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EPSTEIN
v.
EDWARDS

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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.

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

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 filling, it's the

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.

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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

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. The 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 be allowed to bring
24 in allegations of the complaint, truth or
25 falsity, then we need these affirmative

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

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

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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

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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

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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 --

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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.

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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

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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

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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 not 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.

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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 [REDACTED] 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

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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

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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 reed 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

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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

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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 -- ■ 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.

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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.

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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

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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

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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 █. 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

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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.

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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 [REDACTED] 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.

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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

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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 [REDACTED] 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

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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.

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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.

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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.

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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

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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

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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

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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 [REDACTED]
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 [REDACTED] 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

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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 [REDACTED] 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.

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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

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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 **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 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 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

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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

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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

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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 --

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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

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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

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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

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1 and wants to parse through independent
2 allegations or paragraphs and say, ■ 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.

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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

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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

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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 [REDACTED] 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 [REDACTED] 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

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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 te 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 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 ■., E.W. and Jane Doe, are going to be
24 permitted in a manner that befits the
25 dignity of the courtroom, without pejorative

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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 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. ■ 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 **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?

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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 **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

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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

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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

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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, ■ 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?

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1 **MR. GOLDBERGER:** Judge, I apologize.

2 So ■■■ kind of responsible for the stay
3 motion, and ■■■ juggling a couple of balls
4 right now. ■■■ 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,

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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 [REDACTED] 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. [REDACTED] 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 [REDACTED] telling you
19 right now, we can' 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 [REDACTED] 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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