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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY, FLORIDA

Case No. 502009CA040800XXXXMB

JEFFREY EPSTEIN,
Plaintiff/Counter-Defendant,
vs.
SCOTT ROTHSTEIN, individually;
BRADLEY EDWARDS, individually,

Defendants/Counter-Plaintiffs.

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: Thursday, March 8th, 2018
TIME: 1:30 p.m. - 4:50 p.m.
PLACE: 205 N. Dixie Highway, Room 10D
West Palm Beach, Florida
BEFORE: Donald Hafele, Presiding Judge

This cause came on to be heard at the time and
place aforesaid, when and where the following
proceedings were reported by:

Elaine V. Williams
Palm Beach Reporting Service, Inc.
1665 Palm Beach Lakes Boulevard, Suite 1001
West Palm Beach, FL 33401
[REDACTED]

2

1 APPEARANCES:
2 For Plaintiff/Counter-Defendant:
3 LINK & ROCKENBACH, P.A.
4 [REDACTED]
5 By KARA BERARD ROCKENBACH, ESQUIRE
6 By SCOTT J. LINK, ESQUIRE
7 For Defendant/Counter-Plaintiff:
8 SEARCY, DENNEY, SCAROLA, BARNHART &
9 SHIPLEY, P.A.
10 [REDACTED]
11 By JACK SCAROLA, ESQUIRE
12 By DAVID P. VITALE JR., ESQUIRE
13 By KAREN TERRY, ESQUIRE
14
15 For Non-Parties L.M., E.W. & Jane Doe
16 HATCH, JAMES & DODGE, P.C.
17 [REDACTED]
18 By PAUL G. CASSELL, ESQUIRE
19
20 For Jeffrey Epstein:
21 ATTERBURY, GOLDBERGER & WEISS, P.A.
22 [REDACTED]
23 By JACK A. GOLDBERGER, ESQUIRE
24
25

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P R O C E E D I N G S

- - -

1 THE COURT: Thank you. Welcome back
2
3 everybody. Have a seat.
4
5 MR. SCAROLA: May I move to this podium now?
6
7 THE COURT: Sure.
8
9 MR. SCAROLA: Thank you, sir.
10
11 Your Honor, have we decided what motions we're
12 going to hear?
13
14 THE COURT: Yes. My understanding as I left
15 was going to be Edwards' Second Supplement to
16 Motion in Limine Addressing Scope of Admissible
17 Evidence, and of course in that same vein Epstein's
18 Notice of Service of Unredacted Appendix in
19 Support -- or Response in Opposition to Edwards'
20 Second Supplemental Motion in Limine addressing
21 Scope of Admissible Evidence.
22
23 MR. SCAROLA: Your Honor, there are actually
24 multiple submissions to the Court to deal with
25 closely-related issues, and those issues arise out
of the fact that over the course of the last three
weeks 724 new exhibits have been added to the
exhibit list of the defendant Epstein.
And just to provide some general background,
some of which your Honor may recall, there was an

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1 exhibit list filed by Mr. Epstein on November 16,
2 2017. That same exhibit list was attached to the
3 pretrial stipulation on December 22, 2017. And
4 then for the first time on March 5th of 2018 the
5 new exhibit list was filed. If you compare the
6 exhibit lists of November 16th and December 22nd,
7 which, as I said, are the same, with the March 5th
8 exhibit list, 25 new exhibits -- excuse me -- 724
9 new exhibits were added.
10
11 Your Honor held a hearing in this matter on
12 December 5th and made it clear to all parties that
13 exhibits that were not disclosed by the end of
14 December -- and I think it may have been the
15 December 22 date -- I'm not sure about that exact
16 date -- but exhibits that were not specifically
17 disclosed would not be permitted to be used at
18 trial. You made it clear that catchall listings
19 would be unacceptable; that specific individual
20 exhibits needed to be listed. I'm sure your Honor
21 has a recollection of those circumstances. And
22 that, obviously, is a fairly standard order that
23 your Honor adheres to in connection with trial
24 practice.
25
THE COURT: What I just wanted to point out is
in conjunction with what we're going to be

5

1 eventually talking about, we're now dealing with
2 the Motion to Strike Epstein's Untimely
3 Supplemental Exhibits and to Strike All Exhibits
4 and Any Reference to Documents Containing
5 Privileged Materials Listed on Edwards' Privilege
6 Log.
7 MR. SCAROLA: Yes, sir.
8 THE COURT: That led into what I described
9 earlier of the motions that will be on the table.
10 MR. SCAROLA: That's correct. And that's why
11 I acknowledged, your Honor, that we're really
12 dealing with a number of closely-related motions.
13 So the first issue is a procedural issue; and
14 that is, whether your Honor is going to allow the
15 listing and use of 724 new exhibits. And my
16 suggestion to the Court is that that is a threshold
17 issue that really helps to resolve much of what
18 follows because if, as a matter of procedure, those
19 724 new exhibits are not going to be used, then
20 much of the rest of the argument becomes
21 irrelevant. There are, however, very significant
22 substantive issues if the procedural determination
23 does not dispose of the use of those exhibits.
24 THE COURT: These exhibits specifically were
25 added when?

6

1 MR. SCAROLA: They were added by a new list
2 filed on March 5th of 2018.
3 THE COURT: Okay. Just to put this into
4 perspective, March 5th would have been Monday of
5 this week, today being March 8th, and the trial
6 starting on March 13th, presuming it begins as
7 scheduled.
8 MR. SCAROLA: Yes, sir. But I want to make it
9 clear that while the 724 were never listed on a
10 prior exhibit list before March 5, some of those
11 documents were disclosed to us over the past three
12 weeks. So I am not suggesting to your Honor that
13 the first notice we got of an intent to attempt to
14 use these documents was March 5. The first notice
15 we got of an intent to attempt to use some of these
16 documents started some three weeks ago as new
17 disclosures were sent to us.
18 And again, this is from memory, but I think
19 there may have been three separate groups of
20 documents that were sent to us not covering all of
21 the 724. And obviously, your Honor knows from the
22 materials that you have reviewed much attention was
23 focused on documents that we contend and have
24 contended for eight years are privileged documents.
25 Documents listed on a very specific privilege log.

7

1 And those are 45 of the 724 newly-listed documents.
2 And those documents were brought to our attention
3 just last week.
4 So my suggestion to your Honor is that we deal
5 first with the procedural issue because, as I said,
6 that will narrow issues significantly. And then
7 there will still remain some substantive issues
8 with regard specifically to any attempted use of
9 privileged materials.
10 Now, your Honor heard from both opposing
11 counsel that I have accused them of having stolen
12 the documents. I assure your Honor that that's not
13 the case. I have not accused them of having stolen
14 the documents. What I have said in repeated
15 communication is that these are stolen documents.
16 And these documents, if your Honor has had an
17 opportunity to look at the timeline, were very
18 clearly at this point handed over by the bankruptcy
19 court to Fowler White for one purpose and one
20 purpose only; and that was to print them out, Bates
21 stamp them so that they could be turned over for
22 privilege review by the Farmer Jaffe law firm,
23 including specifically Brad Edwards.
24 THE COURT: Let me stop you there so we can
25 put this in context.

8

1 Joe Ackerman, as I recollect, was representing
2 Mr. Epstein for some period of time, and he was at
3 that juncture associated with the Fowler White firm
4 in some capacity.
5 MR. SCAROLA: Yes, sir. That's correct.
6 THE COURT: So if I'm understanding this
7 correctly then, the bankruptcy court turned the
8 documents over to Fowler White.
9 MR. SCAROLA: Did your Honor want me to get
10 into that now? I'm happy to do that.
11 THE COURT: So that I understand. I know
12 during a very tumultuous period of time these would
13 be the Rothstein firm's employee.
14 MR. SCAROLA: Yes, sir. Let me go through
15 this and give you a quick overview, although all
16 the details are provided in the timeline that I
17 provided to your Honor.
18 What happened was that almost immediately
19 following the implosion of the Rothstein,
20 Rosenfeldt, Adler firm a trustee was appointed by
21 the bankruptcy court to take control of the firm,
22 and that trustee took control of all of the firm's
23 files and all of the firm's electronic data,
24 including all of its e-mail servers. So it is the
25 trustee that had possession of all of these

9

1 e-mails.

2 Mr. Epstein through counsel, and at this point

3 it was the Fowler White firm, issued a subpoena in

4 our civil litigation, then pending in front of

5 Judge Crow, for the trustee to produce all of the

6 e-mails. Judge Ray, to whom that subpoena was

7 referred, Judge Ray appointed Judge Carney as a

8 special master to make a determination as to what

9 could appropriately be turned over because

10 obviously these were e-mails that related to a wide

11 variety of cases. It was the entire contents of

12 the e-mail server of Rothstein, Rosenfeldt, Adler,

13 and it was recognized that those e-mails could

14 contain attorney/client and work product privileged

15 materials. So Judge Carney was appointed a special

16 master to make a determination as to what should

17 and could be turned over and report back to Judge

18 Ray.

19 Judge Carney gets 27,000 e-mails and Judge

20 Carney says, "I don't have an appreciation as to

21 what may be privileged here. We need to come up

22 with a procedure so that I can be advised of what

23 privilege assertions are being raised." So Judge

24 Carney says, "I want what was then the newly-formed

25 law firm that Mr. Edwards is working in, I want

10

1 Jaffe, Weissing, Edwards, Fistos and Lehrman" --

2 THE COURT: Farmer Jaffe, right?

3 MR. SCAROLA: Yes. Farmer Jaffe.

4 THE COURT: We can just refer to them as

5 Farmer Jaffe.

6 MR. SCAROLA: All right. "I want Farmer Jaffe

7 to go through these e-mails and prepare a privilege

8 log. Let me know what's privileged here, and then

9 I'll make a determination as to what's going to get

10 turned over."

11 The response from Mr. Edward through me is

12 this is 27,000 e-mails, they want them, they should

13 be responsible for printing them and Bates stamping

14 them and delivering those printed and Bates stamped

15 documents to us for our review. And Judge Ray

16 enters an order.

17 And Judge Ray says in his order -- and it's

18 quoted in relevant part at the bottom of the first

19 page of this timeline -- Judge Ray says the law

20 firm of Fowler White will print a hard copy of all

21 the documents contained on the disks with Bates

22 numbers added and will provide a set of copied,

23 stamped documents to the special master and an

24 identical set to Farmer, who will use the same to

25 create its privilege log.

11

1 And Judge Ray, federal bankruptcy Judge Ray,

2 says, "Fowler White will not retain any copies of

3 the documents contained on the disk provided to it

4 nor shall any images or copies of said documents be

5 retained in the memory of Fowler White's copiers.

6 Should it be determined that Fowler White or

7 Epstein retained images or copies of the subject

8 documents on its computer or otherwise, the Court

9 retains jurisdiction to award sanctions in favor of

10 Farmer, Brad Edwards or his client."

11 So it was obvious that what was to happen at

12 that point was they were to take over the

13 ministerial task as officers of the court of

14 bearing the expense to turn these documents over to

15 Farmer Jaffe and Brad Edwards for purposes of

16 preparing a privilege log.

17 THE COURT: For lack of a better metaphor,

18 though, wasn't that a fox in a henhouse type of

19 situation?

20 MR. SCAROLA: Well, sir, were these not

21 officers of the court, the answer to that question

22 is yes. These were adversaries who were being

23 given control over these documents, but they were

24 adversaries who had a sworn duty to follow the

25 Court's direction. And we had every reason to

12

1 believe that this respected law firm and these

2 respected lawyers would do exactly what they were

3 told to do.

4 Now, we know that the disk that contained that

5 information, as has been conceded by Epstein's

6 counsel, was formatted on December 10 -- excuse

7 me -- December 8th of 2010.

8 THE COURT: What do you mean by the disk was

9 formatted?

10 MR. SCAROLA: What I mean was the documents on

11 that disk were divided into three different

12 categories.

13 THE COURT: And that was December 10?

14 MR. SCAROLA: December 8th of 2010.

15 THE COURT: Thank you.

16 MR. SCAROLA: So within approximately one week

17 after being ordered not to retain any copies

18 there's a disk that is formatted by Fowler White,

19 which is the disk that is now in the possession of

20 Jeffrey Epstein and Jeffrey Epstein's counsel. And

21 it contains without a doubt those documents that we

22 identify on a privilege log that is generated as a

23 consequence of that process. It contains those

24 privileged and attorney work product e-mails. And

25 that assertion of privilege has never been

1 overruled.
2 THE COURT: Did the Special Magistrate Carney
3 or Judge Ray ever hold a hearing to determine the
4 nature of the privilege? Was that ever called up
5 for a hearing?

6 MR. SCAROLA: What happened, your Honor, is
7 that Judge Crow, when he learned of the
8 circumstances of what was going on in bankruptcy
9 court, communicated to Judge Carney, "This subpoena
10 was issued in my case. While I respect you and the
11 work you are doing, it is my job to decide what is
12 relevant and material in my case and it is my job
13 to determine issues of privilege in my case." That
14 short circuited the work that was going on in the
15 bankruptcy court, and Judge Carney never issued any
16 rulings in that regard.

17 So it then became a matter over which Judge
18 Crow was exercising jurisdiction to determine how
19 the subpoena issued in the Circuit Court State
20 Court case, how that subpoena was going to be
21 responded to. So our privilege log goes to Judge
22 Crow.

23 And there's some back and forth about whether
24 the privilege log is or is not adequate, and there
25 is a direction with regard to certain requests for

1 documents on the privilege log. Specifically,
2 there is a Request Number 13, which asks for
3 communications between Farmer Jaffe and the federal
4 government and communications between Farmer Jaffe
5 and any members of the press. And those are
6 ordered turned over. And those are turned over in
7 full compliance with the Court's order. But the
8 issues of privilege that were raised with regard to
9 both attorney-client and work product privilege
10 never gets ruled on by Judge Crow because before
11 they are ruled on, a voluntary dismissal is taken
12 of the claims against Brad Edwards.

13 So we have a privilege log in place. It
14 specifically lists these documents. Some of these
15 documents were listed as attorneys' eyes only. And
16 that restriction has never been lifted. And some
17 of these documents are listed on the separate
18 privilege log, and those restrictions have never
19 been lifted.

20 Now, in some of the communications that have
21 gone on back and forth you may have seen reference
22 to a disclosure to the Razorback defendants.

23 Excuse me. The Razorback plaintiffs.

24 THE COURT: That was the litigation led by
25 Mr. Scherer.

1 MR. SCAROLA: That is correct. The Conrad
2 Scherer firm was involved in that litigation, and
3 the Conrad Scherer firm was also interested in
4 getting to take a look at whatever relevant e-mails
5 might have been in the hands of the bankruptcy
6 trustee, and then got turned over to us.

7 Well, there were direct negotiations in which
8 I was a personal participant with the lawyers for
9 Conrad Scherer, and an agreement was reached with
10 the lawyers for Conrad Scherer because, as we have
11 told every judge before whom we have appeared with
12 regard to these matters, we're not attempting to
13 hide anything. You want to conduct an in-camera
14 inspection, we want you to conduct an in-camera
15 inspection because it will confirm that we're not
16 attempting to hide anything.

17 We will turn over anything that you consider
18 appropriate for us to turn over. But we have no
19 ability to waive our client's attorney-client
20 privilege, your Honor, and some of these e-mails
21 clearly contain information that originated with
22 clients. And we are in the midst at this point of
23 still-pending litigation, and it is important for
24 us to protect our work product privilege as well.
25 Some of that litigation is still ongoing right now.

1 That's the Crime Victims Rights Act case.

2 So there is a very legitimate reason for us to
3 be concerned about protecting both the work product
4 privilege and the attorney/client privilege,
5 particularly protecting it from Mr. Epstein, and
6 particularly protecting it from Mr. Epstein now
7 that we know there was a clear violation of the
8 federal judge's order with regard to the matter in
9 which these materials were to be handled.

10 Interestingly -- and I don't know whether
11 there's any relationship or not -- but shortly
12 after this disk is improperly retained by Fowler
13 White, that Fowler White winds up withdrawing from
14 the case. So they're gone. And apparently the
15 disk sits there for years until a request is made
16 to turn over all of Fowler White files.

17 And what we have been told is Fowler White
18 initially, for whatever reason, resists that
19 request, but Mr. Link and associates go down to
20 Miami, they review files, they get their hands on
21 this disk. There is a significant delay between
22 their appearance in the case and when they finally
23 go to look at the Fowler White files. Then there's
24 a two-week delay between looking at the Fowler
25 White files and receiving the disk. And then

1 there's a two-week delay between receiving the disk
2 and starting to --

3 THE COURT: Excuse me just a minute.

4 Bailiff, see what may be transpiring outside,
5 please. Pardon me. Off the record.

6 (Discussion held off the record.)

7 THE COURT: Go ahead. I apologize.

8 MR. SCAROLA: Your Honor, in the overall
9 scheme of things, I don't think that those delays
10 make very much difference at all. But these are
11 the lawyers who, as your Honor has noted, announced
12 to the Court that they were going to be ready for
13 trial 90 days later, and here it is just weeks
14 before this case is about to begin that they are
15 first reviewing 36 boxes, or over 30 boxes of
16 files. Might have been 31. I think 36 is the
17 number. But boxes of files that never even got
18 reviewed by them.

19 So those are matters of significant concern to
20 us. But the matter of greatest concern is that
21 once it becomes apparent that these are documents
22 that are listed on our privilege log, a privilege
23 that has never been challenged, a privilege that
24 remains in place, and we notify opposing counsel
25 here is our privilege log, here are the numbers,

1 the Bates numbers of these documents on that
2 privilege log, you have an obligation, an ethical
3 obligation, to turn them over to us, to turn them
4 over now, and to make no use of those documents
5 unless and until you have a court order that says
6 otherwise. You need to tell us where did you get
7 them, when did you get them, how did you get them,
8 to whom have you distributed them? And those are
9 questions that we still don't have answered.

10 What we get from the other side is, "Well,
11 they could have come from here, they could have
12 come from there, maybe they came from someplace
13 else, we don't know." And if they don't know where
14 they came from and that source is clearly a proper
15 source, they have the burden in overcoming this
16 privilege assertion to prove a waiver if they
17 contend any waiver existed.

18 It wasn't with regard to Conrad Scherer
19 because when those documents were turned over to
20 Conrad Scherer -- and we have the letters that
21 confirm the written agreement with every detail of
22 that agreement in place -- those were turned over
23 as part of a common interest privilege with an
24 express representation it was attorneys' eyes only,
25 with an express representation they would be turned

1 over to no one. Indeed, when they got turned over
2 to Conrad Scherer, they were originally turned over
3 with a confidentiality watermark on every document.

4 And then they contacted us back again and
5 said, "We're trying to OCR all of these documents
6 so that they are searchable, and we can't do that
7 with the watermark on them. Can you please provide
8 us with another copy without a watermark?" And we
9 did that; again, trusting these officers of the
10 court to abide by their agreement. And we have
11 every reason to believe that Conrad Scherer did.
12 They were not the source.

13 The obvious source, based now upon what we
14 have been able to piece together, is very clearly
15 Fowler White's improper retention of this material
16 after they had been expressly ordered by the
17 federal court not to retain any of it.

18 Now, every representation I have made to the
19 Court, everything that is included on this timeline
20 can be established through documents that pinpoint
21 the dates and the identity of the individuals
22 involved and the character of every disclosure that
23 was made and every disclosure that was withheld.
24 It has taken a substantial effort to put all of
25 this together again. We have been working on this

1 many, many, many hours. But the subject of
2 appropriate sanctions is a subject for another day
3 except to this extent: We need to know who has
4 access, who has had access to this confidential
5 material. We need to know if there's some intent
6 to call a witness who may have been given access to
7 this confidential material. We need to know all of
8 the lawyers involved.

9 And Mr. Cassell is going to address from the
10 perspective of the clients the concern that they
11 have about being informed as to how their
12 confidences have been breached. So with your
13 Honor's permission, I would like him to have an
14 opportunity to address the Court briefly on that
15 topic.

16 THE COURT: What I'd like to do, though, is
17 allow defense counsel to be able to speak to the
18 threshold Binger analysis dealing with the late
19 disclosure, because if Mr. Scarola is right and
20 that is that these exhibits were listed for the
21 first time in March, which would have been three
22 days ago, and discussed perhaps within the last few
23 weeks, then we would have essentially a Binger
24 issue to analyze. So Miss Rockenbach, go ahead and
25 proceed in that respect, please.

1 MS. ROCKENBACH: Thank you, your Honor. I am
2 certain that this courtroom is a place where we are
3 searching for truth and not hiding evidence,
4 whether it is evidence that causes conclusion by
5 this Court that there is no case to be tried. And
6 for the first time after four days of -- and we use
7 that word --

8 MR. SCAROLA: Excuse me. I'm sorry. If this
9 is one of the privileged e-mails, and I assume it
10 probably is, your Honor has entered an order
11 sealing these documents, and the press is present.
12 It is being displayed prominently in violation of
13 ethical obligations to relinquish possession of
14 these documents.

15 THE COURT: All right. In lieu of publication
16 in open court, why don't you just hand me the
17 document, making sure that counsel also has the
18 copy or is referenced with the correct Bates stamp.

19 MS. ROCKENBACH: This is the Bates stamp
20 e-mail 04408; an e-mail from Bradley Edwards to
21 Paul Cassell, October 17, 2009.

22 THE COURT: Okay. Is this an extra copy?

23 MR. SCAROLA: Do we have an extra copy,
24 please? There are literally thousands of e-mails
25 we're dealing with.

1 THE COURT: Outside of the Court's review?
2 Are you objecting to my review?

3 MR. CASSELL: No. We're not waiving any
4 privileges, but we don't want there to be any
5 public reference to the contents.

6 THE COURT: All right. Thank you for that
7 clarification. So let me go ahead and try and put
8 my hands on --

9 MS. ROCKENBACH: Your Honor, I can give you
10 the copy that Terry noted was 04408. I don't need
11 it.

12 THE COURT: Okay, that's fine.

13 MS. ROCKENBACH: The purpose of me putting
14 this particular piece of evidence, which I've been
15 asked on multiple occasions by Mr. Scarola to
16 destroy by the barrage of e-mails over the past
17 four days, I'm handing it to the Court as evidence
18 of no Binger surprise. It can't be Binger surprise
19 by Mr. Edwards if he is authoring an e-mail with
20 regard to this very action that's pending before
21 this Court about five to six weeks before
22 Mr. Epstein sued him. So that can't be a surprise
23 to Mr. Edwards. It actually makes this case
24 incredibly stronger for the issue of probable
25 cause.

1 MR. LINK: It's in the appendix that we've
2 provided you.

3 THE COURT: I'm familiar with it from reading
4 the materials myself and I could probably put my
5 hands on it.

6 MR. LINK: It's in the appendix, your Honor.
7 Appendix 1.

8 MR. VITALE: Bates number?

9 MS. TERRY: 04408.

10 MS. ROCKENBACH: That's it. Thank you.

11 THE COURT: And I have it, too. I can get my
12 hands on it pretty easily, I think.

13 MR. CASSELL: Your Honor, if I could just be
14 heard just briefly.

15 THE COURT: Go ahead and introduce yourself to
16 our new court reporter.

17 MR. CASSELL: Paul Cassell on behalf of three
18 victims, LM, EW and Jane Doe.

19 We'd like the record to be clear that we're
20 joining in the objection to any public disclosure
21 or reference to these documents.

22 THE COURT: Well, reference and public
23 disclosure are two different things, Mr. Cassell.

24 MR. CASSELL: I'm sorry. Any disclosure of
25 the contents or the substance of these documents.

1 But more importantly, your Honor, it's about
2 the truth. It's about the truth and the fact that
3 over the past four days my professional integrity,
4 my character has been impugned to the extent that
5 very simply we told -- actually, I didn't respond
6 to any single e-mail. For the record, Mr. Link
7 responded to e-mails. I didn't want to respond to
8 what I saw was escalating e-mails that started off
9 with a demand that we destroy evidence, which I
10 know as an officer of the court I cannot do, and a
11 demand to disclose who, how, where. And we
12 immediately did. Fowler White.

13 Then I had my paralegal issue an affidavit
14 that established chain of custody. I obtained the
15 Fed Ex receipts for the three boxes that contained
16 this incredible disk. And that's on file with the
17 court.

18 But the e-mails did escalate, and we were
19 asked -- no, demanded -- demanded on multiple times
20 to destroy evidence. I was called unethical more
21 than four times, sanctions were mentioned, the
22 words improper, unethical, six times, hid,
23 disturbing, misdeeds. And then last, but not
24 least, Mr. Scarola did in fact -- and this is not
25 privileged -- did in fact send an e-mail indicating

1 that he didn't want a special master, declined our
2 request for one because it does not take a special
3 master to determine that stolen privileged
4 documents -- this is for the first week, or the
5 first time the week before trial -- are
6 inadmissible. I disagree.

7 No court has looked at these e-mails. And
8 your Honor just asked that question, which was
9 really important, did Judge Crow look at these
10 in-camera and determine the privilege issue?

11 So I am very pleased and I agree with
12 Mr. Scarola for the first time I heard just now a
13 request or an agreement, not even a request, an
14 agreement that these should be looked at in-camera.
15 They absolutely should be looked at in-camera
16 because they eviscerate Mr. Epstein's malicious
17 prosecution case from proceeding.

18 THE COURT: Mr. Edwards.

19 MS. ROCKENBACH: Mr. Edwards.

20 But so disturbed was I by the barrage of
21 e-mails, I reached out to the former ethics
22 director of the Florida bar, a trusted colleague,
23 Tim Chinaris. I have the affidavit. I don't know
24 if your Honor has.

25 THE COURT: I don't remember seeing it.

1 These e-mails, your Honor, go to the very
2 heart of this malicious prosecution case and
3 whether it can proceed.

4 But returning to Mr. Chinaris, he had three
5 opinions after reviewing the relevant documents,
6 speaking to both Mr. Link and myself, based on the
7 escalating accusations over the course of four
8 days. And his three opinions are reflected in
9 paragraphs 29, 30 and 31.

10 Mr. Link and Miss Rockenbach have acted in an
11 ethically proper manner. That was one. Number
12 two, the documents in question were not
13 inadvertently provided nor wrongfully obtained by
14 Mr. Link and Miss Rockenbach --

15 MR. SCAROLA: Excuse me. Your Honor, if this
16 is going to turn into an evidentiary hearing with
17 regard to the ethical propriety of opposing
18 counsel's conduct, I object to this affidavit as
19 hearsay and I want to be able to cross-examine any
20 ethics expert who is of the opinion that retaining
21 privileged documents known to be privileged listed
22 on a privilege log when there is no knowledge as to
23 the source of those documents and a court order
24 exists saying you're not allowed to have them, I
25 want to cross-examine that expert.

1 MS. ROCKENBACH: It was very significant
2 because I was being asked to destroy evidence, I
3 was being called unethical for the first time in 23
4 years, and then I saw the word stolen, and honestly
5 my heart was broken. So Mr. Chinaris has an
6 affidavit that I've filed with the Court. He knows
7 the information --

8 THE COURT: Is that in this?

9 MR. LINK: Your Honor, it's in the package we
10 delivered right before lunch.

11 THE COURT: Okay. I'll be glad to take a look
12 at it.

13 MS. ROCKENBACH: He was the ethics director
14 for the Florida Bar for almost a decade, authoring
15 thousands of opinions on legal ethics for lawyers
16 facing issues with regard to the rules of
17 regulating the Florida Bar.

18 One of the rules that I was thinking about in
19 terms of this hearing was 4-3.3 because both sides,
20 including Mr. Edwards, who happens to be party but
21 should be held to a higher standard than just a
22 simple party, has a duty to disclose candor toward
23 the tribunal. That Florida 4-3.3 rule is very
24 significant in this case because no one can advance
25 false statements or positions to this Court.

1 THE COURT: Well, the objection is sustained
2 in the sense that I really do want to, as I
3 indicated earlier, continue to as best as we can
4 conduct the proceedings in a way that befits the
5 known integrity of not only the attorneys here
6 before us but also the history that has been
7 pervasive in the 15th Judicial Circuit. So I don't
8 want this to dissolve into an ethical discussion as
9 to whether or not someone committed some type of
10 ethical violation. That's really not my focus
11 today. And that focus is better suited for others
12 perhaps at a different time and even perhaps in a
13 different forum.

14 Really what has to be attempted to be divined
15 today is some type of representation by counsel for
16 Mr. Epstein as to what the source of these
17 documents were.

18 MS. ROCKENBACH: Yes, your Honor.

19 THE COURT: Why were they preserved, how were
20 they preserved, for what reason were they
21 preserved, did that preservation violate or come
22 close to violating an order of the bankruptcy
23 court, has the privilege been waived? And then we
24 get back again to the Binger analysis.

25 I did a quick word search, and the Fifth

1 District provides us with some recent direction and
2 assistance and talks about the issue of surprise.
3 And it says, quote, "The opposing party also
4 earlier attempted to exclude the surprise testimony
5 by an unsuccessful motion in limine. Furthermore,
6 prejudice in the context of Binger refers to the
7 surprise in fact of the objecting party and is not
8 dependent upon the adverse nature of the
9 testimony." So that's where we are also going to be
10 focusing today.

11 But I don't want to get into a discussion as
12 to present counsel's ethical responsibilities
13 unless we have to as it relates to the origin of
14 how, if counsel is aware, these documents inclusive
15 of the e-mails, and particularly as it relates to
16 the 724 allegedly new exhibits being added formally
17 for the first time on March 5th, just three days
18 ago, and certainly outside of the Court's pretrial
19 order in terms of timeliness, whether they
20 constitute prejudice. So let's try to focus there,
21 if we could.

22 And I understand, just so the record is clear,
23 doing this for a long time both as a trial lawyer
24 and as a judge, I understand how feelings can be
25 hurt, I understand how people can take umbrage at

1 certain things that are said.

2 The beauty of being an experienced trial
3 judge, if nothing else, is developing a thick skin.
4 Sometimes I'll hear people say something and use my
5 name and they don't even know I'm standing there.

6 MR. LINK: That wasn't me, was it, Judge?

7 THE COURT: No. And I understand that there
8 are going to be instances where people are going to
9 think that I'm the best in the world and the
10 absolute worst in the universe. I've come to that
11 rationale pretty quickly. It took some time, but
12 it was fairly quickly. But I do understand. I
13 don't want anyone to think that I'm not
14 compassionate to the extent that I recognize that
15 there have been accusations hurled here which may
16 be minimally considered offensive and accusatory.
17 But let's move beyond that for now and let's get to
18 some of the issues that I discussed earlier that we
19 can focus on relating to decisions that I'll have
20 to make concerning the potential admissibility of
21 this evidence.

22 MS. ROCKENBACH: Thank you, your Honor. I
23 appreciate that.

24 And we have established the chain of custody
25 through the affidavit of Tina Campbell from our

1 office. So it is clear we did not improperly
2 obtain them, nor were they inadvertently disclosed
3 to us.

4 THE COURT: Tina Campbell is your paralegal?

5 MS. ROCKENBACH: Who obtained the three boxes,
6 the three boxes from Fowler White, which contained
7 that CD which is at issue.

8 THE COURT: I think the disconnect we're
9 having here today is not so much the fact that
10 Miss Campbell received the boxes or somebody got
11 notice that the boxes were there --

12 MS. ROCKENBACH: It was an issue.

13 THE COURT: -- and that somebody did what they
14 did. And there may have been an issue with regard
15 to Fowler White voluntarily turning them over.
16 Those are things that can be dealt with later on.
17 And again, it may be a different forum than I'm
18 even dealing with here today.

19 But what I'd like to know is how Fowler White
20 got the documentation, do we to know that, whether
21 or not that documentation was obtained or retained
22 in a manner that either was in violation of Judge
23 Ray's order or walked a certain tightrope that
24 could be construed as a constructive violation of
25 that order. And if we know that, then it would go

1 a long way in me trying to make a determination as
2 it relates to Binger and its progeny.

3 MS. ROCKENBACH: Thank you.

4 THE COURT: So that's really where we need to
5 focus.

6 I have no problem and I don't think
7 Mr. Scarola has any problem in terms of the fact
8 that you all did your homework; albeit, from his
9 position, late in the game, and secured this
10 information from Fowler White. The critical
11 question, though, is why did Fowler White have
12 these documents, why were they continued to be
13 held, and was it in violation either expressly or
14 constructively as it relates to Judge Ray's order?

15 MS. ROCKENBACH: Thank you, your Honor.
16 Mr. Link has studied this issue and will address
17 that.

18 MR. LINK: So, Judge, let me see if I can
19 clarify a couple of things.

20 First, these exhibits that we're talking about
21 from the disk, they absolutely were just listed on
22 our exhibit list. They were just located by us in
23 the last week. However, on our exhibit list it's
24 always been a general category, as Mr. Scarola
25 said. The reason there are 749 specific exhibits

1 is the clerk required it. So --

2 THE COURT: The clerk required it?

3 MR. LINK: Specific. You have got to do --

4 THE COURT: The clerk, you're saying? Or the
5 Court?

6 MR. LINK: The Court.

7 THE COURT: Oh, okay. I thought you were
8 saying --

9 MR. LINK: It's called the clerk's exhibit
10 list for the Court, but the Court did it.

11 THE COURT: So in conjunction with an order
12 that I had made earlier in the proceeding that I
13 was not going to allow general catchall types of
14 exhibit identification, I required that each and
15 every exhibit be specifically listed. And we've
16 gone through myriad exhibits in our quest to
17 determine whether or not, for example, the Fifth
18 Amendment privilege is going to be recognized and
19 other issues having to do with admissibility. And
20 that was generally followed, to my recollection,
21 because I dealt with many specifically identifiable
22 exhibits. So yes, I agree that that was something
23 that the Court had a specific interest in and has
24 always taken the position that all cards are going
25 to be on the table in a timely fashion so that,

1 number one, first and foremost once all the cards
2 are on the table, the law favors settlement, and it
3 may come to fruition, and has more often than not
4 resulted in an amicable resolution to a case. And
5 as importantly, both sides are adequately prepared
6 so that, as I mentioned in this Pollard case, no
7 one is unduly surprised by something that comes
8 before them at or near the beginning of trial.

9 MR. LINK: Yes, sir. So that is why we did
10 that.

11 The second thing I want to point out to the
12 Court is that Mr. Edwards did the same thing and
13 filed exhibits after the order, just like we did.
14 And I'm not complaining --

15 THE COURT: Well, if you're not complaining
16 about it --

17 MR. LINK: The reason I want to explain is
18 because in our pretrial stip I'm of the mindset
19 when we reach agreement, we have an agreement. And
20 in our agreement, your court order says no
21 additional exhibits unless the parties agree. In
22 the pretrial stip Mr. Scarola and I agreed we
23 reserved our right to add additional exhibits. So
24 in compliance with the pretrial stip and this
25 Courts' order requiring us to identify them, we've

1 been doing that, sir.

2 THE COURT: Okay.

3 MR. LINK: So we are not in violation of the
4 Court's order. Mr. Scarola and I again agreed to
5 do this.

6 So let's talk about Fowler White because it is
7 as clear as mud. It is not as clear as Mr. Scarola
8 says. Here is why. If you look at his --

9 THE COURT: That metaphor, I'm not sure I
10 understand clear as mud.

11 MR. LINK: It's not clear. That's the point.
12 It's not clear, frankly. So it is not as simple
13 and clear as Mr. Scarola says. And I want to show
14 you why.

15 I honestly cannot tell you, I can't, where the
16 disk came from that end up in Fowler White's file.
17 I can't. We have looked for every piece of
18 communication, correspondence, we've gone through
19 their boxes three times trying to answer that
20 question. We have reached out to lawyers for
21 Fowler White. They have no memory of it. So we,
22 like Mr. Scarola --

23 THE COURT: Excuse me. Is Mr. Ackerman still
24 actively practicing?

25 MR. LINK: He is, yes. And we reached out to

1 Joe Ackerman. Mr. Ackerman. Sorry. We reached
2 out to Mr. Ackerman.

3 Here is why it's confusing. And I think this
4 is really important to understand what happened.

5 When the trustee took over the files, there
6 was an understanding by Mr. Edwards and his firm
7 that there would be about 5,000 e-mails, and they
8 agreed to do a -- go through them and do a
9 privilege log. What's missing from Mr. Scarola's
10 timeline is that in November 2010 Edwards informed
11 the bankruptcy court that the trustee had produced
12 74,000, 74,000 pages of documents on two compact
13 disks. Not one. On two.

14 So then what happened, because of the volume,
15 Mr. Edwards and his firm goes in and says, "Judge,
16 we need more time. We did not know we were going
17 to get 74,000 pieces of paper and we need time to
18 go through them."

19 THE COURT: I may have lost you. The 74,000
20 pages were self-generated from the Rothstein firm?

21 MR. LINK: Yes. And delivered by the trustee
22 to Mr. Edwards.

23 THE COURT: And Mr. Edwards, you're
24 suggesting, indicated that they need more time to
25 review the e-mails or whatever documents --

1 MR. LINK: Correct.
2 THE COURT: -- they may have encompassed, and
3 to raise objections, and that forum was the
4 bankruptcy court.

5 MR. LINK: All this started in the bankruptcy
6 court.

7 So when Mr. Scarola says there was one disk
8 produced by the trustee with 27,000 e-mails on it,
9 that's not true. There are two disks and there's
10 74,000 e-mails. That's what Mr. Edwards
11 represented to the Court. I haven't seen these
12 disks, but that's what Mr. Edwards represented.

13 So what happens after that is there is a
14 complicated negotiation between the Fowler White
15 firm and Mr. Farmer, on behalf of the Farmer Jaffe
16 firm, about how are they going to take these
17 documents, which are not Bates stamped, not Bates
18 stamped, and they wanted a hard copy to review so
19 they could make a privilege log, but they didn't
20 want to pay for it. The trustee didn't want to pay
21 for it.

22 Mr. Epstein volunteered with the special
23 master -- actually, Fowler White -- but
24 Mr. Epstein's counsel volunteered that they would
25 use their machine to print out, print out from the

1 disk that had no Bates stamps on them, documents,
2 and Mr. Farmer agreed to that.

3 So they print the documents out -- long before
4 our time, Judge -- they print the documents out, a
5 set is given back to the trustee, and a set is
6 given to Farmer Jaffe. The machine that prints it,
7 according to the magistrate and all the
8 communications, doesn't retain any image. So we
9 start with two disks. To make it more complicated,
10 there was three. One had a problem. But let's go
11 with two disks and 74,000 pages.

12 They print them out. Hard copy documents.
13 One to the trustee, one to Farmer Jaffe. The
14 magistrate wants a copy, and so you will see the
15 magistrate gets two disks: One with 25,000 images
16 on it and one with -- I can't tell you how many
17 images because the special master says, "I didn't
18 look at it."

19 I think -- this is Scott Link guessing -- I
20 want to be clear about this -- I think the disk
21 that ends up at Fowler White was the special
22 master's disk. And here is why I think that: A,
23 it was in a file that said Special Master. B --
24 none of which makes sense to me until we put this
25 together. B, there's a hearing where Mr. Scarola

1 says to him, "You, special master, review all these
2 documents." Just like he said here, he said it ten
3 times, "We have nothing to hide. You decide what
4 should be turned over." The trail goes cold. I
5 can't find a letter or communication from the
6 special master that says, "I looked. Here they
7 are." But I know this: The disk that was sent to
8 Fowler White to copy had no Bates stamp.

9 When you look at the judge's order from Judge
10 Ray that Mr. Scarola pointed out, it says Fowler
11 White will print a hard copy of all the documents
12 contained on the disk with Bates numbers added.
13 That's how they were going to do it.

14 THE COURT: And that disk, I presume, that
15 you're alluding to did have Bates numbers on them.
16 I'm talking about the individual documents.

17 MR. LINK: Yes, sir. They're all Bates
18 stamped. So they were not the disks
19 provided -- again, I can't say they're not. I'm
20 not testifying. This is Scott Link's forensic
21 review.

22 THE COURT: But again, Mr. Link,
23 respectfully -- and I appreciate you're trying to
24 put together and piece together something that
25 transpired seven years ago -- the problem still

1 remains the same. Frankly, it doesn't really
2 matter to this Court what format it was, who
3 formatted it or to whom it was supposed to be
4 intended. I'm sure there may be cases even after
5 this Morley case that we'll be talking about
6 tomorrow at length at the bar conference, but that
7 case stands for the proposition globally of the
8 sanctity in that particular case of the
9 attorney/client privilege to something so
10 rudimentary as whether or not an attorney referred
11 a client to a given doctor for treatment. And the
12 Supreme Court has clearly stated that information
13 is privileged and will not be divulged.

14 MR. LINK: Yes, sir. I was just trying to
15 answer your question about the disk.

16 THE COURT: Okay. So the point that I'm
17 trying to make is when I'm saying it really doesn't
18 matter, all of those other details, what matters to
19 the Court is, again, Judge Ray's order relative to
20 the sanctity of those documents, for lack of a
21 better term, the protection of those documents at
22 all costs, and that Fowler White shall not with the
23 threat of sanctions retain any of those documents.

24 It says here, "Should it be determined that
25 Fowler White or Epstein" -- so not only does it go

1 to Fowler White, but it goes to Epstein -- and
2 constructively, if not explicitly, by this order
3 extends to Mr. Epstein's legal representatives,
4 from this Court's interpretation.

5 MR. LINK: Yes, sir.

6 THE COURT: "Should it be determined that
7 Fowler White or Epstein retained images or copies
8 of the subject documents on its computer or
9 otherwise, the Court retains jurisdiction to award
10 sanctions in favor of Farmer, Brad Edwards or his
11 client," end quote.

12 MR. LINK: And I agree with that. The
13 bankruptcy court reserved that. What I'm
14 suggesting to the Court is I don't think it's as
15 clear as Mr. Scarola said. And he may go to Judge
16 Ray and Judge Ray will have a hearing. Based on
17 what we've looked at, I don't believe it's as clear
18 that that's what they did because it's possible,
19 based upon what I've read --

20 THE COURT: That Fowler White did?

21 MR. LINK: Yes.

22 THE COURT: So are you suggesting to me
23 that -- so that I'm understanding correctly --

24 MR. LINK: Yes, sir. I'm not here
25 representing Fowler White.

1 THE COURT: I understand. But you're here
2 representing Mr. Epstein, who by virtue of this
3 order that is being highlighted in part on the
4 ELMO, that Fowler White did what it was supposed to
5 do pursuant to that order, returned everything that
6 it was supposed to return, but through some
7 happenstance had the disk containing the very
8 information that was the source of Judge Ray's
9 order and somehow, therefore, should be exonerated
10 by virtue of the fact that because we really don't
11 know how Fowler White may have gotten it, but
12 assuming Fowler White did what it should have done,
13 miraculously this disk turns up in Fowler White's
14 files and hence we should essentially ignore the
15 dictates of the order?

16 MR. LINK: No, sir. And I think I've confused
17 the Court. Let me make sure you understand what's
18 on this disk.

19 The 27,550 pages on this disk, we've only
20 looked at 5,000 of them, okay? Of those 5,000, I
21 will represent to you -- and you can look at
22 them -- I don't believe any -- and I know none that
23 we attached -- were communications between an
24 attorney and a client.

25 I asked Mr. Cassell and I asked Mr. Scarola to

1 identify by Bates number if there are any
2 attorney/client communications and we would
3 segregate them. The response I got, every page is
4 an attorney/client communication. So that's one.

5 THE COURT: But that's not what this order
6 says, Mr. Link. The order doesn't say anything
7 about privileged documents.

8 MR. LINK: Judge, I understand that.

9 THE COURT: The order says that Fowler White
10 will not retain any copies of the documents
11 contained on the disk provided to it nor shall any
12 images or copies of said documents be retained in
13 the memory of Fowler White's copies. And we
14 already went through the sanctions.

15 MR. LINK: But we don't know -- here is the
16 disconnect: We don't know as we sit here that the
17 disk that we located there wasn't handed to them by
18 Special Master Carney after Mr. Scarola gave him
19 the job and said look at it and give them whatever
20 you think is okay because the majority of the
21 documents we've looked at have to deal with
22 scheduling and sporting events and going out
23 drinking and all kinds of things. It is not a
24 group of documents that are on the privilege log.

25 Here is the second thing we learned --

1 THE COURT: And is that going to serve as the
2 conduit to attempt to admit these documents into
3 evidence in the face of the order that I have just
4 read?

5 MR. LINK: Your Honor, I see the order. What
6 I'm trying to get across -- I'm doing a lousy job.

7 THE COURT: No, you're not.

8 MR. LINK: -- is that I can't tell you.

9 THE COURT: Try to get to the point that I'm
10 really --

11 MR. LINK: I don't think that we can conclude
12 today that this disk is a result of their violating
13 this order. This disk could have been as a result
14 of the special master looking at it and saying, "I
15 don't see communications between attorney/client, I
16 believe there's been a waiver of the work product
17 based on giving it to Razorback, issue injection,
18 all of these issues have been raised."

19 THE COURT: So now you're suggesting that
20 former Judge Carney, to my knowledge a very well -
21 respected jurist who presided in the Circuit Court
22 in Broward County, to my knowledge, and has done
23 senior work here in the 15th Judicial Circuit
24 somehow engaged in some type of ex parte
25 communications with Fowler White?

1 MR. LINK: Judge, I can't because I've looked.
2 I have searched. I'm not saying that at all. All
3 I can piece together is that Mr. Scarola asked
4 Special Master Carney to do that.

5 This disk, when we got -- we put a sticker on
6 it. We went and looked at boxes and put stickers
7 on things. The disk said Epstein Bates stamp. Had
8 no idea what was on it. Looked like something we
9 should put a sticker on. It came in, the disk, and
10 we started looking at it.

11 When these issues came up, we asked Fowler
12 White to please give us the original boxes. We got
13 the original boxes and found the disk in a folder
14 that says J. Carney printing on it. That's it.
15 That's all that's on this folder.

16 There's no watermarks, there's no
17 confidentiality agreement, there's no stamps on the
18 documents. They are Bates stamped and there's a
19 disk in there. So what I'm suggesting is if we're
20 trying to figure out whether Fowler White violated
21 the order, I don't think it's as clear as
22 Mr. Scarola says.

23 Now, I wasn't there. I can't tell you what
24 they did, Judge. But I do know this: Many of the
25 documents that are on this disk and that are on

1 their privilege log have been used in this
2 litigation. They have been used. They have
3 produced some. They're exhibits that Mr. Edwards
4 has asked about and answered that are on this
5 privilege log. There's over a hundred of them.

6 So this disk is not a disk of their privileged
7 documents. It's a disk of 27,500 documents. And
8 what's the most important part of this is Judge
9 Crow never held an in-camera. Nobody judicially
10 has looked at these. And that's where we need to
11 be.

12 I don't think any of this matters. What
13 matters is we have the records, they're relevant,
14 this Court should determine they're relevant, see
15 if there's a privilege and see if that privilege
16 has been waived. That should be the process.

17 THE COURT: On Thursday afternoon, which is
18 going to be taken up by additional argument, where
19 Friday I'm a committed member to the Bench Bar, as
20 is encouraged not only by the 15th Judicial Circuit
21 and Fourth District Court of Appeal but also by our
22 local Bar Association, of which many of you are
23 prominent members here, so you know that commitment
24 must be taken seriously, and I do take it
25 seriously, and then Friday I'm booked up with

1 hearings on other matters of the 14- to 15 hundred
2 files that I'm carrying in this division, of which
3 this is but one, with the trial to commence on the
4 morning of Tuesday, the 13th of March.

5 MR. LINK: Yes, sir.

6 THE COURT: That's a big endeavor. That is an
7 endeavor that is beyond this Court's ability
8 physically and from a time perspective. So I'm not
9 going to do that.

10 MR. LINK: Your Honor, I know that you don't
11 have the time. I have offered them a special
12 master. They don't want to.

13 THE COURT: It's just too late.

14 MR. LINK: But Judge, the truth is never too
15 late.

16 THE COURT: Please don't interrupt me.

17 MR. LINK: I apologize for that.

18 THE COURT: Protocol dictates the orderly
19 administration of justice and, correspondingly, the
20 orderly preparation for trial. That preparation --
21 and you'll be surprised when it comes to larger
22 cases like this -- not only applies to counsel and
23 their team of attorneys that the respective side
24 have, but it also applies to the singular
25 individual who is responsible for this orderly

1 presentation.

2 I often refer to a case that I printed
3 directly from the Fourth District Court of Appeal,
4 RJ Reynolds Tobacco Company versus Calloway, and it
5 talks about the trial judge's ultimate
6 responsibility. There it was to ensure appropriate
7 attorney behavior, but it talks also about court
8 exercising its control of the litigation of the
9 trial, of important pretrial hearings like we're
10 having here today, and talks about this is
11 especially true in lengthy high-stakes cases and
12 goes on to speak about what a court should and
13 should not tolerate when it comes to interruptions
14 and other matters that don't necessarily befit the
15 presentation of otherwise excellent counsel.

16 But what I was trying to communicate while we
17 were speaking over each other is that this is the
18 very reason why courts have spoken to the issue of
19 timely and reasonableness and preparation.

20 I can't speak to the matter in which this case
21 has been prepared by counsel for Mr. Epstein over
22 the last 3,000 and some odd days. I can, however,
23 speak to what is before me now. Why someone before
24 you and Miss Rockenbach got involved in this
25 case -- because I saw Mr. Ackerman's name in this

1 matter in the four years that I've been presiding
2 over this case -- I saw his involvement, I saw what
3 he attempted to do. His timing was critical --
4 whether his work was or wasn't is not for me to
5 say, but certainly his time in which he spent in
6 representing Mr. Epstein would have been critical
7 to any successor counsel's involvement in this
8 case.

9 Thankfully, for the purposes of most of the
10 decision-making that I do here in the civil circuit
11 courtroom I had experience, and I gained a
12 significant amount of experience in a relatively
13 quick amount of time. It was baptism by fire, I
14 think some would call it. But I had opportunities
15 to get into the courtroom long before others did
16 who had the same experience level. Whether that
17 was good or bad, the results speak for themselves.
18 But I did have that opportunity. And to learn a
19 great deal, not so much from those who I work with,
20 but even more those who I work against, so to
21 speak; my opposing counsel. The wealth of
22 knowledge that I gained from how they did their
23 work was astounding and something that I cherish
24 even to this day. But what it taught me more than
25 anything was that preparation is critical, whether

1 the case is a \$10,000 whiplash case or whether it's
2 a \$10 million class action suit.

3 And the very essence of what's being brought
4 to my attention today, where requests are made for
5 in-camera inspections at a time that's essentially
6 two to three business days prior to the
7 commencement of trial, a special master to review
8 thousands of documents several days before the
9 commencement of trial for the first time, despite
10 recalcitrance from Fowler White, their -- somebody
11 reviewing their files apparently for the first time
12 mere weeks before the case is going to court, those
13 types of things have to be held -- I was going to
14 say in high regard, but what was meant by what I'm
15 saying is preparation in getting to these
16 materials, there was nothing that I knew of despite
17 again what appears to be brief recalcitrance on the
18 part of Fowler White to turn over the materials
19 themselves, this could have been done six months
20 ago, a year ago, two years ago, three years ago,
21 four years ago, five years ago, six years ago, and
22 it should have been done then. To bring these
23 types of matters before the Court at this
24 particular time is, in my view, inappropriate.

25 Now, if this was newly-discovered evidence

1 that was not in the hands of Mr. Epstein's lawyers
2 since 2009, whenever this all came to fruition,
3 then I would say we'd have to take a different
4 approach. But the very nature of the documents
5 that we're talking about -- again, rightly or
6 wrongly held -- were in fact held by Fowler White,
7 Epstein's counsel, at an incredible crucial time in
8 this process; and that being in and around 2010,
9 when the Rothstein firm imploded, when these
10 e-mails were apparently confiscated, when somebody
11 made the decision that instead of Farmer paying for
12 the copy costs, they be handed over to Fowler
13 White. And if I have a bit of an incredulous tone
14 to that statement, it's probably purposeful.

15 But the fact remains, Mr. Link, that these
16 materials were in the hands of Epstein's attorneys
17 from the inception of the issue itself. And to now
18 come to the Court with not five pages of documents
19 to look at, but 27,000, or whatever that number
20 is -- it escapes me because of its sheer mass -- is
21 impossible and is not going to be countenanced
22 here.

23 And I understand what you're going to tell me
24 because I've gotten a flavor for some of these
25 documents that have been provided.

1 MR. LINK: Yes, sir.

2 THE COURT: And that is that they are
3 detrimental to the position taken by Mr. Edwards
4 and that they are helpful to the position taken by
5 Mr. Epstein.

6 The issue, though, is one of whether the
7 protocol and the orderly administration of justice
8 is going to be forsaken notwithstanding also the
9 aspect of privilege and the sanctity of privileged
10 communications, whether all of those considerations
11 are going to be thrown out when balanced against
12 material that has been in the hands of
13 Mr. Epstein's lawyers from day one. And I, for
14 one, am not going to sacrifice protocol over what
15 may or may not be, number one, privileged, and if
16 not privileged, certainly late disclosed
17 documentation of a massive nature.

18 Should the amount of documentation be a
19 determinative factor in a court's analysis in this
20 context, based upon 35 years of compound
21 experience, bench and bar, and a little bit more
22 now than half on the bench, I do not believe that
23 the orderly administration of justice should be
24 countenanced and should be disruptive. Should be
25 disruptive.

1 And what I meant by that, should the
2 destruction of the orderly administration of
3 justice be countenanced? And the answer to that
4 question, in my respectful view, is no. Because if
5 I do it once, then I'm setting a precedent, even
6 though I know trial courts traditionally don't do
7 that, according to case law. And forgive me for my
8 choice of words, but as someone who is a senior
9 member now of the bench -- not a senior judge, but
10 a senior member of the bench -- that sends a
11 message to my colleagues that I'm not doing what I
12 believe is the appropriate thing.

13 MR. LINK: May I respond, your Honor?

14 THE COURT: Sure.

15 MR. LINK: First I want to apologize. I did
16 not mean to interrupt the Court when you were
17 speaking.

18 THE COURT: Not at all. Go ahead.

19 MR. LINK: Second, we're not talking about
20 27,000 pages, we're talking about 49 exhibits.
21 There are only 49 exhibits that we are asking the
22 Court to look at. So that it is not 27,000 pages.

23 Third, I think most importantly I absolutely
24 agree your Honor has a difficult, difficult
25 weighing decision to make between staying on course

1 that's one of the things I want to emphasize for
2 this record. But that's not the case.

3 As I mentioned -- and this is the last time
4 I'll say it -- these documents have been in the
5 possession of Mr. Epstein from the inception of
6 this case as we know it. They didn't move. And
7 the problems that are inherent in this analysis, of
8 which this Court simply does not have the time to
9 address prior to trial, are all of those reasons
10 that I have just described to you: The disruption
11 of the orderly administration of justice, the
12 sacrosanct nature of the privilege, and of even
13 more importance is what I said I wouldn't repeat;
14 and that is, that at all times material to the
15 analysis, from the inception Epstein lawyers had
16 this material. And, obviously, the timeliness, or
17 the abject untimeliness of the request for the
18 Court now to take these matters into consideration,
19 where they are well beyond when exhibits that were
20 known or should have been known were not listed.

21 MR. LINK: Your Honor, may I have one more
22 shot, please? I know you have been very patient
23 with me.

24 THE COURT: If it's going to be any different
25 than what you've told me. If it's going to be the

1 and what I think is more important than any of
2 this, which is getting to the truth. And I believe
3 in my heart, your Honor, the reason I'm so
4 passionate about this and the reason I apologize
5 for interrupting you is if this courtroom is
6 looking for the truth, then those 49 documents have
7 got to come into court. They have got to go in
8 front of the jury.

9 THE COURT: But they're not coming in here,
10 and I would hope elsewhere, if it's going to be at
11 the sacrifice not only as to the orderly
12 administration of justice, but also in derogation
13 of a federal bankruptcy court's order or any court
14 of recognized jurisdiction's order that would have
15 the necessary supervisory control of a given
16 case, but also at the potential extermination or
17 derogation of a privilege. And for all of those
18 reasons is why I am extremely reluctant to start
19 taking these things into consideration just a few
20 days prior to trial.

21 Again, if this was something that came into
22 play that was being hidden by the other side, and
23 I'm talking now generically, and your side
24 discovered that information at the 11th hour, this
25 would be an entirely different discussion. And

1 same, we've already established, and it's a matter
2 of record, and I have made my ruling accordingly.

3 MR. LINK: Yes, sir. I understand that. I'll
4 be very quick.

5 You asked about whether there was any hiding
6 of these documents. And one thing I want the Court
7 to see is this: These are -- Mr. Scarola didn't
8 want me to put that up on the screen, so I'll hand
9 it to you.

10 If you look at the privilege log which they
11 filed, which Judge Crow found inadequate -- and I
12 don't believe there was another privilege log
13 filed, so I don't think there's a privilege log --
14 but that's another day, another issue -- but if you
15 look at the privilege log and the e-mails that it
16 relates to, tell me if a lawyer looking at that
17 would be able to tell the real content of the
18 e-mails that Mr. Edwards was writing. Because I
19 think you have an obligation to disclose in a way
20 that allows a lawyer to make a determination of
21 whether it's privileged or not.

22 THE COURT: Mr. Link, you're making my point
23 for me. Mr. Ackerman, Fowler White, had these
24 materials ever since day one. I don't know how
25 much more I can make this clear.

1 As I said, the analysis would be completely
2 different if it was shown to me that somehow, some
3 way the Searcy, Denney firm, Mr. Edwards, Farmer
4 Jaffe -- I was going to say Ron Rothstein, but I
5 don't want to get him confused with the well-
6 respected coach and former coach of the Heat --
7 Scott Rothstein was sitting on this stuff. That's
8 not what happened here. That's the point that I'm
9 trying to drive home and emphasize. Is not only
10 the issue of timeliness, not only the issue of the
11 privilege has not been tested, but first and
12 foremost is the fact that Fowler White, Epstein's
13 own lawyers, have been sitting on this from day one
14 for seven, eight years.

15 MR. LINK: But we don't know -- the point I'm
16 trying to make, I don't know that they looked at
17 it.

18 THE COURT: That's not my problem.

19 MR. LINK: Maybe Carney gave it to them and
20 said, "Don't look."

21 THE COURT: That's not my problem. If
22 Mr. Epstein has a case against his attorneys, he
23 can deal with those claims to his satisfaction.
24 I'm not here to determine whether or not someone
25 did or did not commit malpractice.

1 file. How that could be the case, who knows? But
2 I'm not finding fault with anything you or
3 Miss Rockenbach or Miss Campbell did. That's not
4 the issue. You've done your job.

5 MR. LINK: I understand. Your Honor, may I
6 have one minute to confer with appellate counsel to
7 make sure there's nothing I need to do to preserve
8 this?

9 THE COURT: Absolutely. Let's just take a
10 brief recess.

11 (Thereupon, a short recess was taken.)

12 - - -

13 THE COURT: All right. Thank you again.
14 Please have a seat. Welcome back.

15 MR. SCAROLA: Your Honor, I want to hopefully
16 tie up a few loose ends on the matter that has just
17 been ruled on.

18 Am I correct in understanding that the
19 defendant is prohibited from making any use of the
20 724 late-disclosed exhibits?

21 THE COURT: Yes.

22 MR. SCAROLA: Next, sir, we would request the
23 defendant be required to relinquish possession of
24 all copies of the privileged documents to the Court
25 under seal. They have expressed some concern

1 MR. LINK: I understand that, Judge.

2 THE COURT: I'm here only to deal with this
3 issue that is before me; and that is, whether a
4 wholesale late disclosure of significant exhibits
5 that have been in the possession of Fowler White,
6 Epstein's attorneys, from day one and, thus, as a
7 matter of continuum in Epstein's possession, his
8 possession is constructive to the possession of the
9 attorneys that represented him, that string of
10 attorneys that have been representing him since
11 2010, and that if nobody got around to looking at
12 Fowler White's documents -- and how that could be
13 understood is beyond me, as not only a seasoned
14 attorney but also now a seasoned judge -- until you
15 and Miss Rockenbach took it upon yourselves and
16 your paralegal to do it is not my problem. And
17 that's all I'll say on the subject.

18 I have made my ruling. It is a several-
19 pronged ruling. And for the reasons that I've
20 stated, that's the reason why I am not going to
21 engage in some type of a last-minute evaluation of
22 documents that could have been evaluated from 2010
23 all the way to March of 2018.

24 But nobody ever took it upon themselves to
25 even look at those documents in Fowler White's

1 stating that we have asked them to destroy them.
2 We want them turned over to the Court under seal.
3 They should no longer have possession of those
4 until such time as somebody rules that they are
5 entitled to have possession.

6 And I want to make one brief comment about
7 that, if I could can.

8 Your Honor knows very well that Fowler White
9 is a very large law firm that keeps meticulous time
10 records with regard to the services that they
11 render. And the concept that it is impossible to
12 reconstruct through those time records what was
13 received, when it was received, when it was
14 reviewed, what happened with it, who was informed
15 of what was happening with it quite frankly is
16 absolutely inconceivable to me; that a law firm of
17 that size, keeping records the way it did, cannot
18 reconstruct what went on with regard to this
19 information.

20 THE COURT: And that's a good point. What I
21 was going to point out earlier and I failed to do
22 that, and I appreciate the reminder, is that I
23 would have expected certainly in deference to the
24 fact that Mr. Epstein was a client of Fowler White
25 that someone from Fowler White would have had the

1 ability to weigh in somehow as to these critical
2 issues.

3 Perhaps I'm being a bit naive when I say that
4 having served Mr. Epstein in their capacity as
5 counsel, it's my respectful belief that they owed
6 an obligation to Mr. Epstein, if not this Court, to
7 explain how and why they had access and kept these
8 records in their possession in light of that court
9 order and in light of this ongoing litigation. And
10 as a matter of respect to Mr. Epstein and his
11 ongoing legal team, to have made some type of
12 affirmative steps to have dealt with this issue
13 head on because of the apparent implications of
14 same.

15 So I again want to make clear that I'm finding
16 absolutely no fault with Mr. Link, Miss Rockenbach,
17 Miss Campbell or anyone else from the Link and
18 Rockenbach firm in terms of what they did, albeit
19 in the manner in which they had to do it and the
20 timing, unfortunately, of the matter from their
21 perspective in having to do it, but that takes
22 nothing away from what the Court has already
23 remarked upon concerning the fact that now Fowler
24 White in the representation of Mr. Epstein had
25 these records from the inception is one of the

1 reasons for the Court's ruling.

2 MR. SCAROLA: Your Honor, may we include in
3 the order a direction that opposing counsel is
4 required to relinquish possession of all copies of
5 the privileged documents to the Court under seal?

6 THE COURT: Well, the only thing that
7 obviously has to be taken into consideration is the
8 appellate rights of Mr. Epstein and how they're
9 going to preserve those rights in light of the fact
10 that the Court has rejected the last minute request
11 for in-camera inspection for the reasons that I've
12 already stated at length on the record.

13 MR. SCAROLA: Which is why I've suggested that
14 they be relinquished to the Court under seal, your
15 Honor. They can be given an exhibit number. To
16 the extent that the appellate court finds it
17 reasonable and necessary to examine those
18 documents, the appellate court will have the
19 opportunity to do that.

20 THE COURT: So you're suggesting to file with
21 the Clerk of Court under seal the documents at
22 issue?

23 MR. SCAROLA: Yes, sir, that's correct.

24 THE COURT: That's better stated.

25 Do you have any objection?

1 MS. ROCKENBACH: No objection, your Honor.

2 THE COURT: So stipulated.

3 MR. SCAROLA: Your Honor will recall that
4 opposing counsel has also informed the Court on
5 multiple occasions that backup in the preparation
6 for this case was being provided by the Gunster law
7 firm, and we would like a certification from them
8 as well that no copies have been retained.

9 MR. LINK: They don't have any, Judge.

10 THE COURT: Okay. That's fine. If Mr. Link
11 and Miss Rockenbach are representing that to the
12 Court, I'm satisfied with that representation.

13 MR. SCAROLA: And I accept that representation
14 as well, your Honor, but what we would like and
15 believe we are entitled to is a list of all persons
16 to whom the privileged documents have been
17 disseminated. And I'm particularly concerned in
18 this regard; that the testimony of any witness
19 might be influenced by their improper exposure to
20 privileged documents. So we ask that a complete
21 list of all persons to whom those documents have
22 been disseminated or the contents of the documents
23 that been disseminated be provided to us.

24 And I know that Mr. Cassell has some concerns
25 in that regard as well that he would like to

1 address with the Court. So if he may have an
2 opportunity to speak to the Court in this regard --

3 THE COURT: That's fine.

4 Mr. Link, if you want to comment on that?

5 MR. LINK: Yeah. I think I can solve that
6 problem very easily, your Honor.

7 The documents were within my law firm, and my
8 client. That's it. They haven't been shown to any
9 third parties. There's not a third-party witness
10 for me to put on the stand. And you have ruled we
11 can't use them. We won't use them.

12 MR. SCAROLA: Does that include Mr. Epstein?

13 THE COURT: Does what include Mr. Epstein?

14 MR. SCAROLA: Has Mr. Epstein been provided
15 with copies of the documents or the contents of
16 these privileged documents?

17 MR. LINK: I just said my client. My law firm
18 and my client. And I can say legal counsel,
19 Mr. Goldberger. So that's it.

20 MR. SCAROLA: That may require some further
21 relief that we can address at another time.

22 And so that the record is clear, your Honor,
23 we believe that sanctionable conduct has occurred,
24 and we are reserving the right at a later time --
25 but it's not something that needs to be addressed

1 now -- but we're reserving the right to address the
2 issue of appropriate sanctions at a later time.

3 THE COURT: Thank you.

4 Mr. Cassell?

5 MR. CASSELL: Thank you, your Honor. Paul
6 Cassell, and I'm here this afternoon, and I
7 understand it's getting late in the day, I'll be
8 very brief, representing three victims; LM, EW and
9 Jane Doe. Just one housekeeping matter.

10 We have filed a motion to intervene, which is
11 unopposed.

12 THE COURT: The only thing I need is an order.
13 Everything else was provided but the proposed
14 order. So if it's unopposed, then phrase it as
15 such and I'll be glad to execute it.

16 MR. CASSELL: Thank you, your Honor.

17 Just so the record is clear, on July 19, 2010,
18 seven and a half years ago, LM said these very
19 documents are privileged, and on February 23, 2011,
20 EW and Jane Doe through counsel said these
21 documents are privileged. So the Epstein entity
22 that is Mr. Epstein and his array of lawyers were
23 on notice at that time that every one of these 45
24 documents was privileged.

25 And then what happened on Friday night, March

1 was in possession of that were in violation of a
2 court order. Mr. Scarola has used the term "stolen
3 documents" and I think that, frankly, describes
4 accurately the nature of the documents, although
5 who the thief was, of course, remains to be
6 determined.

7 So the question in front of you right now is
8 what to do about this. Well, we know one thing.
9 We know there's been absolutely no waiver of
10 attorney/client privilege. How do we know that?
11 Well, your Honor knows the Florida law very well.
12 To be a waiver of attorney/client privilege is
13 something that is disfavored. There has to be a
14 clear, intentional waiver of the privilege. And
15 how do we know there's not been a clear,
16 intentional waiver of the privilege? Just use
17 Mr. Link's word. Things are clear as mud. Well,
18 if something is clear as mud, there cannot be an
19 intentional waiver. So there's no waiver of
20 attorney/client privilege.

21 I know the hour is late.

22 THE COURT: You don't have to feel rushed. I
23 want to make sure that you're heard and that your
24 clients are heard.

25 MR. CASSELL: Thank you, your Honor. We

1 2nd, was that Mr. Link put into the public court
2 file summaries of the e-mails, quoting from them
3 directly, and we believe that was improper. And
4 indeed, we've heard today Mr. Link represent to the
5 Court all we wanted was an in-camera review, but of
6 course they wanted something more. They wanted to
7 put those in the public court file because they
8 knew that the cat would be out of the bag,
9 publicity would ensue, and other damage to my
10 clients could occur. And so I'm here this
11 afternoon to raise what I think are time of the
12 essence concerns about the release of those
13 privileged materials by Mr. Epstein. When I use
14 the term "Mr. Epstein," I'll be referring to this
15 entity.

16 Let's be clear. There is no doubt from sworn
17 testimony in front of the Court that on January 10,
18 2018 agents of this law firm picked up a disk from
19 the Fowler White law firm, and the Fowler White law
20 firm, as you know from the ELMO, had been directed
21 some six or seven years earlier not to retain any
22 copies of these documents. So there should be no
23 dispute about the circumstances right now.

24 At that time Mr. Link's law firm, Mr. Epstein,
25 were in possession of documents that Fowler White

1 appreciate that because what we've heard shockingly
2 this afternoon is -- let me -- I know we need to be
3 careful with language -- let's just say an accused
4 abuser, Mr. Epstein, the man accused of abusing my
5 three clients, we are told has seen these very
6 privileged documents. We're told Mr. Goldberger
7 has seen them. We're told, of course, Mr. Link and
8 his law firm has seen them. And of course this
9 very large law firm, the Fowler White law firm, has
10 seen them as well. And so the question is what do
11 we do?

12 And we're mindful in the fact you're about to
13 embark on what's likely to be a very time-consuming
14 trial. So I would like to impose six remedies that
15 we would ask you to execute today; none of which, I
16 want to emphasize, will require consumption of the
17 Court's time other than signing the proposed order
18 that we will provide for you.

19 The first is -- Mr. Scarola has already asked
20 for this and I believe obtained this, but I want
21 the record to be clear. My clients are asking that
22 you preclude any use of the privileged exhibits
23 either directly, indirectly or derivatively during
24 the upcoming trial because if someone relies on
25 this information, for example, in asking a question

1 to Mr. Edwards or asking a question to any of the
2 witnesses that Mr. Edwards is presenting, that
3 could implicitly reveal privileged information.

4 THE COURT: We have all done this, so don't
5 feel like you're alone. Are you talking about Mr.
6 Epstein?

7 MR. CASSELL: I'm sorry. If Mr. Epstein's
8 attorneys do that, that's the concern.

9 So, for example, if they're formulating any
10 questions to Mr. Edwards, they shouldn't be able to
11 use any privileged information because we're
12 worried that that could implicitly disclose
13 privileged communications.

14 Secondly, we would like Epstein counsel -- and
15 that's a broad term that includes -- I've probably
16 lost track of the different law firms, but
17 Mr. Link's law firm, the Fowler White law firm, I
18 believe there are several others, Mr. Goldberger's
19 law firm, we want them all to canvass their
20 records, canvass their e-mails, canvass their
21 servers and tell us if they -- how did this happen?
22 How did this happen?

23 THE COURT: You're talking about how did the
24 Fowler White firm garner these records?

25 MR. CASSELL: Correct.

1 THE COURT: Well, I'm not sure that any of
2 their servers are going to shed light on that.

3 MR. CASSELL: Well, it may be, for example --

4 THE COURT: I don't want to go on a fishing
5 expedition, as you can appreciate. I don't want to
6 exacerbate the problem; meaning, I don't want to
7 unnecessarily delve into myriad e-mail systems to
8 gain knowledge that is likely residing at the
9 Fowler White firm in some form or fashion, whether
10 it be current or former employees or otherwise. So
11 I am not going to go to that extent at this
12 juncture without further proof or basic proof for
13 going in that direction.

14 MR. CASSELL: That would be our request. But
15 there would be a broad -- you phrased it fishing
16 expedition. We would phrase it a retrieval
17 expedition -- to retrieve what's happened here.
18 But at the minimum we would ask your Honor then to
19 direct Epstein attorneys who were previously before
20 this Court, Fowler White, to examine the
21 circumstances here.

22 You noted that you thought there might have
23 been an obligation for them to address the Court
24 head on. I'm here telling you that the victims
25 believe they, Fowler White, has an obligation to

1 address the victims head on. How did this happen?

2 THE COURT: And understandable. I was not
3 confining the obligation of Fowler White to those
4 entities that I mentioned. It was those entities
5 that came to the Court's mind initially. I don't
6 want this record to suggest I wasn't taking into
7 account the concerns of the victims.

8 MR. CASSELL: Certainly, your Honor, I wasn't
9 suggesting -- and this, of course, is my first
10 opportunity -- you have always referred to building
11 a record -- this is my opportunity to build a
12 record as well. So we want to know how these
13 materials were obtained.

14 The third thing we want to know is who were
15 the materials distributed to? Mr. Scarola has made
16 that request on behalf of his clients. I'm making
17 that request on behalf of my clients.

18 We're told that Mr. Goldberger has seen it,
19 we're told Mr. Epstein has seen it. We want to
20 know who else has seen it. And this, frankly, may
21 require looking at e-mails, looking at servers and
22 that sort of thing.

23 I think the record should be clear that in a
24 routine case, you might say, "Well, that's going to
25 be too expensive." Your Honor is aware this is not

1 a routine case because I understand that two of the
2 finest and largest law firms here in Florida are
3 currently representing Mr. Epstein, so they
4 certainly have the resources to search -- to
5 accomplish the searches that would be involved to
6 see how these materials got anywhere.

7 The fourth thing is we want an order directing
8 Mr. Epstein not to reveal the contents of this
9 information to anyone. We are told that
10 Mr. Epstein has seen the information, so he should
11 be singled out specifically for an order.

12 Fifth -- I think this has already been
13 recovered. All copies of the documents are to be
14 turned over under seal to the Court.

15 Sixth, we want our temporary sealing order,
16 which we will provide later today, to be converted
17 into a permanent sealing order. Mr. Link filed in
18 the public court file, we believe highly
19 improperly, information that he was on notice was
20 privileged. And he said today he wanted an
21 in-camera review. Well, you do not get an
22 in-camera review when you put those very documents,
23 or at least summaries of those very documents, into
24 the public court file.

25 We want the Friday night filing, the notice of

1 redacted materials, to be placed under permanent
 2 seal.
 3 And then the last request is just a
 4 housekeeping request. We're obviously scrambling
 5 to sort out the implications of all this. I'm sure
 6 I have missed some points that need to be made.
 7 Due to the late filing of this document, due to the
 8 public filing of the document improperly, we would
 9 like leave to be able to file a supplemental
 10 application for additional remedies after the trial
 11 concludes and after we have received information
 12 about how the documents were obtained and who they
 13 went to.

14 And so those are the requests that I make on
 15 behalf of my two clients.

16 THE COURT: All right.

17 Mr. Link?

18 MR. LINK: Yes, sir. Thank you.

19 THE COURT: Thank you.

20 MR. LINK: I'm not sure how I can be more
 21 clear about where we got the documents from. We
 22 got them from Fowler White, your Honor. I don't
 23 think that's a mystery anymore.

24 I've represented to the Court who I have
 25 shared the papers with. The Court has ruled that

1 THE COURT: Not as far as the court file is
 2 concerned.

3 MR. LINK: The court file only contains the
 4 redacted version. We have double checked that. I
 5 asked Mr. Cassell to tell me if I missed a
 6 redaction. Could it happen? Yes, it could happen.
 7 We haven't found one. If there was one that wasn't
 8 redacted, we'd be glad to redact it. But the only
 9 thing that was filed in the clerk file was the
 10 redacted version.

11 Thank you, Judge.

12 THE COURT: All right. Thank you.

13 Much of which -- or much of the relief that
 14 has been requested has essentially been taken care
 15 of I believe through the Court's prior order; that
 16 is, that the one disk containing the documents that
 17 are being sought to be introduced at trial to take
 18 to record will be permitted to be filed under seal.
 19 The sanitized redacted versions of those records
 20 I'm also ordering to be sealed in an abundance of
 21 caution just in case there may be some error, not
 22 intentional, on the part of counsel who filed those
 23 records.

24 **Mr. Epstein will be barred from referring to**
 25 **any of those records as it relates to the documents**

1 **we're going to take the disks that we have and put**
 2 **it under seal. We'll destroy all the other copies.**
 3 **That's what Mr. Scarola asked for and that's what**
 4 **we said we would do.**

5 **As to the filing, I never said all I wanted**
 6 **was an in-camera inspection. What I said was**
 7 **Mr. Scarola said he would like one and I said**
 8 **great, let's have one.**

9 **Most important is this: The documents that we**
 10 **filed -- and there was some miscommunication with**
 11 **Mr. Cassell -- I want to make sure the record is**
 12 **clear -- we did two things: We filed redacted**
 13 **documents. We redacted all of the names of EW, LM**
 14 **and Jane Doe, as this Court has instructed. So**
 15 **their initials were wiped out. Mr. Cassell called**
 16 **me and said, "I'm looking at a document and I see**
 17 **their initials." What he was looking at is we**
 18 **served the counsel and hand delivered to the**
 19 **Court -- did not put it in the public file -- the**
 20 **unredacted documents so we would all know what was**
 21 **in there.**

22 THE COURT: By the court, you mean --

23 MR. LINK: To you. To the judge.

24 THE COURT: -- to myself.

25 MR. LINK: Yes, sir.

1 **that were gathered from Fowler White or from any**
 2 **other source that would have included those records**
 3 **that were the subject of Judge Ray's order. So**
 4 **it's to preclude anything coming in through the**
 5 **back door which wouldn't be allowed through the**
 6 **front.**

7 Mr. Link, did you want to comment on this?

8 MR. LINK: Yes. I wanted to remind the Court
 9 we have over a hundred exhibits that were listed on
 10 that disk that are already in the court file.
 11 We've used them in depositions. So I'm
 12 wondering -- those aren't excluded.

13 THE COURT: Right. **I'm not talking about**
 14 **those. I'm talking about the ones that have been**
 15 **derived from Fowler White and that have been sought**
 16 **to be introduced as part of the 748 or 724, or**
 17 **whatever this number is, or the 45 that have been**
 18 **claimed as privileged and have not been ruled upon**
 19 **and will not be ruled upon prior to trial because**
 20 **of the reasons that I have explained in detail**
 21 **earlier.**

22 MR. LINK: Thank you, Judge.

23 THE COURT: Mr. Cassell, did I leave out
 24 anything else?

25 MR. CASSELL: Yes. We want to know how the

1 Epstein entities came into possession of the
2 documents, and then we want to know where they
3 went.

4 THE COURT: Because of the court ruling, I
5 don't find that to be a front burner issue at this
6 time. Please don't confuse anyone here. The
7 Court's reference to front burner as opposed to
8 being an issue of importance. Front burner simply
9 means that in preparation for a trial that is
10 actually a mere two to three business days away, if
11 you count tomorrow, which I don't really count as a
12 court business day because of my obligations to the
13 Bench Bar Conference, I won't have the opportunity
14 to really delve into that prior to trial.

15 And as Mr. Scarola pointed out, I believe,
16 earlier, that can be done at another time. So I am
17 certainly not going to forget that it needs to be
18 done. But it will be ordered that it be done post
19 trial.

20 Any other remedies that are sought as you go
21 along -- I understand the relative late nature of
22 these revelations; hence, you are not precluded
23 from filing a supplemental motion.

24 I also note that you have requested attorney's
25 fees and costs related to this endeavor, and I'm

1 reserving on that as well.

2 MR. CASSELL: But related to that is the
3 distribution. The cat is now wandering out of the
4 bag, so time is of the essence.

5 THE COURT: Right. And again, I think that in
6 an abundance of caution, and I understand your
7 concerns, but what the attorneys here recognize --
8 and Mr. Epstein is also under this order -- is that
9 no further dissemination is going to be made. I
10 think that goes without saying as far as the
11 attorneys are concerned. I've known each of them
12 seated at counsel table for many years, as I have
13 known Mr. Scarola and Miss Terry, Mr. Burlington,
14 and I think they recognize that when this Court
15 makes a statement, that it is abundantly clear that
16 it will be enforced to the letter. I have no doubt
17 in my mind that they will all be respectful of the
18 court order of non-dissemination of any of those
19 documents hence forth.

20 And Mr. Link has already represented to the
21 Court that other than Mr. Epstein and his
22 co-counsel, that there have been no eyes laid upon
23 these documents. Hence, I'm accepting that
24 representation, as Mr. Scarola has accepted those
25 representations during the hearing as well.

1 MR. CASSELL: We haven't heard, of course,
2 from Fowler White. Will the Court direct them to
3 make similar representations?

4 THE COURT: I believe that I have sufficient
5 authority to do that under these relatively
6 peculiar circumstances. My jurisdiction, though,
7 is somewhat limited because they have withdrawn
8 from the case.

9 As a general blanket order I would simply say
10 that all attorneys who have or are representing Mr.
11 Epstein shall be subject to this order of
12 confidentiality, of sealing and of non-
13 dissemination of any such information that is
14 contemplated in any of the documents that are part
15 of the umbrella order of Judge Ray. And that would
16 include all of the exhibits that we spoke about
17 today and that have been filed as a matter of
18 record.

19 MR. CASSELL: Could they also be directed to
20 make a representation as to who they have
21 distributed the documents to?

22 THE COURT: Mr. Link has already -- are you
23 talking about Fowler White?

24 MR. CASSELL: Fowler White.

25 THE COURT: I don't think that I have that

1 ability.

2 MR. CASSELL: Could I be heard on that issue
3 then? I believe that you do have -- all right.
4 We'll deal with that later then, your Honor.

5 MR. LINK: Can I make a suggestion, your
6 Honor, that might be helpful?

7 THE COURT: Sure.

8 MR. LINK: We now have, I think, 34 or 36
9 boxes they delivered; I believe all the boxes they
10 have. The disk, the original disk, we now have it.
11 I don't know for sure, but I doubt that there's
12 another disk that they made and kept. If the Court
13 will instruct as part of this order that we
14 maintain the boxes, because Fowler White wanted
15 them back, then we will take possession of the
16 boxes.

17 THE COURT: If you are telling me that you
18 have authority from Mr. Epstein to retain those
19 boxes and Mr. Epstein is essentially giving you
20 carte blanche, you and Miss Rockenbach and
21 Mr. Goldberger jointly, the authority to make any
22 decisions necessary to protect his interests, that
23 motion would be granted.

24 MR. LINK: I'm standing here with this puzzled
25 look because I'm not sure what that means, frankly.

1 All I was trying to do is say I will preserve the
2 documents, the original files, because I don't
3 think there's another set of files somewhere.
4 Fowler White had asked me to return them once we
5 went through them, and if the Court can instruct me
6 to hold the boxes, then I will do that.

7 THE COURT: I don't have a problem with making
8 that instruction, so I'll leave it at that. You're
9 speaking on behalf of your client, Mr. Epstein, as
10 well as your own law firm, and Mr. Goldberger, I
11 take it, as well, so I have no problem making -- in
12 entering this order since you're current counsel
13 for Mr. Epstein.

14 MR. LINK: Thank you, Judge. I think that
15 will make custody easier.

16 MR. SCAROLA: Your Honor, there are two
17 additional matters that I would hope can be
18 disposed of in advance of the start of trial.

19 THE COURT: Sure.

20 MR. SCAROLA: One is Mr. Epstein's motion to
21 strike Dr. Jansen, and the second is issues with
22 regard to adverse inference. I think that both of
23 those matters have been fully briefed.
24 Mr. Burlington is here to present argument in
25 response to the motion regarding Dr. Jansen.

1 want to tackle first?

2 MR. BURLINGTON: Your Honor, it's his motion.

3 MR. SCAROLA: The motion to strike Dr. Jansen.

4 THE COURT: All right.

5 MR. BURLINGTON: Unless you want me to argue
6 both sides, your Honor.

7 THE COURT: What's the other motion?

8 MR. SCAROLA: Adverse interest, your Honor,
9 from the assertion of the Fifth Amendment.

10 MR. LINK: Which one are we on?

11 MS. TERRY: Jansen.

12 MR. LINK: Jansen. Okay.

13 Good afternoon, your Honor. See if I can
14 start over today.

15 THE COURT: You have done fine.

16 MR. LINK: I don't remember winning one yet,
17 so maybe this one. I have hopes.

18 Your Honor, this is our motion to strike
19 Dr. Jansen. And I know the Court has read the
20 paper, so I'm going to be very brief about this.

21 We have struggled since coming before this
22 Court in December with what this case is, because I
23 keep saying to the Court that Mr. Edwards wants to
24 try a defamation action, he wants to clear his
25 name, he wants defamation-type damages, and the

1 I suggest -- your Honor has told us that we're
2 finishing at 4:30 today -- that we allot 15
3 minutes, seven and a half minutes per side, to each
4 of those matters.

5 THE COURT: All right. Off the record.

6 (Discussion held off the record.)

7 MR. LINK: Your Honor, we have a motion to
8 strike the 79 exhibits that they disclosed late
9 after the cutoff. I think if we're going to do a
10 goose and a gander, the Court should rule those
11 exhibits are stricken.

12 THE COURT: Well, I have to -- I want to
13 review that motion again since my concentration has
14 been on the sequencing that I mentioned before.
15 I'll be glad to deal with it prior to trial.

16 MR. LINK: I'm comfortable with your Honor
17 ruling on the papers if Mr. Scarola is.

18 THE COURT: Well, I'd rather, since it's
19 something of the magnitude of trial exhibits and 79
20 in number, I'd rather have argument on the subject,
21 to be perfectly frank with you. I appreciate your
22 willingness to entrust the Court with that
23 endeavor, but I think it's better to have you heard
24 on the record.

25 All right. Mr. Burlington, which one did you

1 Court keeps rebuking me properly and saying, no,
2 this is a malicious prosecution action. We're not
3 going to try a defamation action.

4 Their expert that they want to put on the
5 stand for damages has no opinion, your Honor, as to
6 damages. Not one. He can't talk about any damage
7 suffered by Mr. Edwards, if any. His sole opinion
8 is that he was given defamatory statements by
9 counsel, defamatory statements, and told to do a
10 search to see how many times the defamatory
11 statements hit a web page or how many people
12 touched the web page with the defamatory statement
13 on it.

14 So, for example, there's a newspaper article
15 that says Rothstein and Edwards, and that magazine
16 or that newspaper has 3,000 people that look at the
17 newspaper. He says there are 3,000 hits. He can't
18 tell you if one of the 3,000 people read the
19 article, what they thought about the article, did
20 it make any difference, did they change their view
21 of Mr. Edwards, did they not do business with him,
22 did they fire him?

23 He says he has no economic damages, so how
24 does it help a jury to hear about nine million web
25 hits when you can't point to a single person -- I

1 said, "Tell me one person, one person, Dr. Jansen,
2 that you know read one of these articles." He
3 said, "I can't. I have no idea."

4 The other thing that was important is he said,
5 "I just use an average of data. I can't tell you
6 exactly because they accumulated over months." He
7 can't even tell us how many times this article was
8 actually touched. All he can tell you is if I go
9 to the Palm Beach Shiny Sheet website, on an
10 average month 3,000 people look at it. So how can
11 that help the jury from a damages expert determine
12 whether the filing of this malicious prosecution
13 action caused Mr. Edwards any damage?

14 Thank you, Judge.

15 THE COURT: All right. Thank you.

16 Mr. Burlington?

17 MR. BURLINGTON: I'm Phil Burlington, here on
18 behalf of Brad Edwards.

19 This determination comes down to four
20 questions. First, is the expert qualified? That's
21 not being challenged.

22 The suggestion that he cannot give opinions on
23 damages ignores the nature of the damages for which
24 case law is clear, which includes reputational
25 damages, shame and humiliation. They have

1 would require, of course, months of trial to pull
2 people in. But that's not our burden.

3 THE COURT: Right. And we're not looking at a
4 defamation case from the standpoint of publication,
5 where publication is really part of it. So that's
6 not what is being sought here in terms of the
7 expert testimony, as I understand it.

8 MR. BURLINGTON: Well, we're seeking to prove
9 the dissemination, as we would in a defamation
10 case.

11 THE COURT: Well, dissemination and recognized
12 or acknowledged publications are two different
13 things is what I'm trying to say. I'm essentially
14 agreeing with you, I think, in the sense that
15 there's no need to prove publication.

16 When I say "publication," I'm talking about
17 the consumption of that information by another
18 party and that party's -- and the effect on that
19 listener, or the effect on the person who agreed
20 with that material. You're speaking only to the
21 issue of dissemination.

22 MR. BURLINGTON: The Browning case says that
23 the two primary factors in determining reputational
24 damages are the gravity of the false allegations --
25 and here we have a young, talented trial lawyer who

1 acknowledged shame and humiliation as an element of
2 damage. We've cited on page 6 of our response
3 five Florida cases. Two of them, Florida Supreme
4 Court cases, make it very clear reputational
5 damages are a valid element of a malicious
6 prosecution case.

7 So how do you monetize -- how does the jury
8 monetize the damage that has been suffered by my
9 client? We've cited cases, and there are cases we
10 rely on from outside the jurisdiction, but it's
11 clear from the many Florida cases we cite this all
12 arises from the common law, and malicious
13 prosecution is described many times as an ancient
14 cause of action, so it's all developed by the
15 common law. So reliance on foreign jurisdictions
16 is not unusual, especially when it's consistent
17 with Florida law.

18 But the clearest discussion is in a case
19 called Browning, which says that in reputational
20 damages, which are particularly hard to prove, and
21 there's no case that I've ever read where in a
22 malicious prosecution case a plaintiff was put to
23 the burden of bringing in an individual who said,
24 "I didn't send my case to this lawyer because I
25 heard he was accused of a crime." That, of course,

1 is being accused not only of heinous crimes, but
2 heinous crimes involving undermining the judicial
3 system. And then the second factor noted in
4 Browning, and it's cited in other cases, is the
5 degree of exposure of the false allegations.

6 And I've cited multiple cases in my brief that
7 say that when courts have evaluated the
8 excessiveness of a malicious prosecution award, one
9 of the critical considerations is the degree of
10 exposure of the false allegations. And this is how
11 we are doing it in the Internet age.

12 If we were 30, 40 years ago and this was done
13 and let's say it was only exposed in this area of
14 the country, Palm Beach County, Broward, Miami, we
15 would come in with the newspaper's circulation to
16 give the jury some idea of the exposure. That
17 doesn't really have much probative value in the
18 Internet age.

19 And Dr. Jansen is undisputedly qualified,
20 probably more than anybody, to do this, and he
21 explained how conservative his analysis was. And
22 he's not going to tell the jury that the nine
23 million six hundred hits means that nine million
24 six hundred thousand people read this story and now
25 believed that Brad Edwards is a criminal, and so

1 forth and so on.

2 And one of the factors here is a very well-

3 recognized principle of the Bigelow case, which is

4 a U.S. Supreme Court case, that says that one of

5 the fundamental principles of justice is that if a

6 defendant engages in wrongful conduct that creates

7 uncertainty as to damages, that falls on them. You

8 can't put the plaintiff to what is an essentially

9 impossible burden, assuming we prove our cause of

10 action. And that, of course, is an issue that this

11 trial will be all about.

12 But they're trying to say really you can never

13 prove reputational damages without bringing in Joe

14 Six Pack off the street and inquiring of him how

15 much of a grudge he's holding against Brad Edwards

16 because of false allegations. That is simply not

17 the standard.

18 Is it helpful to the jury? Well, the jury is

19 not going to understand the complexity of

20 dissemination of information on the Internet, and

21 this witness is specifically qualified to do that.

22 So when we go through the analysis is he

23 qualified, is the issue relevant, is it helpful to

24 the jury, we satisfy those three.

25 Then we come to reasons to exclude. And the

1 The fact that that term is used not only in

2 describing certain parts of the task that was

3 assigned to Dr. Jansen or in our argument regarding

4 the nature of the damages, it's because that term

5 properly applies to false statements of fact that

6 accuse a person of criminal conduct, of being

7 insane, being untrustworthy and so forth. It is

8 not in any way a suggestion that we are bringing a

9 defamation action.

10 The reputational damages are clearly

11 recognized by the Florida Supreme Court. They have

12 been recognized as one of those intangible damages

13 for which a jury has to be given broad discretion.

14 On the other hand, they have to be given

15 parameters. And in this context, the two primary

16 ones as to reputational damages are the gravity of

17 the false allegations and the degree of exposure.

18 And that is exactly what this expert is qualified

19 to testify about. And there's been no suggestion

20 as to what confusion there would be. And so,

21 therefore, we believe we have satisfied the

22 standard, and it's your discretion regarding the

23 admission of his testimony.

24 And to strike a witness entirely is the most

25 extreme remedy that could be sought in this

1 only reason I saw raised in their motion for

2 excluding it was vague references to confusion.

3 And I don't see how there could be confusion, given

4 the clear parameters of what Dr. Jansen testified

5 to were his directions, his methodology. There was

6 terminology that he has to explain to the jury, but

7 all experts do that in complex situations. The

8 jury here would not be capable of making an

9 analysis of the degree of dissemination on the

10 Internet as a matter of their common sense.

11 THE COURT: I didn't read the motion as

12 suggesting a prior Daubert analysis being required.

13 MR. BURLINGTON: I'm sorry?

14 THE COURT: I didn't read the motion filed by

15 Mr. Link to talk about his seeking a Frye or

16 Daubert analysis.

17 MR. BURLINGTON: Correct. That's my reading

18 as well, your Honor.

19 Now, there was a little preamble, as there has

20 been on many motions here, about how this is all

21 about a defamation action, and we've cited in our

22 response the term "defamation" is a general term in

23 the English language, and we've cited Miriam

24 Webster, which is about as white bread as you can

25 get on a definition.

1 context, and we submit it is not appropriate and

2 the motion should be denied.

3 THE COURT: All right, thank you.

4 Mr. Link, you have a few minutes to rebut.

5 MR. LINK: Very briefly, Judge.

6 I think a little bit of the confusion on the

7 damages is there's really two standards. The

8 standard for damages in a malicious prosecution

9 based on lack of probable cause in a criminal

10 action has per se damages. They're assumed,

11 because if somebody makes an allegations that you

12 are a criminal in the criminal court and they have

13 you arrested, then your reputation and your

14 character are immediately impugned.

15 This is civil. In civil it requires damages

16 proximately caused. And it's not a Frye analysis,

17 it's not a Daubert analysis, it's a basic does this

18 help the jury and is it a 403 issue, which is if I

19 get on the stand and I say there were nine million

20 hits when in fact all he did was search for

21 defamatory terms given to him by counsel without

22 taking into consideration was it Mr. Edwards who

23 spoke to the press, did he do a press release, when

24 did these -- when were the -- when did the

25 dissemination take place, did anybody read them,

1 did it make any difference?

2 One of the things Mr. Edwards has told us is
3 he has no economic damages. His law firm has made
4 substantially more money, or himself personally,
5 since Mr. Epstein sued him than from before.

6 So to say to the jury nine million hits sounds
7 like nine million people are reading this. I
8 believe that prejudice outweighs any, any value it
9 might have, any relevance in this action, because
10 he needs to show damages proximately caused and not
11 just put someone on the stand to talk about hits.

12 Thank you, Judge.

13 THE COURT: Okay. I was writing as we were
14 speaking and certainly was anticipating
15 Mr. Burlington to state the well-known legal action
16 that a request to strike a witness is a drastic and
17 extreme measure reserved only in rare
18 circumstances, especially where here we're dealing
19 with an expert which is otherwise qualified to
20 testify to what he's going to testify. And there
21 being no Daubert or Frye analysis necessary, the
22 Court would deny the motion.

23 I would point out that many of the issues that
24 were raised by Mr. Link both in his written motion
25 and orally certainly can be effectively dealt with

1 inference instruction based on Fifth Amendment
2 assertions that we are requesting of the Court,
3 which I suggest to your Honor is in direct
4 conformity with the United States Supreme Court's
5 opinion in Baxter versus Palmigiano and also
6 conforms with the clarification in the case of
7 Coquina Investments versus Rothstein.
8 Interestingly, a matter related to the Ponzi
9 scheme.

10 And those two cases together stand for the
11 basic principle that you may not base civil
12 liability solely upon the assertion of a Fifth
13 Amendment privilege. But if a defendant confronted
14 with evidence against him in the context of a civil
15 case refuses to answer questions that are relevant
16 and material to that civil case, then drawing an
17 adverse inference based upon Fifth Amendment
18 assertion is not required, but is permitted.
19 That's exactly what this instruction says.

20 Your Honor is well aware of the broad array of
21 questions to which Mr. Epstein has refused to
22 provide answers, and it is of particular
23 significance that those refusals occurred in the
24 context of efforts to obtain discovery on the claim
25 that Mr. Epstein himself asserted.

1 on cross-examination. But the core aspect of the
2 Court's ruling today is that reputational damages
3 and damages for humiliation are difficult to
4 demonstrate to a jury, and the manner in which the
5 plaintiff chooses to go about presenting that
6 testimony, in this Court's view, is reasonable in
7 part to Dr. Jansen's proposed testimony. So again,
8 that motion is respectfully denied.

9 The next issue.

10 MR. LINK: Judge, I think that's 0 for 5.

11 THE COURT: I don't keep score. Never have
12 and never will. I know you say it in gest, and I
13 allowed it the last time without a mention, but
14 repeating it is inappropriate.

15 MR. LINK: Judge, I'm sorry. It was not meant
16 to be inappropriate.

17 MR. SCAROLA: Your Honor, the next issue
18 before the Court relates to the plaintiff's
19 entitlement to an adverse inference instruction
20 arising out of each of those circumstances where
21 Jeffrey Epstein has asserted his Fifth Amendment
22 right to remain silent. The primary objection to
23 the entitlement to an instruction really related to
24 the content of the instruction.

25 And I have handed your Honor the adverse

1 He filed a lawsuit intending not to provide
2 any discovery with respect to the claims that he
3 made and, carrying through on that intention,
4 refusing to provide any discovery on those claims
5 that he made. Under those circumstances, an
6 adverse inference instruction is particularly
7 appropriate.

8 I might also point out to the Court that there
9 is a basic principle of law relating to admission
10 by silence. Separate and apart from Fifth
11 Amendment concerns, if someone is confronted with
12 accusations under circumstances where they have in
13 this case not only a right but an obligation to
14 speak up in response to those accusations and they
15 fail to say anything, that accounts to an admission
16 by silence.

17 So based upon those two very fundamental
18 principles, the U.S. Supreme Court recognition, the
19 Fifth Amendment protections do not apply in the
20 context of civil litigation based upon the basic
21 principle of admissions against silence, admission
22 of a party opponent by silence.

23 We ask the Court approve this proposed
24 instruction and permit us to comment upon
25 Mr. Epstein's assertion of the Fifth Amendment

1 privilege in the context of this civil litigation
2 in each context in which those assertions were
3 made.

4 So it relates to his assertion of the Fifth
5 Amendment privilege with regard to the elements of
6 the claim that he brought against Bradley Edwards,
7 it relates to his assertion of Fifth Amendment
8 privilege with regard to all questions relating to
9 his economic circumstances, it relates to his
10 assertion of the Fifth Amendment privilege in every
11 context in which he has asserted that privilege.

12 Thank you, sir.

13 THE COURT: Thank you.

14 Mr. Scarola, the reference to Florida standard
15 jury instruction 301.11, am I going to find this
16 there?

17 MR. SCAROLA: What you're going to find there,
18 your Honor, is a spoliation instruction. And what
19 we've done is we have adopted the spoliation
20 instruction, which is the closest standard in
21 jury -- closest standard jury instruction to these
22 circumstances. That is not an adverse inference
23 instruction based upon Fifth Amendment. No such
24 standard jury instruction exists.

25 THE COURT: Well, I didn't think so. And

1 the Fifth Amendment, refuses to answer questions
2 when evidence is offered against him which is
3 relevant to the case, end quote. I don't think
4 that's an accurate statement of the protection
5 mechanism.

6 MR. GOLDBERGER: I bracketed that myself, your
7 Honor, in the instructions Mr. Scarola gave me.
8 And my concern may be a little different than the
9 Court.

10 Whether that's accurate or not, I don't want
11 this jury to be thinking well, the right against
12 self-incrimination applies in a criminal case and,
13 therefore, he's guilty of everything that they're
14 trying to get an adverse inference on. There
15 simply is not a connect there. I don't know why we
16 need to mention anything about a criminal case in
17 this jury instruction other than Mr. Epstein under
18 the United States Constitution cannot be compelled
19 to provide evidence against himself in a criminal
20 proceeding, period.

21 And then, you know, and the guilt of a crime
22 may not be inferred from the exercise of the Fifth
23 Amendment right to remain silent, that's confusing,
24 your Honor, and it's just going to inject criminal
25 issues into this civil trial, and I think it's just

1 thank you for that clarification.

2 I'm surprised that there really aren't more
3 cases that deal with this instruction in a civil
4 context. And no Florida cases that you're aware
5 of?

6 MR. SCAROLA: Coquina is a Florida case, your
7 Honor.

8 THE COURT: Well, it's a Federal District
9 Court case, not a Florida appellate court case,
10 which would be binding on this Court.

11 All right. Counsel for Mr. Epstein?

12 MR. GOLDBERGER: Now I get to stand.

13 Good afternoon. Jack Goldberger on behalf of
14 Mr. Epstein.

15 Your Honor, as a general statement of the law,
16 Mr. Scarola is correct.

17 THE COURT: Let me tell you where I have some
18 issues, Mr. Goldberger, with this. And Mr. Scarola
19 can speak to it as well, now that I understand its
20 origination.

21 The first sentence I don't really have a
22 problem with. The second sentence is where I have
23 a problem. It says, quote, However, the protection
24 that applies in a criminal proceeding does not
25 apply in a civil lawsuit when a person, based upon

1 not necessary to the instruction that Mr. Scarola
2 is seeking that this Court give to this jury.

3 And then the second sentence, your Honor,
4 address, However, the protection that applies in a
5 criminal proceeding does not apply in a civil
6 lawsuit when a person, based on the Fifth
7 Amendment, refuses to answer questions. And I know
8 where the Court is heading because that requires a
9 balancing test at this point.

10 Judge Crow, by the way, your Honor, back in
11 November of 2013 addressed this very issue in an
12 order that he entered. And I'll quote from it.
13 This is Order on Counter-plaintiff Bradley Edwards'
14 Motion to Determine Status of Punitive Damage
15 Discovery and Applicability of Adverse Inference.
16 And in that order, your Honor, your predecessor
17 judge, Judge Crow, stated, "The counter-plaintiff,
18 Bradley Edwards" -- I'm sorry -- "The
19 counter-plaintiff Edwards' request for jury
20 instructions adverse inference instruction is
21 deferred until the time of trial. And at the time
22 of trial, upon specific analysis of the specific
23 questions and answers, including those propounded
24 in discovery, the Court will determine whether an
25 adverse inference instruction will or will not be

1 given."

2 So I think what Judge Crow meant in 2013 is
3 that you can't determine what the instruction is
4 going to be until such time as you hear the
5 question, and then you must first do a 403
6 analysis.

7 Well, first you must determine whether it's
8 relevant, then you have to do a 403 analysis, then
9 you have to decide whether under that 403 analysis
10 and respecting the sanctity of an invocation of the
11 Fifth Amendment privilege, whether an adverse
12 inference instruction is appropriate.

13 So for Mr. Scarola to simply ask you at this
14 point to have a blanket instruction to give to this
15 jury every time -- based on every time Mr. Epstein
16 invokes his Fifth Amendment privilege I do not
17 believe is a correct statement of the law. And I
18 would ask the Court to follow Judge Crow's order,
19 where he said I'm going to do it on a
20 question-by-question basis.

21 THE COURT: Well, a couple things. One is,
22 again, presuming, without knowing, what was going
23 through Judge Crow's mind at the time, but I would
24 think that the likely contemplation was that by the
25 time this case got to trial, whether it was in

1 my rulings relative to the Fifth Amendment issue
2 that I've already reviewed -- I'll be glad to
3 review a proposed instruction that you and your
4 team prepared.

5 So at this time -- again, I'm going to give
6 the instruction. An instruction. The instruction
7 is still up in the air in terms of the wording.

8 I'm comfortable with actually the first
9 sentence, I'm comfortable with the second
10 paragraph. It's the second sentence in the first
11 paragraph that will need to be changed.

12 MR. SCAROLA: May I suggest a language change,
13 your Honor, because I think I understand --
14 although your Honor has not articulated the
15 concern, I think in rereading that second sentence,
16 I understand how it could be of concern. The Fifth
17 Amendment --

18 THE COURT: The concern potentially is the
19 blanket statement that protection that applies in a
20 criminal proceeding does not apply in a civil
21 lawsuit.

22 MR. SCAROLA: Yes, sir. I understand that.
23 What I suggest for consideration by the Court and
24 opposing counsel, instead of the instruction
25 reading, "However, the protection that applies in a

1 2014, '15 and now '18, Mr. Epstein's criminal
2 issues would have been behind him and that there
3 was not at that particular juncture a need to rule
4 on something that was probably potentially, at
5 best, speculative. However, the time is now, so to
6 speak, because we've gone through in painstaking
7 detail most of those questions that the Court
8 deemed relevant and that Mr. Epstein invoked his
9 Fifth Amendment privilege and, therefore, the Court
10 would find that an adverse instruction would be
11 appropriate.

12 The language that I find fault with,
13 particularly in the second sentence, will have to
14 be ironed out and dealt with in a way that's going
15 to be palatable to the Court.

16 You certainly have the right, and it is a
17 matter of law in the civil context, that if you
18 seek to have an instruction provided to the jury on
19 this issue, it must be filed to preserve error.

20 Now, of course, if it was -- if it's deemed to
21 be erroneous to give an instruction at all, then
22 that requirement would be obviated. However, if
23 you are seeking an order with the Court's stated
24 intent that one will be given -- because as far as
25 the Court is concerned, it is necessary based upon

1 criminal proceeding does not apply," it should
2 read, "However, the prohibition against drawing an
3 adverse inference that applies in a criminal
4 proceeding does not apply in a civil lawsuit,"
5 et cetera. That's the part that does not apply.

6 You still have your Fifth Amendment
7 protection; however, you don't have protection
8 against an adverse inference. That's what I
9 intended to say. It's not said as clearly as it
10 should be, so I suggest that the language read,
11 "However, the prohibition against drawing an
12 adverse inference that applies in a criminal
13 proceeding does not apply in a civil lawsuit,"
14 et cetera.

15 MR. GOLDBERGER: Your Honor, I accept what Mr.
16 Scarola is trying to clarify, but I also accept
17 your invitation to come up with our own instruction
18 at this point.

19 MR. SCAROLA: I just want to be sure our
20 proposal is on the table. And that's what it is.

21 THE COURT: However, the prohibition against
22 drawing an adverse inference -- so we'll eliminate
23 the word "protection" and substitute "prohibition
24 against drawing an adverse inference."

25 MR. SCAROLA: Yes, sir, which I believe is an

1 absolutely exact statement of the law.

2 THE COURT: All right. I certainly can live
3 with that more so than I could letting that
4 sentence stand as it was.

5 But again, your invitation remains. I'll be
6 glad to take into consideration any proposed
7 instruction that you provide me, Mr. Goldberger,
8 and your team.

9 But again, I'm ruling that adverse instruction
10 is abundantly necessary, without question. And,
11 therefore, one will be given.

12 But again, I will invite you to prepare one
13 for the Court's consideration.

14 MR. GOLDBERGER: Thanks, Judge. That's
15 obviously subject to relevancy. Obviously.

16 THE COURT: I'll put on the record for you so
17 that there's no equivocation, I understand that
18 your blanket objection is to giving an adverse
19 instruction at all. That is recognized, and it's
20 overruled.

21 However, as I said, as a substitute, my
22 understanding of the law to be is it will be
23 necessary now that the Court has ruled, unless you
24 simply want to stand on your blanket objection,
25 that an alternative instruction must be given for

1 the Court to consider so as to preserve further
2 your objection.

3 So at this time -- again, I'm going to give
4 the instruction. An instruction. The instruction
5 is still up in the air in terms of the wording.

6 I'm comfortable with actually the first
7 sentence, I'm comfortable with the second
8 paragraph. It's the second sentence in the first
9 paragraph that will need to be changed.

10 MR. SCAROLA: May I suggest a language change,
11 your Honor, because I think I understand --
12 although your Honor has not articulated the
13 concern, I think in rereading that second sentence,
14 I understand how it could be of concern. The Fifth
15 Amendment --

16 THE COURT: The concern potentially is the
17 blanket statement that protection that applies in a
18 criminal proceeding does not apply in a civil
19 lawsuit.

20 MR. SCAROLA: Yes, sir. I understand that.
21 What I suggest for consideration by the Court and
22 opposing counsel, instead of the instruction
23 reading, "However, the protection that applies in a
24 criminal proceeding does not apply," it should
25 read, "However, the prohibition against drawing an

1 adverse inference that applies in a criminal
2 proceeding does not apply in a civil lawsuit,"
3 et cetera. That's the part that does not apply.

4 You still have your Fifth Amendment
5 protection; however, you don't have protection
6 against an adverse inference. That's what I
7 intended to say. It's not said as clearly as it
8 should be, so I suggest that the language read,
9 "However, the prohibition against drawing an
10 adverse inference that applies in a criminal
11 proceeding does not apply in a civil lawsuit,"
12 et cetera.

13 MR. GOLDBERGER: Your Honor, I accept what Mr.
14 Scarola is trying to clarify, but I also accept
15 your invitation to come up with our own instruction
16 at this point.

17 MR. SCAROLA: I just want to be sure our
18 proposal is on the table. And that's what it is.

19 THE COURT: However, the prohibition against
20 drawing an adverse inference -- so we'll eliminate
21 the word "protection" and substitute "prohibition
22 against drawing an adverse inference."

23 MR. SCAROLA: Yes, sir, which I believe is an
24 absolutely exact statement of the law.

25 THE COURT: All right. I certainly can live

1 with that more so than I could letting that
2 sentence stand as it was.

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4 glad to take into consideration any proposed
5 instruction that you provide me, Mr. Goldberger,
6 and your team.

7 But again, I'm ruling that adverse instruction
8 is abundantly necessary, without question. And,
9 therefore, one will be given.

10 But again, I will invite you to prepare one
11 for the Court's consideration.

12 MR. SCAROLA: Your Honor, we thank you very
13 much for your generous allotment of time today.
14 Look forward to seeing you on Tuesday.

15 THE COURT: It's my pleasure.

16 Again, you all have done a superb job in both
17 your written and oral presentations. I appreciate
18 the excellent argument. As I've mentioned in the
19 past, if I had the pleasure of dealing with
20 attorneys of all of your caliber each and every
21 day, I wouldn't have the headaches that I do
22 physically and figuratively.

23 MR. SCAROLA: Your Honor, for planning
24 purposes, are we going to be conducting an initial
25 screening on Tuesday, having jurors fill out the

1 questionnaire and then returning for voir dire on
2 Wednesday? The initial screening I would think
3 would include hardship challenges and also
4 questions with regard to anyone's familiarity with
5 the underlying circumstances of this case.

6 THE COURT: That's something that we're going
7 to have to discuss, and I guess the best time to do
8 it is now. Take a little bit more time.

9 Madam court reporter, are you okay with a few
10 more minutes?

11 THE REPORTER: Sure.

12 THE COURT: My thinking is that likely it will
13 be necessary to preliminarily individually question
14 the venire panels. I'm going to have a hundred.

15 MR. SCAROLA: Yes, sir.

16 THE COURT: I know that will be time
17 consuming, but based upon the Dippolito case, and
18 this having some parallels as far as the publicity
19 aspects are concerned and the nature of the
20 allegations and admissions that we're dealing with
21 here, that it's incumbent upon the Court to
22 individually question each of the initial venire
23 members as to their knowledge of the individuals
24 involved in this case. Those are my thoughts
25 preliminarily.

1 interim order relinquishing jurisdiction on an
2 unrelated case -- a case that goes back to 1995,
3 actually -- and emphasize in that interim order the
4 significance of counsel's stipulation. And so I'm
5 here to make determinations of law, rule, where
6 necessary, but the conduct of the trial is going to
7 largely depend upon lead counsel.

8 So if you guys formulate a questionnaire of a
9 preliminary manner that you can agree on, you got
10 it. I'm more than willing to accede to that. And
11 if that is sufficient in your view to satisfy the
12 issue of pretrial publicity, knowledge of the
13 circumstances, knowledge of any the participants,
14 things of that nature that are critical to the
15 analysis, then that's satisfactory to me.

16 MR. SCAROLA: Well, my suggestion, your Honor,
17 is that once the group is assembled, the Court deal
18 with hardship issues in whichever way your Honor
19 ordinarily deals with hardship issues. Anyone who
20 is not asserting a hardship for which they are
21 seeking to be excused and anyone who does not
22 express any knowledge with regard to Epstein or
23 Rothstein, which I think are the two broad
24 categories that we need to address.

25 THE COURT: I'm not as concerned with

1 MR. SCAROLA: May I make a suggestion?

2 THE COURT: Sure. Whoever is going to
3 primarily conduct voir dire, why don't you come up
4 to the podium so I can hear from you and you don't
5 have to jump up and down.

6 MR. SCAROLA: We've proposed a juror
7 questionnaire and I think that we're probably close
8 in terms of the content of that juror
9 questionnaire.

10 THE COURT: I haven't seen it.

11 MR. SCAROLA: If we're not there already,
12 we're close in terms of the contents of that
13 questionnaire.

14 THE COURT: I haven't seen it yet, so that's a
15 bit of a disadvantage for me because this is
16 something that goes unmentioned, but certainly it
17 is my philosophy in most of the cases that I handle
18 and all of the cases when I'm dealing with
19 exceptionally competent lawyers, once voir dire is
20 over, there's little that the jury hears from me.
21 You are the ones who are going to be essentially
22 steering this trial, and I leave it to competent,
23 experienced attorneys when it comes to
24 stipulations.

25 And the Fourth has reiterated that in a recent

1 Rothstein particularly now as I am, as I was -- I
2 really -- I've never really been concerned with
3 Rothstein.

4 MR. SCAROLA: From my perspective, we can
5 limit it to any knowledge with regard to Epstein.
6 And I would think this is the defense's primary
7 concern as well.

8 THE COURT: Or Mr. Edwards. There's nine
9 million hits, apparently.

10 MR. SCAROLA: Well, that's true. I think
11 those names should be made known to the jurors.
12 Anyone who recognizes those names and anyone who
13 has a hardship remains to be individually
14 questioned.

15 With regard to the others, they are given
16 questionnaires and they are asked to fill out those
17 questionnaires, and then they are excused for the
18 balance of the day. If someone survives individual
19 questioning, they're given a copy of the
20 questionnaire, they fill that out, and they're
21 excused for the balance of the day.

22 THE COURT: All right. So let me stop you
23 there so I'm understanding. The questionnaire that
24 you're proposing would be after the initial issues
25 regarding knowledge of any of the participants in

1 this case?

2 MR. LINK: That's what I envisioned, your
3 Honor. And I think Rothstein, Epstein all have to
4 be part of that dialogue.

5 MR. SCAROLA: I don't have a problem either
6 way.

7 THE COURT: That's fine. Certainly we'll have
8 the opportunity to question them further. If they
9 say they have heard of Scott Rothstein, we will be
10 able to drill down further into that inquiry.

11 MR. SCAROLA: Yes, sir. Anyone who has not
12 heard of any of those three people and does not
13 have a hardship fills out the questionnaire, leaves
14 with instructions to return the following morning.
15 Everybody else is subject to individual voir dire.

16 THE COURT: I'm thinking about it the other
17 way, and I'm thinking the individual voir dire has
18 to come at the initial point of whether or not any
19 of these people have any knowledge of the
20 protagonists here.

21 MR. SCAROLA: Well, it would. The only people
22 who are excused are those who have no hardship
23 concern to raise and don't know any of the three
24 people.

25 THE COURT: But the knowledge of the people

1 has to come first.

2 MR. LINK: It does, your Honor. You have the
3 sequence correct.

4 THE COURT: Because then hardship becomes a
5 non-issue.

6 MR. SCAROLA: That's fine.

7 THE COURT: Okay? It's the degree of their
8 knowledge, if any, that will have to be dealt with
9 first. If they have knowledge of a nature that
10 results in an immediate cause challenge, then we no
11 longer have to get into any of the other issues.

12 MR. SCAROLA: But does your Honor envision two
13 separate individual voir dire's?

14 THE COURT: No.

15 MR. SCAROLA: So you would want to identify
16 everybody who has knowledge and everybody who is
17 claiming a hardship.

18 THE COURT: Has knowledge of a
19 disqualification nature. And if the grammar is
20 incorrect, forgive me for the late hour.

21 So, yes, it would be only those who would
22 be -- who would have knowledge that would subject
23 them to disqualification.

24 MR. SCAROLA: Yes, sir.

25 THE COURT: After that, I see no issue because

1 I have done it before and have had remarkable
2 results using now Chief Judge Gerber's, then Judge
3 Gerber here in the Circuit Court, his voir dire
4 colloquy on hardship. It's excellent. And it is
5 one that I've had very, very good success
6 utilizing. And I have done it in a group. And the
7 group setting is actually better.

8 MR. SCAROLA: I agree that needs to be done in
9 the group.

10 The bottom line is that those who survive the
11 initial screening process either because the
12 screening process is not necessary for them or they
13 have come in, been individually questioned and they
14 still qualify, those people all fill out a juror
15 questionnaire before they leave for the day and
16 they're instructed after filling out the
17 questionnaire to return the following morning.

18 THE COURT: What are you envisioning -- what
19 are you both envisioning on this questionnaire?

20 MR. SCAROLA: All of the basic information
21 that takes a long time to gather on an individual
22 basis that we won't need to gather individually;
23 demographic information, marital status, job
24 history --

25 THE COURT: So you think it would be better

1 with 100 -- let's use 80 as a round number -- 80
2 people -- it would be better -- and, Mr. Link, I
3 want your thoughts on the subject, too.

4 MR. LINK: Yes, sir.

5 THE COURT: It would be better to give them
6 the questionnaire, have them fill it out in our
7 presence and then dismiss them for the day so that
8 you all could evaluate this information, as opposed
9 to going through the standard questionnaire that I
10 have here, which is one we all use with demographic
11 information, the name, place of domicile,
12 occupation, marital status, spouse's occupation,
13 adult child occupation, prior jury service, parties
14 to any pending or past law suits, similar criminal,
15 knowing anyone in the courtroom -- we'll basically
16 take that out of the equation -- and can you and
17 will you be a fair juror in the case?

18 MR. SCAROLA: Yes. We include all that
19 information. We request some additional
20 information as well. They fill out the
21 questionnaires, the questionnaires are gathered,
22 multiple copies are made, the Court has one, each
23 side has a copy or more, if they choose to order
24 them, and we then have a chance to look at them
25 overnight and come back the following day and focus

1 our voir dire on those questions that need to be
2 asked.

3 THE COURT: I'd like to reserve my right to
4 ask the fairness question, so I don't want that
5 included in the questionnaire.

6 MR. SCAROLA: That's fine.

7 MR. GOLDBERGER: Just procedurally, your
8 Honor, I just did this in a case recently in this
9 circuit, and the procedure requested by Mr. Scarola
10 is close to what we did.

11 After the individual got through, they
12 survived the cut, they then filled out the
13 questionnaire, actually down in the jury assembly
14 room. They collected the questionnaires for us,
15 they gave us the copies overnight, and we came back
16 the next day, and it worked pretty well.

17 THE COURT: Okay. So that will be fine. So
18 what we'll do on Tuesday is the 100 people that
19 will be assembled -- we'll be doing jury selection
20 in 11A, so report there at 9:30 on Tuesday
21 morning -- we will go ahead and individually speak
22 to the jurors outside the presence of the
23 remainder. I don't want to do it with the white
24 noise. As I said, that would be headache producing
25 within minutes.

1 pointed out and always keep in mind the cost to
2 summon people to jury service is extraordinarily
3 high, and so we don't want to waste the taxpayers'
4 money in that respect as well.

5 All right. So again, I want to thank and
6 commend each of you for your presentations today,
7 all that participated either directly or indirectly
8 in the presentation of all of your materials.
9 Thank you to our courtroom personnel, thank you to
10 our staff attorney, who's been assisting me. And I
11 wish you all a pleasant evening.

12 MS. ROCKENBACH: Your Honor, you almost got
13 away. I just have a proposed order on the motion
14 to stay that your Honor denied earlier, if I can
15 approach. I gave a copy to Mr. Scarola just a
16 moment ago.

17 THE COURT: Yes. What you can do tomorrow on
18 the substantive motions -- I'll be at the Bench Bar
19 Conference and you have my permission to track me
20 down. Our schedules are posted, so you'll know
21 where I'll be. But I'll be doing the civil
22 presentations during the afternoon. There's two of
23 them. So I'll be able to be reached there.

24 MR. SCAROLA: Thank you very much, your Honor.

25 THE COURT: Thank you again. Have a great

1 MR. SCAROLA: Easiest is just go into the jury
2 room.

3 THE COURT: I think that's the best way to do
4 it.

5 And you'll individually question each of the
6 panel after I have introduced everyone, after I've
7 had the opportunity to make them as comfortable as
8 possible and to explain what we're doing and why --
9 not why we're doing it, because I don't want to
10 hint at anything -- some may recognize the name
11 right off the bat -- but indicate to them that we
12 have agreed that we will question each of you
13 individually so as to find out only preliminary
14 information concerning the matter at hand, and
15 leave it pretty much at that.

16 And then we'll go over with them if they have
17 any knowledge of Mr. Edwards, Mr. Epstein or the
18 Rothstein matter. And I think that's the better
19 way to do it.

20 Obviously, the reason for my doing it, even
21 though it has not come under attack or objection,
22 is because I don't want the entire 100 people to be
23 tainted by one person spouting something that may
24 be of the nature that could arise here. So to
25 avoid that operation -- and, you know, it should be

1 rest of the week. Thank you again to our courtroom
2 personnel. We'll be in recess.

3 (Thereupon at 4:50 p.m., the hearing was
4 concluded.)

C E R T I F I C A T E

THE STATE OF FLORIDA,)
COUNTY OF PALM BEACH.)

I, Elaine V. Williams, Registered Professional Reporter, State of Florida at large, do hereby certify that I was authorized to and did report the above hearing at the time and place herein stated, and that it is a true and correct transcription of my stenotype notes taken during said hearing.

I further certify that I am not attorney or counsel of any of the parties, nor am I a relative or employee of any attorney or counsel of party connected with the action, nor am I financially interested in the action.

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

IN WITNESS WHEREOF, I have hereunto set my hand this 9th day of March, 2018.

Elaine V. Williams
Notary Public in and for the State of Florida
My Commission Expires 03/27/21
My Commission #GG 72248

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