g., Cruse v. Callwood*, 55 V.I. 999, 1003 (D.V.I. 2010) (parties to a pyramid scheme cannot recover on a theory of restitution when they were aware of the nature of the scheme); *Willie v. Amerada Hess Corp.*, 66 V.I. 23, 92 (Super. Ct. V.I. 2017) (Virgin Islands recognizes common law indemnification "where an *innocent* party is held vicariously liable for the actions of the *true tortfeasor*") (emphasis in original). Similarly, Virgin Islands statutory law permitting indemnification for criminal acts requires the claimant to have acted (1) in good faith and (2) without reasonable cause to believe her conduct was unlawful. *See* 13 V.I.C. § 67a. Maxwell does not even attempt to explain how she meets these requirements, nor could she. She was convicted

of several offenses related to *her* intentional criminal misconduct. As Judge Alison Nathan reflected at her sentencing, Maxwell "was instrumental in the abuse of several underage girls," and is now being "punished for the role that she played."[3] The law is clear: public policy bars indemnification for a claimant's intentional criminal wrongdoing. Such is the case here.

Second, Maxwell argues that the doctrine of unclean hands estops Defendants from raising a public policy defense. However, it is Maxwell who is seeking an equitable remedy (indemnification) for her intentional wrongdoing—not Defendants. Additionally, the assertion of unclean hands requires that the individual's alleged wrongful conduct bear relation to the transaction at issue, here, Maxwell's indemnification. *See In re New Valley Corp.*, 181 F.3d 517, 523 (3d Cir. 1999). But Maxwell fails to identify any purported wrongdoing by Defendants in relation to her indemnification claims. Thus, the doctrine of unclean hands does not preclude Defendants' public policy defense.

Third, Maxwell argues that Epstein's conduct prior to his death, specifically negotiation of a non-prosecution agreement, and the Estate's assumed indemnification of others support a finding that Epstein intended to "indemnify employees and [his] co-conspirators." Opp'n Br. at 6. However, the NES Operating Agreement expressly prohibits indemnification for claims that are "the result of . . . reckless or intentional misconduct." Given this unambiguous language, Maxwell cannot be indemnified for her intentional criminal misconduct. *See Matter of Carpe Diem 1969 LLC*, No. 2017-56, 2019 WL 3413841, at *5 (D.V.I. July 29, 2019) ("[C]ourts assume that the intent of the parties to an instrument is embodied in the writing itself, and when the words are clear

[3] Transcript at 89:8-25, *USA v. Maxwell*, No. 20-CR-00330 (S.D.N.Y. June 28, 2022), ECF No. 779.

and unambiguous the intent is to be discovered only from the express language of the agreement.") (cleaned up).

Fourth, Maxwell wrongly asserts that her conviction does "not conclusively establish any issue presented here" and is "not dispositive" of her indemnification claims. Br. at 7. Though Maxwell's conviction is currently on appeal,[4] there are other bases set forth in the Rule 12(b)(6) Motion that independently support dismissal of her claims, including that the lawsuits for which Maxwell seeks indemnification are not related to her performance of legitimate, employment-related duties on behalf of Epstein or his affiliated entities. Accordingly, there is no need to await the outcome of Maxwell's appeal. In sum, Maxwell's substantive arguments in opposition to Defendants' Rule 12(b)(6) Motion are meritless and should be rejected.

CONCLUSION

For the foregoing reasons, the Court should grant the Rule 41(b) Motion, lift the stay, and grant the pending Rule 12(b)(6) Motion.

Respectfully,

Dated: January 16, 2024

/s/ Christopher Allen Kroblin

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[4] As discussed in Defendants' prior briefing, the Court should decline to stay these proceedings during the pendency of Maxwell's criminal appeal. The appeal has not yet been scheduled for oral argument, *see* Appeal No. 22-1426 (2d Cir. Dec. 5, 2023), ECF No. 90, and as described above, further delay in this matter is prejudicial to Defendants' ability to refute Maxwell's claims or administer the Estate.

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Dated January 16, 2024

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 16, 2024, I will cause a true and exact copy of the foregoing **Co-Executors' Reply in Support of Supplemental Motion to Dismiss, or Alternatively, Compel Plaintiff to Appear *Pro Se*,** which complies with the page or word limitation set forth in Rule 6-1(e), to be served via Certified Mail return receipt requested upon:

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