

**FILED**

September 08, 2020

TAMARA CHARLES  
CLERK OF THE COURT

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

CIVIL CASE NO.: ST-20-CV-155

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.

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**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Plaintiff GHISLAINE MAXWELL ("Plaintiff"), by counsel, pursuant to V.I.R.Civ.P. 12, hereby opposes the Motion to Dismiss<sup>1</sup> (the "Motion to Dismiss") filed by Defendants DARREN K. INDYKE ("Indyke") and RICHARD D. KAHN ("Kahn") (collectively, the "Co-Executors"), 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").

**I. PRELIMINARY STATEMENT**

Defendants' Motion to dismiss must be denied because its primary basis is now moot and its secondary arguments have no sufficient basis.

First, Co-Executors' argument that Plaintiff's claim against them is premature in violation of 15 V.I.C § 606(a) is no longer viable. While the Co-Executors argue that they may

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<sup>1</sup> The Motion to Dismiss is cited herein by page number as "MTD."

not be sued until the expiration of twelve months from the granting of letters testamentary, that time has now passed. Under the Virgin Islands Supreme Court's ruling in *Ottley v. Estate of Bell*, 61 V.I. 480 (2014), this action may proceed against the Co-Executors.

Next, Defendants' argument that Plaintiff's claim for common law indemnification is premature on the grounds that a judgment has not yet been rendered against her likewise must fail. Plaintiff has pleaded sufficient facts supporting each element of a claim for common law indemnification recognized in this jurisdiction.

Finally, NES, LLC's argument that Plaintiff's claim for indemnification fails to state a claim is meritless and depends entirely on irrelevant matters that fall outside the four corners of the Complaint. NES, LLC improperly invites this Court to award it summary judgment on the merits of Plaintiff's claim based on a company operating agreement adopted long after Plaintiff served as a company manager. Because this document does not directly pertain to the allegations of the Complaint, this Court should exclude it from its consideration of the Motion to Dismiss and consider only the allegations in the Complaint (viewing these allegations and reasonable inferences therefrom in the light most favorable to Plaintiff). Since NES, LLC does not otherwise argue that Plaintiff fails to state a claim against it upon which relief can be granted, its motion must be denied.

## **II. STANDARD**

A motion to dismiss under V.I. R. Civ. P. 12(b)(6) must be decided based upon V.I. R. Civ. P. 8's pleading standards. The Virgin Islands is a "Notice" pleading jurisdiction. Under Rule 8(a)(2), a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief-because this is a notice pleading jurisdiction ... ." Rule 8's adoption

“eliminates the [federal] plausibility standard and instead will permit a complaint so long as it adequately alleges facts that put an accused party on notice of claims brought against it.” *Mills-Williams v. Mapp*, 67 V.I. 574, 585 (V.I. 2017) (internal quotation marks and citation omitted); *see also* V.I. R. Civ. P. 8, Comment (this approach “declines to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief.”). In applying this standard, the Court must “view the facts alleged in the pleadings and the inferences to be drawn from these facts, in the light most favorable to the plaintiff.” *Pedro v. Ranger Am. of the V.I., Inc.*, 70 V.I. 251, 264 (Super. Ct. 2019) (*quoting Benjamin v. AIG Ins. of P.R.*, 56 V.I. 558, 566 (V.I. 2012)). Rule 8 “will permit a complaint so long as it adequately alleges facts that put an accused party on notice of claims brought against it[,]” *Mills-Williams*, 67 V.I. at 585, and “declines to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief,” V.I. R. Civ. P. 8, Comment.

### **III. ARGUMENT**

#### **A. The Estate May Be Sued In Its Own Capacity And Is Properly Named As A Defendant**

Defendants suggest in a footnote that it was improper for Plaintiff to name the Estate as defendant in this action because it “does not have a separate identity and may not be sued as a party.” *See* MTD at 2 n.1. Defendants do not cite any provision of Virgin Islands law in support of this argument. In fact, there is no provision of Virgin Islands law precluding an action against

an estate, no Virgin Islands has held that it is improper to do so, and courts in this jurisdiction customarily *allow* it.<sup>2</sup>

For example, in *Ottley v. Estate of Bell*, 61 V.I. 480 (2014), the Virgin Islands Supreme Court addressed a lawsuit naming an estate as defendant. *See id.* at 486 (“Ottley named Bell’s estate, Eboni, and Gerard . . . as defendants in the action.”). In deciding the appeal, the Virgin Islands Supreme Court held that it was permissible for the plaintiff to sue the estate. *See id.* at 500 (“Ottley correctly named Bell’s estate as the defendant, and although not necessary, additionally listed the two heirs entitled to inherit her interest in the property.”). Consistent with this decision, Courts in the Virgin Islands have commonly recognized estates as legal entities that can sue and be sued. *See, e.g., Laforce v. Estate of Laforce*, 2019 WL 7987454, at \*2 (V.I. Super. Dec. 27, 2019); *Garvey v. Estate of Moorhead*, 2016 WL 9503603, at \*2 (V.I. Super. Aug. 1, 2016); *Kaloo v. Estate of Small*, 2015 WL 1514572, at \*1 (V.I. Mar. 27, 2015); *Guardian Ins. Co. v. Estate of Knight-David*, 2015 WL 5782098, at \*1 (V.I. Super. Sept. 30, 2015); *Estate of Ludington v. Jaber*, 2011 WL 1304470, at \*1 (V.I. Mar. 22, 2011). These decisions thus demonstrate that the Estate is properly subject to suit in this case.

In sum, Defendants’ argument that the Estate may not be sued as a party is unsupported by any law, is inconsistent with the law and practice of this jurisdiction, and must be rejected.

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<sup>2</sup> Defendants’ sole citation in support of their argument is to an American Jurisprudence treatise—which in turn relies on a single Illinois state court opinion from 1981—that clearly does not reflect the law or practice of this jurisdiction.

**B. Plaintiff's Claims Are Not Premature**

**i. Plaintiff's claims against the Co-Executors are ripe and may proceed**

First, the Co-Executors argue that Plaintiff's claim against them is premature in violation of 15 V.I.C § 606(a). *See* MTD at 4. This statute provides that

[a]n action may be commenced against an executor or administrator at any time after the expiration of twelve months from the granting of letters testamentary or of administration and until the final settlement of the estate and discharge of such executor or administrator from the trust, and not otherwise.

Citing this provision, the Co-Executors argue that Plaintiff may not maintain an action against them "until September 6, 2020." *See* MTD at 4. Since this date has now passed, the Co-Executors argument under 15 V.I.C § 606 is now moot.

Further, the fact that Plaintiff commenced this action before the conclusion of the twelve-month letters testamentary period does not require dismissal. Facing this exact scenario, the Virgin Islands Supreme Court in *Ottley v. Estate of Bell* held that the Superior Court erred in dismissing a complaint for failure to comply with 15 V.I.C § 606 where the claim had ripened by the time the trial court dismissed it. 2014 WL 5471948, at \*6 ("Because Ottley could have immediately refiled the complaint, and the law does not generally require a useless act, the Superior Court erred in dismissing Ottley's complaint for the \$60,000 debt on the basis of noncompliance with section 606(b).") Thus, even assuming Plaintiff was not in compliance with Section 606(a) at the time she filed her Complaint, Plaintiff's claims against the Co-Executors are now ripe by the Co-Executors' own measure and may proceed.<sup>3</sup>

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<sup>3</sup> 15 V.I.C. § 606(b) further provides that "[a]n action against an executor or administrator shall not be commenced until the claim of the plaintiff has been duly presented to

**ii. Plaintiff’s common-law claim for indemnification is ripe and may proceed**

Second, Defendants suggest in a footnote that Plaintiff’s common-law claim for indemnification is premature on the grounds that “a party may not assert a common-law claim for indemnification in a separate action before a judgment has been rendered against her.” *See* MTD at 6 n.5.

Defendants cite one case for this proposition, *Willie v. Amerada Hess Corp.*, 2017 WL 772808 (V.I. Super. Feb. 28, 2017). That case flatly contradicts Defendants’ suggestion and plainly does not require dismissal of Plaintiff’s claim here. In fact, *Willie* expressly *allows* a party to “**plead**” a common law indemnification claim before a judgment has been rendered. *Id.*, at \*30 (“The Court also agrees that before a party can prevail on, **but not plead**, a common law indemnification claim, there must have been a determination that the person who initially brought suit (in this case, Mr. Willie) was in fact injured.”) (Emphasis added.) Indeed, courts in this jurisdiction commonly allow claims for indemnification to proceed despite the absence of any underlying judgment. *Vandenhouten v. Olde Towne Tours, LLC*, 2009 WL 1956360, at \*5 (D.V.I. July 8, 2009) (“there is no merit to Francis’s contention that any indemnity claim against him must await a determination that Olde Towne is liable to the Vandenhoutens”); *Davis v. Sunrise Med. (US), LLC*, 2013 WL 3775461, at \*6 (D.V.I. July 17, 2013).

Under *Willie*, upon which Defendants rely,

[t]o state a claim for common law indemnification, the indemnitee must allege that (1) it has been **or may be sued** (2) for damages, (3) proximately caused by the indemnitor’s actions or inactions, and

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such executor or administrator and by him disallowed.” Defendants do not—and could not—claim that Plaintiff is in violation of this provision. Here, Plaintiff submitted a claim to the Estate and the Estate did not honor it. Compl. ¶¶ 28-29.

(4) but for the relationship between the indemnitee and the indemnitor, the indemnitee would not have been sued or found liable.

*Willie*, 2017 WL 772808, at \*42 (emphasis added).<sup>4</sup>

Here, Plaintiff has pleaded sufficient facts supporting each of these elements. First, Plaintiff alleges that she “has incurred and will continue to incur significant legal fees, personal

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<sup>4</sup> Plaintiff does not necessarily concede that *Willie* properly states the elements of a common law indemnification claim in this jurisdiction. The *Willie* opinion, more than anything, demonstrates that this is not a settled area of law because the Virgin Islands Supreme Court has not yet spoken to the issue. In *Willie*, the Superior Court recognizes that a “key difference” between the Restatement (Second) of Tort and the Restatement (Third) of Tort regarding “Apportionment of Liability” centers on whether a pre-judgment claim is ultimately viable, and that the Restatement (Third) allows such claims while the earlier restatement does not. *Id.* at 30 (citing Restatement (Third) of Torts: Apportionment of Liability § 22(a)). Nevertheless, the Superior Court in *Willie* ultimately held that it would require an underlying judgment before entering any judgment on the merits on a common law claim for indemnification.

The Superior Court reached the opposite conclusion in *In re Kelvin Manbodh Asbestos Litig. Series*, 2006 WL 1084317 (V.I. Super. Mar. 6, 2006). In *Manbodh*, the Superior Court (through now-Justice, Hon. Maria Cabret) held that the rule for common law indemnification claims contained in the Restatement (Third) of Tort is the majority rule and the best rule for the USVI:

In sum, while both the Restatement (Second) and the Restatement (Third) contain more modern approaches to common law contribution and indemnification, the Restatement (Third) represents the current majority substantive law. In the Restatement (Third), the drafters promote the interests of both flexibility and judicial economy by supplying security for settlers. ... For all of these reasons, and in an effort to establish the best total set of rules by bridging the gaps in substantive tort law, this Court acknowledges the current majority rule and adopts the provisions of the Restatement (Third) of Torts: Apportionment of Liability, Topic 3 for the substantive requirements for common law contribution and indemnification.

*Id.* at \*10. It is likely that the Virgin Islands Supreme Court would reach the same conclusion, as that Court has acknowledged that a “strong preference exists for following the most recent Restatement over an older version.” *Banks v. Int'l Rental & Leasing Corp.*, 2011 WL 6299025, at \*6 (V.I. Dec. 15, 2011).

security costs, and other costs in connection with legal suits, proceedings, and investigations relating to Epstein, his affiliated businesses, and his alleged victims.” Compl. ¶ 25. Second, Plaintiff alleges that she “incurred these legal fees and expenses as a direct result of Epstein’s acts and/or omissions.” Compl. ¶ 43. Finally, Plaintiff alleges that “[t]he suits, proceedings, and/or investigations for which Maxwell seeks indemnification were instituted against Maxwell solely because she was an employee of Epstein and his affiliated businesses.” Compl. ¶ 42.

For all of the foregoing reasons, Plaintiff’s claim for common law indemnification is viable.

**C. NES, LLC’s Request That The Court Consider Matters Outside The Pleadings Should Be Rejected**

Defendants argue that Plaintiff’s claim for indemnification against NES, LLC fails because “NES has no obligation to indemnify [Plaintiff] for or advance her fees and expenses” under the “Operating Agreement of NES, LLC dated January 1, 2014” (hereinafter, the “2014 Operating Agreement”). *See* MTD at 6. While Plaintiff did not expressly reference or premise her claims on the 2014 Operating Agreement, Defendants submit a copy of this Operating Agreement with its Opposition and invites the Court to consider it as part of the “pleadings.” *See* MTD at 6. In other words, NES, LLC seeks judgment on the merits of this claim based entirely on matters outside the pleadings.

In ruling on a pre-answer motion to dismiss for failure to state a claim for relief, courts “assume all reasonable factual allegations in the complaint as true and draw all fair inferences from such allegations.” *Arno v. Hess Corp.*, 2019 WL 5295588, at \*14 (citation omitted). “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 facts alleged in the complaint.*” *Id.* (emphasis added) (citation omitted).

“[C]ourts [in the Virgin Islands] have the discretion to exclude extra-pleading materials attached to a motion to dismiss for failure to state a claim for relief.” *Stanley v. Virgin Islands Bureau of Corr.*, 2020 WL 1639902, at \*4 (V.I. Super. Apr. 1, 2020) (citing *Howell v. U.S.V.I. Police Dep't*, 67 V.I. 149, 158 n.4 (Super. Ct. 2016)). In *Howell*, the defendant submitted two documents with its pre-answer motion to dismiss for failure to state a claim. *Howell*, 67 V.I. 149, 158 n.4. Finding that those documents “[did] not directly pertain to any allegation asserted in the complaint” and “[were] not relevant to deciding the present motion to dismiss,” the Court did not convert the motion to a motion for summary judgment and decided the motion based on the allegations in the complaint. *Id.*

Here, Defendants fail to demonstrate the relevance of its extraneous submission. Defendants ask this Court to accept, without a verified statement<sup>5</sup>, that the 2014 Operating Agreement is the controlling document here. Indeed, the document raises more questions than it answers. According to the first page of the 2014 Operating Agreement, NES, LLC was formed in 1998. Presumably, there exist earlier operating agreements relating to the company. Plaintiff may enjoy rights under prior LLC operating agreements. *See, e.g., Branin v. Stein Roe Inv. Counsel, LLC*, 2014 WL 2961084, at \*8 (Del. Ch. June 30, 2014) (finding that an enforceable right to

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<sup>5</sup> The rules in fact require the Court to reject Defendants’ unverified statements regarding the 2014 Operating Agreement and otherwise. *See* V.I.R.Civ.P. 6-1(d) (requiring that “then-available” affidavits and other documents supporting a party’s position to be filed simultaneously with a motion that contains allegations of fact not appearing of record). For example, Defendants apparently ask the Court to conclude based on the representation of its counsel, without any independent support, that Plaintiff has engaged in “fraud, gross negligence, or reckless or intentional misconduct.” *See* MTD at 7.

indemnification can vest in accordance with the terms of an operating agreement such that it may not thereafter be rescinded by a later amendment to the agreement).

Further Plaintiff was a manager of the LLC during the mid-2000s, well before the effective date of the 2014 Operating Agreement. Compl. ¶¶ 15; 46. The company thus had a different management structure, and surely a different operating agreement, at the time that Plaintiff was a company manager. Plaintiff is entitled to discover all circumstances surrounding the company and its indemnification and/or advancement rights and policies over time, including any in effect during her time as manager, before she is required to respond to Defendants' motion seeking judgment on the merits of the claim. Plaintiff is not able to do so now due to the Estate's refusal to voluntarily provide any documents relating to the company. *See* Compl. ¶51 ("By ... letter dated November 22, 2019 [to the Co-Executors], Maxwell requested copies of documents setting forth applicable indemnification and/or advancement rights and policies, including any operating agreements for NES, LLC, and never received a response.")

Defendants themselves suggest that the Court should consider the 2014 Operating Agreement pursuant to the so-called "incorporation-by-reference" doctrine, claiming that Plaintiff "expressly incorporates by reference NES's corporate organizational documents in her Complaint." *See* MTD at 6 n.6. This doctrine is not applicable here.<sup>6</sup> The "incorporation-by-reference" doctrine allows a court to "review *the actual document* referenced in the complaint"

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<sup>6</sup> The "incorporation-by-reference" doctrine has not been expressly adopted by the Virgin Islands Supreme Court, has not been widely embraced in the Virgin Islands, and Defendants ultimately fail to establish that this jurisdiction should recognize this common law rule. *See Gov't of the V.I. v. Connor*, 2014 WL 702639, at \*3 (V.I. Feb 24, 2014), *referencing Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I.2011) ("[T]he Superior Court, when considering a question not foreclosed by prior precedent ... must perform a three-part analysis as set forth in *Banks*").

to ensure that language has not been taken out of context. *Hess Oil Virgin Islands Corp. v. Daniel*, 2020 WL 1819622, at \*8 (V.I. Super. Apr. 8, 2020) (emphasis added). Unlike the *Hess* case, upon which Defendants rely, Plaintiff's Complaint does not expressly reference the 2014 Operating Agreement, which is, in any event, not relevant to the claims here. Plaintiff did not incorporate by reference *any* particular version of the operating agreement because she was unable to do so. The operative operating agreements are not in her possession. Plaintiff asked the Estate for documents pertaining to NES, LLC before commencing this action but was refused. The "incorporation-by-reference" doctrine is therefore inapplicable here.<sup>7</sup>

Finally, in the event that this Court elects to consider the extraneous documents submitted by Defendants with their Motion to Dismiss, thereby converting the motion to a Rule 56 motion for summary judgment, Plaintiff asks that she have a reasonable opportunity to conduct the discovery described herein. Rule 12(d) provides that:

If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion **must** be treated as one for summary judgment under Rule 56. **All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.**

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<sup>7</sup> To the extent Defendants suggest that the 2014 Operating Agreement is not a "matter outside the pleading" for some other reason, any such suggestion too must fail. "[A]ny written or oral evidence introduced challenging the pleadings that 'does not merely reiterate what is said in the pleadings, will constitute a matter outside the pleading for the purpose of triggering a conversion, if not excluded.'" *Raymond v. Assefa*, 2017 WL 5303467, at \*3 (V.I. Super. Nov. 8, 2017) (citing *In re Kelvin Manbodh Asbestos Litigation Series*, 47 V.I. 375, 382 (V.I. Super 2006). A court may only consider, without requiring the conversion of a motion the following: "(1) exhibits attached to the pleadings, (2) matters that the court can take judicial notice of [sic], and (3) items of unquestioned authenticity that are referred to in the challenged pleading and are integral to the pleader's claim for relief." *Id.* The 2014 Operating Agreement falls into none of these categories.

V.I.R.Civ.P. 12(d) (emphasis added). The Virgin Islands Supreme Court has repeatedly reinforced the requirement that a non-moving party have notice and a fair opportunity to be heard with respect to any grounds for summary judgment raised *sua sponte*. *United Corp. v. Hamed*, 2016 WL 154893, at \*5 (V.I. Jan. 12, 2016); *Raymond v. Assefa*, 2017 WL 5303467, at \*3 (V.I. Super. Nov. 8, 2017) (listing Virgin Islands Supreme Court cases). Failure to give a non-moving party adequate notice before conversion constitutes reversible error. *Stanley*, 2020 WL 1639902, at \*5.

Here, NES, LLC may not be permitted to obtain a summary judgment on Plaintiff's claim for indemnification before Plaintiff has a reasonable opportunity to conduct essential discovery. NES, LLC has not moved to dismiss the Complaint because Plaintiff failed to state a claim for relief. Instead, NES, LLC seeks judgment on the merits. The applicable rules of procedure contemplate that a party may conduct necessary discovery before a response to a Rule 56 motion must be made. *See, e.g.*, V.I.R.Civ.P. 56(d) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may ... defer considering the motion or deny it; ... allow time to obtain affidavits or declarations or to take discovery; or ... issue any other appropriate order.").<sup>8</sup> Here, this necessary discovery is exclusively in the possession of NES, LLC and the other Defendants. The Court should therefore deny NES, LLC's Rule 56 motion so that the parties can conduct discovery on the issues presented therein.

In sum, because the 2014 Operating Agreement does not "*directly pertain* to any allegation asserted in the [C]omplaint," the Court should exclude it from its consideration of the

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<sup>8</sup> Plaintiff reserves the right to file a motion pursuant to V.I.R.Civ.P. 56(d) in the event that Defendants' Motion to Dismiss is converted to a Rule 56 motion for summary judgment.

Motion to Dismiss and consider only the allegations in the Complaint. *See Howell, supra*, at 158 n.4 (emphasis added). In the event the Court elects to consider this agreement and converts the Motion to Dismiss to a Rule 56 motion, Plaintiff asks that consideration of such motion be deferred until she can conduct necessary discovery.

**IV. CONCLUSION**

Defendants' arguments in support of dismissal lack legal support and must fail. Their Motion to Dismiss therefore should be denied.

Dated: September 8, 2020

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing, which complies with the word and page requirements of V.I.R.Civ.P. 6-1(e), was served via email and U.S. Mail this 8th day of September, 2020 to:

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IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
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CIVIL CASE NO.: ST-20-CV-155

GHISLAINE MAXWELL,

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ESTATE OF JEFFREY E. EPSTEIN,  
DARREN K. INDYKE, in his capacity as  
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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.

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**ORDER**

This matter comes before the Court on the Motion to Dismiss (the “Motion”) filed by Defendants DARREN K. INDYKE and RICHARD D. KAHN, 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”). The Court being fully advised in the premises, it is hereby

ORDERED, that the Motion is hereby DENIED; and it is further

ORDERED, that a certified copy of this Order shall be distributed to counsel of record.

Dated: \_\_\_\_\_

ATTEST:  
Tamara Charles  
Clerk of the Court

By: \_\_\_\_\_

Dated: \_\_\_\_\_

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JUDGE OF THE SUPERIOR COURT  
OF THE VIRGIN ISLANDS