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

Case No. 50-2009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

v.

SCOTT ROTHSTEIN, individually, and BRADLEY J. EDWARDS, individually,

Defendants/Counter-Plaintiff.
_____/

**PLAINTIFF/COUNTER-DEFENDANT JEFFREY EPSTEIN'S MOTION TO MAKE COURT RECORDS CONFIDENTIAL**

Plaintiff/Counter-Defendant Jeffrey Epstein ("Epstein"), pursuant to the 15th Judicial Circuit's Administrative Order 2.303-9/09, moves the Court to make court records confidential, and in support thereof, states:

1. There is a dispute between Epstein and Defendant/Counter-Plaintiff Bradley Edwards ("Edwards") over the privileged nature of certain documents that were included on a disc recently obtained from Epstein's former counsel, Fowler White.

2. Epstein recently identified exhibits on his Clerk's Trial Exhibit List which included documents obtained from the disc. Edwards moved to strike those exhibits both on their untimely disclosure and because he alleged 49 of the exhibits were attorney-client privileged.

3. The Court held a hearing on March 8, 2018, at which time Edwards' Motion to Strike Epstein's Untimely Supplemental Exhibits and to Strike All Exhibits and Any Reference to Documents Containing Privileged Materials Listed on Edwards' Privilege Log was heard. The

Court struck Epstein's newly disclosed exhibits as untimely but did not make any findings on the privileged nature of the documents. In order for Epstein to preserve his rights concerning the Court's rejection of the *ore tenus* request for an *in camera* inspection and striking of Epstein's newly disclosed exhibits, the Court directed Epstein to file under seal the newly disclosed trial exhibits which Edwards has claimed are privileged. (3/8/18 Aft. Tr. 62:2-63:1.)

4. At the March 8, 2018, hearing, the Court also stated that the copy of the disc entitled "Epstein Bates Stamp" obtained from Fowler White's files should be filed under seal:

> … that the one disk containing the documents that are being sought to be introduced at trial to take [sic] to record will be permitted to be filed under seal.

(3/8/18 Aft. Tr. 75:16-18.) The Court directed the Link & Rockenbach firm to maintain Fowler White's original files (including the original disc). (3/8/18 Aft. Tr. 80:8-81:15.)

5. Because the case was stayed on March 9, 2018, by the Fourth District Court of Appeal, Epstein could not move the Court to seal the disc and exhibits in accordance with Administrative Order 2.303-9/09. Epstein, however, on March 11, 2018, served a Notice of Service of Court's March 8, 2018, Hearing Transcripts and Compliance with Court's Rulings, a copy of which is attached as **Exhibit A.** Simultaneously with the filing of this Motion, Epstein is filing the disc and stricken trial exhibits under seal in compliance with the Court's rulings at the March 8, 2018, hearing.

6. While on March 12, 2018, *nunc pro tunc* to March 8, 2018, the Court entered an Agreed Order sealing two docket entries which referenced the contents of documents Edwards claimed are attorney-client privileged, the Order did not address the sealing of the disc and the stricken trial exhibits.

7. The Fourth District Court of Appeal's stay has now been lifted in part.

8. Epstein recognizes that Administrative Order 2.303-9/09 provides that a request to seal court records must be made by written motion and that the parties may not submit an agreed-upon order. Specifically, the Administrative Order provides:

> 1. A request to make court records … confidential in any type of case must be made by written motion. Parties cannot submit an agreed-upon order. The Motion must be captioned "Motion to Make Court Records Confidential" ... The Motion must identify with particularity the records or hearing to be made confidential and the grounds upon which it is based. …
>
> ***
>
> 3. A public hearing on any motion to seal a court record … will be held as soon as practicable but no sooner than ten (10) days after notice is given to the public and the press. …
>
> 4. A sealing order issued by a court must state with specificity the grounds for sealing and the findings of the court that justify sealing. … The order must contain specific findings that the degree, duration, and manner of confidentiality are no broader than necessary to protect the interests listed in the Interim Rule of Judicial Administration 2.420(c)(9)(A). …

Accordingly, to assure that the disc and stricken trial exhibits that Edwards claims are privileged are accepted by the Clerk under seal and remain under seal, Epstein requests an Order authorizing such filings and advising the Clerk that such filings shall remain under seal until further order of the Court. By filing this Motion, Epstein does not agree with Edwards' privilege assertions.

**CERTIFICATION**

This motion is being made in good faith and is supported by a sound factual and legal basis.

**CERTIFICATE OF SERVICE**

I certify that the foregoing document has been furnished to the attorneys listed on the Service List below on March 21, 2018, through the Court's e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1).

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# EXHIBIT A

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

Case No. 50-2009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

v.

SCOTT ROTHSTEIN, individually, and BRADLEY J. EDWARDS, individually,

Defendants/Counter-Plaintiff.
_____/



**PLAINTIFF/COUNTER-DEFENDANT NOTICE OF SERVICE OF COURT'S MARCH 8, 2018, HEARING TRANSCRIPTS AND COMPLIANCE WITH COURT'S RULINGS**[1]

Plaintiff/Counter-Defendant Jeffrey Epstein ("Epstein") hereby serves the transcripts (morning and afternoon sessions) of the March 8, 2018, hearing, and provides his Notice of Compliance with the Court's rulings. Epstein will file this Notice with the Court once the stay is lifted.

**THE COURT'S RULINGS**

At that hearing, the Court made the following rulings:

- As to Intervenors' (E.W., L.M. and Jane Doe) request to temporarily seal the pleadings relating to the e-mails, the Court granted the request and asked for a proposed Order. (Morning Session, 3/8/18 4:16-5:1.)

- The sanitized redacted version of Epstein's Notice of Filing Appendix shall be filed under seal. (Afternoon Session, 3/8/18 75:20-23.)

[1] Although no written Order has been entered and the proceeding is stayed, Epstein has complied with and will continue to comply with the Court's rulings on the record.

- In order for Epstein to preserve his rights concerning the Court's rejection of the last-minute request for an in-camera inspection and the striking of his newly disclosed exhibits, Epstein shall file under seal the newly disclosed trial exhibits which Edwards has claimed are privileged. (Afternoon Session, 3/8/18 62:2-63:1.) These do not include exhibits that were already in the Court file or used in this case. (Afternoon Session, 3/8/18 76:8-21.)

- Link & Rockenbach, PA's copy of the disc entitled "Epstein Bate Stamp" that is the subject of the dispute will be filed under seal. (Afternoon Session, 3/8/18, 75:12-18.)

- Link & Rockenbach, PA to retain Fowler White's boxes, including the original disc. (Afternoon Session, 3/8/18, 80:8-81:15.)

On Friday, March 9, 2018, at 4:15 p.m. the Fourth District Court of Appeal entered its Order staying the state court action pending its review.

**PLAINTIFF/COUNTER-DEFENDANT'S COMPLIANCE**

Plaintiff/Counter-Defendant Jeffrey Epstein's counsel, Link & Rockenbach, PA, have complied with the Court's rulings at the March 8, 2018, hearing as follows:

- Link & Rockenbach, PA has not made any further dissemination of the documents included in the Appendix in Support of Epstein's Response in Opposition to Edwards' Second Supplement to Motion in Limine Addressing Scope of Admissible Evidence, trial exhibits or other documents from the disc that Edwards has asserted privilege claims over.

- On March 8, 2018, Link & Rockenbach, PA notified its client, its co-counsel (Jack Goldberger), its litigation team working on this matter, and its expert, Timothy Chinaris, to destroy all hard copies and electronic versions of the documents obtained from the disc and any copies of the discs that they had in their possession.

- On March 6, 2018, Epstein filed his Notice of No Objection to Attorney Paul Cassell, on Behalf of L.M., E.W. and Jane Doe, or Defendant/Counter-Plaintiff Bradley J. Edwards Moving to Seal Court Records Until the Court Makes a Determination on How the Documents Shall be Treated.

- Link & Rockenbach, PA is assisting Edwards' counsel to seal the redacted version of D.E. 1242, Epstein's Notice of Filing Redacted Appendix in Support of Response in Opposition to Edwards' Second Supplement to Motion in Limine Addressing Scope of Admissible Evidence, and D.E. 1252, Motion for Court to Declare Relevance and Non-Privileged Nature of Documents and Request for

Additional Limited Discovery, Evidentiary Hearing and Appointment of Special Master.

- Link & Rockenbach, PA has destroyed its paper copy of the Redacted Appendix that was filed in the Court file and has deleted the electronic version from its system.

- Link & Rockenbach, PA, has placed the Unredacted Appendix that was served but not filed in a sealed box that will be maintained in its office, unopened, for appellate purposes.

- In Edwards' March 5, 2018, Motion to Strike Epstein's Untimely Supplemental Exhibits and to Strike All Exhibits and Any Reference to Documents Containing Privileged Matters Listed on Edwards' Privilege Log, Edwards alleged the following exhibits identified by Epstein were privileged:

| No. | Ex. No. | Bates No. | App. No. |
|---|---|---|---|
| 1 | 13-1 | 02645 | |
| 2 | 13-4 | 00149 | 35 |
| 3 | 13-5 | 01527 | 3 |
| 4 | 13-6 | 04493-4495 | |
| 5 | 13-7 | 00014 | 36 |
| 6 | 13-11 | 00090 | 37 |
| 7 | 13-13 | 00133 | 68 |
| 8 | 13-15 | 08006 | 31 |
| 9 | 13-17 | 00026 | 70 |
| 10 | 13-19 | 01004 | 71 |
| 11 | 13-25 | 12289 | 33 |
| 12 | 13-30 | 26481 | |
| 13 | 13-34 | 26480 | 60 |
| 14 | 13-35 | 26356 | |
| 15 | 13-36 | 26570 | |
| 16 | 13-44 | 03731-03732 | |
| 17 | 13-45 | 06406-06408 | |
| 18 | 13-46 | 01686 | 48 |
| 19 | 13-47 | 11123-11125 | 50 |
| 20 | 13-49 | 11126-11127 | 32 |
| 21 | 13-52 | 25925 | |
| 22 | 13-53 | 25874 | |
| 23 | 13-56 | 11145 | |
| 24 | 13-60 | 03191-03192 | 4 |
| 25 | 13-66 | 04398-04402 | 2, 34 |
| 26 | 13-67 | 04408-04412 | 1 |
| 27 | 13-86 | 267477 | 11 |
| 28 | 13-88 | 08042-08044 | 16 |
| 29 | 13-89 | 26741-26742 | 13, 15 |

| No. | Ex. No. | Bates No. | App. No. |
|---|---|---|---|
| 30 | 13-90 | 08059-08061 | 17 |
| 31 | 13-93 | 26756-26758 | 9 |
| 32 | 13-94 | 08036-08038 | 19 |
| 33 | 13-97 | 26762 | 8 |
| 34 | 13-98 | 01117 | 21 |
| 35 | 13-100 | 08121-08123 | 20 |
| 36 | 13-101 | 26749-26752 | 23 |
| 37 | 13-102 | 08128-08130 | 24 |
| 38 | 13-103 | 08118-08120 | 22 |
| 39 | 13-104 | 08131-08133 | 25 |
| 40 | 13-105 | 08124-08126 | 26 |
| 41 | 13-106 | 08135-08138 | 10 |
| 42 | 13-107 | 27494 | 27 |
| 43 | 13-108 | 26760 | |
| 44 | 13-110 | 25997 | 28 |
| 45 | 13-111 | 25937 | 67 |
| 46 | 13-113 | 26604-26605 | 56 |
| 47 | 13-116 | 07019-07021 | |

- Edwards also objected to the following additional exhibits as being late disclosed:

| No. | Ex. No. | Bates No. | App. No. |
|---|---|---|---|
| 1 | 13-2 | 03037 | 54 |
| 2 | 13-3 | 03036 | 55 |
| 3 | 13-8 | 03998-04000 | 6 |
| 4 | 13-9 | 02231 | |
| 5 | 13-10 | 01300 | |
| 6 | 13-12 | 2906-2908 | |
| 7 | 13-14 | 11237 | |
| 8 | 13-18 | 01464 | |
| 9 | 13-20 | 01403 | |
| 10 | 13-21 | 02684-02685 | 51 |
| 11 | 13-22 | 01475 | |
| 12 | 13-24 | 03694 | 79 |
| 13 | 13-26 | 01166 | 38 |
| 14 | 13-27 | 01258 | 72 |
| 15 | 13-28 | 15113-15114 | |
| 16 | 13-31 | 26394 | |
| 17 | 13-33 | 25922 | |
| 18 | 13-37 | 00992 | |
| 19 | 13-40 | 01423 | 7 |
| 20 | 13-41 | 05071 | |
| 21 | 13-43 | 02043 | 81 |

| No. | Ex. No. | Bates No. | App. No. |
|---|---|---|---|
| 22 | 13-48 | 02088 | |
| 23 | 13-50 | 11128-11131 | 49 |
| 24 | 13-51 | 08459 | |
| 25 | 13-54 | 08348-08349 | |
| 26 | 13-55 | 08355 | |
| 27 | 13-61 | 27284 | 87 |
| 28 | 13-62 | 26893 | 89 |
| 29 | 13-64 | 01255 | |
| 30 | 13-65 | 26836-26837 | 90, 91 |
| 31 | 13-68 | 26807 | 92 |
| 32 | 13-69 | 26808-26809 | 93 |
| 33 | 13-70 | 27379 | 94 |
| 34 | 13-71 | 27293 | 95 |
| 35 | 13-72 | 26021 | 63 |
| 36 | 13-73 | 27270 | 96 |
| 37 | 13-74 | 27355 | 97 |
| 38 | 13-75 | 27325 | 100 |
| 39 | 13-77 | 27322 | 101 |
| 40 | 13-78 | 26777-26781 | |
| 41 | 13-79 | 26782-26786 | 102, 103, 104 |
| 42 | 13-80 | 26088-26089 | 105 |
| 43 | 13-81 | 25998 | 52 |
| 44 | 13-83 | 27072 | 108 |
| 45 | 13-85 | Legamaro Depo Ex 6 | |
| 46 | 13-92 | 27522 | 109 |
| 47 | 13-96 | Legamaro Production | |
| 48 | 13-99 | 27051-20752 | 112 |
| 49 | 13-109 | 27025 | 111 |
| 50 | 13-112 | 26973 | 84 |
| 51 | 13-114 | 26737 | 57 |
| 52 | 13-115 | 26485 | 57 |
| 53 | 13-117 | 27013 | 58 |



- Link & Rockenbach, PA has marked the exhibits identified above and placed them in a sealed envelope for filing with the Court under seal once the stay is lifted in order to preserve Epstein's appellate record. Link & Rockenbach, PA will retain a set of these exhibits in a sealed envelope in the sealed box maintained in its offices for appellate purposes.

- With the exception of those documents it is maintaining in a sealed box for appellate purposes, Link & Rockenbach, PA has destroyed all hard copies of the documents it reproduced from the disc that Edwards has identified as privileged.

- Link & Rockenbach, PA has placed its copy of the disc in a sealed envelope, which will be filed under seal with the Court once the stay is lifted.

- Link & Rockenbach, PA has placed Fowler White's original disc in a sealed envelope which will be maintained with its original records at the offices of Link & Rockenbach, PA until further rulings by the Court.

- Link & Rockenbach, PA will maintain control of the Fowler White boxes until further rulings by the Court.

- Link & Rockenbach, PA has deleted the electronic duplicate of the disc and the electronic version of the exhibits identified above from its computer system and Dropbox.

- Link & Rockenbach, PA will work with its IT personnel to remove copies of any documents Edwards has claimed as privileged from its e-mail servers.

**CERTIFICATE OF SERVICE**

I certify that the foregoing document has been furnished to the attorneys listed on the Service List below on March 11, 2018, via e-mail and will be served with the Court once the stay is lifted.

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# EXHIBIT A

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

Case No. 502009CA040800XXXXMB

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

vs.

SCOTT ROTHSTEIN, individually;
BRADLEY EDWARDS, individually,

Defendants/Counter-Plaintiffs.
_____/

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: Thursday, March 8th, 2018
TIME: 10:07 a.m. - 12:08 p.m.
PLACE 205 N. Dixie Highway, Room 10D
West Palm Beach, Florida
BEFORE: Donald Hafele, Presiding Judge

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

Sonja D. Hall
Palm Beach Reporting Service, Inc.
1665 Palm Beach Lakes Boulevard, Suite 1001
West Palm Beach, FL 33401
(561) 471-2995

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**THE COURT:** Good morning. Have a seat. Thank you.

Needless to say the recent barrage, as opposed to flurry, of activity that has transpired is of extreme consternation to the court. It has caused me to have to engage in an inordinate amount of time to the exclusion of other matters that needed my attention.

While the Court understands the gravity of the issues that have transpired, it is with extreme consternation and concern that they have transpired on the eve of trial, a trial that has already been continued once, matters that could have been avoided had timely action been taken. And the burden on the Court to try to get through what would be approximately four feet of documents is extensive and onerous. I have done the best that I can to go through the materials, and I had some assistance, which I appreciate, from one of our staff attorneys, in trying to simply wade through the extensive, complicated, and in many situations, years' old documents, some that go back almost a

decade in terms of their age, and much of which I'm reviewing for the first time.

So it's against that backdrop we will proceed. We will hear the motion filed by Epstein to remove the case from the trial docket relative to Florida Rule of Civil Procedure 1.440 first.

**MR. SCAROLA:** Good morning, Your Honor. With the Court's permission, believe it or not, there is one agreed matter that we would ask the Court to address first.

I would like to introduce to Your Honor University of Utah Law Professor Paul Cassell, former Federal Judge Paul Cassell, who will present that matter to the court.

**MR. CASSELL:** Good morning, Your Honor. Since this is an unopposed motion, it will just take 10 seconds to present.

I'm here pro hac vice, which I'm not sure the Court is concerned about. We do have a motion to seal the pleading and related emails. It's unopposed. We ask that it be granted. Temporarily sealed until you reach a ruling.

**THE COURT:** That's fine. I will need

an order in that regard, please.

All right, Ms. Rockenbach.

**MS. ROCKENBACH:** Thank you. May it please the Court. Good morning.

Your Honor mentioned the barrage that the Court has received. And it's the exact words that I have on the top of my yellow pad to describe the email flurry that has occurred within the last four days, which have truly made me sick. I could not wait for this hearing to occur because of the fact that I know this Court does not need any more paperwork. You need to see the attorneys and understand the chain of evidence and how it was reprehensible that either I or my law partner has been accused of stealing documents. That has made me sick.

So I look forward to discussing the privileged nature of the documents. And I thank Mr. Cassell for being here today.

Your Honor, this is Mr. Epstein's motion to remove this case from the trial docket. It was prompted by Mr. Edwards' motion to separate the trials, which was

filed on Friday, I believe, for the first time identifying that the fact that the default that Mr. Epstein has against Mr. Roth was on the original complaint and it no longer applied.

Mr. Edwards pointed out to this Court and to Mr. Epstein -- he is absolutely correct -- that Mr. Epstein's operative complaint is the Second Amended Complaint to which there is no default.

What rule 1.440 tells this Court to do is to look at the time that Mr. Edwards moved -- it's maybe a notice to set trial. In this case it was a motion to set cause for trial -- was the case at issue.

Rule 1.440 is one of the most strictly complied with mandatory rules of civil procedure, which has been recognized by the Fourth District Court of Appeal, and it's one of those rare instances when a petition for writ of mandamus is appropriate when it's not complied with.

So we need to look at the pleadings and not try this case twice. This case was not at issue when Mr. Edwards filed his

motion -- for the obvious reason, when he filed his motion to set the case in the above-styled cause of action for trial on May 24th, 2017. There is no dispute.

And Mr. Edwards has actually pointed it out, Mr. Epstein did not have a default against Mr. Rothstein.

Contrary to what Mr. Edwards' suggestion is, is to cure this issue --

**THE COURT:** Mr. Epstein did not have a default against Mr. Rothstein.

**MS. ROCKENBACH:** Rothstein, thank you very much.

Contrary to what Mr. Edwards has suggested, there is no cure for a defective motion to set a cause for trial. You cannot cure it.

There are some cases that have been cited. In fact, both sides. I cited Labor Ready from the Fourth District Court of Appeal in my motion. And I understand Mr. Edwards intends to rely upon it. But this was an authored decision by Judge Melanie May from the Fourth DCA. And that case has great language to guide this Court

on.

In that case Judge May wrote, "We do not quarrel with those cases or their holdings."

Your Honor, would the Court like a copy of this case to follow?

**THE COURT:** Sure.

**MS. ROCKENBACH:** Thank you. May I approach?

**THE COURT:** Yes.

**MS. ROCKENBACH:** I have a similarly highlighted copy for counsel.

So in that case, the Fourth DCA has said, "We don't quarrel with genuine parts of prior Fourth DCA case recognizing the mandatory nature and compliance, strict compliance with Rule 1.440." Judge May wrote, "We don't quarrel with Bennett versus Continental Chemicals."

However, we point out that none of those cases involve the case that has been pending at issue for years. Those cases were at issue. Meaning, they had a default. They had an answer. They had a final pleading. Twenty days had run. Another 30

days had run. Compliance with rule 1.440, check the box.

What Judge May said in this case, the Labor Ready case, there was a last minute technical amendment to the complaint. And guess what, they went to trial. It was waived.

That case does not apply. Those facts do not control. What you have before Your Honor is a -- no waiver, no waiver. You have an objection that Mr. Edwards has pointed out, rightfully so, the case is not at issue.

What I filed with the Court immediately, simultaneously with the motion to remove this case from the docket was a proper motion for default against Rothstein.

There is no case that supports Mr. Edwards' position to this Court about severing a case in order to retroactively make it at issue. That doesn't happen in the law.

The law says, in rule 1.440 in the Bennett case and the Gawker case from the Second DCA, says that this Court has to look

at May 24th -- and that is the salient date that this Court must look at -- because that's when Mr. Edwards hastily moved this case and set the above-styled caused of action for trial, May 24th.

To be clear, Your Honor, Mr. Edwards did not move to sever at that time. This case has been pending for some eight plus years. He has never before tried to sever.

He, at that time, on May 24th, instead of pointing out the lack of at issue, and by the way, you need a default, he moved the case. He didn't even move his counterclaim to set for trial, he moved the case.

And then further, to evidence Mr. Edwards' intent to try this case globally, main claim and counterclaim -- which is appropriate, because the counterclaim arises from the main claim -- he entered into a joint stipulation indicating that that's how the case is going to be tried.

So it was not Mr. Epstein who caused this last-minute, 11th-hour, oh, my gosh, we are not at issue, it was Mr. Edwards who

pointed it out.

I researched it over the weekend. And on the very next business day, as soon as I possibly could, I filed the motion to remove the case from the docket.

I then immediately moved to default. I have an order for the Court to sign to enter a default. Served it on Mr. Rothstein's counsel of record, Marc Nurik. And we will then be ready once this Court enters the default, and presumably either party notices it for trial in 20 days when it is then at issue, this Court can then set it no less 30 days. That is the mandatory nature of the rule.

I regret we're here, but this is a strict compliance rule and we have to be at issue.

And, Your Honor, the last thing either side or this Court wants is to try this case twice.

**THE COURT:** Despite the representation, Ms. Rockenbach, that you made in your motion to continue, that Plaintiff and his trial counsel will not seek another continuance.

We will be to ready to try the case in 90 days --

**MS. ROCKENBACH:** Yes.

**THE COURT:** -- quote, end quote.

**MS. ROCKENBACH:** Yes.

**THE COURT:** Why was that not pointed out to me upon a review of the docket, presumably a review of the docket, to determine whether or not there was, in fact, a need to strike the trial notice at that time, instead of gearing up, instead of spending an inordinate amount of court resources, and now taking the position that because what in essence was dilatory conduct on the part of the Epstein trial counsel team, dating back to 2011, now constitutes reason for this case to be stricken?

Does that not sound inequitable? Does that not sound inappropriate? Does that not sound specifically contrary to the quoted language that I have just indicated here?

**MS. ROCKENBACH:** The quoted language as you indicated, Your Honor, I made knowing that there was a default.

Mr. Edwards at that time never said

that default does not apply to the operative complaint. And I never, ever thought that it did not.

**THE COURT:** Isn't that your responsibility? Isn't that the responsibility -- before you make that statement to this Court and make the representation that in light of the fact that you guys were getting up to speed, that part of getting up to speed, would have been your responsibility to check the adequacy of the pleadings -- and as the case that has been cited -- at least one of them indicate, the responsibility would have been to file a motion to strike the case -- strike that. A motion to strike the notice setting trial or the trial order seasonably and timely so that we would not have been in this position in the first place?

It would seem to me that you are essentially creating the error yourselves by not doing due diligence.

**MS. ROCKENBACH:** I wish I had seen it. I knew there was a default against Mr. Rothstein, and that he was in federal

prison. Never before did Mr. Edwards raise this issue that he raised on Friday.

And by the way, Your Honor, the fact that Mr. Edwards has raised it, he is using it as an excuse to sever the trial, which does not cure the defect, and is an appropriate manner to try this case in any event.

Mr. Edwards is the one who pointed out the improper defect, who could have raised it much sooner.

Your Honor, I wish I had seen it. I wish I had seen it. And we are ready to try the case, but that's not the issue.

Mr. Edwards having raised the defect now, we could go through this trial, get a verdict for Mr. Epstein, and I believe we would, and then Mr. Edwards could appeal on the defect because he has raised it.

So there is but one action that the Court can take, and that is --

**THE COURT:** If that transpires, then I quit. Then I am resigning my position. Because if I can't trust what was written already here by you, that you -- that

Mr. Epstein, as the Plaintiff, and his trial counsel, will not seek another continuance, and be will be ready to try the case in 90 days -- quoted language, pledging to this Court that otherwise this case is ready to go -- and now we are faced with this defect after all of the time and expense that has been made here and spent here, is really a travesty.

And while I say that tongue in cheek in terms of my resignation, this would -- it would be astounding to me if that was, in fact, the case.

**MR. LINK:** Your Honor, may I have permission to stand next to my partner on this?

**THE COURT:** Sure. Of course.

**MR. LINK:** Thank you.

Judge, I want to make sure that the record is clear. We are not asking for a continuance. The words that we gave you, we are standing by. This is not a motion for a continuance. And the words that my partner told this Court were absolutely true when she said them. They are absolutely true

today. This is not us not being ready. This a legal defect that cannot be cured.

And I apologize to the Court for where we are and what we have done. And I'm afraid we are going to spend a lot more time together on this case.

But I want this Court to understand that when my law firm says something, we mean it. We absolutely do. And we are not moving for continuance.

But this case cannot go to trial with this defect, that's just the law. But I don't want this Court to think for one second that my partner or I would ever mislead you or say something we didn't mean. I have been accused of enough of that this week.

**THE COURT:** The point that I'm making -- nobody is accusing you.

**MR. LINK:** Not you, Your Honor. I've been accused of stealing documents and a crime.

**THE COURT:** I understand.

**MR. LINK:** And that's the first time in 32 years.

**THE COURT:** And I appreciate that. I understand everybody's emotions are rather high, based upon the fact that all of this has transpired in such a short amount of time.

But again, at the same time, as I said before, it seems to me to be highly inequitable -- and I understand your argument is legal in nature -- but highly inequitable to come before the Court and suggest that by way of dilatory conduct on the part of the Epstein trial team in not securing the technicality that we are speaking about, and that is a default against an individual who will remain in prison for the rest of his life. Who is, to my knowledge, based anecdotally, only based on anecdotal evidence, is penniless and has been disgorged of any assets that he has and that his family has, that somehow because of this technicality we're caused to put this case back and not try the case after, again, an inordinate amount of time and expense, which is in essence taxpayer money, of which this Court has been and continues to be a

steward of those expenses and time.

Again, coupled with the fact that it was represented to this Court that there would be no further delays and that the case would be ready to try. That tells me and that represents to me, that counsel has done their due diligence.

Part of the motion said, "We have heard the Court loud and clear, now we" -- Link and Rockenbach -- "are on the case, with support from the Gunster firm, and we will not allow the same type of conduct that transpired earlier, which the Court was critical of, happen again."

That pledge to this Court means something to this Court. That means that the docket has been assiduously reviewed, and that everything else, short of gearing up for trial on the substantive issues that are before this forum, have been resolved, rectified, and that certainly we are not going to be reaching back seven years on a technicality to somehow thwart the efforts of the Court in trying to moved forward on behalf of both sides to resolve a case that

has drawn a significant amount of public interest and that has been pending for --

**MR. LINK:** Nine years.

**THE COURT:** Nine years is too simple. Three thousand and thirteen days, as of today.

**MR. LINK:** Yes, sir.

Your Honor, if I may. Because what is really important to me, more than anything in this case, is our reputation. And I want this Court to understand that we are not moving for a continuance.

**THE COURT:** I didn't say that was your position, which is why there is a frustration here.

Continuances are discretionary under the law. I have wide discretion. The Rule of Judicial Administration of this state -- and I do my best to follow them. And you have probably heard me at 8:45s make this statement, at least if not expressly, impliedly, that the trial courts of this state shall have a firm continuance policy.

Now, while that may not be popular amongst the bar when the Court enforces that

rule, it is nonetheless a rule of the Florida Supreme Court, and I do my best to follow the law, despite popularity concerns, of which I have none.

**MR. LINK:** And we appreciate that, Your Honor.

**THE COURT:** So --

**MR. LINK:** Sorry, I thought you were done.

**THE COURT:** I am not exonerating the movant here, by any means. You're the first one --

**MS. ROCKENBACH:** The movants being Edwards or Epstein?

**THE COURT:** I'm talking about Edwards. The movant setting the case for trial.

**MS. ROCKENBACH:** Understood.

**THE COURT:** Because Edwards has the same responsibility to the Court, to this community, to the taxpayers, to the public, to my constituency, to assiduously review the docket, to ensure that the notice is being provided in accordance with rule 1.440.

So by no means am I exonerating anyone

here. It's just, again, a cumulation of having to go through what we have gone through together. Up to now, what I have tried to maintain, a civil, professional and efficient atmosphere despite the nature of the case, despite pejorative comments that were made earlier, which the Court has indicated will not be tolerated, and that has been followed carefully by all concerned, and I appreciate that very much.

But here we are. I am familiar with the law. I am familiar with the statute -- strike that.

I am familiar with the rule. I am familiar with the comments to the rule. I am familiar with the case law pertaining to the rule.

I will allow you time for rebuttal, if needed.

**MS. ROCKENBACH:** Thank you, Your Honor.

**MR. LINK:** Judge, thank you for letting me come up here.

**THE COURT:** Mr. Scarola, again, I share my frustration with you and the Edwards' legal team, as well, as far as this

conundrum.

It is disappointing that a firm of your stature, an attorney of your stature, of which I have an abiding respect for all of those who are serving their clients in this case, that, again, the docket was not assiduously combed, and we are left here today with the very real possibility of this case not being tried as scheduled.

Your response, please.

**MR. SCAROLA:** Yes, sir. Your Honor, let me first of all point out that rule 1.440 only permits a party to notice a matter for trial once at issue.

And at the time our notice was filed, we were not a party to the case that was pending against Mr. Rothstein. And quite frankly, had no concern about that case. It was simply not a matter that we cared about, and quite frankly believed, for the reasons that Your Honor has referenced, that it would never really be tried.

This is a defendant who has absolutely no ability whatsoever to ever respond to a judgment against him.

And our concern with regard to Rothstein arose when we were informed of the witnesses that were intended to be called ostensibly in the case against Mr. Rothstein, which was a damage only claim for a conspiracy to commit abuse of process, a claim, which if it had been defended, would have been thrown out because there is no tort because of the litigation privilege for conspiracy to commit abuse of process, and there could not possibly, under any conceivable version of the facts, ever be a claim for damages by Mr. Epstein in connection with that.

Nonetheless, we are told that there are going to be -- there's going to be testimony from Mr. Rothstein -- excuse me. From Mr. Epstein's victims in that portion of the case, that Mr. Edwards is going to be called in that portion of case.

And what became apparent to us is, that an effort was going to be made to use the rouse of a claim against Rothstein as to which we would have no standing to object, to insert into the record information that

would never be admissible in the claim of Bradley Edwards against Mr. Epstein.

It became a particular concern to us, because once a default is entered, the jury is obliged to assume the truthfulness of the facts that are alleged in the complaint.

We are obviously contesting those facts. So what was going to happen if there was going to be a focus on the underlying allegations --

**THE COURT:** Against Rothstein?

**MR. SCAROLA:** Against Rothstein -- is that the same jury was going to be told, you must accept these allegations; and then they were going to be told, you can't accept those allegations. And that obviously in and of itself created a need for us to approach the Court and ask that these claims be severed.

We then determined that there was no valid default ever entered against Mr. Rothstein. It didn't happen. And that's not something, again, that was ever a concern to us.

I don't represent him. I never want to

represent him. I am uncomfortable about the idea of having to be involved in a trial in which I might have to be raising objections that would appear to be objections on behalf of Rothstein to what's going on in that first portion of the case.

So we found out about the procedural defect. Now the issue becomes, does Your Honor have the ability to address those problems? And the answer to that question is clearly yes.

Severance of a permissive counterclaim -- and there is no doubt about the fact that this is a permissive counterclaim -- rests within the sound discretion of the Court.

**THE COURT:** The question that I had was, in reviewing the material, is this still a counterclaim at all, albeit technically brought as same, because Edwards no longer is a defendant in the matter brought by Epstein?

The sole defendant, as I understand it, on a one-count issue is Rothstein.

**MR. SCAROLA:** Yes, sir. I refer to it

as a counterclaim only because that's the procedural posturing in which it arose.

But, when a voluntary dismissal was taken with regard to all claims against Bradley Edwards, it's no longer a counterclaim. It's now our claim against Mr. Epstein.

**THE COURT:** And while it has its genesis in the original action filed by Epstein against Rothstein, Edwards and L.M., the fact that simply because it has its genesis there, as I was trying to think this through among the other materials that I had to review -- and they were substantial -- is that can it not be argued that the only connection between Rothstein's claim bought against him -- strike that.

Epstein's claim brought against Rothstein, the only connection that is even arguable, is that, in fact, the Edwards' case had its genesis in the fact that Epstein originally brought the claim against Rothstein, Edwards and L.M., and then voluntarily dismissed the case at the eve of summary judgment.

I.e., is there any law that supports the proposition that this would, in fact, be a separate action at this juncture having no technical, even legal connection, between the claim brought by Epstein against Rothstein for some type of conspiracy issue, and what is now a separate malicious prosecution claim -- albeit having its genesis in the original Epstein action -- but having nothing shared at this juncture, either technically or legally, other than a case number?

**MR. SCAROLA:** Your Honor, I think that that is flawless logic. We are here to try our claim against Epstein on a fourth amended, quote, unquote, counterclaim that is really a separate action.

But while I understand the Court's reasoning and agree with it, we don't need to try to technically call this something other than what it was derived from, and that is a counterclaim.

Because the law is very clear that this Court has the discretion to sever for separate trials a counterclaim. And that's

the second -- excuse me -- that's the Third DCA case that we cited to Your Honor, Turner Construction Company versus ENF Contractors.

And let me hand -- let me hand the other copy of that to Your Honor.

So we can assume -- without needing to reach the argument as to whether this is or is not still a counterclaim -- we can assume that it is a counterclaim. There is no question about the fact that it's a permissive counterclaim.

And we are in a position, whereas the Third District Court of Appeal observed, it is within a trial judge's discretion to sever a permissive counterclaim from the main claim if there is no evidence of prejudice.

And I was very pleased to hear Mr. Link and Ms. Rockenbach stand before the Court and tell you, We are ready for trial. Because that's what they told you. They told you that back -- they told you they would be ready back in December, and they are telling you again, We are ready for trial. We are not asking for a continuance.

We only want to remove a technical defect that might have us try this case twice.

Well, I assure Your Honor, there could not be a clearer example of waiver on our part of any technical difficulty than I am asserting to the Court right now that could never and will never be the basis for any appellate argument on our part.

So, next, the Court goes on to say, "An appellate court will not interfere with procedural rulings of a trial judge, unless a party is deprived of a substantial right by the procedure employed."

So let's look at the procedure employed, and what the unanimous Fourth District Court of Appeal told us in Labor Ready versus the Australian Warehouses Condominium Association.

**THE COURT:** And again, the mule of me wading through these documents, if you can hand me cases as we go along, I will appreciate it.

**MR. SCAROLA:** Absolutely.

**THE COURT:** Thank you.

**MR. SCAROLA:** This is our appellate

court speaking through Judge May, as I said, an unanimous opinion joined in by Judge Gunther and Judge Farmer. And I am looking at the third page, the last page of this copy, Your Honor, and it's the highlighted language.

"This is not a case where the case had never been at issue." Nor is this. "This is not a case where the parties did not have sufficient time to prepare." Nor is this. "This is not a case where anyone was prejudiced by the technical amendments to the complaint." There they were talking about adding a punitive damage claim to the complaint.

"In situations where the parties have received actual timely notice of the trial, they are precluded from arguing prejudice based upon a technical violation."

Here we don't concede that there is any technical violation at all. But even if there were to be, the Fourth DCA says not a basis to disturb a trial court decision when there is no evidence of prejudice. And we are being told no prejudice.

**THE COURT:** Speak to me again about the issue where, in a setting such as this, if both matters were to be tried together, the position that your client would be in having to prosecute his claim and in essence try potentially try to defend Rothstein at the same time.

**MR. SCAROLA:** Yes, sir. I think that that's really clear. The allegations against Mr. Rothstein are, even in this later version of the complaint, basically identical to the allegations that were made against Mr. Edwards. It is the complaint upon which a voluntarily dismissal was taken as to Mr. Edwards.

So the jury is told in a default circumstance all of the allegations must be accepted as true. And the only issues that arise are issues with regard to causation and damages.

We are contending that there could be -- first of all we are contesting the underlying allegations. The jury is being told accept them with regard to Rothstein. You can't accept them with regard to

Epstein, they are contested.

So that's the first problem. One jury being told to assume two different things.

The other problem is, we are contending that there could be no damages incurred by Mr. Epstein as a result of anything that went on with regard to a Ponzi scheme in which he was not an investor.

We are also contending nothing about what went on at Rothstein, Rosenfeldt & Adler can form the basis for a claim because of the litigation privilege, absolute immunity of the litigation privilege.

So the defense -- excuse me -- the plaintiff in the Epstein versus Rothstein case begins their case by putting on proof about how Mr. Epstein was alleged to have been damaged by these absolutely immune activities.

What do I do at that point? I must stand up every time any of that evidence is being adduced before the jury, and I must object on the basis that this cannot apply to Mr. Edwards. I'm in the position of defending Mr. Rothstein, of objecting on the

causation grounds, of objecting that no injury could have been caused, of objecting on the basis that this is all absolutely privileged information. And from the perspective of the jury, I am now defending this man who is sitting in federal prison for 50 years.

And that simply creates extraordinary prejudice to my client. It creates confusion on the part of the jury, and it is absolutely unnecessary; and, indeed, under these circumstances procedurally precluded because there is no default against Mr. Rothstein.

So this Court has discretion to solve the problem. You simply sever the permissive counterclaim or the separate action, and you allow us to proceed to trial on a case that Mr. Epstein's lawyers have said they are ready to try.

Let's do it. Let's go to trial. They said they are ready. The Court has the ability to cure whatever obstacle conceivably exists to trying this case.

My client finally deserves the

opportunity after 3,000 whatever it is days to be exonerated publicly of the terrible charges that were lodged against him and hang out in the air and hang out in the cloud and hang out in the Internet some nine million point six hundred thousand times. We would like our day in court, sir.

I am pleased to answer any other questions Your Honor may have. But clearly the Court has got discretion to do what we would like you to do. Justice demands that you do what we would like you to do. Thank you, sir.

**THE COURT:** Thank you, Mr. Scarola.

Mr. Link.

**MR. LINK:** Yes, sir.

**THE COURT:** As I mentioned, and I want to give you the opportunity to comment on this point.

In trying to think this through and rationally engage in a discussion, quote, technically and practically, I start with a proposition that the last amendment to the complaint that was filed on behalf of Epstein was solely against Rothstein on a

singular count.

**MR. LINK:** Yes, sir.

**THE COURT:** Clearly that was done after what was termed in quotation marks that I am using, a counterclaim filed by Edwards at a time when Edwards was, in fact, a named defendant in that particular action by virtue of Epstein's decision through counsel, presumably, to no longer include Edwards as a defendant in that action, the terminology and the trappings that would otherwise go along with a pleading entitled counterclaim would dissipate, would legally disappear, in other words, had Mr. Edwards and counsel decided to file a separate action.

**MR. LINK:** Yes, sir.

**THE COURT:** Had this case gone away in its entirety -- let's say, just for the heck of it, that Epstein decided to completely walk away from the lawsuit in its entirety, just walk away --

**MR. LINK:** Could have happen.

**THE COURT:** -- as many do, okay, there was no longer a counterclaim, it is now --

and has really always been, since the time that Epstein -- strike that.

That Edwards was no longer a defendant in the case, a separate action, no longer a counterclaim, technically or practically, because there was no pending claim against Edwards, at least as late as the second amended or whatever iteration of the complaint that was filed in September of 2011.

**MR. LINK:** Yes, sir. I understand that. It's really easy. On Friday Mr. Scarola figured this out. We have had this case for nine years. His client was dismissed in 2012. Why didn't he come here in 2012 and say, Judge, this is no longer a counterclaim, I want my own suit? If he had preceded --

**THE COURT:** I don't think he needed to do that. Why did he have to make a declaration of such, when by operation of law -- again using September 11th, the last iteration of the complaint filed by Epstein against Rothstein only --

**MR. LINK:** Yeah.

**THE COURT:** -- there is no longer the trappings, the necessity of a counterclaim. There is no pending claim against Edwards by Epstein. It essentially -- it essentially morphs, then or becomes -- better stated -- a separate action, because counterclaim no longer applies. It has no application whatsoever. It's a separate action.

The only thing that it shares now --

I will give you a chance in a moment. I apologize.

**MR. LINK:** No, you're doing great.

**THE COURT:** The only thing -- the only thing that it now shares is a common case number. That's it. Okay.

**MR. LINK:** That's no longer important.

**THE COURT:** There's no longer any relationship --

**MR. LINK:** Not true.

**THE COURT:** -- Epstein versus Rothstein is separate and apart, and has absolutely no connection at this stage of the game -- now there may be some tangential things that are shared in terms of the nature of the case, and some may even suggest that if they were

both separately brought that it could constitute a transfer.

**MR. LINK:** Yes, sir.

**THE COURT:** Because it involves, at least arguably, the same transaction and occurrences that may have transpired here. It may even suggest the potentiality of consolidation. Though, on further review if it would come before me and there would be argument against it, the likelihood -- and I'm just speaking generically. I'm not suggesting how I am going to rule on anything that's not before the Court -- but arguably, it could be denied because of -- I wrote down here before Mr. Scarola mentioned it -- confusion of issues before the jury and the potential, the real potential of prejudice when you inject a convicted felon with the notoriety of Mr. Rothstein, who is sitting in prison for the rest of his life, that's made international news, that continues to be shown on CNBC -- I forget the name of the show that has to do with greed -- and what's happened now with Mr. Edwards, in terms of the separate action

that he has brought, albeit, again, having the genesis of the original claim, that has been dropped. But there's nothing that would have prohibited him from bringing a separate action, nothing that would prohibited severance a long time ago that I can think of, because of the fact that they no longer have any interrelationship legally.

Now, again, I will grant you that factually there may be some overlap. I'm not suggesting that. But from a purely legal standpoint, this separate action, there is nothing that I can think of that would necessitate these two matters to be tried together.

And the fact that substantial confusion could be operable here -- as argued by counsel and as written down by the Court, even before the mention of the word -- and the prejudice that would be done here, may even create a better forum for each of the parties to get their justice that they are seeking, i.e., Mr. Epstein's damages against Rothstein. I am not sure whether causation

becomes an issue or not. I think it's simply a matter of damages, but that Rothstein has the opportunity to defend himself against.

But Edwards, on a totally separate legal theory, and in a case that now bears no semblance to a counterclaim, has his right to seek justice in a timely fashion as well. Why not?

**MR. LINK:** My turn?

**THE COURT:** Yes.

**MR. LINK:** Okay. So many things to say.

First, Judge, you nailed it. In 2012 Mr. Scarola could have come to this Court and said all the things you just said.

**THE COURT:** What is preventing him from having it now? What's prevening it from happening now? Why can't I follow what I perceive to be, as often is the case, as I mentioned this probably before, the practical nature of a judge like Judge May from the Fourth District of Court of Appeal, taking the bull by horns, as she often does, has the gift of being able to clarify and

distill often very complex matters, to provide not only legally correct results, but practically correct results, which is why I admire her writing and the way she goes about things.

**MR. LINK:** As do we, Judge.

**THE COURT:** Why is it that somehow this technicality, which really is -- which has, in my view, no bearing on the legal -- on the legalities of the situation, whether were technically oriented or were practically oriented.

But there's no denial of the fact that this is separate, that this really is no longer a counterclaim and hasn't been for the last seven to eight years.

**MR. LINK:** Judge, we disagree with that. I don't think it's that simple, I really don't. I think we're confusing two issues, and let me start there.

There is the issue of severance. It is clearly within this Court's discretion to sever this case. We are not disputing that. We are not saying you should. We thought we were talking about whether the case was at

issue.

But we can talk about severance and whether it makes sense or not. And this Court needs to understand, no matter what Mr. Scarola wants, Mr. Rothstein is going to be part of this trial, whether we are suing him or we are defending their counterclaim, because this case is all about whether we can demonstrate that there is a connection between Mr. Edwards and Mr. Rothstein. That's what he says caused him harm.

We're going to be looking at evidence at some point in which we believe with 100 percent certainty we can make that connection.

**THE COURT:** The connection between what?

**MR. LINK:** Between Mr. Edwards and Mr. Rothstein discussing the Epstein cases and getting around court scrutiny.

**THE COURT:** And that's fine. Why didn't you plead it and maintain the claim when you had the opportunity to do that? Instead there was a dismissal of the claim against Edwards and an abandonment of those

claims back years and years ago. And a choice was made to proceed only on a one-count complaint against Rothstein as of September 2011, thereby, as I indicated earlier, losing any trappings, losing any indicia of counterclaim, at least by that point and likely before that, because there were several iterations of the complaint that were amended, subsequent to the dropping of Edwards from the claim, thereby no longer making it a counterclaim. It was in name only. It had no legal significance whatsoever, except by name.

**MR. LINK:** It does, Your Honor. The legal significance, if I can approach, is laid out in our pretrial stipulation.

And the case law is really clear. When lawyers enter into a pretrial stipulation, Your Honor should follow it.

**THE COURT:** And I am wholeheartedly in agreement.

Let me stop you there, because, again, you have argued it, and I don't want to make a short trip to that.

Then Chief Judge Ciklin in a case --

that slips my memory as far as its name is concern -- spoke eloquently and at length about the sanctity of the pretrial stipulation.

So before I even read it, and what it says here, you quoted from it, that's what I read it. I didn't go back and look at the pretrial stipulation itself, among the -- just so everybody knows -- among the 1,239 docket entries here. So I don't want anybody to suggest that it was simply by virtue of laxity that I did not review the actual brief.

**MR. LINK:** Judge, there's none of us in this courtroom that have any doubt about how much time you have put into this case.

And unfortunately there are probably papers filed that you haven't even received yet; filed before we got the notice.

**THE COURT:** You got my rather brief response.

**MR. LINK:** The brevity was hard to miss. We got it. And we filed these before.

But the reason this joint pretrial stip

is important, Judge, is you keep saying they are not the counterclaim Plaintiff, and Mr. Scarola and I negotiated this together. We wrote it together, we made changes together. And every part of this pretrial stip and the jury instructions and everything we submitted to the Court sets this case up to be tried, Epstein against Rothstein, first issue to be cited, says right in there.

The second issue to be cited, Edwards versus Epstein. We've laid out how we're going to try this case. We've attached exhibit lists, witness lists. We do stipulated facts, Your Honor.

So there is no part of the pretrial that we entered into, long before Mr. Scarola's motion at 5:00 on Friday asking to sever this case, that was ever contemplated by the parties.

We entered into an agreement, two lawyers. That's what a stipulation is. We entered into an agreement, Judge, on how we would try this case. Now Mr. Scarola wants to change his mind. This is our contract.

**THE COURT:** But it's interesting, because in this pretrial, here is what it says. Quote, case against Rothstein. What, if any, damages were sustained by Epstein and proximally caused by Rothstein?

**MR. LINK:** Yes, sir.

**THE COURT:** Parenthetically, continue the quoted provision. Edwards does not agree with this language for the reason that the issue as stated fails to tie causation to Rothstein's operation of the Ponzi scheme.

It is Edwards' position that failure to limit the issue in this way as to Rothstein has a potential of confusing the jury in determining whether Epstein had any probable cause to claim damages Edwards arising out of the same circumstances, end of quote.

**MR. LINK:** Which means if you limit it, that prejudice is gone. That's what he's telling you. He agrees to this issue. He doesn't like the way I framed it. That's the difference.

If I put his language in, which tied it to the Ponzi scheme, he wouldn't have added

that. So all he is saying is, Judge, I agree it's going, but I don't like Link's language.

That is not him saying I reserve the right to not go forward with this claim.

And when you read through this contract between me and Mr. Scarola, as two officers of the court, and Judge Ciklin's opinion, and everybody else's, we are supposed to be bound by what we say here.

So that means, yes, you have discretion to sever cases, you always do. Severing the case, if that's a decision the Court makes, doesn't change the fact, that when Mr. Scarola noticed this case, the one we have a pretrial stip on, Judge, the one you entered an order on, which was the case, was not at issue. We don't like it. It is what it is. It's the law.

And one of the differences in what Mr. Scarola say and what the law is, is that every case where there was a waiver or technicality was post jury trial.

The Fourth DCA has said mandamus is appropriate, it requires no prejudice, it

requires you to follow the law.

**THE COURT:** So what Mr. Link is saying, Mr. Scarola, is that if I grant the motion for severance, this case is going to go up on a writ or mandamus?

**MR. LINK:** I don't mean it in a threatening way, Judge.

**THE COURT:** I don't take it that way.

**MR. LINK:** But that is the truth.

**THE COURT:** McLean Stevenson once said to Frank Burns, "Frank, you've gone over my head so many times, I have footprints on my scalp."

**MR. LINK:** Here is the easy fix. We don't need mandamus. If you decide to sever the cases for whatever reason, 20 days from today, Mr. Scarola can notice his case for trial and you can set it for 30, and we will be here to try the case, and we won't seek a continuance.

I don't think you should sever them, but that's within your discretion. But you can't fix today what was wrong in May, that's the problem.

**THE COURT:** The pretrial stipulation,

just for record, the case I keep on my bench is Palm Beach Polo holdings, Inc., et. al versus Broward Marine, Inc. I have the original email from the Fourth District Court of Appeal copy. So I don't have a cite for you, but it's from 2015. That's easily accessible if you'd like to read it.

**MR. LINK:** Thank you.

I know Mr. Scarola said they're excited to try the case, believe me, Judge, we are really excited to try the case.

The evidence that we recently discovered --

**THE COURT:** Then waive the technicality. If you are so excited about it, then waive the technicality.

**MR. LINK:** I won't do that, Judge.

**THE COURT:** Well, repeatedly you indicate that -- you have indicated today how excited you are about trying the case.

**MR. LINK:** I am.

**THE COURT:** Yet --

**MR. LINK:** With the best judge in the circuit.

**THE COURT:** Thanks.

**MR. LINK:** For this case. How's that? So I don't get in trouble with the other judges. Did I save myself there?

**THE COURT:** Another TV show. Quit telling her how beautiful she is, we all know you are lying. You can figure that one out yourself. But anyway -- that's the husband speaking about.

**MR. LINK:** I am excitedly cautious and I cannot waive the legal right.

**THE COURT:** Well, that's what I'm trying to say about your excitement. The repetitive statement made in the motion is that your client is unwilling to waive the technical issue.

**MR. LINK:** We don't think it's technical. I think that's the difference.

**MS. ROCKENBACH:** May I just jump in?

**THE COURT:** It is my respectful view, hyper technical under these set of facts. The hyper technicality arises because of what I have already explained in detail. And that is, that this is really not a counterclaim, and hasn't been a counterclaim since Mr. Epstein made his decision to drop

Edwards from the case, which only provided the genesis for what was at the time a counterclaim technically. Perhaps even that might be able to be argued because of the fact that it came after the dropping of Edwards as a party to the claim. But certainly, without equivocation, after the second and third and whatever else iterations of the complaint as amended as of September of 2011, there was no semblance of a counterclaim because he was no longer a party defendant in the claim made by Epstein against Rothstein only. And that's where I'm talking about hyper technicality, that despite the eagerness on the part of Epstein to try the case, as enunciated by Mr. Link repeatedly --

**MR. LINK:** Mr. Link's excitement.

**THE COURT:** Well, I presume always that counsel is speaking by and for his or her client.

**MR. LINK:** I am, Your Honor, but I am personally excited.

**THE COURT:** Good. But again, it is without the willingness to waive the hyper

technicality.

Ms. Rockenbach.

**MS. ROCKENBACH:** Your Honor, I just wanted to add an appellate point. It sounds like you and I are both mutual fans of Judge Melanie May's clarity. She authored both of the Fourth DCA's decisions that you are guided by, the genuine parts decision as well as the Labor Ready decision. And it -- submitted to the court, is not a hyper technicality in that the rule says shall, it's mandatory rule, and that is what Judge May was noting and approving and recognizing in the progeny of cases that existed before those two decisions. I am referencing the Bennett case.

What this Court has recognized is that Edwards could have but did not move to sever this case back in 2011 when Edwards was dismissed.

**THE COURT:** Was there a need to do that?

**MS. ROCKENBACH:** Yes. Absolutely. I was thinking about this. In other instances, I have had counsel come up and

tried to swap party names and drop, and switch, and -- you can't just do that. You have to actually -- I think there's an administrative order on it. I think you have to go to the court do it.

But in this instance, you absolutely -- Mr. Edwards had the onus to come before this Court and say a few things. He could have made his case separate. He didn't, he chose not to. He waited at least seven years or six and a half years, by my count, to come on Friday after 5:00 p.m. to file a motion to sever the trial and use the at issue as an excuse to sever.

He didn't move to sever previously. It was not at an issue when he filed his motion on May 24th, 2017. And there is no case that Mr. Edwards -- no case that I could find -- and I looked -- and there's no case that Mr. Edwards has presented to this Court that says, you can cure the mandatory rule or defect of 1.440 by severing a counterclaim or a cause claim.

The last point I would like to make is Mr. Scarola said the rule 1.440 says a

party. It says, "any party." And that's significant. The reason why it says any party is that rule talks about crossclaims. It talks about counterclaims. It talks about any party.

So any party could have moved to set it for trial. And when Mr. Edwards moved, he didn't move as just Mr. Edwards trying to set his counterclaim for trial. He moved the -- the language is in my motion, and I am sure it's in the Court's extensive docket -- he move to set this case, quote, unquote, and quote, above-style cause of action, quote, unquote.

So he clearly could have moved to sever at that time. He did not. He waived the right to timely sever the action. And we ask that the Court grant the default against Rothstein today, unless there is argument to be made, and --

**THE COURT:** How does this change, though, your trial preparation if I sever the case today as opposed to I severed it -- Judge Crow, my predecessor, severed it back in 2011 when it no longer was a

counterclaim, it was a separate action sharing only the same case number?

**MS. ROCKENBACH:** It changes the ability for Edwards to file a ripe 1.440 notice. Because it was not severed, he noticed the entire action for trial when the action wasn't at issue. So severing doesn't cure it.

**THE COURT:** Well, I am asking you, tell me how, for the record, how it affects your trial preparation or your presentation at trial? I think you need to get that on the record.

**MR. LINK:** Yes, Your Honor. It doesn't change our trial preparation. It changes how we try the case. There is a significant difference in me being the Plaintiff in the case and going first and my burden of proof than what Mr. Scarola wants to be is the plaintiff.

And he had a choice. He could have filed a separate action, and he would have been the plaintiff.

He chose -- he chose the vehicle. He doesn't like his vehicle today. He decided

on Friday he didn't like it. But he chose the vehicle of a counterclaim. That means I go first, he goes second. He hates that idea.

So it changes and it's prejudicial if these cases are severed, because they are so intertwined, Your Honor. I can't even think of a case that's not more intertwined.

**THE COURT:** You have the right to go first if the Rothstein case is before this court.

**MR. LINK:** In that case. But I have the right to go first in this case because he has the counterclaim.

**THE COURT:** I don't agree with you there. How do you have that right?

**MR. LINK:** Because I am the plaintiff in the case, I go first.

**THE COURT:** You are the plaintiff in the case against Edwards.

**MR. LINK:** No. But the first issue we described in the pretrial stip that's going to get tried is my issue against Rothstein, that means I go first.

**THE COURT:** I agree with you there.

**MR. LINK:** I don't go first in the trial.

**THE COURT:** That's precisely the question I asked and it was not answered correctly.

**MR. LINK:** Sorry.

**THE COURT:** That's okay.

I just want to make sure that we are clear that if consideration is given to trying both of these cases that Epstein would be able to prove his damages claim against Rothstein.

**MR. LINK:** Yes.

**THE COURT:** But as it relates to issues on the counterclaim -- we are calling it the counterclaim -- the claim brought by Edwards against Epstein clearly, in that particular action, Mr. Scarola would be bringing his witnesses first.

**MR. LINK:** Absolutely, Judge. I think I spoke poorly. I appreciate you correcting that.

But the way the pretrial is setup and the way the case is structured, the first case the jury will hear will be my case

against Mr. Rothstein. Then Mr. Scarola will present his case, and we will defend that.

So one of the things that's in my mind that I can't let go of, is how do we sanitize Rothstein from this case -- that's what Mr. Scarola wants to do -- when his whole claim against is we wrongly filed a pleading that connected Mr. Edwards to Rothstein. That's what Mr. Edwards has said has kept him in anxiety every single day since December 2009, the connection to Rothstein.

So, they have the burden of proof to show that we didn't have probable cause to make that allegation.

I promise you, Your Honor, when we get through the evidence, you will see there was plenty of reason to make that allegation.

So I don't know how you sanitize Rothstein from this case. So if he's going to be in case, isn't it more efficient to do it once? That's what the pretrial says. Mr. Scarola and I contracted to that.

The issue that really is the

struggle -- and I get it -- the struggle is, yes, these two cases are intertwined. Is there some machination I can do that would put this case at issue? And the answer is you can't. There's nothing you can do to cure the May defect, Your Honor. That's the problem. I know that's what you would like to do. I get it.

**THE COURT:** Let's take a five-minute break. We will be back momentarily. We will be in recess. Thank you.

(A recess was had 11:15 a.m. - 11:24 a.m.)

**THE COURT:** Mr. Link, did you finish your argument on the issue?

**MR. LINK:** I am confident I did, but, you know, it's hard for me to turn down an opportunity to say more. But, no, Your Honor, I think we said it all.

**THE COURT:** Thank you very much.

Mr. Scarola, the one thing, again -- well, not the one thing -- multiple things that went through the Court's mind when I was dealing with this was the question I posed to Mr. Link, and that is, that the pretrial contemplation of the case -- of the

action being tried together. And the anticipated response to my question that trial strategy -- albeit now that we have ironed out the way in which the order of proof will proceed -- could be materially effected, and thus prejudicial to Mr. Epstein's position if the cases are not tried together as noticed.

Your thoughts.

**MR. SCAROLA:** Yes, sir. I don't understand what unfair prejudice possibly arises to Mr. Epstein when the jury is instructed that they must consider these cases separately.

The only prejudice would arise if Mr. Epstein is permitted to do what it is now obvious Mr. Epstein plans to do, and that is to use his case against Mr. Rothstein to improperly influence the jury with regard to Mr. Edwards' claims against Mr. Epstein.

The Court recognizes the fact that there is tremendous danger of confusion and prejudice if these two cases are tried together, following the plan that it has now

become evident Mr. Epstein plans to follow.

What unfair prejudice arises if these two cases are tried separately? The answer to that question is, there can be none. And one of the reasons why there will be none is, the separate case against Mr. Rothstein, I predict, will never be tried.

If it is ever tried, it's a one-day trial. It's a jury selection without any opposition; there's a presentation of a case without any opposition; there's a closing argument without any opposition. The case is over in a day. And what they get, if they get anything, is an uncollectible judgment.

**THE COURT:** What about the pretrial stipulation? Judge Ciklin speaks, again, at length, about the sanctity of the pretrial stipulation.

**MR. SCAROLA:** Yes, sir.

**THE COURT:** He calls it the attempt is to, quote, avail ourselves of the opportunity to once again stress the tremendous efficacy of The Pretrial Stipulation. He puts each of the words,

"The Pretrial Stipulation" in capital letters -- strike that. In capitals to start each of those words, and drops a footnote stating, quote, out of respect for and to dignity the use of The Pretrial Stipulation we have intentionally capitalized the name of this important trial efficiency tool, end quote.

**MR. SCAROLA:** And Your Honor, has noted the operative language. Your Honor has noted the reservation that is preserved in that pretrial stipulation about concern for prejudice.

So there's nothing in that pretrial stipulation that supports the position that is being argued on behalf of Mr. Epstein, and that is, that we have somehow agreed that we are going to delay our right to trial by jury while we wait -- perhaps forever -- for the claim against Mr. Rothstein to be placed at issue.

They can't get a default today. There's been no notice. I don't know whether they're ever going to get a default.

We become hostage to their decision

about whether they are going to proceed against Mr. Rothstein if Your Honor accepts the argument that they are making.

Now, I have had substantial experience before this Court. And your Honor is not a Judge who has ever been deterred from doing what you consider to be the right thing to do because there's the threat of an appeal.

They want to petition for writ of mandamus, bring it on. And if the appellate court believes that the arguments that are being made today have merit, we will know before we finish our preliminary screening of the jury on Tuesday.

The Court will act immediately, knowing that this case is going to proceed to trial. And whatever concerns Your Honor has -- and there should be none -- whatever concerns Your Honor has will get resolved very quickly under those circumstances.

If there has ever been an argument for waiver -- if there has ever been a clear demonstration of no prejudice, this record establishes that.

Judge May's words, "Depending upon the

circumstances, the mandatory provisions of rule 1.1440 may be waived."

They have been waived. They agreed that this case was going to be tried without any further delay starting next week. They told Your Honor they would be ready for trial. They told Your Honor they are not asking for a continuance. They told Your Honor they are ready and anxious to try this case.

There has been a waiver of any technical objection that might exist, but there's no technical objection. There is no technical objection.

This is a separate claim. It has proceeded as a separate claim. It was noticed for trial as a separate claim. There is nothing in the pretrial stipulation that suggests otherwise.

We have not stipulated with regard to anything having to do with the Rothstein case, because we don't represent Mr. Rothstein. His signature and no signature of counsel of his appears on that pretrial stipulation.

This pretrial stipulation relates to the trial of what is a separate cause of action by Bradley Edwards against Scott -- excuse me -- against Mr. Epstein.

Judge May, again, "Here the complaint was filed in 2002. The parties had adequate time to prepare for the hearing, and the trial court had provided the parties with the requisite 30-day notice. There was no ambush or violation of the procedural safeguards that Rule 1.440 was designed to protect. That's this case.

There is nothing but, at very best, a hyper-technical argument that is being raised. They are refusing to waive it, because they don't want this case to ever be tried.

And if Your Honor is concerned about the mountain -- the avalanche of paper with which this court has been assailed, I can assure you that it isn't going to stop if we don't start on Tuesday. It's going to get worse.

The defense, in violation of this Court's order, last week listed 724 new

exhibits that they want to use. And they are going to use this hyper technicality to say the pretrial order was invalid because the case was not at issue; a new pretrial order needs to be issued; discovery is not yet closed; we have an opportunity to proceed to take additional discovery; and we can amend our exhibit list, and we can include 724 new exhibits, and more which they say they are still finding.

The only way to put an end to this is to proceed to trial as Your Honor informed everyone we would, in no uncertain terms, the last time this case was reluctantly continued by this Court.

So again, my client has been waiting for nine years to clear his name from the defamatory allegations that were made against him in a maliciously filed lawsuit.

He was accused of heinous crimes, of being associated with one of the most massive Ponzi schemes in history. And the only way he can effectively exonerate himself is by getting his day in court, and he deserves to have that now.

So the solution is very simple. Whether it's a claim or a counterclaim, you have the discretion to sever it. It gets severed. The case is at issue. It goes to trial.

We are ready to proceed, and we ask you for the right to be able -- enforcement of the right to be able to proceed. Thank you, sir.

**THE COURT:** Thank you, Mr. Scarola. Thank you, Mr. Link and Ms. Rockenbach, as well.

**MS. ROCKENBACH:** Your Honor, may I hand the Court one case? I apologize. It's cited in my motion. May I approach?

**THE COURT:** Sure.

**MS. ROCKENBACH:** It is the Bennett case. Because --

**THE COURT:** I have it. Bennett versus Continental Chemicals?

**MS. ROCKENBACH:** Right.

And just to respond to Mr. Scarola with regards to --

**MR. SCAROLA:** I'm sorry, Your Honor, can we put an end to this, because there's a

lot that we need to do?

**THE COURT:** I thought that she just wanted to mention the case.

**MS. ROCKENBACH:** I do.

**THE COURT:** I have it here and I have it highlighted. I have reviewed the highlighted provisions of the case.

**MS. ROCKENBACH:** Thank you. It is about the fact that you can't cure the defect.

**MR. SCAROLA:** I'm sorry. I'm objecting to further argument, Your Honor, and ask that we please move on.

**THE COURT:** I will give you a minute to finish up.

**MS. ROCKENBACH:** Thank you, Your Honor.

In Bennett, the party, just like Mr. Edwards is doing here, suggested to the court to sever in order to fix the rule 1.440 deficiency, and the appellate court said no you can't do that, and "The procedure for setting actions for trial is simple, but many attorneys are careless about it. They serve a notice for trial prematurely. This requires a motion to

strike. And there's not excuse for failing to follow the rule." And it goes on about how the rule is not directory, it's mandatory.

So this Bennett case speaks to exactly what is evolving here in terms of the severance issue. It doesn't correct the defect. Thank you.

**THE COURT:** Thank you.

**MR. SCAROLA:** Does Your Honor want a response?

**THE COURT:** No.

**MR. SCAROLA:** Thank you, sir.

**MS. ROCKENBACH:** And, Your Honor, we do have a motion for default that we filed simultaneously. And I have a proposed order for the Court.

**THE COURT:** Thanks.

I don't know if you've looked at the O'Brien versus Florida Birth-Related Neurological Injury Compensation Association, a case which is from the Fourth District, which indicates that it negatively treated the holding -- at least one of the holdings in Bennett versus Continental. And

it is a Fourth District Court of Appeal case, similar to the reliance by Epstein, principally, on the Gawker versus Bollea case. Bollea, if I recall correctly, is Hulk Hogan from wrestling.

**MS. ROCKENBACH:** Correct.

**THE COURT:** But again, this Labor Ready case, authored by Judge May that we have been speaking about, declined to extend the Gawker case to its handling of the Labor Ready case from the Fourth.

I haven't seen the O'Brien case. I will give it a real quick look, so that I can be as comprehensive as possible.

**MS. ROCKENBACH:** Is that at 942 So.2d 1030?

**THE COURT:** It doesn't give me a citation in this. It just says Fourth District Court of Appeal. March 18th, 1998 is the date of decision. It doesn't give me a cite to report.

But I can look it up real quickly. 710 So.2d 51.

**MS. ROCKENBACH:** I am reading that case right now, Your Honor.

**THE COURT:** By the first blush it doesn't look like it has anything to do with --

**MR. LINK:** We don't see a reference, Your Honor.

**THE COURT:** It talks about fundamental error, is really what it goes to.

It cites to the case and its citation is, quote, We have not been as willing as some of our sister courts to find fundamental error where an objection had been raised by the trial court -- strike that -- had been raised in the trial court. The error could have been corrected and a new trial would have been unnecessary.

One of the string of cites cites that Bennett case. There is no specific application of that case to this one here.

My ruling is as follows: The Court has in preparation for this hearing carefully weighed the respective positions taken by the parties. And I appreciate the well-written briefs and the well-articulated positions taken as it relates to this issue.

The controlling case here in the Fourth

District, as far as the Court is concerned, is the Labor Ready Southeast, Inc. versus Australian Warehouses Condominium Association case. But not so much for the Court's position that it's taking as it relates to waiver, which the Court will use as a secondary proposition in its ruling today, but more so the spirit and intent of the case and the message that Judge May and her colleagues, in my respectful view, sent to the trial courts and the litigators, particularly here in the Fourth District Court of Appeal jurisdictional area.

The primary ruling and what the Court is going to determine here is that it will sever the claims and will try and proceed with the Edwards versus Epstein matter commencing as scheduled on Tuesday, March 13, 2018.

Today being, for the record, and for ease of review, March 8th, 2018. Reference being made to Friday, March 2, 2018. So, again, for ease of review.

Because, frankly, when I'm reading appellate briefs sometimes from the county

court, it makes it so much easier when the trial judge sets forth the dates as opposed to having to go back and try to reconstruct the timeline when the court is making its ruling.

The severance is based on the fact that there is no legal relationship between the Edwards case against Epstein and the damages claim by Epstein against Rothstein solely on a singular-count-amended complaint -- again, forgive the lack of specificity as to the iteration of the amended complaint -- but again, as late as September of 2011 -- six and a half years ago -- and the fact that the Epstein team failed in its capacity, as reasonable trial lawyers, to have secured the default, if it sought same, so as to, in good faith, maintain its claim against Rothstein.

I have no recollection whatsoever of anything coming up during the approximate four years that I have presided over this case in division AG of anything whatsoever having to do with Mr. Epstein's prosecution of that one-count complaint against

Rothstein from that September 2011 amended complaint.

Meaning the entire focus of this Court in the multiple hearings that have been held, in the deluge of paper that -- in part the Court brings on itself because of its preference to have the hard copies, as opposed to utilizing modern technology and solely the computers. It's much easier for me, frankly, and my eyes, physically, to have the paper. It's not because of necessarily wanting it. It's more so because of it's easier on my eyes and causes much less strain on my eyes than having to rely on just the computer copy. I wanted you to know that as well.

So severance in this case, whether it was done in September of 2011 or even before that, when the -- what is called the counterclaim, but in this Court's view is not. It may have been because at the time back in December of 2009 -- if I'm not mistaken is when the Edwards claim was brought in against Epstein. That's the approximate time.

So now we're dealing with approximately seven years ago -- seven plus years ago from the time that the action was brought by Mr. Edwards against Epstein.

Technically, because there may not have been an order signed by the Court, whatever closing documents that are usually and customarily dealt with in closing out a file, may not have been in the court file at that time, perhaps, technically, it constituted a counterclaim. But undeniably, the trappings, the name, the legal effect was not a counterclaim at all, and certainly bore no semblance to a counterclaim once Rothstein dropped Edwards -- once Epstein dropped Edwards -- I apologize -- and proceeded solely against Rothstein.

And whether severance took place or a separate claim would have been brought in December of 2009 -- albeit because of the potentiality of the pleadings not being closed, so to speak, as to Edwards at that particular time, so it may have been called a counterclaim. But certainly, and without equivocation, once that case shifted -- now

Mr. Epstein didn't have to shift it. But it was by his own doing. He shifted it, because he no longer had Edwards as a defendant in the case. He took that operative step.

So it was in name only that this continued having the moniker of a counterclaim, but it wasn't one. It had the genesis in Epstein versus Rothstein, Edwards and L.M. case so as to permit Edwards to bring the claim against Rothstein. But undoubtedly, it no longer was a counterclaim for at least the past seven or eight years.

And in name only, I am not going to remove this case from the docket on what is unquestionably here a hyper technicality.

If I'm directed by the Fourth District Court of Appeal to do so, I will, as always, assiduously follow their order. But I do not believe here -- because the focus of the last eight years has been Edwards' claim against Epstein. And in reality, in name only, since the dropping of Edwards from Epstein's case, his own voluntarily dismissal of Edwards, creating a separate

claim, albeit having its genesis, as all malicious prosecution claims do, in that prior action, there is nothing that has been argued to today to suggest that a separate action has been, could have been, and, in fact, is at issue here. And that has been the focus, and the only focus that I am aware of, juxtaposing the Epstein versus Rothstein case here; that being the only focus has been for the last seven or eight years; and clearly the fours years that I have been presiding over this case, solely the Edwards versus Epstein malicious prosecution claim.

And again, I am not going to be bound, and I don't think any trial court should be bound by the choice of words that may have been used to name a given pleading.

It's a separate claim, and it has been. And clearly and without equivocation has been since, somewhat ironically, what has been brought this matter before the Court is the September 2011 claim that was solely brought by Rothstein -- I mean, by Epstein against Rothstein.

It essentially highlights the precise position that is being taken by this Court legally, factually and practically. And that's the best that I can do.

**MS. ROCKENBACH:** Thank you, Your Honor. I have proposed orders that just simply grant Mr. Edwards' motion to sever and denying Epstein's motion to remove.

And I also have a default for Your Honor, along with the motion for default, if you would like to entertain that as well.

**THE COURT:** Any objection?

**MR. SCAROLA:** We don't represent Mr. Rothstein, Your Honor. But I don't know how that default can be entered without notice to Mr. Rothstein.

He has a counsel, who has appeared in this case. That is, in that case. I don't know whether -- I'm not arguing. I'm expressing a concern.

**THE COURT:** Excuse me. And I apologize for interrupting.

What I was going to say is this. If he has had representation in the case, then he would have to be noticed in order for the

Court to enter a default.

**MS. ROCKENBACH:** Understood.

**THE COURT:** And since this is, again, a later iteration of a complaint to which my understanding was -- he did respond in some fashion originally through counsel or not? Or was he defaulted from --

**MS. ROCKENBACH:** Earlier on. I'm told by co-counsel early on.

We served it on Mr. Nurik, Mr. Rothstein's counsel. The question I am asking is whether it was noticed for hearing today. It went out yesterday.

**THE COURT:** That wouldn't have been an appropriate notice. So it would have to be re-noticed to Mr. Nurik, and we will proceed accordingly once what appropriate notice has been provided.

**MS. ROCKENBACH:** Correct.

**THE COURT:** I just want to make clear, as well, that I have taken into account, by virtue of the ruling that I have made, the contention that somehow trial strategy -- and that was at the behest of the court. I don't believe it was argued in the motion.

But again, in my efforts to try to be as fair as I possibly can to both sides, I raised it to hear from Epstein's counsel what, if any, prejudice would be done by virtue of the severance.

And again, respectfully, again, in my view, I believe that the response that was provided is, in fact, supportive of the Court's position here. And, that is, the added reason for the Court's severance is the fear of the Court, again, by virtue of its going through thousands of pages of documents by now, hearing scores of motions and being exposed to more, reviewing deposition transcripts, having the anecdotal knowledge that the Court has of Mr. Rothstein's criminal activity, and the fact that it is and was, and potentially continues to be, because of the media attention that remains -- just an example, being a CNBC special that continually runs on American Greed, I believe is the name of the show -- that this biggest Ponzi scheme in the history of state of Florida remains very fresh in the minds of many.

And hence, a second reason, a third reason for severance is the absolute danger of confusion relative to a jury's consideration of Edwards' cases versus Epstein's case against Rothstein solely.

While facts overlap, the Court can consider and would consider the confusion issues as well as the prejudice, undeniably, that would be done here if both of these cases were tried together.

Clearly, as I indicated at the inception of this hearing, I am not pleased by the events that occurred here. No court should be. The blame is several fold, including the individual who is sitting here, who ultimately is responsible for the execution of that trial order. So I have, to a degree, blame myself for the execution of that order. And ultimately I bear the responsibility of that, and I recognize that.

But at the same time, as I have mentioned on numerous occasions before groups of lawyers, who have been kind enough to ask me to speak on these types of issues,

just generally in terms of how we do things here, tips from the bench and the like, we so rely on the bar and exceptional lawyers that we have here in terms of our daily business.

That doesn't exonerate the Court in executing the trial order. But it sheds some light on the busyness of the Court, and the fact that we are, at the present time, as you know, responsible in each of the civil divisions of anywhere between 1,100 to 1,200 cases to 1,5' to 1,600 cases in some divisions. The lower number is done by design because one of our judges has agreed to handle the bulk of the tobacco litigation cases, so that Judge has a reduced caseload, deservedly so.

But it does highlight our expected reliance on counsel so that these things don't occur in the future. And it's a good reminder to all concern about how these things can crop up.

But here hyper technicality should not stand in the way of a pending matter of over 3,000 days and nearly nine years.

And again, I do not want this order to reflect a suggestion that the Court is willing to deviate from the dictates of 1.1440 -- strike that. 1.440. But instead, as I indicated before, the primary impetus here is one of severance for the reasons that I have tried to state as clearly and concisely as I can, balancing the rights, strategies and obligations of each party's concern, balancing what I perceive to be in the best interest of justice to all concerned, balancing the rights of Mr. Epstein to proceed against Rothstein, but at the same time recognizing the separate nature of Edwards' claims against Epstein; and the fact --

Again, while facts may overlap, it does not extinguish the proposition that the Court has indicated, and, that is, whether severance be done now, six months ago, seven years ago, or eight and a half years ago, from December of 2009, it would have been the appropriate and right thing to do under these particular factual circumstances.

All right, we have bumped up now

against the lunch hour.

What do you want to handle next?

**MR. SCAROLA:** The evidentiary issues that have cropped up in past week or so.

**MR. LINK:** Would Your Honor mind entering the orders first once we have agreed to the language?

**THE COURT:** That's fine.

Off the record.

(A discussion was held off the record.)

**MS. ROCKENBACH:** May I approach, Your Honor?

**THE COURT:** Again, commendation to our court reporter, who is exceptional and always such a pleasure to work with. We appreciate her work.

There is a case that -- from the Fourth District Court of Appeal that criticizes one of my now former colleagues in terms of the order saying, "for the reasons stated on the record."

So in an abundance of caution, I think it would be best suited for that portion of transcript to be transcribed. You can do it rush if you need to.

I am sure Ms. Sonja would be happy to oblige to the best of her ability. And, really, only that portion of it so that -- my decision would need to be rushed, I think.

**MR. SCAROLA:** Attached, for the reasons stated on the record. Attached.

**THE COURT:** If both sides feel that that's sufficient.

Ms. Rockenbach, is an appellate specialist. I defer to her specialty.

Mr. Scarola, I know you have also been involved in numerous appeals, whether directly or indirectly, but your name appears on many appellate decisions.

Again, I concede to your expertise only to bring up the fact that one of our most respected and one of our former circuit court judges was criticized for the order in the manner in which it's being presented to me.

**MS. ROCKENBACH:** You're correct. I am aware of that decision, unfortunately. And I would ask the Court for a break so that our court reporter could type up the -- not

just the ruling, but we need the entire hearing transcript in order to have a complete record.

So we would ask for a change in court reporters, as reluctant as I am to do that. I know it's my duty to my client and to the Court.

**THE COURT:** I respect that. And again, you will have to deal with Sonja directly.

For the record, again, I apologize for not using her last name. We have known each other for many years. And I know she takes no personal qualms at it, because we have spoken about that before. But at the same time, any review by the court, I would ask that they excuse my lack of formality here.

**MR. SCAROLA:** We have no problem with breaking for lunch at this point so that we can arrange a change of court reporters.

The only appeals I remember, Your Honor, are the ones I lost.

**THE COURT:** Again, thank you for your concerns and your patience as well.

I also recognize and thank Ms. Musgrave for being here.

We will return back at 1:30, so as to give you all some logistic assistance to try to arrange, as you need to, for the court reporter and transcript purposes.

Keep in mind that we will go to 4:30 today. And also, that I am not available tomorrow. I have several panel commitments for the bench bar tomorrow. And so that would preclude any further consideration. I do have a full day of hearings on Monday as well.

**MS. ROCKENBACH:** Your Honor, before we break, anticipating a potential adverse ruling, I have a motion to stay the matter, which is then immediately reviewable as well.

The motion to stay that I have I did not anticipate this court severing the cases. It was only the adverse ruling of the removal of the case from the trial docket. So I would like to revise that motion. But I would make an ore tenus motion to stay this action in order for Mr. Epstein to file the petition for writ of mandamus as to the order denying the motion

to remove the case from the trial docket and a petition for writ or certiorari as to the order granting Mr. Edwards' motion to sever.

**THE COURT:** Mr. Scarola.

**MR. SCAROLA:** We would clearly object to a stay, Your Honor. It would effectively be granting the same relief that the defense has been unsuccessful in obtaining.

We are confident that Your Honor's order will withstand appellate review. And a petition for writ of mandamus is an expedited proceeding. I am sure we will hear from the appellate court if they have any reason whatsoever to question the proprietary or the order that Your Honor has entered.

**THE COURT:** The motion to stay from this Court is denied.

**MR. SCAROLA:** Your Honor, I expect what we will deal with after lunch are issues that relate to the most recently disclosed documents, including, in particular, emails.

**THE WITNESS:** That's what I anticipate.

**MR. SCAROLA:** And I have a timeline, which I provided to opposing counsel. I am

going to hand that to Your Honor in case you want to chew on that over lunch.

**MS. ROCKENBACH:** Your Honor, if I may approach.

**THE COURT:** Sure.

**MS. ROCKENBACH:** I have one submission to the Court. It was hand-delivered yesterday before we received your judicial assistant's email about no future submissions. But it relates to this issue.

**THE COURT:** I can't promise you that I will have time to read it.

**MS. ROCKENBACH:** Understood.

**THE COURT:** I will do the best I can.

**MS. ROCKENBACH:** Thank you very much.

**THE COURT:** Thank you all again for your excellent presentations and arguments. We will be in recess until 1:30.

- - -

(The above proceedings were concluded at 12:08 p.m.)

**COURT CERTIFICATE**

STATE OF FLORIDA )
: SS
COUNTY OF PALM BEACH )

I, SONJA D. HALL, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true record of my stenographic notes.

Dated this 8th day of March 2018.

SONJA D. HALL

# EXHIBIT B

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

Case No. 502009CA040800XXXXMB

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

vs.

SCOTT ROTHSTEIN, individually;
BRADLEY EDWARDS, individually,

Defendants/Counter-Plaintiffs.
_____/

TRANSCRIPT OF PROCEEDINGS

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

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

Elaine V. Williams

APPEARANCES:

For Plaintiff/Counter-Defendant:

LINK & ROCKENBACH, P.A.
1555 Palm Beach Lakes Boulevard, Suite 301
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By KARA BERARD ROCKENBACH, ESQUIRE
By SCOTT J. LINK, ESQUIRE

For Defendant/Counter-Plaintiff:
SEARCY, DENNEY, SCAROLA, BARNHART &
SHIPLEY, P.A.
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West Palm Beach, FL 33409
By JACK SCAROLA, ESQUIRE
By DAVID P. VITALE JR., ESQUIRE
By KAREN TERRY, ESQUIRE

For Non-Parties L.M., E.W. & Jane Doe

HATCH, JAMES & DODGE, P.C.
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By PAUL G. CASSELL, ESQUIRE

For Jeffrey Epstein:

ATTERBURY, GOLDBERGER & WEISS, P.A.
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West Palm Beach, FL 33401
By JACK A. GOLDBERGER, ESQUIRE

P R O C E E D I N G S

- - -

THE COURT: Thank you. Welcome back everybody. Have a seat.

MR. SCAROLA: May I move to this podium now?

THE COURT: Sure.

MR. SCAROLA: Thank you, sir.

Your Honor, have we decided what motions we're going to hear?

THE COURT: Yes. My understanding as I left was going to be Edwards' Second Supplement to Motion in Limine Addressing Scope of Admissible Evidence, and of course in that same vein Epstein's Notice of Service of Unredacted Appendix in

Support -- or Response in Opposition to Edwards' Second Supplemental Motion in Limine addressing Scope of Admissible Evidence.

MR. SCAROLA: Your Honor, there are actually multiple submissions to the Court to deal with closely-related issues, and those issues arise out of the fact that over the course of the last three weeks 724 new exhibits have been added to the exhibit list of the defendant Epstein.

And just to provide some general background, some of which your Honor may recall, there was an





exhibit list filed by Mr. Epstein on November 16, 2017. That same exhibit list was attached to the pretrial stipulation on December 22, 2017. And then for the first time on March 5th of 2018 the new exhibit list was filed. If you compare the exhibit lists of November 16th and December 22nd, which, as I said, are the same, with the March 5th exhibit list, 25 new exhibits -- excuse me -- 724 new exhibits were added.

Your Honor held a hearing in this matter on December 5th and made it clear to all parties that exhibits that were not disclosed by the end of December -- and I think it may have been the December 22 date -- I'm not sure about that exact date -- but exhibits that were not specifically disclosed would not be permitted to be used at trial. You made it clear that catchall listings would be unacceptable; that specific individual exhibits needed to be listed. I'm sure your Honor has a recollection of those circumstances. And that, obviously, is a fairly standard order that your Honor adheres to in connection with trial practice.

THE COURT: What I just wanted to point out is in conjunction with what we're going to be



eventually talking about, we're now dealing with the Motion to Strike Epstein's Untimely Supplemental Exhibits and to Strike All Exhibits and Any Reference to Documents Containing Privileged Materials Listed on Edwards' Privilege

Log.

MR. SCAROLA: Yes, sir.

THE COURT: That led into what I described earlier of the motions that will be on the table.

MR. SCAROLA: That's correct. And that's why I acknowledged, your Honor, that we're really dealing with a number of closely-related motions.

So the first issue is a procedural issue; and that is, whether your Honor is going to allow the listing and use of 724 new exhibits. And my suggestion to the Court is that that is a threshold issue that really helps to resolve much of what follows because if, as a matter of procedure, those 724 new exhibits are not going to be used, then much of the rest of the argument becomes irrelevant. There are, however, very significant substantive issues if the procedural determination does not dispose of the use of those exhibits.

THE COURT: These exhibits specifically were added when?

MR. SCAROLA: They were added by a new list filed on March 5th of 2018.

THE COURT: Okay. Just to put this into perspective, March 5th would have been Monday of this week, today being March 8th, and the trial starting on March 13th, presuming it begins as scheduled.

MR. SCAROLA: Yes, sir. But I want to make it clear that while the 724 were never listed on a prior exhibit list before March 5, some of those documents were disclosed to us over the past three weeks. So I am not suggesting to your Honor that the first notice we got of an intent to attempt to use these documents was March 5. The first notice we got of an intent to attempt to use some of these documents started some three weeks ago as new disclosures were sent to us.

And again, this is from memory, but I think there may have been three separate groups of documents that were sent to us not covering all of the 724. And obviously, your Honor knows from the materials that you have reviewed much attention was focused on documents that we contend and have contended for eight years are privileged documents.

25 Documents listed on a very specific privilege log.





And those are 45 of the 724 newly-listed documents. And those documents were brought to our attention just last week.

So my suggestion to your Honor is that we deal first with the procedural issue because, as I said, that will narrow issues significantly. And then there will still remain some substantive issues with regard specifically to any attempted use of privileged materials.

Now, your Honor heard from both opposing counsel that I have accused them of having stolen the documents. I assure your Honor that that's not the case. I have not accused them of having stolen the documents. What I have said in repeated communication is that these are stolen documents. And these documents, if your Honor has had an opportunity to look at the timeline, were very clearly at this point handed over by the bankruptcy court to Fowler White for one purpose and one purpose only; and that was to print them out, Bates

stamp them so that they could be turned over for privilege review by the Farmer Jaffe law firm, including specifically Brad Edwards.

THE COURT: Let me stop you there so we can put this in context.





Joe Ackerman, as I recollect, was representing Mr. Epstein for some period of time, and he was at that juncture associated with the Fowler White firm in some capacity.

MR. SCAROLA: Yes, sir. That's correct.

THE COURT: So if I'm understanding this correctly then, the bankruptcy court turned the documents over to Fowler White.

MR. SCAROLA: Did your Honor want me to get into that now? I'm happy to do that.

THE COURT: So that I understand. I know during a very tumultuous period of time these would be the Rothstein firm's employee.

MR. SCAROLA: Yes, sir. Let me go through this and give you a quick overview, although all

the details are provided in the timeline that I provided to your Honor.

What happened was that almost immediately following the implosion of the Rothstein, Rosenfeldt, Adler firm a trustee was appointed by the bankruptcy court to take control of the firm, and that trustee took control of all of the firm's files and all of the firm's electronic data, including all of its e-mail servers. So it is the trustee that had possession of all of these



e-mails.

Mr. Epstein through counsel, and at this point it was the Fowler White firm, issued a subpoena in our civil litigation, then pending in front of Judge Crow, for the trustee to produce all of the e-mails. Judge Ray, to whom that subpoena was referred, Judge Ray appointed Judge Carney as a special master to make a determination as to what could appropriately be turned over because obviously these were e-mails that related to a wide variety of cases. It was the entire contents of

the e-mail server of Rothstein, Rosenfeldt, Adler, and it was recognized that those e-mails could contain attorney/client and work product privileged materials. So Judge Carney was appointed a special master to make a determination as to what should and could be turned over and report back to Judge Ray.

Judge Carney gets 27,000 e-mails and Judge Carney says, "I don't have an appreciation as to what may be privileged here. We need to come up with a procedure so that I can be advised of what privilege assertions are being raised." So Judge Carney says, "I want what was then the newly-formed law firm that Mr. Edwards is working in, I want





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

THE COURT: Farmer Jaffe, right?

MR. SCAROLA: Yes. Farmer Jaffe.

THE COURT: We can just refer to them as Farmer Jaffe.

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

to go through these e-mails and prepare a privilege log. Let me know what's privileged here, and then I'll make a determination as to what's going to get turned over."

The response from Mr. Edward through me is this is 27,000 e-mails, they want them, they should be responsible for printing them and Bates stamping them and delivering those printed and Bates stamped documents to us for our review. And Judge Ray enters an order.

And Judge Ray says in his order -- and it's quoted in relevant part at the bottom of the first page of this timeline -- Judge Ray says the law firm of Fowler White will print a hard copy of all the documents contained on the disks with Bates numbers added and will provide a set of copied, stamped documents to the special master and an identical set to Farmer, who will use the same to create its privilege log.







And Judge Ray, federal bankruptcy Judge Ray, says, "Fowler White will not retain any copies of

the documents contained on the disk provided to it nor shall any images or copies of said documents be retained in the memory of Fowler White's copiers. Should it be determined that Fowler White or Epstein retained images or copies of the subject documents on its computer or otherwise, the Court retains jurisdiction to award sanctions in favor of Farmer, Brad Edwards or his client."

So it was obvious that what was to happen at that point was they were to take over the ministerial task as officers of the court of bearing the expense to turn these documents over to Farmer Jaffe and Brad Edwards for purposes of preparing a privilege log.

THE COURT: For lack of a better metaphor, though, wasn't that a fox in a henhouse type of situation?

MR. SCAROLA: Well, sir, were these not officers of the court, the answer to that question is yes. These were adversaries who were being given control over these documents, but they were adversaries who had a sworn duty to follow the Court's direction. And we had every reason to

believe that this respected law firm and these respected lawyers would do exactly what they were told to do.

Now, we know that the disk that contained that information, as has been conceded by Epstein's counsel, was formatted on December 10 -- excuse me -- December 8th of 2010.

THE COURT: What do you mean by the disk was formatted?

MR. SCAROLA: What I mean was the documents on that disk were divided into three different categories.

THE COURT: And that was December 10?

MR. SCAROLA: December 8th of 2010.

THE COURT: Thank you.

MR. SCAROLA: So within approximately one week after being ordered not to retain any copies there's a disk that is formatted by Fowler White, which is the disk that is now in the possession of Jeffrey Epstein and Jeffrey Epstein's counsel. And it contains without a doubt those documents that we

identify on a privilege log that is generated as a consequence of that process. It contains those privileged and attorney work product e-mails. And that assertion of privilege has never been





overruled.

THE COURT: Did the Special Magistrate Carney or Judge Ray ever hold a hearing to determine the nature of the privilege? Was that ever called up for a hearing?

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

So it then became a matter over which Judge

Crow was exercising jurisdiction to determine how the subpoena issued in the Circuit Court State Court case, how that subpoena was going to be responded to. So our privilege log goes to Judge Crow.

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





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

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

Now, in some of the communications that have gone on back and forth you may have seen reference to a disclosure to the Razorback defendants. Excuse me. The Razorback plaintiffs.

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





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

Well, there were direct negotiations in which I was a personal participant with the lawyers for

Conrad Scherer, and an agreement was reached with the lawyers for Conrad Scherer because, as we have told every judge before whom we have appeared with regard to these matters, we're not attempting to hide anything. You want to conduct an in-camera inspection, we want you to conduct an in-camera inspection because it will confirm that we're not attempting to hide anything.

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







That's the Crime Victims Rights Act case.

So there is a very legitimate reason for us to be concerned about protecting both the work product

privilege and the attorney/client privilege, particularly protecting it from Mr. Epstein, and particularly protecting it from Mr. Epstein now that we know there was a clear violation of the federal judge's order with regard to the matter in which these materials were to be handled.

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

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

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

THE COURT: Excuse me just a minute.

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

(Discussion held off the record.)

THE COURT: Go ahead. I apologize.

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

So those are matters of significant concern to us. But the matter of greatest concern is that once it becomes apparent that these are documents that are listed on our privilege log, a privilege that has never been challenged, a privilege that

remains in place, and we notify opposing counsel here is our privilege log, here are the numbers,





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

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

It wasn't with regard to Conrad Scherer

because when those documents were turned over to Conrad Scherer -- and we have the letters that confirm the written agreement with every detail of that agreement in place -- those were turned over as part of a common interest privilege with an express representation it was attorneys' eyes only, with an express representation they would be turned





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

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

The obvious source, based now upon what we have been able to piece together, is very clearly

Fowler White's improper retention of this material after they had been expressly ordered by the federal court not to retain any of it.

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





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

And Mr. Cassell is going to address from the

perspective of the clients the concern that they have about being informed as to how their confidences have been breached. So with your Honor's permission, I would like him to have an opportunity to address the Court briefly on that topic.

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





MS. ROCKENBACH: Thank you, your Honor. I am certain that this courtroom is a place where we are searching for truth and not hiding evidence, whether it is evidence that causes conclusion by this Court that there is no case to be tried. And

for the first time after four days of -- and we use that word --

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

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

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

THE COURT: Okay. Is this an extra copy?

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

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

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

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

MR. VITALE: Bates number?

MS. TERRY: 04408.

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

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

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

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

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

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

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

MR. CASSELL: I'm sorry. Any disclosure of

the contents or the substance of these documents.





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

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

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

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

THE COURT: Okay, that's fine.

MS. ROCKENBACH: The purpose of me putting this particular piece of evidence, which I've been asked on multiple occasions by Mr. Scarola to destroy by the barrage of e-mails over the past four days, I'm handing it to the Court as evidence of no Binger surprise. It can't be Binger surprise by Mr. Edwards if he is authoring an e-mail with regard to this very action that's pending before

this Court about five to six weeks before Mr. Epstein sued him. So that can't be a surprise to Mr. Edwards. It actually makes this case incredibly stronger for the issue of probable cause.





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

Then I had my paralegal issue an affidavit that established chain of custody. I obtained the Fed Ex receipts for the three boxes that contained

this incredible disk. And that's on file with the court.

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





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

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

So I am very pleased and I agree with

Mr. Scarola for the first time I heard just now a request or an agreement, not even a request, an agreement that these should be looked at in-camera. They absolutely should be looked at in-camera because they eviscerate Mr. Epstein's malicious prosecution case from proceeding.

THE COURT: Mr. Edwards.

MS. ROCKENBACH: Mr. Edwards.

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

THE COURT: I don't remember seeing it.





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

the information --

THE COURT: Is that in this?

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

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

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

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





These e-mails, your Honor, go to the very heart of this malicious prosecution case and

whether it can proceed.

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

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

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

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

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

MS. ROCKENBACH: Yes, your Honor.

THE COURT: Why were they preserved, how were they preserved, for what reason were they preserved, did that preservation violate or come

close to violating an order of the bankruptcy court, has the privilege been waived? And then we get back again to the Binger analysis.

I did a quick word search, and the Fifth





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

But I don't want to get into a discussion as to present counsel's ethical responsibilities unless we have to as it relates to the origin of how, if counsel is aware, these documents inclusive of the e-mails, and particularly as it relates to the 724 allegedly new exhibits being added formally for the first time on March 5th, just three days

ago, and certainly outside of the Court's pretrial order in terms of timeliness, whether they constitute prejudice. So let's try to focus there, if we could.

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





certain things that are said.

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

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

THE COURT: No. And I understand that there are going to be instances where people are going to think that I'm the best in the world and the absolute worst in the universe. I've come to that rationale pretty quickly. It took some time, but it was fairly quickly. But I do understand. I

don't want anyone to think that I'm not compassionate to the extent that I recognize that there have been accusations hurled here which may be minimally considered offensive and accusatory. But let's move beyond that for now and let's get to some of the issues that I discussed earlier that we can focus on relating to decisions that I'll have to make concerning the potential admissibility of this evidence.

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

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





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

THE COURT: Tina Campbell is your paralegal?

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

THE COURT: I think the disconnect we're

having here today is not so much the fact that Miss Campbell received the boxes or somebody got notice that the boxes were there --

MS. ROCKENBACH: It was an issue.

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

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





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

MS. ROCKENBACH: Thank you.

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

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

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

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

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

is the clerk required it. So --

THE COURT: The clerk required it?

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

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

MR. LINK: The Court.

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

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

THE COURT: So in conjunction with an order that I had made earlier in the proceeding that I was not going to allow general catchall types of exhibit identification, I required that each and every exhibit be specifically listed. And we've gone through myriad exhibits in our quest to determine whether or not, for example, the Fifth Amendment privilege is going to be recognized and other issues having to do with admissibility. And that was generally followed, to my recollection, because I dealt with many specifically identifiable exhibits. So yes, I agree that that was something that the Court had a specific interest in and has

always taken the position that all cards are going to be on the table in a timely fashion so that,





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

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

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

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

MR. LINK: The reason I want to explain is because in our pretrial stip I'm of the mindset

when we reach agreement, we have an agreement. And in our agreement, your court order says no additional exhibits unless the parties agree. In the pretrial stip Mr. Scarola and I agreed we reserved our right to add additional exhibits. So in compliance with the pretrial stip and this Courts' order requiring us to identify them, we've





been doing that, sir.

THE COURT: Okay.

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

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

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

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

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

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

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





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

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

When the trustee took over the files, there was an understanding by Mr. Edwards and his firm that there would be about 5,000 e-mails, and they agreed to do a -- go through them and do a privilege log. What's missing from Mr. Scarola's

timeline is that in November 2010 Edwards informed the bankruptcy court that the trustee had produced 74,000, 74,000 pages of documents on two compact disks. Not one. On two.

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

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

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

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



MR. LINK: Correct.

THE COURT: -- they may have encompassed, and to raise objections, and that forum was the bankruptcy court.

MR. LINK: All this started in the bankruptcy

court.

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

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

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

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

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

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

I think -- this is Scott Link guessing -- I want to be clear about this -- I think the disk that ends up at Fowler White was the special master's disk. And here is why I think that: A, it was in a file that said Special Master. B -- none of which makes sense to me until we put this

25 together. B, there's a hearing where Mr. Scarola





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

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

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

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

review.

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





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

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

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

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





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

MR. LINK: Yes, sir.

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

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

THE COURT: That Fowler White did?

MR. LINK: Yes.

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

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





THE COURT: I understand. But you're here representing Mr. Epstein, who by virtue of this order that is being highlighted in part on the ELMO, that Fowler White did what it was supposed to do pursuant to that order, returned everything that it was supposed to return, but through some

happenstance had the disk containing the very information that was the source of Judge Ray's order and somehow, therefore, should be exonerated by virtue of the fact that because we really don't know how Fowler White may have gotten it, but assuming Fowler White did what it should have done, miraculously this disk turns up in Fowler White's files and hence we should essentially ignore the dictates of the order?

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

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

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

segregate them. The response I got, every page is an attorney/client communication. So that's one.

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

MR. LINK: Judge, I understand that.

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

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

Here is the second thing we learned --

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

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

THE COURT: No, you're not.

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

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

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

THE COURT: So now you're suggesting that former Judge Carney, to my knowledge a very well - respected jurist who presided in the Circuit Court

in Broward County, to my knowledge, and has done senior work here in the 15th Judicial Circuit somehow engaged in some type of ex parte communications with Fowler White?



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

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

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

There's no watermarks, there's no confidentiality agreement, there's no stamps on the

documents. They are Bates stamped and there's a disk in there. So what I'm suggesting is if we're trying to figure out whether Fowler White violated the order, I don't think it's as clear as Mr. Scarola says.

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





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

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

I don't think any of this matters. What

matters is we have the records, they're relevant, this Court should determine they're relevant, see if there's a privilege and see if that privilege has been waived. That should be the process.

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





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

MR. LINK: Yes, sir.

THE COURT: That's a big endeavor. That is an endeavor that is beyond this Court's ability physically and from a time perspective. So I'm not

going to do that.

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

THE COURT: It's just too late.

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

THE COURT: Please don't interrupt me.

MR. LINK: I apologize for that.

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





presentation.

I often refer to a case that I printed directly from the Fourth District Court of Appeal,

RJ Reynolds Tobacco Company versus Calloway, and it talks about the trial judge's ultimate responsibility. There it was to ensure appropriate attorney behavior, but it talks also about court exercising its control of the litigation of the trial, of important pretrial hearings like we're having here today, and talks about this is especially true in lengthy high-stakes cases and goes on to speak about what a court should and should not tolerate when it comes to interruptions and other matters that don't necessarily befit the presentation of otherwise excellent counsel.

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

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

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

Thankfully, for the purposes of most of the decision-making that I do here in the civil circuit courtroom I had experience, and I gained a significant amount of experience in a relatively quick amount of time. It was baptism by fire, I think some would call it. But I had opportunities to get into the courtroom long before others did who had the same experience level. Whether that was good or bad, the results speak for themselves. But I did have that opportunity. And to learn a great deal, not so much from those who I work with, but even more those who I work against, so to speak; my opposing counsel. The wealth of knowledge that I gained from how they did their work was astounding and something that I cherish

even to this day. But what it taught me more than anything was that preparation is critical, whether





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

And the very essence of what's being brought to my attention today, where requests are made for in-camera inspections at a time that's essentially two to three business days prior to the commencement of trial, a special master to review thousands of documents several days before the commencement of trial for the first time, despite recalcitrance from Fowler White, their -- somebody reviewing their files apparently for the first time mere weeks before the case is going to court, those types of things have to be held -- I was going to say in high regard, but what was meant by what I'm saying is preparation in getting to these materials, there was nothing that I knew of despite again what appears to be brief recalcitrance on the part of Fowler White to turn over the materials

themselves, this could have been done six months ago, a year ago, two years ago, three years ago, four years ago, five years ago, six years ago, and it should have been done then. To bring these types of matters before the Court at this particular time is, in my view, inappropriate.

Now, if this was newly-discovered evidence





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

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

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





MR. LINK: Yes, sir.

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

The issue, though, is one of whether the protocol and the orderly administration of justice is going to be forsaken notwithstanding also the aspect of privilege and the sanctity of privileged

communications, whether all of those considerations are going to be thrown out when balanced against material that has been in the hands of Mr. Epstein's lawyers from day one. And I, for one, am not going to sacrifice protocol over what may or may not be, number one, privileged, and if not privileged, certainly late disclosed documentation of a massive nature.

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



And what I meant by that, should the destruction of the orderly administration of justice be countenanced? And the answer to that question, in my respectful view, is no. Because if I do it once, then I'm setting a precedent, even

though I know trial courts traditionally don't do that, according to case law. And forgive me for my choice of words, but as someone who is a senior member now of the bench -- not a senior judge, but a senior member of the bench -- that sends a message to my colleagues that I'm not doing what I believe is the appropriate thing.

MR. LINK: May I respond, your Honor?

THE COURT: Sure.

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

THE COURT: Not at all. Go ahead.

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

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

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

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

Again, if this was something that came into play that was being hidden by the other side, and I'm talking now generically, and your side discovered that information at the 11th hour, this

25 would be an entirely different discussion. And





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

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

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





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

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

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

If you look at the privilege log which they filed, which Judge Crow found inadequate -- and I don't believe there was another privilege log filed, so I don't think there's a privilege log -- but that's another day, another issue -- but if you look at the privilege log and the e-mails that it

relates to, tell me if a lawyer looking at that would be able to tell the real content of the e-mails that Mr. Edwards was writing. Because I think you have an obligation to disclose in a way that allows a lawyer to make a determination of whether it's privileged or not.

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





As I said, the analysis would be completely different if it was shown to me that somehow, some way the Searcy, Denney firm, Mr. Edwards, Farmer Jaffe -- I was going to say Ron Rothstein, but I don't want to get him confused with the well-respected coach and former coach of the Heat -- Scott Rothstein was sitting on this stuff. That's not what happened here. That's the point that I'm trying to drive home and emphasize. Is not only the issue of timeliness, not only the issue of the privilege has not been tested, but first and

foremost is the fact that Fowler White, Epstein's own lawyers, have been sitting on this from day one for seven, eight years.

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

THE COURT: That's not my problem.

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

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





MR. LINK: I understand that, Judge.

THE COURT: I'm here only to deal with this issue that is before me; and that is, whether a wholesale late disclosure of significant exhibits that have been in the possession of Fowler White, Epstein's attorneys, from day one and, thus, as a

matter of continuum in Epstein's possession, his possession is constructive to the possession of the attorneys that represented him, that string of attorneys that have been representing him since 2010, and that if nobody got around to looking at Fowler White's documents -- and how that could be understood is beyond me, as not only a seasoned attorney but also now a seasoned judge -- until you and Miss Rockenbach took it upon yourselves and your paralegal to do it is not my problem. And that's all I'll say on the subject.

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

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

Miss Rockenbach or Miss Campbell did. That's not the issue. You've done your job.

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

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

(Thereupon, a short recess was taken.)

- - -

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

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

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

THE COURT: Yes.

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

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

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

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

THE COURT: And that's a good point. What I was going to point out earlier and I failed to do

that, and I appreciate the reminder, is that I would have expected certainly in deference to the fact that Mr. Epstein was a client of Fowler White that someone from Fowler White would have had the





ability to weigh in somehow as to these critical issues.

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

So I again want to make clear that I'm finding absolutely no fault with Mr. Link, Miss Rockenbach, Miss Campbell or anyone else from the Link and

Rockenbach firm in terms of what they did, albeit in the manner in which they had to do it and the timing, unfortunately, of the matter from their perspective in having to do it, but that takes nothing away from what the Court has already remarked upon concerning the fact that now Fowler White in the representation of Mr. Epstein had these records from the inception is one of the





reasons for the Court's ruling.

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

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

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

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

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

THE COURT: That's better stated.

Do you have any objection?



MS. ROCKENBACH: No objection, your Honor.

THE COURT: So stipulated.

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

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

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

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

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



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

THE COURT: That's fine.

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

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

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

MR. SCAROLA: Does that include Mr. Epstein?

THE COURT: Does what include Mr. Epstein?

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

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

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

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

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

THE COURT: Thank you.

Mr. Cassell?

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

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

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

MR. CASSELL: Thank you, your Honor.

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

documents was privileged.

And then what happened on Friday night, March





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

Let's be clear. There is no doubt from sworn testimony in front of the Court that on January 10, 2018 agents of this law firm picked up a disk from

the Fowler White law firm, and the Fowler White law firm, as you know from the ELMO, had been directed some six or seven years earlier not to retain any copies of these documents. So there should be no dispute about the circumstances right now.

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





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

So the question in front of you right now is what to do about this. Well, we know one thing. We know there's been absolutely no waiver of attorney/client privilege. How do we know that? Well, your Honor knows the Florida law very well. To be a waiver of attorney/client privilege is something that is disfavored. There has to be a clear, intentional waiver of the privilege. And

how do we know there's not been a clear, intentional waiver of the privilege? Just use Mr. Link's word. Things are clear as mud. Well, if something is clear as mud, there cannot be an intentional waiver. So there's no waiver of attorney/client privilege.

I know the hour is late.

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

MR. CASSELL: Thank you, your Honor. We





appreciate that because what we've heard shockingly this afternoon is -- let me -- I know we need to be careful with language -- let's just say an accused abuser, Mr. Epstein, the man accused of abusing my three clients, we are told has seen these very privileged documents. We're told Mr. Goldberger has seen them. We're told, of course, Mr. Link and his law firm has seen them. And of course this very large law firm, the Fowler White law firm, has

seen them as well. And so the question is what do we do?

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

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





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

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

Epstein?

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

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

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

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

MR. CASSELL: Correct.

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

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

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

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

You noted that you thought there might have been an obligation for them to address the Court head on. I'm here telling you that the victims

25 believe they, Fowler White, has an obligation to





address the victims head on. How did this happen?

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

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

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

We're told that Mr. Goldberger has seen it, we're told Mr. Epstein has seen it. We want to know who else has seen it. And this, frankly, may

require looking at e-mails, looking at servers and that sort of thing.

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





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

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

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

Sixth, we want our temporary sealing order,

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

We want the Friday night filing, the notice of





redacted materials, to be placed under permanent seal.

And then the last request is just a housekeeping request. We're obviously scrambling to sort out the implications of all this. I'm sure I have missed some points that need to be made. Due to the late filing of this document, due to the public filing of the document improperly, we would like leave to be able to file a supplemental application for additional remedies after the trial concludes and after we have received information

about how the documents were obtained and who they went to.

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

THE COURT: All right.

Mr. Link?

MR. LINK: Yes, sir. Thank you.

THE COURT: Thank you.

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

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





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

As to the filing, I never said all I wanted was an in-camera inspection. What I said was

Mr. Scarola said he would like one and I said great, let's have one.

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

THE COURT: By the court, you mean --

MR. LINK: To you. To the judge.

THE COURT: -- to myself.

MR. LINK: Yes, sir.





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

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

Thank you, Judge.

THE COURT: All right. Thank you.

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

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

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

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

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

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

MR. LINK: Thank you, Judge.

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

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





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

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

And as Mr. Scarola pointed out, I believe, earlier, that can be done at another time. So I am certainly not going to forget that it needs to be

done. But it will be ordered that it be done post trial.

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

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





reserving on that as well.

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

THE COURT: Right. And again, I think that in an abundance of caution, and I understand your concerns, but what the attorneys here recognize -- and Mr. Epstein is also under this order -- is that no further dissemination is going to be made. I think that goes without saying as far as the attorneys are concerned. I've known each of them seated at counsel table for many years, as I have

known Mr. Scarola and Miss Terry, Mr. Burlington, and I think they recognize that when this Court makes a statement, that it is abundantly clear that it will be enforced to the letter. I have no doubt in my mind that they will all be respectful of the court order of non-dissemination of any of those documents hence forth.

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





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

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

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

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

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

MR. CASSELL: Fowler White.

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





ability.

MR. CASSELL: Could I be heard on that issue then? I believe that you do have -- all right.

We'll deal with that later then, your Honor.

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

THE COURT: Sure.

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

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

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

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

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

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

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

THE COURT: Sure.

MR. SCAROLA: One is Mr. Epstein's motion to strike Dr. Jansen, and the second is issues with regard to adverse inference. I think that both of those matters have been fully briefed.

Mr. Burlington is here to present argument in response to the motion regarding Dr. Jansen.





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

THE COURT: All right. Off the record.

(Discussion held off the record.)

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

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

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

THE COURT: Well, I'd rather, since it's

something of the magnitude of trial exhibits and 79 in number, I'd rather have argument on the subject, to be perfectly frank with you. I appreciate your willingness to entrust the Court with that endeavor, but I think it's better to have you heard on the record.

All right. Mr. Burlington, which one did you





want to tackle first?

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

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

THE COURT: All right.

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

THE COURT: What's the other motion?

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

MR. LINK: Which one are we on?

MS. TERRY: Jansen.

MR. LINK: Jansen. Okay.

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

THE COURT: You have done fine.

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

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

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



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

Their expert that they want to put on the stand for damages has no opinion, your Honor, as to damages. Not one. He can't talk about any damage suffered by Mr. Edwards, if any. His sole opinion is that he was given defamatory statements by counsel, defamatory statements, and told to do a

search to see how many times the defamatory statements hit a web page or how many people touched the web page with the defamatory statement on it.

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

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



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

The other thing that was important is he said, "I just use an average of data. I can't tell you

exactly because they accumulated over months." He can't even tell us how many times this article was actually touched. All he can tell you is if I go to the Palm Beach Shiny Sheet website, on an average month 3,000 people look at it. So how can that help the jury from a damages expert determine whether the filing of this malicious prosecution action caused Mr. Edwards any damage?

Thank you, Judge.

THE COURT: All right. Thank you.

Mr. Burlington?

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

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

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

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

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

But the clearest discussion is in a case called Browning, which says that in reputational damages, which are particularly hard to prove, and there's no case that I've ever read where in a malicious prosecution case a plaintiff was put to the burden of bringing in an individual who said, "I didn't send my case to this lawyer because I

heard he was accused of a crime." That, of course,





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

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

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

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

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

issue of dissemination.

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





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

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

If we were 30, 40 years ago and this was done and let's say it was only exposed in this area of the country, Palm Beach County, Broward, Miami, we would come in with the newspaper's circulation to

give the jury some idea of the exposure. That doesn't really have much probative value in the Internet age.

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





forth and so on.

And one of the factors here is a very well-recognized principle of the Bigelow case, which is a U.S. Supreme Court case, that says that one of the fundamental principles of justice is that if a defendant engages in wrongful conduct that creates uncertainty as to damages, that falls on them. You can't put the plaintiff to what is an essentially impossible burden, assuming we prove our cause of action. And that, of course, is an issue that this trial will be all about.

But they're trying to say really you can never prove reputational damages without bringing in Joe Six Pack off the street and inquiring of him how much of a grudge he's holding against Brad Edwards because of false allegations. That is simply not the standard.

Is it helpful to the jury? Well, the jury is not going to understand the complexity of dissemination of information on the Internet, and this witness is specifically qualified to do that.

So when we go through the analysis is he qualified, is the issue relevant, is it helpful to the jury, we satisfy those three.

Then we come to reasons to exclude. And the





only reason I saw raised in their motion for excluding it was vague references to confusion. And I don't see how there could be confusion, given the clear parameters of what Dr. Jansen testified to were his directions, his methodology. There was terminology that he has to explain to the jury, but

all experts do that in complex situations. The jury here would not be capable of making an analysis of the degree of dissemination on the Internet as a matter of their common sense.

THE COURT: I didn't read the motion as suggesting a prior Daubert analysis being required.

MR. BURLINGTON: I'm sorry?

THE COURT: I didn't read the motion filed by Mr. Link to talk about his seeking a Frye or Daubert analysis.

MR. BURLINGTON: Correct. That's my reading as well, your Honor.

Now, there was a little preamble, as there has been on many motions here, about how this is all about a defamation action, and we've cited in our response the term "defamation" is a general term in the English language, and we've cited Miriam Webster, which is about as white bread as you can get on a definition.

assigned to Dr. Jansen or in our argument regarding the nature of the damages, it's because that term properly applies to false statements of fact that accuse a person of criminal conduct, of being insane, being untrustworthy and so forth. It is not in any way a suggestion that we are bringing a defamation action.

The reputational damages are clearly recognized by the Florida Supreme Court. They have been recognized as one of those intangible damages for which a jury has to be given broad discretion. On the other hand, they have to be given parameters. And in this context, the two primary ones as to reputational damages are the gravity of the false allegations and the degree of exposure. And that is exactly what this expert is qualified to testify about. And there's been no suggestion as to what confusion there would be. And so, therefore, we believe we have satisfied the standard, and it's your discretion regarding the admission of his testimony.

And to strike a witness entirely is the most extreme remedy that could be sought in this

context, and we submit it is not appropriate and the motion should be denied.

THE COURT: All right, thank you.

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

MR. LINK: Very briefly, Judge.

I think a little bit of the confusion on the damages is there's really two standards. The standard for damages in a malicious prosecution based on lack of probable cause in a criminal action has per se damages. They're assumed, because if somebody makes an allegations that you are a criminal in the criminal court and they have you arrested, then your reputation and your character are immediately impugned.

This is civil. In civil it requires damages proximately caused. And it's not a Frye analysis, it's not a Daubert analysis, it's a basic does this help the jury and is it a 403 issue, which is if I get on the stand and I say there were nine million hits when in fact all he did was search for defamatory terms given to him by counsel without

taking into consideration was it Mr. Edwards who spoke to the press, did he do a press release, when did these -- when were the -- when did the dissemination take place, did anybody read them,





did it make any difference?

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

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

Thank you, Judge.

THE COURT: Okay. I was writing as we were speaking and certainly was anticipating Mr. Burlington to state the well-known legal action that a request to strike a witness is a drastic and extreme measure reserved only in rare

circumstances, especially where here we're dealing with an expert which is otherwise qualified to testify to what he's going to testify. And there being no Daubert or Frye analysis necessary, the Court would deny the motion.

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





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

The next issue.

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

THE COURT: I don't keep score. Never have and never will. I know you say it in gest, and I

allowed it the last time without a mention, but repeating it is inappropriate.

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

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

And I have handed your Honor the adverse





inference instruction based on Fifth Amendment assertions that we are requesting of the Court, which I suggest to your Honor is in direct conformity with the United States Supreme Court's opinion in Baxter versus Palmigiano and also conforms with the clarification in the case of Coquina Investments versus Rothstein.

Interestingly, a matter related to the Ponzi

scheme.

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

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

refusing to provide any discovery on those claims that he made. Under those circumstances, an adverse inference instruction is particularly appropriate.

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

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

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

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

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

Thank you, sir.

THE COURT: Thank you.

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

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

24 standard jury instruction exists.

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





1 thank you for that clarification.

2 I'm surprised that there really aren't more

3 cases that deal with this instruction in a civil

4 context. And no Florida cases that you're aware

5 of?

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

7 Honor.

8 THE COURT: Well, it's a Federal District

9 Court case, not a Florida appellate court case,

10 which would be binding on this Court.

11 All right. Counsel for Mr. Epstein?

12 MR. GOLDBERGER: Now I get to stand.

13 Good afternoon. Jack Goldberger on behalf of

14 Mr. Epstein.

15 Your Honor, as a general statement of the law,

16 Mr. Scarola is correct.

17 THE COURT: Let me tell you where I have some

18 issues, Mr. Goldberger, with this. And Mr. Scarola

can speak to it as well, now that I understand its origination.

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





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

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

Whether that's accurate or not, I don't want this jury to be thinking well, the right against self-incrimination applies in a criminal case and, therefore, he's guilty of everything that they're trying to get an adverse inference on. There

simply is not a connect there. I don't know why we need to mention anything about a criminal case in this jury instruction other than Mr. Epstein under the United States Constitution cannot be compelled to provide evidence against himself in a criminal proceeding, period.

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





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

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

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





given."

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

analysis.

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

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

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

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

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

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

Now, of course, if it was -- if it's deemed to be erroneous to give an instruction at all, then that requirement would be obviated. However, if you are seeking an order with the Court's stated intent that one will be given -- because as far as

25 the Court is concerned, it is necessary based upon





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

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

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

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

THE COURT: The concern potentially is the blanket statement that protection that applies in a criminal proceeding does not apply in a civil

lawsuit.

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



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

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

MR. GOLDBERGER: Your Honor, I accept what Mr.

Scarola is trying to clarify, but I also accept your invitation to come up with our own instruction at this point.

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

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

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



absolutely exact statement of the law.

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

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

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

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

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

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

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





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

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

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

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

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

THE COURT: It's my pleasure.

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

physically and figuratively.

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





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

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

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

THE REPORTER: Sure.

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

MR. SCAROLA: Yes, sir.

THE COURT: I know that will be time consuming, but based upon the Dippolito case, and

this having some parallels as far as the publicity aspects are concerned and the nature of the allegations and admissions that we're dealing with here, that it's incumbent upon the Court to individually question each of the initial venire members as to their knowledge of the individuals involved in this case. Those are my thoughts preliminarily.





MR. SCAROLA: May I make a suggestion?

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

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

THE COURT: I haven't seen it.

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

questionnaire.

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

And the Fourth has reiterated that in a recent



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

So if you guys formulate a questionnaire of a

preliminary manner that you can agree on, you got it. I'm more than willing to accede to that. And if that is sufficient in your view to satisfy the issue of pretrial publicity, knowledge of the circumstances, knowledge of any the participants, things of that nature that are critical to the analysis, then that's satisfactory to me.

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

THE COURT: I'm not as concerned with





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

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

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

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

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

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

this case?

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

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

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

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

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

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

people.

THE COURT: But the knowledge of the people





has to come first.

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

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

MR. SCAROLA: That's fine.

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

MR. SCAROLA: But does your Honor envision two separate individual voir dires?

THE COURT: No.

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

THE COURT: Has knowledge of a

disqualification nature. And if the grammar is incorrect, forgive me for the late hour.

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

MR. SCAROLA: Yes, sir.

THE COURT: After that, I see no issue because





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

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

The bottom line is that those who survive the initial screening process either because the screening process is not necessary for them or they have come in, been individually questioned and they still qualify, those people all fill out a juror

questionnaire before they leave for the day and they're instructed after filling out the questionnaire to return the following morning.

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

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

THE COURT: So you think it would be better





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

MR. LINK: Yes, sir.

THE COURT: It would be better to give them the questionnaire, have them fill it out in our presence and then dismiss them for the day so that you all could evaluate this information, as opposed to going through the standard questionnaire that I

have here, which is one we all use with demographic information, the name, place of domicile, occupation, marital status, spouse's occupation, adult child occupation, prior jury service, parties to any pending or past law suits, similar criminal, knowing anyone in the courtroom -- we'll basically take that out of the equation -- and can you and will you be a fair juror in the case?

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



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

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

MR. SCAROLA: That's fine.

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

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

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

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

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

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

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

Obviously, the reason for my doing it, even though it has not come under attack or objection, is because I don't want the entire 100 people to be tainted by one person spouting something that may be of the nature that could arise here. So to

25 avoid that operation -- and, you know, it should be





1 pointed out and always keep in mind the cost to
2 summon people to jury service is extraordinarily
3 high, and so we don't want to waste the taxpayers'
4 money in that respect as well.
5 All right. So again, I want to thank and
6 commend each of you for your presentations today,
7 all that participated either directly or indirectly
8 in the presentation of all of your materials.
9 Thank you to our courtroom personnel, thank you to
10 our staff attorney, who's been assisting me. And I
11 wish you all a pleasant evening.
12 MS. ROCKENBACH: Your Honor, you almost got
13 away. I just have a proposed order on the motion
14 to stay that your Honor denied earlier, if I can
15 approach. I gave a copy to Mr. Scarola just a
16 moment ago.
17 THE COURT: Yes. What you can do tomorrow on
18 the substantive motions -- I'll be at the Bench Bar
19 Conference and you have my permission to track me
20 down. Our schedules are posted, so you'll know

where I'll be. But I'll be doing the civil presentations during the afternoon. There's two of them. So I'll be able to be reached there.

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

THE COURT: Thank you again. Have a great



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

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

C E R T I F I C A T E

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

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

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

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

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

_____

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