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

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| **GHISLAINE MAXWELL,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**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,**<br><br>**Defendants.** | **CIVIL NO: ST-20-CV-155**<br><br>**COMPLEX** |

**CO-EXECUTORS'MOTION TO DISMISS FOR FAILURE TO PROSECUTE OR, ALTERNATIVELY, TO COMPEL HER 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 motion to dismiss for failure to prosecute, pursuant to Virgin Islands Rule of Civil Procedure 41(b), or alternatively to compel Plaintiff to appear *pro se* so that the action may proceed so that the pending motion to dismiss can be adjudicated.

**PRELIMINARY STATEMENT**

Plaintiff Ghislaine Maxwell ("Maxwell") brings this action against Defendants seeking common law and contractual indemnification for attorneys' fees and other costs incurred in unsuccessfully defending herself in a criminal prosecution brought in the Southern District of New York. On September 7, 2022, the Court permitted Maxwell's counsel to withdraw and ordered Maxwell to obtain new counsel within 60 days, and entered a stay of the proceedings. Maxwell did not obtain new counsel within the designated period, nor in the following four months. At a hearing on March 17, 2023, Maxwell was again ordered to obtain new counsel within 60 days, but again failed to do so then or in the months following. Despite the Court's order and despite that she, as the plaintiff, initiated this action, Maxwell has not obtained new counsel and has not entered her appearance *pro se*. Her refusal to follow court orders and to prosecute this case warrants dismissal pursuant to Virgin Islands Rule of Procedure 41(b). Specifically, under the factors articulated by the Virgin Islands Supreme Court in *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 510 (V.I. 2010), the Court should dismiss Maxwell's claim because: (1) Maxwell is personally responsible for obtaining counsel in this matter; (2) Defendants are prejudiced by Maxwell's dilatory conduct as it has stalled this action for over a year; (3) Maxwell has a history of dilatory conduct as she has now disregarded two Court orders; (4) Maxwell's conduct is willful as she is aware of the Court's orders and has neither followed them nor, if she cannot afford new counsel, appeared *pro se*; (5) dismissal is an appropriate sanction; and (6) Maxwell's indemnification claims fail on their face. Thus, for the reasons set forth in this brief, the Court should dismiss the Complaint under Rule 41(b) or order her to appear *pro se* within 30 days so that the case may proceed.

## BACKGROUND

On March 12, 2020, Maxwell instituted this action against the Estate and NES, seeking contractual and common law indemnification of attorneys' fees and other costs incurred as a result of her criminal prosecution in the Southern District of New York. Maxwell alleges that these costs were incurred "by reason of her prior employment relationship with Jeffrey E. Epstein and his affiliated businesses." Compl. ¶ 1. On May 1, 2020, the Estate and NES moved to dismiss Maxwell's complaint pursuant to Virgin Islands Rule of Civil Procedure 12(b)(6) because (1) Maxwell's claim against the Co-Executors was premature; and (2) Maxwell's indemnification claims are barred by NES's 2014 operating agreement. On June 1, 2020, the parties jointly moved for a stay of the action until the statutory one-year waiting period elapsed on September 7, 2020. The Court granted the parties' motion, and a stay was entered. The stay was lifted on September 8, 2020, and Maxwell filed her opposition to the motion to dismiss. On September 11, 2020, the Co-Executors of the Estate formally rejected Maxwell's claim for indemnification. Subsequently, Defendants filed a reply in support of their motion to dismiss, arguing that Maxwell's claims for indemnification were unripe until judgments were rendered in the civil and criminal actions pending against her in New York, as indemnity would not apply if judgment were rendered against her.

On December 29, 2021, a jury found Maxwell guilty of multiple crimes, including conspiracy to transport minors with intent to engage in criminal sexual activity, transportation of a minor with intent to engage in criminal sexual activity, and sex trafficking of an individual under the age of eighteen. U.S. District Judge Alison Nathan sentenced Maxwell to 20 years in prison followed by five years of supervised release, and ordered Maxwell to pay a fine of $750,000 for

these offenses.[1] During the sentencing proceeding, Judge Nathan rejected Maxwell's argument that she was being punished for Epstein's actions, stating that the evidence at trial established that Maxwell "was instrumental in the abuse of several underage girls," and that Maxwell was "not punished in place of Epstein . . . Ms. Maxwell is being punished for the role that she played."[2]

On July 1, 2022, the Court requested additional briefing on the Defendants' motion to dismiss the complaint in this action. Specifically, the Court sought further briefing on the Defendants' argument that Maxwell's common law and contractual indemnification claims were barred by public policy in light of her criminal convictions. In accordance with the Court's order, Defendants further briefed the issue, and Maxwell filed a response. Defendants' Rule 12(b)(6) motion to dismiss remains pending before this Court.

Subsequently, Maxwell's attorney moved to withdraw as counsel from this proceeding. The Court granted the motion on September 7, 2022, ordered Maxwell to obtain new counsel within 60 days, and entered a stay. Maxwell failed to comply with the Court's order. At a hearing on March 17, 2023, Maxwell was again ordered to obtain new counsel within 60 days. She has again failed to do so. Maxwell's failure to comply with the Court's orders warrants dismissal pursuant to Rule 41(b) or, at a minimum, the issuance of an order compelling her to appear *pro se* so that the motion to dismiss can be resolved.

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[1] *See* Judgment, *USA v. Maxwell*, No. 20-CR-00330 (S.D.N.Y. June 29, 2022), ECF No. 696. Judge Nathan dismissed two of five counts for which the jury found Maxwell guilty as multiplicative, and the Government agreed to dismiss two perjury counts against Maxwell that Judge Nathan previously severed from the determination of the counts considered by the jury. *Id.*

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

## ARGUMENT

Maxwell's counsel withdrew from his representation over one year ago, and since that time, this case has lain dormant. Though the Court has granted her ample time to find new counsel and ordered her to do so, Maxwell has not done so. Additionally, to the extent Maxwell is unable to retain new counsel, nothing precludes her from litigating her claims *pro se*, but she has thus far declined to do so. Accordingly, the Court should dismiss Maxwell's Complaint pursuant to Rule 41(b).

Under Rule 41(b), dismissal is warranted if the "plaintiff fails to prosecute or to comply with these rules or a court order." In weighing dismissal under Rule 41(b), the trial court considers six factors: "(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense." *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 510 (V.I. 2010). The court does not have to conclude that all six factors weigh against the opposing party in order to find that dismissal is warranted. *Nolasco Comms., Inc. v. Bonneville Grp. V.I. Corp.*, No. SX-15-CV-0220, 2019 WL 937584, at *1 (V.I. Super. Ct. Jan. 28, 2019).

Here, all six factors weigh in favor of dismissal: (1) Maxwell is personally responsible for obtaining counsel in this matter or, if she lacks the resources to do so, entering an appearance *pro se*; (2) Defendants are prejudiced by Maxwell's dilatory conduct as it has stalled this action for over a year; (3) Maxwell has a history of dilatory conduct in that she has now disregarded two of the Court's orders; (4) Maxwell's conduct is willful as she is aware of the Court's orders and disregarded them; (5) dismissal is an appropriate sanction under the circumstances; and (6)

Maxwell's indemnification claims fail on their face. Accordingly, the Court should dismiss Maxwell's Complaint.

**1. Maxwell Is Personally Responsible for Obtaining Counsel or Appearing *Pro Se*.**

As a litigant, Maxwell is responsible for retaining her own counsel or, if she is without the means to engage counsel, to move forward on a *pro se* basis. Where the plaintiff is personally responsible for failing to comply with a Court order rather than her attorney, this factor weighs in favor of dismissal. *Carroll v. Sharkey*, No. ST-18-CV-212, 2020 WL 8457889, at *2 (V.I. Super. Ct. Jan. 21, 2020); *Nolasco Comms., Inc.*, 2019 WL 937584, at *2. There is no question that Maxwell is ultimately responsible for securing representation in this matter. Additionally, as evidenced by the docketed notice of receipt and her presence at the March 17, 2023 hearing, Maxwell is aware of her previous counsel's withdrawal and the Court's orders directing her to obtain new counsel. Nonetheless, she has failed to comply and has made no attempt to appear *pro se*.[3] Thus, this factor weighs in favor of dismissal.

**2. Defendants Are Prejudiced by Maxwell's Dilatory Conduct.**

Maxwell's dilatory conduct is prejudicial to Defendants. "Prejudice to the opposing party is generally demonstrated by either increased expense to the opposing party arising from the extra costs associated with filings responding to dilatory behavior or increased difficulty in the opposing parties' ability to present or defend their claim(s) due to the improper behavior." *Hassan v. Brian/Bryan Bishop*, No. SX-2017-CV-302, 2023 WL 3246697, at *3 (V.I. Super. Ct. May 1,

[3] The Rules make clear that Maxwell is responsible for informing the Court whether she wishes to proceed *pro se*. Rule 3-1(c) provides that if a party's representation changes, either by obtaining new counsel or proceeding on a *pro se* basis, the party "is personally responsible" for alerting the court when such changes occur by filing a notice with updated contact information. Though Maxwell's counsel did so on withdrawal in this matter, it does not excuse Maxwell from keeping the Court appraised of her intentions to prosecute her claims.

2023) (quoting *Molloy v. Independence Blue Cross*, 56 V.I. 155, 189 (V.I. 2012)). Here, Maxwell's failure to follow the Court's orders and either retain new counsel or appear *pro se* has resulted in a one-year delay in this matter. Maxwell's claims arise from events that occurred dating back to 2009. *See* Compl. ¶ 19. As time passes, evidence could be lost, memories will fade, and witnesses may become unavailable. If Maxwell is permitted to further delay this case, it will make it more difficult for Defendants to refute her claims. Moreover, Defendants, as Co-Executors to the Estate, are seeking to complete probate and to bring the Estate to a close. While this matter remains pending, the Co-Executors are barred from doing so. As such, this factor weighs in favor of dismissal.

**3. Maxwell Has a History of Dilatoriness.**

Maxwell has a history of dilatoriness as evidenced by her two-time failure to comply with the Court's orders. Indeed, where a litigant has failed to respond to multiple court orders, courts have concluded there is a history of dilatoriness that warrants dismissal. *Carroll*, 2020 WL 8457889, at *3. Maxwell has now disregarded two court orders and has taken no action to prosecute her claim since September 2022. As a result, this case has been stagnant for more than a year. Therefore, Maxwell's history of dilatory conduct warrants dismissal.

**4. Maxwell's Conduct is Willful.**

Maxwell's failure to comply with the Court's orders is willful, which weighs in favor of dismissal. Willful or bad faith conduct is "deliberate and contumacious." *Nolasco Comms. Inc.*, 2019 WL 937584, at *2. As discussed, Maxwell is aware of the Court's orders and has not complied, requested additional time to comply, or taken any steps to appear *pro se*. This demonstrates that her failure to comply with the Court's orders is willful. *See Carroll*, 2020 WL 8457889, at *3 (finding that the plaintiff's conduct was willful where the plaintiff failed to retain

new counsel or appear *pro se* seven months after being ordered to do so). Even if her failure to obtain new counsel is due to her incarceration, nothing prevents Maxwell from entering an appearance and litigating her claims *pro se*. *See id.*; *Johnson v. Johnson*, 14 V.I. 466, 471 (D.V.I. 1977) (noting that individuals have a constitutional right to represent themselves). Nonetheless, she has not done so and has instead disregarded the Court's orders and let her action languish at the expense of Defendants. Thus, this factor weighs in favor of dismissal.

**5. Dismissal Is an Appropriate Sanction for Maxwell's Failure to Comply with the Court's Orders.**

Dismissal is an appropriate sanction for Maxwell's failure to comply with the Court orders because alternative sanctions would not be effective in this matter. Alternate sanctions typically considered by courts include "excluding evidence, precluding witnesses, striking portions of the pleadings, or imposing monetary sanctions." *Hassan*, 2023 WL 3246697, at *3. However, where there is "a lack[] of clear interest on Plaintiff's part to pursue [her] case," other sanctions are not appropriate, and dismissal is warranted. *Id.*; *see also O'Brien v. Gov't of the V.I.*, No. 2007-35, 2011 WL 2650637, at *4 (D.V.I. July 6, 2011) ("Where as here, a party, rather than an attorney, is the cause of undue delay, alternative sanctions often prove unsuccessful."). Here, Maxwell has been granted ample time to retain new counsel or to prosecute her claim *pro se*. Her failure to do so demonstrates a lack of interest on her part to pursue her claims. Accordingly, this factor weighs in favor of dismissal.

**6. Maxwell's Contractual and Common Law Indemnification Claims Fail on the Merits.**

Finally, because Maxwell's common law and contractual indemnification claims are not viable, her Complaint should be dismissed. "A claim, or defense, will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff or

would constitute a complete defense." *Hassan*, 2023 WL 3246697, at *4. As briefed in Defendants' Motion to Dismiss and Supplemental Brief in Support of the Motion to Dismiss, both contractual and common law indemnification for individuals convicted of intentional criminal conduct violates public policy because it would promote illegality and allow wrongdoers to cause injury with impunity. Courts across the country routinely hold that contractual indemnification for those found guilty of intentional criminal acts is unenforceable as against public policy. *See, e.g.*, *Homesite Ins. Co. of the Midwest v. Frost*, No. CV 20-00024-M-DLC, 2020 WL 5369847, at *5 (D. Mont. Sept. 8, 2020) ("in Montana there is an unmistakable public policy against . . . indemnification for criminal acts."); *CSX Transp., Inc. v. Gen. Mills, Inc.*, No. 1:14-CV-201-TWT, 2019 BL 223294, at *11 (N.D. Ga. Jun. 14, 2019) ("if the Plaintiff is ultimately found to have been criminally negligent, then public policy would preclude indemnification."); *Utica First Ins. Co. v. Maclean*, No. CIV.A. 08-1138, 2009 WL 415988, at *4 (E.D. Pa. Feb. 19, 2009) ("[r]equiring an insurance company to defend or indemnify its insured for . . . criminal acts would also violate public policy in Pennsylvania."); *BDO Seidman, LLP v. Harris*, 379 Ill. App. 3d 918, 925 (Ill. App. Ct. 2008) ("[t]aken together, the stipulation of facts pursuant to the PTD agreement shows that plaintiff engaged in conduct which constituted misprision of felony by knowingly concealing the felony fraud of its client, SBU. Under New York public policy. . . indemnification for such criminal conduct is barred by public policy."); *Equitex, Inc. v. Ungar*, 60 P.3d 746, 750 (Colo. App. 2002) ("[p]ublic policy prohibits indemnifying a party for damages resulting from intentional or willful wrongful acts.") (internal quotation marks omitted). *See, e.g.*, 42 C.J.S. Indemnity § 8 ("a contract or bond by which one party undertakes to indemnify the other against the consequences of an illegal act is generally held illegal and void."). The Court should follow this well-established principle and reject Maxwell's contractual indemnity claim.

Additionally, the public policy concerns that bar enforcement of contractual indemnification for those convicted of intentional criminal acts apply with equal force to common law indemnification claims or indemnification based on promissory estoppel. Both of these are equitable doctrines. *See, e.g.*, *Willie v. Amerada Hess Corp.*, 66 V.I. 23, 46 (V.I. Super. Ct. 2017) ("[t]he right to indemnity . . . is a common law equitable remedy . . . ."); *Appleton v. Harrigan*, No. ST-10-CV-275, 2012 WL 13219651, at *5 (V.I. Super. Ct. Dec. 6, 2012) ("[l]ike a claim of unjust enrichment, promissory estoppel is an equitable remedy."). Equity does not condone a criminal actor receiving financial immunity from the consequences of her crimes. Indemnification based on either promissory estoppel or common law is not viable (and violates public policy) where, as here, the indemnitee has been convicted of an intentional criminal act. Courts cannot enforce a judgment upholding a[n] agreement in law or in equity that is against public policy." *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); *see also, e.g.*, *Willie*, 66 V.I. at 92 (Virgin Islands recognizes common law indemnification "where an *innocent party* is held vicariously liable for the actions of the *true tortfeasor*") (emphasis in original); *Equitex*, 60 P.3d at 750 (rejecting a promissory estoppel claim for indemnification because "equitable doctrines such as promissory estoppel may not be used to enforce an agreement in favor of a wrongdoer"). Accordingly, Maxwell's common law indemnification claims are similarly precluded by her criminal conviction. Thus, the final factor weighs in favor of dismissal.

**CONCLUSION**

For the foregoing reasons, the Court should dismiss the Complaint. In the alternative, if the Court is not inclined to dismiss the Complaint, Maxwell should be ordered to appear *pro se* within 30 days or face dismissal of the Complaint.

Respectfully,

Dated: September 19, 2023

*/s/ Christopher Allen Kroblin*

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on September 20, 2023, I will cause a true and exact copy of the foregoing **Motion to Dismiss,** which complies with the page or word limitation set forth in Rule 6-1(e), to be served via First-Class Mail return receipt requested upon:

Ms. Ghislaine Maxwell
Register Number 02879-509
FCI Tallahassee
P O Box 5000
Tallahassee FL 32314

*/s/ Christopher Allen Kroblin*