

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK : CIVIL TERM : Part 39

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3 SEAN RAD, JONATHAN BADEEN,
4 PAUL CAFARDO, GARETH JOHNSON,
5 JAMES KIM, ALEXA MATEEN,
6 JUSTIN MATEEN, JOSHUA METZ,
7 RYAN OGLE, and ROSETTE PAMBAKIAN,

Index: 654038/2018

Plaintiffs,

-against-

8 IAC/INTERACTIVECORP and
9 MATCH GROUP, INC.,

Defendants.

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10 60 Centre Street
11 New York, New York 10007
12 September 5, 2019

13 B E F O R E: HONORABLE SALIANN SCARPULLA, Supreme Court Justice

A P P E A R A N C E S:

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24 Michael Ranita
25 Senior Court Reporter

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1 THE COURT: Let's go on the record.

2 I have before me two motions. One is to -- with
3 respect to the sealing of the Litigation Funding Agreement.
4 And the second motion is to dismiss the case for violations
5 of the Rules of Professional Responsibility with respect to
6 the Litigation Funding Agreement, which, of course, I have
7 tried desperately not to make the centerpiece of this case,
8 but now it is. So we are that.

9 What I want to address first is the motion to --
10 the sealing motion, because I thought that -- I think, when
11 I read the papers, it was the defendants' position that they
12 could not discuss the Litigation Funding Agreement in any
13 context; that was never my intent. So maybe I need to be
14 clear. Maybe I need to clarify my former order, my order,
15 so that I make it clear of what we are talking about.

16 THE COURT REPORTER: I'm sorry, can I just get your
17 name so I know who is speaking on the record.

18 MR. WOLINSKY: Mark Wolinsky for IAC and Match.

19 Frankly, we took the order, and in excess of
20 caution, perhaps, we redacted huge portions of the material
21 and a huge stack of documents.

22 We understood your Honor didn't want -- obviously
23 the core of the litigation funding motion is not about
24 litigation funding. I know we've disagreed about that. It
25 is about the payments to the witnesses. We would like to --

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1 THE COURT: Which we'll deal with that in a moment.
2 But when we were talking about whether to seal the
3 Litigation Funding Agreement, there was an argument made
4 that I thought was a good argument, that this is a
5 competitive industry, I would think that the defendants --
6 that the litigation funder and plaintiffs did not want to --
7 competitors to know what the percentages were. And I
8 thought that that was fine. I had no problem with saying,
9 okay, you don't have to do that. But it was never my intent
10 that you couldn't discuss the litigation agreement, funding
11 agreement, or say that people are getting paid thereunder.
12 That has nothing to do with that. That reveals nothing
13 about the competitiveness, the competitive terms of the
14 agreement.

15 MR. WOLINSKY: Your Honor, with that clarification
16 I think our motion is resolved.

17 THE COURT: Well, so --

18 MS. O'BOYLE: Your Honor, can we be heard briefly
19 on that point?

20 THE COURT: Sure.

21 MS. O'BOYLE: Just so we could have clarification
22 about what can be discussed and what can't be discussed.

23 THE COURT REPORTER: I'm sorry, can I just get your
24 name so I know who is speaking on the record.

25 MS. O'BOYLE: I'm sorry. Laura O'Boyle for

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1 plaintiffs.

2 They have cited throughout their motion provisions
3 of the agreements, and those provisions are the very
4 provisions that your Honor agreed are --

5 THE COURT: Well, in particular -- so, for example,
6 I don't -- I agree with you that if the number is I get 15
7 percent of the amount that's over this amount, or 30 percent
8 when the number comes to here, and 20 percent, all that is
9 competitive. But the fact that people are getting paid
10 under the litigation agreement is not competitive. That has
11 nothing to do with competitiveness. And so in general, as
12 opposed to the specifics, I don't have any problem with
13 defendants saying this Litigation Funding Agreement pays the
14 plaintiffs if they win. I don't have any problem with that.
15 There is nothing secret or competitive about that.

16 MS. O'BOYLE: We agree that the Litigation Funding
17 Agreement, if a plaintiff prevails, they get paid in the
18 litigation, and the funder makes money. That is the basic
19 way the litigation funding works.

20 What we are concerned that they are trying to do
21 here is disclose specific provisions of the agreements
22 related to --

23 THE COURT: So that is what I do not want you to do
24 is say what percentages, the numbers, the competitive edge
25 that a litigation funder has by offering this amount as

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1 opposed to that amount.

2 MR. WOLINSKY: Right.

3 THE COURT: That's what I am protecting.

4 MR. WOLINSKY: Your Honor, I think we are on the
5 same page. So, for example, if the funder puts in 30 --
6 hypothetical numbers. The funder puts in \$30 million, he
7 gets 15 percent in the recovery. A funder puts in \$60
8 million, he gets 20 percent of the recovery. Those are the
9 numbers that are competitively sensitive and that we won't
10 be discussing today.

11 Alternatively, and I want to be very clear, because
12 my argument is going to go into this, Mr. Kim -- I think
13 Mr. James Kim --

14 MS. O'BOYLE: But, your Honor --

15 MR. WOLINSKY: -- he was an original plaintiff.

16 MS. O'BOYLE: This is --

17 MR. WOLINSKY: He had point one percent of all the
18 options in the class.

19 THE COURT: Right. So I understand, I don't want
20 you to speak specifically, as opposed to whether he will get
21 paid or not get paid; that is okay. But the numbers is what
22 I don't want you to reveal.

23 MR. WOLINSKY: Your Honor, what we believe we need
24 to discuss, and I think is within --

25 THE COURT: I've read the papers. I know what your

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1 argument is. So I think if you discuss it in general, that
2 will be totally fine for me. I understand your position
3 about Mr. Kim as opposed to other plaintiffs who are getting
4 paid and he is not. I understand that. But you don't need
5 to say the specific numbers to make your argument.

6 MR. WOLINSKY: Your Honor, we would like to say,
7 put quantification around it. Again --

8 THE COURT: I don't want you to put quantification
9 around it in terms of dollars and cents.

10 MR. WOLINSKY: Okay.

11 THE COURT: Just whether --

12 MR. WOLINSKY: Okay.

13 THE COURT: Okay.

14 MR. WOLINSKY: He's getting a significant amount of
15 money up front. He is getting so much money on a priority
16 basis. You don't want me to put in --

17 THE COURT: I don't want to put in the numbers.

18 MS. O'BOYLE: Your Honor, it's our position that
19 these specific provisions --

20 THE COURT: They are not -- I'm not covering them
21 up. There is no possibility, particularly in connection
22 with whether or not someone gets paid, whether he gets paid
23 a lot or a little is not competitive. The number of -- the
24 legitimate competitive purpose is, I get ten percent if I
25 put in this percent. I'll give you 20 percent. That's

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1 competitive. Okay. Maybe litigation funder B gives 15
2 percent or 30 percent. I agree with that and I'm willing to
3 keep that confidential, but I'm not willing to keep
4 confidential the fact of who gets paid, and in general
5 whether someone gets paid a lot or a little. That I'm just
6 not willing to do. And that was never my intent to do.

7 MS. O'BOYLE: Understood, your Honor.

8 THE COURT: All right.

9 Now, so with a that clarification, I think it is
10 fair for you to withdraw your order to show cause.

11 MR. WOLINSKY: Thank you, your Honor. We will do
12 so.

13 THE COURT: Okay.

14 MR. WOLINSKY: I just want to -- my presentation
15 this morning is prepared on the assumption that I could talk
16 about the numbers. So I will just pass --

17 THE COURT: Good. But you can't.

18 MR. WOLINSKY: I'll quickly flip through those
19 slides. I'll provide the numbers to your Honor on the --

20 THE COURT: You've already provided them for me.
21 I've read your papers very carefully. This is a very, very
22 difficult thing for me, this motion, because I think I will
23 up front tell you my two issues:

24 One is that I have two sets of experts who say
25 diametrically opposed things. So automatically to me that

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1 means a hearing.

2 And secondly, even if I found, as the defendants
3 posit, that this Litigation Funding Agreement is -- the
4 particular provisions here is violative of an attorney, you
5 know, the Disciplinary Rules, that whether dismissing the
6 complaint is the appropriate result. And I could tell you
7 that that is something that I am almost certainly not going
8 to do. So there is -- the question then becomes, what to do
9 about it if it is true. All right?

10 MR. WOLINSKY: Fine. Your Honor, I would like to
11 address both. In terms of a hearing, we would welcome a
12 hearing. We think a hearing would be appropriate.

13 In terms of remedy, I'll address that. And we
14 actually, we heard you the last time and we thought about
15 other remedies that would be appropriate under the
16 circumstances.

17 I just want to go around and make the
18 introductions. I'm Marc Wolinsky, Steve DiPrima, Carrie
19 Reilly, Nate Cullerton, Aneil Kovvali. And in addition,
20 Vineet Bhatia is here from Susman Godfrey, member of the New
21 York Bar, and he represents Gregory Blatt. And Maya
22 Steinitz, Professor Steinitz. She's one of the individuals
23 -- one of the funding experts in litigation funding, and
24 she's submitted a declaration.

25 THE COURT: Do you have a copy of?

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1 MR. WOLINSKY: Yes.

2 THE COURT: Do you just hand it to --

3 MR. WOLINSKY: I just did.

4 THE COURT: Okay. Good.

5 If there is something you object to, let me know.

6 Otherwise, I assume that it's going to be something that is
7 a summary of Counsel's argument.

8 MR. BENJAMIN: Thank you, your Honor. I would just
9 note that on the first slide, the information that you just
10 maintained is sealed, it's going to be visible in open
11 court. So Mr. Wolinsky said that he is going to flip --

12 MR. WOLINSKY: I'll flip through it quickly.

13 THE COURT: Good.

14 MR. BENJAMIN: Okay.

15 MR. WOLINSKY: Your Honor, I think we -- you've set
16 the table, and I've said it already. This motion is not
17 about litigation funding. The two plaintiffs, the two lead
18 plaintiffs Mr. Rad and Mr. Mateen, made hundreds of millions
19 of dollars on this deal. If they want to go into their own
20 pockets and litigate --

21 THE COURT: Let me stop you right there, because
22 here's the thing, the defendants clearly have billions of
23 dollars. So the fact that -- so of course my worry has
24 always been that these are individuals, and while they may
25 be individuals who have millions of dollars, they don't have

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1 the resources of defendants. So it is always been my
2 concern that this motion is a smoke screen. It's to force
3 the plaintiffs to spend their own money and then litigate
4 them to death until they settle this case. That has always
5 been my concern. And the fact that you start out with, gee
6 they got millions of dollars --

7 MR. WOLINSKY: No, they got hundreds of millions.

8 THE COURT: Hundreds of millions, but Match has got
9 billions of billions; right?

10 MR. WOLINSKY: Your Honor, I want to be very clear.
11 We are not talking about -- if they want to recut their
12 Litigation Funding Agreement and take out witness payments,
13 God bless them. And this lawsuit is not going away if we
14 win this motion. Very clear, very clear on that.

15 THE COURT: Okay.

16 (Whereupon, a demonstrative aid was shown on the
17 screen.)

18 MR. WOLINSKY: What the motion is about is what you
19 put your finger on, the payments to witnesses, what we
20 considered to be the payments to the witnesses.
21 Ms. Pambakian and Ms. Kim -- Mr. Kim. And I'll go right
22 through that.

23 (Whereupon, a demonstrative aid was shown on the
24 screen.)

25 MR. WOLINSKY: I'll skip right through that.

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1 (Whereupon, a demonstrative aid was shown on the
2 screen.)

3 MR. WOLINSKY: Let me talk about Ms. Pambakian for
4 a moment. She is -- we think it's a sideshow, but
5 nonetheless, she is a centerpiece of this lawsuit. It says
6 "December 2016 holiday party in Los Angeles. Mr. Blatt, who
7 has been the CEO of Tinder, sexually -- groped and sexually
8 harassed Rosette Pambakian."

9 (Whereupon, a demonstrative aid was shown on the
10 screen.)

11 MR. WOLINSKY: And from that, the plaintiffs say,
12 "Upon information and belief, the defendants covered up
13 Blatt's misconduct, in part because it was essential to the
14 execution of defendant's scheme to deprive the Tinder
15 plaintiffs of their rights as option holders."

16 So there was a cover up as part of a scheme to
17 screw their clients. So she is in the center of this
18 lawsuit even though we think it's a sideshow. Mr. Kim is
19 the center of this case. "And they", the defendants,
20 "bullied and threatened to fire Tinder executives, including
21 plaintiff James Kim, Tinder's current vice present for
22 finance, to stop them from telling the truth. On this
23 basis, defendants manufactured a \$3 billion valuation."

24 So we have two witnesses who not parties in this
25 case. They were parties for 17 days. They still have not

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1 filed a lawsuit anyplace alleging violation of their rights
2 as option holders. So they are, today, witnesses.

3 THE COURT: Well, let me ask you this: Do you
4 disagree or do you agree with their position that they
5 didn't know that there was an arbitration agreement in their
6 employment contract until you pulled out the latest one and
7 showed it to me, because it seems a lot less nefarious if
8 they sued and then go to them and say you've got to
9 arbitrate, and then they withdraw. And don't ask me to
10 decide, which I'm grateful for, whether or not they have to
11 arbitrate.

12 MR. WOLINSKY: Your Honor, I'll accept as true that
13 they didn't know at the time. I'll accept that as true.

14 THE COURT: So they are not plaintiffs anymore.

15 MR. WOLINSKY: They are not plaintiffs anymore.

16 THE COURT: They were at the time the Litigation
17 Funding Agreement was signed; correct?

18 MR. WOLINSKY: Yes. The litigation agreement was
19 signed four days before the lawsuit was filed. So their
20 testimony was locked in at the time the Litigation Funding
21 Agreement was signed.

22 Your Honor, there's really two things baked into
23 the question. One is, I use the phrase "original sin." Was
24 the Litigation Funding Agreement ab initio improper? And I
25 believe it was. Because the amount of payments being made

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1 to Ms. Pambakian and Kim was significantly in excess of the
2 value of the claims that they contributed.

3 Let's take the hypothetical. Two plaintiffs, one
4 with a thousand dollar claim. One with a million dollar
5 claim. The million dollar claim is dependent upon the
6 testimony of the individual with the thousand dollar claim.
7 The million dollar claimant says, great, I'm going to give
8 you \$250,000 of my million dollars if you'll join me in this
9 lawsuit. That's not appropriate, because they are being
10 paid significantly in excess of their value of claim. If
11 they are being paid in that circumstance, in my
12 hypothetical, they are being paid as a witness, not as a
13 plaintiff. And we believe the numbers show that that's what
14 happened here.

15 Now, really, the way to focus on this -- I'm
16 getting ahead of myself. The second aspect of it, let's
17 assume there was no original sin. I believe that there was.
18 Now fast forward, they drop out of the lawsuit. At that
19 point there is a bright-line rule.

20 THE COURT: Let me ask you this: There are more
21 than two that dropped out. Who dropped out?

22 MR. WOLINSKY: Pambakian, Kim, and Metz.

23 THE COURT: Joshua Metz, right?

24 MR. WOLINSKY: Right. And Badeen dropped out.

25 There were four --

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1 THE COURT: Who was the fourth one?

2 MR. WOLINSKY: Badeen, Jonathan Badeen.

3 THE COURT: Let me ask you one question did
4 everyone have RSUs? Did all four of them have RSUs.

5 MR. WOLINSKY: The four existing plaintiffs --

6 THE COURT: Dropped out.

7 MR. WOLINSKY: The four -- if you have RSUs, you
8 had to be an employee. So there were four current employees
9 in the original lawsuit. They had all had RSUs.

10 THE COURT: Who are were they?

11 MR. WOLINSKY: Badeen, Metz, Pambakian, and Kim.

12 THE COURT: And two of them, so they all lost their
13 RSUs; correct.

14 MR. WOLINSKY: Yes.

15 THE COURT: But only two were --

16 MR. WOLINSKY: Only two get an upfront payment
17 under the Litigation Funding --

18 THE COURT: Under the agreement.

19 MR. WOLINSKY: Under the agreement.

20 THE COURT: Okay.

21 MR. WOLINSKY: And three, Pambakian, Kim and
22 Badeen, get a preferred payment out of their -- any
23 recovery.

24 THE COURT: So they get paid first.

25 MR. WOLINSKY: Well, first the Bench Walk.

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1 THE COURT: Right. Get my money back, which I
2 think is a smart thing for everybody to ask for.

3 MR. WOLINSKY: Right. They get their money back,
4 and then Pambakian, Kim and Badeen get first dollar for
5 recovery. And the --

6 THE COURT: So in terms of who got paid out over
7 the -- over the sale, Rad got paid, right?

8 MR. WOLINSKY: Right. All of these people, all of
9 them had options.

10 THE COURT: No, no. Who got paid --

11 MR. WOLINSKY: All of them.

12 THE COURT: -- the lion's share.

13 MR. WOLINSKY: Badeen got --

14 THE COURT: So maybe Rad says, hey, I already made
15 a bazillion dollars. I don't care if someone gets paid
16 before me, and maybe other people said that, too. Why is
17 that inappropriate?

18 MR. WOLINSKY: What's inappropriate about it is
19 because when you look at the arrangements in total, you see
20 that Mr. Metz, who was in the same position of Pambakian and
21 Kim, except for one big respect, Metz doesn't get the
22 upfront payment, and Metz doesn't get the preferred payment
23 on the back end.

24 And your Honor, we put our finger on it right here.
25 Why is Metz different than Pambakian and Kim? Metz's name

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1 appears in the caption and appears in the list of
2 plaintiffs, and that's it.

3 Pambakian and Kim are what turned this ordinary
4 commercial dispute, from Pambakian, into a sexual harassment
5 story with a cover up.

6 THE COURT: Don't call it a story.

7 MR. WOLINSKY: Excuse me.

8 THE COURT: Don't do that.

9 MR. WOLINSKY: Excuse me.

10 THE COURT: Let's go off the record for a second.

11 (Whereupon, there is a discussion held off the
12 record among the Court and all Counsel.)

13 MR. WOLINSKY: You threw me off pace.

14 Why are Pambakian and Kim treated differently from
15 Metz? It just jumps out at you. It stares you in the face.
16 It's right in the complaint. They are treated differently
17 because they had something to offer. Just like my
18 hypothetical, a witness with one thousand dollar claim and
19 another guy with a million dollar claim. I'm going to pay
20 you more than your claim is worth in order to induce you to
21 support my lawsuit. It was original sin. And after they
22 dropped out, we are just in a Black Letter Law land.
23 There's just no question. Your Honor, I think that's kind
24 of the overview of what I would like to cover with you. So
25 let me get into some more detail.

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1 (Whereupon, a demonstrative aid was shown on the
2 screen.)

3 MR. WOLINSKY: So I mentioned this and I introduced
4 Professor Steinitz. She is Professor of Law at Iowa
5 College, but what she really -- the reason we really brought
6 her into this case is that she's routinely retained by
7 litigation finance firms. She is an enthusiastic supporter
8 of litigation finance. And what does she say about these
9 arrangements?

10 (Whereupon, a demonstrative aid was shown on the
11 screen.)

12 MR. WOLINSKY: "This is unusual. The Bench Walk
13 Agreement is inconsistent with the normal structure and
14 function of litigation funding. It is highly" --

15 THE COURT: Is there a normal? I guess I have to
16 ask -- this is why I feel like I really need to have a
17 hearing, because I don't know that there -- is there like a
18 Blumberg form for litigation funding that you mark up and --
19 that's what I don't understand. That's what I feel like I'm
20 not sure about.

21 MR. WOLINSKY: Your Honor, your first comment is
22 correct. We are welcomed to have a hearing to hear from
23 Professor Steinitz. What she is saying is regardless of
24 what -- standard, I give you money. I get a percentage
25 recovery. You litigate the case. I have my fingers in the

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1 pot, or I don't. Those are all standard provisions. This
2 one is different. And that's what Professor Steinitz says.

3 "This one has a unique feature. The unique feature
4 is payments to fact witnesses. Pambakian and Kim were
5 likely being compensated in their capacity as witnesses in
6 the circumstances here, that would be unethical."

7 (Whereupon, a demonstrative aid was shown on the
8 screen.)

9 MR. WOLINSKY: Professor Sebok, Cardozo Law School
10 down the street. He's an avid consultant to Burford
11 Capital. Burford Capital, as you may know is largest
12 litigation funding firm in the world. And he's been working
13 with the ABA on these issues. He is an enthusiastic
14 proponent for litigation finance. And he also says "The
15 Bench Walk Agreements are highly unconventional and unlike
16 any litigation funding arrangement I've seen before. The
17 Bench Walk Agreements appear to involve a vehicle providing
18 multi-million dollar upfront contingent payments to two key
19 witnesses, far in excess of what their claims would be worth
20 if they were pursuing them, which they are not."

21 So we have two experts who are proponents of
22 litigation funding. They are telling this court that what
23 you have in front of you is not the norm. And that's the
24 ethical issue that we are raising today.

25 (Whereupon, a demonstrative aid was shown on the

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1 screen.)

2 MR. WOLINSKY: Your Honor, let me give you an
3 overview of what I'm going to cover.

4 First, "New York law prohibits both contingent and
5 excessive witness payments." I'm going to talk about the
6 conflict between the experts that you see. Then I'll talk
7 about how the Bench Walk Agreement operates and provides for
8 these illegal witness payments. I will skip over the
9 details. And then I'm going to talk about remedies, the
10 point we raised earlier.

11 First, the witness payment provisions must be
12 invalidated.

13 THE COURT: So here is the rub, right, all those
14 plaintiffs are witnesses, so they are all getting paid. So
15 to say that it's a contingent payment isn't right, because
16 other plaintiffs are also going to get paid if they win, and
17 their testimony is, I imagine, is going to be supportive of
18 their case. So that isn't quite right.

19 MR. WOLINSKY: It is right in this respect, your
20 Honor. The other plaintiffs are plaintiffs.

21 THE COURT: Right.

22 MR. WOLINSKY: Kim and Pambakian are not. That's
23 the bright-line division, and --

24 THE COURT: But here's what I'm saying is that it's
25 not such a bright line that when you say "New York law

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1 prohibits contingent and excessive witness payments." If I
2 am going to get paid if I win, that's a contingent payment,
3 but it is not prohibited under New York law.

4 MR. WOLINSKY: Extra payments in your capacity as a
5 plaintiff, as a party.

6 THE COURT: As a party.

7 MR. WOLINSKY: That's the key difference.

8 THE COURT: So you are saying -- but that didn't
9 change -- so that kind of -- what I'm saying to you is, I
10 think that cuts against your original sin. That's my only
11 point.

12 MR. WOLINSKY: Your Honor, it doesn't, because the
13 original sin turns on the fact that they are getting paid --
14 they are not getting a pro rata recovery.

15 If you look at how Mr. Metz gets paid, he had a
16 point one percent of all the options, and after the upfront
17 payments --

18 THE COURT: I -- that is the one thing that gives
19 me pause, because I think that there is a plausible argument
20 that the plaintiffs make, that they were -- they knew that
21 if they joined this lawsuit, they were going to lose a
22 certain amount of money, and so the Litigation Funding
23 Agreement compensates them for that loss.

24 MR. WOLINSKY: Yes.

25 THE COURT: That is a legitimate argument, except

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1 for Metz.

2 MR. WOLINSKY: It's a legitimate argument except
3 for Metz, but there is another point. I'm Pambakian and I'm
4 Kim. I say, look, you want me to join this lawsuit, I'm
5 going to lose my RSUs. You want me to join you have to pay
6 me. That's fine. The question is, why do Rad and Mateen
7 agree to pay it? That's the original sin. Rad and Mateen
8 don't -- these plaintiffs --

9 THE COURT: Because they also lost their RSUs.

10 MR. WOLINSKY: No, they didn't lose --

11 THE COURT: No, they didn't.

12 MR. WOLINSKY: They don't lose their RSUs. They
13 agree to pay because not because they want to increase the
14 size of the pot. They agree to pay to bring these witnesses
15 into the fold.

16 THE COURT: Well, why --

17 MR. WOLINSKY: That's the original sin. And then
18 after they drop out, the payments, the arrangements remain.
19 That's the second sin.

20 THE COURT: What I'm saying to you is that doesn't
21 put them in a better position. It puts them in the position
22 they would have been in.

23 MR. WOLINSKY: No, it puts Rad and Mateen in a
24 worse position financially. Rad and Mateen are giving up
25 value that they would -- I could show you. I'll --

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1 THE COURT: No, I understand.

2 MR. WOLINSKY: Okay. So then I'll address the
3 additional relief.

4 (Whereupon, a demonstrative aid was shown on the
5 screen.)

6 MR. WOLINSKY: First, your Honor, the New York law,
7 um, this is in re: Robinson, 1912, First Department, cited
8 as recently as 2014 by the Court of Appeals. "Payment of
9 money to a witness to make them sympathetic to the party
10 expecting to call him, or for the purpose of influencing
11 witnesses is indefensible under any guise or any excuse."

12 (Whereupon, a demonstrative aid was shown on the
13 screen.)

14 MR. WOLINSKY: And then that's codified in the
15 Professional Rules, 3.4(b). "A lawyer shall not: Offer an
16 inducement to a witness that is prohibited by law, or pay"
17 -- this is where the rub is -- "or pay, offer to pay or
18 acquiesce in a payment of compensation to a witness
19 contingent upon the content of the witness's testimony, or
20 the outcome of the matter." And here we have a payment
21 contingent on the outcome of the matter.

22 Rule 3.4(b)(1) talks about permissible witness
23 payments. "A lawyer may advance, guaranty or acquiesce in
24 the payment of: Reasonable compensation to a witness for
25 the loss of time in attending, testifying, et cetera and

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1 related expenses."

2 So this comes up all the time. The witness says,
3 look, I'm going to miss a day of work. You want me to miss
4 a day of work, you have to pay me. That's fine. That is
5 permitted under New York law. But unreasonable payments
6 unrelated to the loss of time, payments related to a loss of
7 an RSUs is not permitted under the rules.

8 (Whereupon, a demonstrative aid was shown on the
9 screen.)

10 MR. WOLINSKY: Litigation funding. It seems like
11 this is a new issue, but actually it's not all that new.
12 Justice Moskowitz, in 2006, was presented with similar
13 issue. The plaintiff entered into a litigation funding
14 agreement. The plaintiff dropped out of the case, under the
15 funding agreement, the now former plaintiff retained a
16 contingent interest in the outcome of the case. The former
17 plaintiff was a key witness. Justice Moskowitz voided the
18 agreement. Everything you see in Richbell (phonetic), we
19 have in this case.

20 (Whereupon, a demonstrative aid was shown on the
21 screen.)

22 MR. WOLINSKY: What are the plaintiffs' arguments?
23 The first argument from Professor Wendel is that there has
24 to be a quid pro quo. It has to be -- say look, it has to
25 be express. You testify for me, I'll give you money.

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1 That's not what the rule says.

2 THE COURT: Frankly, I would be shocked if anyone
3 actually said that in a document. I mean, that's like, yes,
4 I killed him. Here's the text, you know.

5 MR. WOLINSKY: Then, your Honor --

6 THE COURT: So -- it does have to be -- it doesn't
7 have to say it, but it has to be at least implied that
8 someone's testimony is being purchased.

9 MR. WOLINSKY: No.

10 THE COURT: You don't think that that's true?

11 MR. WOLINSKY: No. Actually, here's what the rule
12 says, "A lawyer shall not acquiesce in the payment of
13 compensation to a witness contingent upon the outcome of the
14 matter." Period. End of story. The person doesn't have to
15 be a material witness.

16 THE COURT: I'm not talking about material. It has
17 to be some indication that that's what is going on as
18 opposed to something else.

19 MR. WOLINSKY: The person has to be a witness.

20 THE COURT: Right. Okay.

21 MR. WOLINSKY: That's all that it has to be. The
22 person has to be a witness.

23 THE COURT: Okay. Bench Walk is getting a payment
24 contingent upon the outcome of the matter, but they are not
25 a witness. Kim and Pambakian are witnesses. That's the

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1 different. Okay?

2 (Whereupon, a demonstrative aid was shown on the
3 screen.)

4 MR. WOLINSKY: So we have Hal Lieberman, Former
5 Chief Counsel for the Disciplinary Committee, widely
6 respected in New York. It's been a pleasure working with
7 him. "Contingent and excessive payments to witnesses
8 violate Rule 3.4(b), even if there is no express quid pro
9 quo."

10 (Whereupon, a demonstrative aid was shown on the
11 screen.)

12 MR. WOLINSKY: Ron Minkoff, he teaches ethics at
13 NYU, Brooklyn, Fordham, Cardozo, and Columbia. This is what
14 he has to say about Professor Wendel's opinion. "His
15 cramped interpretation of the Rule 3.4(b) flies in the face
16 of the rule's plain language, applicable case law, and basic
17 common sense, all of which make clear that any agreement
18 with a fact witness that involves a payment contingent on
19 the outcome of the case is prohibited, whether the agreement
20 mentions testimony or not."

21 I really don't think this is controversial, and
22 frankly, I'm surprised to see Professor Wendel take a
23 different view, because the rule itself just doesn't say
24 what he says it says.

25 (Whereupon, a demonstrative aid was shown on the

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1 screen.)

2 MR. WOLINSKY: What else do the plaintiffs have to
3 say? This is something we just discussed. The fact that
4 Pambakian and Kim were once plaintiffs makes a difference.
5 We have experts who have given opinions on this.

6 Mr. Lieberman, "Pambakian and Kim are solely fact
7 witnesses in this matter now, even though their claims are
8 no longer being asserted in this action. Pambakian and Kim
9 will still directly share in any recovery by plaintiffs in
10 this case. Indeed on a priority basis. These priority
11 payments promised to Pambakian and Kim in their respective
12 joinder letters are prohibited under Rule 3.4 because, one,
13 the payments are contingent, and two, the payments exceed a
14 reasonable amount."

15 (Whereupon, a demonstrative aid was shown on the
16 screen.)

17 MR. WOLINSKY: Ron Minkoff, the same. I could go
18 through it, but I think in the interest of time I won't go
19 through it.

20 I do want to spend time on Professor Simon.
21 Professor Simon is not a paid expert in this case. I don't
22 know if you know Professor Simon. He's considered one the
23 deans of ethics in New York. He teaches at Hofstra. He's a
24 professor emeritus of legal ethics. He's an author of one
25 of the leading treatises.

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1 There was a case in the First Department where his
2 -- one side cited his treatise in support of the idea that
3 witness payments are ethical. And he, for free, pro bono,
4 provided an affirmation in Tricham Housing without any
5 compensation so that the Court would understand his rules.

6 So here's someone, no one is paying him -- no one
7 paid him there and no one is paying him here. Here's what
8 he said in Tricham, a case that was First Department,
9 invalidated a witness payment. "Any compensation
10 arrangement that gives a witness a financial incentive to
11 achieve a specific outcome is improper because the witness
12 will be tempted to testify falsely." And if you dig into
13 the record on that case, you'll see that the witness, who
14 was getting paid in that case, at one time was a party? So
15 Professor Simon needed someone to break the tie; the unpaid
16 expert breaks it in our favor.

17 (Whereupon, a demonstrative aid was shown on the
18 screen.)

19 MR. WOLINSKY: Your Honor, let me go through these
20 -- I don't believe these numbers need to be confidential.
21 This doesn't go to how much they are getting. This goes to
22 how much they own of the pie. Mr. Rad --

23 THE COURT: No, I saw it. I don't need this.

24 MR. WOLINSKY: Mr. Rad has the lion's share;
25 Mr. Mateen has 30 percent; Badeen; Metz, who we talked

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1 about, point one eight; Pambakian, Kim, point one. They are
2 trivial players in this case. They -- I'll skip right
3 through this.

4 THE COURT: And these are all in your papers.

5 MR. WOLINSKY: Yes. So let me go right to the what
6 the experts have to say about this.

7 (Whereupon, a demonstrative aid was shown on the
8 screen.)

9 MR. WOLINSKY: Professor Sebok, proponents of
10 litigation funding. "Pambakian and Kim would obviously want
11 more money to compensate for the loss of RSUs and options,
12 but why would anyone agree to pay?" And this really goes to
13 the core question here. Of course they wanted it, but why
14 pay it. And if the loss of RSUs and their options was the
15 driving factor for the deal, why was there no similar
16 arrangement for --

17 THE COURT: That is really the rub; right? Metz is
18 the rub. And I know Metz put in the affidavit, but his
19 affidavit, frankly, was less than satisfying.

20 MR. WOLINSKY: His punch line, "I cannot fathom why
21 a litigation finance arrangement would provide for a bonus
22 payment between parties contingent on the positive outcome
23 of a joint litigation. In my opinion, the only explanation
24 for this unusual arrangement is that it was promised to
25 secure cooperation and favorable testimony.

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1 (Whereupon, a demonstrative aid was shown on the
2 screen.)

3 MR. WOLINSKY: Mr. Lieberman, "Even assuming, as
4 Professor Wendel posits, that Pambakian and Kim are being
5 compensated through the nonrecourse advances for the cost of
6 losing their RSUs, that does not answer the question of what
7 value Rad and Mateen were getting by overpaying Pambakian
8 and Kim." It's the overpayment.

9 "Given that the only value that Pambakian and Kim
10 brought to the case, aside from their claims, which again
11 were worth less than the payout they were guaranteed." And
12 I showed you that chart. These are trivial plaintiffs.
13 There was no reason to bring them into this suit, except to
14 get -- to secure their testimony.

15 THE COURT: Well, I mean, they have claims.

16 MR. WOLINSKY: They have claims --

17 THE COURT: That's why they are in the suit, right,
18 they have claims.

19 MR. WOLINSKY: No. If you look at Professor
20 Steinitz, it's very interesting the way she talks about it.
21 Their claims, at the end of the day, were negative -- what
22 Professor Steinitz called "negative valued claims." What
23 does she mean by that?

24 THE COURT: If I get paid one dollar, I have a
25 claim. Just because you don't think it's worth ten billion,

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1 I'd take offense at that, If my claim isn't a billion
2 dollars and I'm worthless.

3 MR. WOLINSKY: They had -- let's make up numbers.
4 They had a claim that was worth a million dollars.

5 THE COURT: Yeah, a million dollars.

6 MR. WOLINSKY: But --

7 THE COURT: That might not be a lot to you, but I
8 would like a million dollars.

9 MR. WOLINSKY: No, no, no. It's a lot of money.
10 They had a claim worth a million dollars, but to bring that
11 claim they had to give up five million dollars of RSUs.

12 THE COURT: That's what a litigation funder is for;
13 right?

14 MR. WOLINSKY: No.

15 THE COURT: That's exactly what a litigation funder
16 is for.

17 MR. WOLINSKY: No, no, no, no, no. This is the key
18 point, your Honor. I have a claim that's worth a million
19 dollars, but it's going to cost me five million dollars to
20 bring it.

21 THE COURT: You have to get paid first, right,
22 okay. Got it.

23 MR. WOLINSKY: Well, let's just make sure we are
24 all on the same page. I have a claim worth a million
25 dollars, but it's going to cost me five million dollars to

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1 bring it. Not litigation expense, but in loss of RSUs. Any
2 rational person would say, yeah I have a million dollar
3 claim, but why would I give up the RSUs to bring that claim.
4 I'll stay home.

5 THE COURT: So the litigation funder, who
6 potentially gets a billion dollars, says pay for those RSUs,
7 worth it to me to have you -- to have everybody be a part of
8 the case. That's why it doesn't seem nefarious to me.

9 MR. WOLINSKY: That's --

10 THE COURT: And then I get billion dollars. I take
11 my five hundred million out, you still get your million
12 back, plus you get paid for your loss of RSUs.

13 MR. WOLINSKY: Your Honor, you have put --

14 THE COURT: That makes sense, total sense.

15 MR. WOLINSKY: You -- it does make total sense if
16 you believe that having her in the lawsuit is going to
17 increase your likelihood of getting a billion dollars, not
18 because she is bringing a million dollars to the table, but
19 because she is bringing her testimony to the table. That is
20 the original sin, and that is the subsequent sin.

21 Put yourself in Rad and Mateen's shoes. Put
22 yourself in Bench Walk's shoes. I have a witness who has
23 brings a trivial claim to the table, but, but, if I can
24 secure their testimony, not their claim, their testimony, my
25 claim is all of a sudden worth a lot more. That is paying

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1 for testimony, not for the claim.

2 THE COURT: Only if you -- I mean, you are asking
3 me to make that assumption. And maybe I won't. Maybe I'll
4 say, everybody wanted to sue. Everyone felt that they
5 wanted to vindicate their rights. That's what they wanted
6 to do, and for certain people to vindicate their rights,
7 they were going to lose money. So the litigation funder
8 said to them, yes, you may vindicate your rights, but I'm
9 going to make sure that you are not in a worse position for
10 vindicating your rights than you would be if you just walked
11 away from this million dollars.

12 MR. WOLINSKY: Okay, but why -- but the
13 litigation --

14 THE COURT: So you are asking me to assume for a
15 nefarious purpose, and I'm saying that I don't know that I
16 would do that.

17 MR. WOLINSKY: The litigation funder is an economic
18 animal; right? They are not doing this out of the
19 generosity --

20 THE COURT: Sean Rad and Mateen said, we want you
21 to vindicate your rights. Everybody should do it. Man, I
22 felt bad that I didn't do this, that and the other thing for
23 you at the time, so to make up for you having to do that,
24 I'm going to let you get paid now, because that's the right
25 thing to do, to allow you, even though your claim is a

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1 negligible claim, to allow you to assert it. Isn't that a
2 legitimate thing.

3 MR. WOLINSKY: No, because it's still a witness
4 payment. Look, there's a bright-line rule here.

5 THE COURT: Now that they are out. But when they
6 weren't out and they were plaintiffs, it's not a witness
7 payment. I'm sorry. I don't see that.

8 MR. WOLINSKY: Well, then we have a disagreement.

9 THE COURT: Right. And I think there is an expert
10 who sees it the way I see it and -- AND the problem, I
11 think, is now that they are not in the lawsuit, that -- I
12 see that. I agree.

13 MR. WOLINSKY: Okay.

14 THE COURT: But I'm not going to say, I can't,
15 without hearing some testimony, I can't see saying as a
16 matter of law that the original deal was to pay -- because
17 there are so many possibilities that don't mean that they
18 were getting paid for their testimony.

19 MR. WOLINSKY: Your Honor, then I'm with you, let's
20 have a hearing. If we want to understand what the true
21 motivation is here, let's have a hearing.

22 THE COURT: Okay.

23 MR. WOLINSKY: We are in favor of that.

24 THE COURT: Right. Okay. Anything else you wanted
25 to say, Counsel?

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1 MR. WOLINSKY: Yes, your Honor.

2 THE COURT: Let me say, I've read everybody's
3 affidavits. I've read the expert affidavits.

4 MR. WOLINSKY: No, I'm not gonna spend time on
5 them. What I do want to talk about, remedies.

6 (Whereupon, a demonstrative aid was shown on the
7 screen.)

8 MR. WOLINSKY: And if you would like me to talk
9 about Mr. Grant's affidavit, because it's the only evidence
10 in front of you, I would like to discuss that, but other
11 than that I'll talk about remedies.

12 Mr. Grant is the litigation funder. He is the
13 money. He is the man behind --

14 THE COURT: Right.

15 MR. WOLINSKY: There is an evidentiary -- actually,
16 let me step back. We are in favor of a hearing, but there
17 is a record in front of you, and it is a one-sided record,
18 because in terms of explaining why these payments were made,
19 you have only one affidavit, and that's from Mr. Grant.

20 THE COURT: Well, I also have Mr. Metz's affidavit.

21 MR. WOLINSKY: But they are the recipients.

22 THE COURT: Right.

23 MR. WOLINSKY: In terms of why am I paying you, you
24 only have one witness, Mr. Grant. And to me, the most
25 striking thing is that you don't have any testimony, you

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1 don't have any affidavit from Mr. Rad or Mateen explaining
2 to you, no, no it was just what you just said, your Honor,
3 it was kumbaya time. We were going to reach into our
4 pockets, pay them millions of dollars so they could join the
5 lawsuit. They don't have a kumbaya affidavit. It's not
6 there.

7 THE COURT: I agree.

8 MR. WOLINSKY: Okay. What you do have is
9 Mr. Grant. Here's what Mr. Grant said: "These advances
10 were made as part of the group financing, such that BWA's,
11 Bench Walk's, percentage of any recovery of all proceeds of
12 all claim proceedings were increased by these advances."

13 So let me unpack for you what he is saying there.
14 What -- if you look at the Litigation Funding Agreement,
15 hypothetical numbers, if Grant -- it Bench Walk puts in \$30
16 million, they get 15 percent. If they put in 16 million
17 dollars they get 30 percent.

18 THE COURT: Hypothetically.

19 MR. WOLINSKY: Hypothetically, let's assume. So
20 what he is saying is, by paying advances to Pambakian and
21 Kim, my percentage recovery increased because I invested
22 more money in the lawsuit. So all he is saying is, in terms
23 of making these advanced payments, it was a good business
24 deal. He's not saying that I needed -- he's not saying
25 anything other than that.

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1 THE COURT: I don't expect a kumbaya moment from
2 the litigation funder, right?

3 MR. WOLINSKY: Here's what they do say, and it goes
4 to the RSUs. "These advances were intended to offset part
5 of those financial risks and allow Pambakian and Kim to
6 participate in the claim proceedings, which would benefit
7 both Bench Walk and the other claimants."

8 But he doesn't say what the benefit is. It stops.
9 You would think he would say, yes, and the benefit was
10 kumbaya. The benefit was brotherhood, sisterhood. He
11 doesn't say that. Because -- and the structure of the
12 agreement, look, we -- I think there needs to be a hearing,
13 but the structure of the agreement, the fact that Mr. Metz
14 is let out, and the fact that he is not mentioned in the
15 lawsuit really tells you what is going on here.

16 We have heading in our brief. There's a smell,
17 something doesn't smell right here. As I said, Mr. Rad and
18 Mateen, they are the individuals who are best positioned to
19 explain why these people were brought into the lawsuit, and
20 they did not submit an affidavit.

21 The order to show cause that we talked about
22 earlier today, he has a five page affidavit about how he was
23 wronged by Matt Phelps. There's no affidavit here. The
24 absence is --

25 THE COURT: Noted.

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1 (Whereupon, a demonstrative aid was shown on the
2 screen.)

3 MR. WOLINSKY: Your Honor, let me speak about
4 remedies. Look, contingent fee arrangements with fact
5 witnesses are void and unenforceable as against public
6 policy, period, end of story.

7 Parties -- whether they were parties before, these
8 agreements can't stand today. Original sin. We could argue
9 that until the cows come home. Where they are today, these
10 agreements cannot stay. But now we have an issue, how do
11 you unring the bell. As I showed you hear, contingent fee
12 agreements have been struck in other cases, including in
13 cases where the parties -- where the witness was once a
14 party.

15 (Whereupon, a demonstrative aid was shown on the
16 screen.)

17 MR. WOLINSKY: Why do I say additional relief is
18 required? Let me start with Mr. Kim. Because, your Honor,
19 we believe that the evidence has been corrupted. Starting
20 with Mr. Kim.

21 THE COURT: Based on what?

22 MR. WOLINSKY: Based on what I'm going to show you.
23 Okay? The complaint alleges that the defendants
24 manufactured false, misleading and incomplete financial
25 information about Tinder's future revenues. Who was the

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1 individual -- who was one of the group of individuals
2 responsible for preparing those projections? Mr. Kim. What
3 did Mr. Kim say at the time about these projections?

4 (Whereupon, a demonstrative aid was shown on the
5 screen.)

6 MR. WOLINSKY: This is a text messaging interchange
7 to -- between Mr. Kim and Drew Williams, May 25th, 2017,
8 just before the projection an going to the banks. These are
9 two of the authors of the projections.

10 "I know it's all clean, but I keep wondering what
11 they could finds in the model?"

12 Mr. Kim responds, "I know, and knowing Sean."

13 So "Sean" is Sean Rad. So when he says, "I know
14 it's all clean", he is saying I know the model is all clean
15 "and I keep wondering what Sean is going to find in them."

16 And then Kim writes, "I hope he doesn't go
17 nuclear."

18 And then Kim writes, "If he does, I'm just quitting
19 and you'll be holding the bag, lol."

20 So the allegation in the complaint is that everyone
21 was afraid of Mr. Black, and he is a bully. And here, what
22 Mr. Kim is saying at the time, at the time, is that the
23 projections are clean and he is worried about what Mr. Rad
24 is going to say.

25 THE COURT: Well, no, he didn't say that, right?

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1 Somebody else said that, Mr. Williams --

2 MR. WOLINSKY: He says, "I know."

3 THE COURT: "I know." Okay, but I'm not going to
4 -- I mean who knows what that means.

5 MR. WOLINSKY: Now let's talk about Ms. Pambakian.

6 (Whereupon, a demonstrative aid was shown on the
7 screen.)

8 MR. WOLINSKY: This is a text message --

9 THE COURT: Okay. I hear what you are saying.
10 This has to do -- but let me say this, that if you are
11 questioning the veracity of the witnesses, I have no problem
12 with you doing that. I'm not going to do it now. And I'm
13 not going to assume that what they say in their complaint is
14 false. This -- they said what they said. If you disagree
15 with it, you disagree with it. If you have information that
16 casts doubt on it, good. I'm sure they have information
17 that casts doubt on what your clients say. So at this point
18 in time I'm not going to -- there is no possibility that I'm
19 finding that someone's testimony is irrevocably tainted by
20 this agreement. So I'm taking that off the table right now.
21 I'm not going to not -- I'm not going to find that.

22 MR. WOLINSKY: Okay. I understand that, your
23 Honor. I just want to be clear, for the record, we have
24 documents that show that what she is saying now is
25 inconsistent with what she was saying then.

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1 THE COURT: I'm sure there are plenty of people in
2 the same situation alleging the same things as she is who
3 have inconsistent things that they have said in the past.
4 Again, at this point in the litigation, there is no
5 possibility that I am making a veracity finding. I want to
6 make that clear. I haven't seen what your clients have
7 said, that there are smoking guns, that there may be a
8 complete and total lie in the past. All I'm saying to you
9 now is that this is not the time for anybody to make that
10 decision or resolution, and I'm certainly not going to do it
11 with respect to their testimony.

12 MR. WOLINSKY: Your Honor, then let me just be
13 clear on what I think you can and can do now. You can look
14 at the payments and conclude truth or false, true or not,
15 that the existence of the payments has created an issue
16 about her testimony as a result of an unethical and improper
17 payment, and because of that, this sideshow about the
18 holiday party and a cover up, that the board of directors
19 supposedly participated in, should be knocked out of the
20 case.

21 THE COURT: Not happening. I'm not doing it. I'm
22 telling you.

23 MR. WOLINSKY: Your Honor.

24 THE COURT: There are plenty of things that I could
25 do. That is the not one of them. I'm not going to silence

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1 someone in that way. I'm just not doing it. And I know you
2 know what I mean, so don't ask me again.

3 MR. WOLINSKY: Very well. So then you are left
4 with one remedy is available. Okay? You can -- and it's
5 not easy, especially if you've taken --

6 THE COURT: Well, I'm going to ask the plaintiff,
7 why don't they just redo the Litigation Funding Agreement.
8 Cut out those payments and start again. Let those people do
9 get litigation funding in their arbitration if they want. I
10 don't know, that to me, seems like the easiest thing, and
11 would avoid this whole problem.

12 MR. WOLINSKY: Your Honor, it's easy, but it
13 doesn't undue the prejudice to my clients.

14 THE COURT: What do you think the prejudice is?

15 MR. WOLINSKY: The prejudice to my client is --
16 let's talk about Mr. Kim. Mr. Kim, but for these payments,
17 we think he could've been a witness for us.

18 THE COURT: Ask him.

19 MR. WOLINSKY: He's corrupted. He's got his money.
20 He signed his name to a complaint that he then dropped out
21 of.

22 THE COURT: Again, I'm saying to you that that is
23 not going to rule the day, because if you accept what the
24 plaintiffs say, they didn't know they had an arbitration
25 agreement. I'm sure most people -- let me say this: That

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1 most people within employment contracts don't read the fine
2 print and find out later on that they have to arbitrate.
3 This is not the first time I've heard that.

4 MR. WOLINSKY: Most people don't have Gibson Dunn.

5 THE COURT: Look, you are completely free to trash
6 him with all his inconsistent statements if you think he is
7 a terrible witness and you've got the goods against him.
8 Put him up, cross him. You can do it, and he will look bad.
9 So there's that prejudice. I don't think is insurmountable.

10 MR. WOLINSKY: And we can cross him on litigation
11 funding arrangements.

12 THE COURT: You could cross him on whatever he did
13 that you think affects his veracity.

14 MR. WOLINSKY: Including litigation funding?

15 THE COURT: Let's talk about that separately.

16 MR. WOLINSKY: Well that's --

17 THE COURT: Look --

18 MR. WOLINSKY: -- what we are talking about today.

19 THE COURT: No. I mean, I don't know. I'm
20 thinking about solutions.

21 MR. WOLINSKY: Yes, okay. Well, let's talk about
22 Mr. Kim very concretely. Mr. Kim is on the stand at a
23 trial, assuming whenever that happens, and we say Mr. Kim,
24 let's talk about how you got into this lawsuit. You got X
25 dollars up front; didn't you?

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1 THE COURT: Yes, I am not -- let me say this: I'm
2 not going make a ruling on this today, and I'll tell you why
3 in a minute, but at the end -- and I have to let the other
4 side speak. You've already been speaking for an hour. But
5 I'm not opposed to allowing you to cross examine the witness
6 about the financial incentive, or former financial
7 incentive, and let him explain it. I don't think that
8 that's -- I'm not going to -- I don't find that that
9 prejudice is something that can't be overcome. So let me
10 hear or let me talk to the plaintiffs.

11 MR. WOLINSKY: Sure. Your Honor, just a
12 housekeeping matter. How are we going to document the
13 unsealing?

14 THE COURT: There is no unsealing. It's the same
15 -- I mean --

16 MR. WOLINSKY: Well, you have an existing order
17 that says -- I don't have it in front of me.

18 THE COURT: Let me ask plaintiffs, are you clear
19 now about what I want sealed and what I don't want sealed?
20 If you do an amended order that you both agree on, I'm happy
21 to sign it.

22 MR. BENJAMIN: We would be happy to meet and confer
23 with the other side. We've never had that opportunity, your
24 Honor.

25 MR. WOLINSKY: Your Honor --

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1 MR. BENJAMIN: There were --

2 THE COURT: It doesn't matter. It doesn't matter
3 please don't that. Just do it now.

4 MR. BENJAMIN: Sure.

5 THE COURT: Okay. Go ahead.

6 MR. BENJAMIN: Good morning, your Honor. Matt
7 Benjamin for the plaintiffs. With me is Connor Sullivan and
8 Laura O'Boyle, of Counsel.

9 THE COURT: Good morning, or afternoon. It's still
10 morning.

11 MR. BENJAMIN: Good morning.

12 In the interest of time and because I want to meet
13 the Court exactly where you are, I'm going to focus my
14 remarks on the key issues that I heard in your colloquy with
15 Mr. Wolinsky.

16 We appreciated your remarks about remedy and about
17 credibility and cross examination. I'm just going to put
18 those to the side. We agree that defendants can cross
19 examine until they're blue in the face. And I expect this
20 is not the last time we'll hear about this issue. They're
21 gonna argue it to the jury, the Court of Appeals. The
22 Appellate Division says is appropriate in the case.

23 So I would like to quickly explain why defendant's
24 motion should be denied and there is no hearing warranted,
25 and then I'm going to address --

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1 THE COURT: I'm definitely going to have a hearing.
2 I'm going to say that, I'm having a hearing, because it's
3 unclear to me whether or not, if there is a violation of the
4 disciplinary rules regardless, regardless, I have an
5 obligation, a judicial, ethical obligation to do something
6 about it. And there are two competing views on that issue
7 and I'm not going to -- I have to have a hearing,
8 unfortunately. I don't want to have a hearing, but I have
9 to, because I don't want to get sanctioned for not doing
10 what is appropriate with respect to what is called a
11 violation of the disciplinary rules.

12 MR. BENJAMIN: Having listened to Mr. Wolinsky's
13 remarks and read their briefs, I certainly understand your
14 Honor's reaction. And if these agreements actually
15 implicated Rule 3.4(b), that would make sense. I would just
16 like an opportunity to --

17 THE COURT: Let me ask you this before you go any
18 further. Do I not have experts telling me that it does?

19 MR. BENJAMIN: You have experts in defendant's who
20 are all over the place in the course of their briefing, and
21 I would just like --

22 THE COURT: Do they not say that it is a violation
23 of that rule?

24 MR. BENJAMIN: They do.

25 THE COURT: So then I'm obligated to have a hearing

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1 and find for myself whether or not it is true. I can't
2 avoid it. I can't do it on -- I don't want to do it,
3 believe me. I have said to you many times, I don't want
4 this litigation to be about the Litigation Funding
5 Agreement, but I have my own judicial, ethical obligations,
6 and I'm stuck with it, and I have to comply with it.

7 MR. BENJAMIN: I understand, your Honor.

8 So I would like to just quickly explain why the
9 agreements don't violate Rule 3.4(b), and then I'm going to
10 address the key questions that came out of Mr. Wolinsky's
11 argument, and that's on the original sin question, the
12 question of whether they are plaintiffs versus non
13 plaintiffs, and the key question that defendants are
14 obsessed with, which is why the other plaintiffs agreed to
15 this.

16 The agreements don't implicate Rule 3.4(b) because
17 they don't provide compensation to a witness for testimony.
18 As your Honor explained, there is an independent explanation
19 for the agreements that has nothing to do with paying
20 compensation to a witness for testimony. The agreements
21 cover the costs of the litigation for the ten people who
22 filed this lawsuit and brought their claims, including the
23 specific costs that three people, not two, were uniquely
24 exposed to when they filed this lawsuit.

25 The agreements -- the ten people who received money

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1 under the agreements all filed their claims in this case,
2 all of them still have claims today, and all of them --

3 THE COURT: Do they all get the same amount of
4 money?

5 MR. BENJAMIN: Um, the way they are recover under
6 the agreement, your Honor, is dictated by the provisions at
7 issue.

8 THE COURT: So, again, do they all -- so ten people
9 filed. Do all ten people get -- in relation to how much
10 they would get if the lawsuit is successful?

11 MR. BENJAMIN: So one of the things, the agreement
12 does is allocate recovery. So it's not ten percent for each
13 of the ten people.

14 THE COURT: I agree. I'm going to keep asking you
15 this question until I get my answer, which is, do they get
16 -- is their recovery consistent with their percentage of the
17 lawsuit?

18 MR. BENJAMIN: In some scenarios it is. And in
19 other scenarios it isn't. It depends how much money --

20 THE COURT: Whose isn't?

21 MR. BENJAMIN: It depends how much money the
22 plaintiffs win and how valuable their claims are.

23 THE COURT: Whose claims aren't consistent with
24 their percentage of how much they get?

25 MR. BENJAMIN: So three individuals, Mr. Badeen,

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1 whom the defendants concede doesn't have any testimony to
2 offer and isn't being paid as a witness, which is proof that
3 their quid pro quo theory is wrong, Ms. Pambakian and
4 Mr. Kim. So --

5 THE COURT: Ms. Pambakian and Mr. Kim do get a
6 larger percentage than their percentage that they would get;
7 correct?

8 MR. BENJAMIN: Not necessarily, your Honor. It
9 depends how much money we make.

10 THE COURT: Well if you made no money, who gets
11 paid? If you lose, who gets paid?

12 MR. BENJAMIN: If we lose, no one gets paid.

13 THE COURT: I don't think that's correct. Don't
14 Pambakian and Kim get paid whether or not you win?

15 MR. BENJAMIN: So the advances that have been
16 provided are on a nonrecourse basis.

17 THE COURT: So let me ask you in a yes or no way,
18 do Pambakian and Kim get paid whether or not you win?

19 MR. BENJAMIN: Yes.

20 THE COURT: Okay.

21 MR. BENJAMIN: The reason -- and the reason is that
22 those advances, just like the other costs of litigation that
23 were funded under the terms of the agreement were provided
24 on a nonrecourse basis.

25 The agreement -- all of the people who receive

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1 money under the agreement have claims -- they filed their
2 claims, they have claims.

3 THE COURT: One second. Let me -- are you saying
4 to me Rad gets paid whether or not he wins?

5 MR. BENJAMIN: No, your Honor.

6 THE COURT: No. So that's not really right. Two
7 people get paid whether or not the lawsuit is successful.

8 MR. BENJAMIN: That's correct, because two of those
9 people -- because two of them people had RSUs that were --

10 THE COURT: A lot of -- right, but other people
11 also had RSUs and didn't get paid.

12 MR. BENJAMIN: And I would like to discuss
13 Badeen --

14 THE COURT: Yes. So when you say to me, oh, no,
15 there's no way, that -- to me it seems like it's a question
16 of fact, because it could go either way, which is why I
17 really feel like I need a hearing.

18 MR. BENJAMIN: So a couple of responses, your
19 Honor.

20 THE COURT: Metz doesn't get paid; right?

21 MR. BENJAMIN: Mr. Metz gets paid based on his pro
22 rata allocation. He does not have a prior recovery --

23 THE COURT: He lost RSUs; correct?

24 MR. BENJAMIN: He did. He lost a small of amount
25 of RSUs and --

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1 THE COURT: They all lost a small of amount of
2 RSUs.

3 MR. BENJAMIN: Four of them did, your Honor.
4 That's correct. Three of them, including Mr. Badeen, got
5 protections under this agreement that offset the significant
6 costs that they faced.

7 Mr. Badeen, again, who doesn't have, according to
8 defendants, any unique testimony and isn't being paid as a
9 witness. Your Honor asked about the fact that the
10 plaintiffs, all ten plaintiffs filed this suit, four of them
11 are no longer plaintiffs. I would like to address that.

12 Mr. Wolinsky mentioned the Richbell case and
13 Tricham case. All of the cases that defendants cite, all of
14 them -- first of all, no court has ever dismissed. All of
15 the cases that defendants cite involve two key features that
16 aren't present here.

17 First of all, the witness was paid in an exchange
18 for testimony in almost every case explicitly. I know that
19 we scoffed at the idea that they would write it down in the
20 agreement, but, in fact, in almost every case that they
21 cited, it was, in fact, apparent on the face of the
22 agreement.

23 THE COURT: Don't you think that lawyers learned
24 from former cases --

25 MR. BENJAMIN: Sure.

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1 THE COURT: -- and now they say, boy, that would be
2 a stupid thing for me to put in because these two cases show
3 that that's a dumb thing. But you have to -- I'm not -- my
4 suggestion to you is that it's not like it's off the wall.
5 What defendants are saying is not off the wall. That's my
6 point. It does have merit. Your point has merit. The
7 question is, who wins at the end of the day? And I don't
8 know that I could do that on this hearing without a hearing.

9 MR. BENJAMIN: Mr. Wolinsky focused on the lack of
10 the kumbaya affidavit, as he called it. The reason the
11 kumbaya affidavit isn't necessary is because the case of
12 Mr. Badeen is the kumbaya affidavit. Mr. Badeen received
13 exactly the same type of priority recovery that they say
14 only could have been provided to Ms. Pambakian and Mr. Kim
15 as a corrupt witness statement, but of course when it comes
16 to Mr. Badeen, who received exactly -- and holds today --
17 exactly the same priority recovery, that they don't
18 challenge. They say he has no vital testimony to offer and
19 he wasn't paid as a witness. That is the proof that these
20 provisions have nothing to do with compensating witnesses
21 for testimony.

22 Mr. Wolinsky asks, why would Rad and Mateen agree
23 to these provisions if they weren't purchasing testimony?
24 You could ask the exact same question about why they agreed
25 with respect to Mr. Badeen, whom they concede wasn't paid

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1 for testimony. That is proof, your Honor, that the
2 explanation that you articulated for the agreements, that
3 they covered the costs of litigation, including the specific
4 unique costs that these three people faced, is correct. All
5 ten plaintiffs gave exactly the same type of interest to
6 these three people for the same --

7 THE COURT: Except that doesn't explain Metz;
8 right? So your explanation is sort of, maybe, kind of, but
9 it doesn't explain Metz. And what Metz says is, oh, I just
10 decided I didn't have that big of a deal about it. That, to
11 me, is so lame and not explanatory that it's all over the
12 place. Your explanation doesn't fit with Metz. Theirs
13 doesn't fit with Badeen. So I don't know whose explanation
14 is correct, but certainly if there's is correct, you're in
15 trouble. That -- you are not in trouble, that Litigation
16 Funding Agreement is in trouble.

17 If your explanation is correct, I don't know
18 whether -- I have two witnesses who say, two experts, who
19 say it doesn't matter, it's still violative. So what's to
20 do?

21 My suggestion to you is that you just rework the
22 Litigation Funding Agreement and avoid this whole problem.

23 MR. BENJAMIN: So to respond to that directly, your
24 Honor, there are a couple of authorities that Mr. Wolinsky
25 didn't address in his presentation that explains, number

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1 one, why plaintiffs, a group of ten people, can allocate a
2 recovery in a way that is pro rata, non pro rata, or that
3 even guarantees certain plaintiffs a specific percentage of
4 recovery.

5 On page 21 of our opposition brief, we gave you
6 cites to both the ALI restatement on aggregate litigation,
7 and an ethics opinion from the New York State Bar.
8 Defendants have not responded to either of these citations.

9 What both of these authorities say is that
10 plaintiffs in an aggregate litigation, in a group
11 litigation, can decide to allocate recovery however they
12 like.

13 THE COURT: That doesn't respond to the question of
14 what if someone who's going to give positive testimony gets
15 80 times more than someone who has no testimony. So that's
16 not really -- that doesn't even end the inquiry. It just
17 says as a general matter, if I decide that I'm going to get
18 35 percent and you are going to get 20 percent, no problem,
19 but it doesn't specifically address the issue of the person
20 whose testimony is going to help me gets a lot more than the
21 person whose testimony isn't.

22 MR. BENJAMIN: You are right, your Honor. And in
23 the hypothetical that Mr. Wolinsky gave to you, you'll note
24 that he assumed, in presenting the hypothetical, that the
25 person who received the payment was being paid for their

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1 testimony; right?

2 THE COURT: Well, that's what they are asking --
3 they're asking me to assume that and you're asking me not to
4 assume that.

5 MR. BENJAMIN: I'm simply saying, your Honor, that
6 in all of the cases that defendants cite that have ever
7 found a violation of Rule 3.4(b), two things are true that
8 aren't true here.

9 Number one, the payment was indisputably,
10 indisputably, there was no conceivable basis for the
11 payment, other than to obtain testimony.

12 Let's talk Richbell and Tricham.

13 THE COURT: That's why I feel like I need a
14 hearing. If I find that to be true, then it's indisputable.

15 MR. BENJAMIN: And I'll come back to the hearing, I
16 promise.

17 Richbell and Tricham, the reason that the payment
18 was indisputable in exchange for testimony Richbell and
19 Tricham explains exactly why it isn't indisputable here.

20 Richbell, first. The facts in Richbell, the
21 witness who received the payment executed an agreement to
22 provide testimony at a time that he did not have any claims
23 in the case. And couldn't have any relationship to the
24 proceeding, except as a witness.

25 Tricham, same thing. The individual who signed an

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1 agreement for a contingent interest had no live claims. He
2 couldn't be a plaintiff in the case going forward. His only
3 relationship at the time the agreement was signed, three
4 days before his deposition, was as a witness in the case
5 going forward.

6 Here, in contrast, Kim, Pambakian, and Badeen,
7 whom, again, they admit isn't being paid as a witness, have
8 live claims, they've already filed those claims as a
9 plaintiff in this case, and they have them today, and they
10 brought them and they will bring them going forward.

11 And just to think about the harms that Rule 3.4(b)
12 is designed to prevent. What did the First Department say
13 in Tricham? What the First Department said in Tricham is
14 that the problem with giving a witness, someone who is a
15 witness and only a witness, a contingent interest in the
16 recovery, is that it, quote, "creates an incentive to
17 testify differently." It creates an incentive, your Honor.

18 Here, when these three people, if and when they
19 testify in this case, the jury isn't going to be confused,
20 as you said, about what incentive they might have to
21 testify. They are claimants under the agreement. They were
22 claimants under the agreements the day that they signed
23 them, they were plaintiffs in this case, and they are
24 claimants today.

25 THE COURT: But now -- no they are claimants -- no,

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1 I don't see that. You are saying to me that you -- that I
2 think is a worse argument for you. They are not plaintiffs
3 here. And you are saying that you are going to pay them
4 even if they are not parties here. So they are clearly only
5 witnesses, and they are going to get paid if we win. And
6 they are going to get paid first if we win. And they are
7 going to get paid a lot more if we win than other people who
8 have similar claims. And they are going to get paid even if
9 we don't win. So those -- all of those factors, you are
10 telling me, mean nothing. And I'm saying to you, I don't
11 think that's true. They mean something. And so I cannot
12 just decide, on the papers, whether or not that means that
13 they are being paid, essentially paid for their witness
14 testimony. And it doesn't matter to me so much what
15 happened three months ago. It just matters to me what
16 happened now.

17 So let me ask you again, why don't you just redo
18 the Litigation Funding Agreement? That would obviate all of
19 this. Get them out as claimants under there. Let them do
20 their own Litigation Funding Agreement under their
21 arbitrations, and then we can move forward.

22 MR. BENJAMIN: The answer, your Honor, goes to what
23 the Litigation Funding Agreement tried to accomplish when it
24 was written.

25 THE COURT: It doesn't matter to me what it tried

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1 to accomplish when it was written. It matters to me what
2 I'm going to do going forward. And I'm telling you that I'm
3 not denying this motion out of hand. I'm going to have a
4 hearing. We are going to hear some testimony. And it seems
5 to me that the best thing for you to do is to just rework
6 that agreement to obviate all the issues that I've raised
7 today. If you don't want to do that, I'm totally fine with
8 that, too. We'll have our hearing and I will then decide
9 the motion.

10 MR. BENJAMIN: Certainly understand your reaction,
11 your Honor. There are several points that I would like an
12 opportunity to make --

13 THE COURT: Of course. I'm not trying to cut you
14 off. I'm trying to get to the chase.

15 MR. BENJAMIN: Of course, of course.

16 With respect -- the payments -- the payment
17 provisions under the agreements are actually different, so
18 let's take them each in turn.

19 First the advances.

20 THE COURT: You have a lot of little yellow
21 stickies handed up to you. Do you want to read them first
22 before you talk to me?

23 MR. BENJAMIN: I would rather focus on your
24 questions, your Honor.

25 The advance payment provisions. The only way that

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1 a payment implicates Rule 3.4(b), if it is a payment in
2 compensation to a witness that is either contingent on the
3 context of testimony, or the outcome of the case.

4 Now, I'm going come to the priority recoveries on
5 the back end, because I understand defendant's argument
6 about that being contingent.

7 But focusing on the advances first, there is no
8 argument that those payments are either contingent on the
9 content of testimony or the outcome of the case. They
10 simply aren't.

11 THE COURT: Why do you say that? Because you think
12 it's true? The fact of the matter is, there are people who
13 don't have relevant information who are not getting
14 contingent payments. And the people who have seriously
15 relevant information are getting contingent payments. And
16 there is one who has relevant information who isn't. So
17 it's all over the place. That's my whole point. It's not
18 like I can say, as a matter of law, that what you think is
19 true is true. I don't know.

20 MR. BENJAMIN: So that argument obviously
21 presupposes what testimony people have and what they don't
22 have, which defendants are happy to speculate about where it
23 helps them, but --

24 THE COURT: I don't want to speculate at all. I
25 want the testimony. That's why I keep saying I want a

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1 hearing. I want to hear from every single person what the
2 deal is on this agreement so that I can make a real -- so I
3 can satisfy myself, first of all, that I am -- that I am
4 fulfilling my judicial, ethical requirements, which is
5 really my only concern here. I wish -- I did not want to
6 get involved in this at all, but now I'm involved and I have
7 ethical obligations with respect to Disciplinary Rules. I
8 have two experts, one who was the guy for the First
9 Department forever and ever and ever, so I'm not going to
10 not pay attention to what he has to say, telling me that
11 this is a disciplinary violation. I can't ignore that. How
12 Lieberman says it's a disciplinary violation, he is the guy
13 who was in the First Department for a hundred years. I
14 can't just say, "Sorry, that's wrong."

15 MR. BENJAMIN: And I understand, I completely
16 understand your reaction. They did submit a lot of new
17 reports on reply that we didn't have an opportunity to
18 address.

19 THE COURT: I know. If you have the Second
20 Department guy, I don't know what I would do.

21 MR. BENJAMIN: Understood. We'll try to get the
22 Second and Third and Fourth.

23 THE COURT: All I'm saying to you is that I want
24 you to put your argument down, but at the end of the day I'm
25 not deciding this on the papers.

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1 MR. BENJAMIN: I understand. So I -- I'm just
2 going to proceed with the argument. And I want to address
3 just the plaintiff's non plaintiff point.

4 The fact is is that Richbell and Tricham, and all
5 the other cases the defendants cited, the people who
6 received the payments received them at a time that they
7 could only be witnesses.

8 Again, when Badeen, Metz -- when Badeen and Metz
9 and Pambakian testify, there will not be any confusion about
10 what incentives they have. And the key point, your Honor,
11 is that the agreement didn't change the underlying
12 incentives that they had as plaintiffs.

13 The same things that made the agreement
14 appropriate, and again, that's the reason that I gave you
15 those authorities on pro rata and non pro rata recovery to
16 address Mr. Wolinsky's original sin point, the authorities
17 are clear, one, that plaintiffs can allocate recovery
18 initially in a way that is non pro rata, right, not
19 necessarily in proportion to their claims.

20 And two, that interested witnesses can testify,
21 right, that's CPLR 4512. So it's clear that this agreement,
22 under those authorities, would not be improper, that they --

23 THE COURT: No, I don't think that that -- I don't
24 -- that is not the conclusion that I don't think follows.
25 It doesn't say that in any -- and that it is no matter what,

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1 that if you misallocate, for lack of a better word, or
2 allocate in a way that that automatically clears it. It
3 just says that it's allowed. It doesn't mean that it
4 doesn't raise an inference. Which is the question here,
5 does it raise an inference?

6 MR. BENJAMIN: Yes.

7 THE COURT: That's what I'm saying to you. And the
8 same thing is, of course interested witnesses testify, but
9 interested witnesses only get paid for their time off. They
10 don't get paid more to testify. And that is the second
11 inference that is being raised here.

12 And my question to myself is, is that a fair
13 inference or not. You are saying no. And I believe that
14 you have factual support for your no. Defendants are saying
15 yes. And I believe they have factual support for their yes.
16 And I have experts who are telling me, regardless of motive,
17 it's not allowed. So then --

18 MR. BENJAMIN: I agree with you, your Honor, that
19 certainly, certainly a non pro rata allocation could be
20 connected to testimony. I'm not taking a bright-line
21 position that it couldn't, of course.

22 What I'm saying is that there is evidence, without
23 any need for a hearing -- I understand your Honor's
24 inclination -- but there is evidence in the agreement itself
25 that proves that what we are saying is true and that what

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1 defendants are saying is not.

2 THE COURT: What about the evidence that Metz isn't
3 paid?

4 MR. BENJAMIN: And --

5 THE COURT: What does it say in the agreement about
6 Metz not being paid?

7 MR. BENJAMIN: It doesn't say anything in the
8 agreement, your Honor.

9 THE COURT: So therefore the agreement itself
10 doesn't end the inquiry.

11 MR. BENJAMIN: It says it in the affidavit that
12 Mr. Metz has provided to you.

13 THE COURT: Which I find, as I said to you, is the
14 affidavit that I found to be less than satisfactory.

15 MR. BENJAMIN: And, but, your Honor, think about
16 the authorities that we just discussed. Why would
17 plaintiffs allocate a recovery in a way that is non pro
18 rata? They could do it in any number -- for any number of
19 reasons that are based on their individual circumstances.
20 Mr. Metz has explained to you, under penalty of perjury in
21 an affidavit, that he stood to lose far less and that he was
22 prepared to bring his claims without any kind of protection.

23 Now let's just be clear about what that means. It
24 doesn't mean that Mr. Metz is losing out somehow. It
25 doesn't mean that he is worse off. What it means is that

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1 Mr. Metz thinks that he has his own lottery ticket. He
2 wants to bring his claims in this lawsuit. He thinks he's
3 going to make millions of dollars. And he was prepared to
4 file his claims just like six other plaintiffs in this case,
5 without any significant protections.

6 THE COURT: Now he is done. He doesn't have -- he
7 is not a plaintiff here.

8 MR. BENJAMIN: No, but, your Honor, that's the key
9 point. He still has --

10 THE COURT: Oh, he gets paid --

11 MR. BENJAMIN: That's the key point, your Honor --

12 THE COURT: He gets paid whether or not he is a
13 plaintiff here.

14 MR. BENJAMIN: Because the litigation --

15 THE COURT: No wonder why they are not bringing
16 arbitrations, because if they win -- that makes total sense
17 now.

18 MR. BENJAMIN: No --

19 THE COURT: Why bother. They get paid if they win.
20 They get paid -- wow, that is something that I don't think
21 you want to -- that doesn't help you. I think that hurts
22 you.

23 MR. BENJAMIN: Your Honor, your Honor. The reason
24 that Mr. Metz gets paid is because he still has claims that
25 he is committed to bring under the terms of the agreement.

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1 And this is the key point --

2 THE COURT: No, he hasn't brought any claims.

3 MR. BENJAMIN: That he is committed to bring under
4 the terms of the agreement.

5 THE COURT: Wait a second. If this lawsuit wins,
6 if you win this lawsuit, right, and you are saying he never
7 brings an arbitration, then he doesn't get paid?

8 MR. BENJAMIN: The four individuals have sworn to
9 you, your Honor, under penalty of perjury, not that they
10 intend to bring the claims, but that they will. There is a
11 statute of limitations on the claims, and that they will
12 bring them.

13 THE COURT: So you are telling me if they -- if
14 this litigation goes through and it ends in -- so breach of
15 contract, six years. If the litigation ends in five years
16 and they get paid under the Litigation Funding Agreement,
17 they are still going to bring their arbitrable claims?

18 MR. BENJAMIN: What I could tell you, your Honor,
19 is that the statute of limitations is significantly shorter
20 than that. And obviously I don't want to get --

21 THE COURT: For a breach of contract?

22 MR. BENJAMIN: The claims -- I don't want to go to
23 your privileged advice, your Honor, but what I could tell
24 you is that they are committed to bring their claims.

25 THE COURT: And I find that to be not all that

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1 persuasive.

2 MR. BENJAMIN: Your Honor --

3 THE COURT: I find that not to be persuasive.

4 That's why I want to hear some testimony, because I want to
5 hear them say it out loud. I want to look at them when they
6 say it. I want to question them about it, because an
7 affidavit drafted by an attorney that says, sure, at some
8 point I'm going to bring my claim, but I'm getting paid
9 hereunder whether or not I do, isn't satisfactory to me.
10 That's what I'm saying to you. That's why I say that
11 Mr. Metz's affidavit, which was quite short, quite simple,
12 not really all that explanatory, and I'm sure drafted by an
13 attorney, didn't do it for me. That's my point. I want so
14 see Metz. I want to hear him testimony, or if you don't
15 want to put him, on that's fine.

16 MR. BENJAMIN: I understand, your Honor, and I
17 understand why you are inclined, given the submission that
18 you have received, and all of the different opinions --

19 THE COURT: I know you don't want me to have a
20 hearing, but it's going to happen.

21 MR. BENJAMIN: I understand. I'm not resisting a
22 hearing. I understand that is your inclination.

23 THE COURT: I know. I know you want to make your
24 argument, but I hear your argument and I'm not disagreeing
25 with it. I'm not disagreeing that there could be a

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1 perfectly, legitimate -- as I said to defendants' Counsel,
2 it seemed to me like, sure, why -- you know, I'm going to
3 join this lawsuit. Rad said, I'm not really there. I want
4 you to have the opportunity. I'm going to make it sure that
5 you don't lose money by joining the lawsuit. I'm going to
6 give you that opportunity. That's a perfectly reasonable
7 explanation, but there is also another not reasonable
8 explanation that equally could be happening here. And I
9 don't want to make a decision based on affidavits that are
10 untested and drafted by lawyers. And I want to hear from --
11 and two conflicting expert opinions.

12 MR. BENJAMIN: I understand your inclination.

13 THE COURT: Let me just say this: Did you want to
14 add to your record? I'll let you finish your argument and
15 then I'll say some things.

16 MR. BENJAMIN: The only thing that I would just
17 want to be clear, your Honor, is that all of the cases, all
18 of them cited by defendants that have found Rule 3.4(b) to
19 be implicated, are in circumstances that we know don't exist
20 here. We know it because the people who received these
21 payments are claimants under the agreement. And we know it,
22 and we know it because there is, as you just said, as you
23 just said, there is a plausible explanation for the payments
24 that has nothing to do with testimony, and the case of
25 Mr. Badeen proves it.

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1 THE COURT: But that doesn't explain the expert
2 opinions. You are asking me to say those expert opinions
3 are not worthy. And I'm -- I may wind up saying that, but
4 I'm not going to do it on papers.

5 MR. BENJAMIN: I understand, your Honor. I'm
6 simply saying that --

7 THE COURT: The cases, okay, the cases are what
8 they are, but, you know, this is a different case from that
9 case and the other case, and I have two competing experts
10 who are telling me two different things. And I have
11 witnesses who wrote pretty lame lawyer-drafted affidavits
12 that don't really satisfy me that they are -- I don't want
13 to say "lame", because it may be that they are absolutely
14 100 percent this is what they are doing, but I don't feel
15 confident in saying that just on the basis of the affidavit.
16 That's my point. That's my only point. And I don't know
17 what happened here.

18 Let me end by saying -- let me ask you if you have
19 anything else you want to say before I close your argument.
20 You have a yellow sticky there with something on it.

21 MR. BENJAMIN: Sure.

22 (Whereupon, there is a brief pause in the
23 proceedings.)

24 MR. BENJAMIN: My colleague just wanted me to note
25 for the record, your Honor, that to the extent there is a

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1 hearing, we've already seen the defendants tact here is to
2 try issues of credibility and to make factual arguments that
3 are obviously within the province of the jury, and that they
4 could test on cross examination, again, until they are blue
5 in the face. But that isn't what I understand your Honor to
6 be envisioning is the purpose of such a hearing.

7 THE COURT: No.

8 MR. BENJAMIN: Okay.

9 THE COURT: The only thing I want to hear, I want
10 to hear from the experts. I'll definitely want to hear from
11 both sets of experts. And to the extent that you are
12 arguing that -- I guess I want to hear from the litigation
13 funder, too. Other than that, I don't know who else. I'm
14 going to leave it to you to decide who you want to put on
15 and what witnesses you want to put on. I'm not going to say
16 who you should -- but definitely I want to hear from the
17 experts, because obviously I have two opposing expert
18 opinions.

19 MR. BENJAMIN: I understand the position that your
20 Honor is in. I remember the first time that this issue came
21 before us, you said in denying discovery, I don't want a
22 case within a case within this issue. I understand that
23 defendants have thrown a lot of -- a pile of paper with
24 conflicting opinions and conflicting views at you. I would
25 just note a couple of things. We haven't had an opportunity

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1 to respond to the experts they put in on reply.

2 THE COURT: So you will absolutely have the
3 opportunity to do that in a hearing. And --

4 MR. BENJAMIN: And can introduce additional expert
5 testimony to the extent that would be helpful to the Court?

6 THE COURT: I don't want to make this a trial
7 within a trial, but I'll give everybody the opportunity to
8 put on their case.

9 Again, merely what I suggest you do is go back to
10 the litigation funder and see if you could work something
11 else out to obviate this whole issue.

12 Even if I find that I have an ethical obligation
13 and there is a disciplinary violation, I will not dismiss
14 the case on that ground. And I will find another way to
15 resolve this.

16 MR. BENJAMIN: Okay thank you, your Honor.

17 THE COURT: All right --

18 MR. BENJAMIN: We will certainly --

19 THE COURT: -- so my understanding is the
20 defendants are arguing the motion to dismiss in the
21 Appellate Division next week; correct?

22 MR. WOLINSKY: Yes, on the 10th.

23 THE COURT: So I don't know that I need to do
24 anything until we decide whether or not this case is going
25 forward at all. I feel one hundred percent confident in my

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1 decision, but I've had -- the First Department has, more
2 than one time, told me that I'm a hundred percent wrong. My
3 point is, I don't want you to spend money on this until we
4 see whether or not the case is going forward or not.

5 So what I think we'll do is we will continue --
6 we'll put this issue to the side. We will continue on our
7 discovery, because I made it clear that no matter what, the
8 case is not going to go away on the Litigation Funding
9 Agreement.

10 And then if, in fact, my decision is stayed, then
11 we'll set a hearing. We could meet and confer at a
12 conference. As to the hearing, I don't intend it to be more
13 than one day, max. And I really mean that most sincerely.
14 A couple of years ago I had a hearing where, I mean, I
15 literally just could not stop the lawyers, and so I don't
16 want that to happen here. So please, I want to be up front
17 with how long I want this hearing to take place.

18 (Continued on the next page to include the court
19 reporter's certification.)
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MR. BENJAMIN: And we'll certainly give very
serious consideration to your Honor's suggestion.

THE COURT: Okay.

MR. WOLINSKY: Thank you.

THE COURT: Anything else, Counsel?

MR. WOLINSKY: No.

THE COURT: Okay.

* * * * *

I, Michael Ranita, a Senior Court Reporter for the State of
New York do hereby certify that the foregoing is a true and
accurate transcript of the stenographic minutes taken within.


Michael Ranita
Senior Court Reporter

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