

**FILED**

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TAMARA CHARLES  
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**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' SUPPLEMENTAL BRIEF  
IN SUPPORT OF MOTION TO DISMISS**

**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, respectfully submit this Supplemental Brief in further support of their Motion to Dismiss the Complaint filed in this action on May 1, 2020 (the “Motion to Dismiss”) and in accordance with this Court’s direction during the March 9, 2022 status conference in this matter.

**PRELIMINARY STATEMENT**

As the Co-Executors demonstrated in their Reply Brief in Support of the Motion to Dismiss filed in this action on September 28, 2020 (the “Reply”), courts around the country hold that indemnification for individuals convicted of criminal behavior violates public policy

because it would promote illegality and allow wrongdoers to cause intentional injury with impunity. (Reply at 3-4, n.2.) Courts should not encourage intentional criminal wrongdoing by allowing a party to escape all financial consequences for those acts.

Here, it is indisputable that the suits, proceedings and investigations for which Plaintiff Ghislaine Maxwell demands that Defendants indemnify her are all predicated on Maxwell's own intentional criminal actions. (*See* Motion to Dismiss at 3-4, n.3 (describing the basis of civil suits against Maxwell, each of which was premised on intentional abusive actions by Maxwell herself); Reply at 3 n.1 and Ex. D (describing and attaching Maxwell's criminal indictment in the Southern District of New York).) On December 29, 2021, a jury in the United States District Court for the Southern District of New York found Maxwell guilty of multiple counts of criminal activity; on June 29, 2022, Judge Alison Nathan entered judgment against Maxwell for 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.<sup>1</sup> For these felonies, Judge 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. During sentencing, Judge Nathan rejected Maxwell's argument that she was being

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1. *See Judgment, USA v. Maxwell*, No. 20-CR-00330 (S.D.N.Y. Jun. 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.*; *see also* Joint Letter, *USA v. Maxwell*, (S.D.N.Y. Jan. 10, 2022), ECF No. 574 (“In the event the defendant’s post-trial motions are denied, the Government is prepared to dismiss the severed perjury counts at the time of sentencing, in light of the victims’ significant interests in bringing closure to this matter and avoiding the trauma of testifying again.”).

punished for Mr. Epstein's actions, stating "Miss Maxwell is not punished in place of Epstein . . .

Miss Maxwell is being punished for the role that she played."<sup>2</sup>

The Court should not allow individuals (here, Maxwell) convicted of criminal acts of sexual violence against minors to escape the financial consequences of their actions. Because indemnification in this situation is contrary to public policy, and for the reasons set forth in the Motion to Dismiss and Reply, the Court should dismiss Maxwell's claims.<sup>3</sup>

## **ARGUMENT**

### **I. Public Policy Bars Maxwell's Claims for Indemnification Based on Contract.**

As the Court has recognized, "an agreement is against public policy if it is injurious to the interests of the public . . . . The Court has a duty to refuse to enforce a contract that is contrary to public policy and tends to injure the public good." *Berne Corp. v. Government of the Virgin Islands*, 46 V.I. 106, 115 (Super. Ct. 2004); *see also Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*, 68 V.I. 584, 601-02 (V.I. 2018) (affirming Superior Court's determination that "rigid enforcement of private agreements that threaten the interests of third parties . . . is against public policy.").

Applying this principle to indemnification agreements, courts across the country—including in New York, the situs of the underlying civil and criminal actions against Maxwell—

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2. *See Lauren Del Valle, Ghislaine Maxwell's Attorneys Appeal her Federal Conviction and Sentence*, CNN (July 8, 2022), <https://www.cnn.com/2022/07/08/us/ghislaine-maxwell-appeal/index.html>. The transcript from Maxwell's June 28, 2022 sentencing hearing is not yet publicly available on the docket. *See Transcript, USA v. Maxwell*, No. 20-CR-00330 (S.D.N.Y. Jul. 22, 2022), ECF No. 737 (docket text setting August 12, 2022 deadline for transcription redaction requests and indicating that transcript will be available through PACER on October 20, 2022).

3. The NES Operating Agreement (as that term is defined in the Motion to Dismiss) expressly forbids indemnification of Maxwell for claims that are "the result of fraud, gross negligence, or reckless or intentional misconduct." (NES Operating Agreement Section VI.B.1, at pp. 5-6.) As further detailed in the Motion to Dismiss and Reply, the Court should dismiss Maxwell's claim for indemnification under the NES Operating Agreement based on the terms of that Agreement.

routinely hold that contractual indemnification for those found guilty of intentional criminal wrongdoing is unenforceable as against public policy because it would promote illegality and allow a wrongdoer to cause criminal injury with impunity. *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.”). And Virgin Islands statutory law regarding indemnification likewise indicates that indemnification for willful or wanton acts is inappropriate. 10 V.I.C. § 101 (providing for indemnification of law enforcement officers unless, *inter alia*, the officer seeks indemnification for “any willful or wanton act”).

The Court should follow the holdings of Virgin Islands courts, the great majority of courts in other jurisdictions and legal treatises to find that public policy requires rejection of contractual indemnification for claims or expenses arising from Maxwell's criminal actions here. To hold otherwise would be to encourage individuals like Maxwell — a convicted felon — to engage in crimes victimizing minors with the knowledge that they can offload to others the financial repercussions of their actions and are entitled to incur whatever costs they deem necessary in order to hide from criminal or other repercussions.<sup>4</sup>

## **II. Public Policy Also Bars Maxwell's Claims for Promissory Estoppel or Common Law Indemnification.**

The public policy concerns that bar enforcement of contractual indemnification for those found guilty of intentional criminal acts apply with equal force to common law indemnification or indemnification based on promissory estoppel. Both of these doctrines arise in equity and are based on concepts of restitution and unjust enrichment. *See, e.g., Willie v. Amerada Hess Corp.*, 66 V.I. 23, 46 (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 (Sup. 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

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4. The few cases suggesting that contractual indemnification for intentional wrongdoing may be possible are readily distinguishable from the situation here, with such cases generally both requiring provisions that clearly and unambiguously express the indemnitor's intention to provide indemnity for intentional acts and involving situations where the indemnified party's actions could not be proven to be intentional, much less criminal. *See, e.g., Gibbs-Alfano v. Burton*, 281 F.3d 12, 22-23 (2d Cir. 2002) (acknowledging that contractual indemnification for intentional acts is unenforceable, but finding that the indemnification clause in question was enforceable because there was no finding or factually strong suggestion that the indemnified party's actions were intentional). Here, Maxwell does not allege any contractual provisions that clearly and unambiguously call for indemnification of intentional or criminal acts and, as discussed further in the Motion to Dismiss, the Reply and by the New York court handling the criminal case against Maxwell, the allegations against Maxwell are based on her own intentional criminal actions.

(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”).

Research has not identified any case that permitted indemnification pursuant to promissory estoppel or common law where, as here, the purported indemnitee has been convicted of an intentional criminal act. This long-standing judicial stricture, as well as the equitable nature of both promissory estoppel and common law indemnification, public policy and the facts of this case all strongly suggest that the Court should not be the first to permit common law indemnification for one found guilty of intentional criminal acts. The crimes for which Maxwell stands convicted are based on her own affirmative criminal behavior. As Judge Nathan in the District Court for the Southern District of New York stated in sentencing Maxwell to 20 years in prison for her crimes, “Miss Maxwell is not punished in place of Epstein . . . Miss Maxwell is being punished for the role that she played.”<sup>5</sup> Maxwell cannot employ equitable doctrines to escape the financial consequences of her intentional criminal acts.

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5. *See supra* n. 2.

## CONCLUSION

For the reasons set forth herein and in the Co-Executors' Motion to Dismiss and Reply in Support of the Motion to Dismiss, the Court should dismiss the Complaint in its entirety.

Respectfully,

Dated: August 1, 2022

/s/ Shari N. D'Andrade  
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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on August 1, 2022, I caused a true and exact copy of the foregoing **Supplemental Brief in Support of Motion to Dismiss**, which complies with the page or word limitation set forth in Rule 6-1(e), to be served via VIJEFS upon:

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