IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & 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. EPSTEIN, and NES, LLC, a New York Limited Liability Company** **Defendants.**	**CIVIL NO. ST-20-CV-155**

CO-EXECUTORS' REPLY 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 Reply Brief in further support of their Motion to Dismiss the Complaint filed in this action on May 1, 2020 (the "Motion to Dismiss").

I. MAXWELL'S CLAIM FOR COMMON LAW INDEMNIFICATION IS UNRIPE AND SHOULD BE DISMISSED.

Maxwell initially filed her Complaint prematurely in violation of 15 V.I.C. § 606(a). (Motion to Dismiss at 1–2, 4–6.) After forcing the Co-Executors to file the Motion to Dismiss, Maxwell implicitly conceded her error and, on June 1, 2020, jointly moved with the Co-Executors for a stay of this action until the required one-year waiting period had passed. While the Court granted the stay on August 3, 2020, and Maxwell is no longer in violation of section 606(a), her

claim for common law indemnification remains unripe for adjudication until judgments are rendered in the underlying actions against her pending in New York state and federal courts.

Under the ripeness doctrine, courts in the Virgin Islands "will defer from ruling on a claim when ongoing or potential future litigation precludes an informed determination of the issues." *Simon v. Joseph*, 59 V.I. 611, 628 (V.I. 2013). For example, in *Simon*, the plaintiff, a convicted felon, pursued a legal malpractice action in Superior Court against his criminal defense attorney while his *habeas corpus* petitions were on appeal in federal and local courts and while the Ethics and Grievance Committee of the Virgin Islands Bar Association investigated the attorney's conduct. *Id.* at 615–20. After Simon's attorney moved to dismiss, the Superior Court considered Simon's claims on their merits, ultimately granting the motion. *Id*. On appeal, the Supreme Court vacated the decision, holding that the Superior Court "committed a fundamental error" when it considered any aspect of Simon's claims on the merits rather than *sua sponte* dismissing the complaint for lack of ripeness. *Id.* at 621. Because Simon's criminal appeal and other related actions had not yet been decided (and he still had the ability to file additional *habeas* petitions), the Superior Court "severely disrupted comity amongst federal and local courts by creating inconsistent adjudications of essentially the same factual and legal issues." *Id*. at 630.

Similarly, in *Virgin Islands Government Hospitals and Health Facilities Corp. v. Government of the Virgin Islands*, 50 V.I. 276 (V.I. 2008), the Supreme Court vacated an order granting an award of attorney's fees because "the presence of ongoing litigation precludes an informed determination of whether the moving party is in fact entitled to attorney's fees under the relevant law" and "the prevailing party [could not yet] be ascertained." *Id*. at 280–81. And in *Virgin Islands Water and Power Authority v. Sound Solutions, LLC*, the Superior Court dismissed a claim seeking costs and fees arising from an ongoing underlying case as unripe, holding that

determination of the issue would "force this Court to assess and rule on whether Defendants' [underlying case] is meritorious before such a determination has been made in that case itself" and "there is a substantial possibility that the final disposition in [the underlying case] would moot this cause of action here, or at least substantially alter the appropriate remedy." No. ST-14-cv-558, 2015 WL 3429078, at *4–5 (V.I. Super. Ct. May 27, 2015). As the *Sound Solutions* court found, "[i]t would be improper to allow this case to proceed when the relevant facts are so unstable." *Id*. at *5.

The same reasoning applies here, where the predicate criminal and civil actions accusing Maxwell of sexual abuse and other misconduct are pending in front of various state and federal courts.[1] As a matter of public policy, Maxwell cannot be indemnified for intentional wrongdoing, including criminal conduct.[2] As a result, any determination of Maxwell's common law

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1. The Co-Executors previously described the civil actions pending against Maxwell in the New York state and federal courts. (Motion to Dismiss at 3 n.3.) On June 29, 2020, Maxwell was criminally indicted in the Southern District of New York for conspiracy to entice minors to travel to engage in illegal sex acts, enticement of a minor to travel to engage in illegal sex acts, 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 two counts of perjury. (*See* Indictment, a copy of which is attached hereto as **Exhibit D** (Exhibits A-C were attached to the original Motion to Dismiss).) Her criminal trial is scheduled to begin in New York federal court on July 12, 2021.

2. As this Court has held, "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 (V.I. Super. Ct. 2004). Courts 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. *See, e.g.*, *Austro v. Niagara Mohawk Power Corp.*, 66 N.Y.2d 674, 676 (1985) (indemnification of party for "damages flowing from the intentional causation of injury" void as against public policy); *Equitex, Inc. v. Ungar*, 60 P.3d 746, 750 (Colo. App. 2002) ("Public policy prohibits 'indemnifying a party for damages resulting from intentional or willful wrongful acts.'") (quoting *Bohrer v. Church Mut. Ins. Co.*, 12 P.3d 854, 856 (Colo. App. 2000)); *In re RFC and RESCAP Liquidating Tr. Action*, 332 F.Supp. 3d 1101, 1134–35 (D. Minn. 2018) (indemnification void as against public policy "where the indemnitor shows that the indemnitee's underlying conduct was intentional, willful, or wanton"). *See also* Restatement (Third) of Torts § 22(e) ("Except for contractual indemnity, a vicariously liable person can obtain indemnity from the person whose negligence was imputed only

indemnification claim in this proceeding risks inconsistent adjudication, wastes judicial resources, and threatens to disrupt comity between New York and Virgin Islands courts. In addition, if Maxwell's claim is allowed to proceed, discovery and fact-finding will have to be duplicated, and discovery in this case regarding the facts and circumstances of the underlying civil and criminal cases against Maxwell will have to be taken while those underlying cases are ongoing. Moreover, common law indemnity *may not apply at all* if any of numerous different events relating to the underlying proceedings occur, including if Maxwell is found (1) guilty of the crimes with which she is charged, or (2) civilly liable due to her own misconduct toward young girls, rather than her performance of legitimate, employment-related duties for Mr. Epstein or his affiliated businesses. In these circumstances, the doctrine of ripeness requires dismissal of Maxwell's common law indemnification claim.[3]

The authorities Maxwell cites in her Opposition reinforce the Co-Executors' position. Those sources make clear that, because an indemnitee must discharge liability of the indemnitor in order to receive indemnification, an indemnitee may not plead a claim for common law indemnity unless it is (i) in the original suit, while that original suit is pending, or (ii) in a separate,

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if the vicariously liable person is not independently liable."); 8 Williston on Contracts § 19:19 (4th ed.) (indemnification agreements "tending to promote a breach of duty to the public" generally not upheld). *Cf. Willie v. Amerada Hess Corp.*, 66 V.I. 23, 34 (V.I. Super. Ct. 2017) (conducting an analysis under *Banks v. International Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011), and finding that the Virgin Islands recognizes common law indemnification "when an *innocent party* is held vicariously liable for the actions of the *true tortfeasor*") (emphasis in original).

3. Courts in other jurisdictions also have found unripe claims for common law indemnification brought in a separate action prior to determination of the underlying proceedings. *See, e.g.*, *Medline Indus., Inc. v. Ram Med., Inc.*, 892 F. Supp. 2d 957, 966–67 (N.D. Ill. 2012) (dismissing claim for common law indemnification under Illinois law as unripe when no underlying judgments had yet been rendered); *Lincoln Gen. Ins. Co. v. Kingsway Am. Agency, Inc.*, No. 1:11-CV-1195, 2013 WL 214634, at *10 (M.D. Penn. Jan. 18, 2013) (same, under Pennsylvania law); *Gramercy Advisors, LLC v. BDO USA, LLP*, No. FSTCV136020625S, 2015 WL 2191655, at *3–4 (Conn. Sup Ct. Apr. 9, 2015) (same, under Connecticut law).

"*subsequent* suit against the indemnitor." Restatement (Third) of Torts § 22, cmt. i (emphasis added) (listing cases); *see also Willie v. Amerada Hess Corp.*, 66 V.I. 23, 30 (V.I. Super. Ct. 2017) (denying motion to dismiss counterclaims for common law indemnification where claims were brought in original tort suit); *Manbodh v. Hess Oil Virgin Islands Corp. (In re Kelvin Manbodh Asbestos Lit. Series)*, 47 V.I. 375 (V.I. Super. Ct. 2006) (in original tort action where various parties brought claims for common law indemnification against third-party defendants, converting motions to dismiss to motions for summary judgment and holding that the Restatement (Third) of Torts set forth applicable law). None of these sources supports Maxwell's argument that she may pursue this independent action for common law indemnification while the underlying actions against her—both criminal and civil—remain pending in other jurisdictions.

In particular, Maxwell's contention that *Willie* "expressly allows a party to 'plead' a common law indemnification claim before a judgment has been rendered," is critically misleading as applied to the present facts. (*See* Opposition at 6.) In performing a *Banks* analysis to determine the soundest rule for the Virgin Islands with respect to common law indemnification,[4] the *Willie* court canvassed Virgin Islands precedent since 1980, concluding that there are two types of common law indemnification cases. In the first type of indemnity case, a party may plead an indemnity claim before it is found liable if it does so "through a counterclaim or third-party complaint" in the underlying liability action. *Id*. This was the situation in *Willie*. In the second type of case, a party may bring a separate claim for indemnification "*after a party has been found liable*" in the underlying liability action. *Id*. (emphasis added). Thus, in a separate action for indemnification—such as the present case—a purported indemnitee (here, Maxwell) may not

4. Until the Supreme Court rules on this issue, it remains an open question whether a claim for common law indemnification is a viable cause of action in the Virgin Islands post-*Banks*.

assert a claim for common law indemnification unless and until her liability has been determined in the underlying actions.[5]

II. MAXWELL'S CLAIM AGAINST NES FAILS.[6]

A. The Court Should Dismiss Maxwell's Claim Against NES as a Matter of Law.

Maxwell alleges upon information and belief that NES's governing corporate documents entitle her to the advancement of expenses and indemnification that she now demands. (Compl.

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5. All three of the other decisions cited by Plaintiff—*Vandenhouten v. Olde Towne Tours, LLC*, No. 20008-41, 2009 WL 1956360, at *5 (D.V.I. July 8, 2009), *Davis v. Sunrise Med. (US), LLC*, No. 2012/29, 2013 WL 3775461, at *6 (D.V.I. July 17, 2013) and *Manbodh*, 47 V.I. 392–95—are the first type of case, where an indemnity claim was asserted in an existing action as a counterclaim or third-party claim, and are therefore inapplicable here. Moreover, while Maxwell incorrectly asserts that *Manbodh* is directly contrary to the relevant holding in *Willie*, *Manbodh* says nothing about bringing a separate claim for indemnification while the underlying action remains pending, and that was not the situation faced by that court. Instead, *Manbodh* holds that the Restatement (Third) of Torts, rather than the First or Second Restatements, sets forth applicable law. *Id*. at 392–94. As discussed above, the Restatement (Third) of Torts provides that a claim for indemnification may be brought in the original underlying action or a subsequent suit:

> Except when a contract for indemnity provides otherwise . . . an indemnitee must extinguish the liability of the indemnitor to collect indemnity. The indemnitee may do so either by a settlement with the plaintiff that by its terms or by application of law discharges the indemnitor from liability or by satisfaction of judgment that by operation of law discharges the indemnitor from liability. . . . An indemnitee may, however, assert a *claim* for indemnity and obtain a contingent judgment *in an action where the indemnitee is sued by the plaintiff as permitted by procedural rules*, even though liability of the indemnitor has not yet been discharged.

Restatement (Third) of Torts § 22(b) (emphasis added, in part); *see also* cmt. i (quoted above), notes to cmt. i ("[V]irtually all states permit the indemnitee to assert his claim in the original suit, by cross-complaint or impleader, or in a *subsequent* suit against the indemnitor.") (emphasis added).

6. The Court also should dismiss Maxwell's claims against the Estate itself. While Maxwell continues to incorrectly assert that the Estate is a legal entity that can be sued (*see* Opposition at 3–4), it is a basic tenet of trusts and estates law that "[a]n estate is not a person or a legal entity and cannot sue or be sued; an estate can only act by and through a personal representative and therefore any action must be brought by or against the executor or representative of the estate." 34 C.J.S. Executors and Administrators § 847; *see also, e.g.*, 31 Am. Jur. 2d Executors and Administrators § 1141 (2016) ("Since estates are not natural or artificial persons, and they lack legal capacity to sue or be sued, an action against an estate must be brought against an administrator or executor as the representative of the estate."); *Campbell v. Estate of Kilburn*, No. 3:13-cv-00627-LRH-WGC, 2014 WL 3613701, at *3 (D. Nev. July 21, 2014) ("It has long been recognized that an estate is not a legal entity, but rather a collection of assets and liabilities. Consequently, an estate cannot sue or be sued, and it is thus proper to name the representative

¶ 47.) However, when presented with the actual corporate document in question—the NES Operating Agreement—Maxwell ignores the effect of that document, which unambiguously allows NES to *decline* her claims for indemnification and advancement of fees and expenses. (*See* Motion to Dismiss 6–8.)[7] Instead, Maxwell contends that she should be allowed to conduct a fishing expedition in the hopes of finding some other document that might undermine the unambiguous language of NES's Operating Agreement. That is not the law.

As Maxwell acknowledges, courts deciding a motion to dismiss may consider "items of unquestioned authenticity that are referred to in the challenged pleading and are integral to the pleader's claim for relief." (Opposition at 11 n.7.) Put another way, this Court is free to consider "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleadings." *Groff v. Cane Bay Partners VI, LLLP*, No. SX–15–CV–127, 2017 WL 2709832, at *1–2 (V.I. Super. Ct. June 20, 2017). "The reasoning underlying this approach is particularly sound where the exhibit being considered is the very document forming the basis of a plaintiff's complaint." *Id*. at *1.[8]

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of the estate, rather than the estate itself, as a party."). This principle is reflected in 15 V.I.C. § 606 ("Commencement of action against executor or administrator"). While Maxwell cites cases in which an estate has been named as a defendant, there is no indication that the status of the estate as a entity with the capacity to be sued was at issue in any of those proceedings. The Court should decline Maxwell's invitation to create law recognizing an estate as a separate legal entity here.

7. The NES Operating Agreement also *forbids* indemnification for "fraud, gross negligence, or reckless or intentional misconduct." (NES Operating Agreement, attached as Exhibit C to the Motion to Dismiss, § VI.B.1.)

8. As discussed in the Co-Executors' opening brief (Motion to Dismiss at 6–7 & n.7), the "incorporation by reference" doctrine "permits a court to review the actual document referenced in the complaint 'to ensure that the plaintiff has not misrepresented its contents and that any inference the plaintiff seeks to have drawn is a reasonable one' . . . [and] 'limits the ability of the plaintiff to take language out of context.'" *Hess Oil Virgin Islands Corp. v. Daniel*, No. SX-05-CV-165, 2020 WL 1819622, at *8 (V.I. Super. Ct. Apr. 8, 2020) (quoting *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 797 (Del. Ch. 2016), *overruled in part on other grounds by Tiger v. Boast Apparel, Inc.*, 214 A.3d 933, 939 (Del. 2019)). "Without the ability to consider the document at issue in its entirety, complaints that quoted

Here, Maxwell does not contest the authenticity of the NES Operating Agreement attached to the Co-Executors' Motion to Dismiss.[9] And the NES Operating Agreement is "integral" to Maxwell's claim that she is entitled to mandatory indemnification and the advancement of fees and a myriad of other costs due to the "corporate organizational documents for NES." (Compl. ¶ 47.) Under applicable New York law,[10] "[t]he operating agreement is the primary governing instrument for" a New York LLC, and must contain "any provision not inconsistent with law or its articles of organization relating to (i) the business of the LLC, (ii) the conduct of its affairs and (iii) the rights, powers, preferences, limitations or responsibilities of its members, managers, employees or agents." N.Y. Limit. Liab. Co. Ch. 34, Refs & Annos § 5.1. In other words, Maxwell's claim for contractual indemnification is based on her allegations about the contents of NES's corporate organization documents and, under New York law, the NES Operating Agreement *is* NES's corporate organization document. *See Groff*, 2017 WL 2709832, at *1–2 (in a case asserting claims for breach of an employment agreement and breach of the implied covenant

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only selected and misleading portions of such documents could not be dismissed under Rule 12(b)(6) even though they would be doomed to failure." *Id*. In addition, the Court may consider "a document attached to a motion to dismiss . . . if the attached document is: "(1) central to the Plaintiff's claim; and (2) undisputed." *Id*. (quoting *Ackah v. Hershey Foods Corp.*, 236 F. Supp. 2d 440, 443 (M.D. Pa. 2002)). That is the case here.

9. While Maxwell argues that the Court cannot consider the NES Operating Agreement because "[t]he operative operating agreements are not in her possession," there is no legal or factual basis to believe that an earlier, different version of the NES Operating Agreement even existed. (Tellingly, the language of the NES Operating Agreement does not reference or purport to amend any prior operating agreements.) Maxwell cites no support for the proposition that she can allege, upon information and belief, what she believes a purported previous operating agreement may say and then defeat the Co-Executors' Motion to Dismiss based on the NES Operating Agreement by simply claiming that she does not have that supposed earlier document.

10. NES is a New York limited liability company governed by New York law. (*See* Complaint p. 1 (identifying NES as a "New York Limited Liability Company"); Operating Agreement §§ I, VIII.E.)

of good faith and fair dealing, holding that the original offer letter and form employment contract can be considered on motion to dismiss).

To the extent that Maxwell now argues that her claim for indemnification from NES is based on an implied or unwritten corporate obligation that she might find evidence of, if only she were allowed to rummage through NES's files, this argument is barred by the New York Statute of Frauds. N.Y. Gen. Oblig. Law § 5-701(a)(2) (requiring an agreement to be in writing if "by its terms is not to be performed within one year of the making thereof or the performance of which is not to be completed before the end of a lifetime" or it "[i]s a special promise to answer for the debt, default or miscarriage of another person").[11] Such an argument is also barred by the Virgin Islands Statute of Frauds. 28 V.I.C. § 244 (2019) (voiding any unwritten agreement that (1) "by its terms is not to be performed within one year from the making thereof" or (2) constitutes "[a] special promise to answer for the debt, default, or misdoings of another person"); *see, e.g.*, *Guye v. Lutheran Soc. Servs. of the Virgin Islands, Inc.*, No. SX-10-CV-119, 2011 WL 13116070, at *3–4 (V.I. Super. Ct. Feb. 10, 2011) (granting motion to dismiss claim for the alleged breach of an employment agreement pursuant to the Virgin Islands Statute of Frauds where plaintiff did not assert the existence of a valid, written agreement); *Arawak Foods, Inc. v. Lawaetz*, No. 764/1983, 1985 WL 1264047, at *3 (Terr. V.I. Feb. 21, 1985) (letter stating that defendant personally

11. New York limited liability companies without written operating agreements apply the default provisions set forth in New York statutes, which permit—but do not require—a company to choose to indemnify employees under certain circumstances. *See, e.g.*, *In re Eight of Swords, LLC*, 96 A.D.3d 839, 839 (N.Y. App. Div. 2012) (when no written operating agreement exists, the LLC is subject to the "numerous sections in the [Limited Liability Company Law] that set forth default provisions applicable to the limited liability company"); N.Y. Limit. Liab. Co. § 420.

guaranteed that a corporation's debt would be paid found insufficient to satisfy the Statute of Frauds).[12]

Materials outside of the NES Operating Agreement likewise are insufficient to undermine the unambiguous language of that Agreement. *See, e.g.*, *Borriello v. Loconte*, No. 503180/2013, 2014 WL 702172, at *6 (N.Y. Sup. Ct. Feb. 24, 2014) (finding that, where operating agreement provided for indemnification but was silent on the issue of advancement of fees, LLC members could not vote to advance legal fees); N.Y. Limit. Liab. Co. Ch. 34, Refs & Annos § 5.2.2 (material outside of written operating agreement insufficient to find obligation in face of written operating agreement). Finally, Maxwell's assertions that there are "presumably" or "surely" earlier operating agreements of NES and that she "may" have rights pursuant to those agreements (Opposition at 9–10) are mere speculation—not even rising to the level of factual allegations—insufficient to support her complaint. *See, e.g.*, *Brathwaite v. H.D.V.I. Holding Co., Inc.*, No. ST-16-CV-764, 2017 WL 2295123 at *2 (V.I. Super. Ct. May 24, 2017) (a complaint must "adequately allge[] *facts* that put an accused on notice of claims brought against it") (emphasis added).[13]

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12. To the extent that Maxwell's first cause of action is based on an alleged oral promise, it is likewise barred in its entirety by the Statute of Frauds. *See, e.g.*, *MacKay v. Paesano*, 185 A.D.3d 915, 916 (N.Y. App. Div. 2020) (where breach of contract action dismissed based on Statute of Frauds, promissory estoppel claim also correctly dismissed as an impermissible attempt to circumvent the Statute of Frauds).

13. Maxwell does not respond to that portion of the Co-Executors' motion to dismiss Count Three of her Complaint to the extent it seeks contractual indemnification from "other entities" not named as defendants. (Motion to Dismiss at 8 n.8.) As the Complaint fails to allege the necessary elements of a claim for contractual indemnification against these additional entities, the Court should dismiss Count Three as against them.

B. In the Alternative, the Court Should Convert this Motion to a Motion for Summary Judgment and Dismiss Maxwell's Claim Against NES.

To the extent that the Court concludes that it may not consider the NES Operating Agreement on this motion to dismiss, the Court should convert this proceeding to a motion for summary judgment under Rule 12(d) of the Virgin Islands Rules of Civil Procedure. *See, e.g.*, *Stanley v. Virgin Islands Bureau of Corrections*, No. ST-16-MC-075, 2020 WL 1639902, at *5 (V.I. Super. Ct. Apr. 1, 2020) (holding that the notice requirement of Rule 12(d) was satisfied where moving party attached material outside of pleadings, opposing party noted that it was outside of pleadings and that, in consideration thereof, the Cout would convert the motion to dismiss to one for summary judgment, and opponent received additional time to respond in order to provide contrary factual materials). "[W]hen considering a motion for summary judgment, a trial judge can consider material outside the pleadings, including affidavits, responses to discovery, and other evidence to determine if there is a genuine issue of material fact." *Racz v. Cheetham*, ST-17-CV-461, 2019 WL 7985359, at *2 (V.I. Super. Ct. Nov. 21, 2019) (granting summary judgment).

Summary judgment is appropriate where, as here, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.I. R. Civ. Proc. 56(a). Once the party moving for summary judgment has demonstrated that there is no genuine issue of material fact, "the responding party must introduce some evidence showing a genuine issue for trial. To carry this burden, the nonmoving party may not rest on its allegations alone, but must present actual evidence, amounting to more than a scintilla, in support of its position." *Greene v. Virgin Islands Water and Power Authority*, 67 V.I. 727, 742 (V.I. 2017) (internal citations and quotation marks omitted). While the nonmovant may show "by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition," V.I. R. Civ. Proc. 56(d),

it cannot require additional discovery without showing that "the facts sought exist." *Family Home and Finance Center, Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008) (affirming grant of summary judgment despite nonmovant's argument that discovery was needed to oppose); *see also, e.g.*, *Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 813 (2d Cir. 1994) (affirming grant of summary judgment where nonmovant merely speculated about evidence that could be adduced in discovery).

As discussed above and in the Motion to Dismiss, the language of the NES Operating Agreement unambiguously demonstrates that NES has no obligation to indemnify Maxwell or advance her fees and expenses. (*See* Motion to Dismiss at 6–9 & Ex. C.) Even if Maxwell could adduce evidence of an implied agreement or oral promise for indemnification, such an agreement or promise could not give rise to an enforceable indemnification obligation. (*Supra* § II.A.) And while Maxwell speculates (again, without basis in law or fact) that there are "presumably" earlier operating agreements of NES and that she "may" have rights pursuant to those hypothetical agreements (Opposition at 9–10), such speculation—which does not even rise to the level of a factual allegation sufficient to defeat a motion to dismiss—is insufficient to meet Maxwell's burden here. Because no genuine dispute of material fact exists and Maxwell offers nothing more than her mere hope that discovery could possibly reveal something that might support her claim, the Court should dismiss Maxwell's claim against NES.

III. CONCLUSION

For the reasons set forth herein and in the Co-Executors' Motion to Dismiss, the Court should dismiss the Complaint in its entirety.[14]

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14. In recent briefing on its motion to intervene in this action, the Government of the Virgin Islands asserts that, where Maxwell's claims for indemnification are concerned, "the Epstein Estate and its Co-

Respectfully,

Dated: September 28, 2020

/s/ Christopher Allen Kroblin

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of September 2020, I caused a true and exact copy of the foregoing **Reply 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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Executors clearly are *inadequate* to represent the Government's interest in preserving Estate Funds . . . ," bizarrely accepting as gospel truth Maxwell's allegation that one of the Co-Executors orally agreed to indemnify her. (Gov't of the U.S. Virgin Islands' Reply Brief in Support of Motion to Intervene, dated September 22, 2020, at 4 (emphasis in original).) That is nonsense: as the Court is well aware, the Co-Executors refused to indemnify Maxwell. Maxwell brought this action seeking to obtain indemnification; by this Motion, the Co-Executors seek to dismiss Maxwell's claims for indemnification in their entirety.