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UNCERTIFIED TRANSCRIPT DISCLAIMER IN THE MATTER OF  
 EPSTEIN  
 v.  
 EDWARDS

3

1 THE COURT: Good morning. Welcome  
 2 back. All right as I understand it, you  
 3 want to start with the issue of the motion  
 4 to amend the answer and affirmative  
 5 defenses. Is that accurate?  
 6 MR. SCAROLA: That is, sir. Yes.  
 7 THE COURT: I will be glad to do that.  
 8 I have reviewed the materials from both  
 9 sides. Thank you for that.  
 10 MR. LINK: Whenever you are ready,  
 11 Judge.  
 12 THE COURT: Whenever you are ready, go  
 13 ahead, sir.  
 14 MR. LINK: Good morning, Your Honor.  
 15 Scott Link on behalf of the plaintiff. It  
 16 is our motion for leave to amend the  
 17 affirmative defenses. You have to put that  
 18 in context, Your Honor.  
 19 That is, why do we need affirmative  
 20 defenses that sound in defamation, and they  
 21 do. The reason they do is because the  
 22 counter-plaintiff in this case has made it  
 23 very clear that they are trying the  
 24 allegations in the statements in the  
 25 complaint.

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1 At the last hearing, Mr. Scarola handed  
 2 this out and showed us very clearly what  
 3 their plan is. And this is their plan.  
 4 They believe that we're trying the factual  
 5 allegations of the complaint to see whether  
 6 they were true or false.  
 7 As this Court knows, in the recent  
 8 Supreme Court case dealing with this case,  
 9 the Supreme Court made it very clear that  
 10 there is a narrow exception to the  
 11 litigation privilege. That exception is for  
 12 malicious prosecution. But the Supreme  
 13 Court told us in that opinion Your-Honor --  
 14 I will share it with the Court -- the  
 15 Supreme Court told us in that opinion, Your  
 16 Honor -- gave us a roadmap.  
 17 The Supreme Court told us.  
 18 THE COURT: That Debrincat,  
 19 D-E-B-R-I-N-C-A-T versus Fischer --  
 20 MR. LINK: That's correct, Your Honor.  
 21 THE COURT: -- from the Florida Supreme  
 22 Court, So.3d cite that the parties are well  
 23 familiar with.  
 24 MR. LINK: If you are look at this  
 25 case, you will see that the Supreme Court

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1 made it very clear and gave us a roadmap.  
2 The Supreme Court said really simply -- and  
3 it makes sense -- that if the litigation  
4 privilege applied to the elements of a  
5 malicious prosecution action, there would  
6 never be a malicious prosecution action.  
7 Plus the Supreme Court reaffirmed that  
8 every statement made in the proceeding  
9 itself: the allegations of the complaint,  
10 the statements of witnesses, the statements  
11 of lawyers, and the statements of the judges  
12 are absolutely protected. That's why the  
13 court lays out the elements. And the  
14 elements the court lays out talk about only  
15 the actual initiation of the lawsuit.  
16 So if you turn, Your Honor, to page two  
17 of three, the court sets forth the elements.  
18 We will talk about these elements. The  
19 Supreme Court really give us clarity.  
20 At the bottom of the page two, it talks  
21 about an original criminal or civil judicial  
22 proceeding -- an original proceeding. That  
23 proceeding, according to the Supreme Court,  
24 when you read the Fourth DCA division that's  
25 cited, is the filing, it's the

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1 commencement, it's the action.  
2 If you think about where this law came  
3 from, it comes from the criminal system. If  
4 you think about the criminal system, simply  
5 issuing a warrant, starting an  
6 investigation, filing a criminal complaint  
7 in and of itself can cause injury to your  
8 reputation.  
9 So the Supreme Court tells us the act  
10 that is not protected by the litigation  
11 privilege is the initiation of a lawsuit.  
12 If you look at the probable cause  
13 element, it says there was an absence of  
14 probable cause for the original proceeding.  
15 It doesn't say claim. It doesn't  
16 allegation. It doesn't say statement.  
17 So Mr. Scarola tells us three times  
18 during this hearing on the 29th that what he  
19 plans to do -- what he plans to do --  
20 reading from this transcript at page 82 --  
21 the first thing Your Honor needs to  
22 determine is the issue we have been focusing  
23 on. What are the factual allegations that  
24 we claim were maliciously prosecuted, and  
25 then he goes to our complaint.

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1 According to the Supreme Court, our  
2 complaint is protected. We cannot commit  
3 defamation. We cannot commit any action  
4 that's based on wrongful words. The only  
5 thing that's available is a claim for  
6 malicious prosecution focused on the  
7 initiation of the suit.  
8 On the last page of this opinion from  
9 the Supreme Court, the court tells us this:  
10 The filing of a lawsuit and the joining of a  
11 defendant is the commencement of a judicial  
12 proceeding.  
13 It then says, really importantly, an  
14 action for malicious prosecution which is  
15 based as a matter of law on causing the  
16 commencement of an original judicial  
17 proceeding -- that's what we need focus on.  
18 So if we are trying the statements and  
19 the allegations of the complaint, if that's  
20 what we are doing, then we have to have  
21 affirmative defenses that protect us from a  
22 claim based on allegations in the complaint.  
23 The last thing I want to show the  
24 Court, on Friday after our hearing, I took  
25 the deposition of Mr. Edwards' expert.

8

1 May I approach. During the deposition  
2 of Dr. Jansen -- if you turn to page three,  
3 four and five, Your Honor, you will see what  
4 their expert wants to do.  
5 The assignment was the level of  
6 dissemination of defaming statements --  
7 defaming statements. That's on page three.  
8 Page four. I refer to ties statement  
9 associating Mr. Edwards with the illegal  
10 activities of Mr. Rothstein's, the results  
11 of Mr. Rothstein's lawsuits as the defaming  
12 statements.  
13 So what they plan to do is put on an  
14 expert to demonstrate that the allegations  
15 of the complaint were defaming and caused  
16 damages, the defamation action.  
17 There's nothing in the elements of  
18 malicious prosecution that make it relevant  
19 for an expert to get on the stand and talk  
20 about defaming statements in the complaint.  
21 In fact, to do so violates the roadmap  
22 that the Supreme Court just gave us. There  
23 is no better authority than Debrincat on how  
24 this case should go forward. But if they're  
25 going to be allowed to put an expert on to

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1 talk about defaming statements, if they are  
2 going to be allowed to put the allegations  
3 of the complaint and test their truth or  
4 falsity, which are protected by litigation  
5 privilege, we then need to have affirmative  
6 defenses that sounds like defamation.  
7 Last point I want to point out in  
8 Debrincat, Your Honor is this. It's in the  
9 analysis, and it's the second sentence of  
10 the analysis. Te law has long recognized  
11 that judges, counsel, parties and witnesses  
12 should be absolutely exempted from liability  
13 to an action -- this is the key -- it  
14 doesn't say to defamation -- to an action.  
15 To be specific, to any action for defamatory  
16 words published in the course of the  
17 judicial proceeding.  
18 So if we are exempted from liability  
19 for the words published in the lawsuit, then  
20 we don't need these affirmative defenses,  
21 because they will then have to focus on  
22 probable cause for the judicial proceeding.  
23 But if they are going to by allowed to bring  
24 in allegations of the complaint, truth or  
25 falsity, then we need these affirmative

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1 defenses.  
2 Otherwise, if you look at our answer in  
3 affirmative defenses, Your Honor, we don't  
4 have any. The reason we don't have any is  
5 we didn't raise advice of counsel. There's  
6 not a statute of limitation defense. We  
7 have no affirmative defenses because we are  
8 defending a malicious prosecution action.  
9 But we ask this Court, if this Court is  
10 going to allow them to try the truth or  
11 falsity of the statements in the complaint,  
12 that we be allowed to amend our pleading.  
13 THE COURT: You are not seeking to  
14 amend to affirmatively defend on advice of  
15 counsel?  
16 MR. LINK: We are not, sir. They are  
17 all defamation affirmative defenses.  
18 THE COURT: Well, there's also the  
19 constitutional affirmative defenses that you  
20 are seeking to interpose dealing with the  
21 petition to file against the government or  
22 something along those lines.  
23 MR. LINK: Those are all defamation.  
24 They are all protection of speech.  
25 THE COURT: I presume that falls under

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1 that same umbrella.  
2 MR. LINK: It does, Your Honor.  
3 Everything that we've asked the Court to  
4 allow us to amend is designed to protect our  
5 record, frankly, that we believe that  
6 everything in our pleading -- let me give  
7 you an example.  
8 The Court dismisses Mr. Edward's count  
9 for abuse of process based on litigation  
10 privilege. At the end of the suit when we  
11 win, if we sued Mr. Scarola for malicious  
12 prosecution in going forward with this case,  
13 are the statements he's made in this  
14 proceedings -- for example, Mr. Epstein is a  
15 serial child molester -- are they protected  
16 because they're part of this proceeding? Or  
17 does he waive the privilege somehow because  
18 we bring a malicious prosecution action?  
19 This court tells us very clearly we  
20 could not sue Mr. Scarola for his  
21 statements. It is no purpose in the  
22 malicious prosecution action.  
23 But that's what this door is opening.  
24 That's what they want to do. And we suggest  
25 to Your Honor, we don't want to come back a

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1 second time. We would like to try this case  
2 once. We would like to focus on the  
3 elements of malicious prosecution and not  
4 try a defaming words case in front of the  
5 jury.  
6 Thank you, Your Honor.  
7 THE COURT: Okay thank you, Mr. Link.  
8 Who is going to arguing on behalf of  
9 Mr. Edwards? Mr. Burlington?  
10 MR. BURLINGTON: May it please the  
11 Court. I am Phillip Burlington representing  
12 Brad Edwards.  
13 I have not heard anything today that  
14 justifies their claim that the rights to  
15 petition the government provides them an  
16 affirmative defense as they allege in their  
17 fifth affirmative defense. That has nothing  
18 to do with defamation. We have explained  
19 why it is not a defense to a malicious  
20 prosecution case. Because as the US Supreme  
21 Court has stated very clearly, baseless  
22 litigation is not protected by the privilege  
23 to engage in petitioning of the government  
24 under the First Amendment.  
25 I would note that even considering the

1 presentation here, there is not a single  
2 case from any jurisdiction cited by them  
3 that says that any of these defenses are  
4 valid in a malicious prosecution case. Not  
5 a single case.

6 They have gone so far as to site the  
7 Noerr/Pennington cases, which are anti-trust  
8 cases involving efforts to lobby the  
9 legislative and executive branches of  
10 government, and they have taken that and  
11 tried to apply it to the malicious  
12 prosecution case. That makes to sense.

13 Now, as to the other defenses, they  
14 have also passed over two very critical  
15 considerations which were not addressed in  
16 their motion -- and have not been addressed  
17 here, and I hope will not be addressed for  
18 the first time in the rebuttal, since we  
19 addressed it very squarely in our  
20 response -- and that is, there are three  
21 grounds to deny a motion to amend. One is  
22 where the party has abused privilege. The  
23 second is where the amendment would  
24 prejudice the opposing party, and then the  
25 third is whether the affirmative defenses

1 would be futile because they are legally  
2 insufficient.

3 Now, in this case they've raised five  
4 affirmative defenses eight years into the  
5 litigation and mere weeks before of this  
6 special setting that this Court had for this  
7 month.

8 We pointed out in our response. There  
9 was no explanation why it took them eight  
10 years to dream up these affirmative  
11 defenses. That is an abuse of the  
12 privilege, waiting until the eve of trial,  
13 after discovery is almost completely  
14 concluded to raise multiple affirmative  
15 defenses, many of which raise factual issues  
16 that would require further discovery,  
17 possibly new experts, and maybe even counter  
18 pleading. Those reasons in themselves are  
19 sufficient to justify denial of this motion.

20 But, I have spend more time on the  
21 futility, because I certainly understand  
22 that Your Honor has always expressed concern  
23 that people are allowed to amend. And  
24 again, we don't think that they should based  
25 on the abuse of the privilege and based on

1 the prejudice to our client. But I will get  
2 back to the legal insufficiency.

3 The argument that the Debrincat case  
4 gives a roadmap is simply wrong. Debrincat  
5 is not a roadmap. It is a dead end. It was  
6 the determination that the litigation  
7 privilege does not apply to a malicious  
8 prosecution case.

9 And this is very clearly stated in the  
10 paragraph preceding its conclusion. This  
11 court has never held that the litigation  
12 privilege protects a litigant from the claim  
13 of malicious prosecution. And other  
14 district courts have recognized that the  
15 litigation privilege does not act as a bar  
16 to a malicious prosecution claim.

17 If the Florida Supreme Court was  
18 holding that it does not bar proof of the  
19 first element of malicious prosecution, they  
20 would have said that and said it remains in  
21 force for the other elements. Clearly they  
22 would not have been as categorical as they  
23 were.

24 What they have done is try to parse out  
25 language, again trying to make the roadmap

1 when it's clear this was intended to be a  
2 dead end for that privilege.

3 And they talk about it's only the  
4 initiation of the claim that subjects them  
5 to liability. But even in Debrincat when it  
6 talks about the first element, it says an  
7 original criminal or civil judicial  
8 proceeding against the present plaintiff was  
9 commenced or continued. In this case,  
10 obviously, it was continued.

11 They include the other elements, which  
12 include that there was an absence of  
13 probable cause for the original proceeding.  
14 That means we can prove that the factual  
15 allegations were false, that the legal  
16 claims were invalid, as a matter of law, and  
17 nothing in Debrincat precludes that.

18 It was a simple, very short decision  
19 for the Florida Supreme Court. And it  
20 simply said the privilege does not apply to  
21 malicious prosecution claims.

22 But even putting aside Debrincat, we  
23 have never had a defamation claim. We have  
24 never alleged it. And they have this string  
25 site of cases that talks about how, well --

1 it's called the single publication rule. If  
2 your cause of action is based on a  
3 defamatory publication, you can't avoid  
4 defenses to defamation or the statute of  
5 limitations by pleading things like  
6 intentional infliction of emotional distress  
7 or tortious interference with business  
8 relationships, so forth and so on.

9 It has nothing to do -- not a single  
10 one of those cases had to do with malicious  
11 prosecution. The only one that comes within  
12 shouting distance is Fridovich. But in that  
13 case, the Fourth District rejected the  
14 malicious prosecution case, because that  
15 case arose out of family allegations that a  
16 family member murdered somebody, and they  
17 were essentially fighting over the estate.

18 They created this conspiracy to bring  
19 claims to the prosecutor to prosecute that  
20 family member for murder. That family  
21 member was ultimately convicted of  
22 manslaughter.

23 So the Fourth District said that's not  
24 a bona fide termination in your favor, so  
25 they eliminate the malicious prosecution.

1 Then they went with defamation counts and  
2 related counts. It was a certified question  
3 in Fridovich -- talks about defamation.

4 But they have cited no case from any  
5 jurisdiction that says that you can convert  
6 a malicious prosecution case into a  
7 defamation case, and then raise defenses  
8 that are unique to defamation cases.

9 And this reliance on the deposition  
10 taken recently is nothing but -- that was  
11 a -- that was an expert on damages, and  
12 damages to reputation as a result of false  
13 statements, which is an inherent part of a  
14 malicious prosecution case. An they have  
15 cited no case to the contrary.

16 THE COURT: You have cases that cite  
17 affirmatively to that proposition?

18 MR. BURLINGTON: There is a case called  
19 Mancusi out of the Florida Supreme Court  
20 that define the elements and talked about it  
21 is designed -- in fact, Debrincat says that  
22 malicious prosecution is balanced between  
23 allowing people to bring suits and  
24 protecting the reputation of the individual.

25 So that's one -- that's the nature of

1 it. I mean, the fact that there are similar  
2 elements of damage does not convert  
3 malicious prosecution to a defamation count.  
4 And they have cited no case for that  
5 proposition.

6 But even if we go a little deeper into  
7 these defamation claims to the defamation  
8 defenses, they are clearly invalid as a  
9 matter of law.

10 For example, the fifth one -- excuse  
11 me. I have already addressed the fifth one.

12 The sixth one claims that Mr. Edwards  
13 is a public figure. Now, as noted  
14 previously, this would raise a whole new  
15 factual set of issues plus perhaps the need  
16 for experts.

17 But the Gertz case makes it crystal  
18 clear that a private attorney representing a  
19 client, despite their involvement in a  
20 high-profile case, including their  
21 involvement in a proceeding unrelated to  
22 their civil proceeding is not a public  
23 figure, that you cannot convert -- they are  
24 very specific. You cannot convert a private  
25 attorney representing a client into an

1 officer of the court to bootstrap yourself  
2 into saying it's a public official.

3 And they also said in that case that we  
4 are not going to hold that someone who  
5 simply engages in their professional  
6 activities or has involvement in the  
7 community is converted to a public figure.

8 And what they have attached to their  
9 motion to amend, which they claim Brad  
10 Edwards made himself into a public figure is  
11 nothing more than website statements on the  
12 law firm where Brad Edwards worked that  
13 talked about some of his cases. And that's  
14 nothing more than his professional  
15 responsibility and professional relationship  
16 for purposes of getting clients.

17 THE COURT: Résumé.

18 MR. BURLINGTON: Excuse me?

19 THE COURT: Résumé.

20 MR. BURLINGTON: Sure.

21 And there's nothing even -- only one of  
22 them mentions Epstein.

23 So they have cited no case from any  
24 jurisdiction that says that a defamation  
25 count can result in either a higher burden

1 of proof or additional affirmative defenses  
2 based on the nature of the individual who  
3 was sued in the baseless litigation.

4 Then their seven affirmative defense,  
5 just asserts generally just as a matter of  
6 public concern, and thereof we have a higher  
7 burden of proof.

8 Again, this is rather late in the game  
9 to start changing, not only the factual  
10 issues, but the burdens of proof. But they  
11 also cite no case from any jurisdiction that  
12 says a malicious prosecution case is altered  
13 on the basis of whether there was a matter  
14 of public concern involved.

15 And here, inverting that notoriety of  
16 Mr. Epstein's criminal conduct into a matter  
17 public concern is somewhat of a stretch.  
18 But also, in the Gertz case there was  
19 notoriety in that criminal case. And Gertz  
20 made it very clear that the private attorney  
21 representing a client in proceedings and in  
22 related proceedings, which had a lot of  
23 publicity, did not convert him to either a  
24 public official or a public figure, and  
25 whether or not it was a matter of public

1 concern was not relevant.

2 The case that they seemingly rely on is  
3 the Nodar case, which is a Florida case  
4 where the parent went to the board of the  
5 school board to speak out against a teacher  
6 that he believed was no properly preparing  
7 the students, not properly teaching and was  
8 harassing his son.

9 That was a public forum. It was an  
10 executive branch, not a judicial branch.  
11 And all that the Florida Supreme Court held  
12 was in that context -- because it was a  
13 matter of public concern in the appropriate  
14 public forum -- there was a qualified  
15 privilege, and the malice would not be  
16 presumed from the defamatory statements.

17 Now, again, that was a defamation suit.  
18 It was nothing about malicious prosecution.  
19 But as Justice Scalia noted in his  
20 concurring opinion in the Kalina case,  
21 malicious prosecution has the qualify  
22 privilege built into it, because we have to  
23 prove, not only a lack of probable cause,  
24 but we have to prove malice, and we do not  
25 get a presumption of malice.

1 So that case, the Nodar case, has  
2 nothing to do with either the context of  
3 this case or the cause of action that we had  
4 brought.

5 And they've cited, as I've said, no  
6 malicious prosecution cases to support the  
7 idea that any of these defenses can be  
8 valid.

9 Now, as to the -- I believe it's the  
10 eighth and ninth affirmative defenses, they  
11 are not affirmative defenses at all.

12 Affirmative defense, as the Florida  
13 Supreme Court has stated, is where a  
14 defendant essentially has to admit the  
15 allegations of the pleading. But say --  
16 even assuming that -- I have this defense or  
17 you are limited in these matters in proving  
18 your case or in your damages.

19 Their eighth affirmative defense simply  
20 says this is nothing but a defamation suit.  
21 That's not an affirmative defense. That is  
22 a legal proposition which they rely on to  
23 provide the predicate for the sixth and  
24 seventh affirmative defenses, but it is  
25 nothing but a statement of a legal

1 proposition. It is not a defense.

2 The last affirmative defense claims  
3 that there are known procedures that this  
4 court could put in place that could protect  
5 Epstein's due process rights in the context  
6 of the punitive damage claims. That's not  
7 an affirmative defense. That's a  
8 constitutional challenge in the proceedings  
9 of this court. While I'm not saying they  
10 can't raise constitutional challenges, it is  
11 not a affirmative defense.

12 I would add, they haven't specified a  
13 single thing that has happened thus far in  
14 the context of punitive damages that has  
15 deprived Mr. Epstein of any due process  
16 rights.

17 And I gave a brief summary in our  
18 response to all the protections that have  
19 been established in the case law, in the  
20 statutes for protecting due process rights.

21 And until and unless they come to you  
22 with a colorable argument that those  
23 procedures are inadequate, there's nothing  
24 for you to do in response that generic  
25 assertion that Mr. Epstein could never have

1 his due process rights protected in the  
2 context of the punitive damage award. But  
3 what is clear is it's not an affirmative  
4 defense at all.

5 So, trying to parse out Debrincat to  
6 say that the litigation privilege only  
7 applies to one element of the malicious  
8 prosecution claim, I submit is facially  
9 wrong in light of the complaint. And if  
10 they believe that Debrincat, which concludes  
11 by saying unequivocally that the litigation  
12 privilege does not apply to malicious  
13 prosecution cases, they had an obligation  
14 because they were a tag-along case. And the  
15 Florida Supreme Court, after issuing  
16 Debrincat, issued an order in our case  
17 saying that Epstein should show cause why  
18 Debrincat does not control. And in  
19 response, Epstein conceded that it did  
20 control. There is no to parse out anything  
21 in Debrincat which would create entirely new  
22 law in Florida about parsing out elements of  
23 malicious prosecution for either purposes of  
24 forcing the plaintiff into a position of  
25 having a defamation claim or of taking out

1 specific elements of a malicious prosecution  
2 claim and saying, oh we have defamation  
3 defenses to these.

4 The falsity of the statements in the  
5 complaint are entirely different from a  
6 publication, because it is the act of  
7 triggering the judicial mechanism forcing my  
8 client to defend, litigate, expend funds.  
9 And the falsity of those statements goes to  
10 lack of probable cause, it goes to malice,  
11 and it is an element that we can prove  
12 caused harm, and we should get compensatory  
13 damages.

14 Again, they cited no case. They relied  
15 solely on Debrincat, and it is an extremely  
16 thin read upon which to entirely change the  
17 law of malicious prosecution. And I believe  
18 that Your Honor should deny the motion based  
19 on being untimely with no explanation.

20 None of these cases are new. Debrincat  
21 is the only one that's within the last few  
22 years. But they had time to raise that.  
23 All the others are established law. It just  
24 doesn't apply here.

25 THE COURT: Let me ask you to explain

1 for me, if you will, the issue of futility.  
2 Because usually because of Florida's policy  
3 on liberality of amendments even at trial --  
4 cases after trial that allows for amending  
5 the pleadings -- the amendment is typically  
6 allowed, and then the affirmative defenses  
7 are attacked, traditionally by a motion to  
8 strike.

9 Here your arguments on behalf of your  
10 client are that these amendments are  
11 essentially futile in the sense that I  
12 analogize it with a cause of action brought  
13 by a plaintiff in a given case where the  
14 plaintiff is alleging some type of --  
15 attempting to allege some type of cause of  
16 action that makes no legal sense, or it is  
17 barred by the existing precedent so as to  
18 make any amendments futile.

19 I would suspect that that same analogy  
20 could apply here. Albeit, this is the first  
21 effort, at least as to these affirmative  
22 defenses, that have been made.

23 But are you suggesting that under no  
24 reading of law and the facts that apply here  
25 that it would be either amendable or that

1 any potential amendment based on these facts  
2 and the law that have constituted these  
3 proposed affirmative defense would be  
4 futile?

5 MR. BURLINGTON: You are correct that  
6 normally when affirmative defenses are  
7 initially asserted in a timely fashion that  
8 the means of challenging their legal  
9 sufficiency is a motion to strike.

10 When a no motion to amend is  
11 presented -- especially this late in the  
12 game -- it would be a waste of judicial  
13 resources for you to allow the amendment  
14 knowing that as a matter of law those  
15 defenses are invalid.

16 And there are cases -- I'm not sure  
17 they're the ones cited in our response --  
18 but I have cited case on futility where if  
19 they're legally invalid, they're necessarily  
20 futile.

21 And to go through the motion of  
22 allowing them to amend, requiring us to move  
23 to strike, allowing them to respond when the  
24 legal sufficiency is addressed in these  
25 memos.

1 They cited case law in their  
2 affirmative defenses themselves trying to  
3 justify them. So the futility is  
4 different -- not different, but the need to  
5 do a motion to strike is different when the  
6 amendment is made, when you come to the  
7 Court and seek it to exercise its discretion  
8 to allow an amendment, if it is legally  
9 invalid, there's no reason for the Court to  
10 allow it, because it would be futile. And  
11 that's one of three ways of attacking the  
12 motion to amend as discussed in all the case  
13 law.

14 Otherwise, to say it would be futile, I  
15 guess, we would have to get into the factual  
16 analysis of where the facts don't support  
17 it. But there isn't much difference between  
18 saying the facts don't support it and this  
19 doesn't apply as a matter of law to this  
20 cause of action.

21 So I believe you are fully authorized  
22 to look at the merits of these claims, which  
23 have been argued in the motion and the  
24 response -- and they've certainly had an  
25 opportunity today to argue what they thought

1 was the legal validity.

2 So to simply put that off and have  
3 another hearing on it when the question here  
4 is, do you allow amendments which I believe  
5 are clearly not valid to a malicious  
6 prosecution cause of action. So I believe  
7 you are authorized to do it on that basis as  
8 well.

9 THE COURT: Thank you, Mr. Burlington.  
10 I appreciate your written and oral  
11 presentation, as well, Mr. Link.

12 MR. SCAROLA: May I add just a little  
13 bit to that?

14 THE COURT: I will give you a couple  
15 minutes.

16 MR. SCAROLA: Thank you very much, sir.

17 THE COURT: After Mr. Scarola,  
18 Ms. Rockenbach, if you want to add something  
19 you are free to do so as well.

20 MS. ROCKENBACH: Thank you, Your Honor.

21 MR. SCAROLA: I don't think that it  
22 will take a couple minutes.

23 It was one aspect --

24 THE COURT: Less than that?

25 MR. SCAROLA: Yes, sir.

1 There was one aspect of Mr. Link's  
2 argument that I found extremely confusing.  
3 And maybe it's just some --

4 MR. LINK: Your Honor, you mind if I  
5 move so I can --

6 THE COURT: Feel free.

7 MR. SCAROLA: -- some inability on my  
8 part to comprehend the argument. But he  
9 told us repeatedly that Edwards seeks to  
10 prove the falsity of the allegations of the  
11 complaint instead of proving there was no  
12 probable cause to file the complaint. I  
13 think he repeated that statement at least  
14 three times. And quite frankly, I have no  
15 idea what that means.

16 In order to prove there was no probable  
17 cause to file the complaint, we must look at  
18 the factual allegations in the complaint and  
19 we must demonstrate that there was no  
20 probable cause to file those specific  
21 factual allegations. That is, we must prove  
22 the factual allegations were false, and we  
23 must prove that there was no reason to  
24 believe that they were true. This wasn't a  
25 good faith mistake.

1 So the issues are identical. And what  
2 they were attempting to do by way of this  
3 motion to amend is to get right back to  
4 where they were arguing last week, and that  
5 is, they don't want to ever have to defend  
6 against the claim that Bradley Edwards  
7 fabricated false charges against Jeffrey  
8 Epstein. They don't want to focus on that  
9 at all. And this is one more means by which  
10 to attempt to reargue that same position.

11 THE COURT: Or fabricated false claims  
12 against Jeffrey Edwards (sic) or --

13 MR. SCAROLA: Jeffrey Epstein.

14 THE COURT: Fabricated false --

15 MR. SCAROLA: Edwards fabricated false  
16 claims against Epstein.

17 THE COURT: Correct.

18 MR. SCAROLA: We will help each other  
19 out with that.

20 THE COURT: Or vice versa for that  
21 matter, that Epstein fabricated false claims  
22 against Edwards. Meaning, I am still not  
23 sure where the defendant in the malicious  
24 prosecution claim, Mr. Epstein, stands as to  
25 that issue, as to whether or not he's

1 conceding or not conceding.  
2 MR. SCAROLA: That has been  
3 scrupulously avoided by the other side, Your  
4 Honor. They don't want to face that issue  
5 or even acknowledge it exists. I agree with  
6 Your Honor.

7 THE COURT: Thank you, Mr. Scarola.  
8 Mr. Link, couple things that I would  
9 like you to focus on. First is that -- I  
10 appreciate your bringing it to my attention,  
11 and I have heard this before, about the  
12 punitive expert's testimony on behalf of  
13 Mr. Edwards, that his research has revealed  
14 whatever number of instances whereby  
15 Mr. Edwards' and Mr. Rothstein's names have  
16 been linked, presumably as a result of  
17 Mr. Epstein's conduct.

18 MR. LINK: Yes, Your Honor.  
19 THE COURT: I haven't read it very  
20 closely. At this point I don't know much of  
21 that testimony is going to get in. But  
22 irrespective of that, what Mr. Burlington  
23 has emphasized and what the Court clearly is  
24 under the impression as to its utilization,  
25 is not to prove up any other element of the

1 malicious prosecution claim, except for  
2 damages.  
3 For example, an affirmative defense to  
4 that aspect of the claim could potentially  
5 be that Mr. Edwards failed to mitigate his  
6 damages by virtue of his own zeal in seeking  
7 publicity for his representation of Mr. --  
8 for his representation of the alleged  
9 victims and the plaintiffs in those cases  
10 against Epstein, and therefore, cause much  
11 of his own damages by exercising that zeal.  
12 That may constitute an affirmative  
13 defense as to the damage claim, because just  
14 like a simple negligence action is  
15 concerned, damages are a necessary element,  
16 similar to the questions I had of you last  
17 week when I asked what were Mr. Epstein's  
18 damages as a result of his filing of the  
19 initial suit against Rothstein, Edwards and  
20 [REDACTED] as related to factoring of those cases.  
21 So, there's a distinction of importance  
22 that I can see here as it pertains to the  
23 affirmative defenses that have been asserted  
24 as it relates to a traditional defamation  
25 claim perhaps.

1 Some of these affirmative defenses,  
2 quite frankly, in handling defamation claims  
3 on numerous occasions in the past, I have  
4 never seen before. I never try to stifle  
5 creativity. But at the same time, we have  
6 to take into account, not only judicial  
7 resources, but what the essential argument  
8 of Mr. Burlington boiling it down to its  
9 very essence is you can't fit a square peg  
10 into a round hole. And that is, that the  
11 bulk of these affirmative defenses, because  
12 they deal with defamation, one, are not  
13 pertinent. Two, even if they were, it's not  
14 a defamation claim.

15 I certainly do not plan and will not  
16 try a defamation claim. And also, again,  
17 even if these could be conceivably construed  
18 as defamation claims, they don't pass legal  
19 muster.

20 Some of them, such as the affirmative  
21 defense regarding the petitioning of the  
22 government, has, in my view, absolutely no  
23 application to this case, because if it did,  
24 it would have application to any lawsuit  
25 just about that I could conceive of that

1 would be brought by any person, by any  
2 plaintiff, by any counter-plaintiff.  
3 The application is completely in  
4 opposite to what we're doing here. This is  
5 not redressable by virtue of petition to  
6 government, as are, and as were,  
7 particularly at the time of those two cases,  
8 Noerr and Pennington, where there were  
9 issues of anti-trust violations and the  
10 testing of whether or not anti-trust laws  
11 were in fact being violated. And the  
12 government's -- obvious because of the  
13 Sherman Act -- the government is obviously,  
14 because of Sherman Act, interest in  
15 protecting against anti-trust violations.  
16 So there was that nexus that was clearly  
17 prevalent there.  
18 So I really don't need further argument  
19 as to the fifth affirmative defense.  
20 The sixth affirmative defense deals  
21 with the limited public figure. We haven't  
22 really talked about that from your  
23 standpoint. Your position as to that in  
24 light of the Gertz decision.  
25 MR. LINK: Yes. We believe that if

1 defamatory statements are going to be the  
2 basis for liability and for damages so that  
3 we're moving in absolute litigation  
4 privilege from allegations in the complaint,  
5 then the fact that Mr. Edwards is a quasi  
6 public figure that puts himself out there,  
7 that advertises, that speaks about these  
8 issues, that issues press releases, talked  
9 to the press, should come in as an  
10 affirmative defense in this case.

11 THE COURT: How do you get around Gertz  
12 essentially saying precisely the opposite,  
13 that a lawyer -- even where a lawyer  
14 represents a high-profile client? Here  
15 these aren't high-profile clients.

16 My common sense thinking -- although  
17 really not a part of the decision here -- is  
18 that outside of South Florida, and had  
19 Mr. Rothstein not committed the heinous  
20 crimes that he's been convicted for in  
21 serving a sentence somewhere in the  
22 neighborhood of 50 years, Edwards would have  
23 been off the radar. There would have been  
24 no real issues, other than his connection  
25 with Mr. Epstein.

1 Some may argue that Mr. Epstein is far  
2 more of a public figure than Mr. Edwards is  
3 under the analysis you have suggested.

4 MR. LINK: He may very well be, Your  
5 Honor.

6 THE COURT: But that's not the issue  
7 here. I don't see how Gertz, with the plain  
8 meaning of the opinion, and the fact that  
9 the attorney in Gertz was in fact  
10 representing a high-profile client and there  
11 was afforded immunity -- which wouldn't have  
12 application here whatsoever -- I don't see  
13 the basic fundamental issue being answered  
14 or even arguable.

15 MR. LINK: If I can take one shot at  
16 it, Your Honor.

17 THE COURT: Sure.

18 MR. LINK: I think the difference is  
19 the fact that you represent a high-profile  
20 client does not make you a quasi public  
21 figure. It's the steps and actions that you  
22 take as a result of that.

23 So, the fact that the three plaintiffs  
24 that Mr. Edwards represented were not  
25 high-profile folks does not mean that he

1 didn't voluntarily put himself out there and  
2 create an image and a reputation for himself  
3 and put himself out there in a public way.

4 There are easy examples. I represent a  
5 high-profile client, Mr. Epstein. After the  
6 hearing, the press came up, I didn't talk to  
7 the press. I didn't put myself out there.  
8 Other lawyers will do that. They will give  
9 press releases.

10 Mr. Edwards went even beyond that. He  
11 used these cases to promote himself in a way  
12 that goes beyond simply representing a  
13 client.

14 MR. SCAROLA: Your Honor, excuse me.  
15 There is no record evidence to support that  
16 assertion at all. Absolutely none.

17 THE COURT: I appreciate that. Thank  
18 you, Mr. Scarola.

19 You may proceed.

20 MR. LINK: So there is a distinction.  
21 Simply representing a high-profile client  
22 does not make you a quasi public figure.  
23 But doing things that put yourself out  
24 there, contacting the press, giving  
25 interviews, giving speeches, making

1 yourself -- putting yourself out there as a  
2 specialist in this particular area and  
3 seeking press and accolades does. That's  
4 the distinction.

5 So the fact that I'm representing  
6 Mr. Epstein, who may be a more well-known  
7 figure, doesn't mean I have done anything to  
8 assert myself into the public view. That's  
9 the distinction I would draw, Your Honor.

10 THE COURT: Anything else you would  
11 like to speak to?

12 MR. LINK: Yes, if I can. I just want  
13 to touch on a couple points that  
14 Mr. Burlington made and a point Mr. Scarola  
15 made.

16 Here is the key to this and these  
17 affirmative defenses. And Your Honor asked  
18 a great question. You asked Mr. Burlington  
19 if any cases -- any of the malicious  
20 prosecution cases say that you can take  
21 false statement -- allegedly a false  
22 statement from a complaint -- and use that  
23 to demonstrate lack of probable cause or  
24 damages. And he pointed to the Mancusi  
25 case.

1 Your Honor, we looked at this case last  
2 time that we were here. It's a case that  
3 Your Honor pointed out, I believe, that  
4 talks about the mixed question of fact of  
5 law and the probable cause. There's no  
6 discussion of damages other than punitive  
7 damages in the case. It sets forth the  
8 standards that your court told us about and  
9 recognized, which is, if there's no dispute  
10 as to the facts that were relied on in  
11 making the decision to bring a lawsuit, then  
12 it's up to you. And I said Your Honor may  
13 decide enough or not enough. It's your  
14 call. It's not the jury's decision. That's  
15 what Mancusi says.

16 There is not a case that we have  
17 seen -- and we looked at about 65 -- 67  
18 cases, Florida cases, that discussed that  
19 you can use an allegation in the complaint  
20 to either show lack of probable cause, based  
21 on the truth or falsity, or use it to  
22 establish damages. And here is why.

23 Mr. Burlington doesn't think that the  
24 Supreme Court case answers the question, but  
25 I think it does. And here is what I want to

1 focus the Court on. It is not, Your Honor,  
2 simply the first element of the malicious  
3 prosecution element that focuses on civil  
4 judicial proceeding. This is from the  
5 Supreme Court case.

6 Every element, if you look, an original  
7 civil judicial proceeding. It doesn't say  
8 count, allegation, complaint. It talks in  
9 the big picture. Why? Because once the  
10 lawsuit is filed, that's the damage, the  
11 filing of the lawsuit, not what you plead in  
12 it. That's protected by the litigation  
13 privilege.

14 The present defendant was the legal  
15 cause of the original proceeding. Second  
16 element uses the term original proceeding.  
17 Third element: Determination of the original  
18 proceeding.

19 THE COURT: You think that the  
20 terminology, "an original criminal or civil  
21 judicial proceeding against the present  
22 plaintiff was commenced or continued," seems  
23 to bring in, at least arguably, more than  
24 just the initial complaint?

25 MR. LINK: Yes. But the continue has

1 been defined very carefully. Here is what  
2 the court said. The court says that  
3 continued means this: One, if I'm a new  
4 lawyer coming in, I don't have a defense if  
5 there was not probable cause.

6 If I come in, don't do my homework and  
7 I continue with the proceeding, that's one  
8 aspect.

9 The second aspect is, I may have  
10 probable cause when I start, but if during  
11 the course of the lawsuit something comes to  
12 my attention that makes me now conclude that  
13 what I thought was true is not true, I have  
14 to stop, Your Honor. I don't get to keep  
15 going. But it has nothing to do with the  
16 allegations of the complaint, what I say  
17 during my deposition, what you say during  
18 the case, what the other lawyer say during  
19 the case.

20 And if you look at every one of these  
21 elements -- really important to look at  
22 every one of these elements, except for  
23 malice. Use of the words the original  
24 proceeding.

25 Six, the plaintiff suffered damage as a

1 result of the original proceeding. Again,  
2 that's the filing of the complaint.

3 And you look at Florida's jury  
4 instructions --

5 Mr. Scarola, I don't have them, but  
6 they are the standard jury instructions.

7 -- and look at damages, 406.12, Your  
8 Honor, on malicious prosecution, you won't  
9 see anything in there about the publication  
10 of a false statement or damage caused by a  
11 false statement.

12 Contrast that with defamation, which it  
13 specifically says if you find that there was  
14 a false statement, it's a whole different  
15 standard for damages.

16 THE COURT: Again, we are going to need  
17 get to that bridge when we come to it. But  
18 the malicious prosecution damages state,  
19 quote, if you find for defendant, you will  
20 not consider the matter of damages. If you  
21 find for the plaintiff, you should award the  
22 plaintiff an amount of money that the  
23 greater weight of the evidence shows would  
24 fairly and adequately compensate him for  
25 such loss, injury, damage as the greater

1 weight of the evidence shows was caused by  
2 the institution -- and then it also  
3 parenthetically states -- continuation of  
4 the proceeding complained of.

5 MR. LINK: So it depends on the focus.  
6 Mr. Scarola has not said -- I don't think --  
7 he has always said we're focused on the  
8 initial filing. There's not probable cause  
9 for the initial filing. That's what he has  
10 told us. He has not said there was probable  
11 cause at the beginning, Your Honor, but down  
12 the road Mr. Epstein learned something and  
13 he should have stopped then.

14 So based on exactly what you read, it  
15 focuses on, was caused by the institution of  
16 it, the filing of it.

17 THE COURT: Continuation is one of the  
18 words that's utilized right there in bold,  
19 black print.

20 MR. LINK: If he was arguing that it  
21 was continuation to cause damages. He's  
22 not. He's not, I don't believe -- unless  
23 he's changed his mind.

24 THE COURT: Is that true?

25 MR. SCAROLA: No, Your Honor. It is

1 not true. We contend there was no probable  
2 cause to initiate this proceeding, there was  
3 no probable cause to continue the  
4 proceeding. The initiation and continuation  
5 of the proceeding caused damage to Bradley  
6 Edwards, both because no probable cause ever  
7 existed. So it was both initiated and  
8 continued in the absence of probable cause.

9 MR. LINK: Your Honor, that only makes  
10 sense. If you think what about Mr. Scarola  
11 just said, if it's not probable cause when I  
12 file it, and I continue with the lawsuit,  
13 then there was never probable cause.

14 But the continuation isn't I filed it  
15 and it should have been eliminated that day.  
16 The second day after the lawsuit it's  
17 already been continued.

18 THE COURT: I will give you two minutes  
19 to wrap up. We had planned on 40 minutes.  
20 We are now going on 55. But again, I want  
21 to give both sides the opportunity --

22 MR. LINK: I appreciate that.

23 THE COURT: I have read the materials  
24 and I have heard the arguments. I don't  
25 want to get into repetition. So if there's

1 anything you want to say to rebut  
2 Mr. Burlington's argument or his written  
3 presentation, feel free to do so.

4 MR. LINK: As I have handed the court  
5 the Mancusi case, Your Honor, which does not  
6 say anything about statements or allegations  
7 in the complaint or damages other than  
8 punitive damages.

9 The Supreme Court tells us that there  
10 is still a litigation privilege afforded to  
11 every litigant. The narrow exemption has to  
12 do between when you make the decision to  
13 institute --

14 Mr. Scarola said that he sees them as  
15 the same thing. They are very different.  
16 One draws a line when you file the lawsuit.  
17 And what's on this side of line and before  
18 the lawsuit is filed is what is in your mind  
19 when you make the decision. And that is not  
20 protected.

21 But what you plead in the complaint,  
22 and the truth and falsity of those  
23 allegations is absolutely protected. And  
24 that's what the Supreme Court just told us.

25 Thank you, Your Honor.

1 THE COURT: All right. Thank you,  
2 Mr. Link. The Court is prepared to rule. I  
3 am going to go through it one step at a time  
4 and proceed through the fifth through the  
5 ninth affirmative defenses.

6 The Court finds, as far as the fifth  
7 affirmative defense is concerned that the  
8 pleading made here has no relationship  
9 whatsoever to the case at bar. This is not  
10 a forum of petitioning government for  
11 redress. The Court has stated, and in  
12 agreement with Edwards' position, that  
13 neither Pennington nor Noerr, N-O-E-R-R,  
14 have any application to this claim anymore  
15 than it would have to any generic claim  
16 brought by any plaintiff.

17 This is not an anti-trust case. This  
18 is not a case where the government  
19 involvement is either directly or indirectly  
20 at issue as it relates to the affirmative  
21 defense generally claiming that this is a,  
22 quote, forum of petitioning government for  
23 redress, end quote. It is simply  
24 inapplicable. Any amendment along those  
25 grounds will be futile.

1 As far as the sixth affirmative  
 2 defense, the Court finds that as a matter of  
 3 law that the Gertz case speaks to this issue  
 4 broadly and specifically, and does not place  
 5 Mr. Edwards in the position of a general or  
 6 limited purpose public figure. Hence, any  
 7 affirmative defense that rely upon that  
 8 theory are, again, completely, entirely  
 9 inapplicable to the matters that are  
 10 addressed in this case.

11 The seventh affirmative defense falls  
 12 because of the same reason. Additionally,  
 13 the suggestion that in accordance with the  
 14 First and Fourteenth amendments of the  
 15 United States Constitution and Article 1,  
 16 Section 4 of the Florida Constitution,  
 17 Edwards may not recover presumed or punitive  
 18 damages without clear and convincing  
 19 evidence that Epstein knew of the falsity of  
 20 the claims that he made against Edwards were  
 21 in reckless disregard of the falsity of  
 22 these claims would reconstitute argument and  
 23 a denial, as opposed to a confession and  
 24 avoidance as required by Florida law so as  
 25 to constitute a valid affirmative defense.

1 Again, it primarily relies on Gertz,  
 2 which as I found earlier, is contrary  
 3 directly to the position espoused by  
 4 Mr. Epstein. And the Gertz decision, as we  
 5 all know, is a United States Supreme Court  
 6 decision found at 418 US 323, 1974.

7 The eighth affirmative defense  
 8 specifically addresses defenses to a  
 9 defamation claim. It states, quote,  
 10 Edwards' claims are nothing more than  
 11 defamation claims which are barred by  
 12 defenses applicable to defamation claims as  
 13 set forth in the defenses above.

14 A plaintiff may not avoid defenses that  
 15 apply to defamation actions by  
 16 characterizing them as torts which are not  
 17 subject to those restrictions, as the court  
 18 pointed out in agreeing with the position  
 19 taken by Edwards, that is, that that is not  
 20 a defamation claim. This will not be tried  
 21 as a defamation claim. And any issues as to  
 22 the utilization of Mr. Edward's name in  
 23 print linking to Mr. Rothstein and  
 24 presumably -- again, I haven't read in  
 25 detail the proposed expert's report or

1 analysis, or have seen his deposition  
 2 transcript -- but the Court will certainly  
 3 be amenable to motions that may limit that  
 4 testimony so that we do not blur the fine  
 5 line between what may be construed as  
 6 defamation and malicious prosecution.

7 But certainly the Court understands --  
 8 and was under the impression even before  
 9 reading the brief by Mr. Burlington -- that  
 10 the claims here were one of damages as it  
 11 relates to this -- allegedly false  
 12 statements or statements that linked Edwards  
 13 and Rothstein together, which if  
 14 attributable to Mr. Epstein which are  
 15 brought before the jury, they could  
 16 constitute damages.

17 So again, there's no applicability to  
 18 defamation. It's generic, general manner in  
 19 which the defense is phrased would not pass  
 20 legal muster as well, and any attempt to  
 21 amend would be futile in this Court's view  
 22 because of the distinction legally between  
 23 defamation and malicious prosecution.

24 As far as the ninth affirmative defense  
 25 is concerned, again, in agreement with the

1 position taken by Edwards, I find that the  
 2 built-in remedies that are already  
 3 established in Florida law will provide any  
 4 safeguards that are sought by Mr. Epstein as  
 5 it relates to the punitive damages. And  
 6 merely a recitation of the law does not  
 7 constitute confession or avoidance as far as  
 8 the Court is concerned.

9 It would be similar to saying words to  
 10 the effect that the rules of evidence shall  
 11 apply to this case. That is, that there's  
 12 an application of the Fifth and Fourteenth  
 13 amendments of the United States Constitution  
 14 and Article 1, Section 9 of the Florida  
 15 constitution guaranteeing due process.

16 In any case where punitive damages are  
 17 brought, those built-in due process law --  
 18 whether decisional or statutory,  
 19 constitutional or otherwise -- are all built  
 20 in to the already existing Florida law. And  
 21 the ninth affirmative defense is  
 22 superfluous, and it would be no reason to  
 23 allow amendment. It's simply a statement of  
 24 the law and not a confession of avoidance.

25 So the Court finds, thereafter, that

1 each of the affirmative defenses would  
 2 constitute the improper affirmative defenses  
 3 would not be subject to amendment because of  
 4 futility -- the Court has addressed each of  
 5 these affirmative defenses in requisite  
 6 detail finding that they are either in  
 7 opposite, that they are contrary to  
 8 establish law and thus would be futile to  
 9 try to amend, particularly where I  
 10 referenced the Gertz decision as well as the  
 11 anti-trust cases that were found to be  
 12 completely and entirely in opposite to the  
 13 claims made here.

14 This is not a defamation case. It will  
 15 not be treated as such. It has been  
 16 represented in open court by Edwards'  
 17 counsel that any issues regarding the link  
 18 between Rothstein and Edwards are going to  
 19 be used solely for damages purposes. And  
 20 the Court has not been asked at this  
 21 juncture to limit any such testimony, but is  
 22 amendable to taking up any motions in that  
 23 regard and will treat those at such time.

24 Again, the ninth affirmative defense is  
 25 simply a recitation of law that is already

1 built in and well-known and even conceded by  
 2 the parties is not a confession of  
 3 avoidance, thus making each futile in terms  
 4 of attempting to amend.

5 I would ask for an order confirming the  
 6 Court's ruling, please, from the Edwards  
 7 side.

8 Anybody needs a break?

9 MR. SCAROLA: We are ready to proceed,  
 10 Your Honor, if the Court is ready.

11 Your Honor, we had started off last  
 12 week dealing with issues with respect to the  
 13 Fifth Amendment. Your Honor had asked us  
 14 to -- or we had actually volunteered to  
 15 specifically identify the limited questions  
 16 that we would wish to place before the jury.  
 17 We volunteered that we would identify the  
 18 limited questions that we wanted place  
 19 before the jury?

20 In light of Your Honor's statement that  
 21 we should be focusing only on the civil  
 22 claims against the three plaintiffs  
 23 represented by Mr. Edwards, we have done  
 24 that. And I want to present the Court with  
 25 packets that we have presented to opposing

1 counsel.

2 And while the package itself is thick,  
 3 it's only thick because we have provided  
 4 Your Honor with the backup information.

5 In this motion, there are specific  
 6 questions and answers, so that Your Honor  
 7 can very quickly take a look at the  
 8 questions that we propose to address and the  
 9 assertions of the Fifth Amendment in  
 10 response to those questions.

11 MS. ROCKENBACH: Your Honor, may I  
 12 respond?

13 THE COURT: Sure.

14 MS. ROCKENBACH: As I indicate to  
 15 Mr. Scarola this morning, he filed those  
 16 yesterday afternoon. And I am happy to  
 17 review them and go over them and present  
 18 argument to the Court perhaps this afternoon  
 19 or Thursday when we have the continuation of  
 20 this hearing.

21 But having received them yesterday  
 22 afternoon and not prepared to take them up  
 23 right now, I would suggest that perhaps the  
 24 better place to pick back up on the pending  
 25 motions is precisely where we left off on

1 November 29th, which was Exhibit 9 on  
 2 Mr. Edward's Exhibit list.

3 THE COURT: I am certainly more  
 4 prepared as well to go through that. I  
 5 would like to get a chance to read it.

6 As you know, I do the best I can to try  
 7 to read everything that comes in and  
 8 familiarize myself with the context. So I'm  
 9 going to sustain Ms. Rockenbach's  
 10 suggestion and objection to going forward  
 11 with this particular issue at this time.

12 Let's go back to the evidentiary  
 13 issues. I am also prepared to discuss, as  
 14 well -- and I don't know whether it's still  
 15 on the table -- I presume it is -- it's the  
 16 automatic stay issue.

17 So if there's any reason that  
 18 Mr. Burlington needs to be here -- because I  
 19 believe there's been some request that one  
 20 of the attorneys -- I presume to be  
 21 Mr. Burlington -- had to leave, which is why  
 22 they wanted to speak about this affirmative  
 23 defense issue and the denial of Epstein's  
 24 request to amend his answer.

25 MR. SCAROLA: Mr. Burlington, Your

1 Honor, does not need to be here for the  
2 automatic stay issue. We wanted, for  
3 purposes of conserving his time, to be able  
4 to address the one matter that he would be  
5 arguing today, and we have done that.

6 He may or may not be able to stay any  
7 longer, but he is not required to be here  
8 for the other matters.

9 With regard to going through the  
10 exhibit list, I had proposed to opposing  
11 counsel, and I think I managed -- I think I  
12 referenced this with the Court also during  
13 the hearing that I am prepared to agree that  
14 I will not reference any of those specific  
15 exhibits that the defense identifies as a  
16 problem in opening statement. And I  
17 won't -- I won't reference them with a  
18 witness unless and until Your Honor has made  
19 a determination that it is appropriate for  
20 us to do so.

21 To go through every listed exhibit and  
22 obtain from Your Honor a ruling that  
23 obviously is not going to do any more than  
24 what I am prepared to concede to do  
25 voluntarily, respectfully doesn't make any

1 sense to me. I don't know why we are going  
2 through this process, because the most Your  
3 Honor could do would be to say, I will give  
4 a preliminary indication. At such time as  
5 the evidence is offered, we will make a  
6 determination as to whether a predicate  
7 exist to admit it or not. So I'm willing to  
8 do that.

9 I think we are absolutely wasting our  
10 time to go through the large number of  
11 exhibits that you've identified for purposes  
12 of getting to exactly the point where I am  
13 willing to move voluntarily.

14 THE COURT: Well, couple things, and  
15 that is this. We are always mindful -- and  
16 I am speaking about now trial judges -- but  
17 attorneys as well -- I know any good  
18 attorney, such as all who are sitting in  
19 this room, are certainly well aware of  
20 ensuring that the jury's time is spent in an  
21 efficient manner. That's why the  
22 overwhelming federal case law -- because  
23 Daubert we don't know if it's going to  
24 remain law here in Florida -- but that's why  
25 the overwhelming cases on the Daubert issue

1 speak to actually disallowing Daubert  
2 motions, for example, from being heard  
3 during the trial for the very purpose that I  
4 just cited. And that is, that these folks  
5 are coming in as volunteers, often  
6 reluctantly, taking significant amount of  
7 time away from their businesses, jobs,  
8 families to be here with us, should not have  
9 their time wasted if we can get done on the  
10 front end what may not need to be done  
11 during trial.

12 So I'm comfortable with going through  
13 the exhibits, because there may be some  
14 apparent -- at least from my vantage  
15 point -- reasons why some exhibits should or  
16 should not be admitted or not admitted.

17 And as I pointed out -- and you are  
18 correct Mr-Scarola in your global  
19 observation, that because the law, more  
20 recently than in the past, has, as I earlier  
21 indicated on November 29th, that the  
22 appellate courts recognize what they term  
23 the fluid nature of motions in limine, which  
24 is essentially what we're dealing with here  
25 when we talk about exhibits.

1 The Court will have the opportunity --  
2 and should have the opportunity that if a  
3 contested exhibit comes to fruition during  
4 the trial to be able to either augment its  
5 decision, change its mind, or confirm the  
6 decision made pretrial.

7 But I disagree that it is a waste of  
8 time because a lot of the arguments can be  
9 made now. I can digest those arguments. I  
10 won't forget, and I won't forget the context  
11 of what those arguments are in relation to  
12 exhibits. So I would like to proceed, as  
13 recommended by Epstein's counsel, to go  
14 through what we can go through.

15 We will do it in a little more of an  
16 expeditious fashion, and that is, if I find  
17 there's something that really does need  
18 absolutely, without question, context for me  
19 to make that decision, then I will indicate  
20 to you that rather quickly in that regard so  
21 we don't waste too much time.

22 But I think we can go through those  
23 with some comfort to know at least what the  
24 Court is thinking from that standpoint,  
25 perhaps ruling at this point, with the

1 caveat that consistent with motions in  
2 limine and the recognition by the appellate  
3 courts -- much to my delight -- that there  
4 are often situations where situations will  
5 change and context is introduced to cause  
6 the Court to, perhaps, vary its decision in  
7 some regard. But that is afforded to me  
8 once trial is underway.

9 MR. LINK: Your Honor, before we start,  
10 can I take you up on your three-minute break  
11 opportunity, please.

12 THE COURT: Sure. Not a problem. Take  
13 a few minutes. Come on back about five  
14 minutes, please.

15 (A recess was had 11:16 [REDACTED] - 11:24 [REDACTED].)

16 MR. SCAROLA: May I make a procedural  
17 inquiry, Your Honor?

18 THE COURT: Yes.

19 MR. SCAROLA: I assume that we are  
20 starting on page 23 of Jeffrey Epstein's  
21 revised omnibus motion in limine. Is that  
22 correct?

23 THE COURT: That's what I am  
24 understanding.

25 Ms. Rockenbach?

1 Thanks.

2 MS. ROCKENBACH: You do. Okay.

3 Our objections were filed November 15.  
4 That's obviously a separate document.

5 THE COURT: That I will take.

6 MR. LINK: Your Honor, they are listed  
7 in the motion starting on page three.

8 THE COURT: I thought those were just  
9 exemplars.

10 MR. LINK: In the omnibus motion in  
11 limine, it actually lists, I think, every  
12 single one of the exhibits. They are  
13 identified in here. So they are in two  
14 places.

15 THE COURT: Page three of the revised  
16 omnibus motion in limine?

17 MS. ROCKENBACH: Your Honor, it's the  
18 original omnibus --

19 THE COURT: Is that part of the --

20 MR. SCAROLA: If we are working with  
21 the witness list -- I mean with the exhibit  
22 list, we will just work with the exhibit  
23 list.

24 THE COURT: Let's do that.

25 MR. LINK: That works for us, Your

1 MR. SCAROLA: That's where we left off.

2 MS. ROCKENBACH: Yes. The exhibit  
3 section, which should be letter B.

4 MR. SCAROLA: Well, the specific  
5 exhibits that you are objecting to are  
6 identified in this motion, correct?

7 MS. ROCKENBACH: Actually, we  
8 stopped -- we left off as Mr. Edwards'  
9 exhibit list and we are on number nine.

10 The revised omnibus motion in limine,  
11 identified examples of the objections that  
12 we had. And we have listed and filed our  
13 objections to the exhibit list.

14 THE COURT: Where is the list of  
15 exhibits?

16 MR. SCAROLA: If you have an extra  
17 copy, I need one also, please. I gave mine  
18 to Sonja at the end of the last hearing.  
19 And I was assuming we were going to be  
20 basing this discussion on the motion.

21 MS. ROCKENBACH: Your Honor, may I  
22 approach? I have a copy for Mr. Scarola.  
23 It is Mr. Epstein's amended exhibit list  
24 that we were reviewing.

25 THE COURT: I actually have it.

1 Honor.

2 THE COURT: Thanks.

3 MR. SCAROLA: So I assume we are going  
4 to take these one at a time?

5 THE COURT: Yeah.

6 MS. ROCKENBACH: Your Honor, the next  
7 one that we were on was number nine,  
8 Mr. Epstein's flight logs -- if I may  
9 approach, I would like to give Your Honor  
10 what was provided to my office from  
11 Mr. Scarola. And it is a sampling, because  
12 I think there were over 200 pages for this  
13 particular exhibit.

14 We've objected basis of relevance, of  
15 90.403, judicial value. And these are  
16 flight logs of my client's planes. They  
17 have no relevance to what is being tried in  
18 this case, which is malicious prosecution.

19 Mr. Edwards testified that he knew that  
20 his clients were not on my client's plane,  
21 so the flight logs are completely  
22 irrelevant.

23 THE COURT: Okay, Mr. Scarola.

24 MR. SCAROLA: Yes. Your Honor, one of  
25 the alleged bases for Jeffrey Epstein having

1 concluded that Bradley Edwards was a knowing  
2 participant in the Rothstein Ponzi scheme is  
3 that the scope of the discovery that Bradley  
4 Edwards was seeking once he became a member  
5 of the Rothstein, Rosenfeldt, Adler firm  
6 expanded to include matters that he was not  
7 previously focusing on and which had no  
8 reasonable basis to lead to the discovery of  
9 admissible evidence.

10 So he alleged that the abusive  
11 discovery that Bradley Edwards engaged in  
12 gave him reason to believe that he was only  
13 doing these things because he was knowingly  
14 supporting the Ponzi scheme.

15 So Bradley Edwards obviously has an  
16 opportunity to explain what he did and why  
17 he did it. Yes, I was seeking discovery  
18 with regard to the airplane flight logs and  
19 who was on the airplane. And the reason why  
20 I did that was, because even though my own  
21 clients were not transported on the plane, I  
22 know that other young women were transported  
23 on the plane for purposes of prostitution  
24 and sexual abuse. And I can prove that  
25 through the flight logs that list the other

1 occupants on the airplane, including  
2 children who were being transported by  
3 Jeffrey Epstein.

4 Part of what makes this is a viable  
5 federal claim is the intrastate and  
6 international transportation of children for  
7 purposes of prostitution.

8 The federal law, specifically federal  
9 rule 41.5 -- excuse me 415.5(g) -- and I  
10 referenced this in earlier argument to the  
11 Court -- expressly allows the introduction  
12 into evidence in any case involving a sexual  
13 offense against a child, the commission of  
14 any other sexual offense against a child.

15 So, I was seeking evidence to prove a  
16 pattern of abuse of children including their  
17 transportation for purposes of prostitution.  
18 And I was doing that through flight logs  
19 that identified these children, flight logs  
20 that identified other witnesses, taking the  
21 depositions of pilots. And so all of this  
22 is information than rebuts the assertion by  
23 Jeffrey Epstein that this was an abusive  
24 discovery effort that supported my  
25 conclusion that Bradley Edwards was a

1 knowing participant in the Ponzi scheme.

2 That's what he alleges. In fact,  
3 portions of the deposition of Bradley  
4 Edwards have already been identified by the  
5 defense as their intending to introduce this  
6 in evidence before the jury.

7 I have some of those excerpts, if you  
8 Your Honor needs to take a look at them.  
9 They are offering that evidence with regard to  
10 these matters as part of their support for  
11 the lack of Bradley Edwards' probable cause  
12 to conduct this discovery, the assertion  
13 that this was an abuse of discovery process.

14 Now, that's what they alleged in their  
15 complaint. Those specific allegations are  
16 included in the complaint. Those are false  
17 allegations.

18 THE COURT: Show me those allegations  
19 that you are suggesting?

20 MR. SCAROLA: From the complaint, Your  
21 Honor, or from the deposition testimony?

22 THE COURT: Either way, or both.

23 MR. SCAROLA: Let me do both, then.

24 THE COURT: Thanks.

25 MR. SCAROLA: It's a little bit

1 difficult for Your Honor to see on these  
2 copies what the defense has designated, but  
3 on page 153 it starts at line two and  
4 continues through -- it looks like the  
5 bottom of that page. And then on 276, 277,  
6 278 and 279, it's most of all of those  
7 pages.

8 Then in the complaint, the allegation  
9 in paragraph 35 -- and I will pause, if Your  
10 Honor would like me to do that, while you  
11 are reading that.

12 THE COURT: If you will take a moment  
13 please. Thanks.

14 I don't see much as far as what is set  
15 forth in the latter pages of the deposition  
16 of Mr. Edwards that even mentions plane or  
17 it's connection with the alleged underaged  
18 individuals on that plane.

19 Let me look at the complaint.  
20 Paragraph?

21 MR. SCAROLA: Thirty-three, 34, 35, 36.

22 THE COURT: Okay. This is directed to  
23 primarily to Mr. Rothstein. It says "and  
24 others." But it says, quote -- paragraph  
25 34 -- Upon information and belief, Rothstein

1 and others claimed their investigators  
2 discovered that there were high-profile  
3 individuals onboard Epstein's private jet  
4 where sexual assaults took place and showed  
5 D3 -- and possibly others -- copies of a  
6 flight log purportedly containing names of  
7 celebrities, dignitaries and international  
8 figures.

9 Remind who is D3?

10 MS. ROCKENBACH: One of investing  
11 companies that was being defrauded by  
12 Rothstein.

13 THE COURT: Okay. I have read those  
14 other ones. Are there any other --

15 MR. SCAROLA: Paragraph 35, Your Honor,  
16 then specifically references the litigation  
17 team. As you recall, the litigation team is  
18 defined as including Bradley Edwards.

19 THE COURT: Thirty-five. For instance,  
20 the litigation team relentlessly and  
21 knowingly pursued flight data and passenger  
22 manifests regarding flights Epstein took  
23 with famous individuals knowing full well  
24 that no underage women were onboard and no  
25 illicit activities took place. Rothstein

1 and the litigation team also inappropriately  
2 attempted to take the depositions of these  
3 celebrities in a calculated effort to  
4 bolster the marketing scam that was taking  
5 place. End quote.

6 There's a 40 something that was  
7 mentioned?

8 MR. SCAROLA: I don't know if Your  
9 Honor took a look at 36, but that's a  
10 specific reference to Mr. Edwards and his  
11 conduct of the discovery, and then 42(k).

12 THE COURT: Thirty-six. One of  
13 plaintiffs' counsel, Edwards, deposed three  
14 of Epstein's pilots, and sought the  
15 deposition of a fourth pilot. The pilots  
16 were deposed by Edwards for over 12 hours,  
17 and Edwards never asked one question  
18 relating to or about E.W., [REDACTED] and Jane Doe  
19 as it related to transportation on flights  
20 of RRA clients on any of Epstein's planes.  
21 But Edwards asked many inflammatory and  
22 leading irrelevant questions about the  
23 pilots' thoughts and beliefs, which could  
24 only have been asked for the purposes of  
25 pumping -- that word is used in quotes --

1 the cases and thus by using the depositions  
2 to sell the cases -- or a part of them -- to  
3 third parties, end quote.

4 42(k). Told investigators, as reported  
5 in an Associated Press article, that  
6 celebrities and other famous people had  
7 flown on Epstein's plane when assaults took  
8 place. Therefore, even though none of RRA's  
9 clients claim they flew on Epstein's planes,  
10 the litigation team sought pilot and flight  
11 logs. Why? Again, to prime the investment  
12 pump, enquote, with new money without any  
13 relevance to the existing claims made by RRA  
14 the clients, end quote.

15 MR. SCAROLA: Our position, obviously,  
16 is Your Honor, that having made those  
17 specific allegations in the complaint,  
18 specifically allegations that know assaults  
19 took place on the plane, Mr. Epstein knew  
20 that that was untrue. He knew that children  
21 were being assaulted on the plane, he knew  
22 that there very high-profile individuals who  
23 for were present on plane. And Bradley  
24 Edwards had a reasonable basis to conduct  
25 this discovery pursuant to applicable

1 Florida law and applicable federal law as  
2 well as, because it was reasonably  
3 calculated to lead to the discovery of  
4 admissible evidence.

5 So the flight logs are clearly relevant  
6 and material for that purpose, as is all of  
7 the evidence with regard to what Mr. Epstein  
8 knew was occurring on those airplanes. And  
9 that directly contradicts what is included  
10 in this complaint as a basis for his belief  
11 that Bradley Edwards was fabricating these  
12 claims.

13 THE COURT: Thanks, Mr. Scarola.

14 MS. ROCKENBACH: Your Honor, may I use  
15 the Elmo for a minute?

16 THE COURT: Sure.

17 MS. ROCKENBACH: I really appreciated  
18 Mr. Link's presentation this morning based  
19 on the law, because after the November 29th  
20 hearing, I went back and I spent a good part  
21 of the weekend looking at malicious  
22 prosecution cases, because I thought I must  
23 have missed something. I must have missed  
24 something, because all I hear Mr. Scarola in  
25 court saying he's going to prove that the

1 allegations in the original proceeding that  
2 my client filed are false. And I never knew  
3 that to be a malicious prosecution action.

4 But my research yielded what Mr. Link  
5 indicated this morning, which is the  
6 Debrincat case is the blueprint for this  
7 trial. The Debrincat case actually has the  
8 most guiding principle in it for this court,  
9 which is going to, I think superimpose the  
10 entire exhibit list of Mr. Scarola as it  
11 relates to a lot of these exhibits that go  
12 to one of the other lawsuits, whether it's  
13 Mr. Edwards's lawsuits on behalf of the  
14 three women who sued Mr. Epstein and was  
15 settled in 2010 -- that case is over -- or  
16 the exhibits go to one of the other  
17 lawsuits.

18 The statement in Debrincat that's so  
19 important is that Your Honor, Mr. Scarola  
20 and I, parties and witnesses, should be  
21 absolutely excepted from liability to an  
22 action for defamatory words published in the  
23 course of judicial proceedings.

24 So when Mr. Scarola pulls out my  
25 complaint, my client's original proceeding

1 and wants to parse through independent  
2 allegations or paragraphs and say, I'm going  
3 to prove that that statement is false and  
4 you should never pled it. That's not what  
5 the malicious prosecution law says. That's  
6 not what we are here to do.

7 We here for Your Honor to decide as a  
8 threshold matter whether the facts that my  
9 client reasonably relied on existed at the  
10 time he commenced the original proceeding.

11 And, in fact, that's the Liabos case  
12 that Your Honor discussed with us back on  
13 November 29th, where there's a mixed  
14 question of fact of law Your Honor has to do  
15 that threshold determination of if there's  
16 any question or dispute of those facts that  
17 my client relied on were not in existence.  
18 If the facts existed, then you have to  
19 determine, as the Court, whether my client  
20 had sufficient probable cause.

21 So what are the facts that my client  
22 relied on? They are not the flight logs.  
23 He's not relying on those flight logs.  
24 That's a complete red herring for the Court.

25 I see why it's a focus, though, because

1 Mr. Scarola wants to try other cases. This  
2 is not a sexual abuse case. It is not a  
3 federal court action a Crime Victims' Rights  
4 action. It's not even a defamation case,  
5 which Your Honor clearly stated this morning  
6 when denying the affirmative defense is  
7 related to defamation.

8 So to allow flight logs into this  
9 malicious prosecution case is completely  
10 irrelevant to the issue of whether the facts  
11 that my client relied on when he filed the  
12 original proceeding were in existence at the  
13 time that he filed it. The facts are that  
14 there was a civil action forfeiture  
15 proceeding against Rothstein filed with the  
16 U.S. Attorney's Office, that the Rothstein's  
17 firm was dissolving, that Mr. Edwards held  
18 himself out as a partner in that firm, that  
19 Mr. Edwards had the three lawsuits -- which  
20 he even concedes in his most recent  
21 deposition -- were used by Mr. Rothstein to  
22 fabricate -- and that's the word that  
23 Mr. Edwards testified to under oath -- to  
24 fabricate -- and create a fantasy -- that  
25 was another word Mr. Edwards used.

1 Those facts, did they exist? It sounds  
2 like we're in agreement. Those facts  
3 existed.

4 The razorback lawsuit brought by  
5 Mr. Bill Scherer down in Fort Lauderdale who  
6 was quoted in a newspaper article my client  
7 read and relied that said Mr. Rothstein was  
8 tricking investors. He used Epstein's cases  
9 as a showpiece and bait. Which Epstein  
10 cases? The one that Edwards had.

11 So the flight logs are irrelevant.  
12 They are far astray from what we are here to  
13 try. And they are an attempt to open up  
14 some other lawsuit, sexual --

15 By the way, the three clients of  
16 Mr. Edwards, Mr. Edwards concedes were  
17 not -- you never heard Mr. Scarola deny  
18 that -- because Mr. Edwards conceded, they  
19 are not on my client's planes.

20 So this, like many of the other  
21 exhibits, Your Honor must be precluded,  
22 because they are wholly irrelevant. And if  
23 there was any remote probative value, they  
24 are prejudicial to talk about flight logs  
25 and celebrities who may have been on my

1 client's planes.  
 2 THE COURT: I think that the issue  
 3 itself, meaning the tangential allegations  
 4 that were made that mentioned flight logs or  
 5 mentioned the good faith discovery aspects  
 6 of Mr. Edwards' plight relating to his three  
 7 clients has some relevancy.

8 However, the flight logs themselves  
 9 would be subject to -- and the Court is  
 10 sustaining at this juncture the relevancy  
 11 objection, and also a 403 objection. And  
 12 that is, that while mentioning the fact that  
 13 Mr. Edwards in good faith -- whatever the  
 14 case may have been -- sought these flight  
 15 logs as part of his discovery process  
 16 representing the three young women, at the  
 17 same time the Court has expressly indicated  
 18 its significant reservations. And in fact,  
 19 it's condemnation of trying either those  
 20 cases in this courtroom -- as far as the  
 21 malicious prosecution case is concerned --  
 22 or more importantly that we are going to  
 23 potentially constructively try other either  
 24 underaged or over the age of consent --  
 25 albeit potential sexual assault claims -- in

1 this forum.

2 So again, while it may become relevant  
 3 as to why Mr. Edwards went about his  
 4 business in seeking out those flight logs in  
 5 a matter of good faith discovery, the flight  
 6 logs themselves, in this Court's respectful  
 7 view based upon its ruling, are irrelevant.  
 8 And if there's any probative value at all,  
 9 they would be materially outweighed by the  
 10 prejudice of 403.

11 MR. SCAROLA: May I raise a question,  
 12 Your Honor?

13 THE COURT: Briefly.

14 MR. SCAROLA: Thank you.

15 Do I understand the Court's ruling to  
 16 be that Mr. Edwards is going to be able to  
 17 explain why he was seeking the discovery he  
 18 was seeking, why he was seeking the flight  
 19 logs, the fact that he did obtain flight  
 20 logs that confirmed independent information  
 21 about children being transported on the  
 22 airplane.

23 THE COURT: The latter is the one that  
 24 will have to be discussed further, again, as  
 25 I pointed out earlier, when the context

1 comes up an it's introduced or attempted to  
 2 be introduced outside the presence of the  
 3 jury.

4 To the, what I perceive to be three  
 5 questions, the two former questions, the  
 6 answer would be yes.

7 MR. SCAROLA: Will the Court take  
 8 judicial notice of Florida Statute 90.404  
 9 (2), which is commonly referred to as the  
 10 Williams Rule, and federal rule 415(g),  
 11 which expressly permits the introduction of  
 12 evidence with regard to other sexual  
 13 assaults against children, so that the jury  
 14 is away of the fact that Mr. Edwards, not  
 15 only had a good faith basis to conduct this  
 16 discovery, but quite arguably would have  
 17 been grossly negligent to have failed to  
 18 pursue it?

19 THE COURT: The only thing I would say  
 20 to that, Mr. Scarola, is I don't want to mix  
 21 apples and oranges. And that is, I don't  
 22 want to place the Court's incriminator on  
 23 getting too far afield and turning this into  
 24 a case about alleged sexual exploitation,  
 25 particularly of others outside of

1 Mr. Edwards' representation. That would  
 2 serve only to inflame the jury, and, again,  
 3 would cause the playing field to become  
 4 unlevelled, because the defense to the  
 5 malicious prosecution claim, i.e., Epstein  
 6 and his attorneys, would have to be fighting  
 7 claims that they may not even know about  
 8 much, much less the ones that they do.

9 So again, I want to center on those  
 10 three claims that were brought by  
 11 Mr. Edwards on behalf of his clients, and  
 12 center on those aspects that would be  
 13 relevant to the malicious prosecution claim  
 14 and the alleged ginning up of those claims,  
 15 the alleged attempt to align himself with  
 16 Rothstein, the alleged attempt to factor  
 17 these cases, potentially Mr. Edwards'  
 18 conduct as it related to those factoring  
 19 matters.

20 MR. SCAROLA: I am -- I am sorry. I  
 21 didn't mean to interrupt.

22 THE COURT: What I'm trying to say is  
 23 things like flight logs, the danger of  
 24 unfair prejudice. And also, in -- to answer  
 25 your question regarding the cases that talk

1 about the prior similar acts or perhaps even  
2 subsequent similar acts, those cases are  
3 from the forum of which the actual criminal  
4 claim, or perhaps even a civil claim that  
5 stems from the alleged assault, is being  
6 heard.

7 Again, what I'm trying to emphasize is  
8 that I do not want to introduce tangential  
9 matters into this case which would either  
10 directly or indirectly, whether purposefully  
11 or not, inflame this jury.

12 So that is the ruling of the Court.

13 I want to move forward now on the next  
14 issue that's being objected to, that is what  
15 is generically listed as Jeffrey Epstein's  
16 phone records.

17 MS. ROCKENBACH: May I approach, Your  
18 Honor. And I can swap with the court  
19 Exhibits 10 and 9, the phone records that  
20 were produced to my office by Mr. Scarola.

21 Your Honor, the objection is identical  
22 to the last, and that they are not relevant.  
23 My client's phone records, if there was any  
24 remote relevance as to who my client may  
25 have called on any given day, I don't think

1 commentary as to Mr. Epstein, nor,  
2 obviously, as to the three plaintiffs at  
3 issue.

4 And as conceded by Epstein in his  
5 papers, once Mr. Mr. Link and Ms. Rockenbach  
6 became involved to the matter, and that is  
7 there's no conceivable way that those issues  
8 can be ignored, because of the nature of  
9 Mr. Epstein's announced defense as well as  
10 his deposition testimony to the extent that  
11 he testified. And that is, that these three  
12 cases were a part of some type of an  
13 elaborate scheme by Rothstein and others,  
14 including the litigation team -- which is  
15 defined as including Edwards -- to somehow  
16 inflate, gin up, overexaggerate, whatever  
17 the case may be, the value of those cases to  
18 these investors, whatever damage was caused  
19 to Epstein as a result thereof.

20 So that's the clear unadulterated  
21 ruling of the Court as to that issue.

22 MR. SCAROLA: And I understand that,  
23 sir. My question to you is, if there is a  
24 specific allegation in the complaint --

25 THE COURT: That was brought by

1 that's going to be -- I think it's  
2 prejudicial. I think there's a danger of  
3 prejudicing this jury.

4 I am not quite sure what relevance  
5 Mr. Scarola thinks that phone records have  
6 to the malicious prosecution action, unless  
7 they think we may hear that there is going  
8 to be some attempt to prove the falsity of  
9 some individual allegation in the original  
10 proceeding, which is not what we should be  
11 doing here in this action.

12 THE COURT: Thank you.

13 MR. SCAROLA: I am -- I continue to be  
14 extremely puzzled by that statement, that we  
15 are not here to prove the falsity of claims  
16 in the original complaint.

17 I would like some guidance from the  
18 Court.

19 THE COURT: No need to be puzzled. I  
20 think I've already made myself abundantly  
21 clear. And that is, that the relationship  
22 between the legitimacy of the three claims:  
23 [REDACTED], E.W. and Jane Doe, are going to be  
24 permitted in a manner that befits the  
25 dignity of the courtroom, without pejorative

1 Mr. Epstein.

2 MR. SCAROLA: -- that was brought by  
3 Mr. Epstein against Mr. Edwards, does Your  
4 Honor's ruling contemplate that we get to  
5 prove that allegation is false? Without  
6 getting into what exhibit we are going to  
7 use to prove its false, is there any issue  
8 about the fact that if he alleged it in the  
9 complaint and it's false, we get to prove  
10 it's false?

11 THE COURT: There's no issue as far as  
12 I am concerned.

13 MR. SCAROLA: Thank you, sir. I think  
14 that helps a great deal, because I have been  
15 hearing something entirely different,  
16 repeatedly from the other side. I didn't  
17 understand how they can possibly be making  
18 that argument that we weren't permitted to  
19 prove the falsity of every false allegation  
20 in the complaint.

21 THE COURT: My intent is to hold  
22 Mr. Epstein accountable -- as I try to do  
23 each and every day, no matter whether it  
24 litigant or attorney -- and that is, what  
25 they write they are going to have to stand

1 behind. And I have got no issues in that  
2 respect at all.

3 MR. SCAROLA: Thank you, sir. That's  
4 very helpful. I appreciate that  
5 clarification.

6 THE COURT: Now, again, the mere fact  
7 that Mr. Epstein mentions flight logs in his  
8 complaint does not ipso facto make the  
9 entire flight log disclosure relevant to the  
10 jury's consideration of the claims.

11 So I want to temper my broad statement  
12 by that example as it may constitute  
13 examples in other matters that he's claimed.

14 But generally, globally, yes. The  
15 accountability issue is still resonating  
16 with the Court, and will always resonate for  
17 as long as I am doing this.

18 MR. SCAROLA: Thank you, sir. I do  
19 appreciate that clarification. I'm sorry to  
20 the extent that any of that may seem to be  
21 argument after Your Honor has ruled. That  
22 helps me a great deal.

23 THE COURT: Let's move on.

24 MR. LINK: Your Honor, may I comment on  
25 that very, very briefly.

1 Someone could be conjuring up any  
2 thought process that they may have to  
3 possibly bring a claim. But it's not until  
4 that black and white document is served on  
5 someone and a filing fee is paid, and the  
6 litigation commences -- and as contemplated  
7 by the jury instructions and by the law --  
8 continued by the defendant in a malicious  
9 prosecution claim, the original plaintiff,  
10 to make this at all real.

11 MR. LINK: I think I can answer that  
12 question very easily, and here is why -- and  
13 you raise a really good point.

14 You, Mr. Scarola absolutely gets to  
15 test this. So here is when is Epstein's  
16 complaint is file, December 7th, 2009. I am  
17 suggesting to you that if you read the  
18 Supreme Court case that just came out, it  
19 will tell you what happens afterwards is all  
20 subject to the litigation privilege.

21 THE COURT: Which Supreme Court case  
22 you are talking about?

23 MS. ROCKENBACH: Debrincat.

24 MR. LINK: It's the first thing it  
25 says --

1 THE COURT: Sure. Yes, sir.

2 MR. LINK: We have heard the Court  
3 ruled that way and we've accepted that  
4 ruling. We don't agree that that's what the  
5 law suggests, but that's the playing field  
6 that you have set for us.

7 THE COURT: The playing field being --  
8 and then you don't agree is exactly what, so  
9 that we can maybe clarify whatever your  
10 agreement is so that neither of us or any of  
11 us are working under any false pretenses.

12 MR. LINK: Your Honor, we don't believe  
13 that truth or falsity of any specific  
14 allegation has anything to do with malicious  
15 prosecution. It has everything to do with  
16 defamation. Here is why.

17 We believe that malicious prosecution  
18 focuses on the information that you make the  
19 decision to go forward with the lawsuit.  
20 Did you have enough information that a  
21 reasonable person would bring this civil  
22 proceedings. That's what the case law says.

23 THE COURT: How else is that testing,  
24 Mr. Link, but for the actual allegations  
25 that were brought?

1 MS. ROCKENBACH: Under headnote one.

2 MR. LINK: -- that everything that  
3 happens after 12/7/09 is protected, it's  
4 subject to privilege. What the allegations  
5 are, the truth or falsity, any statements  
6 made by the lawyers, any statements made by  
7 the parties or witnesses.

8 THE COURT: Hold on just a moment.  
9 What about, though, extra judicial  
10 statements? The Debrincat case, the Wolfe  
11 case, for case that we had, was confined to  
12 issues dealing with the litigation itself.

13 The concern that Wolfe had was  
14 primarily one of chilling effect on the  
15 ability of, in that case, a rather  
16 well-known law firm in Miami and their  
17 ability to properly litigate their case  
18 without feeling -- feeling feathered by  
19 that.

20 What transpires outside of the  
21 litigation are you suggesting to me would  
22 not be relevant, meaning publication, things  
23 of that nature, things that this expert is  
24 going to say in terms of damages caused to  
25 Edwards as a result of this filing and it's

1 continuation.

2 MR. LINK: We are on two different

3 points then.

4 THE COURT: Sorry. I may have

5 misunderstood.

6 MR. LINK: You got it, but you are on

7 two different points, so let me tell you

8 this.

9 The extra judicial statements -- and

10 it's a great example. Epstein sues for

11 abuse of process, RICO, whatever he sues

12 for. Outside of the courtroom Mr. Epstein

13 stands up and says to a reporter,

14 Mr. Edwards is a thief. There's no part of

15 that statement that's connected to the

16 litigation. He doesn't have immunity.

17 He makes a statement about the

18 litigation, and he says, I have alleged

19 Edwards was connected to Rothstein's Ponzi

20 scheme. He says it outside of the

21 courtroom. Is that connected to the

22 litigation? Yes, it is.

23 So I don't think the law is unclear at

24 all. And I don't think Mr. Scarola would

25 dispute it if you asked him does the

1 litigation privilege protect everything that

2 happens in a lawsuit through parties,

3 witnesses, lawyers and Judges that are

4 connected to the litigation. He would say,

5 in any other circumstance -- he said it in

6 this room -- he said it in this courtroom

7 two or three times -- all of that is

8 protected by the litigation privilege.

9 MR. SCAROLA: No. There is one

10 exception. And the one exception is

11 continuing to maintain the lawsuit in the

12 absence of probable cause. That's one

13 exemption. Everything else is protected by

14 the litigation privilege. The one thing

15 that is not, the one exemption carved out of

16 the litigation privilege by every court, up

17 until the Third DCA decided otherwise, and

18 the Fourth DCA issued its opinion, every

19 other court in the nation has said you

20 cannot maintain a lawsuit in the absence of

21 probable cause. You can't file it in the

22 absence of probable cause.

23 THE COURT: You're bringing back bad

24 memories. If I heard that once, I heard it

25 a thousand times. I think that's why Judge

1 Warner went out of our -- very kind way -- I

2 am saying that with an abundant amount of

3 respect. I think she's an exceptional

4 appellate judge -- she stated that the trial

5 court correctly followed the Wolfe decision.

6 Off the record.

7 (A discussion was held off the record.)

8 THE COURT: I do need a break. I hate

9 to break you in the middle of a thought, but

10 I do have some lunch plans. I want to make

11 sure that I respect those. It's about five

12 or so after noon. Let's get back, please,

13 assembled at 1:20.

14 What my plan is, I'm going to give you

15 another two hours this afternoon. So we

16 will go whenever we start and two hours

17 thereafter.

18 What I would like to do is try to get

19 through as much of this as we can.

20 My continued suggestion is to work with

21 each other, if you can, as far as any of

22 these exhibits may be concerned. And then

23 what I will do is -- if you are prepared to

24 do it -- is get into the motion to stay if

25 we have time to do that today, okay?

1 MR. GOLDBERGER: Judge, I apologize.

2 So I'm kind of responsible for the stay

3 motion, and I'm juggling a couple of balls

4 right now. I'm not going to be here this

5 afternoon. I got called up for trial. I

6 have to go prepare for that.

7 On a personal level, my son and

8 daughter-in-law their due date is today. I

9 think it's happening so --

10 THE COURT: If you would have told me

11 that, I would have been able to hear it

12 before we did this evidence issue, because I

13 think I mentioned earlier that I was prepare

14 to do this today.

15 You know, my suggestion is probably

16 that either Mr. Link or Ms. Rockenbach could

17 argue it in your absence.

18 I will be glad to take it up the first

19 thing this afternoon, Jack, if it will help

20 you. But, you know --

21 MR. GOLDBERGER: I apologize for not

22 telling you ahead of time.

23 THE COURT: I understand. You have a

24 lot on your mind and I respect that. But at

25 the same time, I told the parties before,

1 you know, I am slammed, and I have to get  
2 this stuff pushed through in the best way I  
3 can describe it. So I'm going to have to  
4 insist that you make yourself available.

5 I will willing to do it, as I said,  
6 first thing out of the gate. I don't expect  
7 it to take very long. I'm expecting it to  
8 be about a 15-minute argument per side. And  
9 I will get you out of here, to te best of my  
10 ability, by 2:00 in the afternoon, as long  
11 as there's no unforeseen circumstance.

12 MR. GOLDBERGER: Let me talk to  
13 co-Counsel.

14 MR. SCAROLA: I can do my argument in  
15 five minutes on that issue.

16 THE COURT: I don't think it's going to  
17 take more than 15 minutes to present, then  
18 five on the rebuttal. So I'm telling you  
19 right now, we can't get it done in less than  
20 half an hour. I will be glad to that. I  
21 will give every you every accommodation, as  
22 I would with any of you here. I would do  
23 the same thing.

24 But I need to respect the fact that  
25 I've put aside this time, and that I've

1 prepared in accordance with the information  
2 that I received from counsel yesterday in  
3 the manner which puts that as the next -- as  
4 the next viable thing to review and -- I  
5 haven't gone through the supplement motions  
6 to compel yet. That is what I was planning  
7 to do on Thursday.

8 I'm sorry about that. Again, it is  
9 with all due respect to your long experience  
10 and the fact I think you're an excellent  
11 lawyer and a great person, so it's not  
12 personal at all, it's just needing to get  
13 this done.

14 Thank you. And thank you all for  
15 understanding. I appreciate that. See you  
16 back assembled at 1:20.

17 (A recess was had 12:09 [REDACTED]. -  
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